

# *Living Originalism* in India? “Our Law” and Comparative Constitutional Law

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## I. *LIVING ORIGINALISM* AND COMPARATIVE CONSTITUTIONAL LAW: TWO QUESTIONS

*Living Originalism*<sup>1</sup> is about American constitutional practice. But it raises two sets of interesting questions for scholars of comparative constitutional law.

First, Balkin is largely silent on the role of comparative materials in living originalism. But the negative implication from his understanding of constitutions is that comparative materials are irrelevant to constitutional construction. One of the central ideas in *Living Originalism* is the notion that the Constitution is “our law,” because the American people “identify with it and are attached to it.”<sup>2</sup> The notion of the Constitution as “our law” has embedded within a conception of an intergenerational “collective subject”—We the People—“with a collective destiny that engages in collective activities,” which include the construction of the Constitution itself.<sup>3</sup> And so living originalism means that “we understand our present situation and the possibilities and needs of the future through the trajectory of our interpretation of the meaning of the past—both the principles we committed ourselves to achieving and the evils we promised we would not permit again.”<sup>4</sup> Constitutional construction is an internally and historically oriented process that draws upon local sources that are situated or particular to American constitutional culture, and seeks to reinterpret and adapt them in light of contemporary circumstances. Comparative materials have no place within this argumentative matrix. So

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1. JACK M. BALKIN, *LIVING ORIGINALISM* (2011).
2. *Id.* at 60.
3. *Id.* at 61.
4. *Id.* at 63.

here is my first question: Is it possible to reinterpret living originalism in a way that renders it comparatively engaged while still acknowledging the distinctiveness of the American constitutional identity? Indeed, can a comparatively inflected living originalism actually sharpen an awareness of national constitutional difference?

Second, Balkin is self-consciously writing for an American audience about the nature of American constitutional practice. He presents living originalism, fidelity, text and principle, original meaning and original expected application, and constitutional construction as indigenous constitutional concepts, in a manner that is deeply reminiscent of Bruce Ackerman's call to reject foreign constitutional frameworks in *We the People*.<sup>5</sup> But, of course, the issues that Balkin grapples with are not peculiarly American. It is entirely possible that his conceptual tools might have some analytic purchase outside the United States. Indeed, in a footnote Balkin opens the door to this possibility, even while he denies it.<sup>6</sup> Balkin doubts the comparative relevance of his argument, by underlining that *Living Originalism* is directed at "the American constitutional tradition and may not be readily generalizable to the constitutions of other countries."<sup>7</sup> The reason is that a contingent combination of factors gives rise to American constitutional culture, and he suggests it is unlikely that these factors are found in other constitutional systems. For example, Balkin draws a link between the sociological legitimacy of the American Constitution to "an imagined transgenerational project of constitutional politics," and opines that "[i]n many cases, a country may play only a minor role in the construction of a national identity."<sup>8</sup> Likewise, he contrasts how America's Constitution "emerged from a revolutionary tradition" with how other "constitutions developed through longer, more gradual, and relatively peaceful transitions from colonial status."<sup>9</sup> But, of course, these are contingent points of contrast that are not necessarily true in every case, and represent differences more in degree than in kind. The American case may be distinctive, but is not utterly unique. This possibility gives rise to my second set of questions: Does Balkin's account of the phenomenology of constitutional argument have purchase outside the American constitutional tradition? If so, what can we learn by exploring the culture of constitutional argument in these foreign constitutional cultures?

I want to offer an integrated answer to these two questions. One can

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5. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 3 (1991).

6. BALKIN, *supra* note 1, at 357 n.2.

7. *Id.*

8. *Id.*

9. *Id.*

imagine a different constitutional world from the United States in which something akin to living originalism is married to deep comparative constitutional reasoning. We can find that example in the constitutional discourse of the world's other great common law, federal, postcolonial liberal democracy: India. In the Indian constitutional imagination, the Constitution marks a decisive and sharp break with the past and was a central element in the formation of the Indian polity. To this day, the Indian Constitution remains a site of organic self-understanding and provides a platform for politics. Indian constitutional argument routinely reaches back to the founding premises of the constitutional order to apply it to contemporary circumstances. But it is nonetheless comparatively inflected. A careful reading of a couple of leading Indian examples illustrates a comparatively inflected living originalism in practice that not only acknowledges but also affirms a distinct constitutional identity—either by sharpening moments of constitutional difference or by highlighting an (arguably contingent) overlap of shared constitutional premises. This interpretive method is what I term the dialogical model of comparative constitutional reasoning. I want to conclude by suggesting how the dialogical model offers a framework for harnessing comparative materials in the service of a living originalism that can enrich the kind of internally oriented constitutional conservation that Balkin advocates. I illustrate how this can be done in practice by offering an alternative basis for Justice O'Connor's concurrence in *Lawrence v. Texas*,<sup>10</sup> in a manner that Balkin would likely endorse.

## II. WHAT IS CONSTITUTIONAL COMPARATIVISM?

Let me first explain what I mean by constitutional comparativism. Why, under what circumstances, and how should comparative constitutional materials figure into a national constitutional practice? More specifically, what role should they play in constitutional interpretation? In the United States, this question has spawned a debate that remains surprisingly polarized. It has become yet another issue that divides conservatives and liberals. The two poles of this debate are what I term constitutional nationalism and constitutional cosmopolitanism.

On the nationalist conception, the use of comparative materials in constitutional interpretation stands at odds with one of the dominant understandings of constitutionalism—that the constitution of a nation emerges from, embodies, and aspires to sustain or respond to that nation's particular circumstances, most centrally to its history and political culture. As Jürgen Habermas has explained, the citizens of a nation often use

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10. 539 U.S. 558 (2003).

constitutional discourse as a means to “clarify the way they want to understand themselves as citizens of a specific republic, as inhabitants of a specific region, as heirs to a specific culture, which traditions they want to perpetuate and which they want to discontinue, [and] how they want to deal with their history.”<sup>11</sup> Indeed, for countries with a diverse citizenry that lack a prior or prepolitical bond of ethnicity, religion, or race, constitutions are an integral component of national identity and reflect one way in which those nations view themselves as different from others. It is fair to say that constitutions continue to be widely understood in this particular and local way. Although conservatives have tended to be constitutional nationalists, and liberals constitutional cosmopolitans, this need not be the case. Indeed, I think something like the nationalist view could be attributed to Balkin.

