

# The Permeability of Constitutional Borders

Gary Jeffrey Jacobsohn\*

*[T]he science of jurisprudence, the pride of the human intellect, which with all its defects, redundancies, and errors is the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns . . . .*<sup>1</sup>

## I. Introduction: Transnational Jurisprudence and the Challenge to Comparative Constitutional Theory

“[I]rrelevant are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people.”<sup>2</sup> These words of Justice Antonin Scalia are hardly reassuring to those of us who study and write about some of these practices, believing perhaps that the Justice and his colleagues might benefit in some small way from what we have learned from our travels and reflection. To be sure, the fact that Justice Scalia’s sentiment was voiced in the course of questioning the appropriateness of another Justice’s invocation of foreign experience suggests that there may actually be some judicial receptivity to comparative insights and findings. But that only begs the question of why there should be.

The question came up again on the last day of the 2002 Supreme Court term when, in his opinion for the Court striking down a Texas homosexual sodomy statute, Justice Anthony Kennedy cited several decisions of the European Court of Human Rights in support of the majority’s holding in the case.<sup>3</sup> “The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.”<sup>4</sup> In response, Justice Scalia dismissed “[t]he Court’s discussion of these foreign views” as “meaningless,” but “[d]angerous dicta,”<sup>5</sup> repeating the now familiar refrain that “this Court . . . should not impose foreign moods, fads, or fashions on Americans.”<sup>6</sup>

Given the momentousness of the legal change wrought by the decision, this exchange received only a passing glance in the extensive commentary immediately following its announcement. It has since received more

---

\* Woodrow Wilson Professor of Political Science, Williams College.

1. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 108 (Thomas H.D. Mahoney ed., The Liberal Arts Press 1995) (1789).

2. *Atkins v. Virginia*, 536 U.S. 304, 347–48 (2002) (Scalia, J., dissenting).

3. *Lawrence v. Texas*, 123 S. Ct. 2472, 2474 (2003).

4. *Id.* at 2483.

5. *Id.* at 2495 (Scalia, J., dissenting).

6. *Id.* (quoting *Foster v. Florida*, 537 U.S. 990, 990 n.\* (2002) (Thomas, J., concurring in denial of certiorari)).

attention; Robert Bork, for example, has cited the references to foreign sources in *Lawrence v. Texas* (along with *Grutter v. Bollinger*)<sup>7</sup> as episodes in an “absurd turn in our jurisprudence” that reflects the arrogance of power of the modern judiciary.<sup>8</sup> “[E]ven Scalia at his gloomiest probably did not foresee [how a new Constitution] might be designed bit by bit from European, Asian, and African models.”<sup>9</sup> In a recent book, he connects this jurisprudential turn with one of his longstanding concerns, “the transnational culture war.”<sup>10</sup> Along similar lines, Ken Kersch discovered in the “seemingly benign references” to foreign sources “a vast and ongoing intellectual project,” part of a “sophisticated effort to transform American constitutional law and its interpretation.”<sup>11</sup> As a result, “[e]ventually, and possibly sooner than we think, the nature and path of American constitutional development will be radically altered.”<sup>12</sup>

These reactions may very well exaggerate the influence of external sources in the outcomes of these cases, and arguably they overstate the broader jurisprudential significance of the infusion from abroad. They do, however, address an important issue concerning the role of constitutional theory in comparative law. The specific problem that concerns me is suggested in Justice Scalia’s objection to the judicial deployment of comparative examples by the Court in overturning the controversial ruling in *Bowers v. Hardwick*.<sup>13</sup> That case withheld the status of the fundamental right to consensual sexual relations between homosexuals (as well as others who perform acts of sodomy in their intimate associations) on the ground that the behavior in question was not “deeply rooted in this Nation’s history and

7. 539 U.S. 306 (2003).

8. Robert H. Bork, *Whose Constitution Is It, Anyway?*, NAT’L REV., Dec. 8, 2003, at 37.

9. *Id.*

10. ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 11 (2003); see also Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57, 58 (2004) (“Using global opinions as a means of constitutional interpretation dramatically undermines sovereignty by utilizing the one vehicle—constitutional supremacy—that can trump the democratic will reflected in state and federal legislative and executive pronouncements.”).

11. Ken I. Kersch, *Multilateralism Comes to the Courts*, 154 PUB. INT., Winter 2004, at 3, 4–5. For good recent examples of the thinking that concerns Kersch, see generally Anne-Marie Slaughter, *A NEW WORLD ORDER* 65–103 (2004) and Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43 (2004). For Koh, the “transnationalist jurisprudence” that he recommends “assumes America’s political and economic interdependence with other nations operating within the international legal system.” *Id.* at 53.

12. Kersch, *supra* note 11, at 16. There are members of Congress who are determined to prevent this from happening. Thus, on February 11, 2004, the Constitution Restoration Act of 2004 (H.R. 3799) was introduced in the House of Representatives. Included among its provisions was section 201, which reads: “In interpreting and applying the Constitution of the United States, a court of the United States may not rely on any constitution, law, administrative rule, executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than the constitutional law and English common law.” Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. § 201 (2004).

13. 478 U.S. 186 (1985).

tradition.”<sup>14</sup> This provoked Justice Scalia to underscore the words “*this Nation’s*” and to observe that the *Bowers* majority opinion, contrary to the implication in Justice Kennedy’s opinion, had not relied on “values we share with a wider civilization.”<sup>15</sup> His own implication was that, in contrast with *Lawrence*, the strength of *Bowers* was evident in the local ingredients that went into its making. Thus a home-grown product is superior to one built with the help of imported materials.

In debunking interpretive approaches that utilize cross-national sources, Justice Scalia was doing more than trumpeting American exceptionalism in constitutional matters. He was, in effect, implicitly raising serious doubts about the whole project of theorizing coherently about constitutions and constitutionalism. Thus, his attachment to local tradition and history involves more than just a preference for a particular approach to substantive due process analysis; it bespeaks as well hostility towards any judicial reliance on transnational norms of constitutional understanding. As a way of limiting judicial discretion in the designation of fundamental rights, privileging those with historical roots in American experience is an understandable way of pursuing the Court’s business in a complex and contested area of the law. It need not, in fact, have anything to do with a principled choice for what Sujit Choudhry calls “legal particularism,” an interpretive stance that emphasizes a nation’s history and political culture in addressing constitutional questions.<sup>16</sup> But when, as in the case of Justice Scalia, there is a categorical rejection of all sources outside of the tradition, the commitment to particularism subverts the effort to theorize about constitutionalism, as opposed to theorizing about *a* constitution.

Ultimately, the goal of constitutional theory is to attain understanding of what it means to be governed by something called a constitution. But the variability in what that something is cannot help but strike even the most casual observer. The differences on display—in text, but more importantly in practice—are mainly attributable to the diversity of social and political life around the world. A sensible reaction to this diversity is to counsel caution in the assimilation of foreign materials into the indigenous constitutional matrix of one’s country. The widely held assumption that a constitution is rooted in the way of life of a given society creates an understandable predisposition to resist the temptations of legal transplantation. For example, Frederick Schauer suggests that “[o]ne need not slide into an unacceptable

---

14. *Id.* at 192.

15. *Lawrence v. Texas*, 123 S. Ct. 2472, 2494 (2003) (Scalia, J., dissenting).

16. Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *IND. L.J.* 819, 830 (1999). Take Justice Kennedy, for example, the author of the *Lawrence* opinion. He is often an ally of Justice Scalia. For instance, in *Michael H. v. Gerald D.*, he joined Justice Scalia’s judgment for the Court that included a preference for “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.” 491 U.S. 110, 127 (1989).

relativism to acknowledge that perhaps American constitutionalists can perform a great service by helping other countries to understand that constitutional constraints rest on culturally contingent social categories."<sup>17</sup> His demonstration that a category such as "political speech" will vary according to cultural history and national differences supports what we might call a policy of "constitutional protectionism," in which national courts are jurisprudentially committed to the defense of their legal borders.

But if this condition "militates against cross-cultural assimilation of constitutional categories," even Schauer acknowledges (albeit in a brief footnote) that there are also "factors of internalization militating in exactly the opposite direction."<sup>18</sup> One of these factors surely must be the natural desire to learn from others in order to improve one's own circumstances. Including the American Constitution, I know of no example of a country whose constitution-making avoided examining and often incorporating promising features from the governing experience of distant lands. While there is a difference between constitution-making and constitutional interpretation that might indicate the wisdom of distinct standards for incorporation, in principle, the logic of self-improvement argues for an open border policy for both activities.

Open—yet not unmonitored. As William Alford reminds us, "we need to approach foreign subjects with an even greater tentativeness of theoretical construct and with an even greater self-consciousness than we would subjects closer to home."<sup>19</sup> Just as responsible advocates of free trade insist on rigorous standards to assess the impact of economic traffic on vital national interests such as working conditions and the environment, comparativists (scholars and judges) must consider how the free flow of commerce in constitutional ideas could affect valued political and legal assets. Alford's worries about the dangers of "grand theory" are rooted in the belief that what Clifford Geertz terms "thick description" is critical to how we form judgments about foreign societies and how we use this knowledge to inform our own self-understanding.<sup>20</sup> Only a "careful, contextualized consideration of a society" can enable one to appreciate why "a gesture that might be quite innocent in one cultural setting may be fraught with meaning in another."<sup>21</sup> Accordingly, Alford argues, if we are to study the criminal justice process in imperial China, we need to focus on the cultural context from which it emerged, rather than due process norms that reveal its deficiencies as an instrument of justice rightly considered.<sup>22</sup>

---

17. Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, 14 CARDOZO L. REV. 865, 880 (1993).

18. *Id.* at 879 n.71.

19. William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945, 947 (1986).

20. *Id.* at 947-48 & n.6.

21. *Id.* at 947 n.6.

22. *Id.* at 949-56.

In this Article, I argue for taking seriously the concerns raised by Schauer and Alford, but distinguish them from the position articulated both by Justice Scalia on the Court and his supporters from the sidelines. Thus, I share the particularist perspective on constitutional arrangements as manifestations of key attributes of national identity, but I contend that this should not preclude courts from seeking constitutional convergence of legal systems in the incremental and proximate fulfillment of transcendent norms of constitutionalism. While advocates of an extreme protectionist constitutional policy will find the cautionary arguments of Schauer and Alford congenial to their case, a less categorical stance on the use of comparative materials will ensure that these arguments are not taken to be the exclusive preserve of the rejectionists. In making this argument, I rely mainly on my own experience exploring constitutional domains beyond American shores, in which I have sought to develop contextually informed, thick accounts of the unique features of local political and constitutional cultures without embracing a rigidly deterministic view of the constraints this imposes on constitutional actors.

In the next section, I argue that aspirational considerations are critical to how one should theorize about the use of comparative materials in constitutional adjudication. All constitutions establish rules for the conduct of public business and the protection of private rights. But only the most crabbed understanding of what constitutions do would stop there; equally common to the genre is a conception, implicitly or explicitly incorporated in the document, of the kind of polity the constitution seeks to preserve and to become. This conception, or vision, will consist of a mix of attributes reflecting what is distinctive in the political culture as well as what are taken to be shared features of a universal culture of constitutionalism. Inevitably, contradictions within a given set of constitutional principles, or between those prescriptions and the societal status quo, will stimulate efforts—judicial and otherwise—to achieve greater consistency. This disharmonic jurisprudential context establishes the incentives, opportunities, and costs inhering in the practice of looking abroad for interpretive inspiration.

I rely on three foreign judicial settings—Israel, India, and Ireland—for suggestive examples in thinking about the permeability of constitutional borders. The Israeli case concentrates on a judiciary whose challenge has been to provide legal coherence to the unresolved political contradictions of an evolving constitutional order. The absence of a constitutional consensus presents judges with attractive incentives for assimilating the experience of courts in other nations, but it also highlights the risks of doing so. The deep division over the most basic questions of national identity, which is responsible in large measure for having impeded the process of constitutional design (including the adoption of a formal comprehensive written document), has encouraged members of the Israeli Supreme Court to complete the task of constitutional closure with the aid of examples taken from places where constitutional development has progressed less problematically in fulfillment

of liberal democratic aspirations. But the identification of one side of the cultural divide with these transnational efforts, and the resistance to them emanating from the other side, threatens to undermine the Israeli Court's ability to function as an effective arbiter of constitutional questions.

The Indian case presents us with a different picture of constitutional disharmony. The Indian Constitution, while by no means free of internal tension, is committed to a specific sociopolitical agenda involving major reform of an essentially feudal society. The free trade in legal ideas that has accompanied constitutional development since the inception of the independent republic has also been used freely by actors with sharply diverging agendas for India's future. Judges who are committed to realizing the constitutionally-mandated agenda have had to be careful to adapt philosophically appealing ideas of external origin to the particular cultural context within which the work of the Indian Court is done. Interests opposed to this agenda have been very clever in employing liberal ideas that resonate favorably within international circles to advance their cause. In this section, I look at several landmark cases that reveal the pitfalls of failing to situate the universal in the particular in the course of seeking guidance from abroad, as well as the constitutional benefits accruing from judges sensitive to the need to direct the light of foreign experience through the filter of their own cultural condition.

Finally, the Irish case is instructive in further illuminating the problem of translation in comparative constitutional theory, particularly as it relates to the realization of universalist aspirations that do not require abandoning the moorings in a specific moral code of conduct. In recent years, the Irish Supreme Court has confronted a number of issues concerning matters of personal freedom complicated by secularizing trends that have created a widening gulf between societal mores and a constitutional tradition rooted in precepts of Catholic theology. The focus of jurisprudential concern has been on the question of natural law, which in Ireland possesses a meaning quite different from what the term conveys in many of the places that secularizing societies often draw upon for models of constitutional emulation. For example, with respect to the right of privacy, which contemporary accounts typically associate with a natural desire for individual autonomy, the Irish Court has struggled to achieve a balance between the need for constitutional adaptation with the respect for traditional institutions of civil society. The penultimate section of this Article reflects on how this effort has contributed dialogically to enhancing the self-understanding of the constitutional culture.

## II. The Disharmonic Constitution

The United States, Israel, India, and Ireland share a common preconstitutional experience as extensions of British imperial governance. That experience produced similarities in postindependence constitutional evolution; invariably, for example, these polities have, to one degree or

another, been engaged in a process of legal de-Anglicization. But the textual constitutional differences—in length and specificity, in comprehensive or cumulative adoption, in configuration of spiritual and temporal domains, to name just a few—are much more obvious than the similarities. However, underlying these differences is a characteristic that unites them and, indeed, all constitutions: their state of imperfection. The gap between the ideal and the actual expresses itself in various ways. In most cases a constitution will accurately reflect local circumstances, but it would be unusual to find a constitution that was not in some way committed to the achievement of things seemingly beyond its immediate reach.

The first great student of comparative constitutionalism pointed out that “[t]he attainment of the best constitution is likely to be impossible for the general run of states; and the good law-giver and the true statesman must therefore have their eyes open not only to what is the absolute best, but also to what is the best in relation to actual conditions.”<sup>23</sup> Aristotle scholars have long contested the meaning of this teaching from Book IV of *The Politics*.<sup>24</sup> However, resolution of the debate is not essential to appreciating the relevance of the philosopher’s observation to the constitutional experiences of diverse nations. To wit, the creation of the American Constitution was accompanied by Publius’s announcement in the last paper in *The Federalist* that “I am persuaded that [the Constitution of 1787] is the best which our political situation, habits, and opinions will admit.”<sup>25</sup> That this focus on “actual conditions” was not all that could be said about the document whose ratification was being sought is the theme of the famous speech delivered over forty years ago by Martin Luther King: “When the architects of our republic wrote the magnificent words of the Constitution and the Declaration

23. ARISTOTLE, *THE POLITICS* 155 (Ernest Barker trans., Oxford Univ. Press 1962).

24. See, e.g., R.G. MULGAN, *ARISTOTLE’S POLITICAL THEORY: AN INTRODUCTION FOR STUDENTS OF POLITICAL THEORY* 113 (1977) (arguing that Aristotle recognized, in advocating a standard constitution, that great harm can be done by using utopian standards to judge ordinary situations and by trying to impose ideal political institutions on people and societies that are far from ideal); JOHN B. MORRALL, *ARISTOTLE* 86–87 (1977) (positing that Aristotle advocated a “type of political gradualism,” in which political thinkers should take account of practical realities while keeping an eye on the ideal norms of politics).

Of more topical relevance to the inquiry here are the political writings of Edmund Burke. Unlike Aristotle, Burke’s reflections on politics and constitutions were always intended to address issues of his time; more specifically, they are most often a response to events in America, India, Ireland, and France. But like Aristotle, he was preoccupied by the problem of how one reconciles respect for local tradition and established practices with principles of justice that have universal application. A particularly strong account of Burke’s attempts to wrestle with this tension may be found in FREDERICK G. WHELAN, *EDMUND BURKE AND INDIA: POLITICAL MORALITY AND EMPIRE* 261–307 (1996). Whelan writes: “The classical doctrine of natural right . . . is broad enough to subsume many of the prominent elements of Burkean theory. The dominant Aristotelian version of the doctrine was closely linked to an endorsement of statesmanship and the need for prudence in applying principles of justice in particular circumstances.” *Id.* at 300.

25. *THE FEDERALIST* NO. 85, at 523 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

of Independence, they were signing a promissory note to which every American was to fall heir.<sup>26</sup> Following Lincoln and others who apprehended an aspirational dimension in American constitutional development, he, in effect, was attaching three additional words to the Publius comment: "at this time." The Framers might not have dwelled on "the absolute best," but in Dr. King's persuasive account their intentions encompassed more than the achievement of what was immediately possible.<sup>27</sup>

This distinction between the actual and the ideal is sufficiently familiar that it prompts one to consider if it is not (in different ways) endemic to the constitution-making process. Perhaps the most distinctive feature of the Indian Constitution is its inclusion of a section of Directive Principles of State Policy, which found its way into the document "in the hope and expectation that one day the tree of true liberty would bloom in India."<sup>28</sup> The Principles are nonjusticiable, although through judicial interpretation they have acquired more than simply hortatory significance in informing the meaning of enforceable fundamental rights provisions.<sup>29</sup> Included are commitments embodying the idea of the Indian State as constitutionally mandated to realizing radical social reconstruction. The model for the Indian framers was the Irish Constitution, whose authors were part of a nationalist movement with ties to Indian nationalists dating back to the nineteenth century.<sup>30</sup> The Irish framers established a clear rationale for their innovation:

[T]hey will be there as a constant headline, something by which the people as a whole can judge of their progress in a certain direction; something by which the representatives of the people can be judged as well as the people judge themselves as a whole. We will judge our progress in a certain direction by asking how far we have advanced in that direction.<sup>31</sup>

26. Martin Luther King, Jr., *I Have a Dream*, Keynote Address of the March on Washington, D.C., for Civil Rights (Aug. 28, 1963), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 217, 217 (James M. Washington ed., 1986).

