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CONSTITUTIONALISM AS A SITE OF STATE FORMATIVE PRACTICES

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Introduction

I must, at the outset, express my appreciation to Professors Norman Dorsen, Louis Henkin, and Michel Rosenfeld for the honor of inviting me to this Roundtable. Commenting on the extraordinarily rich and fascinating papers of Professors Kenneth Karst and Yash Ghai enhances this honor. Together, they articulate achievements as well as crises of constitutionalism at the end of the second Christian millennium. Both have as their principal theme the

troubled relationship between constitutionalism and state formative practices. Professor Karst explores this relationship in terms of the constitutional survival of American "nationhood." Professor Ghai addresses issues concerning constitutional progression and regression in terms of a discourse of human rights in the context of contemporary globalization. Karst and Ghai bring a rich, and often astonishing, array of insights through incredibly diverse circumstances and conjunctures of governance, rights, and justice.

Although the practice of intellectual modesty is a forbidden postmodern virtue, I must state at the outset my inability to do justice to the richness of either presentation. Belonging to an adolescent generation of Midnight's Children that made Salman Rushdie an overnight celebrity, and having been

shaped at Berkeley (though at Boalt Hall) during the height of the anti-Vietnam protests, I encounter these presentations in the context of many a postmodern nightmare. The very phrase-regimes of "nation building," "identity," and "human rights" appear deeply problematic. I am not grounded in the discipline known as "American Civilization." Therefore, I am at a considerable
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disadvantage in relation to Professor Karst's paper. Furthermore, Professor Yash Ghai's contribution presents a baffling diversity of constitutional experiences, mainly in the South. I am accustomed to tracing a genealogical understanding of constitutionalism, yet I find the totalizing narratives in both presentations somewhat forbidding. When I look at these
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texts through my habitus as a social activist who believes that human rights have a future only when human suffering is taken seriously, I consider them in ways that may violate many an authorial intention. These multiple disclaimers remain necessary for those who perform the labor of reading what now follows.

I. Problems of Comparison

The two works present to us many problems daunting the belated emergence of comparative constitutional scholarship. Thus, one sees the return of the old, time-worn problem of comparing the incomparable. The two presentations do not explicitly confront this problem. However, Kenneth Karst seems to be implicitly saying that meditation on contemporary American constitutionalism has lessons for the rest of the world, so much so that one may focus exclusively upon it to reap the harvest for the rest of world constitutionalism. Yash Ghai, in contrast, seems to suggest that one should compare as diverse, and as many, a constitutional development as possible, but from the vantage point of human rights discourse. The Karst approach suggests that one take as a point of departure an inward-looking critique and reconstruction of a world hegemonic single nation narrative. This, in turn, has lessons for us all. The Ghai approach favors many nation narratives, from

some unifying thematic focus, which may deepen the understanding of why some constitutions succeed and why some fail. One hopes the relative strengths or

shortcomings of each may pave the way toward grasping the comparative constitutional experience.

But, for such grasping to occur, one must focus on a host of contexts. The inaugural context is provided by historical times of modern constitutionalism. Much of the business of "modern" constitutionalism was transacted during the early halcyon days of colonialism/imperialism. That historical timespace marks a combined and uneven development of the world in the processes of early modernity. This, in turn, registers the perfectibility of modern notions of constitutionalism in the metropolitan societies, while at the same time constituting a complete denial of its tenets in the juristic and juridical terra nullius constituted by colonies.

The formation of epistemic legal racism, [FN1] combined with cruel felicity, establishes the patterns of perfection for fractured growth of liberal rule of law notions in the metropolis with a reign of terror elsewhere. [FN2] Historically then, traditions of modern constitutionalism enact what Jacques Derrida, following Walter Benjamin, names as the foundational violence of law. [FN3] Comparative constitutional theory and practice risk irrelevance when they fail to perceive the inherent, and at times genocidal, violence that accompanies grand narratives concerning the founding notions of modern constitutionalism: the rule of law, separation of powers, autonomous constitutional review, and guarantees of basic human rights. For example, these notions still appear tainted to the peoples of the First Nations, or to postcolonial peoples in many parts of the world today; this is because they experience in and through constitutional development the replication of the foundational violence. If it is any part of the agendum of comparative constitutional theory to restore "constitutional faith," the histories of this violence have to be traced from distinctly subaltern perspectives, rather than those furnished by

metanarratives of the "bonds of nationhood."

Second, these very founding notions, repudiated abroad, were not available in terms of lived experience to the bulk of Euro-American peoples until very recently. Even as we celebrate, with all the attendant anxieties of judging, the histories of growing inclusiveness of contemporary constitutionalism (as Karst does with poignant rhetoric and Ghai does cautiously), we become aware that the "contemporary" constitutionalism inherits the propensity for violent social exclusion from the "modern." The discontinuities are striking, indeed. But for the subaltern perspective, all that seems to have happened is the transformation of forms of discourse, leaving the content of disempowerment in place. For example, John Grisham's Street Lawyer [FN4] and Rohintoon Mistry's A Fine Balance [FN5] narrate strikingly different stories of constitutionalism illustrative of the subaltern experience of the world's two leading constitutional democracies: the United States and India.

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Third, there is the context of ontological robustness of

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constitutional traditions. Vintage constitutional traditions are available to those entitled by historic time to their own bicentennial celebrations. These vintage traditions then constitute a standard of excellence that all latecomers should aspire to follow. Modern constitutionalism thus seeks to universalize itself, both through processes of sustained cultural diffusion and coercive imposition. The aftermath of the Second World War, the early and middle phases of the cold war, and now economic rationalism entailed in contemporary forms of globalization, provide for a comparativist, fascinating archive of the processes of imposed constitutionalism. In any event, the notion of robustness is problematic in the subaltern perspective as a mere discursive effect, an artifact of dominant modes of constitutional narration, one that constantly invents a tradition rather than pointing merely to contingencies of the "timeplace" [FN6] (to borrow a notion of Harvey) of constitutional

emergences.

Therefore, problems of method are problems of narration. One may choose to look at constitutions as moral autobiographies of nation-states, with warmth of feeling and compassionate generosity as Professor Karst inimitably does. Alternatively, one may privilege diversity from well-tempered relativity of universal truths concerning human rights, as Yash Ghai does. Or, one may define the experience of constitutional development from the standpoint of constitutional losers, not winners, as the subaltern perspectives seek to do.

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The method problem now appears not as a technical problem, but as a distinctly ideological one, even in a post-Fukuyama world!

The Karst and Ghai narratives do not directly address the issues of comparative method, but do illustrate them when they narrate constitutional time as the space for state formative practices. Both authors believe that constitutions are relevant to tasks of "nation-building' or "integration." Both remind us that the tasks of nation-building, such as they are, are never fully done; both, in separate but equal ways, remain concerned with methods through which adjudicatory sites of state power stand invested with the mission of facilitating rights-cultures.

This rich fare of concerns raises a number of critical questions: What constitutes a constitution? How does one read the histories of their enunciation? In what ways are constitutions related to the tasks of nationhood? What are the intersections between constitutional cultures and "civic" cultures? How do specific *1187

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stories about constitutional and social developments shape and emplot metanarratives of comparative constitutionalism? And finally, indeed does constitutionalism (in all its multiplicity of signification) have a future?