The nationalist conception of the nature and character of constitutions has implications for how those documents should be interpreted and for the use of comparative constitutional materials as interpretive aids. On the nationalist view, constitutional interpretation should rely exclusively on sources internal to specific political and legal systems. These sources may vary and include original intent, text, structure, and a nation’s political traditions and values. The use of local and particular sources in constitutional reasoning secures the legitimacy of judicial review. Comparative materials, by contrast, are of no assistance at all, precisely because they come from outside a given legal system. At best, they represent a foreign curiosity of strictly academic interest and little practical relevance. At worst, their use is a foreign imposition or even a form of legal imperialism.

One possible challenge to this position is the increased convergence of constitutional texts, and specifically, bills of rights. In particular, there is a core set of rights—for example, the right to life and the right to equality—that are found in most bills of rights. Moreover, the precise language of the provisions that entrench these rights is often very similar, reflecting the fact that the process of constitution drafting is deeply comparative and draws on common models. In the face of this textual similarity, the nationalist assertion of constitutional difference may be hard to sustain. However, committed nationalists emphasize differences where there appear to be none. On their account, these similarities are rather superficial, and conceal profound differences not apparent at first glance. Nationalists argue that it is beyond dispute that legal texts are inherently ambiguous and require reference to extratextual sources for their

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11. Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 107, 125 (Amy Guttmann ed., 1994).

interpretation and application in concrete cases. Moreover, although overarching principles of political morality provide some assistance, these arguments quickly run out, because the question then arises of which political morality to choose. For example, in choosing the appropriate background principle against which to interpret a constitutional right to equality—found in many contemporary bills of rights—libertarian and egalitarian theories of justice would counsel divergent interpretations of the scope of the provision in the context of challenges to reservations or affirmative action. Nationalists claim that courts, as a matter of empirical fact, do not look outward to foreign experiences to facilitate the choice among these different theories; rather, they turn inward by reference to sources internal to a nation's history and political traditions.

At the opposite end from nationalists are cosmopolitans, who 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. Unlike nationalists, who emphasize the differences among constitutional systems, these scholars see unity in the midst of diversity. This mode of comparative constitutional interpretation exhorts courts to pay no heed to national constitutional particularities when engaging in constitutional interpretation. Courts should regard themselves as interpreting constitutional texts that protect rights that transcend national boundaries. The legitimacy of the reliance on comparative materials is buttressed by the empirical fact of convergence across constitutional systems. An emerging consensus among constitutional systems is proof of a particular constitutional interpretation's truth or rightness. The implicit image here is that of an international community of states and citizens that share a basic commitment to a vision of constitutionalism based on the rule of law and the rights of individuals.

In concrete legal terms, constitutional cosmopolitans may focus on both the interpretation of rights and their limitation. With respect to the former, they would hold that particular rights—such as freedom of expression, freedom of religion, or freedom of association—could each be based on political theories of what interests those rights are designed to protect. Cosmopolitans argue that these theories are the same for every constitution in which those rights are found. These theories flow from liberal political morality, which entails that respect for rights is a condition for the legitimate exercise of public power. Comparative jurisprudence becomes a repository of principles to be relied on as valuable articulations, explanations, and commentaries on the political theories underlying particular constitutional rights. Additionally, foreign judgments suggest how those rights are to be implemented through the crafting of constitutional doctrine, and then applied in concrete cases. A

court no longer has to engage in the burdensome and time-consuming task of formulating the theories underlying particular rights, operationalizing those abstract guarantees through constitutional doctrine, or even applying those rights with respect to specific issues, since comparative case law offers a convenient shortcut to attaining these goals.

A parallel logic applies to the question of justifiable limitations. It is a common feature of contemporary constitutional adjudication that rights are not absolute. Constitutional rights may be limited, but those limitations must meet a test of justification. An emerging model for framing the judicial inquiry into justifiable limits on constitutional rights is provided by the doctrine of proportionality. According to this doctrine, rights can be justifiably limited if a number of criteria are met. The limitation must be undertaken for a sufficiently important reason. The means chosen to vindicate this objective must actually achieve the objective. There must be no other means available that are equally effective in pursuing the objective and impairing the right less than the means chosen. The salutary effects of the rights-infringing measure outweigh the deleterious effects on the right. On the cosmopolitan account, this common template is integral to rights-based adjudication. How one court conceptualizes the notion of proportionality itself, frames the specific legal test that implements it, and applies it in specific cases should guide other courts because they are engaged in a common enterprise.

The American debate over comparative constitutional law, which ebbs and flows, remains intense. Nationalists (who tend to be conservatives) accuse cosmopolitans (who tend to be liberals) of promoting a project of constitutional convergence that undermines American sovereignty. More coherently, they accuse cosmopolitans of failing to take seriously the notion that the Constitution is “our Constitution.” Cosmopolitans fuel both sets of criticisms by viewing comparative constitutional reasoning as a way of affirming America’s membership in the community of liberal democracies in a variety of specific contexts: the death penalty, gay rights, and counter-terrorism.

