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# Constitutional Borrowing

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# CONSTITUTIONAL BORROWING

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Robert L. Tsai\*\*

*Borrowing from one domain to promote ideas in another domain is a staple of constitutional decisionmaking. Precedents, arguments, concepts, tropes, and heuristics all can be carried across doctrinal boundaries for purposes of persuasion. Yet the practice itself remains underanalyzed. This Article seeks to bring greater theoretical attention to the matter. It defines what constitutional borrowing is and what it is not, presents a typology that describes its common forms, undertakes a principled defense of borrowing, and identifies some of the risks involved. Our examples draw particular attention to places where legal mechanisms and ideas migrate between fields of law associated with liberty, on the one hand, and equality, on the other. We finish by discussing how attentiveness to borrowing may illuminate or improve prominent theories of constitutional lawmaking.*

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## INTRODUCTION

In the American system, areas of constitutional law are often conceptualized separately—think of free speech, equal protection, separation of powers. Perhaps due to that tendency, a common phenomenon has gone surprisingly unnoticed in the literature: constitutional borrowing. In this Article, we aim to bring that practice to light, showing how borrowing works in everyday practice and assessing its implications for American constitutionalism. Our investigation, at bottom, concerns how separate bodies of legal knowledge are interconnected and managed.

Consider *Lawrence v. Texas*,<sup>1</sup> in which the Supreme Court ruled that a law criminalizing homosexual conduct violated the right to “liberty” protected by the Due Process Clause. It is possible to see in the decision an appropriation from the language of equality. Justice Kennedy explained:

Equality of treatment and the due process right to demand respect for conduct . . . are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.<sup>2</sup>

The mere existence of laws regulating homosexual conduct amounts to “an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”<sup>3</sup> Moreover, as Kennedy stressed, *Bowers v.*

1. 539 U.S. 558 (2003).

2. *Id.* at 575. Toward the end of the majority opinion, the themes of respect and antistigmatization again populate the reasoning of the Court: “The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.” *Id.* at 578.

3. *Id.* at 575.

*Hardwick's*<sup>4</sup> “continuance as precedent demeans the lives of homosexual persons.”<sup>5</sup> This is a layered response to Justice O'Connor's concurring opinion, which would have decided the case on equal protection grounds.

It is also a prominent instance of constitutional borrowing. Despite formally refusing the equality rationale, the *Lawrence* Court nevertheless appropriated the rhetoric of equality—“stigma,” “discrimination,” and “respect”—to stake the claim that its liberty approach simultaneously protects core equality values.

The phenomenon is not limited to the Supreme Court. Across many institutions legal actors engage in constitutional borrowing for a range of purposes and with complex effects, some apparent and others less obvious. What is interesting to us is that virtually all discussion surrounding instances of borrowing has concerned the substantive appropriateness of the specific appropriation and not the practice itself. Borrowing is simply assumed to be as legitimate as any other mode of persuasion.

In this Article, we set out to name, organize, and evaluate the dynamics of constitutional borrowing. Part I defines and describes the phenomenon. To anticipate, constitutional borrowing is the practice of importing doctrines, rationales, tropes, or other legal elements from one area of constitutional law into another for persuasive ends.<sup>6</sup> We offer several detailed examples, drawing on cases from contrasting bodies of law and time periods. Throughout, we hold to the view that constitutional borrowing comprises a set of practices that can meaningfully and profitably be analyzed together. We pay particular attention to cases in which the Court has traded between liberty and equality. Partly that is because several prominent commentators have recently advocated more aggressive use of liberty doctrines to effectuate what have traditionally been viewed as egalitarian objectives.<sup>7</sup> Therefore, an assessment of these moves seems timely.

Borrowing occurs throughout the law, of course. While we hope that our study will have wide appeal as a consequence, we focus for now on the peculiar challenges of *constitutional* borrowing. Appropriations in this context can raise democratic considerations of the first order, some of which are particular to constitutional law.

Part II presents a typology of constitutional borrowing, focusing on four everyday forms: transplantation, hedging, displacement, and corruption.

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4. 478 U.S. 186 (1986).

5. *Lawrence*, 539 U.S. at 575.

6. Throughout the Article, we use terms such as “borrowing,” “appropriation,” “cross-pollination,” “migration,” and “cross-fertilization” interchangeably. These different words convey the same idea and signify no added distinctions. No descriptor can perfectly capture all of the nuances of the phenomenon, and becoming absorbed with metaphors can distract from the central question of *how* ideas transcend imagined boundaries. See generally THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2006).

7. See, e.g., Jack M. Balkin & Reva B. Siegel, *Remembering How to Do Equality*, in THE CONSTITUTION IN 2020, at 93 (Jack M. Balkin & Reva B. Siegel eds., 2009); Kenji Yoshino, *The Pressure to Cover*, N.Y. TIMES MAG., Jan. 15, 2006, at 32.

These forms can be distinguished based on the borrower's motivations, the circumstances under which the tactic might be preferred, and the persuasive effects and doctrinal consequences entailed. We offer practical illustrations of each type, recognizing that real-world examples often blend two or more of them.

Part III undertakes a considered defense of cross-pollination. On balance, we conclude that constitutional borrowing serves important rule-of-law values, especially commitments to generality, participation, and accountability. Creating a shared repertoire of persuasive moves also opens up possibilities for strategic leveraging by advocates, who may seize opportunities to deploy a device or framework from one field of constitutional law in some other area. In this way, the custom of borrowing empowers citizens and officials alike to take governing principles seriously. It also promises systemic gains, not only promoting certain doctrines in the target domain, but also reinforcing the source idea. For all these reasons, and despite some real dangers, we endorse the general practice.

Even though borrowing is a legitimate and widely accepted part of constitutional lawmaking, it would be a mistake to leap to the conclusion that every act of borrowing is either valid or successful. Part IV presents four criteria by which a particular presentation can be evaluated: fit, transparency, completeness, and yield. This list is not exhaustive, but it offers a tool for organizing further critiques. Part V elaborates how the practice of importation may illuminate or improve five prominent theories: originalism, living constitutionalism, minimalism, redemptive constitutionalism, and popular constitutionalism.

## I. WHAT IS CONSTITUTIONAL BORROWING?

Our first task is to define the phenomenon of constitutional borrowing. Precision will allow readers to assess whether, in fact, the tendency to appropriate is as pervasive as we claim. Once we settle on a working definition of borrowing, we will give some reasons why legal actors may be tempted to cross over from one legal area to another. We then will offer an example of strategic appropriation that also previews some of its risks.

### A. A Definition

For some, the term constitutional borrowing will conjure an act of original design,<sup>8</sup> such as when drafters of a new charter insert language taken from another people's governing document. In describing constitutional bor-

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8. See, e.g., Lee Epstein & Jack Knight, *Constitutional borrowing and nonborrowing*, 1 INT'L J. CONST. L. 196, 197 (2003) (describing borrowing as "'a case of' a larger phenomenon: institutional design"); Frederick Schauer, *On the Migration of Constitutional Ideas*, 37 CONN. L. REV. 907 (2005) (challenging both the model of the "imposed constitution" and the model of the "indigenous constitution"); see also *infra* note 15.

rowing, we do not mean to exclude that initial act of creativity, but we are more interested in the many less formal but far more prevalent aspects of borrowing, such as the ordinary importation of doctrine from one field of domestic law into another. Our goal, then, is to open everyone's eyes to the practices of everyday appropriation.

1. *What do we mean by constitutional borrowing?* A person engages in borrowing when, in the course of trying to persuade someone to adopt a reading of the Constitution, that person draws on one domain of constitutional knowledge in order to interpret, bolster, or otherwise illuminate another domain.<sup>9</sup> It is, in other words, an interpretive practice characterized by a deliberate effort to bridge disparate constitutional fields for persuasive ends.

Notice a few features of this definition. First, it assumes that the average practitioner thinks of constitutional law as organized into separate, bounded, and coherent domains. Practicing lawyers do not commonly work with constitutional law as an undifferentiated whole, but instead experience it as organized into discrete bodies of legal knowledge, such as free speech, substantive due process, equal protection, criminal procedure, or separation of powers. Either explicitly or implicitly, they accept that each of these specialties enjoys some degree of separateness and integrity.<sup>10</sup> That working perception makes borrowing possible. It may occur, for instance, when a court is faced with two arguments—say, a due process claim and an equal protection claim—and chooses to endorse the former while drawing language from decisions associated with the latter. Such an attempt to blur ideas of equality and liberty is what we perceive to be happening in *Lawrence*, even though the majority opinion formally declined to find an equality violation. That example also illustrates an interesting tension. While on the one hand borrowing depends on legal boundaries, on the other hand it works to weaken doctrinal distinctiveness.

A second feature of our definition is that any person with a basic understanding of political or legal history can engage in the practice. Although our examples here highlight the behavior of judges, many other constitutional

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9. One might object to our use of the term "borrowing," since in ordinary usage that word can connote the temporary taking of an object with the intention of returning it unaltered. That is not always how the practice works. As we explain, a borrowed constitutional idea or mechanism may return (or be reused) in prior sites, sometimes with little alteration, and at other times, completely transformed. Nevertheless, we retain the term, mostly because of its intuitive appeal.

10. One could complain that Supreme Court Justices care little for doctrinal niceties and instead seek to assemble coalitions of their colleagues by whatever means necessary. Because borrowing is not possible where boundaries are thought to be meaningless, the work of the Court cannot properly be called borrowing on this account. Two responses occur to us. First, we think it important that some Justices do not perceive their own reasoning process in such crude terms. After all, they do feel the need to justify instances of borrowing and they do not hesitate to critique moves that they think unjustifiably breach constitutional boundaries. We give numerous examples of judicial defenses and critiques of borrowing throughout this Article. Second, even if we treat Supreme Court decisions as fraught with politics, as any serious observer must, that strategic calculations and horse trading happen behind closed doors is not incompatible with a broader perception that respect for doctrinal boundaries is essential to the rule of law.

actors can and often do argue across disparate areas of law, including attorneys, legislators, executive branch officials, political candidates, activists, and ordinary citizens. Wherever constitutional interpretation happens, borrowing is likely to be found.

Third, borrowing is purposive, an intentional act of creative lifting. Whatever else may accompany a choice to borrow, a good faith choice to do so entails a calculation that resorting to another body of knowledge will enhance the rule of law or otherwise improve the odds of a position being accepted by others. Once again, *Lawrence* offers a useful illustration. The Justices wished to strengthen the interpretive choice they made by insisting that the liberty approach actually served the cause of fair treatment promoted by equality norms. In suggesting that liberty claims can enhance equality, they also encouraged liberty-style moves by indicating judicial receptivity to such forms of argument. Because a perceptive advocate will mimic strategies that are endorsed by authoritative decisionmakers, borrowing not only legitimates a particular outcome, but it also opens up interpretive possibilities and activates particular grammars, while simultaneously dissuading other modes of argumentation. After all, any high-profile instance of cross-fertilization will reduce resistance to subsequent cross-overs.

Fourth, our definition hones in on crossover among *legal* domains. Now, of course, an important field of scholarship examines interactions between legal and political discourses—in fact, one of us has made a contribution to that literature.<sup>11</sup> We realize that it might make conceptual sense to classify that sort of crossover as borrowing. Merely distinguishing between legal and political ways of talking is notoriously difficult. This Article brackets those issues and focuses attention on the migration that happens among legal fields.

Fifth, for the most part we put to one side appropriations that bridge constitutional systems (“intersystem” borrowing), focusing instead on ones that span discrete fields of domestic constitutional law (“intrasystem” borrowing). Although we think the concept of borrowing is capacious enough to include transnational migration without losing its conceptual coherence, and although one or two of our examples below will treat instances of inter-systemic borrowing, we concentrate here on the more commonplace phenomenon of exchange between fields of domestic law. We do that chiefly because intrasystemic borrowing has gone largely unnoticed in the literature, while appropriations from country to country have been widely analyzed, both when it occurs at the stage of original drafting and when it takes the form of citation to foreign law.

It is important to be precise about what does *not* constitute borrowing. Arguing from precedent within a given domain—that is, saying that an earlier resolution or rule controls the outcome of a controversy at bar—could

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11. ROBERT L. TSAI, *ELOQUENCE AND REASON: CREATING A FIRST AMENDMENT CULTURE* (2008).

not be described as such. That is true by virtue of our definition, since we have specified that borrowing trades among constitutional fields, whereas precedent works to bind courts within a field. So, for instance, when the *Lawrence* Court drew on *Casey* to support the proposition that “our laws and tradition afford constitutional protection to [certain] personal decisions,”<sup>12</sup> the ruling engaged in straightforward reasoning from precedent rather than cross-fertilization. Referring to an authoritative decision within a certain area therefore will not typically involve borrowing as we are using the term.

Also excluded from the concept is the deployment of devices that so pervade the law that they are not unique to any particular constitutional field. Use of those sorts of mechanisms could not be considered borrowing. For instance, slippery-slope arguments are commonplace throughout the law. When someone makes that sort of consequentialist argument—or deflects it by invoking the common defense, “not while this court sits”—he or she is simply using a form of argument that cuts across legal areas and is foreign to none. That does not qualify as borrowing.

2. *How is borrowing typically resisted?* It is not always easy to tell when borrowing happens so it helps to know what to look for. Questions of legitimacy surround all exercises in constitutional borrowing because they involve exchanges between potentially incompatible domains of legal knowledge. A key to identifying an act of borrowing, therefore, lies in the nature of an opponent’s possible response. Often it will take the form of an objection that the proposed borrowing is inappropriate on the ground that the domains of legal knowledge should be kept apart. Even a covert instance of borrowing may be ferreted out by asking whether it can be plausibly resisted by asserting the integrity of a domain.

In each of the examples we analyze below, opponents of an act of appropriation could have defended a boundary between constitutional domains, or in fact did so. Where connections were not being proposed for the first time, more subtle efforts of resistance to borrowing were likely to be found rather than outright denials that such a relationship could ever be possible. In lieu of claiming that the source of law was off limits entirely, an opponent of borrowing may have objected that the proposed idea was outmoded, unenlightened, or nonrepresentative. Sometimes an opponent argued that borrowing would interfere with prior commitments or unsettle precedent. Any one of these reactions could have alerted readers to an act of constitutional borrowing.

3. *Is borrowing a form of interpretation?* Not every way of working with canonical texts should be subsumed within the term interpretation. Making that mistake could unthinkingly privilege dominant theories while obscuring the mechanics of more creative, more subtle, methods of creating constitutional meaning.

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12. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).



Borrowing augments formal modalities of interpretation, such as those arising from text, history, structure, precedent, or animating principles.<sup>13</sup> In the usual course, an idea or heuristic might be borrowed, and therefore harnessed, in the service of one of these types of formal argument. It could be something as simple as asserting a profound and abiding interrelationship between two legal provisions not obvious from the face of the instrument.<sup>14</sup> Or it could be a more contested move, such as drawing upon the experience, laws, or precedents of another constituted people, such as the English or French, in staking a claim about the genesis and public meaning of a domestic provision.

Borrowing therefore has a peculiar relationship to the familiar modalities of constitutional argumentation. It is neither an officially recognized argument nor has it ever been ruled completely out of bounds. At the same time, the prevalence of borrowing suggests that actors within the system find it invaluable. We think these two features—informality plus indispensability—render it a subsidiary practice. This is a major reason why few will openly admit to engaging in borrowing, yet why its legitimacy generally goes unquestioned.

Another way of appreciating borrowing's mercurial place in the legal order is to consider its relationship to the study of constitutional law as a discipline. We plan to say more on this topic later. For now, notice that each formal method of interpretation is loosely associated with a normative theory of judicial review: exegesis is linked to textualism; historical argumentation embodies a commitment to originalism; ethical arguments can be seen as a corollary to living constitutionalism, and so forth. As far as we can tell, no one has yet articulated a theory of constitutionalism in which borrowing is the engine of interpretation, much less a self-contained account of a constitution's substance. Again, this suggests that while something important is happening when borrowing takes place, legal actors intuitively realize it is not quite accurate to call it an interpretive modality.

In our view, the rationale for refusing to elevate borrowing to the status of a modality is not that borrowing is illegitimate, but that, unlike a formal argument, it is not necessarily tethered to any substantive commitments about what a constitution is or should be. A textual argument presumes that a constitution is in crucial respects like a contract, where the drafters' manifest intentions should be honored; a historical argument acknowledges that a constitution is an act of political contingency; an ethical argument takes as its starting point that a constitution is aspirational. Borrowing makes none of

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13. For works that have tried to describe, catalogue, and delimit the forms of constitutional argumentation, see PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982), PIERRE SCHLAG & DAVID SKOVER, *TACTICS OF LEGAL REASONING* (1986).

14. Thus, borrowing encompasses not only what Akhil Amar calls "intratextualism," but also a wide range of relationships that can be asserted between text- or nontext-based sources of constitutional knowledge. See Akhil Reed Amar, *Intratextualism*, 112 *HARV. L. REV.* 747 (1999).

these claims, and in the refusal, proves its capacity to aid a range of substantive conceptions of the Constitution.

4. *What can be borrowed?* As comparativists are well aware, it is possible to borrow an entire constitution, select written provisions, or particular precedents or customs.<sup>15</sup> But this is just the tip of the iceberg. If we broaden our perspective, it becomes possible to identify all manner of legal appropriations, both between different legal systems and within what we commonly treat as a single political order.

In truth, any element that can reasonably be used to persuade another as to the authoritative meaning of the Constitution is a candidate for appropriation. We do not limit ourselves to rationales or rules, as important as such features are to the process, but rather we include a diverse array of material and strategies that can be used during constitutional debate:

- \* legal texts
- \* frameworks
- \* arguments
- \* doctrinal tests
- \* phrases or figures of speech
- \* rationales
- \* principles
- \* ideas
- \* cultural materials (experiences, prototypes, etc.).

Because the sheer magnitude of appropriations is daunting, we limit ourselves here to the American practice of constitutional borrowing. We look at the ways in which domestic actors work across multiple bodies of constitutional knowledge for persuasive ends.

#### B. *Some Reasons to Borrow*

Why might a person resort to borrowing? Common reasons include an intention to achieve a durable synthesis of areas of law whose connections have been neglected; to take advantage of accumulated wisdom; to blur doctrinal boundaries and unsettle existing categories deliberately; or to secure a

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15. Leading comparative studies differ from ours because they typically focus on cross-border appropriation of ideas, and often within a single area of constitutional law. *See, e.g.*, Mary L. Dudziak, *Thurgood Marshall's Bill of Rights for Kenya*, 11 GREEN BAG 2D 307 (2008); Epstein & Knight, *supra* note 8; Vicki C. Jackson, *Comparative constitutional federalism and transnational judicial discourse*, 2 INT'L J. CONST. L. 91 (2004); Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. PA. J. CONST. L. 640 (1999); Kim Lane Scheppele, *Constitutional Ethnography: An Introduction*, 38 LAW & SOC'Y REV. 389 (2004); Mark Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 325 (1998).

perceived strategic advantage in debate more generally. In fact, a borrower's reasons for acting ordinarily consist of some combination of private and public intentions. Some motivations may be self-regarding in nature, such as a hope to profit personally from the success of litigation or politics; others will have a public cast to them, such as a desire to enhance an advocate's or adjudicator's reputation or to preserve the prerogative of a particular institution, all of which might be gained through a statesmanlike balance of constitutional interests. Other-regarding motivations include concern for the aesthetics of the law (including coherence of the law and respect for the sources of law), concern for how the law is perceived by those who are affected by it, a more specific plan to curry favor with or allay the concerns of certain democratic constituencies, and so on. We will say more about these various motivations in the next Part, where we sort out common types of borrowing.

