

CONSTITUTIONAL MIGRATION AND THE BOUNDS OF COMPARATIVE ANALYSIS

MICHEL ROSENFELD*

It is a great honor and pleasure to contribute to this issue of the *New York University Annual Survey of American Law* dedicated to Professor Norman Dorsen. Although I have known of Professor Dorsen since my law school student days in the 1970s, when I used his political and civil rights case book, I did not actually meet him until the 1990s. We met as I was working with several others, most notably Professor Louis Henkin of the Columbia Law School, to generate greater interest and participation among American constitutionalists in international and comparative constitutional law through the International Association of Constitutional Law (IACL). Professor Dorsen agreed to join the effort and, in large part due to his leadership, the U.S. Association of Constitutional Law (USACL), the American affiliate of the IACL, was founded and he became its President. Under Professor Dorsen's guidance, the USACL counts more than four hundred members, including academics, judges and interested practitioners. Moreover, since the creation of the USACL, Professor Dorsen has continued his impressive contributions to global, international and comparative endeavors, including the launching of *The International Journal of Constitutional Law* (I-CON) of which he is the Chair of the Editorial Board, and the preparation of a new casebook on comparative constitutional law of which he is a co-author.

Norman Dorsen's manifold outstanding intellectual, civic and organizational achievements are well known and deservedly widely praised. What I have found most extraordinary in the years I have had the privilege of working together with Professor Dorsen is that while he could have comfortably rested on his amply deserved laurels as a constitutional scholar, legal advocate in landmark cases, foremost leader in civil liberties and human rights organizations, and institution-builder (any single one of which would have clearly sufficed as the fulfillment of an exceptionally ambitious lifelong project), he continues to take on worthwhile new challenges with renewed creativity, rigorous discipline and seemingly boundless energy. Because of his outstanding contributions and exemplary fair-

* Justice Sydney L. Robins Professor of Human Rights, Benjamin N. Cardozo School of Law. President, International Association of Constitutional Law.

ness and open-mindedness, Professor Dorsen deserves the highest praise. I dedicate to him the following essay, on a subject on which we have been working together, as a small token of gratitude for his leadership and friendship.

I

Comparative law, in general, and comparative constitutional law, in particular, raise special concerns and objections.¹ The principal danger is that foreign materials will be taken out of context, and in the case of constitutional materials this is likely to be exacerbated as relevant differences are prone to be greater and more varied. For example, to the extent that contract law is predominantly concerned with facilitating economic exchange and maximizing efficiency, cultural differences may well only play a relatively minor role. In contrast, constitutional frameworks and objectives may differ so markedly from one country to the next as to raise serious questions about the ultimate worth of comparative analysis.²

Notwithstanding these difficulties, comparative constitutional analysis has become necessary and unavoidable, if for no other reason than there has been an impressive amount of migration of constitutional ideas and of transplantation of constitutional norms across national boundaries.³ Moreover, such migrations have oc-

1. See generally Günter Frankenberg, *Stranger than Paradise: Identity & Politics in Comparative Law*, 2 UTAH L. REV. 259, 262–63 (1997) (criticizing mainstream comparativists as “Anglo-Eurocentric” paternalists prone to imposing Western hegemonic approaches on the subject, and characterizing comparative law as “a postmodern form of conquest executed through legal transplants and harmonization strategies”); O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 17–18, 67 (1974) (arguing that constitutional law is much less amenable to legal transplant from one country to another than is private law).

2. For example, can one really compare the relation between religion and the state in a largely secular country with that in an intensely religious one, or in a religiously homogeneous polity with a religiously diverse one? Or else, even in the case of two religiously homogeneous countries, can one profitably compare a Catholic country to a Protestant one, or to a Moslem one? Cf. Nancy H. Fink, *The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values*, 27 CATH. U. L. REV. 207, 260 (1978) (claiming that the Establishment Clause of the First Amendment represents Protestant ideals and stands as a barrier to genuine freedom for other religions); Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court’s Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713, 716 (1993) (arguing that the Free Exercise Clause of the First Amendment represents, and has been interpreted in terms of, a distinctly Protestant conception of religion).

3. For example, the Canadian Charter of Rights and Freedoms has influenced the drafting of the Bills of Rights in South Africa, New Zealand and Hong Kong and the Basic Law in Israel. Sujit Choudhry, *Globalization in Search of Justification:*

curred not only in the context of constitution-making, but also in that of constitutional interpretation.⁴ Given, therefore, that use of foreign constitutional materials is prevalent, what ought to be expected of comparative constitutional analysis? What is its proper scope? What pitfalls should it seek to avoid? I shall briefly explore these questions below, first by focusing on certain key general issues, and then by examining two concrete cases of use of foreign materials by courts engaged in constitutional interpretation. In the first of these cases, the foreign material was closely considered, but rejected; in the second, the foreign material was relied upon to elaborate domestic constitutional doctrine.