This debate has become deadlocked, futile, and sterile—which may explain Balkin’s decision to ignore it. But it also bears little connection to the real world. Over several years, I have closely examined how constitutional drafters, courts, and legal counsel across a variety of constitutional systems engage with comparative materials, and identified the reasons they give for comparative constitutional argumentation. What emerges is what I term the dialogical model of comparative constitutional

reasoning.<sup>12</sup> The starting point is that a claim to constitutional distinctiveness of the kind that Balkin would make is inherently relative; a constitutional text and its interpretation are only unique by comparison with other constitutions and interpretations. Since difference is defined in comparative terms, a keener awareness and a better understanding of difference can be achieved through a process of comparison. If we engage comparatively and ask *why* a foreign constitution has been drafted and interpreted in a certain way, this better enables us to ask ourselves why *we* reason the way *we* do. Comparative materials are interpretive foils, tools for constitutional self-reflection that help to identify what is special or distinctive about a constitutional order.<sup>13</sup>

When engaging in the comparative exercise, constitutional actors may conclude that domestic and foreign assumptions are sufficiently similar to one another to warrant following a foreign constitutional example. Constitutional actors follow that example not because they are bound by it, but because they are persuaded by it, in part because it coheres with national constitutional assumptions. This is easiest where the point of law is novel, and there is no countervailing precedent. But where a precedent exists, comparative materials can provide the argumentative resources for overturning the existing law as mistaken, because it betrays existing national constitutional assumptions. Conversely, constitutional actors may conclude that comparative materials emerged from a fundamentally different constitutional order. A keener awareness and a better understanding of difference can be achieved through a process of comparison. A constitution can be constructed not only by reference to what it is, but also in relation to what it is not.

### III. TWO INDIAN EXAMPLES OF THE DIALOGICAL MODEL

I think the dialogical model holds out some promise for marrying comparative engagement to the claims for national constitutional distinctiveness that Balkin champions in living originalism. To illustrate this potential, I want to consider two Indian examples of the dialogical model in action: one where comparative materials identified evils to be

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12. See Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 835 (1999); Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. 1, 52 (2004); Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 1, 22 (Sujit Choudhry ed., 2006) [hereinafter Choudhry, *Migration as a New Metaphor*]; Sujit Choudhry, *How To Do Comparative Constitutional Law in India: Naz Foundation, Same Sex Rights, and Dialogical Interpretation*, in COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA 45 (Sunil Khilnani, Vikram Raghavan & Arun K. Thiruvengadam eds., 2012) [hereinafter Choudhry, *How To Do*].

13. See Choudhry, *Migration as a New Metaphor*, *supra* note 12, at 23.

avoided in a manner that furthered the basic goal of the Indian constitutional project, and another where comparative materials were used by a court to identify, reframe, and enforce the premises of the Indian Constitution that were articulated at its adoption.

Article 21 of the Indian Constitution provides that “No person shall be deprived of his life or personal liberty except according to procedure established by law.”<sup>14</sup> An important question that faced the Indian courts early on was the type of procedural protection afforded by this provision. The issue arose in *A.K. Gopalan v. Madras*,<sup>15</sup> which arose out of the preventative detention of the leader of the Communist Part of India a month after the Indian Constitution came into force in 1950. The relevant legislation authorized preventative detention on the basis of an executive order. The detained individual possessed no procedural rights that would normally attach to a decision to imprison an individual, such as clear advance notice of the prohibited conduct, notice of the grounds for detention, a right to a decision by an impartial decision-maker, and the rights to a hearing and to adduce evidence.

At the heart of the case was a choice between two interpretive options. One was that the provision accorded individuals a constitutional right to due process for deprivations of life or liberty, parallel to the kind of protection afforded by the Fifth and Fourteenth Amendments. Indeed, the petitioner argued that the American due process clauses were constitutional models that the interpretation of Article 21 should follow. The other interpretive option was that the procedure to which individuals were entitled was the one the legislature chose—including a grossly unfair procedure, or none at all.

The Court rejected the first position and followed the second. It offered a range of reasons for firmly declining the invitation to shape the interpretation of Article 21 on the basis of the American experience. A number of these were textual. Thus, Article 21 protects different interests than the due process clauses—protecting “personal liberty” as opposed to the “liberty,” and omitting property entirely.<sup>16</sup> Moreover, the protection accorded to the enumerated interests was different—a procedure “established” by law (which the Court took to set no constitutional baseline of fair procedure) opposed to one that was “due” (which the Court took to mean a constitutional guarantee of a minimally fair procedure).<sup>17</sup>

But this choice was not just driven by the plain meaning of the text.

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14. INDIA CONST. art. 21.

15. *A.K. Gopalan v. State of Madras*, (1950) 1 S.C.R. 88 (India).

16. *Id.* at 109.

17. *Id.* at 113.

Rather, the Court discussed and criticized the American experience with substantive due process. Indeed the Court adopted a particular view of what substantive due process stood for—the constitutionalization of judicial policy preferences. As the Court put it, the phrase “means reasonable law according to the view of the majority of the judges of the Supreme Court at a particular time holding office.”<sup>18</sup> This was the true mischief the Court sought to avoid, by closing the door to even procedural due process out of the fear that it might later morph into a substantive form of review.

Moreover, the Court nodded toward the drafting history of Article 21, although it did not discuss it in detail. This history is well known to students of Indian constitutionalism. The precursor to Article 21 tracked the wording of the American due process clauses exactly. Over the course of the drafting process, it was amended in stages: property was removed; “personal” was inserted to qualify “liberty”; and, finally, due process was replaced with a “procedure established by law.” Throughout the drafting of Article 21, the American constitutional experience mattered centrally. But it operated not as a model to be followed, but as a danger to be avoided at all costs.<sup>19</sup> There were two specific dangers that the framers of the Indian Constitution sought to avoid by rejecting the wording of the due process clauses. The first was the concern that the clause would provide an open-ended tool for the courts to second-guess legislative policy judgments, anticipating the views later voiced by the Supreme Court of India in *Gopalan*.<sup>20</sup> The second danger was narrower—the risk that the provision would be used to challenge regulatory and redistributive legislation in the name of economic libertarianism. B.N. Rau, the Constitutional Advisor to the Constituent Assembly, raised the fear that a due process clause could “stand in the way of beneficent social legislation.”<sup>21</sup> Rau invoked *Lochner*-era libertarianism as a risk against which to inoculate the Indian Constitution. Indeed, Rau’s views were based in part on the advice of U.S. Supreme Court Justice Frankfurter, drawing on the New Deal crisis.<sup>22</sup> The memories of these constitutional battles were still fresh, and had already become part of the emerging global constitutional consciousness.