27. I develop this argument at length in GARY J. JACOBSON, *THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION* (1986).

28. GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 50 (1999). Other examples of constitutionally inscribed directive principles may be found in the constitutions of Nigeria, Spain, Portugal, and Namibia. See NIG. CONST. ch. 2, arts. 13-24; CONSTITUCIÓN tit. I, ch. 3, arts. 39-42 (Spain); CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [Constitution] § I (Port.); NAMIB. CONST. ch. 11, arts. 95-101. The practice has also been incorporated in international agreements, such as the International Covenant on Economic, Social and Cultural Rights. See *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

29. INDIA CONST. pt. IV, arts. 36-51 contain the Directive Principles of State Policy.

30. AUSTIN, *supra* note 28, at 76.

31. 67 DÁIL DEB. col. 69 (May 11, 1937), available at <http://www.oireachtas-debates.gov.ie/D/0067/D.0067.193705110029.html>.



The Irish framers were intent on affirming that the new Constitution was both an aspirational document as well as a strictly legal charter, that, while nonjusticiable, the value of the Directive Principles lay in the role they were projected to play in placing moral and political obligations on the state.<sup>32</sup>

In India, this was made even more explicit, and the jurisprudence surrounding Part IV of the Constitution has developed further than it has in Ireland. Article 37 says of the Directive Principles that they are "fundamental in the governance of the country and it shall be the *duty* of the State to apply these principles in making laws."<sup>33</sup> As an Indian constitutional scholar has pointed out, the potential impact of this provision is quite extraordinary when juxtaposed with another that provides that "[i]t shall be the *duty* of the *Union* . . . to ensure that the government of every State is carried on in accordance with the provisions of this Constitution."<sup>34</sup> So despite their unenforceability in the courts, the failure by a state to comply with the constitutional directives would, under a plausible interpretation of the relevant language, justify the central government's determination to require enforcement by the states. The comparative lesson in this is clear, especially in its implications for Americans, whose predominant inclination has been to view the judiciary as exercising a monopoly over constitutional interpretation. When the aspirational dimension of constitutionalism is made explicit, as in the case of those constitutions that include directive principles, the collaborative role of other political institutions in the realization of constitutional norms is also made more apparent.<sup>35</sup> The lesson is not that others consider adoption of similar provisions; rather it is that they take seriously the existence of implicit constitutional commitments (promissory notes if one likes) that create obligations—political, moral, and legal—extending beyond the jurisdiction of the courts.

While the Irish enumeration of Directive Principles has not figured as prominently in constitutional jurisprudence as has its Indian counterpart, in

32. The Irish and Indian experiences with directive principles was carefully studied by the framers of the South African Constitution. One South African scholar writing at the time of the drafting of the transitional Constitution concluded that the Irish, unlike the Indians, had not derived as much benefit from their Directive Principles as they could have. Thus "the moral and political role they might have fulfilled has not materialized." Bertus de Villiers, *Social and Economic Rights*, in *RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER* 618 (David Van Wyk et al. eds., 1995). The reference is to the minimal exploitation of the principles by the courts as an instrument for creating new rights (despite the fact that a landmark case—*Ryan v. Attorney General*, [1965] I.R. 294 (Ir. S.C.)—had ruled that certain rights not explicitly mentioned in the document could be derived from the Directive Principles).

33. INDIA CONST. pt. IV, art. 37 (emphasis added).

34. DURGA DAS BASU, *INTRODUCTION TO THE CONSTITUTION OF INDIA* 135 (9th ed. 1982) (quoting INDIA CONST. pt. XVIII, art. 355) (emphasis added).

35. This is not to say that the Directive Principles are unrelated to the Court's own interpretive powers. As the Indian example illustrates, they can be relied upon to influence judicial interpretation of enforceable provisions (especially fundamental rights), and they can be a source to be drawn upon to assess the constitutionality of legislative enactments.

both cases the list confers upon officials responsible for constitutional development (i.e., more than just judges) a mandate to diminish the gap between actual conditions and political ideals.<sup>36</sup> Although it is easy to characterize such principles as “pious aspirations,”<sup>37</sup> or perhaps mischievous generalities, as “moral precepts for the authorities of the State . . . they have,” in the words of an influential Indian constitutional framer, “at least an educative value.”<sup>38</sup> Their effectiveness is dependent on context. Thus, in speculating on the differing sets of Directive Principles of India and of Ireland, perhaps the most pertinent consideration is that the Indian section represents a more direct and explicit challenge to the status quo than does its Irish counterpart.<sup>39</sup> Indeed, the latter was consciously based on staples of the Catholic social tradition, which had a close connection to the predominant political culture of the nation.<sup>40</sup> In contrast, to the extent that the political culture in India mainly reflected the practices and traditions of its Hindu majority, the Constitution in that country was designed expressly to *reconstitute* a way of life that was viewed as no longer defensible within dominant elite circles.<sup>41</sup> The magnitude of the challenge is suggested in the comment of India’s “Madison,” Dr. B. D. Ambedkar, as he anticipated the commencement of the new constitutional republic:

On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions?<sup>42</sup>

---

36. See Art. 45, Constitution of Ireland, 1937; INDIA CONST. pt. IV.

37. Such was the characterization of Sir Ivor Jennings, as quoted in BASU, *supra* note 34, at 135.

38. *Id.* at 135–36 (quoting B.N. Rau) (alteration in original) (emphasis omitted).

39. Compare INDIA CONST. pt. IV (constitutionalizing principles such as equal justice; free legal aid; right to work, education, public assistance, and a living wage; promotion of educational and economic interests of lower classes; and participation of workers in management of industries) with Art. 45, Constitution of Ireland, 1937 (speaking in more general terms and indicating that the Oireachtas are to be guided in making laws to promote the welfare of the whole people).

40. Pmb., Constitution of Ireland, 1937 (stressing the religious foundation of the document by including “[w]e, the people of Ireland, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ”).

41. This argument is spelled out in great detail in my book, GARY JEFFREY JACOBSON, *THE WHEEL OF LAW: INDIA’S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT* 33–38, 91–121 (2003).

42. 11 CONSTITUENT ASSEMB. DEBS. 979 (1949) (India). This will not surprise those scholars who perceive the increasingly familiar constitutionalization of rights as enabling ruling elites to rely on judicial empowerment to protect their interests in majoritarian political settings. This phenomenon “is often not so much the cause or a reflection of a progressive revolution in a given polity, as it is a means by which preexisting and ongoing sociopolitical struggles in that polity are

While the question possesses a special poignancy in India, it can be asked of all polities. The salient contradictions will vary from place to place, but inherent in the constitutional condition, whether subtle or dramatic, is a disharmony manifest either in the disjuncture between a constitution and a society or between commitments internal to a constitution. The pursuit of a compelling unity becomes an important and predictable part of much of the activity of constitutional politics. This is the context from whence much of the initiative to explore constitutional possibilities abroad comes. Finding "an alternative to less congenial domestic law"<sup>43</sup> is a reasonable way to understand the strategic appeal to foreign sources, but one might view such activity with less suspicion if it is connected to a broader effort to address the imperfections of the local order. Precisely because it sometimes expresses a fundamental contradiction, what is "deeply rooted in [a] Nation's history and tradition"<sup>44</sup> may be as much a problem as a solution for constitutional decisionmakers. Under these conditions, seeking guidance from the experience of others presents attractive possibilities for achieving constitutional coherence. As the examples explored in the sections below suggest, one should be open to the lure of these possibilities—and very cautious about acceding to them.

### III. Israel: External Sources and the Unresolved Dilemma of Constitutional Identity

The Israeli Supreme Court, under the leadership of its President, Aharon Barak, has signed on to the judicialization of politics that is now so evident in India, Europe, and many other places. It is a development that has not pleased all observers, including Robert Bork, for whom the Barak-led judiciary has become "the most activist, antidemocratic court in the world and . . . may, unless a merciful Providence intervenes, foreshadow the future of all

---

carried out." Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 139 (2000). To be sure, Indian support for this claim is complicated by the fact that the evidence suggests, in Granville Austin's apt phrase, that the judiciary was envisioned as "an arm of the social revolution," a role it initially performed in dutiful fashion by standing aside as the Nehru government endeavored to implement its ideas for far-reaching socioeconomic transformation. AUSTIN, *supra* note 28, at 164. It was only years later that the Indian Supreme Court began to resist these changes, although since the end of the dictatorial interregnum of Nehru's daughter in 1977, the judiciary spearheaded the effort to redress the massive inequities plaguing Indian society since time immemorial. Unlike in the formative years, its behavior in pursuing this role is more active than passive, so much so that the Indian Court's reputation as the most activist bench in the world is widely accepted. Much of its current popularity at home stems from its determination to narrow the distance between the animating ideals of constitutional design and the realities of social failure.

43. Kersch, *supra* note 11, at 5.

44. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); see also *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (citing Justice Powell's opinion in *Moore*).

constitutional courts in the Western world."<sup>45</sup> Bork makes clear that one of the forms such intervention would no doubt take is the divine curtailment of a judge's ability to cite foreign constitutional rulings.<sup>46</sup>

The temptation on the Israeli Court to look abroad for guidance and validation is readily comprehensible in light of its unique constitutional predicament, beginning of course with the absence in Israel of a formal, comprehensive written charter.<sup>47</sup> The series of Basic Laws that cumulatively provide Israel with a framework for governance is inherently incomplete and provisional. This means that judges have often found themselves in uncharted constitutional waters, carried by interpretive currents to places where "real" constitutions might yield answers to difficult questions. Thus, for example, it is not surprising that in the absence of any textual constitutional guidance for solving free speech issues, the Israeli Court would find useful (if not controlling) the First Amendment jurisprudence of the American Court.<sup>48</sup> But two enactments in 1992—most notably the Basic Law on Human Dignity and Liberty<sup>49</sup>—had important implications for the practice of constitutional jurisprudence, including the Court's use of foreign materials. Its importance is implicit in Justice Barak's repeated invocation of the term "constitutional revolution" to describe the new state of affairs, not so much for the actual substantive changes introduced by the enactments as for the possibilities latent within them for creative judicial intervention in the unresolved dilemma of regime definition.<sup>50</sup>

What is unresolved is the contradiction highlighted in Israel's Declaration of Independence between the particularist (the commitment to a Jewish State) and universalist (the commitment to a liberal democratic polity) filaments in the existent constitutional constellation. The resulting—

45. BORK, *supra* note 10, at 13.

46. *Id.* at 137 (noting that "[i]nternationalism is illegitimate when courts decide to interpret their own constitutions with guidance from the decisions of foreign courts under their national constitutions").

47. See JACOBSOHN, *supra* note 41, at 8 (discussing Israel's constitutional predicament).

48. See *id.* at 177–227 (discussing the Israeli Court's application and modification of American free speech doctrine in several Israeli cases involving allegedly dangerous speech).

49. Basic Law: Human Dignity and Liberty § 5, 1992, S.H. 150 (Isr.).

50. My account of this development is in Gary Jeffrey Jacobsohn, *After the Revolution*, 34 *ISR. L. REV.* 139, 139 (2000). Much of the early commentary on substantive changes emphasized their connection to the pursuit of a neo-liberal economic agenda. See Hirschl, *supra* note 42, at 106 (explaining that the 1992 enactments resulted from the support of neo-liberal economic forces in Israel); Ran Hirschl, *Israel's 'Constitutional Revolution': The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order*, 46 *AM. J. COMP. L.* 427, 429 (1998) (characterizing the Israeli Court's emphasis on property rights as a "neo-liberal line of interpretation" of the Basic Laws); Aeyal Gross, *The Politics of Rights in Israeli Constitutional Law*, 3 *ISR. STUD.* 80, 90 (1998) (agreeing with Ben-Israel's characterization that the concept of human dignity includes an encouragement of contractual freedom and support for a market economy); Michael Mandel, *Democracy and the New Constitutionalism in Israel*, 33 *ISR. L. REV.* 259, 279–82 (1999) (explaining that the political forces behind the Bill of Rights favored a market system without state interference).

and perhaps inevitable—constitutional project is to bring clarity and unity of purpose to the polity by resolving the inner tensions of these dual aspirations, and to move into a constitutional future that resembles the experience of other liberal democracies. Judicial interpretation, in Justice Barak's view, must be "purposive," with the goal "of achieving unity and constitutional harmony."<sup>51</sup> For example, the Basic Law on Human Dignity and Liberty requires upholding "the values of the State of Israel as a Jewish and democratic State."<sup>52</sup> How is this to be done? Barak notes:

The content of the phrase "Jewish State" will be determined by the level of abstraction which shall be given it. In my opinion, one should give this phrase meaning on a high level of abstraction, which will unite all members of society and find the common ground among them. The level of abstraction should be so high, until it becomes identical to the democratic nature of the state.<sup>53</sup>

Controversy surrounding the Barak agenda has focused on whether it could undermine the long-term influence of the Court in Israeli political life. One of Justice Barak's predecessors, Moshe Landau, gave voice to these concerns by predicting, "If questions of great political import are left to be finally settled by the Supreme Court of Israel, it will lead to the politicization of the Court . . . ."<sup>54</sup> Reliance on a high level of abstraction to achieve a unified view may indeed fuel the anxiety of powerful constituencies that the "enlightened" opinion from which guidance in values is to be found is likely to be a liberal, generally secular intellectual elite, widely perceived as unrepresentative of Israeli public opinion.<sup>55</sup> A constitutional vision imposed on a

---

51. Aharon Barak, *The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and Its Effect on Procedural and Substantive Criminal Law*, 31 *ISR. L. REV.* 3, 5 (1997). Expounding upon his sentiment, Justice Barak stated:

The Constitutional Revolution has led to a change in the judiciary's status. Great responsibilities have been imposed upon it. It must fill the mould created by the "majestic generalities" in the new Basic Laws. The judiciary must be aware of the fundamental values of the people. It must balance them in accordance with the values of the "enlightened general public" in Israel. It must reflect the general public's conscience, the social consensus, the legal ethics and the value judgments of society with regard to acceptable and unacceptable behaviour. Constitutional interpretation should not be formalistic or pedantic. It should be purposive. It should be done from a wide perspective and adopt a substantive approach. A constitution is a living organism, and its interpretation must express the deep "I believe" of the society. This interpretation must base itself on the historical continuance of the nation's creation, with the intention of achieving unity and constitutional harmony.

*Id.*

52. Basic Law: Human Dignity and Liberty § 1, 1992, S.H. 150 (Isr.).

53. Aharon Barak, *The Constitutional Revolution: Protected Human Rights*, 1 *MISHPAT UMIMSHAL* 9, 30 (1992).

54. Moshe Landau, *The Limits of Constitutions and Judicial Review*, in *CONSTITUTIONALISM: THE ISRAELI AND AMERICAN EXPERIENCES 197, 202* (Daniel J. Elazar ed., 1990).

55. Barak's notion that the Court should seek guidance from "enlightened" opinion was criticized in Israel. The criticism has been echoed elsewhere; thus, Bork writes that "Barak's

deeply rifted society has the potential to backfire, particularly if done in a clumsy, heavy-handed way.<sup>56</sup> Whether a prudent imposition should occur depends, in part, on the answer to a question posed by Wiktor Osiatynski in considering the subject of constitutional borrowing. "Which should be attended to first? Should we undertake a broad educational attempt to create a constitutional culture and adopt a constitution only after such a culture is formed? Or should we enact a constitution first and then use it to form a constitutional culture?"<sup>57</sup>

Justice Barak has chosen the second option, which, given the extended delay in formalizing a constitution in Israel, is understandable if controversial. The evolution of the Israeli Constitution is a process that includes the justice and his colleagues—interpretation on a high level of abstraction is the vehicle through which the liberal constitution comes into being. From that point, "[i]t is possible that the constitutional transformation will be internalized; that human rights will become the 'daily bread' of every girl and boy, and that the awareness of rights . . . will prevail, and that we will be more sensitive to the rights of a human being as a human being."<sup>58</sup> There is, then, (at least the hope of) something profoundly transformative in the constitutionalization of rights. Through the Constitution, a culture of rights will be created, whose prospect of success inevitably will incur resistance from those with a stake in the entrenched culture. These opponents will insist on rejecting any methods and sources that are not consistent with a defense of the cultural status quo; any foreign importations will be immediately suspect. As Osiatynski points out, "Culture usually tends to resist borrowing."<sup>59</sup>

It follows that Barak is the anti-Scalia. Barak's jurisprudence, unsurprisingly, is distinguished by an affinity for foreign sources, especially Canadian and American. He notes:

Comparative law can help judges determine the objective purpose of a constitution. . . . A common basis of democracy is, however, a necessary but insufficient condition for comparative analysis. As judges, we must also examine whether there is anything in the

---

enlightened community is not a community at all; the phrase is a metaphor for a particular set of values, which is to be made dominant by judicial decision." BORK, *supra* note 10, at 130. In May 2001, Barak expressed regret for having used the concept of the "enlightened public."

56. See Ruth Gavison, *The Role of Courts in Rifted Democracies*, 33 *ISR. L. REV.* 216, 218 (1998) (advising that courts should be especially reluctant to make determinations "in areas of social controversy, where the grounds of judicial action are not clear"); *id.* at 253 ("The deeper the rifts in society, the more cautious the courts should be, because there is a greater danger of a serious break-down in the cohesion of society.").

57. Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1 *INT'L J. CONST. L. [I•CON]* 244, 266 (2003).

58. C.A. 6821/93, *United Mizrahi Bank Ltd. v. Migdal Coop. Vill.*, 49(4) P.D. 221, 448 (Isr.).

59. Osiatynski, *supra* note 57, at 261.

historical development and social conditions that makes the local and the foreign system different enough to render interpretive inspiration impracticable. But when there is an adequate similarity, interpretive inspiration is proper.<sup>60</sup>

Some of Justice Barak's opinions are vulnerable to the criticism that, in their reliance on comparative materials, they are too open to such inspiration in the face of critical differences between borrower and borrowee in historical development and social conditions.<sup>61</sup> While the merits of such criticism must be evaluated on a case-by-case basis, the best general defense against reliance of this kind starts with skepticism over the justice's own criteria for appropriating foreign sources. The appeal of these sources for Barak lies in their potential for bridging the gap between the liberal and illiberal commitments of the Jewish state.<sup>62</sup> Promoting the harmonies of constitutional unity means muting the discordant notes in the Zionist political composition; this means that a common basis in democracy cannot be the predicate for constitutional borrowing or transplantation. Rather, it is the aspiration *for* democracy that renders the foreign inspirational.

