"A known but an indifferent judge": Situating Ronald Dworkin in contemporary Indian jurisprudence

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[I]n the state of Nature there wants a known and indifferent judge, with authority to determine all differences according to the established law.[1]

1. Situating Dworkin in Delhi

Ronald Dworkin's creative contributions to legal thought[2] are well known to Indian legal, political, and social science circles; and the Indian Supreme Court has indeed anticipated some of his insights. His distant admiration for developments in Indian judicial activism is appreciated by Indian constitutional, political, and social theorists.[3] In locating Dworkin in the Indian context, I hope this article begins a conversation that should have occurred years ago.[4]

At the outset, the low-intensity engagement of American scholarship with the eminently comparable Indian experience,[5] despite the recent upsurge of

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[1] John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government*, *in* SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME AND ROUSSEAU 3, 73–74 (Sir Ernest Barker ed., Oxford Univ. Press 1969) [hereinafter LOCKE].

[2] Dworkin's work was studied by senior teachers of jurisprudence at a month-long national seminar in the 1980s at the University of Dharwar, Karnataka, and in a series of faculty improvement programs under the auspices of the University Grants Commission. Specific aspects of his work have been discussed, for example, in Upendra Baxi, *On the Problematic Distinction between "Legislation" and "Adjudication": A Forgotten Aspect of Dominance*, 12 DELHI L. REV. 1 (1990); Ashish Pathak, *The Dworkinian Critique of Positivism: A Critical Outline*, (2002) 8 S.C.C. 22 (Jour.). Dworkin's work has had an impact on some of India's leading political and social theorists.

[3] In the 1990s, Dworkin addressed the *Bommai* Case, A.I.R. 1994 S.C. 1918, wherein the Supreme Court read the values of constitutional secularism in reconstructing India's federalism; earlier this year, Dworkin delivered the Delhi University millennial lecture.

[4] Even during my association with the Hauser Global Law School Program at New York University School of Law, I missed sustained interaction with Dworkin when he was at NYU.

[5] This statement happily requires with the caveat that exceptions exist; see the work of Marc Galanter, Lloyd and Susanne Rudolph, David Bayley, Myron Weiner, Paul Brass, Francine Frankel,

I.CON, Volume 1, Number 4, 2003, pp. 557–589

comparative interest,[6] poses a problem. Concern with "transitional" constitutionalism,[7] the "reconstruction" of societies razed to their own "ground zero" by the Cold War (such as Vietnam and Cambodia), and the burgeoning interest in China marks the post–Cold War expansion of American legal culture. The fifty-plus years of Indian constitutionalism do not offer any equivalent cultural market. The Indian Supreme Court's impressive achievements perhaps disturb the culture of sentiment and sensibility that regards the American Supreme Court as both an exemplar of judicial process and power[8] and a global paradigm.[9] This hegemonic theoretical virtue is at issue in this essay.

In this essay, I address six themes: (1) a preliminary comparison between John Locke and Ronald Dworkin; (2) a critical summation of Dworkinian virtues; (3) the role of "history"; (4) the diversity of "textual homes"; (5) the moral reading of constitutions; and (6) the distinction between "interpretation" and "amendment." Even this limited comparative pursuit suffers from three limitations. In my case, a little learning about the two constitutionalisms may, after all, be dangerous! Further, I can only count pebbles on the shore of the oceanic American law review literature. And any self-acknowledgement of my own rather eclectic theoretical concerns remains superfluous.

