Transnational Perspectives on the U.S. Transnational Law Controversy

Lorraine E. Weinrib

Follow this and additional works at: https://digitalcommons.law.utulsa.edu/tlr

Part of the Law Commons

Recommended Citation

Available at: https://digitalcommons.law.utulsa.edu/tlr/vol47/iss2/7
I. INTRODUCTION

This Symposium celebrates the extraordinary career of Aharon Barak. In his distinguished professional life, President Barak gave normative structure to many elements of Israeli law, building upon the wisdom of his predecessors and drawing on his encyclopaedic understanding of the doctrinal and adjudicative structures of civil and common law systems as they pertain to private, public, and international law.\(^1\) In his first career as an academic and Dean of the Faculty of Law at Hebrew University, he developed expertise in a wide range of legal subjects and mentored a generation of Israeli lawyers, state officials, and judges.\(^2\) He distinguished himself as an astute and principled Attorney General of Israel, whose commitment to the rule of law, the independence of the judiciary, and the peace process was legendary.\(^3\) During his twenty-eight years on the Israeli Supreme Court, culminating in twelve years as its President, he oversaw the maturation of many areas of Israeli law. Throughout these years of illustrious public service, President Barak produced a veritable library of treatises, monographs, essay collections, articles, and lectures. His accomplishments have attracted world-wide acclaim, in great measure because of his remarkable engagement in transnational legal study and analysis.\(^4\)

One of his most innovative contributions has been the development of a jurisprudence of rights, which permeates Israeli private and criminal law, statutory interpretation, as well as administrative and constitutional law. This project intensified with the recent adoption of two rights-protecting Basic Laws, which moved Israel from the odd situation of having “a constitution without a Constitution,” to constitutional

\(^*\) Faculty of Law, University of Toronto l.weinrib@utoronto.ca.

2. See id. at 27.
3. See id.
protection of a range of human rights, including a right to the most expansive modern constitutional principle — human dignity. President Barak responded to this “constitutional revolution” by delineating a sophisticated methodology for judicial review of rights claims, including challenges to statutes.

In the United States, high praise for President Barak stands aside with severe critique. He has become entangled in the perennial debates on judicial activism and the more recent controversy on the relevancy of transnational legal resources to adjudication under the U.S. Constitution. Remarkably, Elana Kagan’s warm introduction of President Barak when Dean of the Harvard Law School was identified as a matter of concern during the Judiciary Committee deliberations on her nomination to the U.S. Supreme Court.

Barak’s U.S. critics do not appreciate his distinctive jurisprudence or judicial methodology. On the contrary, their criticism merely endorses their preferred positions on U.S. constitutional law, theory, and practice generally as well as the debate on judicial recourse to transnational legal resources. The weakness of their critique undermines its objective — to protect the U.S. Constitution, as the fixed and petrified product of U.S. history, from what they consider to be foreign taint.

This essay suggests that it is time to open up the originalist critique of judicial activism, and the related debate of judicial recourse to transnational legal resources, to transnational perspectives. The proponents of originalism have had many decades to demonstrate the wisdom and institutional legitimacy of their position. Those who prefer the conceptualization of a living constitution, despite their formulation of withering criticisms of originalism, have not succeeded in establishing the superiority of their paradigm. This failure may not reflect the merits of their claims as much as the difficulty of mapping the parameters of the living constitution paradigm in response to its reputation. Many scholars are now working to delineate this paradigm from first principles in imaginative ways. Their efforts would be clarified and strengthened by expanding their intellectual horizons to include transnational legal resources.

The study of President Barak’s approach to constitutional law and adjudication provides an excellent first step on this journey, which should include study of other great rights-protecting justices and sophisticated legal systems that endorse rights-based democracy, the juridical embodiment of the post-World War II “rights revolution.” They need only look to other liberal democracies that have transitioned from majoritarian democracy (or worse) to rights-based democracy both through formal constitutional change and informal re-thinking of constitutional history, principles, text, and interpretive methodologies. These legal systems regard democracy as a means to
achieve the highest aspirations of the modern constitutional state — the rule of law, separation of powers, and respect for equal and inherent human dignity for all citizens, for all persons affected by the state, and ultimately, for all humanity.

Opening the study of U.S. constitutional history and law to transnational perspectives will produce an unexpected shock of recognition, because one of the most impressive postwar efforts to transition to rights-based democracy was the great work of the Warren Court. Domestically, a concerted political campaign promoting originalism and states’ rights repudiated the Warren Court but, from the transnational perspective, the Warren Court’s distinctive mode of adjudication did not fail. Its path-breaking understanding of the foundational nature of rights protection within liberal democracy has enjoyed an intense and flourishing afterlife on the transnational stage. This afterlife has occurred in many different legal settings. One finds it in common law and civil law systems. One also finds it in regional and international rights-protecting systems. It adapts to constitutional systems based on one comprehensive document, a number of separate instruments adopted at different times, an unwritten constitutional foundation still based on legislative supremacy, and situations where rights protection is embodied in a supra-national instrument. So too, it adapts to parliamentary and republican systems and even constitutional monarchy.

This adaptability undermines a number of propositions associated with originalism: that rights protection is inconsistent with or a threat to democracy; that law-making power is vested exclusively in democratic institutions as representative and accountable, without scrutiny as to the quality of representation and accountability that rights-protection provides; that judicial review lacks legitimacy because of the special education, experience, and social status of members of the judiciary; that the judicial role usurps the legislative and constituent powers when it departs from strict readings of constitutional history and text to derive concrete, petrified, socially conservative meaning; and that judicial review attentive to transnational legal resources involves (i) rejection of all that is nationally distinctive or textually directed and/or (ii) selection of comparative sources that either endorse personal and political preferences or adopt progressive social trends.

This essay has five parts. Part II examines the constitutional paradigms that frames the current U.S. debate on judicial activism and judicial recourse to transnational legal materials. Part III analyzes three assessments of President Barak’s work by leading U.S. commentators in the light of these paradigms, to demonstrate that the strong desire to brand him an activist undermines, distorts, and obscures legal analysis generally and the debate on transnational law specifically. Part IV presents what Barak’s critics have labored to obscure: his sophisticated understanding of constitutional law and adjudication in respect to rights protection. Part V delineates the larger dimensions of post-WWII constitutional thought, to which President Barak has made an invaluable contribution. Part VI concludes by inviting transnational study as a means to deeper understanding of U.S. constitutional theory, history, and institutional roles generally and the current debates on transnational legal resources in particular.
II. CONSTITUTIONAL PARADIGMS AND THE TRANSNATIONAL LAW DEBATE

Two opposing constitutional paradigms animate the controversy over judicial consideration of transnational legal resources in the United States. The originalists repudiate reference to modern transnational legal material, which includes the constitutional law of other democracies as well as international human rights law. The most vociferous objections arise in cases involving rights claims, especially challenges to law or state action embodying faith-based and conservative social morality. In contrast, the adherents of a living, rights-based constitutional order are open to consideration of modern transnational legal sources for limited purposes such as taking express notice of established trends in rights-protection in other liberal democracies and under international rights-protecting systems thought to share the same fundamental principles. They consider transnational legal material to be illuminating, but neither authoritative nor persuasive in the interpretation of the U.S. Constitution.

The originalists’ rejection of contemporary transnational material reflects their understanding of the U.S. Constitution as law, written and ratified by political actors to establish new institutions and precise rules for the exercise of public power. The text is not merely supreme, positive, and highly particularized. It is also denotes historically fixed meaning.