Insensitivity to the differences in national circumstances should in any case be avoided in the interest of wise and effective constitutional results (more on this point later). The Israeli example is so suggestive because it invites us to consider the import of disharmony in comparative constitutional theory. If one were to imagine a continuum of constitutional polities that distributed regimes according to the degree to which their governing principles were internally coherent, Israel would doubtless be located at or near one of the endpoints. The other endpoint would be occupied by a nation

60. Aharon Barak, *Foreword: A Judge On Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 112-13 (2002).

61. For Bork, the Israeli Court under Barak's leadership is a principal target for this sort of criticism. Bork remarks:

[J]udges on national courts have begun to confer with their foreign counterparts and to cite foreign constitutional decisions as guides to the interpretation of their own constitutions. One telling indication of the judicial activism and uniformity of outlook among judges is the way that legal interpretations of constitutions with very different texts and histories are now giving way to common attitudes expressed in judicial rulings.

BORK, *supra* note 10, at 10-11.

My own review of Barak-led Israeli Supreme Court decisions suggests that their frequent references to American sources have contributed to the failure of the Israeli Court to develop a jurisprudence, at least in the free speech domain, that reflects the character of the larger pluralist democracy of which it is a part. But this still leaves open the question of whether this is necessarily a bad thing. One might argue, for example, that the Israeli political culture is sufficiently supple to accommodate a range of constitutional possibilities, and that the direction that may initially possess the greatest "fit" with the broader sociopolitical culture is not the best way to go. Bork's criticism would therefore be more persuasive if he presented more evidence than the simple fact that constitutions have different texts and histories.

62. See Barak, *supra* note 60, at 110-11 (asserting that comparative law is particularly useful where legal systems have a common ideological basis).

whose constitutive principles manifested a high degree of consistency, such that an observer would have very little difficulty in characterizing the essential political character and commitments of the country. It is difficult to imagine, though, that even this country's principles would be perfectly consistent in all respects, to say nothing of its harmony between principles and practices. This is especially notable in the United States, which Samuel P. Huntington once characterized as "the modern disharmonic polity par excellence."<sup>63</sup> According to this account, in nations with a high degree of value consensus, the gap between promise and performance—for example, when the commitment to equality coexists with prominent inequality—is the phenomenon most responsible for generating political change and social reform.<sup>64</sup> The argument is also applicable to tensions within constitutional principles (even if they are not the outright contradictions found on the opposite end of the continuum), in this case stimulating efforts to achieve internal consistency. Those efforts may not get very far, in part for a lack of urgency, perhaps also because prudent actors may view the situation as a creative tension better left unresolved. But the impulse to achieve *constitutional* harmony is rarely neutral in its directional tendency; the predominant thrust is to push from the particular to the universal.

The point can be put more emphatically. Alexis de Tocqueville famously declared that "[t]he gradual development of equality of conditions is . . . a providential fact, and it has the principal characteristics of one: it is universal, it is enduring, each day it escapes human power; all events, like all men, serve its development."<sup>65</sup> I would be less inclined to invoke divine sanction to affirm democratic inevitability, and were I to do so, I might still find the path to democracy a more vexed, and hence open, question than did Tocqueville. But one cannot ignore the fact that even when the forces of particularism are in political ascendancy—as has recently transpired in India—the success of their constitutional claims often hinges upon how clever they are in advancing principles that, in Justice Barak's terms, are put forward on "a high level of abstraction."<sup>66</sup> If history tells us anything, it is

---

63. SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 12 (1981).

64. *Id.*

65. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 6 (Harvey C. Mansfield & Delba Winthrop trans., Univ. of Chi. Press 2000) (1835).

66. Barak, *supra* note 53, at 30. This is most evident in the debate in India over adoption of a uniform civil code. The principal advocates of such a code, which is prescribed in Article 44 as one of the Constitution's Directive Principles, are the Hindu nationalists, whose political base is in the BJP, the party that directs the nation's governing coalition. As they see it (and they are not alone in this regard), abandoning the system whereby different groups exercise a measure of legal autonomy over the lives of their adherents is crucial to achieving the goal of a more communal—which is to say Hindu—state. See Susanne Hoeber Rudolph & Lloyd I. Rudolph, *Living with Difference in India: Legal Pluralism and Legal Universalism in Historical Context*, in *RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT* 36, 53–54 (Gerald James Larson ed., 2001) (characterizing the Hindu nationalist party's advocacy of a uniform civil code as a push for legal



that the democratic argument has won, even if in practice it is often notoriously honored in the breach.<sup>67</sup>

But of course local circumstances matter. If “[a]rguments from political culture are so often, in the end, sophisticated forms of a mystical fatalism”<sup>68</sup> that obstruct the path of needed change, they are also the necessary, if not the sufficient, condition for intelligent change. An Iranian judge who finds himself attracted to the American model of separation of church and state would be well advised to question its constitutional importation absent assurances that religion plays a comparable role in the two nations. We might imagine the ideal arrangement for achieving the perfect balance between church and state, and therewith the maximum protection for both spiritual and temporal

uniformity); Martha C. Nussbaum, *India: Implementing Sex Equality Through Law*, 2 CHI. J. INT’L L. 35, 40 (2001) (asserting that for Hindu nationalists, the “Uniform Code would surely mean Hindu Code”). But rather than present the case for the code in terms that honestly convey their aspirations, they have, in effect, appropriated a liberal discourse that allows them to assume the rhetorical high ground of liberal universalism. Whether this strategy will ultimately prevail is yet to be determined, but the chosen terms of debate are a tacit recognition of the globally evident presumption in favor of liberal constitutionalism.

67. Sometimes, however, particularist forces are in such a dominant position that they need not compromise at all, especially in regard to how they frame their arguments. In such places—Iran, for example—ruling clerics may ultimately have to accede to pressures from below, but then again they may overplay their hand and find themselves carried away by a rising tide of liberal sentiment. An Iranian “constitutional revolution” is already imaginable, and ironically, its model, as one student of that country’s politics has noted, is Israel rather than the United States:

Over the past two decades, academics, reformist theologians and liberal clerics in Iran have been struggling to redefine traditional Islamic political philosophy in order to bring it in line with modern concepts of representative government, popular sovereignty, universal suffrage and religious pluralism. What these Iranians have been working toward is “Islamic democracy”: that is, a liberal, democratic society founded on an Islamic moral framework.

Reza Aslan, *Why Religion Must Play a Role in Iran*, N.Y. TIMES, July 18, 2003, at A21.

If this revolution were successful, it would not necessarily result in the triumph of a new paradigm, for indeed “the Jewish version of this ideal currently exists in Israel.” *Id.* So while judicial revolutionaries in Israel are attempting to steer the constitutional politics in that country in a more secular Western direction, many Iranians would find the contradictions of an Israeli-style “religious democracy” a quite desirable and tolerable place to be. Of course, given the pariah status of Israel within the region, it is unlikely that a future Iranian Supreme Court will be too eager to include Israeli precedents in its opinions. But if one were to imagine the collapse of the Islamic Republic and its replacement with a constitutional polity rooted in democratic and indigenous cultures, then, in theory at least, the jurisprudence of the Jewish State would have much to offer such a fledgling regime. The interpretive premises underlying this imagined Court’s borrowing from abroad bears a similarity to what Choudhry calls “universalist interpretation,” but is distinguishable from it in at least one important respect. Choudhry, *supra* note 16, at 833. Universalists “posit that constitutional guarantees are cut from a universal cloth, and that all constitutional courts are engaged in the identification, interpretation, and application of the same set of principles.” *Id.* In seeking a transcendence of national boundaries, they exhort “courts to pay no heed to national legal particularities when engaging in constitutional interpretation.” *Id.* If this were true, however, then surely it would make more sense for the Iranian Court to find in some other foreign jurisprudence—for example, American, German, or Canadian—a better source for constitutional emulation than the incompletely realized Israeli democracy.

68. Baruch Susser, *A Proposed Constitution for Israel*, in CONSTITUTIONALISM: THE ISRAELI AND AMERICAN EXPERIENCES, *supra* note 54, at 181.

concerns. But just as in Aristotle's discussion of the best practicable constitution, the law-giver and statesman should be attentive to "actual conditions," so must the jurist ruling in matters of religion and politics.<sup>69</sup> The analysis of constitutional possibilities for addressing this relationship requires sensitivity to the "facts on the ground," especially the manner in which religious life is experienced within any given society and how this experience affects the achievement of historically driven—if not determined—constitutional ends. As Michael Walzer has pointed out, "[T]here are no principles [beyond a basic respect for human rights] that govern all the regimes of toleration or that require us to act in all circumstances, in all times and places, on behalf of a particular set of political or constitutional arrangements."<sup>70</sup> For example,

[W]e [cannot] say that state neutrality and voluntary association, on the model of John Locke's 'Letter on Toleration,' is the only or best way of dealing with religious and ethnic pluralism. It is a very good way, one that is adapted to the experience of Protestant congregations in certain sorts of societies, but its reach beyond that experience and those societies has to be argued, not simply assumed.<sup>71</sup>

Consider in this regard the controversy generated in Israel over the *Qa'adan* case.<sup>72</sup> In this troubling and painfully vexing case, an Arab couple (the Qa'adans) living in a poorly developed Arab settlement sought to relocate and build a home in Katzir, a better endowed Jewish communal settlement established in 1982 in northern Israel.<sup>73</sup> "We feel," said the husband, "that as citizens of this country we have a right to build our house

---

69. ARISTOTLE, *supra* note 23, at 155.

70. MICHAEL WALZER, ON TOLERATION 2-3 (1997). Walzer proceeds "to defend . . . a historical and contextual account of toleration and coexistence, one that examines the different forms that these have actually taken and the norms of everyday life appropriate to each." *Id.* at 3. He continues: "It is necessary to look both at the ideal versions of these practical arrangements and at their characteristic, historically documented distortions." *Id.*

71. *Id.* at 4. A good example of Walzer's point may be found in the Indian practice of state support for public events of a religiously celebratory nature. As Rajeev Dhavan has observed, "This is where Indian secularism is vastly different from American or any other kind of secularism." Rajeev Dhavan, *The Kumbh*, HINDU, Jan. 26, 2001, available at <http://www.hinduonnet.com/thehindu/2001/01/26/stories/05262523.htm>. India, he points out, practices a "participatory benign neutrality," rather than a "strict neutrality" of the sort that makes it exceedingly difficult in the United States for public resources to be expended for even small creche displays at the Christmas season. *Id.* On the other hand, support for mega-events such as the Kumbh (a Hindu ceremonial gathering attended by millions) is accepted as necessary for a healthy secularism in which the infrastructure of religious diversity is kept viable through direct governmental engagement. *Id.*

72. H.C. 6698/95, *Qa'adan v. Israel Land Administration*, 54(1) P.D. 258 (2000) (Isr.) (all pinpoint citations are to an English translation appearing in a forthcoming volume of the ISRAEL LAW REPORTS on file with the Texas Law Review [hereinafter *Qa'adan*]).

73. *Id.* ¶ 4.

where we choose.”<sup>74</sup> But their application was rejected by the Katzir Cooperative Society, which, in collaboration with the Jewish Agency, had established the settlement on state land in 1982.<sup>75</sup> The refusal to accept the couple was based upon the Society’s policy of accepting only Jewish members.<sup>76</sup> The Supreme Court agreed with the Arabs’ claim that the policy illegally discriminated against them on the basis of religion and nationality.<sup>77</sup>

In its ruling, the Israeli Court decided that, as a general rule, the state was prohibited by the principle of equality from allocating land to its citizens on these ascriptive grounds.<sup>78</sup> Justice Barak’s opinion (which he characterized as one of the most difficult of his career) derived its conclusion from the values inherent in the Jewish and democratic character of Israel.<sup>79</sup> “We hold that the State of Israel was not permitted by law to allocate state Land to the Jewish Agency for the purpose of establishing the communal settlement of Katzir on the basis of discrimination between Jews and non-Jews.”<sup>80</sup> All but one of the five judges found that the law prevented the state from discriminating directly in its land allocation, as well as indirectly through the instrumentality of the Jewish Agency.<sup>81</sup> The majority also was careful to limit its ruling to the facts of this particular case, indicating that there are different kinds of settlements whose special problems would require separate arguments. “[I]t is important to understand and remember that today we are taking the first step on a difficult and sensitive path. It is therefore appropriate that we proceed carefully from one case to the next case according to the circumstances of each case.”<sup>82</sup>

Despite this gesture to incrementalism, the Court’s judgment quickly became a political *cause célèbre*. On the right it was viewed as “effectively defin[ing] Israel as a democratic country only,”<sup>83</sup> and “a blow to the Zionist ideal of a Jewish state.”<sup>84</sup> Thus, “[i]t supports the post-Zionist secularist view that Israel is a state of all its citizens but not with a specific Jewish

---

74. Michele Chabin, *This Land Is Whose Land?*, JEWISH WEEK, Mar. 17, 2000, available at <http://www.thejewishweek.com/news>.

75. *Qa'adan*, *supra* note 72, ¶¶ 2, 4.

76. *Id.* ¶ 4.

77. *Id.* ¶ 40(a).

78. *Id.* ¶ 34.

79. *Id.* ¶ 31.

80. *Id.* ¶ 40(a).

81. Although expressing agreement with Justice Barak’s “basic position” regarding the principle of equality and its implications for the allocation of state lands, Justice Kedmi felt that equality should be balanced against other values, particularly national security. *Id.* ¶ 1 (Kedmi, J., concurring in part and dissenting in part).

82. *Id.* ¶ 37.

83. Yair Sheleg, *Katzir and a “State of All Its Citizens,”* ISR. RELIGIOUS ACTION CENTER (Mar. 14, 2000), at [http://www.irac.org/article\\_e.asp?artid=245](http://www.irac.org/article_e.asp?artid=245).

84. Chabin, *supra* note 74 (quoting Yedidya Atlas, a journalist for a right-wing Jewish radio station).

identity.”<sup>85</sup> Elsewhere, it was hailed as “one of the most powerful and positive decisions to come in decades.”<sup>86</sup>

The director of the Association for Civil Rights in Israel, which brought the case to the Israeli Court, could not have been more Barakian in the effusiveness of his response: “The acceptance of the petition by the Court and the prohibition of the transfer of state-owned land to bodies whose purpose is to enable settlement by Jews only, is nothing short of a revolution, crucial to the very essence of Israel as a democratic state, based on human rights values.”<sup>87</sup>

If the intensity of the reactions (to say nothing of the issue itself) reminds Americans of *Brown v. Board of Education*,<sup>88</sup> Barak’s opinion made the connection quite clear in specifically invoking the school segregation case’s declaration that separate is “inherently unequal.”<sup>89</sup> Also echoing the American decision was the Israeli Court’s directive to the government to proceed with “deliberate speed” in implementing the ruling.<sup>90</sup> And as a further parallel, there was the subsequent activity within the legislative branch to nullify the Court’s controversial judgment.<sup>91</sup>

In 2002, the National Religious Party sponsored a bill designed to overturn *Qa’adan* by expressly giving the government the authority to allo-

---

85. *Id.* While it may further the post-Zionist view in this way, post-Zionists, as we have seen, would see the *Qa’adan* decision as fundamentally incoherent to the extent that its derivation is linked to the alleged democratic values of the State. Indeed, the crux of the ethnocentric interpretation is to be found in Israel’s land policies, and particularly in the ceding of authority to extraterritorial organizations such as the Jewish National Fund and the Jewish Agency. The Court’s incremental decision in the *Qa’adan* case leaves the logic of these policies essentially intact, which is hardly a post-Zionist victory.

86. *Id.* (quoting Aliza Mazor, associate director of the New Israel Fund).

87. The Association for Civil Rights in Israel, *The Right of an Israeli Arab Couple to Build Their Home in Katzir*, at <http://www.acri.org.il/english-acri/engine/story.asp?id=101> (last modified Aug. 3, 2000) (quoting ACRI executive director Vered Livne).

88. 347 U.S. 483 (1954).

89. *Qa’adan*, *supra* note 72, ¶ 30 (quoting *Brown*, 347 U.S. at 495). After citing *Brown*, Justice Barak explained its underlying reasoning: “This approach is premised on the concept that separation is insulting to the minority group being removed from the general public, stressing the difference between it and the others, and perpetuating feelings of social inferiority.” *Id.* He then went on to point out how complicated an issue this is, acknowledging that there may be situations where separate but equal treatment might be legally permitted (as, for example, with reference to the Bedouin community). *Id.* However, he is emphatic that in this case the reasoning of *Brown* is applicable. *Id.*

90. *Id.* ¶ 40(b). Interestingly, after prolonged delay by the Israel Land Administration and an apparent refusal to obey the Court’s order in *Qa’adan*, the Administration has finally—after four years—agreed to allocate a parcel of land in Katzir to the *Qa’adan* family. See Yuval Yoaz & David Ratner, *ILA to Allow Israeli Arab Family Build in Jewish Town*, HAARETZ, May 10, 2004, available at <http://www.haaretzdaily.com/hasen/spages/425431.html>.

91. See The Association for Civil Rights in Israel, *Discrimination in the Allotment of Public Lands*, at <http://www.acri.org.il/english-acri/engine/story.asp?id=54> (last modified Aug. 7, 2002) (describing “the government’s decision to support proposed legislation that discriminates against Arab citizens, and contravenes the Basic Law: Human Dignity and Freedom”).

cate land for Jews only.<sup>92</sup> The bill initially received overwhelming support in the Israeli Cabinet, but ultimately the firestorm precipitated by this incendiary legislation led to its burial in a Knesset committee.<sup>93</sup> Even some supporters of the bill had worried that its passage would reignite the worldwide effort to delegitimize Israel as a racist apartheid state.<sup>94</sup> To be sure, they agreed with the bill's proponents that a law designating state land for sole occupancy by Jews was faithful to honored and enduring Zionist settlement ideals, but they were persuaded that the international repercussions of such a codification were not worth the gains to be had. In short, their legislative retreat in no way signaled any diminution in the contempt they felt for a Barak-led Court that had flagrantly abandoned what they held to be the constitutive commitments of the Israeli polity.<sup>95</sup>

Those commitments, as we know, are deeply contested. Although *Qa'adan* was, in Cass Sunstein's terms, a minimalist holding<sup>96</sup> in the purported narrowness of its reach, it was anything but minimalist in the depth of its theorizing. Moreover, its "color-blind" reasoning presented an awkward fit with the realities of Israeli pluralism, however benignly or malevolently those realities are viewed. When, in 1978, the Israeli Court upheld the exclusion of an Arab from the Jewish Quarter in the Old City of Jerusalem, the Court said, "We have a distinguished rule that we should never give our assistance in any matter that amounts to discrimination between persons on

92. See Joel Greenberg, *Plan to Keep Israeli Arabs Off Some Land is Backed*, N.Y. TIMES, July 9, 2002, at A4 ("The bill, which would amend an existing law, says that state land allocated to build communities in Israel will be 'for Jewish settlement only.'").

93. Joel Greenberg, *Israel Backs Off Bill to Curb Arab Home Buying*, N.Y. TIMES, July 14, 2002, at A4.

94. See *id.* (explaining that supporters of the bill backed off after coming "under fire from critics who accused [them] of supporting racist legislation").

