

1999

Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing

Seth F. Kreimer

University of Pennsylvania, skreimer@law.upenn.edu

Follow this and additional works at: http://scholarship.law.upenn.edu/faculty_scholarship

 Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Ethics and Political Philosophy Commons](#), [Judges Commons](#), [Law and Society Commons](#), and the [Legal Studies Commons](#)

Recommended Citation

Kreimer, Seth F., "Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing" (1999). *Faculty Scholarship*. Paper 1173.

http://scholarship.law.upenn.edu/faculty_scholarship/1173

This Response or Comment is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

COMMENTARIES

INVIDIOUS COMPARISONS: SOME CAUTIONARY REMARKS ON THE PROCESS OF CONSTITUTIONAL BORROWING

*Seth F. Kreimer**

In her interesting paper in this Symposium, Professor Jackson proclaims herself to be perplexed by what she regards as a puzzling ambivalence toward comparative insights in American constitutional law. She suggests that much of the resistance can be viewed as a defense mechanism arising from insecurity and anxiety on the part of American judges. As a particularly fruitful avenue for beginning to resolve this resistance, she advocates the adoption of a notion of "proportionality" from the Canadian constitution.

Professor Somek's contribution, on the other hand, articulates some good theoretical reasons to be skeptical of the process of transplantation of doctrinal devices from other constitutional systems. In his case study of the ambiguous reception of American approaches to equal protection analysis into German law, he suggests that the borrowing has produced doctrinal confusion, and in any event has been largely unnecessary.

In these comments I want to build on Professor Somek's account to try to address some of Professor Jackson's perplexity. For this purpose, I will explore three models of what it means to have a constitution. First, a constitution may be seen as the basic "operating system" by which the political and legal mechanisms of a society are structured. Second, a constitution might be viewed as a series of moral conceptions that constitute the best account of moral ideals by which a society should be guided. Finally, a constitution may be modeled as an element that defines national identity. Each of these models has its place in American constitutional law, and different provisions may be interpreted with emphasis on different accounts. In my view, however, the receptiveness of a system of constitutional law to borrowings from other systems depends, and crucially ought to depend, on which of these models governs the relevant constitutional interpretation. In the American context, each of these models offers different reasons to be skeptical of constitutional borrowing. In some ways, the ambivalent dialogue that Professor Jackson identifies is a

* Professor of Law, University of Pennsylvania.

conversation between Justices who endorse very different models of the proper constitutional enterprise in the cases at hand.

I. THE CONSTITUTION AS OPERATING SYSTEM

A constitution may be analogous to an operating system for a computer: it provides the basic programming by which authoritative decisions are made by political actors, and the rule for determining when such actions are legitimate. In this aspect, the constitution should be judged and construed in instrumental and institutional terms. A "good" operating system for a computer operates efficiently and accurately in accomplishing the tasks set to the computer. Similarly, we should favor the interpretation of the constitutional text which most efficiently, and most accurately furthers the underlying constitutional efforts to establish justice, to secure the blessings of liberty, to provide for the general welfare, and to insure domestic tranquility. Federalism, and separation of powers, are not valuable in and of themselves on this view. They are valued as institutional structures likely to preserve other values of liberty, efficiency or responsive government. The same may be true of other constitutional structures, including some—or on Akhil Amar's view,¹ many—elements of the bill of rights.

It is this concept of the constitution that Justice Breyer invokes in his dissent in *Printz v. United States*,² and it is one that seems to lend itself to comparative constitutional analysis. Federalism is a means to the end of preserving state sovereignty and individual liberty in the context of ultimate national supremacy. Other countries have preserved sovereignty and individual liberty with versions of federalism other than the "absolute" anti-commandeering approach of the *Printz* majority. Indeed, they view local enforcement of national mandates as a means of safeguarding liberty and local autonomy. Thus, as an instrumental matter, "absolutist" strictures against commandeering should not be regarded as an inherent ingredient of federalism. More generally, within the broad parameters laid down by constitutional text and structure, one might argue that American constitutionalism should borrow the features of other constitutional regimes that have shown themselves to be efficacious in advancing the goals our Constitution sets for itself.³

¹ Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

² 521 U.S. 898, 970 (1997) (Breyer, J., dissenting) (looking to the "comparative experience" of Switzerland, Germany, and the European Union).