II. The World of Three "Cs"

The first question (What constitutes a constitution?) makes problematic the

very idea of a constitution. A nominalist response would indicate that constitutions are written texts proclaiming themselves as such. But, as we all know, not all constitutions are written as such. What is more or less theorized, at the same time, is the play and the war between what is written and what is unwritten in that something we call "constitutions." Often called "conventions," the unwritten looms large over the written, at times supplanting what is "written." Histories of slender texts (such as the American) and voluminous texts (such as the Indian) provide vivid examples of the unwritten at play and at war with the written texts. [FN7] In Roland Barthes's telling image, constitutions are not "writerly," but "readerly," texts. Constitutions entail not just the practices of writing but of reading to the point (as Barthes maintains) that the birth of the reader necessarily entails the death of the author. [FN8] Not a bad epithet, incidentally, for the "original intention" narratives!

Comparative constitutionalism also guides us to the insight that the very identity of the constitution as a written text is also problematic. Textual additions evoked by amendment raise profound issues regarding the identity of constitutions. The original text remains, but is so heavily overlaid by subsequent transformations that one has difficulty in naming that which constitutes the constitution. The disruptions, dislocations, and diversions from the original text are so massive as to mock the idea of a
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constitution itself. The bicentennial celebration of the American Constitution produced this bewilderment in a benign way. [FN9] But it also manifests itself on a different register--the register of catastrophic practices of politics of cruelty in the Third World constitutionalism. This is especially true where the "original" constitution is suspended by a chaotic series of interim constitutions creating a multiplicity of "amended," "suspended" *1188

"interim," and "reenacted" constitutional texts.

[FN10] All these happenings interrogate the notions, now celebrated in comfortable climes, of a "constitutional self." [FN11]

These multitudinous formations, reformations, and deformations need further understanding in the plurality of texts within a corpus of text commonly identified as the "constitution." Faute de mieux, I identify these as governance texts and rights/justice texts. [FN12] The former overwhelms, the latter falters. But, as generations pass, governance texts begin to feel the full illocutionary force of the rights/justice texts. A relatively autonomous domain of adjudicatory practices develops, marking the site of many a restless tension, even contradiction, between governance and rights texts. Patterns vary, but adjudication negotiates these in ways that mark a "one-step-forward, two-steps-backward" movement. This movement orphans at times, and also parents at times, rights and justice over demands and needs of governance.

Perhaps one way of conceptualizing constitutions is to differentiate the idea

of constitution at three interlocking planes, which I name as C1, C2, and C3. C1 stands for the word as the world, the site of initially formulated historic constitutional texts. C2 represents constitutional hermeneutics, the site of what is understood in the dominant discourse as constitutional interpretation or constitutional law. C3 signifies "constitutionalism," a set of ideological sites that provide justification/mystification for constitutional theory and practice. These three forming practices [FN13] may constitute the idea, in complex and contradictory mode, of a constitution. An understanding of forming practices helps us evade nominalism and essentialism, and raises questions concerning what Edward Said called the authority of authority. [FN14]

One does not quite get a sense of differentiation in the idea of constitution in the presentations of Ken Karst and Yash Ghai. Karst almost wholly identifies constitution with constitutional law *1189

(C2) and is not

concerned with C1 or C3, especially if C3 is designated as an ideology. He writes: "ideology, in the sense of abstract beliefs would be too flimsy a material to constitute an American identity, too thin a glue to hold a culturally diverse nation together." [FN15] Rather, Karst regards C2 as equivalent to C3. For Karst, the "Supreme Court's interpretations . . . are behavioral illustrations of the civic culture in action, and they also contribute to civic culture's meanings." [FN16] He speaks later about "lofty ideals they profess" but sadly enough betray. [FN17] In one swift

rhetorical stroke, Karst accomplishes the denial of C1 and C3.

But surely C1 in the United States is constituted by a variety of texts. The texts of various state constitutions would also, at least from an external perspective, seem an integral part of the corpus generally known as the American Constitution. Even from an internal perspective, recent constitutional scholarship suggests that the study is at least rewarding. A narrative that wholly overlooks state constitutions already overcentralizes "the bonds of nationhood." Similarly, the elimination of C3 (or its assimilation with C2's dynamic and complex relationship with the problematic notion of "civic culture") accomplishes denial of ideology: both the ideology of law and law itself as ideology. [FN18] In the best of analytic traditions, ideologies are never just "abstract belief systems"; they also name and constitute material practices of power that shape social action for transformation and patterns of sustainable thinking.

Whatever may be said concerning contemporaneous integrative or identity-forming relevance of ideology conceived as an "abstract belief system," there still remains the question of whether the ideological analysis of the idea of constitution is altogether irrelevant. Just two decades ago, one identified constitutionalism into two types: the bourgeois/liberal and socialist/ideal types. The comparative study of constitutions required the construction of C3 as a set of ideologies. To some extent even today, a study of so-called

transitional society constitutionalism is incomplete without a firm grasp of the socialist construction of histories of constitutional legality. [FN19]

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Islamic constitutionalism inaugurated by Ayatollah Khoemeni's construction of Shiite shari'a elude this grasp outside the histories of formation of Islamic polity. [FN20] Furthermore, a grasp of contemporary South Africa is impossible outside the histories of material ideological practices of apartheid.

Professor Karst prefers to speak of "civic culture" as a formation distinct from the free market and property-based ideological tradition of American constitutionalism. He does not indicate the preferred reasons for the expulsion of ideological modes of analysis. Is then constitutionalism as "a grammar of rationality," a discourse of the part, as it were, justifying itself as a representation of the social whole altogether irrelevant to the exploration of practices of identity and nation-building? [FN21]

Similarly, Professor Ghai has little use for the ideological discourses shaping rights as enunciated in the four constitutions he explores. Despite a sensitivity to vastly different contexts of constitution-making in India, Canada, South Africa, and Fiji, Ghai implicitly constructs constitutionalism as the space for negotiation of the global and the national understandings of human rights along the axis of the "tradition" and the "modern." He seems to think that an understanding of forms of rights is pre-given. To this end, note

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his first conclusion: "[I]n all four instances . . . the international standards/rights are the starting points; constitutional proposals/compromises are [in] interrogation with them." [FN22] I will need to revisit this observation in some detail later.

For the present, it suffices to draw attention to Professor Ghai's notion that contemporary constitutions are best understood in terms of histories of metadiscourses concerning "universality" and "relativism" of international

human rights norms and standards. Professor Ghai explores notions of constitutionalism (primarily C2) by privileging the dynamic of political practices directed somehow at accommodating "ethnic" diversity. But these practices, and the attendant notions of rights and governance, offer *1191

a
register of creative but unstable synthesis (as Simmel would say [FN23]) of a "multiplicity of elements" into a "unity," of which politics of constitution-making and change, even when successful, is only one, and often not a crucial, dimension. This transformative labor of creation, of collective modes of meaning, understanding, innovation, and experiment, rendering diverse human yearnings into "formed contents" of constitutional rights, may not be held in the frail dialogical vessel of the discursive history of universality and relativism of human rights. Overall, Ghai offers a wholly utilitarian construction of rights, summed up by his metaphor of the "competing currencies of human rights," [FN24] which inform, and at times shape, constitutional

development.

Both presentations invite us to the post-ideological analysis of constitutional forms and content, theory, and practice. Both authors implicitly theorize that notions of "civic culture" and "human rights" provide worthwhile alternate frameworks. This may make good sense in a post-Fukuyama world, configuring the end of history. However, I disagree not out of allegiance to the obsolescent habits of thought, but out of a subaltern perspective on constitutionalism.

III. Ways of Reading: Construction of Narrative Voice

This brings me to the second question: How may one read/narrate histories of constitutions and constitutionalism? Here, much depends on why one engages in this enterprise. Professor Karst, for example, wishes to narrate American constitutional development in terms of its central role in the maintenance of "the ideal of American nation," an ideal that persists "in major

part by the virtue of its promise of universal legal rights." [FN25] He considers it important to present this development as a progress narrative of the formation of a distinctive American national identity and a "civic culture." This narrative choice rules out the imagination of the subaltern perspective on constitutionalism. Surely, a progress narrative may not conceptualize the constitutional theory and practice in terms of political

practices of cruelty, or histories of deprivation, denial, and disadvantage. Nor may it recourse to an alternate normative framework that regards constitutions (in terms of my tripartite division) as orders of "sustainable" political violence.