The construction of America as the constitutional other was an element of a larger constitutional narrative on the very point and purpose of the Indian constitutional project. It is sometimes said that the Indian

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18. *Id.* at 110.

19. *Id.* at 111.

20. GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 102 (Oxford Univ. Press 1999) (1966).

21. *Id.* at 87.

22. *Id.* at 103-04.

Constitution institutionalized a national and a social revolution. The national revolution was the establishment of the institutions and procedures of democratic self-government for a newly empowered democratic majority, including federalism and parliamentary democracy. In this sense, the Indian Constitution is a decidedly postcolonial constitutional text, akin to the American Constitution. But it is also a charter for the transformation of a deeply hierarchical and unequal society. Long before the British colonial experience, political, economic, and social power had been held in the hands of the very few, with inequalities structured along the intersecting grounds of caste, religion, ethnicity, and income. One of the basic objectives of the Indian independence movement was to harness the state to redress centuries of neglect, exploitation, and discrimination experienced by the Indian masses at the hands of the powerful. These two constitutional agendas were interconnected. A democratic and independent India—the national revolution—was the prerequisite to the social revolution, since it would put political power into the hands of the oppressed.

As Granville Austin has argued, the social revolution gave rise to two interrelated sets of constitutional provisions, Parts III and IV of the Indian Constitution.<sup>23</sup> Part III, entitled “Fundamental Rights,” entrenches the standard schedule of negative rights found in most liberal democratic constitutions (including Article 21). One of the main motivations underlying the entrenchment of these rights was to protect already disadvantaged minorities from further oppression at the hands of newly empowered democratic majorities. This danger was particularly acute within provinces, because federalism created the potential for subnational tyrannies. Part III is expressly subject to judicial enforcement.<sup>24</sup> Part IV comprises the Directive Principles of State Policy, and is a schedule of positive duties. They set a blueprint for a redistributive and regulatory state of precisely the kind that the *Lochner* court treated with constitutional suspicion, by mandating the Indian state to play a central role in the emancipation of the Indian masses. For example, Article 43 obliges the state to set labor standards, including a living wage.<sup>25</sup>

The juridical character of Part IV and its interrelationship with Part III were important issues during the Indian constitutional deliberations, and reflected the lessons drawn from the *Lochner* era and the New Deal crisis. One of the design questions faced by the Indian framers was the justiciability of Part IV. Some argued that Part IV ought to entrench a set of judicially enforceable positive rights, because they were no less

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23. *Id.* at 50.

24. INDIA CONST. art. 32.

25. *Id.* art. 43.

important than the negative rights in Part III, whose justiciability was not a point in dispute. However, this position was ultimately rejected.<sup>26</sup> Part IV is expressly non-justiciable,<sup>27</sup> out of a fear of equipping the courts with the tools to wade into the details of socioeconomic policy, as the *Lochner* court had done. Rather, they were envisioned as constitutional reminders that could be deployed in political discourse as standards of political accountability, and to channel democratic politics to focus on such questions.<sup>28</sup>

This drafting choice led to another set of design issues. During the Constituent Assembly debates, the concern was raised that the Fundamental Rights set out in Part III could be used to challenge policies enacted to implement the Directive Principles of State Policy entrenched by Part IV. The *Lochner* era furnished both concrete examples of public policies and the doctrinal arguments (especially substantive due process) that fueled these fears. One proposal was to immunize laws enacted pursuant to Part IV from challenge under Part III.<sup>29</sup> However, this was regarded as creating too large an exception to the scope of Part III, since the Directive Principles were broadly worded enough to conceivably anchor much, if not most, socioeconomic legislation. Instead, the framers adopted a different strategy—to draft the rights in Part III in such a way as to reduce their potential to serve as swords, to prevent them from acting as roadblocks to transformative public policies, like Article 21.<sup>30</sup>

The debates over the drafting of the Indian Constitution were incredibly rich. They were very much rooted in the politics of the Indian independence movement, in which the members of the Indian Constituent Assembly had been central participants. The basic question was what kind of nation India should become, which these debates answered by reference to India's recent past and hoped-for future. Comparative reasoning—such as the invocation of the American experience with substantive due process—did not dilute the fundamentally Indian character of these debates, or the idea that the Indian Constitution should reflect a view of the nature of the Indian political identity. Rather, comparative materials facilitated and enabled domestic constitutional choice, by clarifying the worrying implications of certain textual options for the success of the Indian constitutional project. In the case of Article

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26. AUSTIN, *supra* note 20, at 77-79.

27. INDIA CONST. art. 37.

28. AUSTIN, *supra* note 20, at 76-79.

29. *Id.* at 77-78 (“It is thus a matter for careful consideration, he [Rau] continued, whether ‘the Constitution might not expressly provide that no law made and no action taken by the state in the discharge of its duties under Chapter III of Part III (the Directive Principles) shall be invalid merely by reason of its contravening the provisions of Chapter II (the Fundamental Rights).”).

30. *Id.* at 78-79.

21, it was a source of lessons to be learned and dangers to be avoided. This reasoning was carried forward to the subsequent interpretation of Article 21 in *Gopalan*. The Court's framework for analysis was an originalism that was comparatively informed. Moreover, it was a *living* originalism in the following sense. The goal of social revolution was one that the Indian state would have to achieve over time. The precise policies through which to achieve that goal would necessarily shift with changing circumstances. The fear of *Lochnering* the Indian Constitution—by interpreting it as an obstacle to the regulatory, redistributive state—was framed at a sufficiently high level of abstraction that it could be employed as an interpretive trope to defend an evolving arsenal of public policies.

The second example of the dialogical model in action is a recent decision of the Delhi High Court on the constitutionality of section 377 of the Indian Penal Code, which criminalizes same-sex sexual activity: the *Naz Foundation* case.<sup>31</sup> The constitutional challenge was brought by a human rights organization, divorced from an actual proceeding. The Court found the provision unconstitutional in its application to consensual sexual acts of adults in private, on the basis of the Indian equality clause (Article 14) and Article 21. Comparative constitutional law played a central role in the case, and illustrates another way in which a living originalism can be comparatively inflected.