95. The movement to formally adopt a constitution for Israel has always been associated with liberal political interests, but *Qa'adan* has prompted thinking on the other side of the spectrum to reassess its opposition to the idea. With a Court that is viewed as hopelessly secular and liberal, some conservatives have figured out that the best way to safeguard Jewish identity is to entrench their ideology in fundamental law. For example, in response to Justice Barak's "first step on a difficult and delicate path" to nondiscrimination, one passionate critic of the decision wrote:

The conclusion to be drawn from this new path should be that the "conservative" circles (from both a religious and nationalist perspective) are actually the ones who today should have an interest in formulating a binding constitution which would not only specifically define Israel as a Jewish and democratic state, but would also bindingly define the practical significance of such a balance.

Sheleg, *supra* note 83.

96. See CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3 (1999) (defining "minimalism" as "the phenomenon of saying no more than is necessary to justify an outcome, and leaving as much as possible undecided"). One should note that Sunstein disputes the notion that *Brown v. Board of Education* was a maximalist decision. "[I]t can even be taken as a form of democracy-promoting minimalism." *Id.* at 39. Despite its great importance, Sunstein views *Brown* as the culmination of a series of minimalist decisions. In that sense, *Qa'adan* should probably be understood as less restrained in its minimalism.

grounds of their religion or nationality. But . . . we must not close our eyes to reality and to actual conditions."<sup>97</sup>

Justice Moshe Shamgar added:

Automatic transfer from place to place of all the varied forms and ways in which the rule of equality has been applied, without taking into account special conditions and circumstances, can be misleading to no small extent; for example compulsory integration of school children there, which forces the English language and Anglo-Saxon culture on each and every student and is regarded there as the height of equality, could be considered here to be compulsory assimilation if an Arab student were to be forced because of it to forego a separate school system in which studies are conducted in his own language and in accord with his own culture.<sup>98</sup>

However incompatible with liberal ideals, separate (but equal?) communal development is plausibly consistent with principles of justice in a society in which group autonomy with respect to important domains of personal law takes precedence over social assimilation.<sup>99</sup>

It may be, of course, that attitudes and assumptions are changing, and that it is now misleading to say of Israel that "[t]he pluralistic, integrationist approach that has been the standard for American society has no relevance here."<sup>100</sup> Alternatively, one would not be surprised to learn that such description is more timely than ever. In either case, it is questionable whether an issue as critical as this—one that goes to the very core of the nation's identity and meaning—should be resolved by the Israeli Supreme Court. The manner of its resolution in *Qa'adan* conforms to the jurisprudential strategy for "achieving unity and constitutional harmony."<sup>101</sup> Thus, the state's Jewish and democratic commitments are made to converge upon a shared principle of formal equality according to which constitutional meaning is assigned. Had the Knesset responded to this provocation with an egregious enactment that, for the first time since the Law of Return, explicitly discriminated by statute against non-Jews, the Israeli Court's ability to effectively counter such a challenge would have been severely tested. When the American Supreme Court was challenged in response to *Brown*, the Justices could rise

---

97. H.C. 114/78, *Burkaan v. Minister of Finance*, 32(2) P.D. 800, 805 (1978) (Isr.).

98. *Id.* at 808.

99. Interestingly, it is not only critics on the left who point out the glaring inequality of conditions that characterize the separate development of the Jewish and Arab communities. Thus the critique on the right of the Israeli Court's invocation of *Brown* in the *Qa'adan* case cleverly included a condemnation of the failure to provide equality to Arab citizens. "If the concept of 'separate, but equal' has not been implemented until now—and indeed the lack of equal facilities extended to the Arab sector should be deplored—the Supreme Court should have ordered that this concept be implemented, rather than in effect canceling it." Sheleg, *supra* note 83.

100. DAVID K. SHIPLER, *ARAB AND JEW: WOUNDED SPIRITS IN A PROMISED LAND* 273 (1986).

101. Barak, *supra* note 51, at 4.

up in righteous indignation and point out in *Cooper v. Aaron* that "Article VI of the Constitution makes the Constitution 'the supreme Law of the Land.'"<sup>102</sup> The Court's further claim that its interpretation of the Fourteenth Amendment *is* the supreme law of the land<sup>103</sup> perhaps went too far; the point, however, is that the judiciary was the unambiguous winner in this confrontation because, however controversial the issue, its ruling was seen as the product of constitutional, rather than ordinary, politics.<sup>104</sup> In Israel, the absence of a genuine constitutional settlement that denies the Israeli Court the political capital to withstand the charge of politics exposes the principles it wishes to defend to a perfunctory and dismissive hearing in the only arena that ultimately matters, the public at large. If the proposition that separation is inherently unequal is to be embraced as a key element in the wider political culture, arguably it should emerge from the crucible of constitutional negotiation and compromise, rather than the abstract theorizing of judges.

Does this mean that the specific outcome in this case was misguided? Is it valid to say that, as Robert Bork does in a brief reference to *Qa'adan*, "once again, universalistic principles were deployed . . . without adequately weighing Israel's particular circumstances and needs"?<sup>105</sup> Is the reliance on *Brown* illustrative of the judicial misuse of foreign precedent? Are there lessons here to illuminate the question of when and how such materials should be used?

The other two judges in the *Qa'adan* majority simply affirmed in two words their agreement with Justice Barak's opinion; the third, Justice Cheshin, wrote two sentences, but then intimated significant disagreement with the opinion's reasoning. "In the division of the general resources amongst the individuals of Israeli society, the petitioners were discriminated against and are therefore entitled to the remedy to which the person discriminated against is entitled. For this reason I agree with the ruling of my colleague, President Barak."<sup>106</sup> This is consistent with his reluctance to address difficult questions of principle<sup>107</sup> and can be taken to mean the

102. 358 U.S. 1, 18 (1958).

103. *Id.*

104. See Jack W. Nowlin, *The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Rights*, 78 NOTRE DAME L. REV. 171, 262-63 (2002) (explaining that the acceptance of the Supreme Court's assertions of judicial supremacy in cases like *Cooper v. Aaron*, 358 U.S. 1 (1958), is a result of "the conclusion of all three branches of the federal government in favor of judicial supremacy").

105. BORK, *supra* note 10, at 125.

106. *Qa'adan*, *supra* note 72, ¶ 1 (Cheshin, J., concurring).

107. Justice Cheshin's deferential position in *Qa'adan* is consistent with his deferential, practical approach in other cases concerning discrimination claims raised by Arab Israelis in the context of intentional underfunding of non-Jewish religious institutions or enrichment educational programs in non-Jewish school districts. In a few such cases that he adjudicated, Justice Cheshin was primarily responsive to concrete, almost mathematical manifestations of discrimination in funding, while being reluctant to address the more principled and difficult questions such as the very constitutionality of the separate but equal doctrine raised by the lawyers representing the

following: the Qa'adans were deprived of their legal right to equality, not because separate is inherently unequal in principle, but because, under the conditions prevalent in Israeli society, separate is in fact unequal.<sup>108</sup> Thus, their effort to improve their living conditions is constrained by the unconstitutional manner in which the resources of the society are allocated in relation to the Arab and Jewish communities. This argument leaves unresolved the question of whether a color-blind society is constitutionally mandated in the Jewish state. Had Justice Cheshin elaborated further, however, he might have: (1) indicated how the objective inequalities between Arabs and Jews that stem directly from state policies are inconsistent with egalitarian norms that enjoy a broad consensus among Israelis; (2) considered how the invalidation of the *Qa'adan* policy was consistent with universal aspirations such as those described in the Israeli Declaration's injunction to "uphold the full social and political equality of all its citizens";<sup>109</sup> and (3) invoked decisions in other countries—for example, Canada and South Africa—to illustrate constitutional approaches supportive of the pursuit of these aspirations.

This position allows one in turn to steer a middle course between Barak and Bork. The latter denounces the constitutional jurisprudence of the Israeli Court for redefining Israeli values so that "Jewish particularism disappears into the mists of abstract universalism."<sup>110</sup> Bork sees peril in "the [Israeli] Supreme Court's promulgation of the abstract universalisms of equality, radical individualism, and rationalism," believing that its actions endanger "Israel's survival."<sup>111</sup> But the Cheshin alternative makes clear that it is possible to accommodate particularism (or at least leave its fundamental commitments unchallenged) while pursuing those universalistic aspirations

---

claimants, let alone the Jewish and democratic issue. There are two main examples of his approach. H.C. 240/98, *Adalah v. Minister of Religious Affairs*, 52(2) P.D. 167 (1998) (Isr.) (rejecting a petition by Muslim communities to declare unconstitutional provisions of the 1998 Budget Law on the grounds that the petition was too broad and required the Court to intrude upon ministerial prerogatives); H.C. 4112/99, *Adalah v. Municipality of Tel-Aviv*, 56(5) P.D. 393 (2002) (Isr.) (a detailed minority opinion by Justice Cheshin—Justice Barak wrote for the majority—rejecting a petition by *Adalah* to force municipalities of "mixed cities" to post street names in Arabic alongside the Hebrew signs). Justice Cheshin's opinion in *Municipality of Tel-Aviv* is highly deferential, labeling the case as dealing with majority-minority relations in the Israeli society—a question that the Court ought to leave for the legislature and executive to decide. Justice Cheshin advocates a minimalist practical solution of replacing only a limited number of street signs in specific neighborhoods where there is a significant number of Arab-Israeli residents. And Justice Cheshin's reference to Qa'adan as a deprived individual, rather than a member of a group victimized by systematic discrimination, further supports this line. His alternative to Justice Barak's "grandiose" approach is an a priori tilt towards judicial restraint in politically charged cases (as opposed to Justice Barak's tilt toward greater activism, or his belief that everything is justiciable). I wish to thank Ran Hirschl for his assistance in illuminating the approach of Justice Cheshin.

108. See SHIPLER, *supra* note 100, at 266–88 (providing examples of the deep-seated segregation between Arabs and Jews).

109. The Declaration of the Establishment of the State of Israel, 1948, 1 L.S.I. 3 (1948).

110. BORK, *supra* note 10, at 130.

111. *Id.* at 132.



that are compatible with both the nation's own promises and the increasingly predominant internationally held view on equal treatment under the law. From this perspective *Brown's* integrationist norm was indeed an unfortunate invocation, in that it prematurely proclaimed a contestable constitutional norm with insufficient grounding in either sociological reality or an inclusively generated constitutional agreement. But Barak's overreaching is matched by Bork's ideologically driven retreat to the narrowest jurisprudential articulation of culture. The excesses of the former do not justify the rigidities of the latter. Nor do they call into question judicial appeal to foreign sources that illuminate and advance those universalist aspirations that are firmly situated within the context of a prevailing constitutional consensus.

#### IV. India: Universalism, Particularism, and the Transformational Constitution

If in Israel the presence of such aspirations—as well as the particularist commitments to which they are attached—must be gleaned from rather spare constitutional materials, the situation in India is dramatically different. The world's longest constitution<sup>112</sup> is remarkably consistent in its embrace of a fairly coherent transformational agenda, but its interpreters need not strain to find in their document ample opportunities for balancing universalist and particularist commitments. The conceptual model of disharmonic politics illuminates the intriguing challenge of their task. "Traditional India with its caste system was a harmonic society because its social inequalities were considered legitimate."<sup>113</sup> By contrast, according to Huntington, the commitment to equality in the United States is disharmonious with the widely perceived reality, a phenomenon which historically has led, as pointed out earlier, to campaigns for political and social reform.<sup>114</sup> But of course India's post colonial constitution was carefully designed to dismantle traditional structures of inequality, many of which were associated with religious practices that had deeply penetrated and were firmly entrenched in the body politic.<sup>115</sup> In this new environment, the juxtaposition between the ideal and the actual produced a constitutional agenda that, in comparative terms, was distinctive in the degree to which it directed political actors (including judges) to pursue the goal of social reconstruction.

---

112. The Indian Constitution is comprised of 395 articles and 83 amendments. See generally INDIA CONST.

113. HUNTINGTON, *supra* note 63, at 12.

114. *Id.* (arguing that the U.S. is a disharmonic society because its social and political inequalities exist within an environment committed to equality). See *supra* notes 63–64 and accompanying text for a discussion of how this disharmony leads to campaigns for reform.

115. See AUSTIN, *supra* note 28, at 50–115 (discussing the fundamental rights and directive principles behind the Indian Constitution).

It is in this decidedly disharmonic political context that judicial choices must be made. While the judiciary has not always performed, in Granville Austin's depiction of the Indian framers' intent, as an "arm of the social revolution,"<sup>116</sup> the judiciary's authority to interpret the law in the service of the political and social vision inscribed in the Indian Constitution has interesting implications for the standard democratic critique of judicial activism. Thus, Robert Bork's denunciation of "the worldwide rule of judges" is based on the observation that increasingly courts around the world have diminished the power of the people "to choose the moral environment in which they live."<sup>117</sup> Courts have preempted these choices often by making a choice of their own, choosing the universal over the particular. "Particularities are usually more difficult to defend than universals;"<sup>118</sup> furthermore, this "search for the universal and . . . denigrat[ion of] the particular" is manifest in "[t]he insidious appeal of internationalism" and the practice of "justices of the Supreme Court . . . look[ing] to foreign decisions . . . for guidance in interpreting the Constitution."<sup>119</sup>

But making choices in relation to the universal and the particular is a very complicated matter. Bork says that "[t]he American Constitution . . . was framed and amended in the light of specific American history, culture, and aspirations."<sup>120</sup> For that reason it makes no sense, he argues, for an American court to take guidance from courts in countries with different histories, cultures, and aspirations.<sup>121</sup> If, however, America's specific aspirations include the progressive realization of principles of justice that are expressive of what its founding document declares to be the self-evident truth of human equality, then it must be the case that the particular history and culture of the United States are in large measure explicable in terms of certain universals. Similarly in India, the aspiration for a more egalitarian society has emerged out of the unique circumstances of that nation's millennia-old experience. The challenge in both countries is to situate the universal in the particular rather than to dichotomize them as if they presented political actors with mutually exclusive options. In the judicial context it means, among other things, remaining open to the possibilities of illumination from abroad while maintaining a realistic sense of how that light needs to be filtered through the prism of local experience.<sup>122</sup>

---

116. *Id.* at 164.

117. BORK, *supra* note 10, at 1.

118. *Id.* at 12.

119. *Id.* at 22.

120. *Id.* at 137.

121. *Id.*

122. Nobody has ever given more thought to this problem in the Indian context than Edmund Burke. For many years he led the opposition to English policy in India as administered by the East India Company. His opposition culminated in the unsuccessful impeachment effort against Warren

Much as Indian national identity is often defined with reference to a composite culture, its borders having been left open to the importation of foreign ideas, so too is that an apt description for its constitutional jurisprudence. As Dr. Ambedkar told the Constituent Assembly, "there was nothing to be ashamed of in borrowing [foreign constitutional principles] because nobody holds any patent rights in the fundamental ideas of a constitution."<sup>123</sup> Judges have relied extensively on foreign materials without viewing such reliance as necessarily transgressive of their history and culture. Thus, in applying American decisions, judges "would not be incorporating principles foreign to [their] Constitution."<sup>124</sup> Interestingly, while Hindu nationalists have vigorously critiqued the concept of a composite culture, their interests nevertheless also lie in allowing the transmission of at least some liberal ideas through these constitutional borders. Indeed, their attraction to, and appropriation of, the theorizing of western intellectuals (and the decisions that connect to it) contains lessons for those engaged in constitutional borrowing.

Case in point: John Rawls. In *Political Liberalism*, Rawls tackled the pluralist conundrum of "how [it is] possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines . . ."<sup>125</sup> While Rawls rightly assumes that all societies with aspirations to political justice confront this vexing dilemma, it is of course a question with special signifi-

Hastings, whose policies towards the native Indian population were thought by Burke to have been unforgivably arbitrary in both transgressing traditional cultural practices and violating principles of natural justice. WHELAN, *supra* note 24, at 3, 7. He believed, as Frederick Whelan has argued, that "morality is in practice necessarily associated with stable traditions." *Id.* at 264. Thus for Burke, moral duties are specific and local, as well as general and eternal . . . [W]hile natural law prescribes duties that can be stated abstractly and universally and that potentially apply to 'the whole human race,' one's actual duties arise from the application of the general principles to particular persons and cases, and depend on circumstances, engagements, and particular histories.

*Id.* at 280. In this regard, his famous speech on Fox's East India Bill still resonates well with contemporary issues of comparative jurisprudence. Among the points made by Burke is that Western charters of liberty could, if prudently managed, be transplanted to India and adapted to local experience:

Of this benefit, I am certain, their condition is capable; and when I know that they are capable of more, my vote shall most assuredly be for our giving to the full extent of their capacity of receiving; and no charter of dominion shall stand as a bar in my way to their charter of safety and protection.

Edmund Burke, Speech on Fox's East India Bill (1783), in *ON EMPIRE, LIBERTY, AND REFORM: SPEECHES AND LETTERS* 293 (David Bromwich ed., 2000).

123. Soli J. Sorabjee, *Equality in the United States and India*, in *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES ABROAD* 94, 97 (Louis Henkin & Albert J. Rosenthal eds., 1990). Sorabjee points out that the openness to ideas from abroad was also consistent with the spirit of Vedic prayer, to wit: "Let noble thoughts come to us from all sides." *Id.* at 101.

124. *Air India v. Nergesh Meerza*, A.I.R. 1981 S.C. 1829, 1852 (as quoted in Sorabjee, *supra* note 123, at 102).

125. JOHN RAWLS, *POLITICAL LIBERALISM* 4 (1993).

cance for India, arguably the most diverse society in the world. Not surprising, then, are the occasional references to Rawls and his arguments in the opinions of Indian judges.<sup>126</sup> When asked about the use of Rawls in judicial opinions, one of them—a former Chief Justice of India—explained that “[i]t is entirely appropriate to use concepts from Western philosophical liberalism in Indian constitutional cases, because there are universals that apply to all societies.”<sup>127</sup>

The occasion for raising the question was a discussion of the so-called *Hindutva Cases*,<sup>128</sup> a series of Supreme Court decisions in the mid-nineties involving application of the Representation of the People Act, the foundational 1951 enactment that governs Indian elections.<sup>129</sup> One of its key provisions details a number of “corrupt practices,” including the inappropriate use of religious speech to advance one’s electoral prospects.<sup>130</sup> In these cases, the Indian Court was asked to address both the constitutionality of the provision and the reach of its statutory application. In the end, it upheld the constitutionality of the section while vindicating, through a narrow construction of the law’s meaning, most of the Hindu nationalists charged with its violation.<sup>131</sup> The cases are noteworthy in India for addressing core issues of national and religious identity. Of less concern for most Indians is that the philosophical edifice, upon which the Indian Court’s argument to sustain the law was built, is taken from the pages of John Rawls.<sup>132</sup> Thus, the Indian

126. See, e.g., *Faraqui v. Union of India*, (1994) 6 S.C.C. 360, 404 (discussing Rawlsian pragmatism).

127. Interview with M.N. Venkatachaliah, former Chief Justice of India, in New Delhi (Mar. 10, 1999).

128. *Joshi v. Patil*, (1996) 1 S.C.C. 169, and eleven other cases decided by the Supreme Court of India are collectively known as the “Hindutva” cases.