F. Tomasson Jannuzi, and Walter Murphy. An independent scholar, Granville Austin, has written authoritatively concerning the making of the Indian Constitution and its development over half a century. *See* Granville Austin, The Indian Constitution: Cornerstone of a Nation (Oxford Univ. Press 1966) [hereinafter Cornerstone]; Granville Austin, Working a Democratic Constitution: The Indian Experience (Oxford Univ. Press 1999). I do not here cite the promising contributions of expatriate and visiting Indian scholars to American law reviews, which remain of less than marginal interest for constitutional theory tasks in the United States. (The only Indian scholar to write substantially on American constitutional interpretation was the late Professor M. Ramawsami whose illuminating work on the creative role of the American Supreme Court and whose treatise on the Commerce Clause are rarely cited.) And, although the top justices of both countries now meet frequently, it is improbable that any American Supreme Court justice will produce a work of sustained comparison such as that of Justice Douglas. *See* William O. Douglas, From Marshall to Mukherjea: Studies in American and Indian Constitutional Law (Eastern Law House 1956).

[6] *See* Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 Cardozo L. Rev. 1523 (2003). *See also* Defining the Field of Comparative Constitutional Law (Vicki C. Jackson & Mark Tushnet eds., Praeger 2002); comparative constitutionalism (Norman Dorsen et al. eds., West 2003). The latter work does manage to focus attention on some actually existing south democratic constitutionalisms as well.

[7] *See* Ruti Teitel, *Post-communist Constitutionalism: A Transitional Perspective*, 26 Colum. Hum. Rts. L. Rev. 167 (1994).

[8] John Rawls, Political Liberalism 231–40 (Columbia Univ. Press 1993).

[9] As concerns the New Second World, the explosion of activist adjudication, for example, has led even the most insightful American scholars to focus on a standard set of issues concerning the question of "fit" between "democracy" and "judicial review," and the "legitimation" of the anti-majoritarian aspect especially of "abstract judicial review." On postcommunist constitutionalism, see Teitel, *supra* note 7.

Situating Dworkin in Delhi is, thus, a risky enterprise demanding of comparative constitutional studies an engagement with "diatopical hermeneutics."[10] What justifies the large narrative risks I run here is the aspiration to achieve a " 'common space' within which the voice of the one evokes a responsive echo in the other, feeling the deprivations of one's own through the longings of the other. . . ."[11]

2. Dworkin and Locke

A skeletal juxtaposition of John Locke and Ronald Dworkin is intrinsically as well instrumentally helpful, the latter because many Indian Supreme Court justices and constitutional theorists are likely to read Dworkin through the lens of Locke[12] (concern with Karl Marx is now irrevocably extinct).[13] Both Locke and Dworkin remain concerned with legitimacy of governance and foundations of constitutional fidelity; the latter emerge in Dworkin as the problem of "associative obligations."[14] Despite marked differences in the original narratives, the Lockean theme of the "fiduciary" nature of public power[15] resonates in Dworkin. Absolute, unbridled, arbitrary power in governance constitutes for both a betrayal of legitimate social trust, which in Dworkin is

[10] A "method of interpretation when the distance to be overcome . . . is not just a distance within one single culture . . . but . . . the distance between two (or more cultures)" with different *topoi*, "modes of philosophising," and "ways of reaching intelligibility. . . ." *See* Raimundo Pannikar, *What is Comparative Philosophy Comparing? in* Interpreting Across Boundaries: New Essays in Comparative Philosophy 130 (Gerald James Larson & Eliot Deutsch eds., Princeton Univ. Press 1988).

[11] These are words of the Indian poet Nirmal Verma, *quoted in* Fred Dallmayr, Beyond Orientalism: Essays on Cross-Cultural Encounter 62 (State Univ. of New York Press 1996).

[12] *See* Kesavananda Bharathi v. Union of India, A.I.R. 1973 S.C. 1461 (especially the opinions of Justices M. H. Beg, S. N. Dwivedi, and K. K. Mathew). Indian scholarship, however, offers no reading that compares different invocations of Lockean political theory.