The judicial role that follows from these precepts is narrowly exegetical — to exhum the particular, fixed meaning of the words in the constitutional text through examination of contemporaneous dictionaries, legal sources, and commentaries. Separation of powers, democracy, self-governance, and federalism are invoked to legitimate this narrow judicial function.

Originalists reject judicial reading of the text to extrapolate abstract or normative directives. Such an approach imposes elite, personal or political preferences and in effect usurps the representative and accountable state legislatures’ authority to make law. In the extreme, it arrogates the constituent power to amend the Constitution contrary to the special institutional requirements designated for this purpose. The Constitution has a conservative function according to this account: it preserves traditional social values and faith-based precepts about the good life for the sake of the community. Change comes, if at all, as the product of electoral and legislative politics at the state level. This historical orientation emphasizes the authority of precedent.

Members of the American judiciary and academics who subscribe to this originalist paradigm reject recourse to transnational legal material. Familiarity with constitutional principles, institutional roles, and adjudicative methodologies in other rights-protecting systems unconnected to the ideas that animated the formulation and

11. See id. at 7-8.
adoption of the constitutional text is alien, foreign, and illegitimate to the interpretation of the U.S. constitutional text. The idea of learning from the writing or judgments of a foreign judge, even one as eminent as President Barak, is inconceivable.

Standing opposed to this historical-textual, originalist approach are the living constitutionalists. They too approach the Constitution as supreme law that reflects commitment to the separation of powers, democracy, self-governance, and federalism. They also hold the highest respect for the constitutional text and its historical genesis. They do not agree that these shared presuppositions direct the judiciary to exhume a fixed, specific, historically demonstrated meaning from the constitutional text, however. In line with the leading historical experts, they question the authenticity of the specific historical meaning originalists deem necessary to resolve constitutional cases; they also question the judicial methodology for discerning such meaning; more generally, they reject efforts to use history to bind later generations living in circumstances and with experience and knowledge unimaginable in the moment of constitutional drafting, ratification, and popular debate.

Living constitutionalists do not consider the adversary process the proper forum to vindicate the historical or intended meaning of the Constitution to then apply to issues of a different era and sensibility, they deny the mutually exclusive possibilities that the originalists offer as between originalism and unrestrained subjectivism. On the contrary, they consider the judiciary duty-bound to read the full Constitution, as amended, holistically — as a coherent, comprehensive embodiment of abstract, normative, and organic meaning. The text stands as a codification of enduring fundamental principles. It embodies a social contract secured over time by institutions responsible to the people as a whole and as individuals. The judiciary has the special responsibility to extrapolate and apply these principles, as binding law, to ensure their continuity within an ever changing polity.

Within this paradigm, the Constitution does not freeze the faith-based or social ordering of the founding generation. Rather, it reflects a mix of sources developed over time, including the ideas that animated and legitimated the Revolution, the Declaration of Independence, the fundamental rights of British subjects under the unwritten British constitution, and the emerging understanding of the relationship between the free individual and the state delineated by Enlightenment theorists. Constitutional adjudication creates the platform for working out the full meaning of these various understandings.

While the text originally extended these rights restrictively, to the national level and to certain classes of persons, later amendments revised this worldview. Many judgments erroneously preserved social practices considered to be constitutionally protected or even paramount to constitutional directives; however, living constitutionalists do not consider such rulings binding. They are committed to bringing judge-made constitutional law into conformity with the constitution’s fundamental principles as revealed in the life of the nation.14

Adherents to this paradigm are open to learning about other constitutional systems based upon the same or similar fundamental principles and institutional roles. This interest extends to the theories and practices of leading justices of other Supreme and Constitutional Courts, including the bodies that adjudicate upon regional and international human rights questions. It follows that they would be genuinely interested in the work of a masterful judge like President Barak, since they recognize commonalities between his account of constitutional principles, institutional roles, and adjudicative methodologies and their understanding of their own constitutional arrangements.

It is now many decades since the originalists succeeded in a concerted campaign to denigrate the work of the Warren Court.\textsuperscript{15} They castigated its judges for invoking the living constitution paradigm, which supposedly empowered an elite judiciary to change the Constitution by reading into its text their personal and political preferences, in effect arrogating political, legislative, and constituent prerogatives. They dismissed the judgments of the Warren Court as departing from acceptable modes of interpretation and lacking methodology. More particularly, the originalists ridiculed judicial references to the core, penumbra, and emanations of the text, invoked to express the understanding of the Constitution as the coherent, comprehensive codification of abstract, normative, and organic meaning. Similarly, they ridiculed language that expressed reverence for individual liberty and equal, inherent human dignity.\textsuperscript{16} They expressed particular consternation at judicial opinions that undermined traditional social roles and faith-based public policy.

Their campaign gathered support from those who found the Warren Court’s rulings too innovative, inconsistent with their own values and moral commitments, or tilted against state power. The Reagan Justice Department gave strong support to this cause.\textsuperscript{17} The Republican Party embraced the originalist critique of judicial activism as its template when the Senate Judiciary Committee appraised nominees for appointment to the Supreme Court; indeed some of these appointments went to the lawyers who had led the original originalist initiative.\textsuperscript{18}

The living constitutionalists had no corresponding organized political leadership, institutional home or public resources. The beneficiaries of the Warren Court’s innovative jurisprudence were individuals and groups who had limited resources, fewer connections in high places, and burdened lives. That was the point: they sought judicial rulings against the legislative and executive branches, which had entrenched political, legal, and constitutional positions that undermined their political standing and full personhood. Moreover, the roots of the Warren Court’s approach to constitutional history, theory, institutional role, and judicial methodology lay in a constitutional paradigm that had not yet come to full maturity.

\textsuperscript{17} See Greene, \textit{supra} note 10, at 86.
\textsuperscript{18} Id.
The intervening decades have provided new perspectives for analyzing the originalist theory, methodology, and analysis. One of these perspectives is domestic. The originalists have expanded their perspective a number of times—from original intent of the drafter, to original understanding of the ratifiers to contemporaneous public meaning. These realignments responded to historical research, legal critique, and ideology. They offer no response to the foundational challenge, however: that originalism was not originally intended. They have refrained from applying their methodology to the full constitutional text without explanation. They cling to precedent selectively, standing firm in the face of research that discredits the historical-textual methodology that they champion when the substantive issues are ideologically sensitive, but forge ahead to novel ideological rulings when the opportunity materializes. They restrict judicial review in the name of democracy, but their rulings on democratic processes seem as open-ended as their critique of the Warren Court. To reach desired results, they have gone so far as to privilege dictionary definitions over syntax. All told, they have failed to deliver the objectivity and methodological rigor they tout as necessary to legitimize the judicial role.

The second new perspective offered by the intervening decades is to be found in transnational legal resources, which shine a new light on the distinctive innovations in legal analysis forged by the Warren Court. Transnational study reveals similar innovations in the sophisticated judicial methodology developed in many leading constitutional democracies to protect fundamental rights and freedoms in the aftermath of the Second World War. More generally, it reveals the vital role of the model of living constitutionalism in framing the foundation of the modern constitutional state, based on deeply rooted understandings of the freedom of the individual and respect for equal and inherent human dignity.

The next section of this paper examines a particular example of the remarkably vociferous originalist polemic against judicial recourse to transnational legal resources in the United States—the assessment of President Barak’s legal thinking by two leading U.S. public opinion leaders, Robert Bork and Richard Posner. It then contrasts these critiques with a very positive assessment of President Barak’s constitutional methodology by a leading scholar of both the Warren Court and the living constitution.