From a subaltern perspective, the making of constitutions is always an enactment of several orders of violence. Thus, discourse *1192

on
constitutionalism is a mode of organizing the politics of forgetting. A modern constitutional text thrives on the annihilation of contexts. The foundational violence of an inaugural constitutional text lives, if at all, in the dominant narrative tradition as a ruin of memory, not, as with the subaltern, as a lived and generationally embodied histories of collective hurt.

Thus, with all his sensitivity, Professor Karst mentions the collective histories of hurt in passing, as a litter of "details the of dismal record," as a parade of horribles. [FN26] If there was a reference to Bury My Heart at the Wounded Knee, I somehow missed it. If there was a reference to the unscrupulous annexation of Hawaii and the symbolic shredding of its flag into so many souvenirs (a memory of hurt still alive among many native Hawaiians), I again missed it. The American impoverished figure, portrayed as a fugitive figure of "have-nots" unburdened by an archive of pain, is even evident in John Grisham's Street Lawyer. [FN27] The "history" Karst constructs here makes the sites of slavery and American apartheid nearly inaudible and

invisible. I need not enlarge this illustrative domain.

Similarly, for Professor Ghai, the enormous cruelty of the Partition of India figures only as providing an unpropitious circumstance for the drafting of a bill of rights. [FN28] The colossal suffering wantonly imposed by apartheid does not inform Ghai's construction of the South African Constitution. He does not convey the feeling that most articles in a bill of rights "resonate with a suffered injustice that is negated word by word, as it were." [FN29] In addition, Ghai's presentation does not convey the pain and horror of the Truth and Reconciliation Commission sessions.

This is consistent with the dominant tradition of tracing the histories of constitutional development. There are simply no commandments issuing from epistemic communities that constrain authorial intentions. Indeed, I am being slightly unfair to Professor Karst, whose sensitivity to social suffering is somewhat deviant in relation to the dominant tradition. But that unfairness, I hope, makes a point: dominant constitutional discursivity constrains us all severely in giving a voice to human suffering, even as a dimension of understanding of the "uncivil" elements in the civic culture. The tragedy of the genre of liberal constitutional progress narratives, seen from a subaltern perspective, is of the *1193

same order that Richard Senett laid at the doorstep of Marxians:

Thus, dialectic consciousness seems to require an almost impossible human

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strength. Here is an ideology of passionate concern with about the world, a passionate commitment against its injustices, and yet an ideology that demands that as historical situations change, the nature of these commitments must be suspended, rethought, and re-formed. Belief is to be at once to be intensely held and yet a distance from self, so that belief can be changed without carrying the burdens of personal loss or a sense of intimate jeopardy. [FN30]

IV. Civic Culture

The relationship between changing constitutional beliefs and practices (my third question) is traced by Professor Karst's distinctive notion of "civic culture." It is time to visit this conception in some detail. Karst's notion of what may be called "culture" is subtle and fluid, as one can readily see in the frequently invoked terms like "cultural politics," "cultural counter-revolution," cultural "inheritance," and "diversity." If it seems an act of violence to reduce Karst's rich analysis to a series of analytic moments, this reduction is required to appreciate the embarrassment of riches.

First, Karst believes that "civic culture" is enwombed in a "national culture." And to understand the latter is to understand the American identity. The "national culture" comprises a web of a "great many understandings and folkways--that is, meanings and day-to-day behaviors."

These are also institutionally embedded in language (the primacy of English); family ("not to be confused with a common definition of family, or a common understanding of familial duty"); religious belief (in "some form" and with "varying degrees of intensity"); and a "future-orientation," embodying "belief in the 'American dream.' " [FN31]

Second, Professor Karst believes that a "civic culture" arises and develops within this national cultural mosaic. This is the field of flow of behavior that enacts meanings. Foremost among these enactment modes are "the law, especially the constitutional law" [FN32] and the notion of universal rights. The hermeneutic and social futures of rights wax and wane in the enunciations of the United States Supreme Court, both as an institution and as an assemblage of individual Justices whose cultural (ideological?) proclivities constitute the talk of the town.

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Professor Karst's third belief is that the idea and the ideal of citizenship are a determinant feature of "civic culture." Unlike all the

decolonized Third World national societies whose "constitutional moment" was marked by the most inclusive forms of citizenship, inclusiveness has been a site of perennial struggle. Even as Karst writes his essay, he seems to conceive of citizenship as an ever-widening process of membership to "civic culture" and as access to rights. [FN33]

Fourth, according to Professor Karst, "civic culture" emerges as a contested

site. Cultural conflict, with all its divisiveness, manifests itself in myriad forms, such as the civil rights movement, human rights activism, women's rights groups, and the right to sexual orientation that "raised the consciousness of the nation." [FN34] But, they also exacerbated modes of production of "legitimate law" [FN35] and periclated patterns of social tolerance, even to the point of generating "cultural counterrevolution." However, in Karst's view, this divisiveness does not disrupt the American identity. Karst says of the militia movement people: "These people say they love America, and it seems reasonable to take them at their word." [FN36] This, perhaps, is because even counterrevolutionary "cultures" are, in the final analysis, "rights-based." [FN37] In this, Karst wishes to persuade us: "If the ideal of the American nation persists, it does so in major part by the virtue of its promise of universal legal rights." [FN38]

Finally, Karst believes that with all this, the "integrative power" of civic culture seems normatively deficient. Genocidal governmental policies persist; [FN39] citizenship as the "substantive principle" languishes; [FN40] and the "material base" of citizenship has yet to be adequately realized. [FN41] Karst offers prescriptions (access to education, right to work) that have been heard before and fallen on hearing-impaired White House and Capitol Hill ears. Still, one ought not to give up.

For one engaged with America, yet not a part of this great odyssey, this is

an instructively moving narrative. What follows by way of critique is an anxious quest for comparative constitutional *1195

and social learning.

Understandably, Karst's narrative of American identity and culture is inward-looking and a source of strength as well as weakness. For example, I do not sense in this grand narrative a global hegemonic constitutional and civic culture. The narrative of the evolution of the idea of American citizenship not only ignores the itinerary of creative inclusion propelled by the notion of citizen-soldier, [FN42] but also lulls us into oblivion by ways in which the "American Dream" has always been an imperial one of "manifest destiny." As the history of the cold war now unfolds, we know (or should know) how the civic culture has been shaped by "militaristic culture."

Militaristic cultures rarely enter the discourse on constitutional law; it often provides the unwritten powers necessary to create (what Edward P. Thompson [FN43] called) a secret state. The "secret" state is a network of shared understandings of power between the civil and military in every modern society. Its grundnorm contradicts in every sphere the idea of the constitutional "open" state. It commands a vast array of discretionary power, usually beyond the pale of social visibility and public accountability. The power of the secret state is necrophilic and against the biophilic nature of "civic" culture of everyday constitutionalism; it thrives on the power (to invoke Braudillard) to organize, administer, and manipulate death. The secret
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state is the "War Machine" that Deluze so powerfully delineates, suspending the discourse of the ethical, which certainly impacts on the making of the civic culture. Thus, for example, the secret state globalizes the Second Amendment in ways that convert the American people's right to bear arms into the universal right of the American industrial-military complex to sell arms worldwide. The so-called "American Dream" has been the nightmare of many nations subject to its social imagery and domination without hegemony.