For now, we emphasize that although a number of private and public intentions may motivate an actor to participate in constitutional debate, borrowing is legitimate only if it is guided by a measure of public virtue. To minimally comply with the rule of law, the act must be underwritten by the advocate–adjudicator's good faith. We describe “good faith” simply as an honest desire to arrive at a defensible position and enhance general understanding of the law.<sup>16</sup> A borrower acts virtuously if her act of creativity is moved by public-spirited reasons, even when accompanied by self-regarding motives. Just as we presume a legislative act is reasonable unless there is persuasive evidence to believe otherwise, so too we presume an act of borrowing is legitimate, unless there are reasons to impugn a borrower's motivations.

Whether a particular act of borrowing is successful, in that it persuades or becomes authoritative, however, is a different matter entirely. The success of a specific instance of borrowing turns on a host of factors such as fit, transparency, completeness, and yield—criteria we take up in due course.<sup>17</sup>

It might be said then, that any plausible act of borrowing must take place under these minimal conditions:

1. A motivated borrower with the requisite disposition who believes the tactic will advance his interests, as well as at least rudimentary knowledge of the forms to be used.
2. A prospective audience expected to have some knowledge of the constitutional ideas involved.
3. Two bodies of knowledge ordinarily understood as discrete, at least one of which is sufficiently developed that it is appealing to the borrower and reasonably appealing to the borrower's audience.

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16. We later consider an instance of bad faith borrowing, point out how to recognize it, and explain why borrowing without integrity is corrosive of rule-of-law values. *See infra* Section II.D.

17. *See infra* Part IV.

The study of borrowing is concerned with how these three conditions are satisfied and, more precisely, how constitutional actors navigate these conditions in real world situations.

### C. *A Few Causes for Concern*

As prevalent as the practice may be, the choice to engage in constitutional borrowing, like other methods of persuasion, entails certain risks. In this Section, we offer an example of borrowing that not only illustrates our definition of the practice, but also previews some of its dangers. A fuller discussion of its vices and virtues appears in Part III.

The most obvious danger is discordance. Not every legal idea is compatible with another—the relationships may not be intuitive, the union may seem forced, and the result may be a jumble rather than a useful harmonization of existing lines of thought. Since basic rule-of-law values include notice and an opportunity to comport one's behavior to the law, borrowing carries a risk of confusion that may have real-world ramifications.

Second, because in the real world constitutional ideas are often associated with constituencies, borrowing often asks one group of idea holders to assume certain new idea relationships. Resistance may have to be overcome. Police officers or prosecutors might not believe they have a stake in a synthetic reading of the Fourth and Fifth Amendments; straights may not feel their constitutional interests are aligned with those of gay and lesbian couples. If these connections are poorly managed, the result could be greater discord rather than accord (though some level of disputation may be a precondition for the germination of new ideas).

Third, principled synthesizing can disintegrate into noncommittal compromising or rote copying that blurs doctrinal categories for selfish or short-term goals. It may be tempting to gesture in the direction of another set of ideas merely to salve bruised feelings, validate a personal preference, or get past the dispute at hand by whatever means necessary. A single instance of careless borrowing may be forgiven or eventually forgotten, but a sustained pattern of misbehavior can breed cynicism about the law. It may raise doubts about the competence or integrity of decisionmakers or, if confusion reigns for too long, it may even destabilize support for one or more areas of law.

*Stanley v. Georgia*<sup>18</sup> presents an intriguing microstudy of borrowing's attractions and challenges. There, the Justices disallowed the prosecution of a man who possessed obscene materials in his home. Justice Marshall's opinion stressed (a) the permeability or limitations of one constitutional domain (the First Amendment), and (b) the salience and compatibility of another domain of knowledge (the Fourth Amendment):

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18. 394 U.S. 557 (1969).

In this context, we do not believe that this case can be decided simply by citing *Roth* [which held obscenity unprotected]. *Roth* and its progeny certainly do mean that the [First Amendment] recognize[s] a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections.

... Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.<sup>19</sup>

That *Stanley's* legal principles are a product of synthesis renders them especially malleable. As an illustration, *Bowers v. Hardwick*<sup>20</sup> contained a controversial refusal to borrow the case. Here is how Justice White's opinion explained the Justices' decision to decline the opportunity: "*Stanley* did protect conduct that would not have been protected outside the home, and it partially prevented the enforcement of state obscenity laws; but the decision was firmly grounded in the First Amendment. The right pressed upon us here has no similar support in the text of the Constitution . . . ."<sup>21</sup> In other words, although the original decision involved a harmonization of the First and Fourth Amendments, *Bowers* isolates the precedent and tries to drain it of persuasive power by emphasizing only the speech strand of the synthesis.<sup>22</sup> Justice White facilitates this move by arguing that the text supports one claim (*Stanley's* speech) but not the other (*Hardwick's* plea for privacy). Moreover, the added textual precondition for borrowing fashioned by the Court ignores the fact that *Stanley's* own claim required interpreting the word "speech" to protect sexually explicit materials, just as the conclusion that *Hardwick's* claim was nontextual required an effort to characterize it that way rather than as a textually grounded claim of "liberty" as that word is used in the Due Process Clause of the Fourteenth Amendment.<sup>23</sup>

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19. *Id.* at 563–64.

20. 478 U.S. 186 (1986).

21. *Id.* at 195.

22. This is one of the risks of borrowing: one combination of concepts or principles can be disentangled or disaggregated at a different point in time. For another example, see Justice Stewart's concurring opinion in *Whalen v. Roe*, 429 U.S. 589 (1977), taking apart both *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Stanley v. Georgia*, 394 U.S. 557 (1969). Of *Griswold*, he writes, "Although the broad language of the opinion includes a discussion of privacy, the constitutional protection there discovered also related to (1) marriage; (2) privacy in the home; and (3) the right to use contraceptives. Whatever the *ratio decidendi* of *Griswold*, it does not recognize a general interest in freedom from disclosure of private information." *Whalen*, 429 U.S. at 608–09 (Stewart, J., concurring) (citations omitted).

23. At its best, such a step would say that the fact that a concept appears in the Constitution shows its importance to the Founding generation. At its silliest, the inquiry would devolve into whether or not a word or idea was mentioned by the Framers or not and accord that fact decisive weight.

The heightened privacy interests identified in *Stanley* have been highlighted to protect the receipt of certain information, including adult pornography, but not child pornography involving real children.<sup>24</sup> Moreover, *Stanley*'s privacy language has been used by lawyers to resist mandatory union dues used for advocacy with which one disagrees,<sup>25</sup> but not to make end-of-life decisions,<sup>26</sup> use drugs for therapeutic purposes,<sup>27</sup> or, until recently, engage in consensual sodomy.<sup>28</sup> Mostly for the better, though sometimes for the worse, the enhanced manipulability of *Stanley* has something to do with constitutional borrowing. Mixing constitutional ideas can lead to the selective assertion of one interest at the expense of the other. Sometimes the outcome is principled and logical; other times, decisions to borrow (or refusals to borrow) are so strained they seem outcome determinative.

Such concerns aside, we think borrowing's benefits for the rule of law outweigh its downsides because, among other things, the practice facilitates the formation of a robust constitutional culture and encourages individuals to take principles seriously. In Part III, we take up a defense of constitutional borrowing as a general practice, while recognizing that particular instances may require more scrutiny.

## II. SOME TYPES OF BORROWING

We now consider several common types of borrowing: (a) transplantation; (b) hedging; (c) displacement; and (d) corruption. These do not comprise the complete universe of types, but they capture much of the action. We give examples of each form, discuss why a constitutional actor might resort to one or another of them, and probe some of the benefits and risks associated with each. Some of the instances we analyze involve borrowing from liberty for equality's sake or vice versa; others may consist of cross-pollination among the domains typically associated with liberty.

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24. *Osborne v. Ohio*, 495 U.S. 103 (1990); *see also* *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (“[W]e have held that in a variety of contexts ‘the Constitution protects the right to receive information and ideas.’” (quoting *Stanley*, 394 U.S. at 564)). Interestingly enough, *Stanley* has been cited favorably to protect a person who views a sexually explicit image that appears to be of a real child but turns out not to be. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002).

25. *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1977) (“[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.” (citing *Stanley*, 394 U.S. at 565)).

26. *See Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 341 (1990) (Stevens, J., dissenting).

27. *Washington v. Harper*, 494 U.S. 210 (1990).

28. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

### A. Transplantation

Perhaps the most common method of borrowing is transplantation of legal ideas, in whole or piecemeal, from one context to another.<sup>29</sup> Importing an idea into a new domain is tempting when the idea possesses a track record of success in the sense that it seems defensible, has proven useful, or, quite apart from its demonstrated utility, enjoys support among specialists or the public.<sup>30</sup>

A prominent instance of transplantation culminated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>31</sup> There, use of the “undue burden” test heralded a newly sensitized attitude toward the competing challenges presented when a state regulates an individual’s decision to abort an unwanted fetus.<sup>32</sup> That formulation replaced the more protective, but less elegant trimester framework fashioned by *Roe v. Wade*. Little attention has been paid to the migration of the undue-burden test. In fact, it had been selectively used in liberty cases,<sup>33</sup> but was originally deployed to determine when a state law interfered with Congress’s dormant power to regulate Commerce.<sup>34</sup> *Casey* doesn’t acknowledge this lineage, but it does reference

29. What we describe is a juridically mediated version of what Alan Watson has elaborated. See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO THE STUDY OF COMPARATIVE LAW* (2d ed. 1993). Watson’s approach has been challenged, most notably by Legrand, for understating the connections between law and society. Pierre Legrand, *What Legal Transplants, in ADAPTING LEGAL CULTURES* 55 (D. Nelken & J. Feest eds., 2001). In using the term “transplant,” we emphasize the possibility of conscious adaptation of ideas, while embracing a more robust notion of legal culture.

30. With an original act of transplantation, the most pressing concerns that arise are fit and completeness (discussed at greater length in Part IV).

31. 505 U.S. 833 (1992). Justice O’Connor employed the phrase “undue burden” in an abortion controversy in her concurrence in *Webster v. Reproductive Health Services*, 492 U.S. 490, 529–30 (1989) (O’Connor, J., concurring in part and concurring in the judgment), as well as in her opinions in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O’Connor, J., dissenting), and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452 (1983) (O’Connor, J., dissenting).

32. *Maher v. Roe*, 432 U.S. 464 (1977), foreshadowed the shift in meaning that would be entailed in transplanting the undue-burden approach into the abortion context. First, Justice Powell’s opinion stated that although the right to privacy “protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy[,] [i]t implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.” *Id.* at 473–74. Powell referenced *Whalen v. Roe*, 429 U.S. 589 (1977), for this proposition, but that opinion does not employ the language “undue burden.” See *Maher*, 432 U.S. at 473–74. Second, *Maher* declined to adopt the reasoning of rulings typically associated with the undue-burden test in the right-to-travel cases (where an undue burden usually led to the application of strict scrutiny), characterizing them as embodying a “penalty analysis” inapplicable to public subsidy of abortions. *Id.* at 474 n.8. Relatedly, the Justices refused to find guidance in *Sherbert v. Verner*, 374 U.S. 398 (1963), which they considered to be unique to the Religion Clauses. *Maher*, 432 U.S. at 475 n.8.

33. It has been used in the right-to-travel area. See *Shapiro v. Thompson*, 394 U.S. 618, 663–77 (1969) (Harlan, J., dissenting) (discussing whether a one-year welfare residence requirement amounts to an undue burden upon the right of interstate travel).

34. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) (“[W]e have held that [the Commerce] Clause . . . bars state regulations that unduly burden interstate commerce.”) (internal

election law cases for support of the proposition that even a recognized liberty interest can be restricted by the states without violating the Constitution, concluding: “The abortion right is similar.”<sup>35</sup>

It is worth pausing to evaluate the mechanics of the importation. First, adoption of the undue-burden test frequently grants discretion to the government that did not previously exist. The approach is unclear about whether an illicit motivation on the part of the state actor is important or whether the actual imposition on a rights bearer is all that matters. Second, in at least some instances, the undue burden approach has been deemed inappropriate for a particular setting. Jurists do not always explain why officials will be afforded greater discretion in some settings but not in others. Third, in many places the undue-burden test offers a supplementary approach to determining a violation of constitutional principle, whereas *Casey* made it the exclusive measure of a woman’s right to end her pregnancy. These consequences—which together make up the transplantation’s “yield”<sup>36</sup>—are not always self-evident or permanent, but they are crucial to how borrowing ought to be assessed.

This leads us to a further point: a choice *not* to transplant can itself be momentous.<sup>37</sup> It may tell of methods bypassed or principles rejected, motivations at work, conflicts deferred, or the range of future outcomes constrained. *District of Columbia v. Heller*,<sup>38</sup> which interpreted the Second Amendment to protect an individual right to keep and bear arms, illustrates how. Toward the end of the opinion for the Court, Justice Scalia addressed Justice Breyer’s dissent, which proposed a test for Second Amendment claims that would “ask[] whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects

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citations omitted); see also *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (articulating a “clearly excessive” burden test for incidental burdens on interstate commerce).

35. *Casey*, 505 U.S. at 873–74. As the *Casey* decision pointedly states:

[N]ot every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right. An example clarifies the point. We have held that not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote. . . . The abortion right is similar.

*Id.* (citations omitted).

36. See *infra* Section IV.D.

37. These decisions have been called “non-borrowings.” See Epstein & Knight, *supra* note 8. Kim Lane Scheppelle suggests that students of political design think more broadly in “aversive” terms, namely, by reflecting on “the *negative models* that are prominent in constitution builders’ minds.” Kim Lane Scheppelle, *Aspirational and aversive constitutionalism: The case for studying cross-constitutional influence through negative models*, 1 INT’L J. CONST. L. 296, 300 (2003).

38. 128 S. Ct. 2783 (2008). For critiques of *Heller*, see Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923 (2009); Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246 (2008); Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551 (2009).



upon other important governmental interests.”<sup>39</sup> That proved to be too much for Scalia, who set about explaining why Breyer’s approach was misguided.

The Justices’ self-conscious refusal to borrow an undue-burden or “interest balancing” approach had several consequences. First, the Court’s resistance to balancing was intended to convey *commitment*. Breyer’s approach would have impermissibly empowered judges to determine “on a case-by-case basis whether the right is *really worth* insisting upon.”<sup>40</sup> As Scalia put it, “[a] constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.”<sup>41</sup> Second, bypassing the test signaled a stronger protective position for enumerated rights than for implied ones. “We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach,”<sup>42</sup> Scalia wrote. He thereby declined to protect the right to bear arms in the same way as a woman’s right to terminate her pregnancy.

Instead, *Heller* adopted something akin to the First Amendment’s rule-and-exception approach. Drawing heavily on free speech ideas, Scalia insisted:

We would not apply an “interest-balancing” approach to the prohibition of a peaceful neo-Nazi march through Skokie. The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest-balancing by the people—which Justice Breyer would now conduct for them anew.<sup>43</sup>

Borrowing from the First Amendment appeared to serve two persuasive ends in *Heller*: (1) enlisting popular respect for expressive rights on behalf of gun owners; and (2) turning the question of whether balancing occurs into a question of who properly balances.<sup>44</sup> It also bolstered the Court’s rejection of balancing approaches drawn from other areas of constitutional law.

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39. *Heller*, 128 S. Ct. at 2821. Justice Breyer applied his standard to “assess the extent to which the District’s law burdens the interests that the Second Amendment seeks to protect,” *id.* at 2861 (Breyer, J., dissenting). He “weigh[ed] needs and burdens,” *id.* at 2864, and concluded that the ordinance “burdens the Second Amendment’s primary objective little, or not at all.” *Id.* at 2863. He justified the approach by referring to other instances of more deferential approaches, including election law cases, procedural due process opinions, and decisions involving the speech rights of public employees. *See id.* at 2852.

40. *Id.* at 2821 (majority opinion).

41. *Id.*

42. *Id.*

43. *Id.* (citation omitted).

44. For the *Heller* Court, reasoning in a textualist–originalist spirit, the answer is the founding generation rather than present day judges or policymakers.

The Court's move in *Heller* was explicit, but a refusal to appropriate can be so subtle that it may be missed by the casual observer. In *Washington v. Harper*,<sup>45</sup> for instance, Justice Kennedy turned aside an inmate's liberty claim to be free from psychotropic drugs in the absence of judicial review. Justice Stevens's dissent, joined by Justices Marshall and Brennan, showed the path not taken: an extension of the right to "freedom of the mind" stressed in *Stanley v. Georgia*.<sup>46</sup> For them, the Court missed an opportunity to adapt this language from the prior ruling: "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."<sup>47</sup> We can envision a number of reasons why *Stanley* might not have been appealing to the majority. Perhaps they felt it better to limit the concept spatially, to the home, rather than extend the case to public institutions. Perhaps this entire way of thinking was deemed improper when it came to incarcerated persons. Whatever the truth, *Harper*'s rejection of this framework *sub silentio* involved an inobtrusive but nevertheless significant refusal to engage in transplantation.

### B. Hedging

We earlier described an instance of borrowing—*Lawrence*—in which multiple rationales were available, and, having selected one rationale over another, the Court deliberately blurred the differences between them.<sup>48</sup> We now name this particular move hedging, because it is frequently undertaken to reduce the risks and disadvantages of making a singular doctrinal commitment. Often, hedging occurs when there is already an established (or at least a working) relationship between two legal domains (e.g., two clauses of the Constitution, related political values, and so on).

This form of borrowing may strive to ameliorate troublesome features of common law decisionmaking. The problem with embracing a single rationale, or textual basis, for a particular resolution is the risk of becoming overly constrained in the future by existing precedent (including erroneous or outmoded decisions), by long-unexamined analytical frameworks, or by assumptions that turn out to be mistaken. If legal decisions were simply about conforming to past forms or existing expectations, there would be little to worry about. Yet adjudication is also about looking forward, predicting whether and to what degree other social actors will conform their behavior to the law. In this sense, hedging provides one route for escaping some of the undesirable features of path-dependent adjudication. If the choice to endorse and explicate a liberty rationale at the moment of decision

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45. 494 U.S. 210 (1990). The state in question allowed such decisions to be made by medical experts, with some administrative review.

46. 394 U.S. 557 (1969).

47. *Harper*, 494 U.S. at 238 n.3 (Stevens, J., dissenting) (quoting *Stanley*, 394 U.S. at 565).

48. See *supra* text accompanying notes 1–5 (discussing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

proves too difficult to sustain in the face of social pressure, if it meets unexpected circumstances, or if it winds up at a logical dead end, the basis of an alternative rationale has already been introduced. Because of path dependence, a line of argument or idea is far easier to sustain if it has already been introduced into an area of law than if it must be raised for the first time. Thus, the incentives of a common law system may push actors to seize the chance to present even incomplete renderings rather than wait for an opportunity to make a systematic presentation.

From an institutional perspective, hedging can reflect a compromise to achieve consensus among members of an adjudicative body. The primary rationale may be the one that gains the broadest assent of decisionmakers within an institution; gesturing in the direction of a secondary rationale might well be a pragmatic solution to retain certain wavering members of a coalition.