22. In Heller, 554 U.S. 570, the majority ignored the relevant syntax in order to bifurcate the clauses of the Second Amendment. The appropriate grammatical structure is the Latin ablative absolute, which would have been well-known to educated men in the founding era and therefore correct for an approach based on public meaning. The Second Amendment, read within this structure, integrates the meaning of the two clauses so that the right to bear arms is connected to the need for a militia.
paradigm, Owen Fiss.

III. U.S. CONSTITUTIONAL PARADIGMS, TRANSNATIONALISM AND PRESIDENT BARAK

How do we understand the fact that President Barak has become a polarizing figure in the U.S. debate on judicial activism and transnational law? Robert Bork and Richard Posner label him a judicial activist who exemplifies the dangers of recourse to transnational legal resources in the adjudication of U.S. cases. Owen Fiss, in contrast, analyzes the methodology in a few of Barak’s path-breaking cases on anti-terrorism and compares it favorably to comparable U.S. cases. Without engaging in the debate on transnational legal sources, he demonstrates the power of comparative analysis to illuminate the strengths and weaknesses of judicial reasoning particularly in regard to the protection of fundamental rights.

Robert Bork begins his review of Barak’s monograph, The Judge in a Democracy, by expressing regret for the extensive influence that such an activist judge has had on law in Israel and internationally. Such judicial activism undermines the law-making function of democratic institutions because it does not constrain the judiciary to legal rules beyond its creation. Barak exemplifies this failing in that he “reaches results or announces principles that cannot plausibly be derived from the constitution he cites” rather than applying “the principles of the constitution as they were understood by the men who made the constitution.”

This critique embodies certain presuppositions. It either assumes that all constitutional law is based on a comprehensive written instrument that embodies original intent, an untenable premise, or, at least, requires examination of the constitutional arrangements in which a particular judge does his work. But Bork pays scant attention to the limited formally written elements of the Israeli constitutional system, much of which — as is common in the British model — is judge made. His description of Israeli cases is both superficial and inaccurate, as if taken from secondary accounts by others who share his political views, even though most of the cases to which he adverts are available in English translation.

One would expect a leading U.S. jurist to know more about the variety of constitutional arrangements in the democratic world. Moreover, one would also expect careful study of the particular legal context and the larger comparative context before condemnation of a foreign judge for having set a “world record for judicial hubris” in deciding cases in a manner that is “ludicrous,” “officious,” or even “dangerous.”

Bork suggests that the two relatively recent rights-protecting Basic Laws, which

25. Id. at 127 (He refers here, and in his book, to Evelyn Gordon, an Israeli journalist who shares his political views. She was a reporter for the Jerusalem Post from 1990-97, reporting on the Supreme Court and the Knesset as well as other issues, and then wrote a regular column from 1998-2009. She has published articles in the Israeli quarterly Azure, in which the Bork article appears, as well as Commentary where she is currently a blogger. See ROBERT BORK, COERCING VIRTUE 103-06 (2002)).
the Israeli Supreme Court affirmed as constitutional instruments authorizing judicial review of statutes, do not have this status or effect because their adoption lacked a constitutional ratification process and only 25% of Knesset members approved them.\textsuperscript{27} The insistence upon ratification is odd since numerous national constitutional instruments do not have the imprimatur of ratification. It is even more strange to insist upon ratification in Israel, where the elected legislature exercises the constituent power when it enacts Basic Laws.

Moreover, the Knesset, in its constituent capacity, passed these Basic Laws a second time, with strong endorsement, adding amendments that strengthened and expanded their normative prescriptions and affirmed the mandate for judicial review of executive action and statute.\textsuperscript{28} The most important point is that these Basic Laws do not give the judiciary the last word. One contains a legislative override. Both are easily amended by the Knesset. Also relevant is the fact that the cases that Bork cites to illustrate Barak’s judicial activism are predominantly cases of review of executive action, not statute. The few instances where the Supreme Court has invalidated legislative provisions have not precipitated amendment of the Basic Laws.

Bork cites two American Supreme Court cases that he considers as activist as the ones that Barak has decided — \textit{Roe v. Wade} and \textit{Lawrence v. Texas}, both cases involving invalidation of statute and “moral” issues.\textsuperscript{29} He characterizes these cases as instances where the U.S. Supreme Court rewrote the Constitution by introducing new principles to trump laws that the U.S. federal arrangements allocate to state legislatures.\textsuperscript{30} He cites \textit{Lawrence} as an exceptionally egregious example of judicial
activism because newly appointed judges overturned a prior ruling, which effectuated a change in the meaning of the Constitution itself.  

Regrettably, Bork does not specify the parallels he sees between the U.S. Supreme Court cases and the Israeli ones he cites. His observation that activist judges “have enlisted on the ‘elite’ side of the transnational culture war” suggests that he projects the U.S. culture war onto the transnational stage, just as he projects on Israel the need for a fully written, particularist, historically frozen constitutional text, legitimated by ratification, subject to procedures for constitutional amendment different from the ordinary procedure for legislation. The Israeli cases he considers do not relate to the subject matter that falls within the U.S. culture war rubric, although there are Israeli cases decided by President Barak that do contain this content. In addition, he does not mention the cases that raise intense cultural concerns within the Israeli context.

Bork’s views of Barak are not limited to the world of book review readers. He saw fit to invoke his ill-informed critique on the political stage when he intervened in the public debate on the nomination of Elana Kagan to the U.S. Supreme Court. His concern was her decanal introduction of President Barak, in an award ceremony at the Harvard Law School, as her “judicial hero,” “the judge or justice in my lifetime whom [sic], I think, best represents and has best advanced the values of democracy and human rights, of the rule of law and of justice.” Bork countered that Barak “may be the worst judge on the planet, the most activist” and condemned Kagan’s praise for him as “disqualifying in and of itself.” Kagan countered by indicating her remarks were directed at Barak’s contribution to the development of Israeli law.

Richard Posner’s assessment of President Barak is more thoughtful, but just as critical. While he describes Barak as a likely recipient of a Nobel Prize in law, if there were one, and acknowledges his reputation for brilliance, he assesses Barak’s The Judge in a Democracy as sufficient reason for American judges to refrain from citing foreign judgments. The main reason for this aversion is that Barak’s thinking is so “weirdly different” from his own.

Barak must be condemned because his view of democracy mandates the enforcement of particular rights and does not adhere to the strictures of originalist interpretation. Posner is especially displeased at Barak’s use of abstract concepts such as interpretation, separation of powers, objectivity, equality, and reasonableness, which he dismisses as the “empty verbiage” and “plays on words” that activist judges typically invoke to usurp the legislature’s law-making power. He accounts for Barak’s perceived excesses biographically — he is to be regarded as the “prisoner of his experiences,” which he reduces to his childhood suffering in Lithuania during the Holocaust, ignoring.

31. Id. at 126-27.
32. See Stolberg, supra note 6.
33. Id.
34. Id.
36. HOW JUDGES THINK, supra note 35, at 363-64.
37. Id. at 367; Enlightened Despot, supra note 33.
his major role in building the legal system and judicial function in one of the most challenged and successful post-WWII democracies.38

Like Bork, Posner characterizes the legitimate judicial role as originalist, both at home and abroad. He has not studied other constitutional systems sufficiently to realize that it would be quite difficult to determine what originalism might mean within the Israeli legal system, which is based on a long list of national peculiarities, including distinctive history (nationhood after systemic discrimination against the Jewish minority in the Christian world and, to a lesser extent, in the Muslim world; the extreme deprivations and atrocities suffered by the Jewish people in Europe before and during World War II); a combination of unwritten and written constitutional resources as well as a step-by-step constitutional drafting process; multiple sources of law including Jewish, Ottoman and British law; proportional representation with a very low threshold for party status that produces a close to dysfunctional coalition system; fundamentalist religious political parties as well as parties hostile to the state itself; a population largely made up of refugees from non-democratic politics with traumatic experiences and/or no experience in democratic governance; constant vigilance against terrorism within and beyond national borders; and recurrent military engagements between frequent wars. He seems unaware of the problem of applying originalism to states that have deep historical roots, rather than definitive breaks from those roots precipitating the entrenchment of a formal, comprehensive written constitutional instrument.