³ The position is not without precedent. Justice Felix Frankfurter was fond of recounting the "kindred problems" faced by Anglophone federalisms. See, e.g., *State Tax Comm'n of Utah v. Aldrich*, 316 U.S. 174, 182-85 (1942) (Frankfurter, J., concurring); *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 649-50 (1944); *Freeman v. Hewit*, 329 U.S. 249, 251 n.1 (1946); *Staub v. City of Baxley*, 355 U.S. 313, 325-26 n.1 (1957) (Frankfurter, J., dissenting).

On occasion, Justice Frankfurter managed to assert the analyses of sister Anglophone

To the extent one is attracted to originalist or customary interpretive methodologies, of course, this argument is misguided: the contemporary experience of other countries tells us little about either the intent of the Framers, or the evolving traditions of our own country. But even on its own terms, this argument suffers from two defects.

First, as anyone can testify who has wrestled with the continual updates in the Windows operating system, much less the challenge of moving from an Apple to an IBM, the effort to transport a program that works well on one operating system into a different environment may be less than wholly successful. Part of the moral of Professor Somek's cautionary tale is precisely that it is risky to predict the way in which a legal doctrine will function in a new legal environment based on the way it functioned in its old one. Professor Jackson at some points in her paper recognizes the difficulty, but is nonetheless attracted to constitutional borrowing.

Second, and more importantly as an instrumental matter, the idea that the constitutional structure should be adjusted for maximum efficiency may seriously misconstrue the object of American constitutionalism. The American Constitution is, in many dimensions, not an effort designed to achieve the best that government can offer. It is, rather, an attempt to avoid the worst, an attempt keyed to the peculiar pathologies that have been shown to be likely to afflict American democracy. Its combination of judicial supremacy and difficulty of amendment makes the American Constitution a pre-commitment device, designed to guard against the particular popular excesses that are likely to sweep through our system. Our First Amendment doctrine rejects "content regulation" and "prior restraints" because of our documented tendency to populist intolerance; we are troubled by racial classification because of the history of slavery and the legacy of racism; we are leery of libel judgments because of the ghost of John Peter Zenger, and the specter of run-away juries. Where these dimensions predominate, the fact that a particular legal structure has

courts as relevant precedent. *See, e.g.,* *New York v. United States*, 326 U.S. 572, 583-84 n.5 (1946) (noting the barrenness of "sovereign / proprietary" distinction in other federal systems for purposes of intergovernmental tax immunity); *O'Malley v. Woodrough*, 307 U.S. 277, 281 nn.6, 8 (1939) (referring to foreign precedents in determining that imposition of income tax on judges' salaries was not unconstitutional); *Graves v. New York ex rel O'Keefe*, 306 U.S. 466, 490-91 (1939) (Frankfurter, J., concurring) (arguing for abandonment of tax immunity doctrine on the basis of other federal systems).

At other opportune moments, Justice Frankfurter abandoned the parallelism for claims that American commitments were defined by our constitutional differences from other federal structures. *See, e.g.,* *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 361 (1959) (granting federal maritime jurisdiction while noting that "[s]uch a system is not an inherent requirement of a federal government"); *Williams v. North Carolina*, 317 U.S. 287, 304 (1942) (Frankfurter, J., concurring) (upholding the states' ability to regulate marriage and divorce, despite contrary foreign federal systems); *Irvin v. Dowd*, 359 U.S. 394, 408 (1959) (Frankfurter, J., dissenting) (comparing the scope of federal judicial review with other federal systems).

not resulted in pathology in a different legal culture is hardly persuasive evidence for borrowing the device. The mediating influences that prevent melt-downs in its home environment may be entirely absent here.

If one adopts what Vincent Blasi once called the "pathological perspective,"⁴ the study of comparative constitutional law would focus not on legal successes in other regimes, but on legal failures. A risk averse "pathological perspective" would be most interested in using the experience of other countries not to identify models to be borrowed, but traps to be avoided. Indeed, at least at the level of rhetoric, American constitutional discourse has not been at all reluctant to engage in comparative analysis. Justices have argued for the rejection of racially conscious programs on the ground that they are reminiscent of apartheid,⁵ against dilutions of search and seizure rules because they are likely to lead to the excesses of Nazi Germany or the pass laws of South Africa,⁶ and against flag salutes because they are of a piece with the Siberian gulag.⁷

⁴ Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 *COLUM. L. REV.* 449 (1985).