129. Representation of the People Act, 1951 (43 of 1951), 41 INDIA A.I.R. MANUAL 52 (5th ed. 1989).

130. The relevant section defines corruption as:

The appeal by a candidate or his agent . . . to vote or refrain from voting for any person on the ground of his religion, race, caste, community, or language or the use of, or appeal to, religious symbols . . . for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

*Id.* § 123(3).

131. Findings against politicians were reversed in the case of one Hindu nationalist who had pledged in his campaign to turn Maharashtra into India’s “first Hindu state,” *Joshi*, (1996) 1 S.C.C. at 204, and in the case of another who had allegedly appealed to voters on the basis of the candidate’s support of “Hindutva.” *Kapse v. Singh*, (1996) 1 S.C.C. 206, 221. Although “Hindutva” is widely considered to signify the religious faith of Hindus, the Court, in a case upholding findings against two political candidates, interpreted the term as referring to the culture and ethos of the people of India. *Prabhoo v. Kunte*, (1996) 1 S.C.C. 130, 161.

132. Although there is no citation of Rawls in the Court’s judgment, the author of the opinion, Justice J.S. Verma, was familiar with the argument of *Political Liberalism*, having cited it two years earlier in his majority opinion in the *Ayodhya Reference Case*. *Faraqui v. Union of India*, (1994) 6 S.C.C. 360, 403–04. His opinion there quotes a speech of a judicial colleague, in which the latter said:

In a pluralist, secular polity law is perhaps the greatest integrating force. A cultivated respect for law and its institutions and symbols; a pride in the country’s heritage and

Court's understanding of a "corrupt practice" relied on a Rawlsian normative view of politics, in which the presence of procedurally correct reasoned deliberation becomes the measure of viable secular democratic institutions. Activities that depart from this defining norm are therefore corrupt because of their tendency to undermine the essential principles of secular democratic governance. "In order that the democratic process should thrive and succeed, it is of utmost importance that our elections to Parliament and the different legislative bodies must be free from the unhealthy influence of appeals to religion, race, caste, community, or language."<sup>133</sup> The Indian Court's argument bears a striking resemblance to formulations advanced in contemporary liberal political theory which, as Ronald Thiemann has aptly put it, "grant virtual axiomatic status to the belief that religious convictions must be limited solely to the realm of the private."<sup>134</sup> This segmentation is essential for a "liberalism of reasoned respect," the goal of which is a structured society that places a premium on the virtue of civility.<sup>135</sup>

Not long after the judgments in the *Hindutva Cases* were announced, the justice who had authored the opinions received some unsolicited praise for his efforts from Ronald Dworkin, who happened to have been in India at the time of the decisions.<sup>136</sup> As perhaps the preeminent Rawlsian legal philosopher, Dworkin's approval of the rulings is perfectly understandable.<sup>137</sup> For Justice J.S. Verma, whose opinions in these cases (reversing most of the convictions) prompted some observers to question his liberal credentials and to suspect him of harboring anti-Muslim views, this approval from a pedigreed and disinterested "enlightened" source was quite welcome.<sup>138</sup> But

---

achievements; faith that people live under the protection of an adequate legal system are indispensable for sustaining unity in pluralist diversity. Rawlsian pragmatism of 'justice as fairness' to serve as an 'over-lapping consensus' and deep-seated agreements on fundamental questions of basic structure of society for deeper social unity is a political conception of justice rather than a comprehensive moral conception.

*Id.* (quoting M.N. Venkatachaliah).

133. *Prabhoo*, (1996) 1 S.C.C. at 160.

134. RONALD F. THIEMANN, *RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY* 89 (1996) (criticizing most modern political philosophers for failing to address the proper role of religion in public life).

135. See Paul J. Wiethman, *Introduction: Religion and the Liberalism of Reasoned Respect, in RELIGION AND CONTEMPORARY LIBERALISM* 1 (Paul J. Wiethman ed., 1997) ("The central animating idea of the liberalism of reasoned respect is a vision of an ideal and well-ordered society of civility and mutual respect.").

136. Interview with J.S. Verma, former Chief Justice of India, in Ghaziabad, India (Feb. 28, 1999).

137. Dworkin had previously called for "a fusion of constitutional law and moral theory." RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 149 (1977). He then reminded his readers that "Professor Rawls of Harvard . . . has published an abstract and complex book about justice which no constitutional lawyer will be able to ignore." *Id.*

138. Justice Verma became a lightning rod for criticism for failing to distinguish between Hinduism and Hindutva. Many observers felt that this played into the hands of the anti-Muslim Hindu right, for whom Hindutva is not so much about religion as it is about racial, national, and cultural phenomena for constituting a regime of political domination by the majority over the

however useful Rawls and Dworkin were in affirming judicial bona fides, Rawls's teachings were arguably misplaced in the context of the Indian socioeconomic environment and constitutional culture.<sup>139</sup> The application of public reason-based arguments to sustain the constitutionality of restrictions on religious speech was, in a setting where religion is a constitutive reality for most people, inadequate to the task of convincingly placing such rhetoric beyond the arena of public disputation. Elsewhere, I have suggested that, however appealing restrictions based on content-neutral principles conforming to contemporary depictions of the liberal state might be in elite legal circles in India and the United States, the non-neutrality of the Indian state, as delineated in the nation's Constitution, renders problematic the transference of abstract moral reasoning from one constitutional locale to another.<sup>140</sup>

The ameliorative aspirations of Indian constitutionalism are critical to the interpretive choices faced by judges. In construing "corrupt practices" this means attending to those constitutive principles that establish a polity's constitutional identity, and then, in specific instances, drawing the appropriate conclusions from Montesquieu's teaching that "[t]he corruption of each government generally begins with that of [its] principles."<sup>141</sup> The constitutional essentials of the Indian polity were forged out of the tension between religion and equality.<sup>142</sup> If political corruption is best represented as an erosion of the core commitments of a given polity, then the most compelling argument for allowing limitations on religious speech in an Indian electoral setting is that they might advance constitutive egalitarian goals. This is not to say that such limitations are advisable, only that their legality should be appraised in accordance with the constitutional essentials of the Indian

---

nation's minorities. See, e.g., Brenda Cossman & Ratna Kapur, *Secularism's Last Sigh?: The Hindu Right, the Courts, and India's Struggle for Democracy*, 38 HARV. INT'L L.J. 113, 114 (1997) (arguing that the Supreme Court erred in the *Hindutva Cases* by concluding that "*Hindutva* constitutes a way of life of the people of the subcontinent and that it constitutes neither a violation of the prohibition on promoting religious enmity and hatred").

139. See JACOBSON, *supra* note 41, at 161-88 (discussing the limited applicability of Rawlsian philosophy in the Indian context); see also Upendra Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]Justice*, in FIFTY YEARS OF THE SUPREME COURT OF INDIA 168 (S.K. Verma & Kusum eds., 2000). Baxi criticizes "Eurocentric" Indians in the legal profession who are "enamoured of" the juristic theory of the "North" and its main exemplars: John Rawls, Jurgen Habermas, and Ronald Dworkin. *Id.*

140. See JACOBSON, *supra* note 41, at 161-88 ("Indian restrictions on religious speech can be justified according to content-neutral principles that conform to contemporary conceptualizations of the liberal State; but those principles do not readily conform to the nonneutrality of the Indian State as delineated in the nation's Constitution.").

141. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 171 (David Wallace Carrithers ed., 1977).

142. See S.P. SATHE, *JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS* 165 (2002) (noting that "the makers of the Constitution were not oblivious to the prevailing inequities in the social life" and that they recognized, in light of the long history of discrimination under the Hindu caste system, an "affirmative action to weed out the past vestiges of inequality was necessary").

experiment, rather than with Rawlsian “constitutional essentials,” which do not specifically include principles of socioeconomic justice.<sup>143</sup>

This claim might appear on first glance to be premised on purely particularist assumptions. In effect, it says that the norms of public reason must be framed in such a way that culturally specific iterations are given their due. It argues that constitutional restrictions on religious speech, to be legitimate, must be shown as necessary to defend core principles of *this* secular regime, and that a defense based on the logic of an ideal secular democracy fails in India, whether or not it succeeds elsewhere. It emphasizes the distinctiveness of the Indian example, rooted in the transformational agenda of Indian nationalism, in which the democratization of a social order inhabited by a thickly constituted religious presence provides a special logic for managing the constitutional affairs of church and state.

However, upon closer examination, the attention to the specific interpretive requirements of the Indian constitutional context suggests, as mentioned earlier, that distinguishing universals and particularities is not a simple matter for clear-cut delineation. In India today, liberal, content-neutral principles are invoked most insistently by political interests who understand that faithful adherence to such principles will advance the cause of an ethnically conceived nationalism that by definition exalts the partial over the whole. Moreover, as many students of Indian politics have noted, this ascriptively based nationalism is associated with the protection of upper caste and class interests, which means that one challenge to substantive equality is compounded by another.<sup>144</sup> The commitment to formal equality—

143. For Rawls, constitutional essentials are of two kinds:

- (a) fundamental principles that specify the general structure of government and the political process: the powers of the legislature, executive and the judiciary; the scope of majority rule; and
- (b) equal basic rights and liberties of citizenship that legislative majorities are to respect: such as the right to vote and to participate in politics, liberty of conscience, freedom of thought and of association, as well as the protections of the rule of law.

RAWLS, *supra* note 125, at 227.

144. See, e.g., THOMAS BLOM HANSEN, *THE SAFFRON WAVE: DEMOCRACY AND HINDU NATIONALISM IN MODERN INDIA* 121–26 (1999). Hansen notes:

The RSS [a leader of the Hindu nationalist movement] is committed to a culturally conservative vision of a rejuvenated nation . . . . This vision does not entail any subversion of hierarchies but is, on the contrary, founded on hierarchies and will, if implemented, undoubtedly be more beneficial to the upper castes and the middle castes than to the poorer sections of the population.

*Id.* See also CHRISTOPHER JAFFRELOT, *THE HINDU NATIONALIST MOVEMENT IN INDIA* 45–50 (1996) (“[T]he egalitarian nature of the RSS was contradicted by other features of the movement, and for a long time it was associated with the high castes.”); MADHU KISHWAR, *RELIGION AT THE SERVICE OF NATIONALISM AND OTHER ESSAYS* 251 (1998) (stating that “the Hindutvavadi leadership itself articulates the aspirations of certain upper caste groups far more than those of its new-found lower caste supporters,” although it is “uncomfortable with caste-based loyalties because they come in the way of ‘uniting’ all Hindus”); ACHIN VANAİK, *THE FURIES OF INDIAN COMMUNALISM: RELIGION, MODERNITY AND SECULARIZATION* 56 (1997) (“The stronger the

to some of the constitutional essentials of liberal constitutionalism—is fundamentally strategic, in other words, an investment in political calculation, not in political principle. At this stage in the realization of Indian constitutional aspirations, judges who integrate formal norms of universal justice into their constitutional discourse may actually be (in some cases inadvertently) aiding the forces of regressive cultural particularity. The implication that follows from this is not that judges should avoid looking abroad for constitutional guidance; rather, it is that they should exercise careful discretion in selecting their instructional sources. At least in the short term, Indian jurists may make more progress in realizing their ultimate goals by exploring jurisprudential options gleaned from, say, the contemporary South African constitutional experience, than from the philosophical literature of the United States.<sup>145</sup>

While the distinctiveness of constitutional regimes persists in the face of the harmonizing effects of liberal globalization and international law, increasingly apparent in the rising prominence of these phenomena are certain common attributes of constitutional organization that transcend national boundaries. If constitutional borders are to remain permeable to transcendent ideals, then a distinctive feature of Indian constitutional jurisprudence that speaks to the relationship of the particular to the universal warrants consideration: the “basic structure” doctrine.<sup>146</sup> It is the foundation for the

---

mobilization around caste, the more damaging it is to the communal advocates of Hindu nationalism.”).

145. Accompanying this attention to the particulars of constitutional context should be an awareness of how the achievement of local constitutional aspirations can serve the ends of a transcendent ideal of constitutionalism. David Beatty, for example, has argued that “[f]or ordinary people, who believe in the idea of human rights, the good news is that the judgments that have been written by courts around the world point very strongly to the existence of universal principles of law.” David Beatty, *Law and Politics*, 44 AM. J. COMP. L. 131, 141 (1996). His point speaks more to means than to ends, to “a universal method of constitutional validation.” But an analysis of how nations at different stages of political development and with different social and cultural circumstances address common problems of constitutional import can also engender a more textured account of what the substantive liberal democratic ideal might look like in practice. For example, distinguishing alternative contexts for secular constitutional development may reveal complementary approaches to a more normatively driven model of church and state relations. The ameliorative emphasis in Indian secularism highlights for Americans the importance of substantive equality to the achievement of religious tolerance, much as the assimilative bent of American secularism conveys to Indians the salience of liberal pluralism in mitigating the communal obstacles to religious freedom. Each, that is, can be a contributing factor in the realization of the other’s constitutional aspirations. In this regard, see JACOBSOHN, *supra* note 41, at 265–90, where I discuss what is arguably the most controversial religion decision handed down by the U.S. Supreme Court, *Employment Division v. Smith*, 496 U.S. 913 (1990), widely known as the peyote case. I try to show how Justice Scalia’s opinion for the Court might have benefited from familiarity with India’s ameliorative approach to church and state issues. But, of course, given the Justice’s disdain for comparative case law, the familiarity would doubtless have had no effect whatsoever.

146. S.P. Sathé summarizes the “basic structure” doctrine as follows:

[The basic structure] doctrine is posited on the hypothesis that the power of constitutional amendment could not be equal to the power of making a constitution.



Supreme Court's extraordinary power to declare a constitutional amendment unconstitutional on substantive grounds. In a landmark case, *Kesavananda v. State of Kerala*,<sup>147</sup> the Indian Court affirmed that there are certain basic features of the Constitution which cannot be altered through the exercise of the power of amendment.<sup>148</sup> Any effort to amend the document that would leave its "basic structure" transformed can be nullified by the Court under the theory that such changes as are contemplated by the amending power cannot be understood to include the making of a new constitution.<sup>149</sup> Subsequent cases have added to the list of basics that may not be amended out of existence. They now arguably include such general features as the supremacy of the Constitution, the rule of law,<sup>150</sup> the principle of separation of powers, judicial review,<sup>151</sup> freedom and dignity of the individual, unity and integrity of the nation, the principle of free and fair elections,<sup>152</sup> federalism, and secularism.<sup>153</sup>

With the exception of federalism (and possibly judicial review), all of these "basic features" are essential for constitutional government. They are universal attributes of constitutionalism. But needless to say, this particular list lacks precision. Moreover, there are no universally accepted articulations of these attributes, although some manifestations of them may come closer to a constitutional ideal than others. As the arbiter of the meaning of these terms, the Indian Supreme Court can insure that its reputation for judicial activism will remain substantial. In the last seventeen years, however, it has struck down constitutional amendments on only two occasions, and since the basic structure doctrine's inception in 1973, it has been successfully invoked

---

The power of constitutional amendment could not be used for repealing the entire constitution. The identity of the original constitution must remain intact. This doctrine imposes a restriction on the power of the majority and is in that sense a counter majoritarian check on democracy in the interest of democracy.

S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J.L. & POL'Y 29, 43 (2001).

147. A.I.R. 1973 S.C. 1461.

148. *Id.* at 1534-35.

149. This doctrine was sharply debated in India. At least one constitutional theorist in the United States, Walter Murphy, has defended the idea of an unconstitutional amendment on grounds very similar to the reasons given by the Indian Court. He has contended that an amendment, rightly construed (that is, following the Latin *emendare*), leads to correction or improvement, not reconstitution. "Thus changes that would make a polity into another kind of political system would not be amendments at all, but revisions or transformations." Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 163, 177 (Sanford Levinson ed., 1995).

150. *Gandhi v. Naraim*, A.I.R. 1975 S.C. 2299.

151. *Minerva Mills v. Union of India*, A.I.R. 1980 S.C. 1789; *Wamanrao v. India*, A.I.R. 1981 S.C. 271; *Kumar v. India*, (1997) 3 S.C.C. 261.

152. *Gandhi*, A.I.R. 1975 S.C. at 2299.

153. *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. 1, 149.

in only five cases to invalidate provisions of constitutional amendments.<sup>154</sup> But its invocation is not limited to the review of amendments. In another landmark case, *S.R. Bommai v. Union of India*,<sup>155</sup> the foundation was laid for the Indian Court's controversial ruling upholding the central government's dismissal of three state governments that had been implicated in the violent destruction of an Islamic mosque in the northern Indian city of Ayodhya in 1992, an event of cataclysmic consequence for the nation.<sup>156</sup> The Indian Court rejected the contention of counsel for the three dismissed governments that the only legitimate grounds for invoking Presidential Rule (under article 356, providing for dismissal when "the government of the State cannot be carried on in accordance with the provisions of [the] Constitution")<sup>157</sup> was because of a serious interruption of the democratic *process*.<sup>158</sup> The justices decided that the failure to act in accordance with the substantive provisions of the Constitution, in this case the commitment to secular rule, was sufficient to trigger the emergency powers of the union government.<sup>159</sup> The Court stated:

Secularism is a part of the basic structure of the Constitution. The acts of a State Government which are calculated to subvert or sabotage secularism as enshrined in our Constitution, can lawfully be deemed to give rise to a situation in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.<sup>160</sup>

In *Bommai*, unlike in the subsequent *Hindutva Cases*, the Indian Court was careful to respect the secular ideal of religious freedom, while focusing on actual conditions, including religion's constitutive role in the social order. The dominant theme of most of the opinions invokes one of the oldest Indian traditions—*sarva dharma sambhava* (equal treatment of religions)—which is also at the core of any serious account of the essentials of secular governance. "We hold that no one religion should be given preferential status, or unique distinction, that no one religion should be accorded special privileges . . . for that would be a violation of the basic principles of democracy . . ." <sup>161</sup> But presented in this rather formal way, the equal

154. SATHE, *supra* note 142, at 89.

155. (1994) 3 S.C.C. 1.

156. In December of 1992, a wave of violence engulfed much of India precipitated by a Hindu mob's destruction of the Babri Masjid Mosque in Ayodhya. Not since Partition had so much blood flowed through the streets of Indian cities and towns. The orgy of Hindu-Muslim rioting and tumult was a chilling reminder of the awful circumstances that accompanied the birth of independent India.