Hedging may also reflect an effort to safeguard against misjudging the nature and extent of social support for a decision by deliberately minimizing differences between rationales. This amounts to an external explanation: drawing on a secondary body of knowledge is useful for promoting public acceptance of the main rationale. Still, there may be costs. The most serious risk with hedging is uncertainty about the seriousness of an actor's commitment to a set of governing values and the circumstances under which they might be controlling.

Embrace of a secondary set of ideas may be aimed at a subset of constitutional actors rather than the public at large. As such, hedging should not be understood as unprincipled or frivolous commentary, but instead as sophisticated signaling. *Yick Wo v. Hopkins*,<sup>49</sup> a decision now known as an early and strong statement against racial discrimination, may have involved targeted signaling through borrowing. *Yick Wo*, one of several Chinese laundry operators refused a permit by the City of San Francisco, challenged the denial on two grounds: (1) the city's ordinance was unduly vague and lacked procedural safeguards; and (2) the city's refusal to renew his permit to operate a laundry constituted an effort to harass or oppress him on account of race or national origin. Ultimately, the Supreme Court held that the Board's nonrenewal of the Chinese applicant's permit violated the Equal Protection Clause since it appeared to be motivated by racial animus. Instead of resting on one set of virtues, the opinion by Justice Mathews careened toward the liberty rationale before making a sudden break for equality.

The *Yick Wo* opinion went out of its way to disagree with the California Supreme Court as to "the real meaning of the ordinances in question." Although the state court had found it neither arbitrary nor unusual to regulate the laundry industry in the abstract, several devastating paragraphs characterized the city ordinance as both "arbitrary" and "unusual"—conventional due process language:

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49. 118 U.S. 356 (1886).

[The ordinances] seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. . . . The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint. . . .

. . . .

. . . When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.<sup>50</sup>

In a surprising turn, the Justices then declined to strike down the law on its face based on due process principles, and instead deemed the law unequally applied to the Chinese:

[T]he cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured . . . by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States.<sup>51</sup>

Formally, the Justices stopped short of nullifying the law and commanding that it be rewritten; they merely restored the complainants to their positions absent such discriminatory behavior. Yet their hedge toward liberty was strong enough that readers of *Yick Wo* remain uncertain as to the actual holding of the opinion—does it serve the cause of antidiscrimination, strike a blow for liberty, or both?<sup>52</sup>

It is possible to understand the High Court's flirtation with the liberty rationale as a stern message intended for the ears of policymakers charged with drafting legal instruments: in the future, craft such ordinances more carefully if you wish to gain the benefit of the presumption of constitutionality normally enjoyed by legislation. The Justices may have found it easier to accuse a low-level bureaucrat of racial discrimination than to impute animus to an entire legislative body, but they also implied that such lenience could not be expected in the future. The risk of insufficiently

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50. *Id.* at 366–70.

51. *Id.* at 373.

52. Needless to say, our reading of the case differs from that of others. See generally Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About Yick Wo*, 2008 U. ILL. L. REV. 1359 (arguing that *Yick Wo* is little more than a treaty case).

cabined administrative discretion may prompt more skeptical review of governmental actions, especially those rhetorically discredited like the ordinance in *Yick Wo*.

Because the actor makes an uncertain commitment to a secondary rationale (often strongly implied but not always explicated), the counterbalancing move is comparatively less constrained. As a result, hedging opens up a powerful way to invite further legal innovation by others while leaving the possibility of firmer commitments for a later date. The proposition that liberty can enhance equality in the long run (or vice versa), asserted openly in *Lawrence* and merely hinted at in *Yick Wo*, can be best appreciated in these terms.

### C. Displacement

A person may engage in borrowing not with the hope of achieving a stable synthesis but rather with a goal of ensuring that the imported ideas eventually come to dominate prevalent ideas and restructure the relationships among governing constitutional norms. We call such a project displacement. It differs from transplantation in terms of motivation and effects. A single transplantation is usually undertaken for short-term or fleeting reasons, whereas displacement fulfills transformative goals (whether ideological or institutional).

Displacement may be a net positive for the rule of law if a body of constitutional ideas has become stagnant and therefore has lost touch with prevailing community sentiments or experience, or if an area of law has become riddled with exceptions and countermethods leading to substantial confusion among specialists and ordinary people. On the other hand, a project of displacement may unsettle broadly held expectations, it could provoke a pushback, and it risks producing an outcome that may be no better than what is replaced.<sup>53</sup> Displacement can be carried out by validating an emerging trend, in which case the implementation costs of the tactic can be minimized, or by reforming still-prevalent practices and beliefs, which may incur exponential costs in the name of reform.

In a number of rulings in the last two decades or so, politicians, activists, lawyers, and jurists have energetically drawn on equality ideas to give meaning to the Religion Clauses.<sup>54</sup> These efforts have produced a dramatic

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53. For a comparative study of two projects of displacement in the First Amendment realm, one involving the civil rights movement and another involving religious conservatism, see TSAI, *supra* note 11, at 78–111.

54. Notions of equal dignity and respect have long been a part of the liberal tradition's stance toward religion, of course. Rather than ignoring those elements, our account highlights the ambitions of a monolithic equality approach. Even those who observe "the seeds of an equal protection analysis" in early religious liberty jurisprudence acknowledge that ideas of equality have sometimes been deliberately "imported" from different contexts into specific areas, with varying consequences. See generally Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C. L. REV. 275, 277–78 (2006) (exploring language of equality in state constitutional provisions and early judicial decisions protecting religious liberty).

reordering of expectations as to the scope of rights and institutional obligations such that one could say that, for better or worse, the analytical frameworks and vocabulary associated with equality have largely displaced earlier readings of the Free Exercise and Establishment Clauses. In several cases, treating religious believers differently from other social actors has triggered charges of “hostility,” “animus,” and even “subordination.”<sup>55</sup> To the extent that equality or antidiscrimination are meant to supplant other conceptions of injury, we would say that the liberty approach has been displaced by equality-based formulations.

In this instance, liberty ideas have been displaced by a particular brand of equality, a restricted view that does not protect against laws that disproportionately affect protected groups. Of course, the major move came in *Employment Division v. Smith*<sup>56</sup> in 1990. There the Court abandoned the rule that had, for some thirty years, treated incidental burdens on religious practice as presumptively unconstitutional.<sup>57</sup> Speaking for the majority, Justice Scalia announced that such burdens on religion would no longer be subject to heightened scrutiny. Although laws that purposefully targeted religious actors for special regulation would continue to trigger a compelling interest test, general laws that merely had the effect of making observance more difficult would not.<sup>58</sup>

A footnote suggested that the *Smith* decision was part of a broader shift in the Court’s thinking. It cited *Washington v. Davis*,<sup>59</sup> where the Court had controversially ruled that the Equal Protection Clause offered only minimal protection against laws or policies that, although neutral on their face, had the incidental effect of disadvantaging protected classes.<sup>60</sup> For instance, a written employment test that happened to eliminate a disproportionate number of African Americans seeking to become police officers would no longer occasion any particular constitutional concern, absent further evidence that the test reflected a discriminatory purpose.<sup>61</sup>

*Smith* ought to have counted as a turnabout, and many critics viewed it that way.<sup>62</sup> But Justice Scalia framed the decision differently. He argued that

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55. See TSAI, *supra* note 11, at 100–08; see also Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1327–31 (2008).

56. 494 U.S. 872 (1990).

57. Interestingly, *Sherbert v. Verner* also lifted its core concept from another area of law. Justice Brennan looked to free speech cases for the strict scrutiny standard that was to become free exercise law for thirty years. See 374 U.S. 398, 403 (1963) (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

58. See *Smith*, 494 U.S. 872.

59. 426 U.S. 229 (1976).

60. *Smith*, 494 U.S. at 886 n.3 (citing *Davis*, 426 U.S. 229).

61. *Davis*, 426 U.S. at 246.

62. See, e.g., Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2006) (criticizing *Smith* explicitly); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990).

it was actually the old rule that had been out of step—that it had been, in his words, a “constitutional anomaly.”<sup>63</sup> From *Smith* onward, incidental burdens on free exercise would be handled just like laws that exerted a disparate racial impact. Explicitly importing the disparate impact rule from equal protection helped the Court portray *Smith* as a restoration rather than a revolution.<sup>64</sup>

Scalia tried to extend this project of displacement even further in *Crawford v. Marion County Election Board*. There, he argued in a separate opinion that disparate impact claims ought to be presumptively unavailable in the voting rights area, just as they are in free exercise and elsewhere in equal protection.<sup>65</sup> Generally applicable election regulations should not draw any special sort of scrutiny, he argued, even if they have the effect of imposing disproportionate burdens on particular classes of voters. For Scalia, therefore, Indiana’s voter identification requirement was permissible not only because it did not impose a significant burden on a particular class of voters, as the majority held, but also because, even if it had placed a substantial obstacle in the path of a defined group, the regulation was not driven by a discriminatory purpose. In his words, “[a] voter complaining about [a nondiscriminatory election] law’s effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional.”<sup>66</sup> Two others—Justice Alito and Justice Thomas—signed on to that argument.<sup>67</sup>

63. 494 U.S. at 886.

64. More recently, Judge Fernandez of the Ninth Circuit expressed his preference for displacement in the *Newdow* case, a challenge to recitation of the Pledge of Allegiance, which includes the phrase “under God”:

Were we to [choose among the many approaches to interpreting the Religion Clauses], the one that appeals most to me, the one I think to be correct, is the concept that what the religion clauses of the First Amendment require is neutrality; that those clauses are, in effect, an early kind of equal protection provision and assure that government will neither discriminate nor discriminate against a religion or religions.

*Newdow v. United States Cong.*, 292 F.3d 597, 613 (9th Cir. 2002) (Fernandez, J., concurring in part and dissenting in part), *amended by* 328 F.3d 466 (9th Cir. 2003), *rev’d sub nom.* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

Many of those who stress theories of neutrality, equal status, or equal dignity as the primary or exclusive method of reading the Religion Clauses are undertaking a project of displacement. See generally CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1 (1986).

65. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1626 (2008) (Scalia, J., concurring in the judgment).

66. *Id.*

67. Admittedly, the disparate impact rule Scalia was seeking to export came from an equal protection decision. See *Washington v. Davis*, 426 U.S. 229 (1976). If voting rights doctrine is seen as a subset of equal protection, then what Scalia was advocating might not count as borrowing. On this reading, Scalia was simply seeking the consistent application of an idea within and throughout a single, undifferentiated domain of constitutional law. However, we think that reading is not the most plausible one. After all, voting rights law has taken on a degree of independence and specialization.

Importantly for our purposes, Scalia was consciously seeking to further his displacement project. Successfully importing the disparate impact rule from other areas would make the majority's approach to voting rights look like a departure. According to Scalia's story, it would "effectively turn back decades of equal-protection jurisprudence" for courts to consider carving out exemptions from election regulations for voters who are disproportionately burdened by them.<sup>68</sup> That was because "[t]he Fourteenth Amendment does not regard neutral laws as invidious ones, *even when their burdens purportedly fall disproportionately on a protected class*," and certainly not when they fall on unprotected ones.<sup>69</sup> In support of this proposition, Scalia now could cite not only *Washington v. Davis*, but also *Employment Division v. Smith*.<sup>70</sup>

The *Crawford* plurality did not embrace this extension of the campaign against disparate impact claims. Instead, it held that even "reasonable, non-discriminatory" voting regulations would be subject to a balancing test, under which a burden on the right to vote would be weighed against the state's justification.<sup>71</sup> Nevertheless, Scalia's arguments put pressure on protections against disparate impact in the voting rights area.

What distinguishes displacement from transplantation, in sum, are a borrower's motivation and the ultimate consequences of an appropriation (what we call its yield). It is difficult to detect a desire to displace in a single controversy, because identifying a displacement requires gauging the degree to which an idea's proponents favor a fundamental reordering. Within a deliberative body, some members may be committed to a program of displacement, while others could simply believe that a synthesis makes sense in the context of a discrete dispute but not necessarily in others. A strong pattern that authoritative actors establish or accept may be evidence of an ongoing project of transformation.<sup>72</sup>

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*See, e.g.,* Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201, 1201–02 (1996) (arguing that voting rights law is and should be distinct from the rest of equal protection doctrine). And, for an even longer period of time, the Religion Clauses have been treated as relatively autonomous. To the degree that voting law is seen as distinct, Scalia can be seen as advocating a species of borrowing.

68. *Crawford*, 128 S. Ct. at 1626 (Scalia, J., concurring in the judgment).

69. *Id.*

70. *Id.* (citing both cases). Of course, the campaign to displace meaningful constitutional protection for disparate impact is incomplete in other ways as well. For instance, speech law is not completely insensitive to claims that laws burden expression, even if that is not their aim. *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968) (protecting incidental burdens on speech with a form of intermediate scrutiny).

71. *Crawford*, 128 S. Ct. at 1616.

72. It is easy to foreswear such ambitions, yet it may be hard to know whether to credit a disavowal. Specialists may be skeptical of limiting language, knowing that what was necessary to achieve a resolution may in fact represent an unstable alliance. It is more difficult for the average citizen to determine whether to take qualifying language seriously.



### D. Corruption

At this point, we address a darker set of motivations that can, in extreme situations, infect an act of borrowing: appropriation may be conducted with the goal of corrupting an area of law. When this happens, borrowing would occur not for the sake of prompting a good faith reconsideration of the trajectory of the law, but instead for the purpose of confusing observers, insulating a matter from accountability, or rendering a doctrine unusable by practitioners. In each of these rare scenarios, borrowing to corrupt the law would constitute an expression of bad faith and should be treated as harmful to the rule of law.

Our examples help to describe this type of borrowing, though none of them necessarily rises to the level of corruption. Justice Scalia raised the specter of cultural incompatibility in two disputes where he found himself on the losing end: once in *Lawrence*, and again in *Roper v. Simmons*.<sup>73</sup> In *Lawrence*, he objected to reliance on the law of “foreign nations” based on the fact that *Bowers* itself was “devoid of any reliance on the views of a ‘wider civilization.’”<sup>74</sup> While Scalia referred to foreign sources as “alien law” in *Roper*, which barred the execution of juvenile offenders, most of his objections in both cases were directed at what he believed to be the Supreme Court’s lack of sincerity or consistency in drawing on external sources.<sup>75</sup> As for “the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world”—he wrote, “[i]n fact the Court itself does not believe it.”<sup>76</sup>

Yet for all his reservations,<sup>77</sup> he did not accuse the Court of corruption in the sense that we have described. As in *Lawrence*, these and other concerns are better classified as questions of fit.<sup>78</sup> If Scalia thought the Court’s inconsistency was driven by a desire to make the law unusable, unstable, or unworkable, he did not come out and say it. The closest he came was when

73. 543 U.S. 551 (2005).

74. *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (quoting *Lawrence*, 539 U.S. at 576 (majority opinion)). For this reason, Justice Scalia deplored the majority’s “meaningless dicta.” *Id.* He also thought the reliance on foreign sources was “[d]angerous,” however, because “this Court . . . should not impose foreign moods, fads, or fashions on Americans.” *Id.* (quoting *Foster v. Florida*, 537 U.S. 990, n.\* (2002) (Thomas, J., concurring in denial of certiorari)). Justice Scalia’s objections still did not represent a fundamental attack on constitutional borrowing, but rather concern about judicial endorsement of fleeting attitudes. His concern reappeared later, when he characterized reliance on Canadian law as little more than “judicial imposition” justified by other countries’ exercise in judicial imposition. *Id.* at 604.

75. See *Roper*, 543 U.S. at 627 (Scalia, J., dissenting).

76. *Id.* at 624. Among other things, Justice Scalia argued that “[t]he Court has been oblivious to the views of other countries when deciding how to interpret our Constitution’s requirement that ‘Congress shall make no law respecting an establishment of religion . . . .’” *Id.* at 625 (quoting U.S. CONST. amend. I). The same is true, he said, when it comes to abortion. *Id.*

77. We characterize these moves as borrowing in part because the proponent is not arguing from precedent nor from analogy.

78. See *infra* Section IV.A.

he suggested that the majority opinion amounted to “the Justices’ own notion of how the world ought to be, and their diktat that it shall be so henceforth in America.”<sup>79</sup> We might say that the law had become corrupted if an appropriation muddled the doctrine in the service of raw politics or personal preference. Then perhaps we could conclude that an outgrowth of law had become untenable or unusable. But that did not appear to be Scalia’s primary concern.

We would need to know more, of course, to assess a charge of corruption. Are instances of borrowing defensible on their own terms or according to some overarching metric?<sup>80</sup> What does an act of appropriation yield?<sup>81</sup> Other factors are worth considering. The more dramatic the move and the more serious its doctrinal ramifications, the more red flags it may raise. The fact that *Roper* goes to great lengths to minimize, or even marginalize its borrowing (or at least to keep its significance unsettled) cuts against a finding of corruption. So does the relative lack of novelty: it is hardly the first time the Supreme Court has looked to foreign or international sources, and there is even a basis for saying that the law of nations was originally contemplated as a resource for federal law.<sup>82</sup>

A more plausible case of corruption might be found in Chief Justice Burger’s resort to “Judeo-Christian moral and ethical standards” in *Bowers v. Hardwick*.<sup>83</sup> Never before had privacy jurisprudence turned so openly on the content of religious injunctions. In fact, the opposite was true: core precedents had abetted, in the name of privacy, an individual’s choice to resist efforts to inculcate religious or sectarian norms.<sup>84</sup> Although drawing from natural law was once an accepted form of argumentation, the canons of

79. *Roper*, 543 U.S. at 628 (Scalia, J., dissenting). He also later wrote:

We must disregard the new reality that, to the extent our Eighth Amendment decisions constitute something more than a show of hands on the current Justices’ current personal views about penology, they purport to be nothing more than a snapshot of American public opinion at a particular point in time (with the timeframes now shortened to a mere 15 years).

*Id.* at 629. Here, too, the charge of corruption was no more than a passing suggestion, buried among other concerns about methodology.

80. Justice Scalia contends, “The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners’ views as part of the *reasoned basis* of its decisions.” *Id.* at 627.

81. See *infra* Section IV.D.

82. See U.S. CONST. art. I, § 8, cl. 10 (empowering Congress “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations”); *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (drawing on the practices of the “civilized nations of the world” to interpret the Eighth Amendment’s ban on “cruel and unusual punishment”); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”).

83. 478 U.S. 186, 196 (1986) (Burger, C.J., concurring).

84. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (extending rationale to unmarried persons’ effort to resist “protection of morals”); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (citing privacy concerns to aid individuals’ resistance of communal objections to contraception).

particular faith traditions had for generations been treated as domains separate from secular law. In reaching for parochial standards to underpin the state's police power and categorically reject Hardwick's privacy claim, Burger introduced a new element into the ongoing dispute over the nature and scope of individual autonomy. The potential ramifications for constitutional liberty alone rendered the move noteworthy.

Did Burger honestly believe that the legal text dovetailed with religious doctrine? If so, why prefer expressions of disapproval from the Hebrew Bible over exhortations from the New Testament to treat social outcasts and the politically vulnerable with equal respect? Again, we would need more information to determine whether Burger acted with integrity. One might ask, in comparable situations, whether the jurist reached for religious authority to interpret a constitutional provision. If not, an inference might be drawn that he or she tried to complicate due process doctrine to foreclose a line of argument for an entire group of people or to express his or her private preferences in the guise of law. As for *Bowers*, the fact that natural law approaches to judicial interpretation had long been out of vogue and that no other member of the Court was willing to endorse his concurring opinion are not dispositive, though they certainly locate his approach at the margins of jurisprudential practices.