The background to *Naz Foundation* is that in a growing number of constitutional systems, courts have condemned discrimination on the basis of sexual orientation, and interpreted constitutional guarantees of liberty and/or privacy in a non-discriminatory manner to encompass sexual intimacy between same-sex partners. These comparative materials were at the center of the legal submissions to the court in *Naz Foundation*, which should be understood as part of a global legal-political strategy to advance the cause of same-sex rights through public interest litigation. The methodological question was the relevance of these materials to the interpretation of the Indian Constitution. This was a point of cleavage among the parties challenging and defending the provision. The argument against the role of comparative constitutional law offered by the Union of India (it has since dropped its opposition to the challenge to section 377) sounded in a nationalist register. It entailed the following claims: (a) the Constitution should be interpreted to be consistent with Indian cultural norms; (b) when interpreting the fundamental rights provisions of the Constitution, courts should prefer interpretations that are consistent with Indian cultural norms and reject interpretations that are inconsistent with them; (c) when determining whether violations of rights are justifiable,

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31. *Naz Found. v. Gov't of NCT of Delhi & Others*, (2009) WP(C) No.7455/2001, July 2, 2009 (Del. H.C.). For a more detailed analysis of the case, see Choudhry, *How To Do*, *supra* note 12.

courts should defer when legislation reflects Indian cultural norms; and (d) comparative materials are an irrelevant and illegitimate aid to constitutional interpretation, since by definition they come from outside the Indian cultural context.<sup>32</sup>

In *Naz Foundation*, the asserted cultural norm was the disapproval of homosexuality.<sup>33</sup> Within the nationalist framework, the rejection of comparative constitutional law therefore meant the following: (a) the Constitution should be interpreted in a manner that is consistent with the rejection of homosexuality; (b) the right to privacy should not be interpreted as protecting the right to sexual intimacy among homosexuals, and the right to equality should not be interpreted as prohibiting distinctions drawn on the basis of sexual orientation because that would be inconsistent with Indian cultural norms that disapprove of homosexuality; (c) if those rights have been violated, the court should defer because section 377 reflects an Indian cultural norm that disapproves of homosexuality; and (d) comparative jurisprudence which holds to the contrary on one or more of these points is irrelevant.

The parties that challenged section 377 failed to provide an extended defense for the use of comparative materials. But the best answer is provided by constitutional cosmopolitanism, and consists of the following propositions: (a) the Constitution should be interpreted to be consistent with the principles of liberal political morality; (b) Article 21 should be interpreted as protecting the right to privacy, which in turn entails the right to sexual intimacy—homosexual and heterosexual—and Articles 14 and 15 should be interpreted as prohibiting discrimination on the basis of sexual orientation; (c) even if section 377 reflects an Indian cultural norm that disapproves of homosexuality, courts should not defer to section 377 simply because it reflects Indian cultural norms; and (d) the court should cite and apply comparative materials that stand for one or more of these propositions as if they were law.

Much of the judgment in *Naz Foundation* fits this account. Comparative constitutional law was a central feature of the judgment, and figured prominently at nearly every stage of the court's analysis. First, the court cited comparative case law from the United States, the European Court of Human Rights, South Africa, Fiji, and Nepal—all of which interpreted the right to privacy as encompassing the right to intimate sexual relations—in support of its holding that Article 21 encompasses the right to engage in such conduct, and was, therefore, violated by the challenged provision.<sup>34</sup> This issue attracted the most serious and sustained

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32. See *Naz Found.*, (2009) WP(C) No. 7455/2001, at para. 24.

33. *Id.* at para. 12.

34. *Id.* at para. 58.

engagement with comparative materials.<sup>35</sup> Second, the court relied on comparative case law from Canada and South Africa to define the content of the right to dignity, also protected by Article 21, which the court held was violated as well.<sup>36</sup> Third, the Court turned to the decisions of the United States Supreme Court and the Constitutional Court of South Africa to hold that a facially neutral ban on “unnatural sex” without reference to sexual orientation in fact deliberately targeted homosexuals as a class, because the prohibited sexual acts were closely associated with homosexuality.<sup>37</sup> Fourth, the Court looked to decisions from the European Court of Human Rights and the United States Supreme Court to hold that popular disapproval of homosexuality on the ground of morality, no matter how widespread, is not a legitimate reason to limit constitutionally protected rights.<sup>38</sup>

However, this reading of *Naz Foundation* cannot explain one of the most striking features of the judgment—its invocation of the ideals animating the adoption of the Indian Constitution, as described by scholars and reflected in the writings and speeches of its most important framers. For example, at the end of its treatment of Article 21, the Court noted that the “fundamental rights had their roots deep in the struggle for independence” and referred to Granville Austin’s explanation that “they were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India.”<sup>39</sup> In a parallel fashion, after the Court concluded that public morality could not justify the limitation of rights, the Court referred to Austin’s argument that one of the basic purposes of the Indian Constitution was to achieve or foster a “social revolution.”<sup>40</sup> The court defined this revolution as the creation “of a society egalitarian to the extent that all citizens were to be equally free from coercion or restriction by the state, or by society privately.”<sup>41</sup> Finally, at the end of its reasons, after it had addressed all the constitutional issues—including the appropriate remedy—the Court invoked Nehru and his speech on the Objective Resolution in the Constituent Assembly to argue that one of the underlying themes in the Indian Constitution is “inclusiveness.” The Court continued:

This Court believes that [the] Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally

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35. *Id.* at paras. 53-64.

36. *Id.* at paras. 25-28, 41-47.

37. *Id.* at paras. 94-98.

38. *Id.* at paras. 75-87.

39. *Id.* at para. 52.

40. *Id.* at para. 80.

41. *Id.*

displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as “deviants” or “different” are not on that score excluded or ostracised.

Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination. This was the “spirit behind the Resolution” of which Nehru spoke so passionately.<sup>42</sup>

This material on the point and purpose of the Indian Constitution is a world away from the constitutional cosmopolitanism that sets the character and tone of the rest of the judgment. The judgment, in a very basic sense, speaks in two voices: a global voice that draws heavily on constitutional jurisprudence from abroad, and an Indian nationalist voice that gives pride of place to the political project underlying the adoption of the Indian Constitution. In addition to failing to justify its use of comparative constitutional law, the Court also fails to provide any explanation for how the externally and internally driven parts of its reasons are connected.

A careful examination of the hearing transcript<sup>43</sup> and the judgment shows that the missing link between the comparative jurisprudence on same-sex rights and the basic premises of the Indian Constitution is the analogy between sexual orientation and untouchability.<sup>44</sup> The Indian Constitution singles out untouchability for special and selective condemnation in Article 17. Article 17 provides in full: “‘Untouchability’ is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of ‘Untouchability’ shall be an offense punishable in accordance with law.”<sup>45</sup> Alongside Articles 15(2), 23, and 24, Article 17 applies to private actors, in contrast to the other provisions of Part III (“Fundamental Rights),” which apply to government and direct it to act or refrain from acting in certain ways. Article 17 purports to abolish a social status, and the social practices that revolve around that status, which exist apart from and independent of state action.<sup>46</sup> In other words, Article 17 applies horizontally. Moreover, it goes much further, and mandates that the private breach of this constitutional duty must be punishable by criminal sanction.

Article 17 reflects the view, as Gopal Guru puts it, that “dignity may not easily come forth from the upper castes; it will have to be forcibly

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42. *Id.* at paras. 130-31.

43. *Edited Transcript of the Final Arguments Before the Delhi High Court, in THE RIGHT THAT DARES TO SPEAK ITS NAME* 48 (Arvind Narrain & Marcus Eldridge eds., 2009).

44. *Id.* at 54.

45. INDIA CONST. art. 17.

46. MADHAV KHOSLA, *THE INDIAN CONSTITUTION* 88-90 (2012).

extracted from the recalcitrant members of twice-born civil society.”<sup>47</sup> The whole constitutional architecture of reservations for Scheduled Castes found in Articles 15(4), 16(4), 29(2), 330, and 332—which aim to fundamentally redistribute economic, political, and social power toward the Scheduled Castes—is designed to compensate for millennia of neglect and exploitation. As Guru explains, the nationalist movement was not just about the advocacy of self-government to oppose “the colonial configuration of power,” but also about the promotion of social justice to challenge “local configurations of power.”<sup>48</sup> Indeed, it was “one of the central organizing and mobilizing principles of the nationalist movement.”<sup>49</sup>

What analogy did the Court see between untouchability and sexual orientation? Unfortunately, the Court does not say. But perhaps the argument is this. *Naz Foundation* held that the effect of section 377 was to create a status offense—to “be classed as criminal as such.”<sup>50</sup> Since section 377 criminalizes “these sexual acts which . . . are associated more closely with one class of persons, namely, the homosexuals[,] Section 377 . . . has the effect of viewing all gay men as criminals.”<sup>51</sup> Section 377 effectively brands homosexuals as outlaws who do not enjoy the law’s protection. The Court described the effects of this status offense:

Even when the penal provisions are not enforced, they reduce gay men or women to what one author has referred to as “unapprehended felons,” thus entrenching stigma and encouraging discrimination in different spheres of life. Apart from misery and fear, a few of the more obvious consequences are harassment, blackmail, extortion and discrimination. There is extensive material placed on the record in the form of affidavits, authoritative reports by well known agencies and judgments that testify to a widespread use of Section 377 IPC to brutalise [the] MSM [men who have sex with men] and gay community.<sup>52</sup>

But what is the link between sexual orientation and untouchability? The treatment which homosexuals experience today is similar in kind to that which “untouchables” experienced and which prompted the adoption of

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47. Gopal Guru, *Constitutional Justice: Positional and Cultural*, in *POLITICS AND ETHICS OF THE INDIAN CONSTITUTION* 230, 235 (Rajeev Bhargava ed., 2008).

48. *Id.* at 232.

49. *Id.* (citing K.M. PANIKAR, IN DEFENCE OF LIBERALISM 15 (1962); Rajeev Bhargava, *Democratic Vision of a New Republic: India, 1950*, in *TRANSFORMING INDIA* 26 (Francine Frankel, Zoya Hasan, Rajeev Bhargava & Balveer Arora eds., 2000)).

50. *Naz Found. v. Gov’t of NCT of Delhi & Others*, (2009) WP(C) N.7455/2001, July 2, 2009 (Del. H.C.), at para. 50 (citing Jawaharlal Nehru, Speech Commenting on the Criminal Tribes Act (1936)).

51. *Id.* at para. 94.

52. *Id.* at para. 50.

Article 17, in that the treatment of homosexuals likewise flows from their social status. As was noted during the Constituent Assembly Debates, the purpose of Article 17 was “to save one-sixth of the Indian population from perpetual subjugation and despair, from perpetual humiliation and disgrace.”<sup>53</sup> This manifest injustice was delivered not by the hands of the state, but “by a vast mass of Hindu population which is hostile to them and which is not ashamed of committing any inequity or atrocity against them.”<sup>54</sup>

The comparative jurisprudence on the criminal prohibition of anal intercourse was not simply applied, as constitutional cosmopolitanism would suggest. The picture is more complex. Comparative materials led the Court to revisit and update the premises of the Indian Constitution. The engine of this change is the analogy between untouchability and sexual orientation. The Court may have reasoned that the two were indeed analogous, and accordingly that the Indian Constitution should condemn discrimination on the latter basis as much as on the former. The doctrinal implications of this reading of *Naz Foundation* remain to be worked out. *Naz Foundation* could stand for the proposition that there is a constitutional doctrine that grows out of Article 17, whereby groups who experience disadvantage analogous to that experienced by “untouchables” are entitled to the highest degree of constitutional protection. This disadvantage occurs along every dimension—social, economic, and political—and is mutually reinforcing. With respect to such groups, for example, this doctrine might counsel a particularly stringent approach to equality claims brought under Articles 14 and 15 that does not shy away from the prohibition of indirect discrimination, which is often proof of legislative animus toward the most disadvantaged. It could render inadmissible public morality as the justification for the infringement of constitutional rights of such groups, because public morality is particularly likely to reflect a naked preference to harm those groups. Finally, it may mean that the interpretation of other fundamental rights is infused with equality, so that a court is particularly alert to the importance of the interests protected by those rights to the group in question, and ensures that the scope of the right is defined accordingly. For example, against the backdrop of pervasive cultural disapproval of homosexuality, this doctrine provides an additional reason for including sexual intimacy within the right to privacy under Article 21, which, of course, is the main