II

To gauge the proper place and scope of comparative constitutional analysis, it seems logical to start by examining how foreign constitutional materials are actually being used in the making of constitutions and the elaboration of constitutional doctrine. Constitutional material has been imported⁵ and exported.⁶ In addition, at least with respect to fundamental rights, the spread of international covenants since World War Two has spearheaded a wide convergence of paramount constitutional norms.⁷ In particular,

Toward a Theory of Comparative Constitutional Interpretation, 74 IND. L.J. 819, 821–22 (1999).

4. See, for example, Section 39 of the South African Constitution, which provides in relevant part, that “[w]hen interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law[] and . . . may consider foreign law.” S. AFR. CONST. ch. II (Bill of Rights), §§ 39(1), 39(1)(b)-(c); see also GARY JEFFREY JACOBSON, *APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES* 177–227 (1993) (discussing Israeli Supreme Court’s embrace of American free speech doctrine).

5. See Choudhry, *supra* note 3, at 821–22 (describing references by South Africa, New Zealand, Hong Kong, and Israel, when drafting their respective constitutions, to the Canadian Charter of Rights and Freedoms).

6. See, e.g., Lawrence W. Beer, *Constitutionalism and Rights in Japan and Korea*, in *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 225, 229–43 (Louis Henkin & Albert J. Rosenthal eds., 1990) [hereinafter *CONSTITUTIONALISM AND RIGHTS*] (describing the United States’s involvement with the drafting and imposition of a constitution on occupied Japan after the latter’s surrender at the end of World War II).

7. Although formally the fundamental rights protected by international covenants are treaty-based rather than constitutional rights, functionally they often operate very much like their counterparts under national constitutions. Thus, for example, the rights guaranteed by the European Convention of Human Rights (ECHR) can be vindicated by individual citizens of countries party to the Convention before the ECHR Court in Strasbourg. MARK JANIS, ET AL., *EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS* 29 (2d ed. 2000).

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several rights similar to those included in the 1789 French Declaration of the Rights of Man and the 1791 American Bill of Rights were enshrined in the United Nations-sponsored International Covenant on Civil and Political Rights (ICCPR), while other rights similar to certain rights included in many twentieth century constitutions were adopted in the United Nations's International Covenant on Economic, Social and Cultural Rights (ICESCR). These covenants became binding after ratification by a sufficient number of countries in 1976.⁸ Furthermore, comparable rights have been embraced by regional charters for the protection of human rights, such as the aforementioned European Convention (ECHR)⁹ and its African and American counterparts.¹⁰ In short, in many parts of the world, an individual citizen can be protected by an overlapping set of similarly defined rights operating respectively on an international, regional and national scale. Also these various rights may not merely be superimposed on top of one another, but they may influence each other's shaping as, for example, when national courts take into account international or regional rights in the course of interpreting domestic constitutional rights.¹¹

Even where they are not directly adopted, rejected or incorporated, foreign materials can influence domestic constitutional development through more indirect means. Such indirect influence may occur through comparison or contrast.¹² In cases of an adoption, incorporation, or influence through favorable comparison of foreign constitutional materials, one can speak of "positive influence."¹³ Conversely, in cases of rejection or unfavorable contrast, one can speak of "negative influence."¹⁴ Both positive and negative influences, and even constitutional transplants, are more likely to involve transformation rather than mere copy, and are more prone to be dynamic rather than purely static. For example, the Israeli

8. These international covenants were initially approved by the United Nations ten years earlier in 1966. HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 137-39 (2000).

9. See *supra* note 7 and accompanying text.

10. STEINER & ALSTON, *supra* note 8, at 136.

11. See, e.g., *Regina v. Keegstra*, [1990] 3 S.C.R. 697, 749-754 (Can.) (considering Article 4 of the United Nations' *International Convention on the Elimination of All Forms of Racial Discrimination* ratified by Canada in determining the constitutionality of "hate speech" under the freedom of expression protections extended by the 1982 Canadian Charter of Rights and Freedoms).

12. This is what took place in the two cases discussed in Section IV below.

13. Andrzej Rapaczynski, *Bibliographical Essay: The Influence of Constitutionalism Abroad*, in *CONSTITUTIONALISM AND RIGHTS*, *supra* note 6, at 407-08.