Like Bork, Posner takes no interest in the Supreme Court of Israel’s sophisticated reading of the legal instruments that Israel considers constitutional — instruments that are filled with references to the norms and abstractions that he derides as “empty verbiage” and “plays on words.”39 He dismisses the idea, so integral to Barak’s juridical universe, that statutory and constitutional interpretation entails harmonizing the principles of the legal system as a whole with the curt statement, without any indication of its foundation, that “no real legal system has a unitary spirit or common set of values.”40 In reference to the converging trends in rights adjudication in liberal democracies in the aftermath of World War II, he stipulates that “[t]he problem is not learning from abroad; it is treating foreign judicial decisions as authorities in U.S. cases, as if the world were a single legal community . . . .”41

It is not clear what Posner means when he acknowledges the possibility of learning from abroad. His explicit denial of authoritative status is not helpful, since he would be hard pressed to find anyone in the living constitutionalist camp, anywhere, who would disagree. This position seems to be a figment of the originalist imagination. He acknowledges that transnational law may offer strong or persuasive reasoning, but, again like Bork and other originalists, he is not interested in legal reasoning. He therefore does not examine the complex methodology that Barak applies to move from abstract principle, to doctrine, to the rulings that he finds so otiose. Also, following Bork, Posner

38. How Judges Think, supra note 35, at 368.
40. Enlightened Despot, supra note 35.
jumps to cases on “moral” issues, namely abortion and same-sex marriage, as the prime U.S. examples of unacceptable activism, i.e., judicial imposition of personal moral or social preferences in lieu of respecting the law-making authority of legislatures. No link between this culture war inspired originalism and Barak’s work is provided.

Posner, like Bork, premises his claims on mistaken views of the Israeli legal system. He states that Israel does not have a constitution, on the assumption that only the U.S. constitutional model passes muster. He thus dismisses the instruments and principles considered constitutional within the British model of constitutional law, so important to the U.S. framers’ thinking. He asserts that Barak elevated the Basic Laws to constitutional status by “holding that the Knesset cannot repeal them,” ignoring the fact that Barak has always acknowledged, as he must, that they fall under the rules of amendment that the Knesset has stipulated. He labels Barak’s account of constitutional adjudication as “weird,” and warns Americans against the influence of adjudication in other democracies on the assumption of shared democratic principles. He seems unaware that his insistence upon positivist, originalist constitutional interpretation has been expressly rejected by the full range of modern constitutional democracies on the basis of their shared principles, especially the commitment to rights-based democracy.

Owen Fiss presents a strikingly different approach to President Barak’s mode of adjudication. He prefaces his comparison of the judicial review of challenges to actions taken in the “war against terrorism” in the U.S. and Israeli Supreme Courts by setting out the basic parameters of his approach to U.S. constitutional law. Unlike Bork and Posner, he aligns himself with the living constitution paradigm by stipulating that the meaning of the Constitution is not circumscribed by the words set down in 1787 and the twenty-seven amendments adopted thereafter. Rather, he advocates reading the Constitution as a set of principles embedded in the framers’ words, in various enactments that further expound those principles, and in structural elements of governance. These principles include the separation of powers and basic fundamental rights and liberties such as the prohibition against cruel and unusual punishment and the people’s right to speak freely unless the government has established lawful grounds for surveillance.

While Bork also refers to principles in his test for activism, he advocates judicial subservience to originalist readings of the constitutional text and deference to the function and product of majoritarian institutions, leaving little or no space for fundamental principles.

Fiss’s basic premise is that constitutional principles must prevail in times of peace and in times of war. He objects to the tendency to accede to a reduced level of judicial
protection of these principles in the context of perceived emergency conditions.\textsuperscript{51} Indeed, Fiss contends that these principles are just as important in times of stress; deference in times of emergency might precipitate a permanent reduction in protection.\textsuperscript{52}

Fiss therefore respects President Barak’s steadfast commitment to judicial review of constitutional principles in times of national danger and stress. His close reading of the relevant case law leads him to a clear conclusion — that the Israeli Supreme Court under Barak’s leadership safeguarded basic civil liberties to a greater extent than the Supreme Court of the United States, even though Israel faces equal or greater dangers to national security.\textsuperscript{53} He does not consider Barak’s approach “weird,” an engagement in the transnational culture war, or driven by his childhood experiences during the Holocaust.\textsuperscript{54}

Fiss does not ignore the distinctive history, principles, and institutional structure of the Israeli legal system or assume any similarity to U.S. constitutional law in substantive or institutional terms. He notes correctly that the Israeli judiciary is directed by a combination of unwritten principles and a series of Basic Laws, largely treated as having constitutional status by the Israeli Supreme Court within the parameters of legislative supremacy.\textsuperscript{55} He acknowledges the long-term plan to entrench all the Basic Laws into one instrument with the status of supreme law, subject to a special amending procedure.\textsuperscript{56}

Having evaluated Barak’s judgments within the actual framework of the Israeli constitutional system, Fiss does not detect an illegitimate usurpation of legislative or constituent prerogatives.\textsuperscript{57} He characterizes Barak’s approach as faithful to the constitutional principles embedded in the aspirations set out in the Declaration of Independence of Israel, customary international law, and the understanding of democratic governance as the institutionalization of these abstract constitutional principles. Moreover, Fiss characterizes Barak’s analytic methodology as an exercise in rationality.\textsuperscript{58}

Fiss is well known for the view that the quality of legal analysis and its supporting material legitimate the adversary process. On this basis, he analyzes Barak’s adjudicative methodology carefully. He notes that each judgment begins with an account of the particular constitutional values raised in the litigation, the basic rights under analysis in the light of those values, and the analytic tools necessary to reconcile contentious factual

\textsuperscript{51} Fiss, supra note 46, at 259-60.
\textsuperscript{52} Id. at 275. Note that the two new rights-protecting Basic Laws are not automatically displaced by emergency regulations. See Basic Law: Freedom of Occupation, s. 6 (“This Basic Law shall not be varied, suspended or made subject to conditions by emergency regulations”). Basic Law: Human Dignity and Liberty, s. 12, makes the same stipulation and then sets out that a declaration under s. 9 of the Law and Administration Ordinance permits the enactment of emergency regulations to deny or restrict stipulated rights if the denial or restriction is for a proper purpose and for a period and extent no greater than is required. This type of provision, which contemplates judicial review, is similar to emergency clauses in other post WWII constitutions and in statute law.
\textsuperscript{53} Id.
\textsuperscript{54} See id. at 271-72.
\textsuperscript{55} Id. at 271-72.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 277.
and legal claims.\textsuperscript{59} This approach, he observes, cautions against peremptory institutional deference.\textsuperscript{60}

Fiss offers close analysis of one case, in which Barak considered Palestinian challenges to the placement of the security wall within the Occupied Territories on the ground that it interfered with the most basic elements of day to day life, including access to agricultural lands, family, medical care, education, shopping, and religious activities, among other things.\textsuperscript{61} Barak acknowledges that the route stipulated by the military officials warrants respect because it was based on the specific professional expertise of government experts and legitimated by the political responsibility that the military must take for all of its decisions.\textsuperscript{62} This respect does not trigger judicial deference, however. The judiciary has its own legal expertise to apply. In addition, the judiciary operates under its own distinct responsibility — the duty to scrutinize impugned law and state action on standards of rationality, in both instrumental and substantive terms whenever fundamental values are implicated, regardless of the high political importance or sensitivity of the constitutional question under review.\textsuperscript{63}