Notably absent from the progress narrative are the caused histories of the cold war and post-cold war global diaspora in the second half of the Christian

twentieth century. The Karst narrative, describing the forging of the American identity and the bonds of nationhood, seems to overlook that constitutional powers beyond the pale of judicial review shape patterns of formation of "civic culture" as much as, if not more than, those subject to judicial review. Thus, Karst forfeits the understanding of the *1196

scope of world-historical
movement of American constitutional theory and practice, in relation to the formation of American civic culture. This confiscation of narrative surplus is what I find troublesome about Karst's work.

This, in turn, raises the question of how a Karst-like understanding of American constitutional development can enrich comparative narration. One example of the many modes of understanding is provided by the "critical event" (in the protean sense to which Lyotard gives birth) of hostile cold war
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propaganda in which the Soviet Union found a telling example of the scandal of bourgeois constitutionalism and legality that practiced apartheid even in its combat armed forces struggling to install democracy worldwide. Brown v. Board of Education [FN44] was an inauguration of a new civic culture that marked the ascendancy of activist judicial process. In this process, the United States Supreme Court assumed the custodianship of radical social change, thereby demonstrating the potential of the bourgeois legal system for justice. Judges do not usually take global diplomatic initiatives, but the early years of the cold war presented an ideological challenge to what Professor Karst describes as the national identity. Whatever may be said about my hopefully not altogether conjectural reflection on Brown and its progeny, my general point remains. The civic culture of a global superpower and notions of national identity are shaped both by the isolationist and the interventionist moments in the realm of foreign policy. This realm is almost wholly immune from incursion by judicial review, though often influenced by the cold and post cold war turns and twists.

The discourse on the universality of human rights (which both Karst and Ghai address) also cannot be understood outside the collisions between the world of politics of human rights and politics for human rights. [FN45] Karst is a safe guide for anyone wishing to grasp the ways in which this collision shapes the internal discourse about essential ingredients of American

identity and citizenship. Yet that discourse is affected by the image of the United States as a globally active champion of human rights. Its Congress is the only legislature in the world to annually review human rights performance of all nations; its laws regularly subject American aid and assistance to preferred human rights conditionalities; and the selective regime of sanctions is the *1197

gourmet cuisine at the White House and on Capitol Hill. Its federal courts revive an ancient law--the Alien Torts Act--to subject deposed foreign heads of state, somehow within jurisdiction, to redress for violating customary international human rights law. The powerful American media thematizes human rights violations worldwide as news and views it as a capital-intensive and highly profitable commodity. Moreover, American voluntary and philanthropic associations seek to promote human rights worldwide. There are perhaps more human rights gurus and pundits in the United States than there are cardinals per square inch in the Vatican!

The promotion and protection of human rights abroad is a crucial component of the civic cultures, although opinions may vary concerning the legitimacy of some of the above-mentioned processes (in particular congressional oversight). The global policing, through acts of rights-oriented domestic and foreign policy, shapes the contours of American "civic culture." Any narrative that wholly privileges the internal constitutional law evolution (and regression) remains incomplete, even misleading.

V. Civic Culture, Commerce, and Technoscience

Even in so sensitive an autonomization of American "civic culture" as Karst displays in his work, one misses an analysis of the social and cultural impact of economic and technological power concentrations on the dynamic of the American national identity formation. This absence is puzzling in a presentation that seeks to grasp "culture" in the ceaseless flow of everyday acts and enterprises of social life. If this is a conscious choice on the part of Professor Karst, then it shows the costs of a post-ideological frame of analysis. It is, I believe, one of the creative strengths of ideological analysis to draw attention to the political unconscious in the discipline of cultural studies. If, on the other hand, this is a conscious exclusion, we stand confronted by the problem of relationship between culture as meaning and behavior, on one hand, and the materiality of culture on the other.

An extraordinary feature of American constitutional development has been, from a comparative standpoint, the extension of, or appropriation by, aggregations of capital and technology rights that one ordinarily thinks of as belonging to individual persons or citizens. Corporations claimed and won due process rights even before the freed slaves attained a modicum of civil rights and women won the right to adult franchise. The movement continues in the long and complex history of American constitutional law (C2). Corporations

successfully claim First *1198

Amendment rights in ways that expand commercial free speech to constant consumer, and environmental, detriment; and they are now possessed of First Amendment rights to privacy, honor, and reputation that make SLAPPs (Strategic Lawsuits Against Public Participation) possible. [FN46] Accountability in campaign funding stands retarded by complex considerations of First Amendment rights of American corporations. These provide a few examples of conspicuous consumption of rights-jurisprudence by corporate American power.

One just has to add the dynamic of First Amendment industries to grasp

the global reach of this appropriation. These United States industries, especially the motion picture and music industries, preeminently shaped the dominant struggles over formulation of the notion of trade-related intellectual property rights in the transition from GATT to WTO, thereby creating new patterns of international economic inequity. The WIPO 1996 World Copyright Treaty, primarily at the instance of the American corporate lobby, now protects copyright in digital works (electronic and genomic databases). Furthermore, constitutional interpretation has fostered the growth of biotechnological industry as a strategic United States industry to be promoted and protected at all costs. In Diamond v. Chakrabarty, [FN47] the United States Supreme Court created First World jurisprudence on patenting GMOs (genetically modified organisms) that now extends to the making of transgenic animals, cloning, and

the possibility of germ-line therapy. Following the invention by Wilmut of Dolly and Polly, the American constitutional jurisprudence is already de-complicating and legitimating, in the face of human rights-based objections, the possibility of human cloning as a proper technoscience industrial venture. [FN48]

This summary presentation suffices to raise a few questions concerning Ken Karst's narratives of inclusive citizenship. If one adds the category of "corporate citizens" (as pre-post-ideological analysis would require) to his analysis of "groups" struggling for substantial citizenship, one sees the emergence of the crucial contradiction. As citizenship expands, it also narrows; as identities become diverse, they also become homologous. The spread of global consumer ideology [FN49] makes Americans, and all of us--the

global consumer middle classes--lustfully mutated gremlins. The "membership in a community," which Karst celebrates as an American triumph, after all is a membership in a corporatized community that is global--"the New World Order Inc." [FN50] Global corporations largely constitute the new

commonwealth, to which we all belong. Comparative constitutionalism needs to archive and assess the contribution made by American constitutionalism to this new commonwealth.

The relation between New Social Movements and constitutional interpretation also contributes to the shaping of "civic culture." Professor Karst primarily

focuses on these movements for inclusive citizenship. However, movements for accountability and participation exist in the making of constitutional choices and public policy signified by Noam Chomsky, Ralph Nader, Jeremy Rifkin, Pat Roy Mooney, the Sierra Club, the Rainforest Alliance, and the many movements against American environmental racism. [FN51] These too have played a role in the making of American identity, albeit a subaltern one.

All this, in turn, raises the problem of construction of "citizenship" in a globalizing world, an issue that is scarcely addressed in the discourse of multiculturalism. At one historic moment, the privilege of being a "citizen of the world" signified an order of transcendence from the "bonds of nationhood." Now, outside fungible protests against globalization, this privilege merely means the "pursuit of happiness" for the globalizing middle classes everywhere as incarnated by practices of contemporary constitutionalism. The Fourth World (the eternal return of the same, comprising the impoverished masses of the South in the North and the South in the South) remains a relative stranger to the blessings of contemporary constitutional theory and practice.

VI. Groups: Identity and Integration

Professor Karst is almost wholly persuasive in his presentation of heterogeneity of cultural groups. Cultural groups tend to "coalesce, flourish, ramify, and sometimes erode." [FN52] Identity, categories, and labels tend

to reify the internal heterogeneity of groups and the dynamic of generational flux and intergenerational *1200

change. [FN53] Groups tend to move

from "defensive solidarity to integration" when each "material advantage brings more of the group's members into regular contact with national culture" and "active participation in the identity politics of a cultural group is in no sense inconsistent with national identity." [FN54] Much the same goes for individuals within groups who float in and out of them, in acts of belonging and separation, in what has been described as "postethnic" society.