14. *Id.*

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Supreme Court's adoption of American First Amendment doctrine¹⁵ has led to rulings on certain issues that are inconsistent with American decisions on the same issue.¹⁶ On the other hand, in an example of negative influence, India refused in the 1940s to extend due process protection to property rights in its new constitution for fear of repeating the United States's experience during the *Lochner* era.¹⁷ During the *Lochner* era, which lasted from 1905 to 1934,¹⁸ the United States Supreme Court struck down much social and economic regulation as a consequence of reading a substantive component into due process property rights and thus entrenching laissez-faire conceptions of private property and freedom of contract rights. However, by the time India began work on its new constitution, the United States Supreme Court had thoroughly repudiated the *Lochner* doctrine for well over a decade.¹⁹ Accordingly, the negative influence of *Lochner* on India was that of a discredited American doctrine rather than that of a prevailing one.

III

Because of the multiplicity and complexity of contextual variables often confronting comparativists, apparent similarities or differences among constitutional norms or doctrines emanating from distinct national constitutions may sometimes prove misleading. For example, a cursory review of various freedom of speech provisions drawn from numerous constitutions throughout the world reveals a striking similarity in the formulation of that right. Examination of how freedom of speech is construed in various countries,

15. JACOBSON, *supra* note 4, at 180.

16. *See, e.g., id.* at 211–12 (discussing the case C.A. 9/77, *Electric Co. v. Ha'aretz*, 32(3) P.D. 337, in which the Israeli Supreme Court cautioned against being “taken in by the American decision in *New York Times v. Sullivan* [376 U.S. 254 (1964)],” and held that a person's right to reputation was entitled to the same considerations as another's right to speech); *cf.* JACOBSON, *supra* note 4, at 178–79 (noting Israel's use of American doctrine could also reach diametrically opposed results in hate speech cases as exemplified in a hypothetical posed by Justice Barak in C.A. 399/85, *Kahane v. Broad. Auth.*, 41(3) P.D. 255, 295–96).

17. Soli J. Sorabjee, *Equality in the United States and India*, in CONSTITUTIONALISM AND RIGHTS, *supra* note 6, at 94, 96–97.

18. This era took the name of the U.S. Supreme Court decision in *Lochner v. New York*, 198 U.S. 45 (1905).

19. *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934).

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however, reveals huge discrepancies ranging from virtually unconstrained liberty to extensive speech regulation.²⁰

Conversely, what initially appears to be clearly different may turn out in the end to be quite similar. This is well illustrated through a comparison of the nearly contemporaneous abortion decisions issued respectively by the United States Supreme Court and the German Constitutional Court. In *Roe v. Wade*,²¹ the Supreme Court recognized a constitutional right to abortion predicated on a woman's privacy and liberty rights. In contrast, the German Court in the *Abortion I Case*²² stressed above all the paramountcy of the right to life, underscoring the German Constitution's great commitment to reversing the Nazi regime's wanton disregard for life culminating in its "final solution" policy.²³ In spite of their markedly different approaches, both courts carved out abortion rights that seem nearly equivalent in terms of their practical scope. The American Court allowed for limitations on a woman's privacy rights for purposes of protecting her health or her fetus's potential for life after reaching viability; the German Court, for its part, allowed for exceptions to the protection of the fetus when required for purposes of safeguarding the pregnant woman's physical or mental well-being. In view of this, it is not obvious whether greater weight ought to be placed on the similarities between the practical results reached in the two countries or on the differences between the two jurisprudences; or, whether these differences ought to be primarily viewed in terms of rationalizations embedded in different political cultures.

Comparativists confront a further complication stemming from the strategic use of foreign constitutional materials. Indeed, constitution-makers or interpreters of the constitution may seek to enhance the legitimacy of their decisions by couching them in terms of well-respected foreign constitutional norms, even in the absence of genuine fit. For example, the Israeli Supreme Court had recourse to American First Amendment doctrine in cases leading to outcomes strikingly at odds with the outcomes of similar

20. See generally Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 353 (Michel Rosenfeld ed., 1994).

21. 410 U.S. 113 (1973).

22. Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 39, 1 (F.R.G.), translated in DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 336-46 (2d ed. 1997).