### III. A DEFENSE OF BORROWING

Over time, constitutional borrowing has been deployed to various ends by advocates of all stripes. Yet despite that widespread acceptance, we think that it is necessary to demand firmer grounding for the practice. Unexamined tradition or habit is no substitute for a principled defense.

Why, then, should anyone support borrowing? One rationale is that borrowing can promote certain rule-of-law values. It helps restore generality to the law, it creates opportunities for strategic leveraging, it may facilitate accountability, and it fosters systemic strengthening. If these gains predominate, they provide reason enough to legitimate the practice in a constitutional order.

Borrowing does not deserve support in every circumstance, of course. It may occasionally do violence to the very virtues that render the practice defensible in most situations. We flag some general dangers here and then, in the next Part, we set out a framework for identifying the conditions under which particular instances of borrowing retain or lose their attractiveness.

#### A. Generality

Constitutional borrowing tends to promote the development, over time, of a general repertoire of doctrinal moves that are common to disparate areas of law. Lon Fuller once remarked that the "requirement of generality" was "[t]he first desideratum of a system for subjecting human conduct to the

governance of rules.”<sup>85</sup> Officials, according to the generality principle, should apply the law rather than resolve specific disputes according to personal inclination or the demands of justice in each instance anew.<sup>86</sup> Borrowing encourages a type of generality that may be wholesome for a variety of other reasons, as well. It hinders hyperspecialization and thereby facilitates participation by nonexperts. And wider involvement in lawmaking can in turn promote democratic accountability. People who value legal consistency will have greater opportunities to press decisionmakers not to exercise their power in patternless or idiosyncratic ways. Migration of legal ideas may also break down outmoded categories, heighten awareness of the limitations of context-specific adjudication, and encourage the search for commonalities.

Perhaps most significantly, generality across areas of law can foster a sense of fairness among litigants—a perception that comparable cases are being treated comparably, even though they may fall into different doctrinal categories. In other words, borrowing can foster a felt sense of evenhandedness by encouraging the spread of common methods and devices across domains of constitutional discourse.<sup>87</sup> For reasons like these, generality has long been prized by those who seek to promote the rule of law.<sup>88</sup> Yet few have noticed that migration among legal fields can promote that quality.

Generality can, in turn, improve predictability.<sup>89</sup> The intermingling of constitutional ideas and mechanisms can give advocates a better sense of

85. LON L. FULLER, *THE MORALITY OF LAW* 46 (1964).

86. See Kent Greenawalt, *The Rule of Law and the Exemption Strategy*, 30 *CARDOZO L. REV.* 1513, 1514 (2009) (describing “[a] core element (some might say *the* core) of the rule of law” and citing FULLER, *supra* note 85).

87. So, for example, a Native American peyote user whose claim is denied on the ground that drug laws had only an “incidental effect” on sacred practices might take comfort in the fact that incidental discriminatory effects could not form the basis for an equal protection claim by other complainants. See our discussion of *Employment Division v. Smith*, 494 U.S. 872 (1990), *supra* text accompanying notes 56–61, for further explanation.

88. Generality is an important component of the rule-of-law tradition. Along with other characteristics, it is seen to distinguish rule-bound behavior from dictatorial or idiosyncratic decisionmaking. See FULLER, *supra* note 85, at 46–49; JOSEPH RAZ, *THE AUTHORITY OF LAW* 215–16 (1979); BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 93, 97 (2004); Greenawalt, *supra* note 86, at 1514–15; Jeremy Waldron, *The Rule of Law in Contemporary Liberal Theory*, 2 *RATIO JURIS* 79, 93–94 (1989).

When we invoke the rule of law here, we do not mean to deploy its thickest meaning, according to which government is required to adhere to a full-fledged conception of justice. Although some thinkers have understood the rule of law that way, we adhere to a thinner meaning, according to which a regime could be at once unjust and compliant with the rule of law. Cf. Greenawalt, *supra* note 86; Waldron, *supra*. Constitutional borrowing is neutral as to substantive justice—it can be deployed independent of more rigorous requirements of legal or political morality. Moreover, we do not suggest that even a uniform and ubiquitous implementation of constitutional borrowing would be sufficient to guarantee full governmental observance of the rule of law or any one of the values associated with that tradition.

89. Greenawalt, *supra* note 86, at 1515 (“[Officials who observe the rule-of-law value] legal standards that are clear in their content and whose application to particular circumstances is (at least for the most part) definite. . . . [This is what scholars have] called principled predictability.” (internal quotation marks and citations omitted)).

which forms of persuasion are likely to count, even in an unfamiliar area. Some might predict that borrowing would undermine predictability by promoting endless possibilities. Yet its proponents would argue that the custom has promoted a stable range of expectations.<sup>90</sup> Over time, they would say, borrowing has enabled lawyers and lawmakers to craft arguments that stand a greater chance of success. Borrowers assist in harmonizing domains of constitutional law, and improved coherence fosters a greater measure of certainty.<sup>91</sup>

Consider the question of whether the government ought to be able to exclude religious actors and entities from its support programs.<sup>92</sup> For some, that issue presents a strong temptation toward inconsistency. Often the same people who believe that the government should not be able to selectively deny aid to religious groups also believe that government should be able to refuse to fund abortions even though it financially supports natural childbirth.<sup>93</sup> For them, the state ought to be prohibited from selectively defunding the exercise of a constitutional right in the free exercise area, even though it is permitted to do so when it comes to due process. Tropes that populate these controversies include, on the one hand, the government-as-speaker (facilitating state influence), and, on the other hand, the government-as-forum-creator (working to limit government discretion). Inconsistency in the use of these metaphors can be flagged as a refusal to borrow—and as a threat to generality.

In *Locke v. Davey*,<sup>94</sup> the tension between free exercise and due process concepts was momentarily eased. There, the Court decided that a state could refuse to finance certain religious activity.<sup>95</sup> Washington State had created a scholarship program that covered all proposed subjects of study, except devotional theology.<sup>96</sup> In upholding the program, the Court lifted an idea from its due process and free speech cases, namely the notion that when the government is funding and managing its own program, it enjoys wide discretion to choose which activities to support, even if the unfunded conduct is constitutionally protected. “The State has merely chosen not to fund a distinct

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90. They might point to the spread of the disparate impact rule from equal protection to free exercise, *see supra* notes 57–64 and accompanying text, or the general application of the undue-burden standard to liberty provisions. *See supra* notes 31–35 and accompanying text.

91. Any benefit to calculability would of course be a matter of degree. We have seen that constitutional actors may import in multifarious ways. Insofar as borrowing is indeterminate, then it may or may not contribute to greater predictability about the substance of law.

92. *See generally* Tebbe, *supra* note 55.

93. *Id.* at 1284 (citing Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 989–90 (1991)).

94. 540 U.S. 712 (2004).

95. A complicating factor, which the *Davey* Court stressed, was that the legislature made this programmatic decision to comply with Washington state’s Constitution, which had been construed by the state’s highest court to prohibit indirect funding of religious training.

96. *Davey*, 540 U.S. at 715.

category of instruction,” Chief Justice Rehnquist explained,<sup>97</sup> characterizing the issue as a matter of curricular control rather than the creation of an expressive forum.<sup>98</sup> The *Davey* Court’s implicit debt to the abortion cases was “unmistakable,” as one prominent commentator put it.<sup>99</sup> Here, constitutional borrowing arguably exerted pressure toward generality.<sup>100</sup>

Our attention to evenness also suggests a way to appraise improper uses of borrowing, as we will explain further in Part IV. When jurists reference distant ideas not in a manner that furthers consistency across legal doctrines, but instead in a way that creates anomalies, damage to the rule of law can result. Think of Justice Scalia’s dissent in the Ten Commandments case *McCreary County v. ACLU of Kentucky*, where he argued that government ought to be able to publicly honor “a single Creator.”<sup>101</sup> Allowing open acknowledgment of monotheism would have meant a turnabout, he realized, because it would have countermanded the Supreme Court’s long-standing prohibition on government endorsement of religion, as well as the even more ancient requirement of neutrality among faiths.<sup>102</sup> In his defense, Scalia pointed to other areas in which the Court had happily disturbed settled doctrine, specifically voting rights and criminal procedure.<sup>103</sup> That revealing gesture highlighted the transformative character of what Scalia was trying to accomplish. For him, these other moments of judicial creativity served as prototypes for action. So although borrowing often promotes legal consistency, it can also highlight the damage that a move, whether accomplished or merely proposed, may inflict on generality in the law.

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97. *Id.* at 721.

98. *Id.* at 720 n.3.

99. Douglas Laycock, *The Supreme Court, 2003 Term—Comment: Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 176 (2004).

100. Of course the dissent also had an argument for consistency. See *Davey*, 540 U.S. at 726 (Scalia, J., dissenting). Our point, however, is that both majority and dissent were employing borrowing in ways that would bolster methodological and conceptual consistency—either harmony with liberty-based due process cases (for the majority) or harmony with equality-based antidiscrimination ideas (in the case of the dissent).

101. 545 U.S. 844, 893–94 (2005) (Scalia, J., dissenting) (“Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion.”); see also *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, J., concurring).

102. See *McCreary*, 545 U.S. at 860 (majority opinion) (“[T]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.” (internal quotation marks and citations omitted)).

103. *Id.* at 892–93 (Scalia, J., dissenting) (“[This Court has] found unconstitutional bicameral state legislatures of a sort that had existed since the beginning of the Republic. . . . [T]he Court has not shrunk from invalidating aspects of criminal procedure and penology of similar vintage.” (citing *Roper v. Simmons*, 543 U.S. 551, 568 (2005))).

### B. Empowerment

A related point in favor of constitutional borrowing is that the practice promises to foster wider participation in the maintenance of constitutional norms. Once a regime agrees to govern by law, it presents opportunities for legal actors to exploit contradictions and inconsistencies. And to the degree that borrowing promotes values associated with the rule of law by highlighting constitutional ideas, generalizing them, and facilitating their use, it will also enable advocates to find creative uses for those ideas.

In other words, borrowing may promote empowerment in several related ways. First, an environment in which borrowing is tolerated encourages constitutional actors to understand that they can—and indeed, must—take matters into their own hands if organizing values are to emerge and endure. Second, it rewards syntheses of different areas of law, thereby advancing holistic thinking. Third, borrowing presents advocates with a practical way of making connections between policy objectives and long-term interests, namely by leveraging one idea to develop another.

Borrowing begets further borrowing. A robust custom of importation creates possibilities for constitutional actors to strategically leverage ascendant concepts, techniques, or tropes for use in new domains. Because even one instance of borrowing lends a legal device currency beyond its original context, it empowers advocates to press for a second and third migration. Even people who find themselves regularly in opposition to the prevailing judicial mood nevertheless may be able to redeploy a widespread legal technique in a strategic manner.

Perhaps the best contemporary example of empowerment is the effort of progressive legal scholars to deploy concepts associated with individual liberty in the service of an egalitarian vision. Recently, Jack Balkin and Reva Siegel have warned against reliance on the tiers-of-scrutiny framework originally associated with equal protection; instead, they have advocated forms of legal argumentation drawn from the Court's liberty jurisprudence, particularly its speech and due process cases.<sup>104</sup> Protecting the ability of all people to pursue their divergent life plans may also ensure that all people enjoy the status of full citizenship.<sup>105</sup> And protecting liberty for all can serve egalitarianism without generating the sort of legal backlash that can accompany more transparent attempts to redistribute opportunities to subordinate groups.<sup>106</sup> So these scholars have pressed legal activists to take advantage of the Court's recent receptivity to liberty-oriented claims—in areas such as speech, criminal procedure, and due process—in the service of promoting

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104. Balkin & Siegel, *supra* note 7.

105. *See id.* at 99–100.

106. *Id.* at 98. One mechanism that holds particular promise for their vision of “redemptive constitutionalism” is the designation of a set of fundamental interests—in travel, voting, access to justice, and the like—that the Court has said cannot be distributed unequally along class lines. *See id.* at 98–100.

the full citizenship rights of women, cultural minorities, and religious groups. Balkin and Siegel have also urged jurists to reconstruct the Equal Protection Clause by “borrow[ing]” from statutes concerning employment, jury service, and voting rights, the use of rebuttable presumptions of illegality for government policies that work a disparate impact on subordinated groups.<sup>107</sup>

Likewise, Kenji Yoshino has drawn attention to a new sort of equal protection violation, where people are subordinated not because of their membership in a disfavored group, but instead because they engage in conduct that is particularly closely identified with the group’s distinctive attributes.<sup>108</sup> So, for instance, employers sometimes disfavor not all African American women, but only women who wear cornrows.<sup>109</sup> Although courts have not consistently protected against this sort of hybrid inequality, Yoshino applauds the willingness of certain courts to disallow it, and he encourages the migration of their ideas. When in *Tennessee v. Lane* the Supreme Court held that Congress could require states to make its courthouse’s wheelchair accessible, it framed the issue not as a matter of protecting a subordinate group, but instead said that all people—disabled or otherwise—have a due process “right of access to the courts.”<sup>110</sup> That move was similar to the way the Court had, just a year earlier, struck down the Texas sodomy statute in *Lawrence* not only in order to protect a right to intimate sexual conduct enjoyed by all citizens, but also to protect gay and lesbian citizens. Yoshino applauds the liberty rationale in *Lane*, just as in *Lawrence*, and he encourages the further spread of that particular framework for understanding and deciding civil rights cases. He issues a strategic call for future litigants and lawyers to style their claims not in terms of equality for members of disfavored groups, but in the language of liberty interests shared by all citizens alike.<sup>111</sup> That deployment of due process doctrine in the service of antisubordination could be seen as a prominent example of the phenomenon we are tracking.

Constitutional borrowing is especially empowering because it is agnostic to political ideology. Think, for instance, of the way that lawyers representing religious conservatives in the 1980s and 1990s were able to exploit the trope of discrimination in order to depict their clients—often

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107. *Id.* at 107.

108. Yoshino, *supra* note 7 (describing “the new discrimination”).

109. KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 131–34 (2006) (discussing *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (1981)). Cornrows are a braided hairstyle that is particularly closely associated with certain aspects of African American culture. Yoshino predicts that under this new civil rights paradigm, courts should extend protections not on the basis of membership in subordinate groups but instead in order to encourage the development of human capacities by all individuals.

110. 541 U.S. 509, 523, 531–33 (2004).

111. See YOSHINO, *supra* note 109. Similarly, one of us has suggested that it is possible to use the Court’s abortion funding decisions in order to make conceptual space for the government’s refusal to fund religious groups on equal terms with others. See Tebbe, *supra* note 55.



members of large religious communities—as victims of just that sort of governmental oppression.<sup>112</sup> That rhetorical strategy contributed to decisions protecting the right of religious speakers to access certain public forums, such as school buildings after hours, on equal terms with nonreligious community groups.<sup>113</sup> In this respect, the substantive and rhetorical achievements of the civil rights movement empowered later actors, who may have seen the world in very different terms and pursued different ideological objectives.

Think too of how defenders of federalism have deployed the practice. A controversial but somewhat successful strategy has involved importing the language of equality into domains such as the Commerce Clause and Eleventh Amendment. To magnify the authority of states, advocates have taken to describing state interests in terms of equal “dignity,” “respect,” and even “trust.”<sup>114</sup> This innovation has not only permeated discussions immediately before the Supreme Court,<sup>115</sup> it has also empowered states (and states’ rights proponents more broadly) to surmount various doctrinal impediments to the cause of federalism. In sum, strategic leveraging occupies a place in the rule-of-law tradition because it is seen to provide limited but real protection against governmental caprice, and because it offers that protection to groups with varying commitments.

When a state commits itself to the rule of law, it does not guarantee that the legal rules it adopts will be just or wise. Yet even an unjust state that claims to govern by law implicitly agrees to obey the rules it has itself established, even if that will result in occasional defeats. In Jeremy Waldron’s words: “In an oppressive regime which *does* respect the rule of law, there will be at least some values and principles in the official culture to which the citizen can appeal in his complaints about injustice, and some tensions which he can exploit to embarrass the regime.”<sup>116</sup> Granted, constitutional borrowing may promote strategic leveraging more weakly than other legal

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112. NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 206, 207–12 (2005).

113. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–31 (1995); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993).

114. See, e.g., *Alden v. Maine*, 527 U.S. 706, 715 (1999) (“[States] are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.”). More oddly, in the Supreme Court’s dormant Commerce Clause decisions, the Justices have emphasized a state’s right to be free from “discrimination” rather than the federal government’s prerogative in regulating interstate trade. See, e.g., *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

115. During oral arguments over whether Section Five of the Voting Rights Act is consistent with our constitutional design, Justice Kennedy argued that the preclearance provision offended the “sovereign dignity” of states, which are not “trusted” to behave when it comes to the commands of equality. He, and presumably others, were troubled by “this differentiation between the states.” Adam Liptak, *Skepticism at the Court on Validity of Vote Law*, N.Y. TIMES, Apr. 30, 2009, at A16. See generally Timothy Zick, *Statehood as the New Personhood: The Discovery of Fundamental “States’ Rights”*, 46 WM. & MARY L. REV. 213 (2004).

116. Waldron, *supra* note 88, at 93–94.

practices. Moreover, borrowing is relatively indeterminate, since the available sources for any particular borrowing will be multifarious. Yet to the degree that the practice promotes values associated with the rule of law by generalizing constitutional ideas and making them widely available, it may open up opportunities for advocates to find creative uses in one context for methodological moves created in some other domain. In our view, constitutional borrowing does more to foster such productive interactions than it does to shut them down.

### C. Accountability

Under the right circumstances, borrowing also may heighten the law's accountability to the people affected by its dictates. Once a mechanism has become widespread and institutionally entrenched, a failure or refusal to adopt it becomes more visible. In other words, the migration of a stable repertoire of moves over several domains will make a subsequent refusal to adopt that repertoire—or the introduction of a new technique—appear anomalous rather than innocuous. Conversely, constitutional actors may be asked to answer for an affirmative act of importation, particularly when that act disturbs existing ways of working in a particular area. The fact that the new element hails from another area of constitutional law makes it more visible. Either way, the prevalence of borrowing can heighten the salience of certain legal moves, making them available for commentary and critique. There may be costs, to be sure—unused ideas can become unusable, and popular ideas can acquire undeserved priority—yet the basic intuition seems correct that borrowing can facilitate awareness of, and perhaps even greater vigilance over, developments in the law.

Consider two instances in which the Court abandoned or neglected its strict scrutiny framework, and the public reactions that they drew. Both cases involved the complex crossover between areas of law associated with liberty and equality that we have been tracking throughout this Article. And both show how persistent borrowing can expose a subsequent departure.

Think first of *Employment Division v. Smith*, where the Court discontinued heightened scrutiny of laws that incidentally burdened religious freedom.<sup>117</sup> Because strict scrutiny was a familiar mechanism when *Smith* was decided, having come to free exercise law from equal protection and free speech cases, and because the Court had been employing that mechanism for roughly three decades in its free exercise doctrine itself, the decision to abandon it drew attention. Outcry was heard in Congress, which attempted to reinstitute the strict scrutiny regime as a statutory matter. It first passed the Religious Freedom Restoration Act (“RFRA”) and then, after that law was partially invalidated,<sup>118</sup> Congress enacted the Religious Land

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117. 494 U.S. 872 (1990).

118. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

Use and Institutionalized Persons Act (“RLUIPA”).<sup>119</sup> Without question, Congress got involved because it disagreed with the *Smith* Court’s decision to abandon the compelling interest test, which had become widespread.<sup>120</sup> Roughly a dozen states similarly expressed discontent with the turnabout by passing state-level analogues to RFRA.<sup>121</sup>

Think second of *Lawrence*, where the Court deemphasized the traditional tiers-of-scrutiny approach. The Court declined to apply the compelling government interest test, which had already spread from equal protection to domains associated more closely with liberty or autonomy, including due process.<sup>122</sup> Here, too, the Court’s refusal to adopt a formal presumption of unconstitutionality generated considerable debate.<sup>123</sup> We say this quite aside from any critique or defense of that aspect of *Lawrence*. Our object is simply to show that in an era in which constitutional borrowing is as customary as it is today, a refusal (or decision) to import a prevalent legal tool can serve a deliberative function.

Under conditions where legal techniques can be expected to be used with some frequency, in sum, departures from those approaches are easier to spot and therefore can draw the sort of public scrutiny and dialogue that helps to keep the judiciary faithful to its own professional and institutional standards. Valuing that sort of accountability comports with the more general rule-of-law notion that government should not act in an arbitrary

119. 42 U.S.C. §§ 2000cc to 2000cc-5 (2006). For an account of the history leading up to RLUIPA, as well as the current state of the constitutional rules, see Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699, 705–11, 725–27 (2005).

120. See Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2006) (setting out Congress’s finding that “in [*Smith*] the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion” and explaining that a purpose of RFRA is “to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened”).

121. Of course the Court itself claimed that it was in fact acting to eliminate a “constitutional anomaly”—the presumption of unconstitutionality for disparate impact claims. See *supra* Section II.C. On that account, it was not *Smith* itself that stood out, but instead the free exercise rule that had been in place previously. After all, as the *Smith* Court pointed out, disparate impact claims no longer drew strict scrutiny. *Smith*, 494 U.S. at 886 n.3 (citing *Washington v. Davis*, 426 U.S. 229 (1976)). Recently, Justice Scalia tried unsuccessfully to export this disparate impact rule to the area of voting rights, as well. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1626 (2008) (Scalia, J., concurring in the judgment).

122. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The Texas [sodomy] statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”); see also *id.* at 586 (Scalia, J., dissenting) (noting that the Court has not subjected the Texas sodomy law to strict scrutiny, and chiding the majority for applying “an unheard-of form of rational-basis review that will have far-reaching implications beyond this case”).

123. The dominant reaction was not chiefly disapproval, as with *Smith*, but instead a more even-handed sort of interest. See Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2002–2003 CATO SUP. CT. REV. 21; Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103 (2004); Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447 (2004); Cass R. Sunstein, *What Did Lawrence Hold? of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27; Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).

manner.<sup>124</sup> Now holding the judiciary to its own standards is not the same thing as making it accountable to public opinion in the manner that politicians are. Justices may well continue to buck public sentiment, as they did in *Smith*, but they will do so with fuller awareness of the possible cost to the Court's legitimacy.

#### D. Reinforcement

So far we have been discussing the benefits of borrowing by focusing on the borrower and persons directly affected by official action. But there may be other beneficial effects as well. Specifically, an act of appropriation can not only shore up the target area of law, but also can work to legitimate or reinforce the legal source. Consequently, and perhaps most importantly, a culture of borrowing can strengthen the constitutional system as a whole. In other words, when a constitutional actor lifts a mechanism from domain *X* for use in domain *Y* that act may not only bolster domain *Y* in the intended way, but might also enhance the credibility of the mechanism within domain *X*, as well as the credibility of domain *X* as a whole. When that happens, borrowing can also have systemic effects because the wider network of foundational ideas may be reinforced. That can not only stabilize the domains of substantive law immediately involved—*X* and *Y*—but it can also bring somewhat greater coherence to legal discourses more generally. Of course systemic reinforcement is not necessary or automatic in all cases, nor is it invariably good, but it is an interesting consequence of many such exchanges.

Something like that happened in *Lawrence*. There the Court looked to substantive due process decisions in order to protect intimate conduct, particularly within the home. That move worked to legitimate the right of intimate conduct and association developed in cases like *Griswold v. Connecticut*,<sup>125</sup> *Eisenstadt v. Baird*,<sup>126</sup> and especially *Roe v. Wade*<sup>127</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>128</sup> Those cases had been under sustained attack, and their logic and vitality had been threatened by *Bowers v. Hardwick*,<sup>129</sup> by the time the Court turned to the Texas sodomy law. Moreover, the *Lawrence* Court went the additional step of appropriating from the domain of equality. In the process of reinforcing *Y*, they also thereby legitimated *X* in the form of antidiscrimination rationales and the

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124. TAMANAH, *supra* note 88, at 95; Greenawalt, *supra* note 86, at 1514.

125. 381 U.S. 479 (1965).

126. 405 U.S. 438 (1972).

127. 410 U.S. 113 (1973).

128. 505 U.S. 833 (1992).

129. 478 U.S. 186 (1986).

decision of *Romer v. Evans*,<sup>130</sup> even without directly saying so. This dynamic of mutual reinforcement should not be understated. And in that particular context, the move put added pressure on earlier statements of the Court that sexual orientation could not define a suspect class.

Think too of the migration of the disparate impact rule from *Washington v. Davis*<sup>131</sup> and equal protection to *Employment Division v. Smith*<sup>132</sup> and free exercise. That appropriation likewise not only justified a rewriting of free exercise law—enabling the Court to characterize the old rule as “a constitutional anomaly”<sup>133</sup>—but also shored up an approach to equal protection that has seen its share of high-profile criticism.<sup>134</sup> To the degree that the Court could proliferate the idea that a presumption of unconstitutionality should only follow a showing of discriminatory treatment, it could more convincingly describe the old disparate impact approach as a “constitutional anomaly.”<sup>135</sup>

Whether or not one approves of the Court’s decision in either of these examples, the point is this: when constitutional actors engage in borrowing, they may fortify not only the area of law into which the idea is imported, but also the legal source. So the *Lawrence* Court strengthened the principle of equal dignity when it brought that idea to bear on the problem of intimate association, and the *Smith* Court lent additional credence to its rejection of disparate impact claims in equal protection when it extended that refusal to free exercise. What is more, the strengthening impacts the system of constitutional mechanisms more generally. There is a ripple effect of mutual reinforcements across constitutional law as a whole. People come to see the field as united by a common interpretive focus, of course—the text of the Constitution—but also by an interlocking set of techniques, ideas, sources, and mechanisms.

#### IV. CRITERIA FOR EVALUATION

Now that we have a sense of some of the forms that constitutional borrowing can take, as well as an appreciation of its virtues, it becomes

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130. 517 U.S. 620 (1996). In *Romer*, the Court relied on an equal protection rationale to strike down an amendment to the Colorado Constitution that prohibited special protections in state and local laws against discrimination on the basis of sexual orientation. *Id.*

131. 426 U.S. 229 (1976).

132. 494 U.S. 872 (1990).

133. *Id.* at 886.

134. See, e.g., Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1137–38 (1997) (articulating a sustained critique of the rule of *Davis*). Congress too has adopted the disparate impact approach in several statutes, despite the Court’s critique of that rule in its equal protection cases. See, e.g., Civil Rights Act of 1991, 42 U.S.C. § 2000e–(k)(1)(A) (2006).

135. One could imagine, for instance, an imminent attack on the *O’Brien* test, which applies heightened scrutiny to laws that incidentally burden speech. See *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968).

possible to construct a framework for evaluating incidences of borrowing.<sup>136</sup> Below we explicate four evaluative tools: (a) fit; (b) transparency; (c) completeness; and (d) yield. These criteria implement basic assumptions about the rule of law. First, the notion of fit complies with the sense that the law's substance (including borrowed material) should be compatible with existing arrangements. Second, a preference for transparency endorses the expectation that arguments appeal to reason and further a public purpose. Third, completeness is related to substantive fidelity and deliberative values, necessary features of a purposively designed legal system. Fourth, the idea of yield acknowledges that above all, the rule of law must solve problems of practical governance (and therefore, an act of borrowing must not frustrate self-rule but aid it in some fashion).

Once borrowing is understood as a presumptively legitimate practice—a general acceptance that the previous Part tried to promote—most concerns that arise have to do with how well particular legal ideas fit together; how open and notorious the borrowing is; what is lifted and what is left behind; and what, as a practical matter, that creative act yields.

#### A. *Fit*

Questions of fit arise with greatest urgency when one engages in an original act of transplantation, but subsidiary concerns about fit can also linger even when two domains are already associated in the public imagination or treated as entwined in legal practice. How well different bodies of constitutional knowledge fit together turns on a number of factors, including: (1) whether linkages between the areas already exist (synergy), and the duration of any connections (novelty); (2) what the justifications for the appropriation are and how readily they might be embraced by specialists and average citizens (persuasiveness); (3) how the synthesized values are applied to the dispute at hand (practical yield); and (4) whether and how other background conditions underlie a combination of ideas (resource constraints, social environment, and the like).

In *Roper v. Simmons*,<sup>137</sup> the Supreme Court declared the execution of juveniles to be a violation of the Eighth Amendment. Writing for the Court, Justice Kennedy devoted a separate section to the experience of the United Kingdom, as well as Article 37 of the United Nations Convention on the Rights of the Child, which bars capital punishment for crimes committed while a person is under the age of eighteen.<sup>138</sup> Anticipating concerns of fit,

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136. Bear in mind that such evaluative criteria should be used in conjunction with more traditional means of assessing legal justifications rather than replacing them. What we offer are methods of reaching normative judgments about the quality of borrowing to supplement existing methods for assessing an interpretation of the Constitution.

137. 543 U.S. 551 (2005).

138. *Id.* at 576–78. The fact that the United States has not ratified the Convention did not stand in the way of the *Roper* Court's calibrated appropriation of that legal source to bolster its Eighth Amendment rationale. This is because the Court gave great weight to the fact that "every

Kennedy pursued a four-fold response. First, he emphasized a shared Anglo-American heritage: “The United Kingdom’s experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins[,]” namely, the English Declaration of Rights of 1689.<sup>139</sup> Second, he suggested that certain constitutional provisions, such as the Eighth Amendment, *contemplate* borrowing, particularly if judicial tradition has already ratified such an approach.<sup>140</sup> Third, he relied on the decisive weight of world opinion. Repeatedly, Kennedy stressed the “historic ties”<sup>141</sup> and overlap between the “affirmation of certain fundamental rights by other nations and peoples” and “the centrality of those same rights within our own heritage of freedom.”<sup>142</sup> Fourth, he softened any precedential effect of the borrowing by indicating that such extraneous sources are “not . . . controlling.”<sup>143</sup> Recognition of interconnected traditions among democratic nations, Kennedy argued, “does not lessen our fidelity to the Constitution or our pride in its origins.”<sup>144</sup>

Justice Scalia took aim at the *Roper* majority, focusing on questions of fit. He attacked “the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world.”<sup>145</sup> First, he suggested that appropriation should be rejected out of hand for lack of sincerity or consistency. On numerous occasions, Scalia pointed out, the High Court has expressly gone against the grain of world opinion in establishing some constitutional standard.<sup>146</sup> He pointed to the First Amendment as an example of an area where the Court has been “oblivious to the views of other countries.”<sup>147</sup> Having argued for the distinctiveness of American legal culture, he then disputed whether it made sense to infuse American law with English law, in light of “the United Kingdom’s recent submission to the jurispru-

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country in the world has ratified [the Convention] save for the United States and Somalia,” and no country ratifying the instrument has entered a reservation with respect to the prohibition on juvenile executions. *Id.* at 576.

139. *Id.* at 577.

140. *Id.* at 575 (“[A]t least from the time of the Court’s decision in [*Trop v. Dulles*, 356 U.S. 86 (1958)], the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments.’”). Justice O’Connor, who dissented on the ground that no national consensus could be discerned against capital punishment for juveniles, nevertheless agreed that “the special character of the Eighth Amendment, which . . . draws its meaning directly from the maturing values of civilized society[,]” justifies consideration of foreign and international sources. *Id.* at 604–05 (O’Connor, J., dissenting).

141. *Id.* at 577 (majority opinion).

142. *Id.* at 578.

143. *Id.* at 575.

144. *Id.* at 578.

145. *Id.* at 624 (Scalia, J., dissenting).

146. *See id.* at 624–26.

147. *Id.* at 625.

dence of European courts dominated by continental jurists—a legal, political, and social culture quite different from our own.”<sup>148</sup>

Scalia’s objections are best classified as arguments about fit, for he implicitly acknowledged the permeability, at some level, of all legal systems. Justices in the majority and the dissent assumed the legitimacy of borrowing as a practice. They simply disagreed about whether the tool should be used in the case at bar. Some of the dispute had to do with the consequences of borrowing: Scalia believed that it was being deployed “to set aside [a] centuries-old American practice” and might lead to the displacement of American law by foreign law;<sup>149</sup> the *Roper* majority thought it did no more than “underscore[ ]” existing “rights within our own heritage of freedom.”<sup>150</sup>

Putting to one side the merits of these arguments, their intensity illustrates the seriousness with which questions of fit are often taken. The connections between American law and that of other communities remain contested. Whatever the right answer may be in any particular case, we think the rule of law requires that material taken across boundaries bear a defensible relationship to existing cultural practices and political commitments.

Consider again the First Amendment. It is sometimes said that “today [the Religion Clauses] are recognized as guaranteeing religious liberty and equality to ‘the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.’”<sup>151</sup> The endorsement test pioneered by Justice O’Connor takes the incorporation of equality into religious liberty law a step further. Under that approach, the salient question becomes whether the state’s action with respect to religion “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”<sup>152</sup>

But questions of fit continue to hound the endorsement test. For one, it is not apparent whether the endorsement approach should be a supplemental test or should replace other methods of assessing religion claims. There remains significant dispute over whether a dignitary approach can truly capture the full range of interests identified by the First Amendment. Does equal access to resources, a solution that generally accompanies the equality model, capture all objections to government support of churches and religious organizations? All of these questions in fact suggest there remain crucial, but not always fully worked out, connections between equality and liberty.

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148. *Id.* at 626–27.

149. *Id.* at 628.

150. *Id.* at 578 (majority opinion).

151. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 590 (1989) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985)).

152. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).



Now that the language of equality saturates debate over the Religion Clauses, a pressing question of fit today concerns the point at which “differentiation” becomes “discrimination.” To this point, adjudicators have occasionally engaged in the overheated rhetoric of equality when they invalidate state action, rather than systematically theorizing the circumstances under which treating religious and nonreligious activity differently should rise to a matter of substantive justice.<sup>153</sup> For instance, in *Good News Club v. Milford Central School District*,<sup>154</sup> the Justices struck down a school policy that opened up a public school after hours for “social, civic, or recreational use”<sup>155</sup> but not for religious activities.<sup>156</sup> Along the way, Justice Thomas ridiculed the school’s position as “a modified heckler’s veto,” evoking the 1960s in which African American protestors were cruelly attacked by private citizens while states utilized various techniques to shut down demonstrations.<sup>157</sup> Harry Kalven described the notion of the “Heckler’s Veto” this way: “If the police can silence the speaker, the law in effect acknowledges a veto power in hecklers who can, by being hostile enough, get the law to silence any speaker of whom they do not approve.”<sup>158</sup>

Should the state’s action in this instance be understood as “discrimination” either in the sense that it unjustifiably burdens or stigmatizes someone, or in the sense that the state is expressing hostility toward a private message? If so, is it discrimination on par with the kinds of subordinating programs of the past against racial minorities and women, or does reaching such a constitutional judgment require considerations beyond the idea that a party is treated differently?<sup>159</sup>

When the language of equality or speech (here, both) is brought to bear on a problem, it frames a matter in terms of access, thereby marginalizing more substantive concerns that might arise. Once the state is required to make such property management decisions on an equal basis, for fear of expressing animus, can it bar other community groups, such as the Aryan Youth, from using school grounds after hours?<sup>160</sup> Perhaps public officials ought to retain the ability to decide not to facilitate speech by such groups. There might be an argument that the two scenarios can be distinguished on the ground that religious groups enjoy a privileged constitutional status vis-à-vis other groups, though this answer is not obvious if the speech part of

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153. Typically, no Establishment Clause injury will be heard if subsidies or other public resources are equally available.

154. 533 U.S. 98 (2001).

155. *Good News*, 533 U.S. at 109.

156. *Id.* at 111–12.

157. *Id.* at 119.

158. HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 140 (1965).

159. For an argument that exclusions from support programs amount to impermissible discrimination less often than is supposed, see Tebbe, *supra* note 55.

160. For a defense of state discretion to support nonreligious actors without also aiding religious ones, see *id.* at 1271–82.

the equation is taken seriously—for, under free speech principles, even the despised are entitled to some opportunity to congregate and make themselves heard.<sup>161</sup>

We raise this example not because we necessarily disagree with where the Justices have drawn the line.<sup>162</sup> Every adjudicative act entails trade-offs, and it seems defensible to demand, at least presumptively, equal access to public resources.<sup>163</sup> After all, the school could always get out of the business of serving as after-hours property manager. Yet something valuable could be lost by putting a school in such an either-or position. And that, ultimately, is our point: wrapping a resource allocation question in the language of equality can raise as many questions as it answers.

### B. Transparency

It may be profitable to evaluate an instance of constitutional borrowing according to how open and notorious it is. Appropriation is overt if the synthesis is undertaken self-consciously or systematically, if it cites to or quotes from accepted sources, or if it openly considers and rejects alternative formulations. A combination is covert if it is made without revealing its genesis or evolution, if it is presented as well-established despite the lack of a pedigree, or if it is made casually rather than painstakingly.

Consider the Massachusetts Supreme Judicial Court's ("SJC") decision in *Goodridge v. Department of Public Health*,<sup>164</sup> which provides an example of intersystem borrowing (incorporating federal law into state law) as well as interdomain appropriation (appealing to equality for the sake of liberty). Invalidating an opposite-sex marriage statute on equal protection grounds, the Justices prominently quoted from *Lawrence v. Texas* to affirm their "obligation . . . to define the liberty of all."<sup>165</sup> Throughout, the SJC couched the equality question as one enveloped in a "core concept of common human dignity,"<sup>166</sup> or as conjoined principles of "respect for individual autonomy

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161. Political speech could likely be excluded in toto, but closing school doors only to a disfavored political perspective would be harder under existing law.

162. For an argument that the *Good News* Court drew the line in the wrong place because it failed to take into account the fact that an outside group was seeking to proselytize in an elementary school, see 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 206 (2008).

163. *But cf.* Tebbe, *supra* note 55 (arguing that government exclusion of religious groups from support ought to be constitutional more often than is commonly supposed). We note that, at least in the public school context, the Equal Access Act makes many of these questions less practical than theoretical by requiring equal treatment of school-sponsored student groups.

164. 798 N.E.2d 941 (Mass. 2003).

165. *Goodridge*, 798 N.E.2d at 948 (quoting *Lawrence v. Texas*, 539 U.S. 558, 571 (2003)).