Scrutiny of instrumental rationality entails two steps. The first is to evaluate the connection between means and ends.\textsuperscript{64} The second is to evaluate whether the impugned law or state action impairs the right as minimally as possible.\textsuperscript{65} Fiss notes that this type of rationality review is similar to the analysis by U.S. judges under the rubric of strict scrutiny analysis, but then points out a striking difference: whereas the U.S. Supreme Court applies this level of scrutiny “only intermittently, and hardly ever in the context of war,” the Israeli Supreme Court applies these factors consistently wherever fundamental values are implicated.\textsuperscript{66}

U.S. constitutional analysis has no parallel for the final stage of proportionality analysis — the consideration of substantive rationality.\textsuperscript{67} Fiss pinpoints the crucial significance of this consideration by citing the high burden of justification imposed on the state to establish that the breach of the constitutionally protected fundamental interest is proportionate to the benefit anticipated from the infringing statute or state action.\textsuperscript{68} This final stage justification is pivotal in the case under examination since the state satisfied the two instrumental rationality standards — first, that the military’s preferred route was rationally connected to the level of security considered necessary and, second, that this route impaired the rights of the Palestinians minimally given that benchmark level of security.

Barak assesses the arguments and supporting factual and expert material submitted

\textsuperscript{59} Id. at 274, 276.
\textsuperscript{60} Id. at 275-76.
\textsuperscript{61} Id. at 274-75. See HCJ 2056/04 Beit Sourik Vill. Council v. Israel [2004], available at http://www.icrc.org/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/09d47365bd007706c12575c20046ec2a!OpenDocument.
\textsuperscript{62} Fiss, supra note 46, at 275.
\textsuperscript{63} Id. at 275-76.
\textsuperscript{64} Id.
\textsuperscript{65} Id. at 277.
\textsuperscript{66} Id. at 276-77 (citing Korematsu v. United States, 323 U.S. 214 (1944)).
\textsuperscript{67} Id. at 277.
\textsuperscript{68} Id.
to the Court to ascertain both the benefit sought and the harm precipitated by the
impugned state action. In concluding that the harm imposed on Palestinian communities
by the military’s designated route exceeded the additional security protection projected
for the Israeli populace, Barak ruled that the state had not justified its position.69
Accordingly, the government would have to alter the route of the wall, at great cost and
at the risk of a reduced level of security.

Fiss respects this methodology as a rigorous, legitimate mode of judicial scrutiny
of the adequacy of rights protection, despite the high political and military significance
of the powers under review. He describes it as “the embodiment of reason in the service
of humanity,” i.e., respect for human dignity.70 In addition, Fiss characterizes Barak as a
“modern day apostle of the Enlightenment” for actualizing the enjoyment of rights so
effectively. He considers this achievement all the more remarkable given the geopolitical
context in which Israelis live, which is saturated in violence and religious passions.71

These contrasting assessments of Barak’s approach to constitutional rights
adjudication under the Israeli constitutional framework reflect deep-rooted disagreement
on the most basic understandings of U.S. constitutional history, text, institutions and
practice. These assessments reveal more about the strengths and weaknesses of these
competing paradigms than they do about Barak’s adjudicative methodology, Israeli
constitutionalism, or the merits of transnational legal discourse. In particular, they
demonstrate that the originalists’ hyper-positivistic, socially conservative polemic leaves
no room for judicial consideration of normative constitutional principles relating to rights
protection.

The originalist school has precipitated a flight from legal reasoning so extensive
that leading adherents treat transnational study as a threat to their preferred polemic
within domestic constitutional debate. Fiss, in contrast, is open to analyzing the Israeli
constitutional system sufficiently to recognize that the precepts of the living constitution
model thrive within it,72 notably in the anti-terrorism context, one of the best tests of the
strength of constitutional principles, the separation of powers and the independence of
the judiciary.73 Departing from the defensiveness of Bork and Posner, Fiss does not
make any claim about the propriety of recourse to transnational legal materials by the
U.S. judiciary.74 Rather, his analysis and conclusions demonstrate the high value of such
expertise on academic understanding of modern constitutional thought and practice,
including the thought and practice of the legal system that is the most difficult to
understand — one’s own.75

The next section of this paper takes a more detailed look at President Barak’s
constitutional universe. It suggests the enrichment that the study of transnational law

69. Fiss, supra note 46, at 277-78. See HCJ 2056/04 Beit Sourik Vill. Council v. Israel [2004], available at
http://www.icrc.org/ihl-nat.nsf/39a82e2ca42b52974125673c00508144/09d47365bd007706c12575c20046ee2a
!OpenDocument.
70. Fiss, supra note 46, at 278.
71. Id.
72. Id. at 259, 271-73.
73. Id. at 260-70.
74. Id. at 271-74.
75. Id. at 277.
IV. PRESIDENT BARAK’S APPROACH TO CONSTITUTIONALISM

President Barak’s remarkable contribution to Israeli constitutional law and to the theory of constitutional rights protection is infused with his extensive expertise in comparative law. As a student at Hebrew University, he was taught by a faculty that included many Jewish émigrés from sophisticated legal systems, including both common law and civil law systems. While a law professor and then Dean of the Hebrew University Faculty of Law, and later as a justice on the Supreme Court for almost three decades, he dedicated himself to the development of Israeli law, including private and corporate law. He was actively engaged over the years in the codification of particular areas of Israeli private law. He has studied and analyzed the institutional roles appropriate to rights-protecting democracies, as well as the framing provided by international law, all from a transnational perspective.

As noted, President Barak published widely in Israel and abroad while still an active judge. He produced three monographs in English entitled Judicial Discretion, The Judge in a Democracy and Purposive Interpretation in Law.^{76} In his masterful article in the Harvard Law Review, Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy,
he provides an integrated model of public law fully informed by his comparative perspective.^{77} More recently, since his retirement, he has returned to a life of teaching and writing. His latest book Proportionality: Constitutional Rights and Their Limitations, has just been published by Cambridge University Press.^{78} He is currently writing a monograph on human dignity, the concept that underlies modern constitutional rights-protection. A number of his leading judgments are available in English translation on the website of the Supreme Court of Israel and more generally on the internet.^{79}

President Barak has studied American constitutional law, history, and theory in great depth and at close quarters, having enjoyed extended and regular visits to many leading U.S. law faculties. He has engaged in many of the debates within American constitutional law, including the debate on transnational law now raging in academic, judicial, and political circles. He strongly affirms the relevance of comparative and international law to the adjudication of public law questions, rejecting the repudiation of this type of intellectual openness in the U.S. academy and by a number of Supreme Court

\[^{76}\text{Aharon Barak, The Judge in a Democracy (2006); Aharon Barak, Judicial Discretion (Yadin Kaufman trans., 1989); Aharon Barak, Purposive Interpretation in Law (Sari Bashi, trans., 2005) [hereinafter Purposive Interpretation].}\]

\[^{77}\text{Aharon Barak, Foreword: A Judge on Judging: The Role of A Supreme Court in a Democracy, 116 Harv. L. Rev. 19 (2002-2003) [hereinafter Foreword].}\]

\[^{78}\text{Aharon Barak, Proportionality: Constitutional Rights and Their Limitations (2012).}\]

justices. His high stature in U.S. legal academic circles may have prompted Bork and Posner to make him an example of the dangers of judicial reference to transnational legal material.