23. See *id.* at 336-39.

cases in the United States.²⁴ Quite plausibly the Israeli Supreme Court, operating without a written constitution and in the face of significant uncertainty concerning the scope of its ultimate authority, could gain in stature and legitimacy by embracing well-respected and established American doctrine. Moreover, the lack of fit, far from delegitimizing the borrowings, could paradoxically enhance their perceived validity. This could be either if the divergent results were interpreted in terms of a proper accounting for relevant contextual differences; or, if the discrepancy between results was viewed as a necessary but limited departure from the normative protections flowing from the imported doctrine, in ways that remain consistent with commitment to the fundamental values at stake. In short, while fashioning a somewhat more restricted right to free speech than that warranted by the American doctrine it embraces, the Israeli Supreme Court may have at once created for itself a greater space to fashion limits to guaranteed protections, and made it much more difficult to impose further limitations beyond a certain point.

Strategic use of legal materials can occur as much in a purely domestic setting as in a transnational one. Indeed, it is quite natural for legal advocates, in common law jurisdictions at least, to use legal precedents strategically, stressing helpful aspects or interpretations while downplaying those that run counter to their clients' interests. Moreover, to the extent that judges must defend the decisions they have reached in their opinions—often against explicit attack by their dissenting colleagues²⁵—they too can be prompted to use materials strategically.²⁶ Consistent with these remarks, the principal difference between strategic use of domestic materials and of foreign materials is that in the latter case contextual differences are likely to be both greater and more difficult to grasp. Thus, the comparativist needs to be more vigilant than those

24. JACOBSON, *supra* note 4, at 178–79, 211–12 (noting that the adoption of American doctrine could reach diametrically opposed results in hate speech cases and has in freedom of the press cases).

25. For an example of an exchange between Justices Scalia and Breyer concerning the legitimacy of having recourse to comparative analysis in order to resolve issues relating to American federalism, see *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (majority opinion written by Scalia, J.) and *id.* at 976–77 (Breyer, J., dissenting).

26. This does not imply, of course, that judges use materials strategically to benefit one party before them or another. Rather, judges, strictly speaking, become advocates of their own decisions, thus tending to view precedents in the light most favorable to such decisions.

who deal exclusively with domestic borrowings, but otherwise their respective tasks appear to be nearly identical.

Whether approaching foreign constitutional materials from a strategic or a purely straightforward comparativist standpoint, one should be mindful that there may be significant diversity within a single national constitutional jurisprudence or tradition. For example, should a foreign constitutional court look to the U.S. Supreme Court for guidance concerning whether to extend constitutional privacy protection to homosexual sex among consenting adults, it would hardly find any clear-cut guidance. Indeed, not only did the United States Supreme Court split 5-4 in its decision to deny extending such rights to homosexuals in its controversial 1986 ruling in *Bowers v. Hardwick*,²⁷ but the Court's majority did not appear to share a common view on the subject.²⁸ And if that were not enough, one of the five Justices in the majority indicated after his retirement from the Court, four years after the *Bowers* decision, that he "probably made a mistake."²⁹

Even where there is a palpable lack of unity, a foreign constitutional jurisprudence may be instructive in the way it frames issues and in the way the relevant antagonists construct their opposing arguments in light of the operative conceptual settings. For example, a foreign constitutional court looking to the United States for guidance in determining whether affirmative action is consistent with constitutional equality would find first that the United States Supreme Court could not muster a bare majority to agree on a uniform constitutional standard to assess the constitutionality of affirmative action during the first eleven years that it dealt with the issue.³⁰ Second, the foreign court would realize that the profound

27. 478 U.S. 186 (1986) (5-4 decision).

28. Compare *id.* at 190-94 (stressing the lack of tradition supporting the right at stake, and the absence of a logically compelling reason for extending to homosexuals privacy protections available to heterosexuals), with *id.* at 196 (Burger, C.J., concurring) (emphasizing the strong moral condemnation of homosexuality in the Judeo-Christian tradition).

29. Retired Justice Powell made this statement on October 18, 1990, at New York University School of Law. Anand Agneshwar, *Ex-Justice Says He May Have Been Wrong*, NAT'L LAW J., Nov. 5, 1990, at 3.

30. The first affirmative action case decided on the merits by the Supreme Court was *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). A majority on the Court did not agree on a single criterion for determining the constitutionality of race-based affirmative action until its decision in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). For an extended analysis of the Court's jurisprudence during that period, see MICHEL ROSENFELD, *AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY* 163-215 (1991) [hereinafter ROSENFELD, *AFFIRMATIVE ACTION AND JUSTICE*].

split within the Supreme Court regarding affirmative action revolves around a definite axis, and is constrained by a concrete set of ideological and historical factors. Thus, all sides to the affirmative action debate in the United States agree that constitutional equality is individual-regarding rather than group-regarding;³¹ that constitutional equality should conform to equality of opportunity rather than equality of result;³² and that the ideal society should be color-blind.³³ Consistent with this, American jurisprudence on affirmative action would presumably have little to contribute in a constitutional setting marked by commitment to group-regarding equality, far removed from the racial issues that have profoundly affected American history, and ideologically oriented towards equality of result rather than equality of opportunity. Indeed, the principal objections to affirmative action in the United States are that it devalues individual merit and achievement—which are crucial to the realization of equality of opportunity—and that it unduly promotes group-regarding objectives. Clearly, these objections vanish if the goal is to equalize benefits among groups and if the constitution is meant to secure equality of result rather than promoting equality of opportunity.