[13] Justices Krishna Iyer, O. Chinnappa Reddy, D. A. Desai, and M. P. Thakkar, in particular, brought lively insights from Marxian approaches to interpretive tasks. Indeed, the Indian Supreme Court is perhaps the only postcolonial Constitutional Court to have sought, in *E. M. S. Namboodripad v. T. M. Nambiar*, A.I.R. 1970 S.C. 2015, to expound authoritatively, through a close reading of Marx, Engels, and Lenin, the view that the classical Marxian theory of law and state did not regard courts and judges as mere embodiments of class bias. For an analysis, see Upendra Baxi, Marx, Law and Justice 1–16 (N. M. Tripathi 1993). Such jurisprudential feats remain, of course, inconceivable in American constitutional adjudicative practice and its underlying mainstream theory.

[14] Ronald Dworkin, Law's Empire 176–224 (Belknap Press 1986); *but see* A. John Simmons, *Associative Political Obligations*, 106 Ethics 247, 259–61 (1996) and Leslie J. M. Green, *Associative Obligations and the State, in* Law and Community: The End of Individualism? 93–118 (Alan Hutchinson & Leslie J. M. Green eds., Carswell 1989).

[15] Locke, *supra* note 1, at 87; *see also id.* at 78–79.

manifested primarily in the logics and paralogics of rights.[16] The natural law–like inherence of "background rights" in Locke contrasts with the higher "secular" quotient in Dworkin's grounding of rights in democratic constitutionalism.

Locke, within his own episteme, is preoccupied with the transition from the ideal "state of Nature" to the state of "Commonwealth."[17] There, "the community comes to be umpire, by settled standing rules; indifferent and the same to all parties."[18] And second, justices "with authority to determine all the controversies and redress the injuries that may happen to any member of the commonwealth,"[19] exercise a "decisive power" which "any number of men, however associated," may "appeal to."[20] The "decisive power" is configured in Locke's notion of law as *umpire*. And Locke is careful not to trust to judges (be they "legislative or magistrates appointed . . ."[21]) tasks that only the "people" may perform when "the law is silent or doubtful, and the thing be of great consequence."[22]

Dworkin's impressive corpus creatively wrestles with these inaugural Lockean insights. His notion of "associative obligations"[23] refines our Lockean understanding of the state of commonwealth as an imaginative moral community that ought to take rights seriously. Dworkin finds inadequate the Lockean imagery of "settled rules" or "promulgated established law"[24] and their equal dispensation by "known and indifferent" as well as "upright" judges in a political paracommunity;[25] for Dworkin there are no "settled" rules liberated from tasks of ongoing interpretation. In his supple, creative pen, the Lockean *umpire* emerges as law's *empire*.

Of course, for both, "judges" signify figurations of the politics of desire (in an evocative Lacanian sense).[26] A good Lockean *civitas*[27] is more than an

[16] *See generally* A. John Simmons, The Lockean Theory of Rights (Princeton Univ. Press 1992).

[17] Locke, *supra* note 1, at 72, 74.

[18] *Id.* at 50.

[19] *Id.* at 52.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 142.

[23] *See* Dworkin, Law's Empire, *supra* note 14, at 176–224.

[24] Locke, *supra* note 1, at 84.

[25] I designate it thus to avoid the rather dreadful conflation of all forms of life with those that remain merely state/law ordained and further to suggest that the state/law, no matter how preeminent, merely signifies one community among many.

[26] In Lacan, desire is a lack or loss that by definition may never be fulfilled. For a recent extension of Lacan to legal theory, see, e.g., David S. Caudil, Lacan and the Subject of Law: Toward a Psychoanalytic Critical Legal Theory (Humanities Press 1997).

[27] Locke, *supra* note 1, at 77.