⁵ See, e.g., *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (finding that racial reapportionment "bears an uncomfortable resemblance to political apartheid"). See also *Metro Broadcasting v. FCC*, 497 U.S. 547, 633 n.1 (1990) (Kennedy, J., dissenting) (invoking race-conscious definitions of Nazi Germany and South Africa); *Holland v. Illinois*, 493 U.S. 474, 507-508 n.6 (1990) (Stevens, J., dissenting) (analogizing South African and Nazi precedents to current efforts to determine race for legal purposes).

⁶ See, e.g., *Florida v. Bostick*, 501 U.S. 429, 443 (1991) (Marshall, J., dissenting); *California v. Acevedo*, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting). Over the years (particularly in the period immediately after World War II, and particularly in opinions authored by Justice Jackson after his service as a special prosecutor at the Nuremberg trials), the Court has recognized the importance of this restraint on limitless searches as a bulwark against police practices that prevail in totalitarian regimes. See, e.g., *United States v. Di Re*, 332 U.S. 581, 595 (1948) (preferring to allow some criminals to escape punishment to "a too permeating police surveillance"); *Johnson v. United States*, 333 U.S. 10, 17 (1948) (distinguishing "our form of government, where officers are under the law, and the police-state where they are the law"). Cf. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 225-26 (1953) (Jackson, J., dissenting) (objecting to executive detention of aliens without a hearing as bearing "unmistakable overtones of the 'protective custody' of the Nazis"); *Shaughnessy*, 345 U.S. at 217-18 (Black, J., dissenting) (analogizing detention to Soviet and Nazi practices).

⁷ See *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 640-41 (1943) ("Ultimate futility of such attempts to compel coherence [of sentiment] is the lesson of every such effort from the Roman drive to stamp out Christianity. . . , the Inquisition. . . , the Siberian exiles. . . , down to the fast failing efforts of our present totalitarian enemies.")

Negative examples have also been invoked to protect a host of other artistic, intellectual, and political freedoms. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("the totalitarian state[s] in our own times. . . have censored musical compositions to serve the needs of the state"); *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring in result) (quoting "poignant" argument for academic freedom in South Africa); *Tenney v. Brandhove*, 341 U.S. 367, 381 (1951) (Black, J., concurring) (warning of the use in Argentina of congressional investigating committees to suppress dissident newspapers); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes."); *Karlan v. City of Cincinnati*, 416 U.S. 924, 926 (Douglas, J., dissenting) (quoting *Terminiello*, 337 U.S. at 4); *Brown v. Allen*, 344 U.S. 443, 512 (1953) (claiming that the availability of the writ of

But even here, the arguments are likely to be mostly rhetorical, for the real question is the likelihood that the particular failures of other systems will replicate themselves here. And in this dimension, it is the particular pathologies of the American history that are most important. The heritage of *Dred Scott*⁸ and the abdication of *Korematsu*⁹ are of more interest than the history of South Africa. The Red Scares of World War I and the McCarthy Era are likely to be more instructive than the purges of Stalin or Pol Pot.

II. THE CONSTITUTION AS MORAL FRAMEWORK

The proper scope of constitutional analysis may be quite different than the instrumental claims I have just sketched. Instead of an operating system to be modified for pragmatic reasons, a constitution may instead provide the basic moral concepts which legal decision makers are to apply to particular issues before them in the way that best realizes basic commitments. Applying this model, persons under the authority of the United States are protected from cruel punishment, deprivations of liberty without due process, or denied equal protection not because those protections are conducive to other goals, but because basic dignity and equal treatment—appropriately conceived—are valuable in and of themselves. In this model, a constitution is to be interpreted in the fashion that best captures its moral aspirations, and the moral insights of other legal systems that have resolved similar issues are instructive—or perhaps probative of the “real” nature of the moral concept at issue.