166. *Id.*

and equality under law.”<sup>167</sup> These ideas were expressed in *Lawrence* as an exposition of the Fourteenth Amendment, but in the judgment of the SJC, they were guaranteed to a greater degree by the Massachusetts Constitution. The hybrid nature of *Goodridge* was underscored by the separate concurrence of Justice Greaney, who thought the same outcome could have been “more directly resolved using traditional equal protection analysis.”<sup>168</sup>

The SJC made it obvious that the institution was adopting as its own—and adapting—the *Lawrence* Court’s assertion that “[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”<sup>169</sup> In the process, the SJC replayed the U.S. Supreme Court’s own hedge between liberty and equality. Moreover, because the court quoted directly from *Lawrence* and pointed out that the precise question of gay marriage was left open in that decision, it was also apparent that the state court was, on its own initiative, going farther than the *Lawrence* Court had.

Because *Goodridge* appropriated ideas of liberty (articulated by others) for the sake of equality and did so overtly, a reader is shown every step of the reasoning process. Transparency may invite disagreement by showing where the movable components of an argument are, thus exposing them to attack and possible ridicule. But opting for transparency also arguably reduces the tensions surrounding a controversial decision by acknowledging the hard choices facing a decisionmaker. Overt borrowing invites the citizen to walk along with the jurist in an exploration of constitutional possibilities, and the citizen is afforded the opportunity to embrace or reject the synthesis proffered. One could conclude that the SJC had no business drawing on a liberty case to adjudicate an equality controversy, or one could agree with the general approach but disagree with how the ideas were interwoven. At all events, the point is that signposting the appropriation can fill a deliberative function, even if it ends up prompting more intense disagreement in the short run.

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167. *Id.* at 949; *see also id.* at 959 (“Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family—these are among the most basic of every individual’s liberty and due process rights.”).

168. *Id.* at 970 (Greaney, J., concurring). The California Supreme Court’s decision that the state’s same sex-marriage ban also contains an overt instance of borrowing. There is no question that the ruling’s equality rationale is firmly grounded in the state constitution, California legal precedents, and even social transformations in the state regarding public attitudes toward homosexuality. Even so, the state court justices employed *Lawrence* as a model for answering the interpretive question. Citing the case directly, and calling it “somewhat analogous,” they pointed to its repudiation of *Bowers* as proof that constitutional rights “properly should be understood in a broader and more neutral fashion so as to focus upon the substance of the interests that the constitutional right is intended to protect.” *In re Marriage Cases*, 183 P.3d 384, 421 (Cal. 2008) (citing *Lawrence*, 539 U.S. at 565–77).

169. *Goodridge*, 798 N.E.2d at 953 (quoting *Lawrence*, 539 U.S. at 575) (internal quotation marks omitted).

On other occasions, constitutional borrowing is conducted more covertly, without identifying a particular source, and without underscoring the interpretive innovation that might be involved. It might consist of language, reasons, or ideas that suffuse an opinion rather than a single, focused, prominent moment of appropriation. Consider the criminal procedure decision, *Chambers v. Florida*,<sup>170</sup> which deemed the interrogation of several black youths over the course of several days and nights to be a denial of due process of law, in the process throwing out confessions made under duress.<sup>171</sup> The defendants had made both liberty and equality arguments, and the Justices chose to ignore the claims sounding in racial inequality, at least formally.<sup>172</sup>

Yet the indications of racial injustice were too powerful to deny: in their search for a killer, police engaged in a racial dragnet, detaining and questioning upwards of forty African Americans.<sup>173</sup> Justice Black's integration of the ideas of equality and liberty proved to be sophisticated. First, the opinion recounted the facts in such a way that left little doubt of the racially charged atmosphere or of the sheriff's immediate focus on black suspects.<sup>174</sup> Second, Black seamlessly combined rationales of liberty and equality in recounting the background and purpose of the Fourteenth Amendment: "Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny."<sup>175</sup> In other words, protecting liberty by scrupulously enforcing fair procedures also made state actions "free of prejudice, passion, excitement, and tyrannical power."<sup>176</sup> Though the opinion did not directly accuse any of the state actors in this case of racial discrimination, Black insisted over and over that the ruling would nevertheless aid "the poor, the ignorant, the numerically weak, the friendless, and the powerless."<sup>177</sup> And in the application of these principles to the facts at hand, he referred to the defendants as "ignorant young colored

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170. 309 U.S. 227 (1940).

171. *CHAMBERS*, 309 U.S. at 241.

172. *Id.*; see Brief in Support of the Petition for Writ of Certiorari, *Chambers v. Florida*, No. 195, July 11, 1939, at 25, 28 (contending that defendants' equal protection and due process rights were violated because the evidence was tainted by "illegal influences," including that their interrogator threatened to "turn[] them over to lynchers if they changed their stories"). Marshall's brief may have invited this strategy by declining to make race-based arguments in their strongest form, yet subtly weaving perceived inequities into his liberty arguments.

173. *CHAMBERS*, 309 U.S. at 229.

174. The Broward County Sheriff testified that he was rounding up blacks and taking them to the jail in Dade County "to escape a mob." *Id.* at 230 (internal quotation marks omitted). Deputies arrested individuals without warrants and questioned them, eventually releasing everyone but the accused. The ruling repeatedly referred to "the haunting fear of mob violence." *Id.* at 240.

175. *Id.* at 236.

176. *Id.* at 227.

177. *Id.* at 238.

tenant farmers” questioned “by state officers and other white citizens.”<sup>178</sup> *Chambers* ended with a ringing endorsement of judicial review “for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion.”<sup>179</sup>

The Court has also engaged in veiled borrowing in order to encourage a liberty-oriented template for thinking about a problem. Strangely, the best recent example comes from free exercise law, even though that area has seen some of the most aggressive efforts to displace liberty rules with an equality framework, as we described above.<sup>180</sup> In *Locke v. Davey*<sup>181</sup> the Court softened its exclusive focus on evenhandedness and began to speak in terms that subtly—but unmistakably—drew on liberty-oriented areas of constitutional law, particularly free speech and due process.<sup>182</sup> At hand was the question of whether a state could establish a college scholarship that would be available to all students who met certain criteria, except those who planned to major in the study of religion from a faith perspective.<sup>183</sup> At first, the scholarship seemed to involve just the sort of facial discrimination on the basis of religion that the *Smith* Court had said would remain presumptively invalid. Yet the *Davey* Court upheld the program without any particularly rigorous examination. It chiefly reasoned that Davey had not been excessively burdened when the state denied him a subsidy.<sup>184</sup>

In the course of his majority opinion in *Davey*, Chief Justice Rehnquist emphasized that when the government establishes a subsidy program, it is entitled to decide which activities it wishes to fund and which ones it does not.<sup>185</sup> Ordinary readers would not have placed any particular weight on that formulation. But to specialists, the statement carried covert significance.

178. *Id.*

179. *Id.* at 241. Without having to take a firm position in the ongoing debate at that time over whether more aggressive judicial review was authorized when state action harmed a discrete and insular minority, *Chambers* rhetorically inclined in that direction.

A similar instance of indirection occurred in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), which invalidated a handful of vagrancy laws on vagueness grounds. Some of the defendants were African Americans and women, and the Justices strongly suggested that the liberty approach served the goals of equality: “Those generally implicated by the imprecise terms of the ordinance—poor people, nonconformists, dissenters, idlers—may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts. . . . [T]he scheme . . . furnishes a convenient tool for ‘harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.’” *Id.* at 170 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97–98 (1940)). Justice Douglas ends his hedge toward equality thus: “[T]he rule of law implies equality and justice in its application. . . . The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.” *Id.* at 171.

180. *See supra* Section II.C.

181. 540 U.S. 712 (2004).

182. For an earlier discussion of this interpretation in *Davey*, see *supra* text accompanying notes 94–100.

183. *Davey*, 540 U.S. at 724–25.

184. *Id.*

185. *See id.* at 720–21.

Rehnquist borrowed the trope from the abortion funding cases. One of those had held that when the government subsidizes childbirth, it need not also subsidize abortion.<sup>186</sup> Another had established that when Congress establishes a program to support counseling around childbirth, it may require any abortion-related speech to occur in a segregated institution that does not receive federal aid.<sup>187</sup> What made the borrowing covert was that Rehnquist did not cite either case—and certainly did not explain the analogy to abortion funding, which involved a seemingly disparate area of constitutional law, namely due process. His borrowing was surreptitious in this sense, likely to be detected only by experts.<sup>188</sup>

Now, the fact that constitutional borrowing can be covert does not in itself put it at odds with the rule of law. We can imagine good reasons for not signposting every interpretive move. First, requiring every instance of borrowing to be explicit would force jurists to write inartful and dense opinions when brevity would better serve their needs. Second, there are many situations where a linkage between two domains is historically established such that it is uncontroversial to assert it in shorthand. Third, covert borrowing can be useful for reaching a defensible position, so long as the move away from the norm of transparency is for a jurisprudentially acceptable purpose. Think again of *Chambers v. Florida*,<sup>189</sup> where the record of abuse or discrimination “develop[ed] a sharp conflict” among the parties.<sup>190</sup> Without accusing anyone of discrimination, the Court spoke of the potential for abuse more generally, preferring insinuations when it came to racial misconduct. That example teaches that covertness can be productive if the doctrinal precedents are themselves not yet adequately developed, or if a social consensus in favor of a transformative agenda has not yet crystallized (for reasons like these, one might have preferred the liberty rationale to the equality rationale in the decades before *Brown v. Board of Education*).<sup>191</sup>

While it does not make sense to abolish covert borrowing, there are trade-offs when one borrows furtively. Covert appropriation gains its power from naturalizing the linkage between disparate ideas. Many such linkages are subtle. Thus, it is entirely possible for careful specialists, no less than ordinary citizens, to miss the calibrated gestures. In many cases, the coupling will go unnoticed because the asserted association is entirely uncontroversial (either in terms of popular opinion, the expectations of specialists, or possibly both). But in at least some instances of covert borrowing, signposting is avoided precisely because a decisionmaker anticipates controversy. This was almost

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186. *Maier v. Roe*, 432 U.S. 464, 469–80 (1977).

187. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (“[T]he Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.”).

188. *See, e.g.*, Laycock, *supra* note 99, at 176 (calling the migration unmistakable).

189. 309 U.S. 227 (1940).

190. *Id.* at 238.

191. 347 U.S. 483 (1954) (holding separate-but-equal education violative of the Equal Protection Clause of the Fourteenth Amendment).

certainly one of the calculations involved in *Chambers*, as the Justices apparently wished to avoid inflaming local inhabitants in a high-profile death penalty crime. The impulse was also likely at play in *Davey*, where the Court looked to sensitive abortion decisions. In such instances, a choice is made to try to promote social acceptance of a legal position by framing it as a foregone conclusion, an easy case. The tactic can produce moving, and even memorable readings of law, but in some situations the suppression of disagreement in this fashion risks producing incremental change without an appropriate degree of public deliberation.

### C. Completeness

A matter well worth investigating is the extent of appropriation. We call this the question of completeness. How much of a prior work is copied and what is left behind? Is it an offhand move or a serious one? Does an actor mean to take an entire system of thought and make it salient to the matter at hand for disputes going forward, or is it a more targeted compilation of ideas? Is the effort meant to be duplicated in the future or, based on its treatment, is it likely to be disowned or ignored at a later date?

RLUIPA<sup>192</sup> exemplifies incomplete borrowing. Disagreeing with the Court's decision to strike down the Religious Freedom Restoration Act,<sup>193</sup> Congress pushed back in a calibrated fashion. It did so by reappropriating the idea of strict scrutiny for some, but not all, situations where a person's religious freedom might be unduly constrained by local law or policy.<sup>194</sup> Recall that strict scrutiny had previously been transferred from other areas of constitutional law into free exercise, only to be abandoned in *Employment Division v. Smith* for most types of free exercise claims.<sup>195</sup> In RLUIPA,

192. RLUIPA provides, in pertinent part:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1) (2006).

193. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

194. Unlike RFRA, RLUIPA restricts strict scrutiny for land-use regulations, programs, and penal institutions that receive federal funds or substantially burden "commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. §§ 2000cc(a)(2)(B), 2000cc-1(b)(2). For a more comprehensive analysis of RLUIPA, see Christopher Serkin & Nelson Tebbe, *Condemning Religion: RLUIPA and the Politics of Eminent Domain*, 85 NOTRE DAME L. REV. (forthcoming 2010).

195. See *supra* Section II.C. Under *Smith*, a presumption of unconstitutionality will still apply if the government targets religious behavior, if it administers a system of individualized consideration in such a way that nonreligious actors are given relief while religious ones are not, or if a claim is "hybrid" in the sense that it involves the violation of more than one constitutional right. See *Employment Div. v. Smith*, 494 U.S. 872, 881–82 (1990).

Congress reinstated the presumption of unconstitutionality for laws that place a substantial burden on observance, but only in two narrow settings: prisons<sup>196</sup> and land-use regulations.<sup>197</sup> Therefore, we should consider RLUIPA a partial, legislative exercise in borrowing.<sup>198</sup>

Why pursue a strategy of partial borrowing? The history of interbranch dialogue over the scope of religious liberty already showed that the Supreme Court favored a narrow, and decidedly court-centered, interpretation of Congress's Section Five power to enforce the Fourteenth Amendment.<sup>199</sup> Tailored borrowing in this instance has given the Court another opportunity to rethink its reading of Congress's Section Five authority without threatening the judiciary's core function. Because the statute does not seek to challenge the Court across the board, it is possible to imagine it as a measured response rather than a reflexive rejection. For this reason, the strategy increases the odds that the statute will be approved, even if approval is not required by the courts.<sup>200</sup> If Congress's gambit is successful, it will prompt the Justices to back away from the notion that "strict scrutiny" is a term of art that only judges may use in this area. Partial borrowing in RLUIPA thus may lead to a more cooperative relationship between Congress and the Judiciary with regard to the enforcement of religious freedom. A byproduct may be a more realistic understanding of how constitutional terminology can cross boundaries and when mutual usage of such ideas will in fact benefit the rule of law.

Incomplete borrowing preserves maneuverability in current and future deliberations. For this and other reasons (particularly in the common law system, which prefers incrementalism), it is wishful thinking to hope for a truly complete instance of borrowing every time out. Three justifications for incomplete borrowing come to mind: (1) it is impossible to anticipate all uses and misuses of a particular position; (2) judges have imperfect information as to the likely reactions of key actors; and (3) given these uncertainties,

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196. 42 U.S.C. § 2000cc-1.

197. *Id.* § 2000cc.

198. To the extent that Congress interpreted the First Amendment in RLUIPA, it also provides an example of *constitutional* borrowing.

199. For a fuller account of the history of dialogue between the Court and Congress concerning the scope of religious liberty in the wake of *Smith*, see Tebbe, *supra* note 119, at 705–11, 725–27.

200. Congress did not limit itself to this Section Five argument, but also claimed the power to enact RLUIPA under the Spending Clause (for the prison provisions) and under the Commerce Clause (for the land-use provisions). Yet it is quite clear that Congress targeted these two areas in part because it thought it could build a record of significant violations of religious freedom with regard to institutionalized persons, on the one hand, and zoning and landmarking determinations, on the other. That record would show violations even under *Smith* and would establish Congress's authority to enact such legislation under the enforcement power in Section Five. *See* 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement by Sens. Hatch and Kennedy) ("The [provision] requiring that substantial burdens on religious exercise be justified by a compelling interest, applies only to cases within the spending power or the commerce power, or to cases where [it is possible to make out a claim under the individualized assessments rule of *Smith*].").



it may be wise to see if a fresh combination of ideas takes hold before signaling total commitment, to leave room for reconsideration or a better alignment of constitutional interests. In this respect, incomplete borrowing aligns with the judicial instincts of incrementalism and deliberativeness, rule-of-law values that help to promote a sense, if not always the reality, of stability.<sup>201</sup>

Still, for all of the potential upside of partial borrowing, there may be drawbacks. One risk is that questions of fit may not be adequately dealt with ahead of time, and that the consequences of appropriation later haphazardly confronted, if at all. Another is that others may be unwilling to accept it without knowing more. Take an instance of borrowing from one understanding of equality to another, pursued by proponents of a right to marry for same-sex couples. Both in mobilizing the public and filing lawsuits, they have likened denial of marriage rights on the basis of sexual orientation to the injustice of a similar exclusion on the basis of race.<sup>202</sup> This is more than the borrowing of a legal precedent—it is the taking of another’s historical experience for a persuasive purpose, and in some quarters, such a comparison has been actively resisted.<sup>203</sup> Some of the resistance has to do with fear that referencing someone else’s experience invariably transforms it. Doing so may alter the historical magnitude of the earlier event by asserting a superficial, even false, equivalence; worse, the appropriation may transfer control over historical memory. Other concerns about partial borrowing seem to reflect uncertainties about the policy consequences of aligning race and sexual orientation. One outraged group decried “the genderless marriage project” for “mak[ing] just such an appropriation.”<sup>204</sup>

Think, too, of the undue-burden and endorsement tests. Each time either test has migrated across domains, the derivative work has changed. Reworking a legal standard from another field could involve partial borrowing. Taking some features of a test but not others can give a misleading sense of progress or it can obscure substantive changes to the law. *Casey*’s importa-

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201. See generally *infra* Section V.C (discussing implications of borrowing for minimalism).

202. See, e.g., Brief for Professors of History and Family Law as Amicus Curiae Supporting Petitioner at \*6–7, *Kerrigan v. Comm’r of Public Health*, 957 A.2d 407 (Conn. 2008) (No. 17,716), 2007 WL 4725460 (“Anti-miscegenation laws were considered an intrinsic part of marriage law and were justified as enacting what nature or God dictated and preventing ‘corruption’ of the institution of marriage. . . . As in the case of laws regulating the duties of spouses in marriage, racial regulations that had predominated for centuries changed to reflect society’s evolving conceptions of equality.”); Adam Liptak, *Gay Marriage Through a Black-White Prism*, N.Y. TIMES, Oct. 29, 2006, § 4, at 43.

203. *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (“[T]he traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a different kind [from anti-miscegenation laws.]”); Karl Vick & Ashley Surdin, *Most of California’s Black Voters Backed Gay Marriage Ban; 53% of Latinos Also Supported Proposition 8*, WASH. POST, Nov. 7, 2008, at A3 (quoting African American outreach director of the Protect Marriage Campaign as stating that “[t]he gay community was never considered a third of a person”).

204. Brief for United Families Connecticut as Amicus Curiae in Support of Defendants-Appellees at \*14–15, *Kerrigan*, 957 A.2d 407 (No. 17,716), 2007 WL 4725443. Of course, we do not sanction this argument.

tion of an existing standard conveyed the Court's continuing commitment to the rule of law, but it also helped to obscure the fact that its commitment to a woman's right to terminate her pregnancy had become significantly more complicated. Just as important, partial borrowing may imply that a test is equally demanding across contexts when in fact much depends on the particular circumstances. Application of the undue-burden test to actual state efforts to circumscribe abortion surely warrants such a conclusion. The same could be said of the Establishment Clause area, where proponents of the endorsement approach have enjoyed only partial success.<sup>205</sup> What counts as state "endorsement" of religion is more limited than what the word signifies in equal protection law or even in ordinary parlance: to show favoritism, support, or approval. For some, it may mean no more than that the state is not actively discriminating against a person of faith. Others may hold a more stringent view. But these differences are not apparent from the face of the test or even the Court's own definition of the term.

One final concern about an act of copying that is woefully partial: the tactic can transfer significant discretion to differently constituted bodies, raising doubts about the extent of an institution's commitment to constitutional principles. As the Supreme Court's own jurisprudence has illustrated, just what constitutes an undue burden on a woman's right or when the state has endorsed religion owes much to changes in the Court's composition. Simultaneously overt and incomplete appropriation carries added risks, as the chances of a major doctrinal shift in the absence of sustained contemplation increase enormously.