When contextual variables are properly accounted for, comparative constitutional analysis can play a useful role in identifying relevant and meaningful similarities and differences and convergences and divergences. Comparative analysis can also indicate to what extent transplanted constitutional materials assume in their country of adoption the role they perform in their country of origin. Comparative analysis can shed light on foreign constitutional concepts, doctrines, and practices, but it is also useful for purposes of obtaining a better understanding of one's own constitutional order or culture through comparisons with relevant foreign counterparts. Finally, in as much as a country's constitutional jurisprudence is fragmented, such as the American jurisprudence on homosexuality or affirmative action, it may even in the best of cases not provide solutions, but only paths of argumentation centered around particular axes.

IV

Further insights into the uses of comparative analysis can now be pursued through a brief examination of two actual cases. The

31. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

32. See ROSENFELD, *AFFIRMATIVE ACTION AND JUSTICE*, *supra* note 30, at 158–60.

33. *Id.* at 207.

first of these, *Regina v. Keegstra*,³⁴ was a 4-3 decision by the Canadian Supreme Court upholding the constitutionality of a criminal statute punishing hate speech. The statute was challenged as being in violation of the right to freedom of expression protected by the Canadian Charter.³⁵ In deciding this case, the Canadian Supreme Court's majority examined American First Amendment doctrine, and decided not to follow it.³⁶ The second case, *State v. Solberg*,³⁷ was a decision by the Constitutional Court of South Africa that upheld a ban on the sale of certain alcoholic beverages on Sundays, Good Friday and Christmas as not violative of the freedom of religion clause of South Africa's interim constitution.³⁸ In a concurring opinion, Justice Sachs concluded that the challenged law did violate freedom of religion, and relied on American Establishment Clause jurisprudence to justify his position. Accordingly, I will focus below on Justice Sachs's opinion rather than on that of the Court's majority.

Keegstra upheld a ban against crude anti-Semitic statements designed to incite hatred, but unlikely to lead to any immediate incitement to violence. In many respects, the situation in *Keegstra* seems very similar to that at stake in the *Collin v. Smith* case involving a proposed neo-Nazi march in a Jewish neighborhood called the village of Skokie, a suburb of Chicago.³⁹ Because the proposed Neo-Nazi march was deemed not to amount to an incitement to violence, however, the American courts held it to be protected speech.⁴⁰ Thus, the Canadian Supreme Court reached the opposite result than that produced by American courts, and did so after a thorough and sophisticated analysis of American free speech jurisprudence.

To say that the Canadian Court rejected the American approach because of differences in culture and in the delimitation of the respective rights involved would not be wrong, but it would be misleading. It would be more accurate to stress that the Canadian Court noted and carefully weighed a series of convergences and divergences between the two constitutional jurisprudences, and de-

34. [1990] 3 S.C.R. 697 (Can.).

35. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2(b).

36. [1990] 3 S.C.R. 697 (Can.).

37. 1997 (10) BCLR 1348 (CC) (S. Afr.).

38. S. AFR. CONST. (Interim, Act No. 200, 1993) ch. 3 (Fundamental Rights), § 14 (Religion, belief and opinion).

39. 578 F.2d 1197 (7th Cir. 1978).

40. *Id.* at 1201-10.

cided that on balance, the American *doctrine* was not sufficiently suited for adoption in Canada.

Distilled to its essentials, the difference between the Canadian constitutional jurisprudence on hate speech and its American counterpart in the aftermath of *Keegstra* is as follows. In Canada, hate speech is not constitutionally protected if it amounts to *incitement to hatred* on the basis of race, religion or ethnic origin, while in the United States hate speech is protected so long as it does not constitute *incitement to violence*.⁴¹ Behind this difference, moreover, stand two pluralist multi-ethnic and multi-religious constitutional democracies, both steeped in a common law tradition inherited from the British, and both, in the broadest terms, sharing the conviction that free speech is essential for purposes of pursuing the truth, achieving democracy, and promoting human flourishing and self-fulfillment through self-expression.⁴²