This is the argument that was adumbrated a decade ago by Justice Stevens’ plurality in *Thompson v. Oklahoma*,¹⁰ and Justice Brennan’s dissent in *Stanford v. Kentucky*,¹¹ claiming that the overwhelming disapproval of juvenile death penalties around the world suggests that such penalties are inconsistent with the minimum of civilized decency imposed by the equal protection clause.¹²

Although the argument was rejected by Justice Scalia’s majority in *Stanford*, even Justice Scalia acknowledged that world public opinion

habeas corpus is “one of the decisively differentiating factors between our democracy and totalitarian governments”); *Elrod v. Burns*, 427 U.S. 347, 353 (1976) (noting that the patronage system was associated with the Nazi rise to power); *United States v. White*, 401 U.S. 745, 764-65 (1971) (Douglas, J., dissenting) (accusing majority of allowing chilling effect of surveillance of the sort associated with “totalitarian countries”); *Ker v. California*, 374 U.S. 23, 62 (1963) (Brennan, J., concurring opinion) (finding no logical distinction between actions of the police at issue and those “usually associated with totalitarian police”).

⁸ *Scott v. Sandford*, 60 U.S. 393 (1856).

⁹ *Korematsu v. United States*, 323 U.S. 214 (1944).

¹⁰ 487 U.S. 815, 830-31 (1988).

¹¹ 492 U.S. 361, 389-90 (1989) (Brennan, J., dissenting).

¹² See also *Campbell v. Wood*, cert. denied, 511 U.S. 1119, 1120 (1994) (Blackmun, J., dissenting) (arguing that hanging is cruel and unusual punishment because “only three jurisdictions in the English-speaking world . . . impose state-sponsored hangings”).

could be relevant when "determining whether a practice uniform among our people is not merely a historical accident, but. . . implicit in the concept of ordered liberty. . ."¹⁵ In this concession, Justice Scalia was on firm precedential ground, for at least in the area of substantive due process, the Court had regularly practiced comparative constitutional law of this sort. In the two generations before *Stanford*, it was regular practice to rely on "the concept of ordered liberty' . . . enshrined in the history and the basic constitutional documents of English-speaking peoples"¹⁴ to establish the metes and bounds of extratextual constitutional norms.

When this "Anglophone" conception of substantive due process was in vogue, Justice Black noted with some asperity that "[i]f the Due Process Clause does vest this Court with such unlimited power to invalidate laws, I am still in doubt as to why we should consider only the notions of English-speaking peoples to determine what are immutable and fundamental principles of justice."¹⁵ In the spirit of emerging globalization, Professor Jackson presumably would feel it appropriate to expand focus of such inquiry and look to international practice more generally. When examining the death penalty, medical experimentation,¹⁶ and perhaps the status of gays and lesbians, comparative analysis could reveal the deep-seated and universal character of certain moral arguments that she (and I) would like to embody in American law. I would feel less sanguine, however (and I suspect that she would join me), about using a similar decision-making procedure on issues of abortion, separation of church and state, anonymous speech, flag burning, libel, or criminal procedure,

¹⁵ *Stanford*, 492 U.S. at 370 n.1.

¹⁴ *Ingraham v. Wright*, 430 U.S. 651, 673 n.42 (1977) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27-8 (1949)). See also, e.g., *Rochin v. California*, 342 U.S. 165, 169 (1952) ("canons of decency and fairness which express the notions of justice of English-speaking peoples"); *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting) (privacy in the home regarding the use of contraceptives "by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of 'liberty'"); *Quinn v. United States*, 349 U.S. 155, 167 (1955) (rules on prosecution for contempt of Congress governed by "long-standing tradition here and in other English-speaking nations"); *Williams v. North Carolina*, 325 U.S. 226, 234 (1945) (domicil for constitutional purposes treated as "an historic notion common to all English-speaking courts"); *Malinski v. New York*, 324 U.S. 401, 413-14 (1945) (Frankfurter, J., concurring) ("The safeguards of 'due process of law' and 'the equal protection of the laws' summarize the history of freedom of English-speaking peoples running back to Magna Carta and reflected in the constitutional development of our people."); *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 366 (1916) (constitution embodies "only relatively fundamental rules of right, as generally understood by all English-speaking communities") (quoting *Otis v. Parker*, 187 U.S. 606, 609 (1903)); *Harriman v. ICC*, 211 U.S. 407, 419 (1908) (power to require testimony is usual "in English-speaking countries at least").