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53. Choudhry, *How To Do*, *supra* note 12, at 80 (quoting *Voices Against 377, Note on the Constituent Assembly Debates and Equality*, supplemental submission in *Naz Found. v. Gov’t of NCT of Delhi and Others*, (2009) WP(C) No.7455/2001, July 2, 2009 (Del. H.C.)).

54. *Id.*

holding in *Naz Foundation*.<sup>55</sup>

This mode of comparative constitutional reasoning is dialogical. External legal sources were used as foils to constitutional self-reflection, and nourished and reframed the judges' reading of internal constitutional sources. *Naz Foundation* illustrates the role of argument by analogy—in this case, the idea that a constitutional system may single out social groups who have experienced severe disadvantage for the highest degree of constitutional protection, and that comparative materials may serve to highlight that other social groups experience analogous forms and levels of disadvantage that warrant a comparable constitutional response. The question was whether comparative constitutional law resonated with pre-existing Indian constitutional premises; *Naz Foundation* held that it did.

The Indian constitutional experience illustrates a comparative, engaged living originalism in practice. It demonstrates that to engage comparatively does not necessarily entail a commitment to a project of constitutional convergence on a shared liberal democratic model, as constitutional cosmopolitans claim it must, and as nationalists fear. The dialogical model—as exemplified by *Gopalan* and *Naz Foundation*—provides a framework for engagement with comparative materials in a way that not only acknowledges, but also affirms, a distinct constitutional identity. It does so either by sharpening moments of constitutional difference (*Gopalan*) or by highlighting a shared (and arguably contingent) overlap of shared constitutional premises (*Naz Foundation*). The identity-affirming possibilities of comparative engagement have often been overlooked in the recent literature on comparative constitutional law, but are a common feature of constitutional argument across many jurisdictions. The globalization of the practice of modern constitutionalism is not necessarily in tension with a genuine commitment to “our constitution” as the overarching framework within which constitutional discourse occurs.

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55. Readers will notice that Indian constitutional doctrine shifted sharply in direction between *Gopalan* and *Naz Foundation* on the question of substantive due process. In *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597, the Supreme Court rejected *Gopalan* and announced the existence of the doctrine of substantive due process under Article 21. Until *Naz Foundation*, the principal target of the doctrine of substantive due process had been executive action. *Naz Foundation*, along with the Supreme Court's recent decision in *Selvi v. Karnataka*, A.I.R. 2010 S.C. 1974, may mark the beginning of the application of substantive due process to legislation. Moreover, *Naz Foundation* reformulated that doctrine, elevating the standard of review set out in *Maneka Gandhi*—that a violation of an Article 21 right not be “arbitrary”—to a requirement that the state demonstrate that it has a “compelling state interest” for infringing the right, a much more stringent standard. If the Supreme Court of India affirms *Naz Foundation* on appeal, it must offer a coherent framework that reconciles the interpretation of Article 21 with Part IV, and remains faithful to the basic relationship between Parts III and IV worked out during the framing of the Indian Constitution. For example, it may: (a) reaffirm that contract and property lie outside the scope of the provision; and (b) mandate deference to state action that purports to implement Part IV.

CONCLUSION: RETHINKING *LAWRENCE*

Let me conclude by reflecting on the dialogical model of comparative constitutional law for living originalism in the United States. Scholars of comparative constitutional law can sometimes be evangelical when proselytizing the benefits of comparative engagement to domestic constitutional analysis. To be clear, I do not hold this view. I do not stake the claim that for a constitutional actor to be worldly and sophisticated, comparative analysis is a necessity—and conversely, that the absence of comparative engagement is symptomatic of a narrow-minded and dated parochialism. Living originalism can regard comparative materials as irrelevant, and would not be deficient for doing so. But it is possible for a living originalist to harness them. Balkin says that when the American people engage in constitutional construction, they appeal to “the principles we committed ourselves to achieving and the evils we promised we would not permit again.”<sup>56</sup> The Indian experience illustrates how this kind of internally oriented constitutional conversation can nonetheless be enriched through comparative materials.

Here is how. One of the most powerful argumentative tropes in *Living Originalism* is analogy. For example, Balkin underlines how the woman suffragists drew parallels between the denial of their right to vote and the plight of the colonists who complained about taxation without representation.<sup>57</sup> Arguments by analogy highlight an underlying principle that unites two examples. This is a form of living originalism, because new social movements and social claims invoke historical examples of groups whose constitutional claims have been accepted in the past, and attempt to establish a continuity with them in the present.

Analogies from foreign constitutional systems can function in the same way—to help identify principles that *Americans* have already committed themselves to. The *Naz Foundation* case illustrates how this can be done with respect to novel legal questions. But foreign analogies can also be more disruptive, because they can highlight how precedents are unfaithful to national constitutional premises, and can provide the interpretive resources to overturn them. Consider a potential application of a comparatively inflected living originalism in *Lawrence*. *Lawrence* provoked a heated debate over its constitutional comparativism, both on and off the Court. Justice Kennedy’s majority judgment cites decisions of the European Court of Human Rights to illustrate “that the reasoning and holding in *Bowers* have been rejected elsewhere.”<sup>58</sup> Although it is

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56. BALKIN, *supra* note 1, at 63.

57. *Id.* at 84.

