

Book Prospectus

Our Constitutional Metaphors: Law, Culture, and the Management of Crisis

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There is little question that the late twentieth and early twenty-first centuries have represented the era of the constitution. The breakup of the Soviet Union and demise of formal colonization have entailed the unprecedented globalization of the constitution as a form, with close to 150 nations now claiming constitutions. While these developments have led the field of comparative constitutional law to burgeon, *Our Constitutional Metaphors* focuses on popular metaphors and other emblems for constitutions: the body politic, architecture or construction, textuality and writing, the living tree, and the voice. To track the pervasiveness of these metaphors, the book draws on a wide textual archive composed of literature, film, architecture, television, and other artistic mediums. Constitutional metaphors become controlling in a given place and moment, I argue, because they index the particular crises confronted by that national or political culture. Constitutional metaphors, as such, magnify *both* unique constitutional challenges faced by a given society *and* paradoxes endemic to all constitutions and constitutional law, whether they pertain to matters of framing and ratification, jurisprudence and interpretation, or a constitution's popular support. On the one hand, this book therefore studies how constitutions and the metaphors associated with them help to naturalize the abstract, disembodied realm of law and make legal principles socially meaningful. Yet on the other hand, it explores how constitutional metaphors can problematically cover over failures of social justice, submerging the very crises that their symbolism simultaneously leverages and yet works to manage and contain.

In general, the international migration of the constitution has been an overwhelmingly positive development responsible for the spread of democracy, social justice, and human rights. In many nation-states, the constitution has also become a primary symbol of national belonging. Yet the story of the constitution's global ascendancy is not without contradictions, and this book wrestles with those tensions, putting pressure on the current climate of what Sanford Levinson has called "constitutional faith." It therefore investigates how literature, architecture, and other cultural forms can nurture constitutional faith, encouraging active, alive, and egalitarian civic engagement. But at once, *Our Constitutional Metaphors* challenges the ethos of constitution worship by contending with the neo-imperial undercurrents of that form's globalization. For much of the global South, the mandate to adopt a constitution has operated as a rent-seeking, international standard of compliance. Likewise, whereas constitutions are often viewed as inherently geared to mitigate deeper conflicts, this book examines scenarios in which projects of constitutionalism have met with disappointment or failure. And perhaps most importantly, *Our Constitutional Metaphors* investigates how and why constitution worship can, under some circumstances, indirectly sanction abuses and other failures of human rights—which is to say that constitutions are by no means failsafe antidotes to institutionalized injustice. The book therefore considers situations in which a constitution either isn't ratified and never comes into legal force; is superseded by a replacement document; or is somehow less than successful, whether because it

contains loopholes and contradictions, isn't sufficiently progressive, or is canceled by contrary goals and provisions.

Yet above all, *Our Constitutional Metaphors* stakes a claim for the importance of aesthetic theory to understanding both constitutional law and the current atmosphere of constitution worship. In one sense, constitutional metaphors influence jurisprudence at all levels. Drafters of constitutions comprehend that endeavor by way of metaphors; jurisprudence and legal reasoning are guided by metaphors; and scholars of law reinforce those explanatory frameworks through their categories and conventions of analysis. Yet at once, constitutional metaphors are crucial to generating public devotion to and respect for a constitution and surrounding legal culture. This is all to say that constitutional metaphors can be deeply ambivalent. At the same time as they forge political community, they can register the risks and conflicts threatening to sunder that society. As I therefore argue, even otherwise valuable constitutional metaphors can smuggle in reactionary, exclusionary ideas about political community, providing ideological warrants for oppression and disenfranchisement. In other words, the very symbolism that renders a constitution powerful can compensate for and mask its unique failures. Indeed, I argue that specific metaphors become compelling in particular contexts precisely because they imaginatively resolve underlying sociopolitical crises—although typically by diverting attention from those realities.

Organization

Our Constitutional Metaphors begins with a theoretical **Introduction** that traces a genealogy of the constitution by following the dominant metaphors that have, at different points in history, been enlisted to describe and authorize constitutions. It also looks to the form of the constitution to conduct a broader theorization of political metaphor.

Thereafter, **Part I, “Anatomy and Design,”** considers the two most enduring metaphors for the constitution: the body politic and architecture. These twinned metaphors contained in the very etymology of the word “constitution,” however, can denote opposing ideals. Whereas the notion of a body politic suggests organic naturalness, architectural language instead implies constructedness and artificiality. Theorists have accordingly complained of the former metaphor's conservative valences, or how it can legitimize social hierarchies as well as myths about a homogenous, insular community. In contrast, the imagery of building and architecture typically alludes to the design of an egalitarian, balanced democracy.