Underneath this great abstract convergence, however, lurks several divergences leading to important differences in perception and self-perception. Canada's democracy and constitutionalism is steeped in a culture committed to multiculturalism and group-regarding equality.⁴³ This is in contrast to the United States's emphasis on individualism and an assimilationist ideal.⁴⁴ Accordingly, while the United States has endeavored to become a "melting pot," Canada has placed greater emphasis on diversity and promoted the image of an "ethnic mosaic."⁴⁵

Consistent with those differences, Canadian conceptions of democracy, pursuit of the truth, and the connection between self-expression and self-fulfillment—all of which are meant to be

41. This latter standard was explicitly adopted by the U.S. Supreme Court in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam), and has been followed ever since. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). However, as noted by the Canadian Supreme Court in *Keegstra*, neither *Brandenburg* nor any subsequent American case has formally overruled *Beauharnais v. Illinois*, 343 U.S. 250 (1952), a 5-4 decision upholding a criminal group libel law in the context of hate speech that did not amount to an incitement to violence. *Keegstra*, [1990] 3 S.C.R. at 739.

42. For a more extended comparison, see Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis* (Cardozo Law School, Public Law Research Paper No. 41, April 2001), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=265939.

43. Kathleen Mahoney, *The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography*, 55 *LAW & CONTEMP. PROBS* 77, 85 (1992).

44. See discussion *supra* pp. 11–12.

45. See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 14 (1995).

promoted by freedom of expression—differ significantly from their United States counterparts. For example, inasmuch as ethnic group interests figure prominently in Canadian democratic politics, and hate speech tends to threaten mutual respect among groups, freedom of speech's nexus to democracy justifies excluding protection from incitement to ethnic hatred. Furthermore, while Canada's commitment to pursuit of the truth is in principle as strong as that of the United States, the majority in *Keegstra* noted that reliance on the "marketplace of ideas" should be subject to certain constraints, given the experience during the Nazi era and thereafter with hate propaganda that fueled pernicious and all-too-often eventually destructive passions.⁴⁶ Finally, because of its less individualistic and less atomistic conception of self-expression and self-fulfillment, the Canadian Supreme Court expressed more concern than its United States counterpart for the gradual long-term effects of hate speech not only on its intended targets but also on the non-target audience whom it might influence or desensitize over time.⁴⁷ Accordingly, the Canadian Court concluded that drawing the line at incitement to hatred was more appropriate than doing so at incitement to violence.⁴⁸

Besides stressing the differences between the two countries' constitutional approaches, the Canadian Court also sought to buttress the validity of its own solution, by pointing out that the American position was not as clear-cut or straightforward as it might first appear. In so doing, the Canadian Court took into account not only judicial opinions relating to hate speech, but also scholarly commentary on the subject. According to the Canadian Court, when the American picture is taken as a whole—including the fact that *Beauharnais*, the case that upheld banning group libel, has never been overruled⁴⁹ and that several American scholars had recently called for exempting hate speech from constitutional protec-

46. *Keegstra*, [1990] 3 S.C.R. at 747.

47. *Id.* at 746–47.

48. *See id.* Whereas the incitement to violence standard seems to focus exclusively on the proponents and targets of hate speech—the first being presumably sometimes prompted to violence by their own hate rhetoric in contrast to the latter who might react violently to being vilified by the hate message—the incitement to hatred standard addresses concerns relating to the targets of hate speech and to those other listeners who are not in the target group. *See id.* Indeed, the target group victimized by hate speech may gradually withdraw from the larger society and live in fear whereas the non-target groups may gradually lose respect for the victims or become indifferent to their suffering, thus greatly weakening the social fabric of the polity. *Id.*

49. *Id.* at 739.

tion⁵⁰—the case for tolerating hate speech is by no means clear.⁵¹ Moreover, to the extent that American toleration of hate speech is closely linked to that country's strong aversion to content-based regulation of speech, the Canadian Court expressed skepticism about the firmness or immutability of the aversion in question. Noting that the United States Supreme Court has upheld bans on obscenity and allowed for greater regulation of commercial speech than other kinds of expression, the Canadian Court argued that the American commitment to content-neutrality was, at least in practice, far from ironclad. In short, both because of differences between the two countries' constitutional objectives, and because some other differences may be more superficial than real, the Canadian Supreme Court concluded that the contrary American approach to hate speech did not militate against its own solution to the problem.