"independent community" with the power to invent and disinvent "compounded and mixed forms of government, as they think good";[28] they may "only think good" those forms of *civitas* that avoid the "the same uncertainty as was in the state of Nature."[29] Contractual renunciations of "natural power to society" are justified so long as individuals are fully assured that they "be governed by declared laws" safeguarding "peace, quiet, and property," and that their rights "promulgated by standing laws" are protected by "known authorized judges."[30] The Lockean social contractarianism celebrates the idea of law and rule in terms of social cooperation, not of domination, in the achievement of the "common good."[31]

Dworkin's distinctive conceptions of equality or "equal concern" offer a radical contrast. Unlike Locke, Dworkin offers a democratic conception of judicial review. For him, the realm of adjudication is moral and ethical, one that seeks to resettle the "settled standing rules" in the direction of a moral "equal concern," indeed to a point where American Supreme Court justices emerge as functional equivalents for the "people," or, at any rate, in a first approximation. Acting as the custodians of constitutional values and ideas, limiting the prowess of moral majorities, the justices are the initial bearers of the Lockean right to resistance.[32]

3. The Dworkinian virtues

I sum up Dworkinian "virtues," in what follows, in a cluster of twelve interrelated but distinct features. Like all meditations concerning virtues, this attempt highlights forms of "epistemological imprisonment"[33] and perhaps struggles for cognitive liberation.

3.1. Epistemological imprisonment?

This necessarily truncated comparison between Locke and Dworkin suggests the *first* Dworkinian virtue: Dworkin's work is, in itself, an aspect of the theoretical "chain novel" of narratives of liberal political theory. Each thinker strives to present, in his day and age, the best possible account of liberal virtues and values. Locke, by the force of circumstance, was moved to address the global justification of imperial rule and ambition.[34] In contrast, is it unfair to

[28] *Id.* at 76–77.

[29] *Id.* at 80.

[30] *Id.*

[31] *But see* John Dunn, The Cunning of Reason: Making Sense of Politics 47–137 (2001) for the complexity entailed in this contrast.

[32] *See* Ronald Dworkin, Taking Rights Seriously 206–22 (Harvard Univ. Press 1977).

[33] *See generally* Russell Hardin, One for All: The Logic of Group Conflict (Princeton Univ. Press 1995).

[34] *See* Bhihku Parekh, *Liberalism and Colonialism: A Critique of Locke and Mill, in* The Decolonization of Imagination: Culture, Knowledge, and Power 81–98 (Jan P. Nederveen Pieterse & Bhikhu Parekh

ask: Does Dworkin evince the birthmarks of a certain distinctive epistemological violence in not taking the postcolonial liberalism of existing south democratic constitutionalisms seriously?[35]

3.2. General and necessary distinctions

Dworkin provides some sophisticated "general and necessary distinctions"[36] for doing the "general jurisprudence" of a two-hundred-year-old constitutionalism. If, for Austin, these were heuristic devices facilitating a theory of law for an age of empire, for Dworkin, newer concepts remain seemingly inherent to a reasoned elaboration of a theory of constitutional democracy. A task of comparative constitutionalism is thus set: the extendibility of these distinctions to existing postcolonial democratic constitutionalisms.

However distinctively rooted and contested in American constitutional theory, many Dworkinian distinctions resonate in the theory and practice of existing democratic south constitutionalisms. Prime among these is the distinction between "policy" and "principle" and the "trumping" feature of rights, which is now, as it were, a stock-in-trade of thinking about human rights everywhere. *Sovereign Virtue* offers a banquet of dazzling distinctions; these will surely affect constitutional and political theory.[37]

3.3. State theory

Dworkin, unsurprisingly, has no *explicit* theory of state. Apart from configurations of governmentality,[38] he has little use for state-theory discourse[39] and the

eds., Oxford Univ. Press 1995); Uday Singh Mehta, Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought (Chicago Univ. Press 1998).

[35] For example, the excellent narrative of comparative constitutional positions concerning abortion in Ronald Dworkin, Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom 60–67 (Knopf 1993) [hereinafter Life's Dominion], does not pause to acknowledge, even in a bare form, the ways in which south legislation and jurisprudence address the complexity.

