

## FOREWORD

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How do international interactions affect the processes of constitutional development? In this era of globalization, we often brandish incarnations of the magic word “constitution” to defend our systems of legal and political order. Some of us even advise societies on “constitution-making.” Often, however, most of us know little about the constitutions and the societies that exist outside of our own borders and legal systems. In the interest of inciting thoughtful discussion and research on these issues, on March 20-21, 1998, the University of Pennsylvania Journal of Constitutional Law presented its first annual symposium: *Contextuality & Universality: Constitutional Borrowings on the Global Stage*. In this interdisciplinary and international collaboration, constitutional observers examined some of the domestic and transnational constitutional processes in Africa, Asia, Europe, the Middle East, and the United States.

In this, the first of two symposium volumes, the consensus of the authors seems to be that constitutional development cannot be divorced from the context in which it arises—history and culture are not easily or willingly abandoned by citizenry or by the courts. Further, when borrowings do occur they are often from non-U.S. sources. If there are any universals in the borrowing process, they might lie in courts and societies trying to accord their values with international norms of human rights and human dignity.

Mark Tushnet, a scholar well known to those who study the American Constitution, ponders the benefits of comparative constitutional law by examining three elements. First, he examines how we might determine when a constitutional borrowing has been successful. Next he explores what units of comparison might be most useful for comparing constitutions. Finally, he analyzes a functionalist approach and determines that such a method founders when it is used to address context-specific problems of a specific society or legal system. He concludes by observing that his analysis of the elements “suggests the possibility of reciprocal influences among constitutional systems.”

Jeremy Sarkin, a scholar based in South Africa, has written widely about human rights and legal reform in South Africa. He argues that an understanding of the context of South Africa is a necessary precondition to understanding the “extent and effect” of its constitutional borrowing. Using history and case law, he examines the extent and impact of foreign and international law on the development of

South Africa's Interim Constitution and its Constitutional Court. His analysis reveals that South African courts have heavily borrowed from international sources. Sarkin concludes that although constitutional borrowings have been important guides to the development of South Africa's human rights jurisprudence, South Africa's constitutional development is still heavily context-specific.

Alexander Somek is a Professor of Law in Vienna, Austria. His article contemplates the usefulness of formulae by the German Federal Constitutional Court, especially in its Equal Protection review. His research examines the evolving doctrine of the Court from three different vantagepoints—he terms them the comparative, official, and “die-hard” accounts of the Court's analytical formulae. He demonstrates that constitutional borrowings necessarily involve re-interpretation and change in the borrower and well as in the lender. Somek concludes that the role of formulae in German constitutional analysis depends on an “unwritten rule of judicial self-authorization.”

Hoyt Webb is a practicing attorney who clerked for a judge on the new Constitutional Court in South Africa. Through his analysis of four major cases that have come before the Court, he demonstrates the borrowings which the court has undertaken as it has interpreted the Fundamental Rights enumerated in the Interim Constitution. Like Sarkin, he suggests that constitutional borrowings are still necessary and helpful for a South African Constitutional Court still new to the constitutional interpretation of human rights.

This inaugural symposium would not have been possible without the support of the University of Pennsylvania Law School community, notably Dean of the Law School Colin Diver; budget guru Ernie Gonsalves; computer, audio, and video experts Gates Rhodes, Brady Ajay, and their crew; the Journal's “founding” adviser Professor Barbara Bennett Woodhouse; and the Journal's team of advisers: Professors Matthew Adler, Seth Kreimer, and Kim Lane Scheppele. The Symposium benefited greatly from their wisdom, aid, suggestions, and critiques.

Integral to the momentum and spirit of the Symposium process were my friends and colleagues on the Journal's founding Board and the families behind them who helped to make us the zany, creative, and questioning group that we are. I am especially grateful to Mike Gold, Samidh Guha, Jorge Reynardus, Michelle SimmsParris, Emily Nelson, and Kanika Williams. Following in that fine tradition, the symposium benefited greatly from the interest and commitment of the Journal's first group of Associate Editors. I extend special thanks to then-Associate Editors Lesley Foxhall, Chanah Brenenson, and Neil Shevlin for their invaluable help. They went beyond the reasonable call of duty to create and produce advertisements and informational material integral for informed communication at the symposium. Without the Journal team, there would be no Journal and no annual symposium. Finally, I dedicate my efforts in and results from

the year-long project of this Symposium process to the memory of my uncle Vinod Khurana. From our respective contexts of struggle, a unique clarity of vision emerged. We, in very different ways, have been spurred to seek new and transcendent universals.

Although the Journal staff has expended many hours of effort to produce this symposium and its publications, these volumes are appropriately a testament to the careful analyses and innovative examinations of the authors. I have been dazzled by their stimulating thoughts and profoundly fortunate to have interacted with them. May these symposium volumes motivate you to discern the contexts of the world and seek beyond the accepted universals.

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