58. *Lawrence v. Texas*, 539 U.S. 558, 576 (2003).

possible to read *Lawrence*'s citation of European jurisprudence narrowly as a refutation of *Bowers*' claim that the prohibition of sodomy was universal in Western civilization, the better view is that the majority was engaged in an under-theorized form of cosmopolitan interpretation, which viewed *Lawrence* as part of a growing transnational discussion over same-sex rights, in which the American constitutional position had become increasingly anomalous. Justice Scalia's dissent sounded in nationalism, accusing the majority's references to European case law as "meaningless dicta" and "dangerous dicta" because "foreign views" were not relevant to the interpretation of the American Constitution.<sup>59</sup>

Balkin discusses *Lawrence*, but does not address its comparative engagement and the controversy surrounding it. Rather, he offers a series of ways to justify the decision that are applications of living originalism and are oriented inward toward the American constitutional tradition. One is the anti-caste theory of the Equal Protection Clause, which prohibits legislation that subordinates a social group, either by its intent or its effect, and creates second-class citizens.<sup>60</sup> The anti-caste principle emerges from a reading of the basic point of the Fourteenth Amendment and is anchored in the fight for racial equality.<sup>61</sup> In its fullest form, it comprehends the interdependent nature of discrimination at the hands of the state in a particular law, and a broader system of systemic disadvantage that cuts across the political, economic, and social spheres. The mediating mechanism between official discrimination at the hands of the state and a caste-like status is the social meaning created by legislative classifications. This meaning undergirds social norms that legitimize widespread discrimination across a broad range of interactions with public and private actors.

Over time, the Supreme Court has extended the reach of the anti-caste doctrine to protect other groups, including gays and lesbians in *Romer v. Evans*.<sup>62</sup> However, *Romer* focused narrowly on the issue of legislative animus,<sup>63</sup> and did not address the broader system of social meanings and subordination of which the challenged law was a part.<sup>64</sup> Justice O'Connor's concurrence in *Lawrence* moved further toward the full realization of the anti-caste doctrine in the area of same-sex rights, but

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59. *Id.* at 598 (Scalia, J., dissenting) ("The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans.'") (citation omitted).

60. BALKIN, *supra* note 1, at 235-36.

61. See Charles Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

62. 517 U.S. 620 (1996).

63. *Id.* at 632.

64. *Id.* at 630.

stopped short. She emphasized the issue of legislative animus and the collateral legal consequences of a conviction under the anti-sodomy law for a variety of areas like employment. But she only mentioned in passing the ways in which the mere existence of such laws create broader social meanings that subordinate gays and lesbians, and did not attach any constitutional significance to those broader social meanings and their concrete consequences.<sup>65</sup> Moreover, neither *Romer* nor *Lawrence* sought to draw analogies between orientation-based discrimination and race-based discrimination in order to shape the scope of the anti-caste doctrine and apply it in those cases.

Unlike Justice Kennedy's, Justice O'Connor's opinion did not engage with comparative materials. But her application of the anti-caste doctrine could have been strengthened by engaging with foreign decisions that have conceptualized the harm of anti-sodomy laws in terms of equality. These decisions highlight that the mere existence of such laws—even if unenforced—fuel harassment, violence, and prejudice by private actors against gays and lesbians. They do so by creating a status offense that renders gays and lesbians outsiders to the law, and which have analogized the effects of such laws to those that discriminate on the basis of race. Indeed, a comparative example was readily at hand. Five years prior to *Lawrence*, the South African Constitutional Court explained that the effect of an anti-sodomy law was to “legitimate or encourage blackmail, police entrapment, violence (‘queer-bashing’) and peripheral discrimination, such as the refusal of facilities, accommodation and opportunities.”<sup>66</sup> Moreover, the South African Constitutional Court drew a powerful analogy between the consequences of an anti-sodomy law and the consequences of laws that criminalized interracial sexual relations under apartheid. Thus, it explained that “[j]ust as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offense builds insecurity and vulnerability into the daily lives of gay men.”<sup>67</sup> In short, discrimination on the basis of sexual orientation was analogous to discrimination on the basis of race. Since the prohibition on racial discrimination is one of the core commitments of the South African constitutional order, this analogy highlighted the incompatibility between anti-sodomy laws and the basic premises of the South African

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65. *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) (“When a State makes homosexual conduct criminal, and not ‘deviate sexual intercourse’ committed by persons of different sexes, ‘that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.’” (citation omitted)).

66. *Nat'l Coal. for Gay & Lesbian Equal. & Another v. Minister of Justice & Others*, 1999 (1) SA 6 (CC) at para. 24 (quoting Edwin Cameron, *Sexual Orientation and the Constitution: A Test Case for Human Rights*, 110 S. AFR. L.J. 450, 456 (1993)).

67. *Id.* at para. 28.

constitutional project.

In applying the anti-caste doctrine, Justice O'Connor could have engaged with the reasoning of the South African Court, and made a parallel line of argument. She could have described the broader negative consequences that flow from the mere existence of anti-sodomy laws and the social meaning they create, explaining how they create a status offense. She could have then analogized these consequences to the harms created by the miscegenation laws that *Loving v. Virginia* held were prohibited by the Fourteenth Amendment because they were a form of racial discrimination.<sup>68</sup> In short, *Lawrence* presented a missed opportunity for the Court to make a link to *Loving* and to draw an analogy between discrimination on the basis of sexual orientation and race—a possibility that was highlighted by comparative jurisprudence from South Africa. If it has been used in this way, comparative constitutional law would not have functioned as evidence of a growing consensus across constitutional systems toward which the United States should converge. Rather, it would have served as an interpretive foil to enable an American court to apprehend and frame an argument for the unconstitutionality of anti-sodomy laws that was firmly rooted in the most central parts of the American constitutional tradition.

What would Balkin say to this analysis? Balkin defends *Lawrence* on the basis of the anti-caste principle and traces the origin of the principle to the struggle against racial subordination. But he does not set out all the doctrinal implications of this principle, nor their detailed application to anti-sodomy laws. The South African Constitutional Court's analysis would have assisted him in doing so, in the service of *American* constitutional principle. This is precisely the kind of comparatively inflected living originalism that I hope he would wholeheartedly endorse.

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68. 388 U.S. 1 (1967).