[36] John Austin, The Province of Jurisprudence Determined (J. Murray 1832)

[37] Ronald Dworkin, Sovereign Virtue (Harvard Univ. Press 2000). Important among the distinctions here maintained are, for example, those between "luck" and "justice" (pp. 320–50); plebiscitary or majoritarian conceptions of democracy as opposed to "partnership" conceptions (pp. 358–70), "ethically sensitive" (continuous) and "insensitive" (discontinuous) approaches to theory of justice (pp. 323–24).

[38] By this term, I signify different formations of "democratic governance" in Euroamerican constitutionalism. Examples include unitary versus federalist constitutionalisms, rigid versus flexible constitutions, and constitutions that structure differentially the composition of the judiciary, with variants in the mode by which the apex courts may decide upon the validity of legislative acts and administrative actions, and in the relative distribution of salient powers between the executive and the legislature. *See generally* Michel Foucault, Power, Three Essential Works of Michel Foucault 174–222 (James D. Faubion ed., The New Press 2000) [hereinafter Power].

[39] *See, e.g.*, Antonio Negri & Michael Hardt, Labor of Dionysus: Communism as Critique of the Capitalist and Socialist State-Form (Univ. of Minnesota Press 1994).

problem of law and regulation within this framework.[40] How the kinds of governmentality may articulate state forms, their public and secret histories,[41] their materiality (that is, the infrastructures and networks of the power of surveillance, and technologies of creating submission), and their propensities (that combine always the rule of law with reign of terror[42]) pose questions concerning the "nature" of the state that in the abstract do not engage him save when they are presented with an admission ticket to the marbled portals in which the Nine Wise Persons sculpt the shifting vocabularies of "constitutional fate."[43]

Thus, Dworkin's pursuit of an old theme—the distinction between "legislation" and "adjudication"—regards the separation of powers doctrine not as an archive of the division of spoils but, rather, as a community of concerns and principles. State theories, in the critical Marxian mode, construct this differently. Louis Althusser has reminded us that the separation of powers masks the unity of state power, which is, "above all, a *political* problem of relation of forces, not a *juridical* problem concerning the legality and its spheres."[44] Similarly for Nicos Poulantzas, it is "an index of *internal* relations of subordination . . . of the various state 'powers' " to the "dominant power" (the executive) that "constitutes the unity of state power."[45] Various state formations constitute notions of legality, rights, and justicing very differently.[46] Owing, perhaps, to the category mistake that conflates the inaugural insights of critical *Marxian* political theory with the political practices of *communism*, liberal theorists maintain no conversation with these variations.

[40] *See, e.g.*, Rene B. Bertramsen et al., State, Economy and Society (Unwin Hyman 1991).

[41] To which E. P. Thompson valiantly drew our attention in the discourse of the secret state in Edward Palmer Thompson, Writing by Candlelight (Merlin Press 1980).

[42] To take the smallest, yet revealing, example of tyranny—the majestic "due process," with midnight searches of welfare recipients and food coupon holders for the "welfare" state's verification of the condition of the Original Sin, or the state's covert hostile operations targeting the politically luckless though formally enfranchised citizens and persons. For a more general discussion, see Issac Balbus, *Commodity Form and the Legal Form: An Essay on the Relative Autonomy of Law*, 11 L. & Soc'y Rev. 571–88 (1977).

[43] *Cf.* Phillip Bobbitt, Constitutional Fate: A Theory of the Constitution (Oxford Univ. Press 1982). The imagery of constitutional fate, as sculpted by the U.S. and Indian Supreme Courts, is also expressed by the first Indian Nobel Laureate, Rabindranath Tagore. He said that the wheels of God grind slowly but exceedingly fine. Supreme Courts are secular divine mills producing the future of human rights. Impatience with adjudicative dispensation is, after all, not a civic virtue (per Dworkin) in addressing our common fate.

[44] Louis Althusser, Montesquieu, Rousseau, Marx: Politics and History 91 (Verso 1982).

[45] Nicos Poulantzas, Political Power and Social Classes 130 (Verso 1978).