Given the emergence of a "postethnic" society, the fears of American "Balkanization" certainly appear overrated. Even the militia groups say that "they love America, and it seems reasonable to take them at their word." [FN55] However, sociological analysis does not quite give this impression. [FN56] Their claim that they "love America" is not at stake, but rather whether that America of their imagination is intrinsically lovable and how much of their love is a form of hate towards the very constitutional values that fashion and forge the American identity. People whose life projects are adversely affected by the spectral presence of such groups may view these developments very differently than the spirit of cosmopolitan tolerance that informs Professor Karst's narrative.

To be sure, the constitution and law have played a powerful role, mainly through the myth and reality of rights to forge and sustain the unique form of

American integration and identity. The pursuit of "rights" politics often defines group identity, and almost always protects and promotes "cultural politics." Indeed, Karst's entire paper may be read as a massive footnote to his statement: "If judicial declarations of rights can affect the politics of cultural pluralism, the causal connection also runs from cultural politics to the courts' definitions of universal rights." [FN57] It is refreshing to find a social theorist who would invoke the language of causality in grasping social transformation within an overarching national "civic culture."

This, I repeat, is a highly persuasive picture--until one lets Karst's silences or half-silences speak. Karst has no use whatsoever for the notion of class. His only reference to class reduces it to the notion of a status.

[FN58] The already dubious categories (such as biological and scientific) "seem to be blurring *1201

in culture." [FN59] "Culture" here appears (in Justice Holmes's immortal phrase) as a kind of "brooding omnipresence," as an idea of America, which, like Circe, beckons Americans within the sway of her undiminished enchantment. Were this magic spell to break, "Balkanization" must ensue. The mission of charismatic social theory lies in maintaining the uses of this enchantment.

Thus, upon reading Karst, one would almost have to believe the following. First, that impoverishment in America is a "cultural" phenomenon rather than a function of vast differences in income, wealth, and access to networks of power
(Cite as: 21 Cardozo L. Rev. 1183, *1201)
and influence. Second, that the persistent low rate of unionization among workers in the United States has nothing to do with the history of dominance and regimes of microfascism. And finally, that even the homeless, decreasing legions of the "welfare poor," and aliens (documented and otherwise) who support a vast informal economy do so out of boundless allegiance to the spirit of the great American "civic culture."

I still recall with a sense of trauma, until this day, my visit to Charleston, West Virginia, where the tenth anniversary of Bhopal was commemorated, near the site of the Union Carbide plant. While some out-of-state groups participated, not a single local worker attended the solidarity meeting or the candlelight procession out of privately expressed fears that any participation witnessed by company spies would result in a corporate blacklist from the job market throughout the state. This fear, canceling the otherwise historical gains of the First Amendment, was very real for them. Obviously, I cannot generalize the cartelization of this fear across the United States, but it appears to me that the "race to the bottom" characterizing the "genius of American corporation law" [FN60] has the clear and cruel consequence of organizing systems of job blackmail. In contrast, societies like India or

South Korea, which lack the robustness of rights so characteristic of American "civic culture," allow far greater articulation of worker solidarity.

To revert to Karst's text, "classes" are again briefly mentioned, [FN61]

but only as a security alert: "Our decision making classes should remember that in modern times serious rebellions typically have been started by citizens who have seen themselves falling out of the middle classe." [FN62] This sage counsel, of course, does not extend to the benefit of the "have-nots."

deprivation is clearly more dangerous to the constitutional classes than absolute poverty, as described in America's leading cities as in terms of "dead" or "wild" zones. [FN63]

Karst's picture of an end to racism in the United States is a little more complex than his obliteration of the class divide and his reasons for it. [FN64] The cultural revolution he describes as having taken place already is one where everyone is American, and as such everyone is a "cultural mulatto." [FN65] Despite this, Karst feels troubled by the overrepresentation of people of color in prisons and death rows; [FN66] and by Dorothy Robert's narrative of how "government policies on reproduction have devalued both decisions about reproduction by women of color and actual reproduction of children of color." [FN67] One might add to this the emergence of what Dorothy Nelkin calls "a biologic underclass." [FN68]

Impoverishment and racially based injustice do not distract or disrupt the Karstian narrative. To be distinctively American is to be always forward-looking. Social groups have to claim more than an "equal claim to America's 'community of memories.' " [FN69] Rather, they ought to share "the promise

of freedom and equality," in the great tradition of universal human rights that "are the cultural inheritance of all Americans." [FN70] Nothing should be allowed to periclate this heritage which ought to be, as Karst must be read

to say implicitly, the eventual common heritage of all humankind.

The achievement of American constitutionalism lies in the prevention of a civic culture that promotes class-consciousness and class-conflicts and achieves social justice (as Edmund Burke said of political growth in England) only by "insensible degree." The specter of "Balkanization" may not haunt the United States because of her unique development of this immensely malleable and infinitely robust "civic culture." There may be other ways to tell the story of American development--stories that emplot force and fraud, political repression, social savagery, deprivation, and disadvantage in ways that combine the rule of law with the reign of terror. However, it would be profligate to resort to such ways when, regardless of the past, the future lies in the great thematic of *1203

unity within diversity.

VII. Human Rights and Constitutionalism

In a sense, though, in contexts that cannot so readily disarticulate repression and suffering, Professor Yash Ghai more or less continues the Karstian narrative. He, too, starts with the grand narrative of rights, and locates the strength or frailty of the four constitutions in terms of how they

(Cite as: 21 Cardozo L. Rev. 1183, *1203)

respond to the international human rights and standards that provide a global equivalent of Karst's notion of "civic culture." The "framework of rights," he says, provides scope for the mediation of "competing ethnic and cultural claims." [FN71] On the whole, though necessarily more immersed in it, histories of regime-sponsored and insurgent violence remain marginal to the wider cultural narrative about the place of rights in unfolding constitutionalisms. This complicates even more Professor Ghai's complex recourse to the notion of "culture." [FN72]

But Professor Ghai is more directly concerned with globalization than is Professor Karst. The culture of globalization fosters a context of "alienation and powerlessness" that seems to threaten (as well as mobilize

defensive solidarity around) national cultures; and, in a sense, escalates the consequences of multiethnicity. The "sterile and unproductive controversy" concerning "relativism" and "universality," Ghai rightly notes, stands exacerbated by thoughtless and reductionist discourse on the clash of civilizations.

Even so, Professor Ghai seems to regard "human rights" as a distinctively benign product of globalization. I wish I could be so confident, but my reading of history and my understanding of human rights suggest otherwise. Both suggest that communities in struggle and peoples in resistance are the first, and abiding, authors of human rights. It took nearly seven decades

after Mohandas Gandhi's protest at early intimations of apartheid for the international regime of human rights to outlaw its more vicious

(Cite as: 21 Cardozo L. Rev. 1183, *1204)

forms. Had the world waited for the common article in the International Bill of Human Rights asserting a right to decolonization, we would still be living in a colonial present. Countless movements that questioned the legitimacy of colonial imperialism scripted the right to self-determination. Much the same could be said about the recent emergence in international human rights law concerning the motto: "Women's rights are human rights." [FN73]

It is this category mistake (to invoke Gilbert Ryle's notion) that leads Professor Ghai to assert that the four constitutions he explores had as their starting point the international human rights standards. [FN74] The Indian Constitution was being written around the same time that the Universal Declaration on Human Rights was being scripted. Indeed, it presages many a development in international human rights law and jurisprudence. The distinctions the Indian Constitution makes between the enforceable rights and the Directive Principles of state policy are featured two decades later as the paradigms of here-and-now mandated rights (in the International Covenant on

Civil and Political Rights) and rights subject to "progressive realization" (in the International Covenant on Social and Economic Rights). The Indian Constitution inaugurated the classical liberal model of human rights in

addressing the logic of aspiration of human rights to civil society. In prohibiting the age-old practice of untouchability and by sculpting a human right against exploitation, in Articles 17 and 23 respectively, it transformed the liberal notion of rights from being merely a corpus of constraints on state power. The constitution, by the enunciation of an obligation on Indian Parliament to expeditiously enact laws realizing these rights, superimposed (by Article 35) a fundamental variation on an otherwise careful crafting of the federal principle and detail. Thus, far from conforming to an international regime of human rights normativity, the constitution contributed to the eventual emergence of forms of international human rights.