The concurring opinion of Justice Sachs in *State v. Solberg* is remarkable not because it relied on American constitutional doctrine to resolve an issue arising under the South African Constitution, but because it drew on the American Establishment Clause, which deals with the separation between Church and State, when the South African constitutional order does not explicitly address such separation.⁵² As already mentioned, the South African Constitution encourages looking to foreign law in constitutional cases.⁵³ The relevant constitutional provisions relating to religion in *Solberg*, however, involved only the right to freedom of religion and a derivation from the right to equality that discrimination on the basis of religion was presumptively unfair (and hence unconstitutional).⁵⁴ The South African Constitution has no equivalent to the Establishment Clause. As a matter of fact, state aid to religion was specifically authorized by the interim constitution then in force, provided only that such aid was dispensed equitably and that individuals affected thereby were affected freely and voluntarily.⁵⁵

The narrow question concerning equity and freedom of religion before the South African constitutional court in *Solberg* was

50. See, e.g., Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (proposing legal sanctions for racist speech and "reject[ing] an absolutist first amendment position").

51. See *Keegstra*, [1990] 3 S.C.R. at 738–41.

52. 1997 (10) BCLR 1348, 1392 (CC) (S. Afr.) (Sachs, J., concurring).

53. See *supra* note 4 and accompanying text.

54. *Solberg*, 1997 (10) BCLR at 1392.

55. *Id.* at 1393 (referring specifically to the "unwillingness to erect walls of separations [sic] between church and state" on the part of the South African Constitution's drafters).

whether the ban on the sale of certain liquors on Sundays, Easter and Christmas, but not on other Christian or secular holidays, was constitutionally permissible.⁵⁶ Stressing that the entire South African Bill of Rights evinces a strong constitutional commitment to an open, diverse, and pluralistic society with “no official orthodoxy or faith,”⁵⁷ Justice Sachs indicated that the challenged liquor law could be constitutionally problematic if, *inter alia*, it appeared symbolic of a government endorsement.⁵⁸ Indeed, notwithstanding the lack of an establishment clause, any such perceived endorsement would be constitutionally suspect inasmuch as it would tend to cast South Africans belonging to the favored religion as “insiders,” and all others as “outsiders.”⁵⁹

Justice Sachs referred to the American Establishment Clause jurisprudence in general, and to the United States Supreme Court decision in *Lynch v. Donnelly*⁶⁰ in particular, because notwithstanding the differences between the respective societies and constitutions involved, the American jurisprudence provided useful insight into the problem of division among insiders and outsiders. In drawing on American jurisprudence, however, Justice Sachs was mindful of the dangers of “simplistic transplantation” and of the need to account for both South Africa’s “specific situation” and the “problems [it] share[s] with all humanity.”⁶¹ Moreover, Justice Sachs explained:

If I draw on statements by certain United States Supreme Court justices, I do so not because I treat their decisions as precedents to be applied in our courts, but because their dicta articulate in an elegant and helpful manner problems which face any modern court dealing with what has loosely been called church/state relations. Thus, though drawn from an-

56. *Id.* at 1355–56 (majority opinion) (quoting LOURENS DU PLESSIS & HUGH CORDER, UNDERSTANDING SOUTH AFRICA’S TRANSITIONAL BILL OF RIGHTS 157 (1994) (internal quotation marks omitted)). Technically, the ultimate determination of the constitutionality of the Sunday liquor law challenged in *Solberg* depended on a two step inquiry. First, it had to be determined whether the challenged law was in violation of freedom of religion and equality. *Id.* at 1392 (Sachs, J., concurring). Second, if the law was found thus in violation, it could still pass constitutional muster provided it amounted to a reasonable limitation of those rights in an open and democratic society. *Id.* at 1392 n.109. Justice Sachs found a violation, but concluded that it amounted to a reasonable limitation. *Id.* at 1409–10. In what follows, I only deal with the first step of his inquiry.

57. *Id.* at 1394.

58. *Id.* at 1390.

59. *Id.*

60. 465 U.S. 668 (1984).

61. *Solberg*, 1997 (10) BCLR at 1391–92.

other legal culture they express values and dilemmas in a way which I find most helpful in elucidating the meaning of our own constitutional text.⁶²

Turning to the specific issue before Justice Sachs, it may seem at first odd that he should focus on *Lynch*—a case about a crèche located on municipal property as part of a Christmas display involving Santa Claus and reindeer—in the context of a liquor sales ban. But on further inquiry, and when placed in their proper respective settings, the two cases turn out to have much in common. Indeed, in both cases what was at stake was the perception of government endorsement of a particular religion rather than actual endorsement. The principal objective in *Solberg* was public safety and the reduction of alcohol-related injuries on roads during public holidays; in *Lynch*, the objective was to enhance local commerce and entice consumers to patronize merchants with stores in the center of town where the display with the crèche was located. Also, in both cases, though the ultimate objective may have been secular, the means employed showcased one particular religious tradition among the many prevalent in the polity. This is self-evident in *Lynch*, but also true in *Solberg* given South Africa's strong Protestant heritage, the ubiquity of its Christian temperance tradition, and the fact that the ban only included Sundays and certain other Christian holidays although the dangers posed by drivers under the influence of alcohol is in all likelihood the same on all public holidays.