President Barak’s approach to constitutional adjudication builds on a general theory of constitutional law applicable to all rights-protecting constitutional democracies. It applies to constitutions based on the common law, the civil law, or some combination of the two. It applies regardless of the form that a constitution takes — whether fully or partly written; whether imbued with the status of supreme or higher law; whether old or new; and whether reviewed by a Supreme or Constitutional Court. He regards the judiciary as the guardian of the constitutional order and, in particular, of the rights-protecting, democratic governance that modern constitutionalism mandates.

Within this theory, the judiciary and the legislatures are both law-making bodies. In the aftermath of the Second World War, the constitutional authority of the judiciary has been enlarged, not at the expense of the democratic function, but to protect its vibrancy. Judicial review protects the democratic function, the rule of law, the separation of powers, the independence of the judiciary, and constitutional rights. Unlike the legislature, the judiciary performs its law-making function interstitially in the context of litigated cases. The particular responsibilities of the judiciary are daunting: to facilitate change within a stable structure by “maintain[ing] normative coherence” and fidelity to fundamental values.

The judiciary performs this function with attentiveness to the history of the twentieth century, in which the fragility of democracy and the horrific pain and suffering inflicted by despotic, racist, and genocidal governance were fully demonstrated. The constitutional lessons drawn from that history are both institutional and substantive. Judicial review of the exercise of public authority, including review of legislation, has a paramount normative function: it ensures the rule of law, the stability of the constitutional order and access to justice against those who would privilege private power based on wealth, traditional elites, and social hierarchies. This model therefore affords generous rules of standing and justiciability. Substantively, it respects and


81. Foreward, supra note 77, at 25.

82. Id. at 36.

83. Id. at 38. President Barak’s delineation of democracy includes constitutionalism, legislative supremacy under the constitution, fundamental principles, and human rights. Id. at 38-46.

84. Id. at 32. In regards to the common law, the judiciary is the primary lawmaker, while in the legislation, the judge is the faithful interpreter. Id. at 29.

85. Id. at 29-36.

86. Id. at 20-21.

protects individual freedom and equality, not merely as a national set of historically crystallized priorities, but in association with the postwar international rights-protecting instruments.\textsuperscript{88}

The written constitution erects a normative umbrella for the whole legal system, shaping "the character of society and its aspirations throughout history."\textsuperscript{89} The constitution establishes the framework for the democratic system and for governance on the basis of philosophy, politics, society, and law.\textsuperscript{90} Its text is only "the tip of the iceberg," however.\textsuperscript{91}

The language of the constitution is both abstract and general for a number of reasons. It must reflect the negotiated compromises necessary for its adoption, the affirmation of the particular nation's fundamental values, covenants and social viewpoints, and the generality appropriate to an instrument designed to frame human behavior and governance for an unknown future.\textsuperscript{92} In addition to its express formulation, this language implies constitutional principles of great importance and complexity, such as the separation of powers, the independence of the judiciary, and respect for human rights. The interpreter's task is to extract the "legal meaning" from the "linguistic meaning," a rational process that produces legal norms.\textsuperscript{93}

This normative foundation, reflecting historical understandings and shaped by contemporary values, frames the interpretive and analytic methodology for judicial review. Judges must not impose their own preferences in the guise of interpretation.\textsuperscript{94} They do their interpretive work within the boundaries of the linguistic meaning of the text, attentive to the appropriate levels of generality and abstraction.\textsuperscript{95} This model denies exclusivity and pre-emptive priority to historical readings of constitutional text.\textsuperscript{96} Judges are not to limit their review to historical meaning or intent, either subjectively understood at the time of its drafting or ratification or in regard to questions that might later come to the judiciary for resolution in an unknown and unknowable future.\textsuperscript{97} The future grows out of the past but it is not enslaved to it.\textsuperscript{98}

The judiciary's interpretive engagement is purposive (or teleological), tied to the deeply held normative values of constitutionalism. One level of inquiry focuses on subjective purposes, which relate to the founders' contribution, the "goals, interests, values, aims, policies, and function" that they "sought to actualize."\textsuperscript{99} The attitude to the founders' intentions relates to abstract concerns, not to the concrete legal arrangements in place in their historical moment. There is no assumption that the founders meant to

\textsuperscript{88.} BARAK, supra note 78, at 37.
\textsuperscript{89.} PURPOSIVE INTERPRETATION, supra note 76, at 370.
\textsuperscript{90.} Id.
\textsuperscript{91.} Aharon Barak, Judicial Perspectives: The View from Israel, in THE CONSTITUTIONAL BASES OF POLITICAL AND SOCIAL CHANGE IN THE UNITED STATES 287 (Shlomo Slonim, ed., 1990).
\textsuperscript{92.} PURPOSIVE INTERPRETATION, supra note 76, at 372-73.
\textsuperscript{93.}  Foreward, supra note 77, at 64.
\textsuperscript{94.} Id. at 73.
\textsuperscript{95.} Id. at 68.
\textsuperscript{96.} PURPOSIVE INTERPRETATION, supra note 76, at 376.
\textsuperscript{97.} Id. at 375.
\textsuperscript{98.} Foreward, supra note 77, at 70.
\textsuperscript{99.} PURPOSIVE INTERPRETATION, supra note 76, at 375.
petrify their legal, social or political universe. On the contrary, the constitutional system leaves room for and embraces change; to some extent, it mandates change. In stipulating these interpretive directives, Barak situates his constitutional theory and interpretive methodology within the living constitution paradigm.

Barak characterizes U.S. academic and judicial preoccupation with originalism as both exceptional and regrettable. He supports this proposition by reference to statements by justices in other constitutional democracies, which reject subjective original intent and meaning as the exclusive or dominant interpretive methodology and embrace instead the living constitutional paradigm and its interpretive methods. The national constitutional systems referred to are the Canadian, Australian and German. To the extent that he refers to U.S. Supreme Court justices and judgments favourably, his references are usually to the Warren Court, which he understands to be prototypical of the judicial role within rights-protecting democracy.

The judiciary’s purposive methodology extends to examination of objective purpose, which relates to the aspirations of the entire constitutional instrument, with attention to the relationship between the whole and its parts. Added constitutional instruments or amendments may thus have the effect of altering the meaning of the earlier text to avoid internal contradiction. As noted, objective interpretation is the primary mode of constitutional interpretation, especially in regard to older constitutional instruments.

President Barak encapsulates his approach to constitutional interpretation in these words:

Purposive interpretation of the constitution is based on the status of the judge as an interpreter of the constitution. A judge who interprets the constitution is a partner to the authors of the constitution. The authors establish the text; the judge determines its [legal] meaning. The authors formulate a will that they wish to realize; the judge locates this will within the larger picture of the constitution’s role in modern life. The judge must ensure the continuity of the constitution. He or she must strike a balance between the will of the authors of the constitution and the fundamental values of those living under it.

President Barak’s rejection of originalist readings of the constitutional text leaves room for consideration of transnational law. He finds the case law and academic literature in constitutional democracies that embrace the same normative foundations illuminating, but not authoritative. He rejects importation of alien or foreign elements.

100. Foreward, supra note 77, at 72. ("... If one succeeds, as do the originalists, in escaping the heavy hand of the subjective will [of the framers], why become entrenched in the historical past rather than turning an eye towards contemporary needs? Why not take account of the fundamental modern principles that encompass the Constitution?").
101. PURPOSIVE INTERPRETATION, supra note 76, at 385-86.
102. Id. at 378-79.
103. Foreward, supra note 77, at 70-71.
104. Id. at 73-74.
into the domestic constitution. Rather, transnational engagement provides deeper insights and self-knowledge, revealing possibilities that otherwise lie hidden within one’s own legal system. So too, it heightens one’s awareness of the distinctiveness of other systems. Like an “experienced friend,” it provides guidance about successes and failures elsewhere. The solution to each constitutional question is and must be “local,” but it is enriched by consideration of the possible “arguments, legal trends, and decision-making structures available.”