157. *Bommai*, (1994) 3 S.C.C. at 218 (quoting INDIA CONST. art. 356, cl. 1).

158. *Id.* at 220 (explaining that an attempt to limit the words "'provisions of this Constitution'" to "certain machinery provisions in the Constitution is misconceived and cannot be given effect" and that the words also encompass provisions like "fundamental rights").

159. *Id.* at 149.

160. *Id.*

161. *Id.* at 76.

treatment principle provides only limited insight into the underlying commitments of those in India who have espoused it. Some who voice the ideal of equality, insisting, for example, on the immediate enforcement of the constitutionally directed goal of a uniform civil code, were directly implicated in the violence against Muslims, whom they stridently and provocatively describe as unfair beneficiaries of Indian law. Their purpose in doing so is to advance their ambitious agenda of creating a Hindu state, which, as we saw in the election cases, benefits from the appropriation of a liberal constitutional discourse whose legitimacy inheres precisely in its universal appeal to human rights.<sup>162</sup>

At least several of the judges in *Bommai* correctly understood that the pursuit of the ideal of *constitutionalism* required an incremental approach to *constitutional* adjudication in order to establish the identity of the ideal in the actual.<sup>163</sup> For these judges, the jurisprudential challenge was to work within the constraints of the existing social reality without allowing it to obscure the secular vision of the transcendent ideal. In his thoughtful account of constitutionalism, Harvey Wheeler noted:

We know that the constitution of each country reflects in some sense the broad sociological configurations of its people, but beyond this it also seems true that in some countries the constitution is able to serve as a kind of democratic magnifier of civic wisdom, able somehow to produce the actual effects of greater democracy and deeper wisdom than seems practically possible in modern society.<sup>164</sup>

*Bommai* is a case where a special effort was made to work within the broad sociological configurations of the Indian people, while protecting the ideal of greater democracy to which the people had been constitutionally dedicated. The ideal was familiar within the Indian tradition (nowhere better exemplified than in the Emperor Ashoka), but not always evident in the path of precedent established by judicial decisions.<sup>165</sup> To clarify the ideal, one finds decisions of other national courts that are usefully referenced, if not reflexively transplanted to Indian soil. In doing so, the judges are attempting to show (in contrast to the tendentious and simplistic renderings of the Hindu revivalists) how the commitment to secularism embedded in the concept of equality is meaningful only if equality is situated within the context of the Indian Constitution's specific transformative aspirations. "Our object," as

162. See *supra* text accompanying notes 124–33; see also Brenda Cossman & Ratna Kapur, *Secularism: Bench-Marked by Hindu Right*, 31 *ECON. & POL. WKLY.* 2613, 2613 (1996) (analyzing a series of Indian Supreme Court judgments that recognized the Hindu ideology of *Hindutva*).

163. See *Bommai*, (1994) 3 S.C.C. at 118 (arguing that certain principles inherent in the Constitution must be adjudicated circumspectly).

164. Harvey Wheeler, *Constitutionalism*, in 5 *HANDBOOK OF POLITICAL SCIENCE* 1, 5 (Fred I. Greenstein & Nelson W. Polsby eds., 1975).

165. See SATHE, *supra* note 142, at 7–8 (noting that early decisions sometimes "appeared revolting to the basic tenets of democracy").

one of the justices explained, "is to ascertain the meaning of the expression 'secular' in the context of our Constitution."<sup>166</sup>

Two of the justices invoked the concept of "positive secularism" to supply this meaning.<sup>167</sup> It was designed to remedy the deficiencies of the formal equal treatment model, which, while compatible with the liberal ideal, strengthens existing sociocultural structures in a society where the impact of the dominant religion is pervasive, encompassing, and unacceptably inegalitarian. Sameness in the state's interactions with different religious communities is not in itself a virtue. Of what relevance is this to the dismissal of the three governments? The political support for the destructive campaign waged by Hindu activists in Ayodhya assumes a significance that extends beyond the immediate and obvious details associated with that event. As one of the positive secularists wrote in his opinion:

The interaction of religion and secular factors . . . is to expose the abuses of religion and of belief in God [for a] purely partisan, narrow or . . . selfish purpose to serve the economic or political interests of a particular class or group or . . . country. The progress of human history is replete with full misuse of religious notions in that behalf.<sup>168</sup>

Thus, a judge looking objectively at the political dynamic at work in the mobilization around Ayodhya could plausibly have concluded that the most profound threat to secularism resided not so much in the immediate damage to communal relations so vividly on display in the rubble of the mosque, but in the long term consequences of unchallenged ethnoreligious nationalism for the prospects of social reform and reconstruction.<sup>169</sup>

To recapitulate, what we find in India is a variant of the universal constitutional predicament. Every constitutional court must accommodate constraints of sociopolitical and historical context and aspirations that push and pull towards convergence to a cluster of commonly held or overlapping norms. Bruce Ackerman has written of "the rise of world constitutionalism," a phenomenon that "American constitutional lawyers have treated . . . with astonishing indifference."<sup>170</sup> How to achieve a balance between these constraints and aspirations is one of the great problems for constitutional theory. In the case of India, which "by the standard criteria of political science," Ackerman correctly points out, "should never have been able to sustain

---

166. *Bommai*, (1994) 3 S.C.C. at 232.

167. *Id.* at 166, 233.

168. *Id.* at 164.

169. Other scholars have recognized the Ayodhya incident as a threat to the movement toward a secular, pluralistic society and an example of how ethnoreligious nationalism could undermine long term social reform. See, e.g., JAFFRELOT, *supra* note 144, at 457-68 (1995) (detailing the riots, prosecutions, and social chaos following the destruction of the mosque).

170. Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 772 (1997).

constitutional democracy,"<sup>171</sup> the judiciary has had a mixed record in bringing forth a reasonable equilibrium. Nevertheless, it is easy to agree with Ackerman's belief that among the reasons for India's success in sustaining a liberal democracy in the face of immense obstacles is the "increasing prominence of the Constitution, and its judicial institutions, as the guardians of the nation's fundamental constitutional commitments."<sup>172</sup>

These commitments are both short and long term, consisting of those that address the particular burdens of Indian history as well as those whose fulfillment would mark a convergence toward constitutional democracies dissimilarly situated by historical experience. The basic structure doctrine has become jurisprudentially instrumental to their keeping. Essentially, it says that there are features of constitutional governance so important that their preservation requires maintaining the option of exercising the most extreme of countermajoritarian judicial acts: overturning a constitutional amendment.<sup>173</sup> The precise configuration and content of these features are variable, reflecting the circumstances of time and place. Overturning a constitutional amendment is an option not yet associated with the rise of world constitutionalism, but, in one form or another, judiciaries around the world are confronting the same set of considerations that enter into the calculations of the Indian Court.<sup>174</sup>

---

171. *Id.* at 781.

172. *Id.* at 782.

173. Here one can draw an interesting contrast with the United States, where the idea of an unconstitutional constitutional amendment has never seriously taken hold. Neither, it should be added, has the dismissal of a state government, as provided for in the Guarantee Clause of Article IV, Section 4. The Indians patterned their provision for dismissing state governments on the American clause, but for the same reason that they instituted the basic structure doctrine to trigger a finding of unconstitutionality in the case of a procedurally correct amendment, they validated the authority to dismiss a state government that was in violation of the provisions of the Constitution. In both instances, the Constitution was viewed as more than a document laying out procedures for governance. The same animating assumption incorporated in the doctrinal orthodoxy that a liberal society cannot tolerate the endorsement of an official or public philosophy is to be found in conventional wisdom about entrenchment, the Guarantee Clause, and judicial finality. Thus, the person who believes that an unconstitutional constitutional amendment is a contradiction in terms, that republicanism is too indefinite a concept to enforce via Article IV, and that the Constitution is what the Supreme Court says it is, is likely today to adhere to a set of jurisprudential precepts fundamentally opposed to the idea of a state-supported public philosophy. The liberal constitutionalism that is presupposed by this positivist emphasis is much more congenial to process than to substance; accordingly, deference must be extended to the amendments that emerge from the procedures of Article V, the governments that are elected by popular voting in the states, and the decisions that are produced by majorities on the Supreme Court. That such outcomes would be deemed illegitimate on the basis of principles not explicitly specified by the text of the Constitution exemplifies a perspective incompatible with the requirements of neutrality associated with the liberal state.

174. See Elai Katz, *On Amending Constitutions: The Legality of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251, 264 (1996) ("The French and German Constitutions, among others, explicitly prohibit changes to fundamental democratic principles.").

## V. Ireland: Constitutional Adaptation, the Claims of Culture, and the Virtue of Prudence

To travel from Delhi to Dublin is to open oneself up to the shock of recognition. To be sure, expectations of jarring discontinuities will not go unfulfilled. Thus, moving from an immense, impossibly diverse country to one that is in these respects its opposite cannot but help produce a dizzying sense of unfamiliarity. But if one looks beyond the obvious (and important) differences, some commonalities appear that are quite suggestive for constitutional borrowing and the problem of balancing the universal and the particular.

In the case of religion, for example, religious identity figured prominently in the two nations' struggles for independence from the same Empire. More specifically, Articles 25 and 26 of the Indian Constitution, which concern the nature of the State's relations with religious life, echo language in Article 44(2) of the Irish Constitution of 1937 (much like, as previously mentioned, the Indian section on Directive Principles is modeled after Article 45).<sup>175</sup> More generally, religion in both places penetrates deeply into the fabric of society, and while the differences between Hinduism and Catholicism matter greatly in terms of the sorts of problems this creates for their respective polities, it offers us a shared jurisprudential challenge to consider: how to realize the Constitution's democratic aspirations while respecting the existence of an entrenched and countervailing religious presence.

As suggested earlier in relation to the directive principles of both countries, when compared to India, this religious presence in Ireland does not represent as massive an obstacle to the achievement of constitutionally inspired political and social goals. Indeed, with regard to questions of social and economic justice, mainstream Catholic theology was to a large extent quite compatible with reform-minded policy objectives.<sup>176</sup> But that same theology was difficult to reconcile with a whole host of rights-related concerns—abortion, birth control, and homosexuality, among others—that, particularly in the context of increasing integration into the larger European community, presented a substantial judicial dilemma.

Justice Barak would surely recognize the problem, as there are some glaring similarities between the Irish and Israeli experiences. For example, references in Irish Supreme Court opinions to the "Christian and democratic nature of the State"<sup>177</sup> will resonate with students of Israeli jurisprudence.

---

175. Compare INDIA CONST. pt. II, arts. 25–26, with Art. 44, § 2, Constitution of Ireland, 1937.

176. George Weigel, *The Democracy Connection*, in *ASPIRING TO FREEDOM: COMMENTARIES ON JOHN PAUL II'S ENCYCLICAL "THE SOCIAL CONCERNS OF THE CHURCH"* 119–20 (Kenneth A. Meyers ed., 1988) (discussing the way in which Roman Catholicism stresses the need for and encourages development in human rights and democracy).

177. See, e.g., *Ryan v. Attorney General*, [1965] I.R. 294, 312 (Ir. H. Ct.). The full quotation is: "I think that the personal rights which may be involved to invalidate legislation are not confined

Neither of the majority faiths in Israel and Ireland is an established religion; however, each enjoys a constitutional recognition that far exceeds mere symbolic significance. The Irish Constitution's preamble commences, "In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred," and then "[h]umbly acknowledg[es] all our obligations to our Lord, Jesus Christ, Who sustained our fathers through centuries of trial . . ."<sup>178</sup> Although the language in a preamble is widely assumed to have limited (if any) legal standing, it can hardly be dismissed as irrelevant when cited, as it was, in the following manner: "It cannot be doubted that the people, so asserting and acknowledging their obligations to our Divine Lord Jesus Christ, were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and with Christian beliefs."<sup>179</sup> This led the Chief Justice (in the majority opinion) to conclude in a landmark case that "the Christian nature of our State" supports the criminalization of homosexual conduct on the grounds that its practice is "morally wrong."<sup>180</sup>

Such reliance on the preamble, while revealing, is much the exception in Irish constitutional jurisprudence. More important to the judicial dilemma are the explicit natural law references in the body of the constitutional text. Thus the long standing debate in the United States over the existence or relevance of natural rights or law to constitutional adjudication is very much beside the point in Ireland. "For the purposes of constitutional interpretation,

---

to those specified in Article 40 but include all those rights which result from the Christian and democratic nature of the State." *Id.*

178. Pmbli., Constitution of Ireland, 1937. In addition, Article 6, section 1 of the Irish Constitution reads: "All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good." In 1972, however, a constitutional amendment deleted a provision from the 1937 document that had recognized the "special position" of the Catholic Church. Noel Browne, *Church and State in Modern Ireland*, in *IRELAND'S EVOLVING CONSTITUTION, 1937-1997: COLLECTED ESSAYS* 46 n.22 (Tim Murphy & Patrick Twomey eds., 1998).

179. *Norris v. Attorney General*, [1984] 1 I.R. 36, 64 (Ir. S.C.). One cannot help but compare this case with the American decision in *Bowers v. Hardwick*, decided two years later. 478 U.S. 186 (1986). There too a Chief Justice cited "Judeo-Christian moral and ethical standards" to uphold an anti-sodomy statute. *Id.* at 196 (Burger, J., concurring). The mention of religious beliefs in this brief concurring opinion occupies a place of lesser prominence than does the reference in Chief Justice O'Higgins's opinion, but it is arguably a more controversial move by an American justice, who clearly lacks any textual justification for making it. The text of the Irish Constitution does not address the specific issue of homosexuality. Thus in Ireland, too, the Irish Court's decision must be considered controversial as an example of interpretive excess.

180. *Norris*, [1984] 1 I.R. at 64-65. There were two passionate dissents written in this case, whose positions were eventually vindicated by the European Court of Human Rights. The European Court found the Irish legislation to be in violation of the European Convention for the Protection of Human Rights. *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) at 21 (1998). This was one of the cases cited by Justice Kennedy in *Lawrence v. Texas* to support the majority's view that the right of homosexual adults to engage in intimate, consensual conduct had been accepted by the wider civilization. 123 S. Ct. 2472, 2483 (2003).

its existence is a positivistic fact which requires no justification."<sup>181</sup> As noted by an Irish Supreme Court justice,

A judge may be a legal positivist and have no use for natural law concepts, but if the Constitution (as it does) explicitly recognises the existence of rights anterior to positive law these jurisprudential views must yield to the clear conclusions which are to be drawn from the construction of the constitutional text.<sup>182</sup>

So, for example, Article 41(1) reads: "The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law."<sup>183</sup> Over the years, however, the Court's reliance on principles of natural justice has not required explicit textual specification, and the notion of unenumerated rights has flourished within Irish constitutional jurisprudence.<sup>184</sup>

There is little ambiguity about the natural law source for the Irish Court's invocations—the Thomistic philosophical tradition and its emphasis on duties rather than, as in the liberal version more familiar to American law, rights.<sup>185</sup> Until recently, the Irish judiciary rather *faithfully* upheld the Catholic natural law position in constitutional adjudication. The initial break occurred in 1971 with the establishment of a constitutional right to marital privacy in *McGee v. Attorney General*.<sup>186</sup> While known for being the first time the Irish Supreme Court expressly ruled in a case contrary to Catholic teaching, the landmark decision is especially notable for illuminating the problem of how one protects universal rights at the local level.

The problem has risen in intensity and urgency in the ensuing years with the well-documented changes that have been occurring in Irish society. As

181. Richard F. Humphreys, *Constitutional Interpretation*, 15 DUBLIN U. L.J. 59, 70 (1993).

182. *Id.* (quoting Justice Costello).

183. Art. 41, § 1, Constitution of Ireland, 1937. Also explicit in its invocation of natural rights is Article 43, section 1, which provides that "[t]he State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods."

184. For an account of natural law jurisprudence and unenumerated rights, see J.M. KELLY, *THE IRISH CONSTITUTION 1249–59* (Gerard Hogan & Gerry Whyte eds., 2003).

185. For an extensive treatment of natural law in Irish jurisprudence, see DESMOND M. CLARKE, *CHURCH AND STATE: ESSAYS IN POLITICAL PHILOSOPHY* 138, 146–47 (1984) (explaining the Irish Constitution's linkage of inalienable rights and duties as an evolution of rights concepts borrowed from Thomistic notions of duty in natural law theory, and noting a fundamental irony that the Constitution's inalienable rights were derived from a moral-legal theory that recognized rights merely as a species of duty). See also V. Bradley Lewis, *Liberal Democracy, Natural Law, and Jurisprudence: Thomistic Notes on an Irish Debate*, in *REASSESSING THE LIBERAL STATE: READING MARITAIN'S MAN AND THE STATE* 140, 141 (Timothy Fuller & John P. Hittinger eds., 2001) (examining "the efficacy of natural law argument in the public discourse and constitutional jurisprudence of modern liberal democracies by looking at the recent jurisprudence of . . . Ireland").

186. [1974] 1 I.R. 284 (Ir. S.C.).



one observer has noted, "communal views of society are increasingly challenged by a growing emphasis on the rights of the individual."<sup>187</sup> This liberalizing trend is reflected in the most sensitive constitutional arena—abortion—with a series of decisions that have loosened, if not severed, the hold of traditional natural law teachings on personal behavior.<sup>188</sup> Nevertheless, the idea that the decline in influence of institutionalized religion means that the thickly constituted religious presence in Ireland is no longer of constitutional significance is as questionable as a similar conclusion would be in regard to the major religions in India. "[The] cooling of religious zeal does not entail a complete rejection of Ireland's strong Catholic heritage; there is little doubt that the Church will continue its social, spiritual, and cultural mission in this revised context . . ."<sup>189</sup> Catholic teaching may no longer dictate the substance of legislative and judicial activity, but the tension between Christian and democratic commitments remains a factor at the core of constitutional interpretation.

In *McGee*, the Court heard a married woman's claim that restrictions on access to contraception (a ban on the selling or importation into Ireland of any birth control device) violated her constitutional rights, most importantly her right to lead her private life in accordance with the dictates of her own conscience.<sup>190</sup> In the main opinion by Justice Brian Walsh, there are two references to the Constitution's preamble that underscore the interpretive challenge for the Court. The first is to the language quoted earlier to the effect that "the Constitution acknowledges God as the ultimate source of all authority."<sup>191</sup> The second is to the constitutional intention to "promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured . . ."<sup>192</sup> In the face of these dual (if not contradictory) commitments, the reference in the opinion

---

187. Gerard F. Whyte, *Religion and the Irish Constitution*, 30 J. MARSHALL L. REV. 725, 725 (1997).

188. The most important of these decisions, *Attorney General v. X*, [1992] 1 I.R. 1 (Ir. S.C.), involved the efforts of a 14-year-old rape victim to obtain an abortion in England. The Attorney General sought to prevent her travel abroad in order to uphold the Constitution's ban on abortion. *Id.* While the decision left the meaning of the constitutional provision in some confusion, it did hold that in view of the substantial risk to the life of the mother (who had threatened suicide), the injunction against the girl's travel would have to be lifted. *Id.* at 52–55. In the wake of the decision, two constitutional amendments—one protecting the right to travel and the other to receive information about abortion—were adopted after approval by the electorate. See Thirteenth Amendment of the Constitution Act, Am. No. 13/1992, 1992 (amending Article 40(3)(3) of the Irish Constitution to guarantee the right to travel); Fourteenth Amendment of the Constitution Act, Am. No. 14/1992, 1992 (amending Article 40(3)(3) of the Irish Constitution to guarantee the right to disseminate information regarding services available in other countries). The latter will be discussed shortly.