¹⁵ *Rochin*, 342 U.S. at 176 (Black, J., concurring).

¹⁶ See, e.g., *United States v. Stanley*, 483 U.S. 669, 687 (1987) (Brennan, J., concurring in part and dissenting in part) (discussing the Nuremberg Tribunals as precedential); *Stanley*, 483 U.S. at 710 (O'Connor, J., concurring in part and dissenting in part) (similarly citing the Nuremberg Tribunals); *Washington v. Harper*, 494 U.S. 210, 238 (1990) (Stevens, J., concurring in part and dissenting in part).

where some of our most cherished liberty-preserving doctrines are global outliers.¹⁷

Indeed, the history of the use of comparative analysis in American law suggests that the result is often as oppressive as liberating: in the days when “due process” was identified with the norms of the English-speaking world, the fact that British practice did not encompass the exclusionary rule was a basis for declining to impose it on the states,¹⁸ just as Justice Frankfurter relied unsuccessfully on British practice to justify punishment of public criticism of sitting judges.¹⁹ So too, during the McCarthy era, the Court regularly invoked the national security programs of our sister democracies as precedents to assure themselves that loyalty oaths and secret informers were not inconsistent with democratic liberty.²⁰ And if one considered Leviticus to be one of the original fundamental laws, one might even characterize Justice Burger’s concurrence in *Bowers v. Hardwick* as a piece of comparative constitutional analysis extended over time.²¹

Leaving aside the question of whether comparative analysis in the definition of moral rights is likely to expand or contract liberty, the use of cross-border constitutional borrowing is likely to generate three sets of structural problems.

First, in most areas, comparative analysis is unlikely to achieve much conceptual leverage. It is notoriously difficult to reconstruct the historical consensus, or consensus of states required by originalist or “customary” approaches to constitutional interpretation. There seems to be little reason to expect that a global moral consensus is any more easily ascertainable. Indeed, in *Stanford*, the most that the dissenters could say was that “[o]f the nations that retain capital punishment, a majority—65—prohibit the execution of juveniles. Sixty-one. . . have no statutory provision exempting juveniles. . . .”²²

Second, there is the problem of translation. Professor Jackson appears to argue that the issues of “proportionality” in American separation of powers and federalism doctrine (and perhaps elsewhere) can be illuminated by the use of “proportionality” in Canadian constitutional doctrine. But the meaning of “proportionality” in the Canadian system may be quite different from the “proportional-

¹⁷ See, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 381 (1995) (Scalia, J., dissenting) (suggesting that the prohibition of anonymous campaign speech in foreign democracies supports prohibition here).

¹⁸ See *Wolf v. Colorado*, 338 U.S. 25, 29-30 (1949).

¹⁹ See *Bridges v. California*, 314 U.S. 252, 284-88 (1941) (Frankfurter, J., dissenting). See also *Sacher v. United States*, 343 U.S. 1, 23 (1952) (Frankfurter, J., dissenting).

²⁰ See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951); *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123, 189 (1951) (Reed, J., dissenting). See also, e.g., *Hoffa v. United States*, 385 U.S. 293 (1966) (use of informers “from time immemorial”); *Rose v. Locke*, 423 U.S. 48 (1975) (“Crimes against nature” is not vague, in view of use among “English speaking people”).

²¹ 478 U.S. 186, 196 (1986) (Burger, J., concurring) (condemning homosexuality as violative of ancient Judeo-Christian morality, as well as ancient Roman law).

²² 492 U.S. at 389 (Brennan, J., dissenting).

ity” we could borrow from the German system that Professor Somek describes. And there is no particular reason to think that either “proportionality” is morally better than the “proportionality” that the Court might have picked up out of Catholic “just war” doctrine, or the ethical principle of double effect. Borrowing the term “proportionality” yields no guarantee, or even likelihood, that the concept will mean the same thing to our courts that it does to its originators, or that the results reached in the American context will mirror the results the doctrine yields in its home arena, even if we were certain that those results were to be emulated.

Indeed, verbal similarities may be misleading. Where a novel issue has not been worked through in the American system, seeing the working pieces that go into an alternative legal analysis may be instructive, at least in making sure that relevant considerations are not omitted from domestic analysis. But the important element here, as Professor Somek points out, is examination of the factual elements that actually determine the decision, rather than the rather malleable language of doctrine that holds them together.