While comparative constitutional engagement offers “expanded horizons and cross-fertilization of ideas,” the judiciary must be on guard lest an alien historical or social element renders a particular insight inappropriate. Influence is greatest when earlier constitutional texts influence later ones or where there is a strong commitment to the same constitutional principles, such as democracy and human rights. International conventions and the decisions of international and national courts that interpret these conventions can provide direction given the similarity in their subject matter to that of national constitutions.

President Barak notes with irony that the United States Supreme Court stands apart from this engagement in comparative constitutional law even though many democratic countries have been influenced by the American Constitution and its interpretation. U.S Supreme Court justices thus “fail to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems.” He offers a mild admonition: “wise parents do not hesitate to learn from their children.”

This theoretical approach to transnational law is exemplified in President Barak’s judicial methodology, not necessarily in the results of cases. His cites as his favoured comparators the Canadian Charter of Rights and Freedoms, 1982 and the German Basic Law, 1949. His methodology stipulates two stages of adjudication. The first addresses the scope of the right, based on purposive or teleological interpretation, and the fact of its infringement, while the second addresses the possible justification of any infringement. The onus of argument and evidence in the first stage is carried by the rights-claimant; the onus then shifts to the state in the second. The second stage encompasses the instrumental and substantive rationality review so well described by Fiss.

President Barak has made a significant contribution to the development of modern constitutional thinking and practice. He stands in the line of great judges who have transformed the political theories of the Enlightenment into modern constitutional precepts, institutions and institutional practice. This work has taken place in the aftermath of the Second World War, when democratic nations considered it imperative to establish and secure rights-protecting democratic governance at home as well as in the defeated and failed states. One of the most basic features of this postwar constitutional paradigm is the understanding of constitutionalism as a living tradition that melds respect for equal and inherent human dignity with governance under representative and

105. Id. at 110-11.
106. Id. at 111.
107. Id. at 112-13.
108. Id. at 114 (citing United States v Then, 56 F. 3d 464, 469 (2d Cir. 1995) (Calabresi, concurring)).
accountable institutions. The next section situates President Barak’s thinking within this constitutional paradigm.

V. THE POST-WORLD WAR II CONSTITUTIONAL PARADIGM

The Second World War ushered in an intense period of constitutional construction and reconstruction marking the juridical response to totalitarian, racist, imperialist governance and World War. This project extended beyond the defeated states to shine light upon the dirty corners of oppression and discrimination within established democracies. It had become clear that majoritarian rule, while an admirable achievement in contrast to totalitarian oppression, did not provide adequate realization of the constitutional principles generated by the Enlightenment. The missing element was identified as judicially enforced fundamental rights and freedoms, based on respect for the equal and inherent dignity of the human person, at the national and supra-national level.

The fall of relatively enlightened states into totalitarian oppression demonstrated that majoritarian processes and party politics can work to undermine the principles that legitimate the democratic function — especially the primacy of the individual encapsulated in the idea of one person, one vote. Moreover, real, perceived and manufactured emergency can induce legislators to set aside their duty to protect and respect equal and inherent human dignity. Even in relatively stable periods, rational deliberation and consensus building can be held hostage to historically privileged values or to the privilege of social, political and wealthy elites. So too, constitutional stipulations for equal treatment under the law can succumb to the ill will, ignorance or expedience of elected officials who do not consider themselves bound to attend to the needs or desires of minorities (including the vulnerable within minority communities), the disadvantaged, or those who simply cherish increased pluralism and diversity.

Within the postwar constitutional paradigm, judicially enforced rights-protecting instruments have the status of supreme or higher law in order to eradicate these democratic deficits. These instruments require the state to respect, and in some cases actively protect, the equal and inherent human dignity of all persons subject to its authority. These entitlements are not the gift of the state. Rather, they are conceived as preconditions of its legitimacy. Representative and accountable institutions deliberate upon and enact legislation that embodies public preferences, on the condition that the validity of those laws depends on their conformity to the principles embodied in the fundamental rights and freedoms. Independent, expert, politically detached and intellectually engaged judges scrutinize the content and impact of law and state action for conformity. The non-majoritarian and non-democratic character of judicial review makes possible its institutional and substantive rationality, which legitimates public law.

This post-WWII conceptualization of the constitutional state is predicated upon an organic understanding of the constitutional order. Abstract principles are conceived as looking backward and forward in time. They are remedial in that they correct or prevent repetition of past failures of major and minor proportions, some domestic and some foreign. They are transformative in that they cast their normative framing into the
unknowable future. Judicial review provides a bridge from past failings to deeper fidelity to this normative framing. On this basis, access to the courts is necessary and generous, affording both private and public interest standing. Expert and representative interveners participate by providing argumentation and, in some instances, contributing expert opinion and social science data to the factual record. Parties and interveners introduce relevant comparative constitutional reference material. Concrete and abstract questions are justiciable, including issues of the highest political import. The rule of law encompasses the rule of constitutional law in the broadest sense.

Constitutionally protected rights and freedoms make up a coherent unity, elaborated case by case, slowly correcting prior failings by applying fundamental principles to novel questions. The full extent of the substantive principles engaged is not exhausted by the social, historical or textual encapsulation of specific constitutional formulations. It is also not reflected in the idea of absolute, concrete rights or freedoms frozen in time. Courts read the rights to perpetuate their fundamental content in application to a changing world. Courts also evaluate the state’s claims that its encroachments on rights and freedoms are justified in order to realize the fullest enjoyment of the underlying principles.

These principles determine that the amplitude and application of each of the guaranteed rights must accommodate all other guarantees and pre-eminent constitutional principles as well as other considerations that from time to time rise to the stature of constitutional concern, such as the exigencies of emergency conditions that threaten constitutional governance or the existence of the constitutional state.

This structure of rights protection combines purposive interpretation of the constitutional text with proportionality analysis of all tentative findings of infringement of protected rights and freedoms.

Purposive interpretation articulates the principles inherent in the specifically guaranteed rights and freedoms as abstractions that enjoy priority over linguistic evaluation, historical origins and meaning, national understandings and traditional or faith-based mores, and considerations of utility or efficiency. Theoretical, historical and transnational perspectives illuminate national ways of thinking and values in both positive and negative ways. When the values and principles engaged optimize the equal enjoyment of human rights, there is less room for national variations. The intellectual engagement is not bound by specific cultural, traditional, positivist, or national considerations. Rationality displaces culture war, because this approach entails not merely a living constitutional ethos, but also an intellectually open engagement.

Purposive analysis requires judicial analysis of argument and factual material based on the history and theory of constitutional and human rights as well as developing trends in other rights-protecting democracies and within international human rights law. This mode of analysis requires judicial analysis of argument and factual material submitted by the state to satisfy its onus to justify the curtailment of any particular right. On this basis, the judiciary applies a sequenced set of rigorous tests, not to impose personal or political preferences, but to ensure that the state acts in conformity to its constitutional duties.

The shift in onus to the state to justify a prima facie infringement of a guaranteed
right is enormously important. For example, when there is only one stage of argumentation, it is respectable for the state to argue that equality does not extend to same-sex couples on the basis of textual analysis, legal history, tradition or faith based considerations — or differences in social relations and family formation under legal systems that criminalized certain sexual acts or discriminated against sexual minorities. This approach leaves the extension of equality to the vulnerable, politically powerless, and disadvantaged to the legislatures or constitutional amendment.

