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YOUNGER COMPARATIVISTS COMMITTEE

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The Younger Comparativists Committee's *Scholarship Advisory Group* (SAG) is pleased to compile this quarterly *New Scholarship Bulletin* as a service to younger comparativists. The SAG consists of Fiona De Londras (University College Dublin), Wulf Kaal (Chair) (University of St. Thomas—Minneapolis), David Landau (Florida State University), Salil Mehra (Temple University), and Adam Shinar (Harvard University).

Younger comparativists who wish to have their work included in the next edition of the *New Scholarship Bulletin* are invited to email details of their new scholarship to **David Landau, Editor-in-Chief**, at dlandau@law.fsu.edu.

- I. Jill Goldenziel (jgoldenziel@law.harvard.edu), *Veiled Political Questions: Islamic Dress, Constitutionalism, and the Ascendance of Courts*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1932738.

This article explains how judicial independence can develop in regimes that are not fully democratic. Conventional wisdom holds that a strong legislature and political parties are necessary for the emergence of an independent judiciary. This article challenges conventional wisdom by explaining how judicial independence may arise in regimes where these conditions are not present. It presents a theory of how judicial independence emerges and why and when other political actors will respect it. The article also explains why courts may be better poised than legislatures to counter executive power in non-democracies. The theory is developed through a discussion of cases involving Islamic headscarves and veils in Middle Eastern courts. These cases have broad political implications because of their significance to Islamists, who pose the biggest challenge to the power of traditional elites in majority-Muslim countries; and their broad legal ramifications with respect to judicial power, individual rights, constitutional convergence, religious freedom, and the relationship between *shari'a* and state law. The article also explains how national courts have interpreted Islamic law and challenges the notion that courts function to secularize state-sponsored religion. To the author's knowledge, this article contributes the first complete discussion in the English-language academic literature of recent high court cases in Egypt, Kuwait, and Turkey that are unavailable in translation, thus contributing to the body of foreign constitutional case law available for comparative study.

- II. Claudia Haupt (cehaupt@law.gwu.edu), *Religion-State Relations in the United States and Germany: The Quest for Neutrality*, available at: www.cambridge.org/9781107015821.

This comparative analysis of the constitutional law of religion-state relations in the United States and Germany focuses on the principle of state neutrality. A strong emphasis

on state neutrality, a notoriously ambiguous concept, is a shared feature in the constitutional jurisprudence of the US Supreme Court and the German Federal Constitutional Court, but neutrality does not have the same meaning in both systems. In Germany neutrality tends to indicate more distance between church and state, whereas the opposite is the case in the United States. Neutrality also has other meanings in both systems, making straightforward comparison more difficult than it might seem. Although the underlying trajectory of neutrality is different in both countries, the discussion of neutrality breaks down into largely parallel themes. By examining those themes in a comparative perspective, the meaning of state neutrality in religion-state relations can be delineated.

- III. Jean Ho (lawjeanho@nus.edu.sg), *Comparative Law and the Claim of Causation*, available at: <http://www.comparativelawreview.com/ojs/index.php/CoLR/article/view/23>.

To accept that everything happens for a reason is to accept the connection between cause and effect that forms the basis of the notion of causation. Although causation or *un lien de causalité* has long been regarded as integral to the law on extra-contractual obligations, its use in the study of the development and status of comparative law in various legal systems has not been attempted. This article which appears in the latest issue of the Comparative Law Review pursues a novel train of inquiry by claiming that the actual importance of comparative law to a legal system should be understood as a chain of events that culminate to inform the regard in which comparative law is held today. The claim of causation in comparative law posits that the history of engaging in comparative law in a legal system influences the type of scholarship on comparative law produced which in turn influences the pedagogy of comparative law. The veracity of this claim is tested by considering the history, scholarship and pedagogy of comparative law in selected legal systems in Europe and North America. This article then looks at several legal systems in Asia in one of which the claim of causation risks total displacement. Such an occurrence, far from defeating the claim of causation, reveals the difficulty of dissociating the pedagogy of comparative law (the effect) from its history and scholarship (the causes).

- IV. William Partlett (wpartlett@brookings.edu), *Making Constitutions Matter: The Dangers of Constitutional Politics in Current Post-Authoritarian Constitution-Making*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1924958.