In *Lynch*, the Court held 5-4 that the display including the crèche did not violate the Establishment Clause.⁶³ It may therefore seem ironic that Justice Sachs should look to *Lynch* to buttress his conclusion that South Africa's liquor sales ban ran counter to that country's constitutional protection of freedom of religion. Actually, Justice Sachs focused not on *Lynch*'s outcome but on the common approach to the problem adopted in Justice O'Connor's concurring opinion⁶⁴ and Justice Brennan's dissenting opinion.⁶⁵ Both of these justices focused on the message that a state endorsement of a particular religion sends to non-adherents—that they are not full members of the political community.⁶⁶ The difference between the two is that whereas Justice O'Connor does not believe

62. *Id.* at 1392–93.

63. *Lynch*, 465 U.S. at 671–72.

64. *Id.* at 687 (O'Connor, J., concurring).

65. *Id.* at 694 (Brennan, J., dissenting).

66. *Id.* at 688 (O'Connor, J., concurring) (“Endorsement sends a message to nonadherents that they are outsiders”); *id.* at 701 (Brennan, J., dissenting) (“The effect on minority religious groups, . . . [or] those who may reject all relig-

that inclusion of the crèche in an otherwise commercial Christmas display conveys a meaning of endorsement,⁶⁷ Justice Brennan does.⁶⁸ And Justice Sachs agrees with Brennan, thus finding support for his own conclusions in *Lynch*'s dissenting opinion.

Strictly speaking, *Lynch* does not involve an endorsement of religion—the municipal government is not displaying the crèche to convey the message that Christianity is the only true religion—but rather an *incorporation* of the symbols and traditions of a particular religion; the message becomes an invitation to all to come and celebrate this national holiday season of which the story of the birth of Christ is an integral part. It is precisely this kind of incorporation that lies at the root of Justice Sachs's objection to the liquor sales ban. Prior to recent adoption of its new constitutional order, South Africa's law and public sphere were strongly marked by Christian norms and prescriptions,⁶⁹ and the apartheid regime was inextricably linked to state promotion of certain Christian values.⁷⁰ Accordingly, it is easy to understand how incorporation of Christianity or its symbols in otherwise secular legislation might exacerbate feelings of being insiders or outsiders. In short, although on the surface *Lynch* seems to have little in common with *Solberg*, Justice Sachs identifies certain deeper links which make the American case relevant in South Africa, despite the lack of an establishment clause in its constitution.

V

The preceding discussion highlights some of the many uses of foreign constitutional materials and of the complexities associated with them. It also confirms that comparative constitutional analysis is necessary, potentially productive, capable of yielding insights into one's own constitutional system as well as into others, but also fraught with difficulties and potential pitfalls. As the world becomes more interdependent, borrowings and comparisons are increasingly inevitable. The main question relates to their optimal use and proper scope. To a large extent, the answer to that question depends on one's conception of the proper relation between

ion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support.”).

67. *Id.* at 693 (O'Connor, J., concurring).

68. *Id.* at 695 (Brennan, J., dissenting).

69. *Solberg*, 1997 (10) BCLR at 1395–96.

70. This is, of course, not to say that apartheid had any inherent links to Christianity. As a matter of fact, when Christian beliefs were invoked against apartheid, they were ruthlessly suppressed. *Id.* at 1395 n.120.

identity and difference in the context of constitutional norms, order and practices. For some, the basic principles of constitutional law are essentially the same throughout the world.⁷¹ For others, the problems confronting different societies are frequently the same, but the solutions are different inasmuch as they must be tailored to the particular needs of each society.⁷² Finally, at the other end of the spectrum is Montesquieu's view that the laws of each nation ought to be so closely tailored to fit its particular needs that it is highly unlikely that they would be suitable for another nation.⁷³ But is that latter view still pertinent today? In any event, whatever one's position, comparative analysis is still indispensable. Its ultimate reach and meaning may vary, however, depending on one's position on the relative importance of convergences and divergences.

71. *See, e.g.*, DAVID BEATTY, *CONSTITUTIONAL LAW IN THEORY AND PRACTICE* (1995).

72. *See, e.g.*, MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 10 (2d ed. 1994); Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 534–36 (1992).

73. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 8 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