[46] *See* Upendra Baxi, *The Colonialist Heritage, in* Comparative Legal Studies: Transitions and Traditions 46–58 (Pierre Legrand & Roderick Munday eds., Cambridge Univ. Press forthcoming 2003).

Dworkin's implicit approach to state theory is idealistic. The law's empire is one that relates to "attitude, not territory, power or process," a "self-reflexive attitude addressed to politics in the broadest sense," a "protestant attitude[47] that makes each citizen responsible for imagining [what] his [or her] society's public commitments to principle are, and what these commitments require in new circumstances."[48] Citizen justices set the paradigm for self-reflexive citizen practices.[49] "The courts are the capitals of law's empires and judges are its princes, but not its seers or prophets."[50]

Who would be the "seers and prophets" of the law's empire to guide its princes? Dworkin accords this privilege to legal "honortaries" (as Max Weber used to name this epistemic community). However, a materialist state theory would at least explore the state formations in which such charismatic figures might arise, survive, and even prosper.

3.4. Moral reading

Dworkin's constitutions entail the practices of "moral reading" by all, from the apex justices to all citizens. No doubt, judicial practices contain a heavy, self-referential (recursive), doctrinal (technical) core that may elude citizen practices. What both ought to share is fidelity to constitutional values, virtues, and visions. However, the elevation of citizen justices' interpretative practices as paradigmatic suggests (to borrow the German jurist Peter Häberle's phrase) "a mental *Einbahnstrasse* (one way street)."[51] The moral reading remains further mired, as we see later, in a mix of descriptive and prescriptive elements. Transported to India (and other existing democratic constitutionalisms), moral reading occurs in ways that may startle even Dworkin.

3.5. Conceptions of democracy

The liberal *Einbahnstrasse* syndrome enables Dworkin to model the contrast between "majoritarian" and "constitutional" democracy in ways that fully ignore a Marxian critique of the forms of bourgeois law and democracy.

[47] For an enunciation of the difference between Catholic and Protestant approaches to constitutional interpretation, see Sanford Levinson, Constitutional Faith 27–53 (Princeton Univ. Press 1988).

[48] Dworkin, Law's Empire, *supra* note 14, at 413.

[49] *But see* Dworkin, Taking Rights Seriously, *supra* note 32, at 206–22.

[50] Dworkin, Law's Empire, *supra* note 14, at 407.

[51] *See* Florian Hoffmann, *Book Review: Häberle and the World of the Constitutional State*, 4 German L.J. 61, 69 (2003). In the making of each and every activist justice lies whole histories of social movements: a feature common both for India and the United States. Further, the dissipation of socialist state formations owes a great deal to a culture of self-reflexive interpretive citizen agency. It is simply untrue to suggest that this occurs best within "militant particularisms" of the liberal political/cultural traditions. One awaits Dworkinian labors that trace histories of hermeneutic partnership. Available space forbids further elaboration here.

Dworkin's recent modeling makes a critical move within liberal discourse that justifies constitutional judicial review against the staple indictment of its undemocratic and antimajoritarian profile. Democratic judicial review brings a relatively disinterested judicial voice to the task of ensuring the "preconditions of democracy." Pitted against the second or third best performances of representative institutions, judicial review contributes to ideal state-formative practices[52] on a platform of higher deliberative discourse ethics in the best-case scenario.

No matter how messily birthed to reflect specific regime needs, which they may not quite serve and may sometimes betray in ways that forbid simplistic correlations, apex justices emerge in the Dworkinian model as deeply *normative* judicial beings, freestanding moral agents guarding democratic virtues and values. Not entirely unmindful of the normless ways in which minuscule citizens *somehow* become apex justices,[53] Dworkin insists that once on the bench they ought to perform as Hercules, regardless of how this figure[54] remains exposed to celebration or requiem.[55]

But distinct patterns of constitutional midwifery matter. For example, Indian apex justices have a relatively short shelf life; they retire at the age of sixty-five and the average tenure of three years (governed, furthermore, by elevation to chief justiceship by seniority, yielding ludicrously brief tenures, from a fortnight to a few months!) denies Indian Supreme Court justices the longevity of an American Hercules. With arrears going into seven figures, they are moved to tears of envy when they hear about the "unconscionable" caseload of American Supreme Court justices! The Indian Supreme Court has

[52] For the notion of constitutional interpretation as a "state formative practice," see Upendra Baxi, *Constitutionalism as a Site for State Formative Practices*, 21 Cardozo L. Rev. 1183 (2000) [hereinafter Baxi, *State Formative Practices*].