This paper—which was selected from over 30 papers to be presented at the American Society of Comparative Law Annual Conference—will explore a critical question at the intersection of constitutional and democratic theory: Is the process of constitutional drafting and ratification important in determining whether a constitution will serve as a constraint on future government activity? Many constitutional theorists maintain that constitution-making process is critical in making a constitution “matter.” They argue that the best constitution-making process is one where the people divorce constitutional drafting and ratification as much as possible from pre-existing, ordinary rules and institutions by encouraging the “people” to directly act through irregular mechanisms such as referendums and constitutional conventions. This irregular expression of popular

sovereignty—called “constitutional politics”—ensures that the constitution will transcend ordinary politics and therefore limit future legislative and executive action.

The massive wave of constitution making in post-communist Europe and Asia in the late 1980s and early 1990s—a valuable laboratory for testing constitutional theory—suggests serious problems with this approach. First, the most successful and legitimate post-communist constitutional orders were established without engaging in constitutional politics. Instead, these countries made wide use of ordinary political mechanisms—including parliaments—in the construction of robust constitutional orders. Second, post-communist nations that have sidelined ordinary political institutions and rules in favor of the mechanisms of constitutional politics in creating constitutional orders have actually been far less successful in building constitutions that constrain government activity.

Post-Soviet constitutional development helps explain why constitutional politics has not helped create legitimate constitutional limitations on political power. Russia is the paradigmatic example. After two years of parliamentary constitution-making, Russian President Yeltsin—locked in a battle with parliament to control the fate of Russia—drew on the language of constitutional politics to sideline existing rules and institutions. After winning a referendum in which more than 50% of the voters declared their support for Yeltsin, he called an appointed constitutional convention, disbanded parliament, and dispersed the Constitution Court. He then ratified his own personally drafted authoritarian constitution.

The Russian example shows how constitutional politics can allow charismatic individuals to reassert dictatorship. In the absence of unwritten conventions or rules, the extralegal, popular mechanisms of constitutional politics can help charismatic leaders claim the mantle of popular legitimacy and assert dictatorship. Constitutional theorists therefore should appreciate the important role that ordinary political institutions and rules—even ones tainted by association with a prior regime—can play in the construction of legitimate constitutions. Otherwise, liberal constitutional theorists risk legitimizing the creation of authoritarian constitutions.

- V. Brian Ray (brian.ray@law.csuohio.edu), *Proceduralization's Triumph and Engagement's Promise in Socioeconomic Rights Litigation*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1950325.

Three of the Constitutional Court's socio-economic rights decisions of the 2009 term are the culmination of a strong trend towards the proceduralisation of socio-economic rights that many commentators have argued fails to fulfil their original promise. This triumph of proceduralisation undeniably restricts the direct transformative potential of these rights. But there is another aspect to this trend—an aspect reflected in the Court's emphasis on participatory democracy and the ability of procedural remedies to democratise the rights-enforcement process. This article considers what the triumph of proceduralisation means for future social and economic rights litigation and argues that properly developed the engagement remedy can give poor people and their advocates an important and powerful enforcement tool. At the same time, engagement can help strengthen and promote

consistent attention to the constitutional values these rights protect. Tapping this potential requires the Constitutional Court and lower courts to apply the remedy more consistently, to develop its requirements more fully and to apply those requirements robustly where government fails to engage meaningfully on social welfare policy. The courts are only the starting point, however. For engagement to truly succeed, government must develop comprehensive engagement policies and institutionalise those policies at all levels. Finally, civil society must expand its role beyond pressing for engagement in individual cases into advocating for such institutionalisation.

- VI.** Brian Ray (brian.ray@law.csuohio.edu), *Demosprudence in Comparative Perspective*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1649034###.

Lani Guinier and Gerald Torres recently coined the term “demosprudence” to define legal practices that specifically target social movements and attempt to catalyze legal change (including constitutional change) through such movements. Demosprudence has sparked a debate even in its early stages of development. Gerald Rosenberg has criticized demosprudence in general, and Guinier’s account of oral dissents as a demosprudential device in particular, in a recent article that was part of an entire panel devoted to the concept and published as part of a symposium by the Boston University Law Review. In essence, Rosenberg’s critique is that political science literature has consistently shown that court decisions generally have very little effect on social movements, except in very narrow circumstances, and the effect is minor compared with other influences on such movements.