Chapter One, “Policing the Body Politic and the Anxiety of Globalization,” explores the breakdown of the movement for a formal European Constitution. The French, Dutch, and Irish “no” votes that derailed the ratification process are commonly attributed to fears about immigration, or that a united Europe would both render the nation's borders overly porous and defile the integrity of the body politic. These anxieties, of course, deny many economic and other realities of globalization. For insight into such tensions, this chapter analyzes a series of recent European films (the Dardenne brothers' *La Promesse*, Michael Haneke's *Caché*, Gabriel González Iñárritu's *Biutiful*, and Stephen Frears's *Dirty Pretty Things*) that imagine European nationalism in

“biopolitical” terms. In each of these films, it is the European social body that succumbs to illness, impotence, and decay—or a failure of sovereignty—and undocumented immigrant labor provides healing and nourishment for those ailments. Whereas in Haneke’s *Caché* French decadence is haunted by the nation’s crimes in Algeria, *Dirty Pretty Things* explores the London black market in harvested organs—traffic that both allows illegal immigrants to trade their kidneys for European passports and allegorically purifies British society of forms of waste. These cinematic portraits of the biopolitical “constitution” of Europe thereby open up the reactionary dimensions of the body politic metaphor.

Chapter Two, “Constituting the State: South Africa and the Architecture of Mourning,” instead reckons with the dominant symbolism associated with the South African Constitution, which I argue has apologized for failures of social justice in that nation’s post-apartheid reconciliation process. This chapter analyzes both a series of public monuments and a collection of transition era novels for insight into the prevalent tendency to depict the Constitution as the vehicle for redistribution and reconstruction. For instance, the entire façade of the Johannesburg Apartheid Museum is one grand representation of the Constitution, and shrines to the Constitution bookend the Museum’s scripted odyssey through apartheid’s history. A parallel tribute lies at the heart of the guided tour of Robben Island. These sites also fold the indigenous ritual of *isivivane* into their paeans to the Constitution, participating in the “rainbowism” widespread in post-apartheid political discourse. As scenes of rebuilding, however, they enact forms of wealth and property reallocation that cast South African recovery as successful and complete. Unlike these state-sponsored portraits of national renewal, novels from the 1990s by Nadine Gordimer, Zakes Mda, and Ivan Vladislavic contend with disturbing limits and avoidances implicit to the architectural metaphor.

Part II, “Interpretation,” shifts to consider a pair of metaphors that foremost describe competing schools of constitutional jurisprudence. Debates about constitutional interpretation commonly vacillate between the two poles of “livingness,” or ideas about the living constitution, and originalism, which seeks to ascertain a document’s meaning at the time of its drafting. These different positions have been reflected in the emblems of, first, the living tree and discourses of livingness and, second, images of the text and other implements of writing, including the scene of a constitution’s drafting and signing. This Part of the book explores the significance of these two influential and visible symbols in United States and Canadian constitutional jurisprudence and law.

In the American context, one key image used to both commemorate and cull support for the Constitution is that of its physical text and writtenness. In certain cases, this preoccupation with the Constitution’s text and other elements of its founding, framing, writing, and signing has justified an originalist agenda. Yet **Chapter 3, “Sacralizing the Text and the Legacies of Black Disenfranchisement,”** primarily explores how the “semiotics of rights” pervading American legal and political culture has produced an exclusionary definition of citizenship in which signatory self-inscription and self-narration are seen as the central routes to liberal freedom. On the one hand, self-authorship has offered a productive avenue to civic empowerment, and this chapter

begins by exploring how a number of abolitionist and other texts depicting emancipation under slavery productively leverage this symbolic economy of writing. Yet on the other hand, the conceit of written self-determination has also provided an enabling logic that, prior to Reconstruction, outlawed African American education and, today, continues to sanction structural disenfranchisement. In turn, the chapter concludes with readings of a collection of cultural texts that call such a logic into question, including Toni Morrison's *Beloved* and the HBO serial *Deadwood*, in particular the episode "Full Faith and Credit." I read these texts against the backdrop of diverse case law and constitutional developments, including the legacy of *McCulloch v. Maryland*, the evisceration of the Reconstruction Amendments, and recent incursions on The Voting Rights Act.

In Canadian jurisprudence the metaphor of the living tree is almost uniformly accepted, usually within equal protection and civil rights cases. **Chapter 4, "The Living Constitution and the Myth of Natural Law,"** thus investigates the doubled nature of the "life metaphor" and discourse of livingness in judicial decision-making and legal reasoning primarily in Canadian Constitutional law. In the process, this chapter first charts how ideas about the living constitution have productively enlarged equal protection claims to expand the rights of women and minority populations. Thereafter, however, I complicate those advances by studying how the rhetoric of "life" can curtail certain freedoms and police practices deemed counter to the protection of life (as quintessentially occurs in policies regulating women's reproductive health). Insofar as the discourse of livingness reinscribes ideas about the naturalness and organicism of the political community, it returns us to the liabilities implicit to the body politic metaphor.