#### D. Yield

It may be fruitful to ask whether an instance of borrowing is intended to promote or resist the law's development along its present path, and to what extent it is successful in terms of the borrower's aims. Such purposes and consequences collectively constitute the yield of an act of borrowing. Along these lines, we call the appropriation of one set of ideas to alter or expand another area of law an offensive use of the tactic. By contrast, doing so to shore up, amplify, or preserve the vitality of an existing set of ideas constitutes defensive borrowing. If an act of borrowing produces nothing worthwhile in either direction, that failure may provide legitimate grounds for criticism.

*Grutter v. Bollinger*<sup>206</sup> illustrates defensive appropriation in action. The outcome surprised many observers because it rescued affirmative action in public universities, on the condition that admissions policies preserve the ideal of individualized assessment of applicants' profiles. In the process, Justice O'Connor's ruling drew upon the First Amendment to shore up a

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205. See *supra* text accompanying notes 152–153 (describing adoption of the endorsement test as an example of borrowing from equality doctrines).

206. 539 U.S. 306 (2003).

besieged Equal Protection jurisprudence by carving out an island of permissive race-consciousness in a sea of race-disfavoring precedent.

In reasoning that university officials enjoyed a measure of discretion to consider the race and ethnic background of prospective students, the opinion might have simply recounted the ways in which the context differed from private contracting or redistricting, and left it at that. But falling back on this truism became difficult because of conditions the Justices themselves created: for years, they had inveighed against race-dependent decisions by public officials, regardless of whether policies were motivated by a desire to hurt or help minorities. Promoting the individualist position, they called such proxies “offensive and demeaning,”<sup>207</sup> and dangerous for “balkaniz[ing] us into competing racial factions”<sup>208</sup> and for “promot[ing] notions of racial inferiority and lead[ing] to a politics of racial hostility.”<sup>209</sup> Saying admissions decisions were different somehow seemed inadequate, open to the criticism that this amounted to disingenuous line drawing.

Searching for a way of dealing with the prospect of thwarted public expectations may explain why the Justices chose to couch the University of Michigan’s interest in the benign use of race in constitutional terms. Here is how O’Connor put it: “We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”<sup>210</sup> Thus, *Grutter* drew upon ideas of liberty *defensively*.

To discern the borrowers’ possible motivations, consider a path not taken: a strong line of cases from within equal protection jurisprudence itself, arising in the late 1940s and powerfully ratified by *Brown v. Board of Education*,<sup>211</sup> stands for the idea that the educational interaction of people from different races enhanced the experiences of all—why not just go there? Two concerns might have given a jurist pause. First, those precedents involved the state employing race to exclude or otherwise damage the prospects of a racial minority. Second, the Justices had largely discredited the practice of citing those cases expansively in the name of diversity. So one would have to look elsewhere to give university officials the “special” authority to take account of race. The academic freedom cases proved to be an intriguing avenue to reach a result that had otherwise been foreclosed. The novelty of relying on First Amendment cases to blunt the logical force of the Court’s own recent anti-affirmative pronouncements grounded in the Equal Protection Clause should not be missed.

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207. *Miller v. Johnson*, 515 U.S. 900, 912 (1995).

208. *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

209. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

210. *Grutter*, 539 U.S. at 329. See generally Paul Horwitz, *Grutter’s First Amendment*, 46 B.C. L. REV. 461 (2005) (pointing out the First Amendment implications of the ruling).

211. 347 U.S. 483 (1954).

Complications linger from this moment of cross-fertilization. For one thing, many of the academic freedom cases involved teachers or students resisting university policy and did not provide a constitutional grounding for university policy based on institutional self-definition.<sup>212</sup> It is not readily apparent how far the First Amendment could be employed by universities to resist legal challenges by individuals or burdens demanded by governmental entities. Moreover, the companion case *Gratz v. Bollinger*<sup>213</sup> made no mention of the First Amendment rationale. That absence suggests that the actual scope of any right to self-definition on the part of the university remains open to question.<sup>214</sup> Worse, it could later be rejected as merely seasoning in *Grutter* rather than an effort to articulate a First Amendment right in earnest. Whatever the case, the general points, we think, hold true: the Justices creatively borrowed from a relatively unsullied area of law to avoid having to grapple anew with its university cases from the Equal Protection context and to justify a departure from ordinary equal protection analysis.

If *Grutter* involved a defensive appropriation, then a case like *Boyd v. United States*<sup>215</sup> epitomizes offensive borrowing. In that decision, Justice Bradley invalidated a federal statute requiring a defendant or claimant in a civil proceeding under the revenue laws of the United States to make his papers available for inspection on pain of the allegations being “taken as confessed.”<sup>216</sup> The ruling made several synthetic moves with the cumulative effect of expanding the protections of liberty and personal property under the Fourth and Fifth Amendments. *Boyd* incorporated the British case of *Entick v. Carrington*,<sup>217</sup> in which Lord Camden deemed “illegal and void” the Secretary of State’s practice of issuing general warrants to search private

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212. See, e.g., *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603–04 (1967) (holding that vague law empowering dismissal of university employees for uttering seditious words implicated “academic freedom”); *Shelton v. Tucker*, 364 U.S. 479, 484–86 (1960) (describing “academic liberty” in terms of associational rights of teachers); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (holding that contempt sanction against university professor for refusing to answer questions regarding classroom lectures invaded “academic freedom and political expression,” grounded in “political freedom of the individual”). An effort to expand the notion of “academic freedom” to encompass certain “burdens imposed by a university” in *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 238 (2000) (Souter, J., concurring in the judgment, joined by Stevens and Breyer, JJ.), gained only three votes. Cf. *Widmar v. Vincent*, 454 U.S. 263, 277–81 (1981) (Stevens, J., concurring in the judgment) (arguing that some decisions by university to allocate scarce resources should be protected by “academic freedom”). For some possible readings of *Grutter* on this point, see generally Horwitz, *supra* note 210.

213. 539 U.S. 244 (2003).

214. We take no further position on the persuasiveness of *Grutter*’s borrowing of the First Amendment, other than to note that “academic freedom” was a limited and highly contested concept in earlier cases. For a case that illustrates the fragility of the idea, see *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 69–70 (2006) (rejecting claim that law requiring access to military recruiters as condition for federal funds violates universities’ freedom of expressive association).

215. 116 U.S. 616 (1886).

216. *Boyd*, 116 U.S. at 620.

217. (1765) 95 Eng. Rep. 807 (K.B.).

homes and seize personal books, papers, and effects as evidence of seditious libel.<sup>218</sup> Completing the act of transplantation, Justice Bradley argued:

As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution . . . .<sup>219</sup>

Furthermore, the opinion suggested that the subject matters of the Fourth and Fifth Amendments “run almost into each other.”<sup>220</sup> Justice Bradley signaled the mutual appropriation underway: “We have already noticed the intimate relation between the two amendments. They throw great light on each other.”<sup>221</sup> In applying these broad principles to the facts at bar, he brushed aside both the fact that no physical seizure was required by the law, a potential hurdle for the Fourth Amendment claim, as well as any objection that revenue proceedings are civil in nature, which arguably put the statute beyond the Fifth Amendment’s bar against self-incrimination.<sup>222</sup> Justice Bradley insisted that the statute effectuated a constructive search, even if the proceedings lacked “the aggravating incidents of actual search and seizure.”<sup>223</sup> Likewise, he determined the proceedings to be “quasi-criminal” in nature for purposes of the Fifth Amendment.<sup>224</sup> In short, the importation of foreign case law and the hedging of the *Boyd* Court between the possible grounds of decision, all were conducted with the principal goal of expanding domestic notions of liberty aggressively.

How does the offensive–defensive dyad help those who wish to uncover and assess what is transpiring? First, the terminology trains attention on the strategic motivations and doctrinal effects entailed in borrowing. What are the intended and actual consequences of the move—to defend rapidly eroding territory or stake out new ground? Is the appropriated material intended

218. *Id.* at 818.

219. *Boyd*, 116 U.S. at 630.

220. *Id.*

221. *Id.* at 633.

222. Dissatisfied with the majority’s decision to blend and give credence to both rationales, Justice Miller preferred to say that “this is a criminal case within the meaning of that clause of the Fifth Amendment . . . .” *Id.* at 639 (Miller, J., concurring). To his mind, “[t]here is in fact no search and seizure authorized by the statute.” *Id.* Instead, he believed that:

The order of the court under the statute is in effect a subpoena *duces tecum*, and, though the penalty for the witness’s failure to appear in court with the criminating papers is not fine and imprisonment, it is one which may be made more severe, namely, to have charges against him of a criminal nature, taken for confessed, and made the foundation of the judgment of the court.

*Id.*

223. *Id.* at 635.

224. *Id.* at 634.

to cultivate a fresh line of argument or sow the seeds of an existing framework's demise? Engaging the matter in this way focuses analysis on the scope of a borrower's efforts, how they might impact other lines of doctrinal development irrespective of one's intentions, as well as the social capital that might have to be expended to sustain a particular project. In other words, focusing on yield, whether defensive or offensive, aids the effort to evaluate a particular act of borrowing.

Second, since all interpretive choices are made in an environment of cultural and political change, one can better assess what external factors a constitutional actor might be seeking to accommodate or resist through cross-pollination. The *Grutter* Court's defensive creativity may have been a response to an outpouring of support for affirmative action by business leaders, university presidents, and military officials. What remains to be seen is whether the defense of diversity provokes conversations beyond the university dimension or whether *Grutter* and *Gratz* remain special cases. Similarly, *Boyd* appeared to entrench still-robust notions of property and liberty in its reading of the Fourth and Fifth Amendments, drawing on confident expositions of such ideals. Later attempts to undermine *Boyd*'s synthesis could be seen as efforts to limit the far-reaching nature of its premises to effectuate the rise of the modern administrative state and entrench its existence.<sup>225</sup> The audience for an act of cross-fertilization may not be judges or lawyers alone, but administrators, legislators, and ordinary citizens. If this is so, then it may be worthwhile for studies of borrowing to evaluate how effective these accommodations actually are.

## V. IMPLICATIONS FOR THEORY

Our investigation of borrowing carries implications for constitutional theory. In this Part, we juxtapose our evaluation of the practice with five prominent contemporary approaches: originalism, living constitutionalism, minimalism, redemptive constitutionalism, and popular constitutionalism. Chiefly, we conclude that drawing attention to cross-fertilization, and valuing it in the way we propose, cuts against theories that seek to limit judicial creativity most strictly. On the other hand, we identify places where borrowing cannot easily be assimilated even by proposals that otherwise provide greater room for judicial action, such as living constitutionalism and redemptive constitutionalism. We also show how an appreciation of borrowing can augment each theory, and vice versa. Throughout, we take care to acknowledge that borrowing is only one persuasive technique among many, and we recognize that our defense of borrowing is incidental to the main thrust of most constitutional theory. Nevertheless, we aim to show how adherents of

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225. See generally William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995); Note, *The Life and Times of Boyd v. United States (1886–1976)*, 76 MICH. L. REV. 184 (1977).

each approach could profit from a study of the practice of constitutional borrowing.

### A. Originalism

Although borrowing seems to entail just the sort of hermeneutic creativity that troubles originalists, in fact it often plays an important role in deciphering the original meanings of the Constitution. Consequently, students of borrowing and originalists have quite a bit more to say to one another than might at first be supposed. For clarity, we will assume here a fairly pure form of originalism, according to which original meanings should be virtually determinative in constitutional decisionmaking and are privileged over other interpretive methods.<sup>226</sup> However, we put to one side versions of the theory that look to the subjective intent of framers or ratifiers, engaging instead with versions that privilege the initial public understanding of constitutional provisions.<sup>227</sup>

Two values seem to drive common versions of originalism—the democratic authority of the Constitution and the rule of law—and both of these factors might at first seem to disfavor migration.<sup>228</sup> First, the will of the people might be undermined if readers of one provision of the Constitution were permitted to lift meanings from other provisions freely (assuming such crossovers were not originally contemplated). On this view, importing a concern for equality of gay men and lesbians into due process jurisprudence, in the style of the *Lawrence* Court,<sup>229</sup> could work to unmoor privacy law from the act of ratification by the sovereign people.<sup>230</sup>

Originalism is designed to enhance a second constitutional value as well, namely the rule of law.<sup>231</sup> The hope is that tying judges to the original understanding of the Constitution will limit individual idiosyncrasy and result in a set of interpretations that are more stable from case to case. Borrowing might well be seen as a threat to that sort of legal stability, because the practice entails thinking beyond the boundaries of settled doctrinal

226. See Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 166 & n.1 (2008) (citing as examples RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 4–5, 88 (2004); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989)).

227. This version of the theory is sometimes called “original meaning originalism.” See, e.g., Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 388 (2007).

228. Primus, *supra* note 226, at 167 & n.6 (identifying these two principal justifications for originalism, and citing Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980), and Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599 (2004)).

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

230. Here we are assuming that the right to privacy itself has been ratified in the first place. For our earlier analysis of *Lawrence*, see *supra* Introduction and Section III.C.

231. See Primus, *supra* note 226, at 169, 211–20.

fields.<sup>232</sup> Pure originalism may mistrust a judicial technique that seems to invite just the sort of untethered interpretive ingenuity that could lead judges to read their own predilections into the text. So, in sum, looking at both of the values that drive originalism might suggest that adherents would resist borrowing.

Yet in fact there is significant overlap between constitutional borrowing and originalist practice. Interestingly, leading originalists often do look afield when they interpret the text. As a consequence, they have something to gain from thinking carefully about the types of, and justifications for, migration among constitutional domains. Conversely, students of borrowing ought to pay attention to how the practice has been deployed by those who limit themselves to historical methods of deciphering the Constitution.

Consider once again the majority opinion in *Heller*.<sup>233</sup> There Justice Scalia construes the Second Amendment partly by reference to long-standing constructions of the First Amendment's speech provision. First, of course, he notices that both rights have limits: at the time of the founding, citizens were not thought to be able to "speak for *any purpose*" and that seems to count as evidence that they also had no entitlement "to carry arms for *any sort of confrontation*."<sup>234</sup>

Moreover, Scalia imports the mechanism for determining the contours of the right. Rather than the undue-burden approach proposed by Justice Breyer in dissent, he insists on a more categorical form of protection. The First Amendment was originally understood to prioritize speech interests above all others—with discrete exceptions for obscenity, libel, and the like—and it was not designed to allow courts to determine later on that the government's interests overrode the right to expression on a case-by-case basis.<sup>235</sup> So too, according to *Heller*, the Second Amendment was thought to guarantee the freedom of law-abiding citizens to defend their homes through the use of firearms,<sup>236</sup> with the state able to limit the right only within certain

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232. There is an obvious irony here, since we have argued that the exchange of ideas across doctrinal lines most often works to foster generality and predictability in the law. See *supra* Section III.A.

233. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). For our earlier discussion of the case, see *supra* Section II.A.

234. *Heller*, 128 S. Ct. at 2799.

235. In his words:

Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest-balancing by the people—which Justice Breyer would now conduct for them anew.

*Id.* at 2821 (citations omitted).

236. See *id.* at 2810.



bounded categories, such as possession by felons, ownership by the incapacitated, and carrying arms near schools.<sup>237</sup>

In sum, while the *Heller* Court is stoutly originalist—it says at one point that “[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them”<sup>238</sup>—still it leaves ample room for cross-fertilization among domains of original public meaning.<sup>239</sup> Now certainly proponents like Scalia may wish to limit borrowing to particular time periods, namely those in which the various constitutional provisions were framed and ratified. A borrowing enthusiast would chafe at that sort of restriction on cross-historical sharing. Yet despite such differences, originalists may take a surprising degree of interest in this Article’s effort to define, describe, and defend the practice.

### B. *Living Constitutionalism*

Living constitutionalism allows interpreters to go beyond original meanings, at least some of the time.<sup>240</sup> Though that approach is more open to borrowing than some others, its adherents have not yet appreciated the import of the practice for the development of constitutional understandings.

One variant of the theory holds that the Constitution’s commands have been revised from time to time through extraordinary popular mobilization.<sup>241</sup> Those revisions are then available for application by jurists to specific disputes. This sort of living constitutionalism dovetails with constitutional borrowing at several points. Most generally, it creates conceptual space for the deployment of borrowing to effectuate constitutional change that has been legitimated by sufficient popular agreement. On this view, courts can and should engage in importation when doing so would help to clear pathways of appropriate revision. Common law techniques—

237. *Id.* at 2816–17. Other instances of borrowing in *Heller* may raise questions for originalists. For instance, the opinion draws from the English Bill of Rights’s protection against the disarmament of Protestants, *id.* at 2798, as well as from state constitutions in America that protect certain gun rights. *Id.* at 2802–04. It makes these connections despite the possibility that differences in context may limit these sources’ ability to decipher the original meaning of the Second Amendment. Each of these moves, too, is better understood as an instance of borrowing rather than an argument from precedent. They are transparent in that they are difficult to miss, and yet they naturalize historical crossovers that may not be as appropriate as they seem.

238. *Id.* at 2821.

239. Across domains (First Amendment–Second Amendment) as well as systems (state–federal and English–American).

240. Living constitutionalism is difficult to define; it is often described simply in opposition to originalism. Perhaps partly for that reason, the approach appears to be embattled today, even among progressives. See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007); Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 353 (2007) (“It certainly seems like the originalists are winning.”). But see Jack M. Balkin, *Alive and Kicking: Why No One Truly Believes in a Dead Constitution*, SLATE, Aug. 29, 2005, <http://www.slate.com/id/2125226/> (“We are all living constitutionalists now.”).

241. In his Holmes Lectures, Bruce Ackerman aligns his own sophisticated theory with living constitutionalism. Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007).

presumably including borrowing—can play a role in constitutionalism by implementing the imperatives generated by prior engagement of the people.<sup>242</sup>

Living constitutionalism (of this ilk) has not yet acknowledged the usefulness of constitutional borrowing for its project. That should not be altogether surprising, since the practice we identify has operated in the background until now. Quite simply, borrowing is one of the ways in which jurists incorporate acts of popular mobilization into the canon.<sup>243</sup>

Conversely, living constitutionalism has a contribution to make to the argument of this Article, namely the insight that borrowing may find sources not only in court decisions, but also in extraordinary statutes and other products of clear democratic expression. For example, Bruce Ackerman has argued that decisions upholding the Civil Rights Acts of the 1960s, together with popular approval of the laws themselves, may elevate to canonical status the constitutional judgments contained in the laws.<sup>244</sup> If that is right, then courts may legitimately lift devices or mechanisms from these laws for use in constitutional interpretation, application, and even extrapolation.<sup>245</sup>

Our assessment of constitutional borrowing also exceeds the bounds of this brand of living constitutionalism. That theory rejects common law techniques that stray too far from acts of popular sovereignty. Unmoored from expressions of the people's will—whether in formal amendments, landmark statutes, or momentous elections—constitutional interpretation risks impairing its legitimacy.<sup>246</sup> In our view, however, constitutional borrowing may be appropriate not solely when it lifts concepts from authorities that have received the imprimatur of democratic mobilization, but more generally when doing so will promote values of generality and empowerment.<sup>247</sup> That is not to say that rule-of-law considerations will always trump considerations of popular sovereignty whenever a particular instance of cross-pollination is

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242. Leib, *supra* note 240, at 361 (arguing that living constitutionalists allow “interpretive mechanics” and “‘extrinsic’ constitutional modalities” to play a role throughout constitutional interpretation, while originalists allow use of these mechanisms only “in later conceptual stages of the interpretive enterprise”). In particular, Ackerman hopes to show how judicial techniques can be employed to elevate the status of the Second Reconstruction to “one of the greatest acts of popular sovereignty in American history.” Ackerman, *supra* note 241, at 1788.