Ghai also underestimates the full significance of the fact that the Indian Bill of Rights, which conceives participatory rights in governance, has yet to be fully envisaged in international instruments on human rights. India now has a fifty-year-old *1205

tradition of legislative or political reservations for her untouchable and indigenous peoples, both at the level of Parliament and State Legislatures. While this may not have met the egalitarian aspirations, [FN75] the imagination that mandates representational rights is distinctive. So is the imagination that now extends reservations for these classes, as well as for women, in the 80th Amendment. Constitutionalization of self-governance at the village and municipal levels yields permanent participation in governance by women of the depressed classes, now numbering

over 300,000. These fundamental rights also enshrine the violently contested sites of reservation in education and employment to educationally and socially backward classes. This has shaped the history of the Indian state's

adjudicatory power.

Furthermore, the Indian activist adjudication has innovated this heritage of rights. As early as 1973, the Supreme Court of India asserted the power of judicial review over the validity of constitutional amendments by inventing the doctrine of the unamendable (save through judicial validation) "basic structure" of the constitution. Since the eighties, India's Supreme Court has democratized access to judicial power by the disadvantaged, dispossessed, and deprived classes of Indian society through the processes of social action litigation. In this transformation, marking the conversion of the Supreme Court of India into the Supreme Court for Indians, this court has begun to take human suffering seriously and, in the process, assumed a dimension of social movement. I have narrated this story elsewhere. [FN76] Its patterns of judicial activism have impacted constitutional development in the South, including the South African Constitution, which enshrines democratization of standing as an integral aspect of its Bill of Rights. Ghai's presentation insufficiently highlights this development, one that also challenges the dominant notions about the legitimacy of judicial role.

VIII. Globalization Global institutionalization of human rights is now, of course, a reality.

[FN77] But so is the institutionalization of the human rights of global corporations and foreign investors. The emergent global economic constitutionalism periclates visions of social justice articulated in many postcolonial constitutions.

The intersection of globalization and constitutionalism manifests itself in interesting ways in South African constitutionalism. Professor Ghai brings home the dilemma of the globalizing logic of property rights and the aspiration of reconstruction in a post-apartheid South Africa. This is a constitutional ordering that has to combine and recombine the reversal of racial injustices

with the need to satisfy the land-hungry global corporations. For the corporations, land symbolizes a factor of production that is an aspect of heavily transfer-priced global capital transactions and related corporate practices of creative accounting. Identity politics is invested in South Africa with an order of cultural meanings of property in ways perhaps not wholly relevant to the American "civic culture." The complexity and contradiction of South African land restoration and reform under the circumstance of globalization needs more attention.

Through its rights provision, the South African Constitution offers challenges to some of the rights-negating consequences of contemporary economic

globalization. One needs only to add, in this context, the Constitution Certification judgment discourse, in which the Constitutional Court pointedly leaves open the issue of what rights the corporate capital, national and global, may claim. The constitution cautiously addresses the question of corporate "citizenship" rights: corporate entities as jural persons are allowed access, by the text, to the regime of human rights only so far as applicable. This stands in marked contrast to the American constitutionalism paradigm of trade-related, market-friendly human rights. [FN78]

In dealing with Canada, however, Professor Ghai fails to highlight the ways in which NAFTA, as a dimension of regional economic globalization, is impacting on the federal design of the constitution and progressive laws and policies designed to prevent environmental degradation. I refer here to the NAFTA suits filed by obscure American corporations, winning huge settlements on

the ground that they are denied equality of national treatment.

Indeed, what we witness today is the emergent global economic constitutionalism, the networks of global and regional economic treaty regimes posing challenges to the protection and promotion of human rights within national constitutional frameworks.

The processes of globalization affirm the normativity of universal human rights while at the same time limiting the role of the state in the real life attainment of human rights. Many social and economic rights are simply made

unattainable by economic rationalism that lies at the heart of notions of liberalization of economies, privatization of resources and services, and the exceptionally favored treatment to be accorded to global capital.

Again, the example of South Africa is most instructive. Its constitution provides the highest affirmation of universal human rights. It provides for judicial enforcement of social and economic rights in ways that no modern constitution ever dared to do by explicitly requiring courts to apply international human rights law and jurisprudence in interpreting the Bill of Rights. Thus, the constitutional court is able to declare capital punishment while, simultaneously, the United States is strenuously defending situation of juvenile death sentence before the Human Rights Committee. [FN79] Ghai is rightly concerned with ways in which social and economic rights may be judicially translated into action. Early indications (as in Thiagraj Soobramoniam, involving denial of scarce medical and health services resources to a terminally ill person) are disappointing. But at least this decision initiates an articulate judicial discourse concerning the allocation of community resources through national and provincial budgets: How far are courts bound to implement constitutional and international standards, and how legitimate is it to leave such matters wholly to executive discretion? Judicial underenforcement of basic human rights is a more problematic notion in South Africa than under United States constitutional theory and practice. At

the same time, forces of globalization would seem to press or call for systematic underenforcement of social and economic rights, including civil and political rights (such as the right to form or function as trade unions).

IX. The Marginalized Constitiutionalisms: Return to Problems of Comparative Method

It would, despite the length of this comment, be reinforcive of
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the dominant constitutional analysis tradition to leave out Professor Ghai's portrayal of Fijian constitutional development. Through his lifework, both as an activist scholar and as an expert consultant, Professor Ghai has tirelessly sought to remind comparative constitutional scholarship of the value of studying patterns of constitutionalism in the new states in the Pacific. There are messages in his rich corpus of work concerning the struggle to attain constitutional pluralism consistent with indignity and divergent modernities.

Unfortunately, Ghai is constrained by the theme of his presentation to treat the recent Fijian developments wholly as points of departure from the international human rights normative perspective. We still get a broad picture of identity politics movements that disrupted the pattern of accommodation of the 1970 constitution, which was replaced, after a military coup, by the 1997 constitution. Ghai is not quite nostalgic about the 1970 constitution, with its "debased" adaptation of the European Convention of Human Rights, the social
(Cite as: 21 Cardozo L. Rev. 1183, *1208)
incomprehension surrounding this British implant, and the state of public discourse that emphasized "ethnicity" rather than human rights. [FN80] He is equally critical of the 1997 constitution that entrenches the collective rights of the indigenous Fijians over the Indo-Fijians. [FN81] Anxious about the already compromised future of human rights in Fiji, Ghai laments about the outgrowth of "traditionalism," while mildly entertaining the expectation that this might eventually be modified by the "fair share in political power" provisions of the 1997 constitution.