189. Christine P. James, *Céad Míle Fáilte? Ireland Welcomes Divorce: The 1995 Irish Divorce Referendum and the Family (Divorce) Act of 1996*, 8 DUKE J. COMP. & INT'L L. 175, 224 (1997).

190. *McGee*, [1974] 1 I.R. at 305–09.

191. *Id.* at 317.

192. *Id.* at 310 (quoting Pmb., Constitution of Ireland, 1937).

to *Griswold v. Connecticut*<sup>193</sup> was doubtless tinged with envy, since the American Constitution, Justice Walsh pointed out, is not "governed by the precepts of Christianity."<sup>194</sup> According to the justice, the discovery in *Griswold* of a right to privacy still required a rejection of legal positivism, but, without the competing tug of Christian doctrine, the result was more straightforwardly attainable through a process of reasoning driven by principles of universal application.<sup>195</sup>

At several places, the opinion mentions Aristotle and the "virtue of prudence."<sup>196</sup> These references appear in a paragraph declaiming judicial responsibility for determining the substance of natural law in a pluralist society. The broader context is this: on the one hand, there is the petitioner, who asserts a right of privacy as a matter of individual conscience; on the other, the state, which imposes a restriction consistent with the theological precepts of the majority's religion and its church. The Irish Court's solution is indeed an exercise in prudence. The woman's right is upheld, but not as a matter of conscience, rather as a vindication of the family "as the natural primary and fundamental unit group of society."<sup>197</sup> The Court continues:

[T]he rights of a married couple to decide how many children, if any, they will have are matters outside the reach of positive law where the means employed to implement such decisions do not impinge upon the common good or destroy or endanger human life . . . . It is outside the authority of the State to endeavour to intrude into the privacy of the husband and wife relationship for the sake of imposing a code of private morality upon that husband and wife which they do not desire.<sup>198</sup>

Thus, by appealing to the Catholic-inspired provisions of Article 41 to upset a Catholic-inspired policy, the Irish Court was able to secure a right that was in progressive step with the movement for globalization of rights while legitimating it under the local mandate of traditional Catholicism.<sup>199</sup>

193. 381 U.S. 479 (1965).

194. *McGee*, [1974] 1 I.R. at 319.

195. For Justice Walsh, the Irish Constitution clearly indicates that "justice is placed above the law and acknowledge[s] that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection." *Id.* at 310.

196. *Id.* at 318-19.

197. *Id.* at 310.

198. *Id.* at 313.

199. There is substantial literature on the political effects of Catholicism on the success of liberal democratic institutions. Most familiar, perhaps, is Robert Putnam's argument that Catholicism, in its traditional form, discourages the formation of a civic culture supportive of liberal democracy. ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 107-09 (1993). On the other hand, there is another argument that extends back at least as far as Tocqueville, which is that religion (including Catholicism) can, and has, played a civilizing role in fostering values that are useful for civic responsibility. It is interesting to note, apropos the above discussion, that Tocqueville, after mentioning that "Ireland began to pour a Catholic population into the United States," observes that Catholics "form the most republican and democratic class there is in the United States." This, he acknowledges, will be surprising to those who wrongly "regard the

*McGee* is only one decision, which is not cited as illustrative or representative of a distinctive Irish constitutional jurisprudence. Rather, the point is to call attention to an interpretive approach with suggestive possibilities for comparative constitutional theory. In this regard, one should note a similarity between the judgment here and the *Bommai* decision in India. Within their respective political contexts, both the Indian and Irish Courts achieved progressive outcomes essentially by drawing upon constitutional sources expressive of the particular realities of the local culture. Both took notice of developments in other places—notably the United States—to advance their arguments, but then, in contrast with the American Court, pursued these arguments in quite different directions.<sup>200</sup> In the case of India, the basic structure doctrine provided cover for negotiating a constitutional understanding of secularism that balanced the specific concerns of the Indian Constitution with the aspirations of liberal constitutionalism, the latter of which is most sharply defined by the American model. In Ireland, natural law sustained a constitutional right to privacy, not so much as a support for individual autonomy, but in order to advance the authority of the family “as the necessary basis of social order.”<sup>201</sup>

Interpreting natural law in this way is a means of harmonizing the dual influences of the inherited liberal democratic tradition of the Free State and the teachings of the Catholic Church on the Constitution adopted by the people of Ireland in 1937. But this harmonizing process, in its emphasis on specific, if selective, features of Catholic natural law, is distinguishable from Justice Barak’s interpretive method of moving the focus to the highest level of abstraction, thus, in effect, reconciling the tension between the Jewish and democratic contents of the polity through artful transvaluation of the meaning of the more particularist of the nation’s twin philosophical commitments.<sup>202</sup> (In India, as discussed above, the dynamic of abstraction

---

Catholic religion as a natural enemy of democracy.” He then goes on to explain that the reason for Catholicism’s compatibility with democracy has to do with its favorable predisposition to equality of conditions. TOCQUEVILLE, *supra* note 65, at 275–76. How much of this is relevant to the constitutional question in contemporary Ireland is uncertain, but the egalitarian theme seems at least to resonate with the language of the Constitution’s Directive Principles, which were inspired by Catholic doctrine. This of course is relevant to my earlier contrast between Catholicism and Hinduism and the extent to which they pose a challenge to the existing social order.

200. In *McGee*, for example, Justice Walsh wrote: “Three United States Supreme Court decisions were relied upon in argument by the plaintiff: *Poe v. Ullman* [367 U.S. 497 (1961)]; *Griswold v. Connecticut* [381 U.S. 479 (1965)]; and *Eisenstadt v. Baird* [405 U.S. 438 (1972)]. My reason for not referring to them is not because I did not find them helpful or relevant, which indeed they were, but because I found it unnecessary to rely upon any of the dicta in those cases to support the views which I have expressed in this judgment.” *McGee*, [1974] 1 I.R. at 319 (footnotes omitted).

201. *Id.* at 311.

202. An extreme version of Barak’s methodology as applied to Ireland may be found in the work of the Irish constitutional theorist, Richard Humphreys, who proposes that “the natural law conception of the Constitution . . . be regarded as effectively a secular one.” Humphreys, *supra*

may actually work to the benefit of those pursuing illiberal ends.) Yet, if the goal in Ireland is, as in Israel, the achievement of constitutional harmony, judges will continue to be tested in ways that will challenge their jurisprudential imagination in progressively perplexing ways. This is nowhere better illustrated than with the issue of abortion. Here the constitutional politics of disharmony that are increasingly manifest in the disjuncture between constitution and society have become centered in the document itself, one consequence of which is that debate in Ireland over an unconstitutional constitutional amendment is no longer a matter of purely academic interest.

Under Article 26 of the Irish Constitution, any bill passed by both houses of the legislature (*Oireachtas*) may be referred to the Supreme Court for a decision on whether it is repugnant to the Constitution.<sup>203</sup> In 1995, this provision was invoked to allow consideration of a bill passed in order to execute the terms of a recently adopted constitutional amendment.<sup>204</sup> The Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill prescribed conditions for providing individual women or the general public information relating to abortion services lawfully available

---

note 181, at 69. For Humphreys, "[w]e are not engaged in an exercise of deciding what was meant in 1937. We are rather searching for the best contemporary understanding of the natural rights which the constitution mandates the State to protect." Richard F. Humphreys, *Interpreting Natural Rights*, 28-30 IRISH JURIST 221, 227-28 (1993-1995). Students of American jurisprudence may be reminded of Benjamin Cardozo's discussion of natural law in *The Nature of the Judicial Process*, where, for reasons similar to Humphreys's, Cardozo advocates understanding the concept "in a different sense from that which formerly attached to the expression 'natural law.'" BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 122 (1921). That the Irish theorist's view is anti-Justice Scalia with a vengeance is confirmed by Humphreys's designation of recommended sources from which to draw the contemporary understanding. "[The] task involves an attempt to determine the extent to which the international community has recognised the right sought to be protected, and the result of that enquiry goes directly to the question of whether the right concerned, or the aspect of it at issue, deserves protection as a natural right under the Constitution of Ireland." Humphreys, *supra* at 227. Such a proposal for determining the scope of fundamental rights represents Justice Scalia's worst nightmare, combining as it does a rejection of both originalism and indigenous constitutional evolution. Going abroad for constitutional inspiration is not simply a matter of obtaining analogical perspective on contested meanings, but of direct transplantation. To be sure, the Irish Constitution explicitly affirms a connection to the European Union, and the increasing importance of the European Court of Justice in the laws of even the most independent-minded of Union members is undeniable. Art. 29, Constitution of Ireland, 1937. This perhaps mitigates somewhat the radical quality of the proposal, although Humphreys specifies the American Constitution ("as interpreted by the United States Supreme Court") as a source equal in usefulness to that of the case law emerging from the European Convention on Human Rights. In the end, however, Humphreys calls for "a fundamentally internationalist reorientation of our constitutional law." Humphreys, *supra* note 181, at 77. To the extent that Justice Scalia is successful in casting the opposition to his rejection of comparative materials in terms of such a commitment, he will doubtless be vindicated in his struggle to exclude cross-national references from American constitutional law.

203. Art. 26, Constitution of Ireland, 1937.

204. *In re* Article 26 of the Constitution & *In re* Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill, [1995] 1 I.R. 1, 19, 27 (Ir. S.C.) [hereinafter *Abortion Information Case*].

outside of Ireland.<sup>205</sup> It followed up on the Fourteenth Amendment to the Constitution, which had granted the "freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state."<sup>206</sup> While there were a number of questions for the Court to consider, perhaps the most interesting had to do with whether this amendment was itself constitutional in light of the Eighth Amendment, which declares: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."<sup>207</sup>

That the consistency of the two amendments would come before the Irish Court was not a surprise given the attention to the question that had surfaced before adoption of the latter amendment. Opponents had contended that provisions contrary to the natural law content of the Constitution, in this case pertaining to the right to life of the unborn, could not legally be added to the document.<sup>208</sup> Supporters saw these objections as an effort by the defenders of sectarian politics to contain the secularizing trends of liberal democracy.<sup>209</sup> As presented to the Court by the "counsel for the unborn,"<sup>210</sup> "any provision in the Constitution or in any legislation which would permit or render lawful the giving or obtaining of such information was contrary to the natural law right to life of the unborn which right is acknowledged by the Eighth Amendment to the Constitution."<sup>211</sup> In addition, "the natural law is the foundation upon which the Constitution was built and ranks superior to the Constitution."<sup>212</sup> The judicial response was succinct and direct: "The Court does not accept this argument."<sup>213</sup>

Does this response constitute a rejection of the idea that, unlike in India, a court may not declare as unconstitutional an amendment passed in conformity with the procedures set out in the Constitution? Perhaps, but the

205. *Id.* at 2.

206. Art. 40, § 3(iii), Constitution of Ireland, 1937 (incorporating Amend. XIV, Constitution of Ireland, 1937 (1992)).

207. *Id.* In its judgment the Court indicated that, absent the Fourteenth Amendment, the bill would be in clear violation of the Eighth Amendment. *Abortion Information Case*, *supra* note 204, at 24.

208. Consider, for example, counsel's argument in a 1995 abortion case before the Supreme Court of Ireland that the 1992 amendments were impermissible insofar as they contradicted the Constitution's natural law foundation. *Abortion Information Case*, *supra* note 204, at 8 ("For as long as the present constitution remains in force, nothing in it or in any laws passed by the Oireachtas, or any interpretation thereof by the judiciary can run counter to the natural law. The natural law is clear—nobody may directly or indirectly take human life either born or unborn.")

209. See, e.g., Irish Family Planning Association, News, at <http://www.ifpa.ie/news> (last visited April 1, 2004) (aggregating news and commentary on the fight to reform Ireland's abortion laws).

210. *Abortion Information Case*, *supra* note 204, at 8.

211. *Id.* at 37.

212. *Id.*

213. *Id.* at 38.

response is interestingly vague. After going on at considerable length about the supremacy of the Constitution with respect to lawmaking powers, the Irish Court pointed out that the two amendments would appear to be in direct conflict "as decided by this Court" in several cases.<sup>214</sup> "The People in enacting this amendment were aware of this conflict because they specifically decided that the freedom to obtain or make available such information [about abortion] should not be limited by the provisions of the Eighth Amendment."<sup>215</sup> In effect, then, in upholding the ultimate authority of the people to amend the Constitution, the Irish Court was acknowledging its own subordination to the supremacy of the document. In contrast with what the American Court said in *Cooper v. Aaron*—that "the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land"<sup>216</sup>—the Irish Court's interpretation of its own Fourteenth Amendment was distinguishable in theory from the meaning of that amendment as understood by its sovereign authors.

But more was involved here than judicial humility. The Irish Court relied very heavily on Justice Walsh's opinion in *McGee*. It quoted from a lengthy excerpt to the effect that:

In a pluralist society such as ours, the courts cannot as a matter of constitutional law be asked to choose between the differing views, where they exist, of experts on the interpretation by the different religious denominations of either the nature or extent of these natural rights as they are to be found in the natural law. . . . The judges must . . . interpret these rights in accordance with their ideas of prudence, justice, and charity. It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time: no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts.<sup>217</sup>

Or, stated differently, judges must be sensitive to the increasing diversity of opinion in society concerning fundamental moral questions. The natural law basis of the proscription against abortion is, as it was in the case of birth control, theological. To the extent that this particular commitment is inscribed in the document it must be respected—at least by judges. After all, the Constitution *is* supreme. But in relation to matters not specifically addressed in the text, the sovereign will of the people, which stands for the rule of the universal over the particular, must be respected and be permitted to infuse the fundamental law with prevailing ideas and concepts. The Irish

---

214. *Id.* at 44.

215. *Id.* at 45.

216. 358 U.S. 1, 18 (1958).

217. *Abortion Information Case*, *supra* note 204, at 41–42 (quoting *McGee v. The Attorney General*, [1974] 1 I.R. 284, 318–19 (Ir. S.C.)).

Court may disagree that "the equal right to life of the mother" requires information about abortion options outside of Ireland, but the Eighth Amendment's protection of the right to life of the unborn cannot nullify a subsequent amendment adopted under prevailing popular assumptions that such information is required.<sup>218</sup>

To comprehend the seeming paradox of the Irish Court's rejection of the idea that natural law was superior to the Constitution while concurrently affirming the proposition that "justice is not subordinate to the law," one might envision these moves as an attempt to steer Irish constitutional jurisprudence more in the direction of the prevailing norms of the European (and American) Community with regard to the role of religion in civil affairs.<sup>219</sup> Thus, the subordination of natural law effectively means the channeling of Catholic theology to its proper place within the constitutional polity, a place that, implicitly in the Irish Court's opinion, still respects the uniqueness of Irish history and culture. For example, in overturning the previously discussed *Norris* case, the European Court of Human Rights suggested that the Irish Supreme Court majority's explicit invocation of Christian theology to uphold the criminalization of homosexual conduct represented an inappropriate elevation of sectarian natural law within the scheme of constitutional enforcement.<sup>220</sup> In the absence of any constitutional provision on homosexuality, reliance on Catholic theology to determine the scope and substance of civil rights was arguably a distortion of the correct relationship between temporal and spiritual authority demanded by principles of liberal constitutionalism. This may be distinguished from the Constitution's explicit protection of unborn life, in which the Court's enforcement of a general ban on abortion is normatively unproblematic as an exercise of judicial power.

---

218. *Id.* at 44. Left open is the question of whether an amendment that presented a direct textual conflict with an existing constitutional provision would be ruled unconstitutional by the Court. For example, the Court distinguished the provisions in the Fourteenth Amendment about foreign services available for abortion from hypothetical language that advocated or promoted the termination of pregnancy. In the latter case, the value of constitutional supremacy might require a choice between two conflicting expressions of the sovereign will. The Court was not even close to addressing this question, as illustrated by its description of the terms of the statute:

The condition that the information to be given does not advocate or promote the termination of pregnancy and the prohibition on any person, to whom [Section 5] applies, making an appointment or other arrangement on behalf of a woman with a person who provides services outside the State for the termination of pregnancies are a clear indication of the intention of the legislature to respect and as far as practicable to defend and vindicate the respect to life of the unborn, having regard to the equal right to life of the mother.

*Id.* at 46.

219. *Id.* at 41.

220. See *Norris Case*, 142 Eur. Ct. H.R. (ser. A) at 21 (1988) ("[S]uch justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant.").

To be sure, the ban has historic roots in Catholic natural law; its codification within the provisions of the supreme law of the land symbolizes the intimate relationship between the state and the religion of the nation's majority. But the very act of constitutional inscription and incorporation means that natural law is subordinate to the Constitution; judges do not appeal from the document to some higher law in order to establish the terms or dimensions of legal obligation.

The Court's lengthy opinion in the *Abortion Information Case* makes no references to any foreign materials.<sup>221</sup> That provokes one to ask why, with a major component of the case—the balancing of competing rights claimed on behalf of the unborn and the mother—having been much adjudicated in the United States, Germany, Canada, and other jurisdictions, the Court would not seek guidance from abroad. One factor “militating against the cross-cultural assimilation of constitutional categories” is, as Schauer and other particularists emphasize, the problem of translation—simply put, the difficulty in assigning legal significance to critical terms and concepts whose meaning is culturally determined.<sup>222</sup> When, for example, an issue has not traditionally been framed in terms of a discourse of rights, the utility of borrowing from locations where the opposite is true may not be deemed worth the effort.<sup>223</sup> In Irish jurisprudence generally, and specifically in regard to abortion, the idea of natural law has exerted a powerful sway over the decisionmaking of the Irish Court. In most other constitutional polities (especially the United States) it occupies a much less prominent place in constitutional adjudication,

---

221. *Abortion Information Case*, *supra* note 204, at 1.