Third, any inclination to borrow is subject to what might be referred to as the Judy Garland argument. At the end of *The Wizard of Oz*, you will recall Judy Garland voicing the opinion that she has learned that “if you ever go looking for your heart’s desire, don’t go farther than your own back yard; if it isn’t there you never really lost it to begin with.”²³ Open-mindedness and humility are virtues, and it is well to approach the considered work-product of other constitutional systems with these virtues well in hand. But there is no reason to believe that these virtues are only or best exercised in examining foreign systems. We can sharpen our moral perceptions at least as effectively by examining the constitutional jurisprudence of American state courts, or by examining prior generations of American constitutional analysis as by focusing on foreign systems. And once one recognizes that an apparent foreign innovation has in fact had a trial run in parts of the United States, or in other eras, examining the way that a concept functions in domestic “laboratories” over time might be a better way of predicting its efficacy in future analysis than simply admiring the concept’s analytical virtues.

For example, Judge Calabresi, who initially invoked German and Italian precedents in suggesting adoption of a “suspensive veto” in state statutes of dubious constitutionality,²⁴ undertook a slightly more extensive analysis and was able to find American precedents to support his position when he made the same suggestion a year later in *Quill v. Vacco*.²⁵

²³ THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

²⁴ *United States v. Then*, 56 F.3d 464, 468-9 (2d Cir. 1995) (Calabresi, J., concurring).

²⁵ 80 F.3d 716, 739 (2d Cir. 1996) *rev'd*. *Vacco v. Quill*, 521 U.S. 793 (1997) (*atmg* Thompson v. Oklahoma, 487 U.S. 815, 857 (1988) (O’Connor, J., concurring in the judgment) and

Similarly, if one is drawn to "proportionality" analysis as Professor Jackson is, it is not difficult to identify contemporary cases in cognate American fields, from *BMW v. Gore*²⁶ to *Dolan v. City of Tigard*,²⁷ to the balancing approaches in negative commerce clause doctrine²⁸ where the courts explicitly or implicitly use "proportionality" as a working part of constitutional analysis. Most prominently, in the First Amendment area the "proportionality" approach seems quite congruent with balancing approach used by the majority in *Dennis v. United States* to uphold the Smith Act.²⁹ Indeed, the virtues Professor Jackson claims for "proportionality" (clarity, transparency, and openness to context) have been equally claimed for explicit "balancing" by a prior generation of constitutional analysts.³⁰

Of course, once one recognizes that "proportionality" has already had its run in American constitutional law, one might conclude that the fact that constitutional balancing in America abetted judicial unwillingness to reign in the excesses of the McCarthy era, and was superseded by a series of categorical protections of free speech, there may be reason to be dubious about re-introducing it under the flag of constitutional borrowing. But humility, I would suppose, works both ways.

III. THE CONSTITUTION OF NATIONAL IDENTITY

A third, and final, model of the constitution counsels even greater skepticism toward constitutional borrowings. A constitution may "constitute" the commitments that define a national identity. If they command sufficiently wide allegiance, these commitments can embody the civil religion of the nation.

In the United States, this is a model of particular salience. Unlike many other polities, we have had only one Constitution over the

Abele v. Markle, 342 F. Supp. 800, 807-9 (D.Conn. 1972) (Newman, J., concurring in the result).

²⁶ 517 U.S. 559 (1996).

²⁷ 512 U.S. 374 (1994).

²⁸ See, e.g., *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) (upholding statute "unless the burden imposed. . . is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree.").

²⁹ See *Dennis v. United States*, 341 U.S. 494 (1951).

³⁰ For discussions of the virtues and defects of balancing a generation ago, see Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 912-16 (1963); Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821 (1962); Laurent B. Frantz, *Is the First Amendment Law? - A Reply to Professor Mendelson*, 51 CAL. L. REV. 729 (1963); Wallace Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479 (1964); Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963); Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 737-44 (1963); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255-57. See generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972 (1987).

course of our national history: the one which established us initially as a nation. Every official is required to swear an oath to "protect and defend" the national Constitution. A new citizen is required to demonstrate attachments to the principles of the Constitution, and consummates her national affiliation by swearing to "protect and defend" the Constitution of the United States. In this regard, the definition of constitution is a process of capturing the essence of the national identity, whether it be the "land of the free and the home of the brave" or government "of the people, by the people and for the people."