Proportionality methodology imposes an entirely different legal burden on the state — to justify, not merely to describe, assert, or explain. It is very difficult to justify unequal treatment in regard to family and spousal status given current social science, medical understandings, and societal developments “in a court of law.” The justificatory burden reflects the fact that the court has recognized a prima facia breach of a constitutionally protected fundamental right.

When the judiciary engages in purposive interpretation and proportionality analysis it does not change the meaning of the constitutional text; nor do the members of the judiciary impose their personal or political preferences. On the contrary, the shift in onus that frames purposive interpretation and rational analysis of justification demands a highly sophisticated mode of legal reasoning as well as an elaborate record of adjudicative, legislative and social fact. Perhaps more importantly, the legal reasoning required also excludes extraneous considerations. The U.S. judgments that have moved towards equality for gays, lesbians and other sexual minorities reflect this two-stage, rationality-infused methodology.109

When these standards of rationality inform constitutional analysis, they eventually come to permeate the law-making process and the exercise of all public authority under law, including executive rule making and the application of rules. The stricture that any breach of a right must be prescribed by law upholds the democratic function and the rule of law at the expense of vague and arbitrary law making as well as arbitrary power. The further strictures of instrumental and substantive justification require the state, if it is to sustain the validity of the impugned law or state action, to demonstrate that it has carried out its constitutional duties to protect rights. These duties require argument, evidence, expertise, and/or social science to demonstrate the instrumental and substantive rationality of the impugned exercise of public authority.

It has taken decades for this constitutional paradigm to mature. One of its strongest manifestations developed as the distinctive adjudicative model of the Warren Court, which treated the U.S. Constitution as a unified, codified whole; brought to life the long-neglected amendments adopted after the Civil War; and invoked equal and inherent human dignity to abandon racial discrimination, the subordination of women to nature, faith and culture, and the disrespect within criminal and administrative law of the primacy of the individual.

Roe v. Wade and Lawrence v Texas, the culture war cases that the originalists repudiate most vehemently, are strong examples of the post-WWII constitutional

The statements in the Warren Court case law pointed out for ridicule most frequently by the originalists are clear statements of various strands of this model, which has become the scaffolding of constitutionalism in many national and supra-national rights-protecting settings.

It is regrettable that U.S. academics and justices who read the American Constitution as a holistic document committed to fundamental constitutional principles have so little connection to the constitutional ideas and practices developing in other jurisdictions more congenial to their way of thinking — ideas and practices directly connected to a widely respected, normatively inspired, and institutionally innovative period in U.S. constitutional history. The concluding section of this paper looks forward to a more open attitude to transnational legal resources.

VI. ORIGINALISM, TRANSNATIONALISM, AND THE UNITED STATES CONSTITUTION

Robert Bork and Richard Posner have good reason to express concern about the appeal of the work of sophisticated and well-educated foreign justices who introduce influential Americans, including future judicial appointees, to the postwar model of constitutionalism and direct them to its elaboration of the ideas of the founding generation, those who framed the post-Civil War amendments, and the work of the Warren Court.

Casual references by Supreme Court justices to rights-protecting rulings in foreign courts have triggered strenuous objection. But, to borrow President Barak’s imagery, these references are merely the tip of the transnational legal iceberg. Transnational resources offer American judges, academics, and even politicians, a full juridical paradigm upon which to rebuild their understanding of U.S. constitutional law, theory, and judicial methodology as a living, historically-informed, and textually based constitutional framework, committed to the equal and inherent dignity of all members of American society.

Those who champion originalism often say that their paradigm prevails over the living constitution paradigm because they have a theory and their interloquiters do not. The study of comparative constitutional law and international human rights law demonstrates that they do not have a theory. Rather, they have a construction of assumptions and a clunky, result oriented mode of legal argumentation.

Moreover, this study reveals a constitutional paradigm embedded in U.S. constitutional history, the work of the Warren Court, and, in particular, cases such as Roe and Lawrence. This paradigm consists of a developed, sophisticated and institutionally legitimate mode of constitutional engagement that flourishes as the foundation of modern constitutionalism and does so to a considerable extent as a U.S. export. This constitutional paradigm delivers what the originalists cannot — an objective,

110. For analysis of Roe v Wade and another less obvious example, Lochner, see Lorraine E. Weinrib, The Postwar Paradigm and American Exceptionalism, in THE MIGRATION OF CONSTITUTIONAL IDEAS, 84 (Sujit Choudhry ed., 2006). For analysis of this dynamic in the U.S. death penalty cases, see Lorraine E. Weinrib, Constitutional Conceptions, Constitutional Comparativism, in Defining the Field of Comparative Constitutional Law, 3 (Vicki C. Jackson & Mark Tushnet eds., 2002).
institutionally legitimate role for the courts based on an analytic methodology that infuses the exercise of public power with fundamental norms as well as both instrumental and substantive rationality.

Given the shared commitment to the substantive foundations of living constitutionalism, it makes sense for modern constitutional democracies to learn from each other when drafting, interpreting and developing constitutional law. This intellectual engagement does not erase the differences between constitutional arrangements or aspirations in different nation states. It acknowledges shared normative commitments. There is no question of alien importation, borrowing or migration. The legal paradigm of the modern constitutional state reflects ideas that are larger than the history of any particular nation or the words of any legal text. This paradigm is the progenitor of the modern constitutional state, not its product.

Current academic literature on constitutional interpretation in the United States indicates strong interest in revisiting the monopoly on history and text arrogated by the originalists. These efforts focus critical attention upon the failings of the originalist enterprise. This critique would be strengthened by including transnational perspectives, which provide theoretical framing, institutional structure and legal methodology. These resources can illuminate the relevant history from a fresh perspective — the neglected heritage of British constitutionalism as well as the Enlightenment roots that all modern rights-based constitutions share. This history grounded the signature features of the Warren Court’s work. This perspective does not eliminate history and text from the debate, as the originalists claim. Rather, it situates legal analysis within an enlarged understanding of the relevant history and text.

As President Barak has so eloquently stated, transnational legal resources offer the comfort and guidance of an experienced friend. Chief Justice Roberts, aligning with the attitudes of Bork and Posner, invokes the same metaphor. He equates judicial selection of comparators with picking out friends in a crowd, i.e., to affirm one’s own established preferences. President Barak’s work, as well as that of other great constitutional judges of his and earlier generations, is far from arbitrary, however. It is true that there are legal systems that permit the imposition of the death penalty on juveniles and the mentally retarded, restrict access to abortion based on retrograde ideas about women’s sexuality, criminalize adult consensual homosexual acts and/or deny sexual minorities the basic opportunities in life, and undermine the integrity of the democratic electoral system. But, in what way are they America’s friends? Chief Justice Robert’s example reflects the poverty of the idea that transnational legal engagement involves finding and counting up countries with similar laws. The ideal of a petrified constitution has failed to provide the vibrant democratic engagement and judicial impartiality promised. It has drawn a distorted and misleading picture of the legitimate ways in which judges, academics and opinion leaders learn from other rights-protecting democracies. It denies what transnational legal resources confirm — that it is possible to conceive a judicial role in protecting rights that reflects the best understandings of the separation of powers,

111. See supra note 9.
112. See Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be the Chief Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary, 109th Cong. (2005).
the rule of law, the independence of the judiciary, and democratic governance. It also undermines the leadership role that the United States should have in the development of a transnational constitutional paradigm that is one of the greatest exemplars of American jurisprudential genius.