243. Ackerman, *supra* note 241, at 1788 (“My aim has been to provide common law tools that will permit the profession to recognize the Second Reconstruction for what it was—one of the greatest acts of popular sovereignty in American history.”).

244. *Id.* at 1791 (discussing *Katzenbach v. Morgan*, 384 U.S. 641 (1966)).

245. Consider an extraordinary implication: judges might begin to revise their treatment of laws that impose a disparate impact on certain subordinate groups. Instead of requiring litigants to show a discriminatory purpose in order to trigger serious judicial examination, courts could import from statutes concerning employment and housing a rebuttable presumption of invalidity for laws that reinforce social stratification. Balkin & Siegel, *supra* note 7, at 100–01. Looking to these transformative statutes might also inspire courts to craft remedies for disparate impact that involve the judgments of political branches.

246. Ackerman, *supra* note 241, at 1801.

247. In this sense, constitutional borrowing may have greater affinity with the “organicists” that Ackerman identifies, such as Justices Holmes and Jackson. *Id.* at 1800–01.

assessed. But our account does provide independent reasons for supporting specific acts of borrowing that cannot be found among arguments supplied by living constitutionalists.

### C. Minimalism

Constitutional borrowing is a tool of common law adjudication available for use by minimalist judges. It is conceptually compatible with incremental decisionmaking and may be deployed in the spirit of judicial modesty. Yet minimalism would probably resist full-blown migration in ways that students of borrowing might profitably consider. Conversely, borrowing's virtues may give strict minimalists some reason for pause.

Minimalism champions judicial humility expressed in an incremental method of constitutional adjudication.<sup>248</sup> It encourages courts to decide as little as possible in order to minimize certain risks, including the possibility of outright error. Minimalism is also designed to reduce the risk of political backlash against controversial decisions. To the degree that the law is left undertheorized, chances improve that a judgment may win the approval of people with diverse foundational commitments.<sup>249</sup>

Minimalism opposes pure forms of originalism, which prioritize original meaning over precedent or tradition with potentially revolutionary consequences.<sup>250</sup> It also stands against perfectionist theories of interpretation, both liberal and conservative, that seek to interpret the Constitution in accordance with one or another substantive philosophy or vision of justice.<sup>251</sup> In contrast to these theories, minimalism urges judges to build on the collective wisdom of the Anglo-American constitutional tradition in stepwise fashion.

Instances of minimalist borrowing are commonplace and may occur whenever courts trade among closely related fields of constitutional law. If

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248. We describe an ideal-typical version of minimalism that is useful for our analysis but not identical to the theory advanced by any specific thinker. Of course the prominent version is associated with Cass Sunstein. See, e.g., CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 27–30 (2005) [hereinafter SUNSTEIN, *RADICALS IN ROBES*]; CASS R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006) [hereinafter Sunstein, *Burkean Minimalism*]; CASS R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) [hereinafter Sunstein, *Foreword*]. Another adherent of minimalism might be Justice Stephen Breyer. See STEPHEN BREYER, *ACTIVE LIBERTY* 5–6 (2005). For an eloquent critique, see Ronald Dworkin, *Looking for Cass Sunstein*, N.Y. REV. BOOKS, April 30, 2009, at 29.

249. For additional discussion of minimalists' preference for "shallow" rulings, see Sunstein, *Burkean Minimalism*, *supra* note 248, at 364, and Sunstein, *Foreword*, *supra* note 248, at 20–22.

250. If the framers envisioned incremental constitutional evolution, then originalism and minimalism may dovetail. Sunstein, *Burkean Minimalism*, *supra* note 248, at 389.

251. *Id.* at 394 (citing RONALD DWORBIN, *JUSTICE IN ROBES* (2006), and RICHARD A. EPSTEIN, *TAKINGS* (1985), as implicit examples of liberal and conservative perfectionism, respectively); see also SUNSTEIN, *RADICALS IN ROBES*, *supra* note 248, at 31–34 (describing the characteristics of perfectionist theorists). For another example of perfectionism, see JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY* (2006).

*Lawrence* can be understood as a minimalist decision, as some have argued, then its importation of certain equality notions fulfills the aims of incrementalism.<sup>252</sup> One of the techniques exemplified in that case—hedging—aligns particularly well with minimalism’s skepticism of doctrinal maximalism and experimentation at reduced cost. Should either the equality or liberty rationale prove more durable because it is less controversial, the other rationale can be adjusted, all without doing violence to the law. In this way, judicious resort to borrowing may help to generate principled yet incomplete statements of law.

Even so, borrowing cannot easily be confined to thin readings of law and, in fact, it could well be turned to the cause of theoretical ambition. One story we have told recounts how the Court has traded between equality and liberty conceptions of the Free Exercise Clause, initially by lifting the strict scrutiny mode of analysis from speech decisions in the 1960s, and later by displacing that approach with a ban on disparate impact claims taken from equal protection law.<sup>253</sup> Neither of those instances necessarily exceeded the bounds of legitimate borrowing that we have set out. They therefore suggest that there may be a tension between exuberant borrowing and pure minimalism. Restricting borrowing to minimalist uses will almost certainly tend to dilute its virtues, particularly generality and empowerment.<sup>254</sup> Whereas minimalism tends to limit adjudication to specific areas of doctrine, constitutional borrowing may support decisions that look beyond the immediate legal domain for useful tools and points of mutual contact.

While our analysis does not undermine minimalism as a general interpretive orientation, it does encourage minimalists to identify places where borrowing may promote or impede incremental adjudication. Conversely, proponents of borrowing should consider whether the values associated with the practice might sometimes be overbalanced by the risks that that minimalism warns against.

#### D. Redemptive Constitutionalism

Recently Jack Balkin and Reva Siegel have called for a “redemptive constitutionalism,” under which judges, legislators, and litigants would work to vindicate the egalitarian purposes of the original Constitution and the Reconstruction Amendments.<sup>255</sup> Redemptive constitutionalism was practiced during the civil rights movement of the 1960s (which they refer to as the

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252. See Sunstein, *Burkean Minimalism*, *supra* note 248, at 378–79 & 379 n.138 (offering *Lawrence* as an example of rationalist minimalism, though acknowledging other possible readings of the decision).

253. See *supra* Section II.C.

254. Sunstein has recognized that minimalism may put pressure on the rule of law. Sunstein, *Burkean Minimalism*, *supra* note 248, at 365 (“Narrowness [which is prized by minimalists] is likely to breed unpredictability and perhaps unequal treatment. It might even do violence to the rule of law, if only because it leaves so much uncertainty.”).

255. Balkin & Siegel, *supra* note 7, at 101–03.

Second Reconstruction), but its methods have largely been forgotten.<sup>256</sup> So Balkin and Siegel urge jurists to recapture the mechanisms by which Congress and the Court worked together during the civil rights era to fulfill the original promise of the First Reconstruction.<sup>257</sup>

Redemptive constitutionalism entails significant acts of constitutional borrowing, as a matter of both description and prescription. It recalls that during the civil rights era the Court often combated social stratification not solely through equality law itself, but also by guaranteeing individual liberty for all.<sup>258</sup> Promoting egalitarianism through liberty had the advantage of reducing the risk of backlash by dominant groups, members of which would also enjoy the benefits of increased protection against government. Yet protecting individual freedom nonetheless furthered the Reconstruction project of dismantling the racial caste system. For example, free speech doctrine imported the mechanism of strict scrutiny in early decisions that ensured the ability of the NAACP to protest civil rights abuses.<sup>259</sup> Similarly, the Court resuscitated substantive due process, which had previously been associated with economic rights,<sup>260</sup> in order to protect women's autonomy and thereby guarantee their status as equal citizens.<sup>261</sup> In these ways and others, the Court bridged the domains of liberty and equality to further an egalitarian vision of the Constitution.

As for prescription, redemptive constitutionalism endorses what amounts to an assertive deployment of borrowing across domains of law associated with liberty and equality. *Lawrence* is of course the most prominent recent example. As we noted above, and as Balkin and Siegel also appreciate, liberty models are attractive to gay rights advocates because they avoid forcing people to define themselves as members of an identity group in order to win protection.<sup>262</sup> Sexual autonomy and criminal procedure are two other domains in which protecting individual liberty can work to dismantle social stratification.<sup>263</sup>

256. *Id.* at 97–99.

257. *Id.* at 93–95. Redemptive constitutionalism diverges from living constitutionalism, despite its similar progressive orientation. At root, the former seeks, as its title suggests, to redeem—to revive and reinvigorate the egalitarian principles of the First and Second Reconstructions. In that respect, it may be closer to originalism than it is to living constitutionalism. Accordingly, in his most recent work, Jack Balkin has heartily endorsed many aspects of originalism. Balkin, *supra* note 240.

258. Balkin & Siegel, *supra* note 7, at 100.

259. *See e.g.*, *NAACP v. Button*, 371 U.S. 415 (1963). Although Balkin & Siegel do not cite *Button* or describe that specific instance of borrowing, the example is consonant with their more general description of the Warren Court's attempt to protect the speech rights of the NAACP in order to further equality goals. Balkin & Siegel, *supra* note 7, at 90.

260. *See, e.g.*, *Lochner v. New York*, 198 U.S. 45 (1905).

261. Balkin & Siegel, *supra* note 7, at 94.

262. *Id.* at 99–100.

263. Redemptive constitutionalism may also entail reworking equal protection law not by reference to liberty protections, but instead by means of devices taken from civil rights statutes. One way to invigorate equal protection, according to Balkin and Siegel, is to “borrow[]” from employ-

Our defense of borrowing therefore legitimates one judicial mechanism for implementing redemptive constitutionalism. Several of that theory's proposals may be achieved through the practice, as we have just shown. In this way, at least, the two projects resonate with one another.

In another sense, however, spotlighting constitutional borrowing reveals a challenge for the redemptive project. The difficulty arises out of the relative agnosticism of the technique we have identified. For every act of importation that promises to revive the progressive potential of the First and Second Reconstructions, there is an available act that may retrench social stratification. One might wonder what will persuade courts to source their concepts from the redemptive tradition of American constitutionalism, which includes the achievements of the civil rights era, rather than the retrogressive tradition furthered by decisions such as the *Civil Rights Cases*,<sup>264</sup> *City of Boerne*,<sup>265</sup> and *Washington v. Davis*.<sup>266</sup> Nothing in our defense of the practice commands that sort of retrenchment, obviously, but nothing we have said prohibits it either. Such indeterminacy does not defeat redemptive constitutionalism's agenda, but it does mean that the theory must give independent reasons why judges should lift their ideas from redemptive domains of law rather than from retrogressive ones.

### E. Popular Constitutionalism

Popular constitutionalism seems at first blush to have the least to learn from our treatment of constitutional borrowing. As it presents itself, that theory—or family of theories<sup>267</sup>—is concerned with the allocation of

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ment and voting rights law the device of “mak[ing] more use of rebuttable presumptions when policies have significant disparate impact” on traditionally subordinated groups. *Id.* at 100–01. Of course, reviving disparate impact doctrine on the model of the Civil Rights Acts runs headlong into the problem of *Washington v. Davis*, 426 U.S. 229 (1976), which has itself been a source of judicial appropriation, as we have shown. See *supra* Section II.C. Redemptive constitutionalism purports to resolve that tension by proposing not that courts require defendants to remedy disparate impact, but instead that they fashion remedies that heighten political accountability by requiring lawmakers to justify publicly any effect that their enactments may have of reinforcing caste inequality in America. Balkin & Siegel, *supra* note 7, at 101.

Balkin and Siegel further urge courts to abandon the binary model of judicial scrutiny, which neatly divides authority between judges and legislatures, depending on whether the classification at issue draws strict scrutiny or not. Instead, they advocate Justice Marshall's sliding-scale approach. *Id.* at 101 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 70, 98–110 (1973) (Marshall, J., dissenting)). Presumably this change would affect several areas of constitutional doctrine via the borrowing mechanism. It dovetails with the observation we make above that the Court recently has been distancing itself from the tiers-of-scrutiny framework altogether in one constitutional domain after another. See *supra* Section II.A.

264. 109 U.S. 3 (1883).

265. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

266. 426 U.S. 229 (1976).

267. Popular constitutionalism is perhaps most closely associated with Larry Kramer, but we are using the term to refer to a group of loosely related views. What they have in common is skepticism toward the widespread assumption of judicial dominance over constitutional interpretation and enforcement. See Larry D. Kramer, *Popular Constitutionalism, circa 2004*, 92 CAL. L. REV. 959, 967–74 (2004) (describing varieties of living constitutionalism).

interpretive authority between the courts (and government as a whole) and the populace, not with specific discursive practices. According to popular constitutionalism, the role of the people in American governance does, and should, “include[] active and ongoing control over the interpretation and enforcement of constitutional law.”<sup>268</sup> That project appears to sideline arguments about whether and how judges should practice cross-pollination when they interpret the Constitution.

Yet there are synergies between popular constitutionalism and the custom of borrowing. These points of convergence both provide helpful arguments for popular constitutionalists and suggest areas of future research for students of borrowing. Specifically, popular constitutionalism points out that the migration of ideas may well occur not only among judges and not only between judges and lawmakers, but also between lawyers and activists. Insofar as we are correct that constitutional ideas migrate outside adjudicative and legislative processes, popular constitutionalists may gain an additional way to question the common assumption that judges ought to be given exclusive or final authority over the signification of constitutional provisions. For once we see that citizens and groups, too, can creatively re-deploy readings of the Constitution, then judges have one less claim to a monopoly over its interpretation. We have mostly analyzed borrowing by jurists, but the same tools are readily wielded by nonspecialists. After all, one teaching of popular constitutionalism is that social actors can reclaim legal techniques that are ordinarily practiced by professionals. Our observation, if correct, would open up a promising area of inquiry into the practice of constitutional borrowing by “the people themselves.”

The study of borrowing offers a more specific contribution as well, one that pertains to the normative claim of popular constitutionalism. Advocates of that theory argue not simply that interpretation of our basic law ought to take place among the people, but also that disputes over the meaning of the Constitution ought not to be settled finally by the Supreme Court.<sup>269</sup> They seek to destabilize the assumption, widespread among Americans, that the Court’s word concerning the meaning of constitutional law ought to be paramount.<sup>270</sup>

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Popular constitutionalism claims to be different from living constitutionalism—as we have described it in Section IV.A.—in the sense that while the latter focuses on the ability of the people to alter or amend the Constitution, the former also describes and defends their power to engage in constitutional interpretation and enforcement. *See id.* at 961 n.3 (distinguishing Bruce Ackerman’s work from popular constitutionalism).

268. *Id.* at 959. One of us has advanced a theory according to which the development of a popular language is a core aspect of constitutionalism. *See* Tsai, *supra* note 11.

269. That stronger position is associated not only with Larry Kramer, but also arguably with Mark Tushnet and Sanford Levinson. *Id.* at 985. Representative works include SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER (2003); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); JEREMY WALDRON, LAW AND DISAGREEMENT (1999); Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489 (2006).

270. Kramer, *supra* note 267, at 985.

We aim to intervene at a particular point in that argument. A common reason for giving final interpretive authority to the Court is that the nation needs to definitively resolve intractable legal disputes to reduce uncertainty and unpredictability. On this view, the Court occupies the best institutional position for providing a final determination.<sup>271</sup> Defenders of popular constitutionalism have responded by challenging the empirical claim that the Court does in fact provide better closure on controversial matters, as well as by pointing out that institutional design alone cannot determine whether courts deliver legal certainty.<sup>272</sup> Examination of how these institutions actually function may yield surprisingly little evidence of any “settlement gap” between a system of judicial supremacy and more diffuse arrangements.<sup>273</sup>

We have argued that the judicial practice of constitutional borrowing can bolster predictability and empowerment. If that is right, then our treatment of borrowing may open up a new line of argument for popular constitutionalists, namely that nonjudicial actors are also capable of strategic leveraging and therefore that any claim of judicial distinctiveness in this regard may be overdrawn. When politicians, administrators, and advocates leverage mechanisms from one domain of constitutional law in some other area, they too promote rule-of-law values—just as effectively as judges. The notion that borrowing by nonjudges can enhance legal stability further weakens the claim that courts enjoy a peculiar institutional advantage in settling matters of constitutional importance.

Furthermore, the synergy between popular constitutionalism and our study of borrowing suggests further research opportunities. In particular, it tees up an investigation of the social conditions most favorable to crossover attempts by nonjudicial actors as well as exploration into when these opportunities are bypassed. Such studies may illuminate the pragmatic considerations that motivate acts of borrowing, obstacles to their reception, and the microprocesses of conceptual change. Along the way, researchers could uncover the various ways in which popular and judicial borrowing inform one another.<sup>274</sup> Who knows? Evidence of widespread borrowing could bolster or undercut our guardedly positive evaluation of its effects.

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271. *Id.* at 987; LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW*, 234–35 & n.13 (2004) (citing Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997)).

272. KRAMER, *supra* note 271, at 234; Kramer, *supra* note 267, at 987–88.

273. Kramer, *supra* note 267, at 987 (“[E]xperience suggests that if there is a ‘settlement gap’ between a world with judicial supremacy and a world without it, that gap is likely to be small.”). At least one scholar has argued that a judge’s role is to help sustain a level of “unsettlement” regarding the Constitution’s meanings. See LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* (2001).

274. Some studies have examined constitutional debate in this vein. See, e.g., TSAI, *supra* note 11, at ch. 4 (juxtaposing civil rights advocates of the 1960s and social conservatives of the 1980s and showing how courts absorbed their mobilized discourse); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004); Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008); Robert L. Tsai, *Reconsidering Gobitis*:



## CONCLUSION

Constitutional borrowing is a historical fact. It is also alive and well today, with persons of different ideological inclinations enlisting the technique on behalf of divergent legal arguments. Despite its prevalence, until now the practice has rarely received a sustained examination or defense. Here, we have defined constitutional borrowing, cataloged its various forms, justified the practice from a rule-of-law perspective, and offered some tools for critiquing particular acts of borrowing. We have argued that while borrowing is not an unalloyed good, it nevertheless often serves core rule-of-law values. And if we are correct that it is a defensible fixture of democratic constitutionalism, then a number of theories of constitutional lawmaking should be reexamined. Accounts that can incorporate borrowing might do so by elaborating the conditions under which borrowing is normatively desirable. Proponents of more mechanistic notions of judging ought to explain why borrowing is incompatible with their accounts and how, precisely, borrowing is to be avoided.

We recognize that constitutional borrowing is a species of a broader phenomenon worthy of more fine-grained investigation. Appropriations occur throughout the law. Custodians of the law are constantly copying, adapting, and recycling ideas, frameworks, and heuristics. Looking ahead, it may be useful to consider what, if any, distinctive issues are raised when some kinds of borrowing are compared to others (say, importing from the common law or from statutes as opposed to appropriating from domestic constitutional law or foreign jurisdictions). Each of these projects would help jurists confront the reality that in our system of government, borrowing is the rule rather than the exception.

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*An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363 (2008) (examining the social conditions under which presidential rhetoric led to judicial reversal over right of conscience and endorsement of prights position).