This is not a model that inclines American judges to large-scale constitutional borrowing,³¹ and it is this model, rather than defensive anxiety, that motivates Justice Scalia in his summary rejection of the proposals that the Supreme Court look to international comparisons in interpreting the American Constitution. In regard to the "cruel and unusual punishment clause," he maintains that American practice is determinative "even if that position contradicts the uniform view of the rest of the world" because what is at issue are the "fundamental beliefs of this Nation."³² And again, with regard to federalism, Justice Scalia views it as an adequate answer to proposed international comparisons that "[t]he fact is that our federalism is not Europe's."³³ Justice Scalia fails to engage the instrumental claim of Justice Breyer's comparative institutional argument in *Printz* because he rejects its premises.

This is not to say that international comparisons will be absent from analysis under this model, but they will be comparisons of a particular sort. To the extent that our national identity fixes a link with the common law countries, we can expect constitutional cognizance to be taken of the commitments of the "English-speaking" democracies. This custom flourished during the first half of this century.³⁴

In recent years, as our common law fixation has loosened its grip, and the world position of the British Empire has decayed, references to the customs of the "English-speaking world" have come to sound increasingly quaint and parochial, disappearing almost entirely from the last two decades of constitutional discourse. Rather, like the

³¹ One could imagine situations in which the model of the constitution as defining national identity *could* impel borrowings. For example, if a nation sought to reject its prior identity and reform its national self-conception, constitutional borrowings could be an attractive mode of proceeding. I would venture the barely informed hypothesis that something of the sort was involved in German borrowings in the course of the effort to reject the legacy of National Socialism.

³² *Thompson v. Oklahoma*, 487 U.S. at 868-69 n.4. Justice Scalia justifies this exclusive focus on American experience by explaining that "[w]e must never forget that it is a Constitution for the United States of America that we are expounding." *Id.*

³³ *Printz*, 521 U.S. at 935 n.11. *Cf. Younger v. Harris*, 401 U.S. 37, 44-45 (1971) ("It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.").

³⁴ See *supra* notes 13-14 and accompanying text.

“pathological perspective” in institutional analysis, comparisons with other legal regimes have been invidious ones: racial classification is to be rejected because it is “like apartheid,” flag salute requirements are un-American because they are too close to the “fast failing efforts of our totalitarian enemies.”³⁵

There is nothing inherently wrong with this. As the parent of a teenager, I am well aware that one of the ways we shape our personal identities is by choosing identities to reject. The same is true of nations: by differentiating our constitutional commitments from those of other societies, we can deepen the commitment to the values that are truly our own.

Moreover, even where we find things to admire in the constitutional systems of our friends and neighbors, this model is hardly conducive to constitutional borrowing. Nor, ultimately, should it be. To the extent that constitutional systems constitute the core of a common American identity, we ultimately must look to our own history and aspirations. We may be challenged to rethink our system by the examples of others, but it seems most unlikely that we would end up choosing a stable American identity by adopting any other country’s constitutional doctrines.

Let me draw a closing analogy from religious practice. If I as a Jew find that Buddhist meditation seems a useful spiritual practice, I may well decide adopt the practice of meditation. But it is unlikely I will adopt a Buddhist sutra as a focus for the meditation. It would be far more productive for me to dig more deeply into the history of Jewish practice to discover its own meditative techniques. So too, I suggest, the most constructive use of comparative constitutional law is not as an alternative store of constitutional software, but a challenge to us to reexamine the resources in our own system.

³⁵ See *supra* notes 4-9 and accompanying text. The shadows of this effort to distinguish American practices from foreign identities show themselves in Justice Black’s defensive claim in *Korematsu* that it is “unjustifiable” to call the Japanese detention camps “concentration camps with all the ugly connotations that term implies.” *Korematsu*, 323 U.S. at 223. Note that this differentiation itself has been directed at English practices. See, e.g., *Speiser v. Randall*, 357 U.S. 513, 536 (1958) (rejecting “‘taxes on knowledge’ which have had a notorious history in the English-speaking world.”) (citing *Grosjean v. American Press Co.*, 297 U.S. 233, 246-47 (1936)).