When juxtaposed with the Karstian analysis of American "civic culture," and Ghai's own glimpses of Canadian "multiculturalism," what space for understanding opens up? Is it merely the space for an engaged and yet hypercritical judgment on the human rights potential of the Fijian constitution? Important as Professor Ghai's critique is, comparative

constitutionalism at least brings home the truth that, regarding the tasks of human rights, all nations are equal strangers at the close of the second Christian millennium. The Fijian situation is not unique or even distinctive. This is lamentable, and concerned scholarship, such as Ghai's, must always protest against the tyranny of majorities.

It is common enough in constitutional and social experience to find "majorities" that acquire a "minority" syndrome: a collective feeling of insecurity, even paranoia, that seems to threaten their place, and prominence,

in the future development of *1209

the nation. Given this, some constitutions (in the realm of C1), as in the case of Malaysia, entrench the rights of the majority (Bhoomiputaras; literally the sons of the soil) against predominant ethnic minorities. Some others, such as Lebanon (prior to its current devastation), provided for elaborate power sharing in the composition of highest institutions of governance among competing communities. Other constitutions, such as that of contemporary India, contest notions of constitutional secularism in the direction of reassertion of the dominant (Hindu) hegemony. Still others, such as that of Iran, constitutionally outlaw and severely punish religious heterodoxies, measured of course by standards of "political" Islam. And still others achieve (in the realm of C2) reversal of minority rights by reactionary judicial activism. This is seemingly the case in the United States in relation to racial justice, expressed through wayward judicial invigilation over affirmative action programs, or by ensuring electoral equity through rectification of traditional logics of demarcating electoral constituencies. [FN82] The problems are no less acute in the so-called "transitional constitutions."

As a non-hegemonic epistemic enterprise, comparative constitutionalism needs to transform itself into constitutional ethnography, or the anthropology of power-fields, so memorably developed by Max Gluckman. [FN83] We need to

ask, following Emile Durkheim, how best may one trace the non-constitutional

elements in a constitution? Put another way, what patterns of play (competitive politics) and war (violent social annihilation) stand combined as codeterminants of lived histories of power and the received notions of constitutionalism? Further, how does one relate the operations of markets, national and global, to constitutional development, and changing notions of constitutionalism underlying it, especially given the dominance/hegemony of a solitary superpower, promoting in the South both "good governance" as well as gross violations of human rights? How does one study the relationship between constitutionalism and state-formative practices in ways that attend to the inner histories of formation of the self, of a secret state, underpinning the manifest state ordering? Finally, how do we fashion narratives of social suffering from a subaltern perspective on constitutionalism?

I cannot help wondering how Kenneth Karst would have essayed an understanding of the Fijian, and Professor Ghai of the *1210

American, constitutional
cultural politics. Assuming Karstian analysis, the emergence of constitutional culture in Fiji would need to undergo parallel transformations in contradictory tasks of governance and justice as revealed in the United States experience of re-imagining constitutionalism. In a Ghai mode, the logics and languages of universal human rights stand invoked as forces of acceleration of the pace of historical transformation. Underlying both the approaches is the notion that forms of constitutionalism do, after all, constitute turning points of future

histories of humankind. South Africa, Northern Ireland, and the "former" Palestine buttress this optimism for such future histories. On the other hand, huge interrogations stand posed by Sri Lanka, Lebanon, the "Central Asian" republican regimes of the former Soviet Union and Afghanistan. If ever the genre of comparative constitutionalism is to emerge in its full potential, it

needs further anchoring, going beyond prescriptive, admonitory knowledges concerning Habermasian/Rawlsian "constitutional essentials."

But, given the habitus of the dominant comparative constitutionalism discourse, I imagine that both Ken Karst and Yash Ghai would have found a range of common steadying and rallying points. Perhaps both would have found that there are no ways of exploring constitutional theory and practice outside the constant frame of ways of reinventing traditions, and of re-imagining "nationhood" within some dominant narration. Perhaps both would have found unsuspected commonalties of intersection between the dominant and subaltern cultures in the pursuit of a consensual constitutional development, somehow providing a means of mediating devastating social conflicts. Perhaps both would chafe, by the habits of human rights hearts, at the constitutional alchemy of combining, somehow, the representations of "collective" with "individual" rights. And finally, without being exhaustive, both might have found unsettling the problematic ways of recombining the ever-present configurations of the rule of law with the reign of terror.

(Cite as: 21 Cardozo L. Rev. 1183, *1210)

The future of comparative constitutionalist scholarship lies in the domain of such imaginary conversations that accord equal discursive dignity to all constitutional discourses, and fashion the narratives of future vicissitudes of human rights that may not, in a rapidly globalizing world, be taken for granted in any constitutional site.

[FNa1]. Professor of Law, University of Warwick; Vice Chancellor, University of Delhi (1990-1994) and South Gujarat (1982-1985); Visiting Professor, Global Law Program, New York University (1966-1999). Professor Baxi's major contributions, and concerns, stand directed to development of social theory of human rights and to the effective uses of law by subaltern groups, a site already captured by "special" or "dominant" interests.

[FN1]. See Peter Fitzpatrick, The Mythology of Modern Law 13-43 (1992).

[FN2]. See Mahmood Mamdani, Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism (1996); Uday Singh Mehta, Liberalism and Empire: India in British Liberal Thought 77-152 (1999).

[FN3]. Jacques Derrida, The Force of Law: "The Mystical Foundation of Authority," in Deconstruction and the Possibility Of Justice 29-67 (Drucilla

Cornell et al. eds., 1992).

[FN4]. John Grisham, Street Lawyer (1998).

[FN5]. Rohintoon Mistry, A Fine Balance (1995).

[FN6]. Cf. David Harvey, Justice, Nature & The Geography of Difference 293- 95, 299-306 (1996).

[FN7]. See Upendra Baxi, Courage Craft and Contention: The Indian Supreme Court in the Eighties 1-22 (1985) [hereinafter Baxi, Courage Craft and Contention].

[FN8]. See Roland Barthes, Image, Music, Text 148 (1977).

[FN9]. See generally Sanford Levinson, Constitutional Faith 180-94 (1988).

[FN10]. See Upendra Baxi, Constitutional Interpretation and State Formative Practices in Pakistan: A Preliminary Exploration, in Comparative Constitutional Law 132-56 (Mahendra P. Singh ed., 1989).
(Cite as: 21 Cardozo L. Rev. 1183, *1210)

[FN11]. M. M. Slaughter, The Multicultural Self: Questions of Subjectivity, Questions of Power, in Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives 369-82 (Michel Rosenfeld ed., 1994).

[FN12]. Upendra Baxi, Postcolonial Legality, in Blackwell Companion to Postcolonial Studies 119 (Henry Schwartz & Sangeeta Ray eds., 2000).

[FN13]. See Georg Simmel, The Sociology of Georg Simmel 33 (Kurt H. Wolff ed., 1950).

[FN14]. See J. M. Bernstein, The Philosophy of the Novel: Luckas, Marxism, and the Dialectics of Form 103 (1984).

[FN15]. Kenneth L. Karst, The Bonds of American Nationhood, 21 Cardozo L. Rev. 1141, 1144 (2000).

[FN16]. Id. at 1147-48.

[FN17]. Id. at 1148.

[FN18]. See Upendra Baxi, Marx, Law and Justice 151-55 (1993) (elaborating
(Cite as: 21 Cardozo L. Rev. 1183, *1210)

these notions).

[FN19]. See Arthur J. Jacobson, Transitional Constitutions, in Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives 413-22 (Michel Rosenfeld ed., 1994); see also Ruti G. Teitel, Post-Communist Constitutionalism: A Transitional Perspective, 26 Colum. Hum. Rts. L. Rev. 167 (1994); Ruti G. Teitel, Transitional Jurisprudence: The Role of Law in Political Transformation, 106 Yale L.J. 2009 (1997).