This article critically examines the debate over demosprudence. It first outlines the concept of demosprudence and connects it to several related literatures, including Jack Balkin’s liberal constitutional renaissance and Reva Siegel’s and Robert Post’s concept of democratic constitutionalism. It then develops an extended response to Rosenberg’s critique. Finally, it adopts a comparative – specifically South African – perspective to consider what it means for a court to act demosprudentially and why the practice may have particular value in developing democracies like South Africa.

- VII.** Ozan Varol (ovarol@kentlaw.edu), *The Democratic Coup d’État*, available at: <http://ssrn.com/abstract=1922792>.

For the first time in the literature, this Article examines the typical characteristics and constitutional consequences of a phenomenon that I call the “democratic coup d’état.” To date, the academic legal literature has analyzed all military coups d’état under an anti-democratic framework. That conventional framework considers military coups to be entirely anti-democratic and assumes that all coups are perpetrated by power-hungry military officers seeking to depose an existing regime to rule the nation indefinitely. Under the prevailing view, all military coups therefore constitute an affront to stability, legitimacy, and democracy. Federal law in the United States reflects the same disdain for military coups by prohibiting, with certain exceptions, any financial assistance “to the government of any country whose duly elected head of government is deposed by military coup or decree.”

Drawing on fieldwork that I conducted in Egypt and Turkey in 2011, this Article challenges that conventional view and its underlying assumptions. Although all military coups have anti-democratic features, some military coups are distinctly more democratic than others because they respond to a popular opposition against an authoritarian or totalitarian regime and overthrow that regime for the limited purpose of transitioning the state to a democracy and facilitating the fair and free elections of civilian leaders. The Article thus argues that military coups can be normatively acceptable methods for transitioning an authoritarian regime to democracy.

Following a democratic coup, the military temporarily governs the nation as part of an interim government until democratic elections of civilian leaders take place. Throughout the democratic-transition process, the military behaves as a self-interested actor and entrenches its policy preferences into the new constitution drafted during the transition. Constitutional entrenchment may occur in at least three ways: procedural, substantive, and institutional. First, the military may setup the democratic transition process so that the process produces a substantive constitutional outcome favorable to the military. Second, the military may reserve substantive constitutional powers for itself in the new constitution. Third, the military may establish counter-majoritarian institutions in the new constitution that continue to enforce the military's policy preferences even after the military relinquishes power to democratically elected leaders. The Article then tests the constitutional-entrenchment thesis using three comparative case studies: (1) the 1960 military coup in Turkey; (2) the 1974 military coup in Portugal; and (3) the 2011 military coup in Egypt.

- VIII.** Ozan Varol (ovarol@kentlaw.edu), *The Origins and Limits of Originalism: A Comparative Study*, available at: <http://ssrn.com/abstract=1912202>.

In the debate about originalism in the United States, scholars have devoted scant attention to the question whether the United States stands alone in its fascination with originalism. According to the prevailing view, originalism is distinctively American and the study of comparative originalism is an oxymoron. This Article challenges that conventional view. Drawing on neglected Turkish-language sources, the Article analyzes, as a comparative case study, the use of originalism by the Turkish Constitutional Court (Anayasa Mahkemesi) to interpret the secularism provisions in the Turkish Constitution. Comparing the Turkish version of originalism to American originalism, the Article sheds light on broader debates in the United States about the origins, functioning, and limits of originalism.

This comparative study calls into question the existing theories in the American legal literature about why originalism thrives in certain nations. This Article suggests a new hypothesis that views support for originalism as a cultural, not legal, phenomenon: Originalism blossoms in a nation when a political leader associated with the creation or revision of the Constitution has developed a cult of personality. The cult-of-personality hypothesis explains why originalism has thrived in nations such as Turkey and the United States, where the nation's founders have developed a strong cult of personality, but has

failed to find a strong and sustained following in nations such as Australia, where the founders are held in no special reverence.

The Turkish case study is also instructive on the limits of originalism. Critics of originalism in the United States argue that originalism allows the dead hand of the past to rule an evolving society. In response to the critics, originalists note that the legislature has the option of amending the Constitution if its original meaning no longer comports with societal norms. But what if constitutional amendment were not an available option? The Turkish case study suggests that when the legislature lacks a plausible method—however difficult it may be—for amending the Constitution in times evolving societal norms, the continued use of originalism by the judiciary may motivate the legislature to place political constraints on the courts. In Turkey, the Constitutional Court's embrace of originalism but rejection of legislative attempts to amend the Constitution led to the adoption of a court-packing plan in September 2010.

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