222. Schauer, *supra* note 17, at 879.

223. Mary Ann Glendon has written at length about the transferability of rights discourse in constitutional law. “So far as constitution-making and judicial interpretation of rights are concerned . . . there is little evidence that, thus far, oversimplified rights ideas in the current American dialect are displacing nuanced and complex interpretations more suited to conditions elsewhere.” MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 168 (1991). It is interesting to contrast Glendon's views with Bork's. They are in agreement on most constitutional issues, and while Bork quotes Glendon approvingly for her critique of rights discourse, their positions on constitutional borrowing are widely disparate. Bork attacks the excesses of borrowing in the context of a critique of the “liberal wing of the Court” and its proclivity for rights and universals at the expense of culture and particulars. BORK, *supra* note 10, at 22. Glendon, on the other hand, deplors the insularity of American courts, urging them to explore approaches from abroad so that they will come to appreciate the alternatives to a rights-based jurisprudence. GLENDON, *supra*, at 170. Whereas Bork imagines exercises in cross-national constitutional assimilation as a liberal strategy for gaining influence on the Court and thus opposes it, Glendon believes such techniques to be of potential benefit to conservatives as well and heartily supports them.

The favorable trade balance that the United States appears to enjoy in the great diffusion of rights ideas that is taking place in the world today is less hefty than many Americans suppose. More important, however, from an American point of view, is the fact that, in this sort of commerce, to be an exporter without being a judicious importer is to be at a disadvantage.

*Id.*



and to the extent that it matters at all, its meaning is philosophical, not theological. Its judicial application is generally associated with expansion of personal freedoms, not, as in Ireland, with limitations placed upon them. What is "deeply rooted in [the Irish] nation's history" is a sectarian worldview increasingly questioned and challenged by inhabitants who find their cultural borders readily penetrated by the secularizing forces of "a wider civilization."<sup>224</sup> To expect that their constitutional borders will not be similarly penetrated is unrealistic.

But what the Court seems to have understood (at least in *McGee* and the *Abortion Information Case*) is that the monitoring of these constitutional borders is critical, that whatever the ultimate extent of integration into the cultural and constitutional mainstream of advanced liberal democratic polities, the balance between the universal and the particular needs to be carefully calibrated. Mary Ann Glendon has observed:

Because the role of law in the constitution of culture is so much more limited than that of the mores, it . . . behooves lawmakers to be solicitous of, or at least to try to avoid damaging groups such as families, churches, and local communities where values are formed, maintained, and transmitted. Comparative law does not provide blueprints or solutions. But awareness of foreign experiences does lead to the kind of self-understanding that constitutes a necessary first step on the way toward working out our own approaches to our own problems.<sup>225</sup>

Her point is an example of what Sujit Choudhry refers to as "dialogical interpretation," that is to say, "comparative jurisprudence [as] . . . an important stimulus to legal self-reflection."<sup>226</sup> With respect to natural law in Irish jurisprudence, one might point out in this connection that the Irish Supreme Court appears to have accepted that the declining efficacy of such moral argument in the contemporary culture requires a diminution of its role in determining constitutional outcomes. Also, however, the Irish Court understands that for critical institutions of civil society—in particular, family and church—that have evolved in significant ways through the precepts of natural law thinking, any radical departure from traditional moorings could be damaging to these institutions, and perhaps to its own legitimacy as well. The Irish Court's decisions in these sensitive areas have been criticized for being too tentative and too bold, no doubt a commentary, in part, on an institution seeking to work out, as Glendon says, its own approach to the nation's unique problems.<sup>227</sup> It is in this circumstance that looking abroad

---

224. Justice Scalia tries to distinguish between forces from "a wider civilization" and something "deeply rooted in this Nation's history" in *Lawrence v. Texas*, 123 S. Ct. 2472, 2494 (2003) (dissenting).

225. MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 142 (1987).

226. Choudhry, *supra* note 16, at 836.

227. GLENDON, *supra* note 225, at 142.

(without necessarily bringing anything home) may be most helpful—if only to sharpen the awareness of constitutional difference.

## VI. Conclusion: Permeability and Imperfection

To complete this journey, I return to the concerns raised at the time of departure. As disparate as the places visited in these pages are, a characteristic that unites them, and indeed all constitutions, is their state of imperfection. While the gap between the ideal and the actual is omnipresent—in most cases a constitution will accurately reflect local circumstances and project, in Publius's words, "the best which [the] political situation, habits, and opinions will admit"<sup>228</sup>—it expresses itself in a variety of ways. Sometimes, as in the case of India, the framers will make explicit their founding constraints with the inclusion of provisions (the Directive Principles) that say, in effect, that our constitutional ideals are immediately unenforceable and must rely for their fulfillment upon the eventual arrival of propitious political and social conditions. Sometimes, as in the case of Israel, the gap will be implicit in the contradictions that lie at the core of constitutional arrangements, leading bitter antagonists to concur on only one main point: that however fundamentally flawed the status quo is, it may be worth maintaining for at least the short term. And sometimes, as in the case of Ireland, the space between what a constitution is and what it ought to be is manifest in the normative code embraced in the document, but obscured by a fundamental ambivalence over the changing status of traditional institutions of civil society governed by that code.

Constitutional imperfection is, then, the setting within which constitutional interpretation takes place. Justices in the Indian, Israeli, and Irish Supreme Courts all regularly consider judgments and approaches from the courts of other nations. They do this presumably to determine what might profitably be transplanted to native constitutional soil. Yet much of what judges do when they scrutinize the work of foreign judiciaries may simply enable them better to comprehend the scope and substance of constitutional imperfection. Comparative inquiry illuminates the jurisprudential challenge inherent in the gap between actual and ideal conditions. Whether to catch a glimpse of the future in anticipation of judicially imposed constitutional improvements at home or to get a better appreciation for the limits of reform through exposure to alternative legal contexts abroad, expanding the scope of constitutional sources expands the available options for judicial problem solving.<sup>229</sup>

---

228. THE FEDERALIST NO. 85, *supra* note 25, at 523. I include the qualification to account for constitutions, perhaps best exemplified by the old Soviet Constitution, that bear no resemblance to the realities on the ground. Whether a sham constitution may be considered a constitution is best left for another discussion.

229. As for Justice Scalia's position on the irrelevance of foreign jurisprudence for American constitutional interpretation, it can mean one or both of two things. Either Americans have nothing

Indeed, for critics of borrowing, the additional options made possible through these endeavors are exactly the problem. In his classic text on American politics, E.E. Schattschneider wrote that “[t]he most important strategy of politics is concerned with the scope of conflict.”<sup>230</sup> All efforts to expand or contract the scope of conflict, he argued, have a bias attached to them, with socialization of conflict associated with liberal causes and with privatization as a defense of the status quo.<sup>231</sup> In the judicial context, this model conforms to the debate over constitutional protectionism in the United States, as evidenced by Robert Bork’s insistence that the appeal of going abroad for judicial guidance is a phenomenon associated with the liberal wing of the Court.<sup>232</sup> Also, his denigration of universals in favor of “[c]onservative pragmatism [and] its concern with particularity—respect for difference, circumstance, tradition, history, and the irreducible complexity of human beings and human societies”<sup>233</sup>—is consistent with Schattschneider’s account of the political dynamics of scope management. “Universal ideas in the culture, ideas concerning equality, consistency, equal protection of the laws, justice, liberty, freedom of movement, freedom of speech and association, and civil rights tend to socialize conflict.”<sup>234</sup> To understand Justice Scalia’s aversion to the recent comparative moves of some of his colleagues on the Court, one need only reference his constitutional orientation on questions of federalism, where his state sovereignty stance manifests, in Schattschneider’s terms, a clear preference for privatizing conflict in the interest of nonuniversalist ends.<sup>235</sup> As Ken Kersch, a supporter of Justice Scalia’s views on borrowing, has argued, “Just as the New Dealers transcended an outmoded localism and pioneered a constitutionalism for a newly interconnected nation, so too the new legal multilateralists would transcend, in the words of Justice Ginsburg, the outmoded ‘island or lone ranger mentality’ of the nation-state.”<sup>236</sup>

In the course of this Article, I have offered oblique reactions to this criticism; now I respond more directly—albeit briefly—by addressing the

---

to learn from abroad because perfection has been attained, or, however imperfect our attainment, judges should not allow themselves to be the instruments of convergence between the ideal and the actual. The first position could reflect an extreme particularist perspective in which the ideal is to be understood in purely relativistic or positivistic terms, entailing a collapse of any distinction between the “is” and the “ought” in constitutional jurisprudence. The second could reflect an extreme posture of self-restraint, requiring a commitment to judicial abnegation with respect to any aspirational role for the Court. Both positions, I would argue, undermine constitutional theory, an enterprise whose vitality requires confronting the problem of constitutional imperfection.

230. E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* 3 (1960).

231. *Id.* at 4–7.

232. Bork, *supra* note 8, at 37.

233. BORK, *supra* note 10, at 3–4.

234. SCHATTSCHNEIDER, *supra* note 230, at 7.

235. *Id.*

236. Kersch, *supra* note 11, at 18.

two most serious elements of the critique, which may be referred to as the *cultural* objection and the *juridical* objection. The first objection argues that constitutional interpretation must be grounded in the legal and political culture within which it operates and that the infusion of foreign sources into the process of domestic adjudication undermines the constitution's role in sustaining a viable sense of national identity. In Justice Scalia's words, "We must never forget that it is a Constitution for the United States of America that we are expounding."<sup>237</sup> The second objection asserts that the expansion of the geography from which constitutional sources may be drawn encourages judges to assume an increasingly active role in the inappropriate adaptation of constitutional meaning to changing social realities and intellectual currents of opinion. Moreover, this activity undermines the authority of the courts.

#### A. *The Cultural Objection*

The cultural objection should not be taken lightly, especially in the United States. It has become commonplace (which is not to diminish its relevance to the issue at hand) that the American Constitution, as the embodiment of the political ideas that provide definition to the nation, is constitutive of the society. Other polities, as is often pointed out, are more dependent on such factors as ethnicity, race, religion, or language to establish a secure basis for national unity, identity, and membership. Therefore, to trifle with indigenous constitutional sources by exposing them to the importation of transnational materials is potentially to compromise the integrity of the American national experiment.

But this presumes a result that is empirically contestable. The question of whether such exposure invites a threat of compromise is by no means obvious. As the dialogic approach to the use of comparative law suggests, going outside one's constitutional borders may actually result in an enhancement of national self-understanding. Certainly experience elsewhere indicates that *how* judges choose to make use of foreign case law, for example, matters much more than the fact that they permit themselves to be instructed by it in the first instance. Judges in all three of our constitutional settings could (as some of them did) inspect the equal treatment principle in American church and state jurisprudence and recognize that it incorporates a widely held and respected precept of liberal constitutionalism. But the principle might also ordain practices with problematic implications for certain societies in their current circumstances, which then would require creative adaptation of the precept to conform to the specific needs of the judge's constitutional polity. This is what happened in the *Bomma* case when some

---

237. *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988).

Indian judges, after reflecting on the antiredistributive social implications of the American solution,<sup>238</sup> reconfigured the equal treatment norm in a way that addressed local needs consistent with the spirit and history of their constitutional tradition.<sup>239</sup>

On the other hand, in the *Hindutva Cases*, the judicial deployment of Rawlsian theory could have been better attuned to the immediate Indian political context. Contrary to Schattschneider's analysis of the socialization of conflict in American politics, the appeal in those cases by Justice Verma to universal ideas crafted in the West actually advanced (whether inadvertently or by design) the cause of nonegalitarian, illiberal interests.<sup>240</sup> In the *Qa'adan* case, Justice Barak's incorporation of *Brown's* color-blind principle into his reasoning for the Israeli Court represented an attempt to identify the Israeli approach to equal treatment with an American solution that was both politically and sociologically at odds with the reality at home. Arguably, in both of these instances, political conditions had not reached the point at which the judicial insinuation of universalist concepts into the local constitutional equation had much of a chance to achieve results comparable to what was attainable in settings where a tighter fit existed between aspirations and actualities. In contrast, Justice Walsh's opinion in *McGee* demonstrated a sensitivity to the claims of culture by providing a constitutional path that led to a more expansive field of personal freedom without severing or obscuring the connection to "[the] Nation's history and tradition."<sup>241</sup> To the extent that

238. See Richard A. Epstein, *Religious Liberty in the Welfare State*, 31 WM. & MARY L. REV. 375, 391 (1990) (arguing that the Takings Clause of the Constitution prohibits redistribution along religious lines).

239. From a non-American perspective one needs to consider that the desirability of permeable constitutional borders may sometimes lie in the possibilities inhering therein for changing important cultural attributes of the local constitutional scene. In his study of the Indian Constitution, Granville Austin points out that "[t]he most frequently expressed fear, and the most easily understandable, was that the largely foreign origin of the Constitution would make it unworkable in India." AUSTIN, *supra* note 28, at 325. The fear was well grounded given the pointed efforts of the framers to borrow from other systems. As Andrzej Rapaczynski notes, "[I]t is one of a few cases of a massive borrowing by a country with a vastly different tradition that has had lasting effects on the legal and political culture of the borrowing country . . ." Andrzej Rapaczynski, *Bibliographical Essay: The Influence of U.S. Constitutionalism Abroad*, in CONSTITUTIONALISM AND RIGHTS, *supra* note 123, at 405, 447. To say that this was a bad thing, however, would be to deny the surprising success of the Indian constitutional experiment.

240. In his critique of judicial multilateralism, Ken Kersch comments on the appeal of Rawlsian philosophy for those intent upon making American constitutional law more cosmopolitan. They seek to "articulate the universal principles on which all 'rational' and 'fair-minded' people can agree." According to Kersch, it is no coincidence that these principles support a whole array of liberal interests, including the welfare state. As we see in India, however, the local context will often determine whether this is in fact the case. Kersch, *supra* note 11, at 10.

241. Cf. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (withholding the status of fundamental right to consensual sexual relations between homosexuals (as well as others who perform acts of sodomy in their intimate associations) on the ground that the behavior in question was not "deeply rooted in this Nation's history and tradition").

a natural right of privacy, as developed in the United States and elsewhere, was to be a positive source for legal change, it had to be adapted to Ireland's natural law environment. So—yes to constitutional borrowing, but only under the conditions of easy alignment between constitutional innovation and constitutional tradition.

Not only is it a distortion of the record to see "courts everywhere displac[ing] traditional moralities with cultural socialism,"<sup>242</sup> the alleged facilitators of this development, judges relying on decisions of foreign courts, stand unjustly charged. Or at least the charge should be targeted at particular judges rather than issued as a blanket indictment of a judicial practice. Were judges, for example, to follow Mary Ann Glendon's recommendations in seeking guidance from foreign decisions, would Bork see this as further evidence that the culture war was being lost? But there is a larger point to be made, which is that the replacement of particular traditional moralities (translation: immoralities) is not in principle incompatible with the pursuit of constitutional aspirations. When, as is true for the United States, these aspirations implicate rights that citizens are meant to enjoy not only because they are citizens, but also by dint of their common humanity, then an interpretive dimension of extraterritoriality need not be viewed as a dangerous threat to American constitutional integrity.<sup>243</sup>

### B. *The Juridical Objection*

The juridical objection is closely related to the cultural objection. Judges will expand the scope of their constitutional field of vision in order to legitimate outcomes that would otherwise be defeated if confined to domestic sources. Judges who open their constitutional borders to the importation of foreign legal materials are, it is claimed, activists who have discovered yet another means to avoid the constraints of text and intention. Thus, in *Lawrence*, Justice Scalia views the citation of decisions by the European Court of Human Rights as additional firepower in an expanding arsenal of weapons of judicial activism.<sup>244</sup> As Justice Clarence Thomas observed in a denial of certiorari opinion challenging the use of foreign precedents: "[W]ere there any support [for the argument advanced by the foreign citations] in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of

---

242. BORK, *supra* note 10, at 137.

243. This is not to suggest that all of Ken Kersch's concerns about the ambitions of the "multilateralist project" are unfounded. That there are a number of intellectuals (and perhaps some judges) who envision a global government in accordance with which U.S. law is subject to international treaties is undeniable. But these ambitions hardly exhaust the possible reasons for looking abroad for constitutional assistance.

244. See *Lawrence v. Texas*, 123 S. Ct. 2472, 2495 (2003) (Scalia, J., dissenting) (characterizing the majority's discussion of "foreign views" as "[d]angerous dicta").

Zimbabwe, the Supreme Court of India, and the Privy Council.<sup>245</sup> Interestingly, Robert Bork has criticized an Israeli decision concerning the adoption of a child by a lesbian couple for its reliance on a California law to “normaliz[e] homosexual conduct,” remarking, “Israel has lost the authority to define what constitutes a legal family on its soil whenever a foreign country recognizes some other arrangement as a family.”<sup>246</sup>

That the citation of foreign sources opens up possibilities for judicial activism is irrefutable; but like many other possibilities already in use, the technique is in principle unrelated to instances of activism or restraint. Thus, in *Lawrence*, the Court overturned a sodomy statute in Texas, but in *Grutter v. Bollinger*,<sup>247</sup> the contemporaneous affirmative action case that displayed the Court again referring to foreign developments, a Michigan program was upheld. This will remind us of the *Hindutva Cases* in India, which validated the Representation of the People Act section on corrupt practices, in part on the basis of its consistency with principles famously articulated by an American philosopher.

In practice, however, as the Schattschneider model predicts, judicial appeals to law in other places are surely correlated positively with challenges to the status quo. But the important question to be asked is how one should evaluate the activity or passivity of courts, for which there is no single generally applicable answer. A court in Israel that expands the geographic scope of its resource base beyond its own borders invites a different level of scrutiny for its actions than its counterpart in India. Assuming that the goal of each is to use foreign case law as an instrument of change, assessments of the wisdom or propriety of doing so must account for the different constitutional contexts within which the two courts operate. So it must matter that the Israeli Court's appropriation of a foreign case will be understood as an effort by the judiciary to advance the prospects of one side of a constitutional debate that has raged since the inception of the state. In contrast, a similar appropriation by the Indian Court may be immunized from most attacks because of two historically specific reasons: (1) as an “arm of the social revolution,” the judiciary can claim a constitutional mandate to emulate “progressive” developments in other places; and (2) as an institution functioning within a society that accentuates and values syncretistic development, the assimilation of foreign materials into the native jurisprudence enjoys the legitimacy of an action that, in cultural terms, appears perfectly natural. To the extent that the juridical objection is expressed as a concern over the maintenance and best use of institutional power, the evaluation of the efficacy of constitutional borrowing will require detailed analyses of the political and cultural assets and liabilities of a given national judiciary. In the United

---

245. *Knight v. Florida*, 528 U.S. 990, 990 (1999).

246. BORK, *supra* note 10, at 125–26.

247. 539 U.S. 306 (2003).

States, one would want to look not only at the nature of the constitutional consensus upon which the Court exercises its authority, but also at the assimilative character of American political ideas and practices. How permeable our constitutional borders should be is a question best answered by determining who we are and what we aspire to be.



Copyright of Texas Law Review is the property of University of Texas at Austin School of Law Publications and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.