[FN20]. See Chibli Mallat, The Renewal of Islamic Law 59-107 (1993).

[FN21]. Alvin W. Gouldner, The Dialectic of Ideology and Technology: The Origins, Grammar, and Future of Ideology 46 (1976) (originating the phrase "a grammar of rationality").

[FN22]. This formulation in the paper originally presented at the Roundtable finds no place in the final version. See Yash Ghai, Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims, 21 Cardozo L. Rev. 1095 (2000). But the central preoccupation remains in the crucial notion of the "framework of rights," signifying "standards and norms of human rights reflected in international institutions for the interpretation and

enforcement of rights" See id. at 1103, 1132-33.

[FN23]. See Simmel, supra note 13, at 15-16.

[FN24]. Ghai, supra note 22, at 1134.

[FN25]. Karst, supra note 15, at 1160.

[FN26]. See id. at 1148.

[FN27]. See Grisham, supra note 4.

[FN28]. See Ghai, supra note 22, at 1106-07.

[FN29]. Jurgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy 389 (1996).

[FN30]. Richard Sennett, The Fall of Public Man 252 (1974).

[FN31]. Karst, supra note 15, at 1147.

(Cite as: 21 Cardozo L. Rev. 1183, *1210)

[FN32]. Id.

[FN33]. See id. at 1147-48; see also Morgan J. Kousser, Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction 366-455 (1999).

[FN34]. Karst, supra note 15, at 1151.

[FN35]. Habermas, supra note 28, at 28-41.

[FN36]. Karst, supra note 15, at 1157.

[FN37]. Id. at 1157-60.

[FN38]. Id. at 1160.

[FN39]. See id at 1172.

[FN40]. See id. at 1173.

[FN41]. Id. at 1179.

[FN42]. See Judith N. Shklar, American Citizenship: The Quest for Inclusion (1991).

[FN43]. Edward P. Thompson, Writing by Candle light 149-80 (1980).

[FN44]. 348 U.S. 886 (1954).

[FN45]. See Upendra Baxi, The Future of Human Rights (forthcoming 2000); Upendra Baxi, Voices of Suffering: Fragmented Universality and the Future of Human Rights, in The Future of International Human Rights 101-56 (Burns H. Weston & Stephen P. Marks eds., 1999) [hereinafter Baxi, Voices of Suffering].

[FN46]. See generally George W. Pring & Penelope Canan, SLAAPs: Getting Sued for Speaking Out (1996).

[FN47]. 447 U.S. 303 (1980).

[FN48]. See Clones and Clones: Fact and Fantasies About Human Cloning (Martha C. Nussbaum & Cass R. Sunstein eds., 1998).

(Cite as: 21 Cardozo L. Rev. 1183, *1210)

[FN49]. See Leslie Sklair, Social Movements and Capitalism, in The Cultures of Globalization 291-311 (Fredric Jameson & Masao Miyoshi eds., 1998). See generally Rosemary J. Coombe, The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law (1998).

[FN50]. See Donna J. Haraway, Modest_Witness@Second_Millennium.FemaleMan(c)-Meets-Oncomouse(tm): Feminism and Technoscience (1997).

[FN51]. See Andrew Rowell, Green Backlash: Global Subversion of the Environmental Movement (1996).

[FN52]. Karst, supra note 15, at 1162.

[FN53]. See id. at 1162-64.

[FN54]. Id. at 1171.

[FN55]. Id. at 1157.

[FN56]. See Manuel Castells, The Power of Identity 94-95 (1997).

[FN57]. Karst, supra note 15, at 1143.

[FN58]. See id. at 1168.

[FN59]. Id. at 1169.

[FN60]. See generally Roberta Romano, The Genius of American Corporate Law (1993).

[FN61]. See Karst, supra note 15, at 1175.

[FN62]. Id.

[FN63]. See Scott Lash & John Urry, Economies of Signs & Space 144-70 (1994).

[FN64]. See Karst, supra note 15, at 1169-70.

[FN65]. Id. at 1170.

[FN66]. See id. at 1141.

(Cite as: 21 Cardozo L. Rev. 1183, *1210)

[FN67]. Id. at 1172-73.

[FN68]. Dorothy Nelkin & Lawrence Tancredi, Dangerous Diagnostics: The Social Power of Biological Information 176 (2d ed. 1994).

[FN69]. Karst, supra note 15, at 1181.

[FN70]. Id. at 1181.

[FN71]. Ghai, supra note 22, at 1099.

[FN72]. As rich as Karst's, Ghai's notion of culture is even more indeterminate. Not all Ghai's salient formulations cohere, even contextually read. His overall refrain, that "culture" is "more a matter of political choice than inherent value to the identity of a community," see id. at 1100, accords primacy to the political view that Ghai's own narration contraindicates. What Ghai seems to have in view is political culture, of which constitutional culture is a subset. He rightly observes that: "There is no homogeneity of

culture in a state" Id. As a descriptive claim, this is true everywhere. See Upendra Baxi, The Conflicting Conceptions of Legal
(Cite as: 21 Cardozo L. Rev. 1183, *1210)
Culture and the Conflict of Legal Cultures, in Monsiumus Order Pluralismus der Rectshskulturen 267-82 (1991); Pierre Legrand, Fragments on Law-as-Culture 1- 34 (1999).
[FN73]. Baxi, Voices of Suffering, supra note 43, at 101-56.
[FN74]. See Ghai, supra note 22, at 1099. His revised version of the Roundtable contribution at least recognizes that, out of these four, the Indian situation was unique, in the sense that there were no international instruments on human rights from which its constitution could draw inspiration. But this is immediately followed by the caveat that the "contents and orientation of rights were drawn ... from foreign precedents." Id. at 1132. There are bases for contesting this averment that casts Indian innovation in terms of mimesis.
[FN75]. See Marc Galanter, Competing Equalities: Law and the Backward Classes in India (1984); see also Upendra Baxi, Legislative Reservations for Social Justice, in From Independence to Statehood: Managing Ethnic Conflict in Five African and Asian States 210-24 (1984).
[FN76]. See Upendra Baxi, Indian Supreme Court and Politics (1979); Baxi, Courage Craft and Contention, supra note 7; Upendra Baxi, Taking Suffering
(Cite as: 21 Cardozo L. Rev. 1183, *1210)
Seriously: Social Action Litigation Before the Supreme Court of India, in Law and Poverty: Critical Essays 387-415 (1989); Upendra Baxi, The Avatars of Judicial Activism: Explorations in the Geography of (In)Justice, in The Indian Supreme Court: Fifty Years (S.K. Verma & Kusum eds., forthcoming 2000); Satyaranjan P. Sathe, Judicial Activism, 11 J. Indian Sch. Pol. Econ. 1-37, 219-58 (1999); Satyaranjan P. Sathe, Judicial Activism, 10 J. Indian Sch. Pol. Econ. 400-41, 604-39 (1998).
[FN77]. See Ronald Robertson, Globalization (1992).
[FN78]. See Upendra Baxi, On Judicial Activism, Legal Education & Research in a Globalizing India, Annual Capital Foundation Lecture (1996), in 1 Supreme Court on

Public Interest Litigation (Jagga Kapoor ed., 1998); Upendra Baxi, The Future of Human Rights (forthcoming 2000).

[FN79]. See Upendra Baxi, 'A W ork in Progress?': Reflections on the United States' Report to the United Nations Human Rights Committee, 36 Indian J. Int'l Law 34-53 (1996).

[FN80]. See Ghai, supra note 22, at 1130.

[FN81]. See id. at 1129-34.

[FN82]. See generally Kousser, supra note 33.

[FN83]. Max Gluckman, The Judicial Process Among the Barotse of Northern Rhodesia (1955).

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