[53] *See* Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 261–320 (Harvard Univ. Press 1996) [hereinafter Freedom's Law].

[54] That figure emerges variously in the experience of actually existing democratic south constitutionalisms at least through an adaptation of Michel Foucault's figuration. For people living under the conditions of existing postcolonial democratic constitutionalism, the very figure of "courts" and "justices" stands mired in a variety of (mostly unwritten) histories and memories of occupation, subjugation, disadvantage, discrimination, and dispossession that Michel Foucault signified as among the sites of "tiny and horrible machiavelianisms." In colonial timespaces, courts and justices signified sites of domination that collaborated in the production of pervasive human rightlessness. And the nationalist struggles for emancipation from colonialism/imperialism were, in a sense, aspects of "guerrilla anti-judicial operations," celebrating forms and "acts of popular justice." Postcolonial constitutionalisms everywhere remain marked by memories of this struggle, often resulting in an abiding distrust of adjudicative power. Michel Foucault, Power/Knowledge: Selected Interviews and Other Writings (Colin Gordon ed. & trans., Pantheon Books 1980) [hereinafter Power/Knowledge].

[55] *See* Edward B. Foley, *Requiem for Hercules*, 18 Const. Comment 463 (2001) (book review of Dworkin's *Sovereign Virtue*).

a vast appellate jurisdiction, transcending the portfolio originally offered by the Bill of Rights. Necessarily, these background conditions situate the Indian Hercules very differently. Cultural contexts within which they perform often cast them in the image of an ambivalent "constitutional" Brahmin! All this aggravates the tasks of normative cross-cultural comparison.

3.6. Legitimacy

Sovereign Virtue richly evokes the connection between political legitimacy (the justification for the power to rule) and "equal concern." "No government," Dworkin insists, is "legitimate that does not show equal concern for the fate of all those citizens over whom it claims allegiance. Equal concern is the sovereign virtue of political community" without which "government is only tyranny."[56] What equal concern signifies in terms of principles, policy, and practices, or in terms of Rawls's imagery of "decent hierarchical societies"[57] (presumably like India) in contrast with the liberal "well-ordered societies" (American and West European), turns out to be a complex and somewhat forbidding affair. *Sovereign Virtue*, however, addresses the law as more than a forum or community of principles; the issue, now, is how best to relate the pursuit of principles to policies, or, more starkly put, how analogies with the free market may yet yield a theory about just governance.

3.7. Transdisciplinarity

Dworkin exemplifies the virtues of multi-, even trans-, disciplinarity in addressing, most prominently, the aesthetics of law and jurisprudence. Originally focused on high political, literary, and cultural theory, he now attends to some pressing issues raised by globalizing technologies and their inevitable constitutional fallouts, such as issues related to reproductive freedom, assisted suicide,[58] and the probable rights-oriented adjudicative responses to the possibilities of human cloning.[59] These concerns remain urgently relevant for existing Third World democratic constitutionalisms, currently engulfed by waves of global capitalism enshrining the trade-related, market-friendly paradigm and endangering the universal human rights of individual persons.[60] How one may adapt the Dworkinian model of taking human rights seriously in a technoscientific, globalizing civilization emerges as a major comparative thematic.

[56] Dworkin, Sovereign Virtue, *supra* note 37, at 1. *See also* Ronald Dworkin, *Sovereign Virtue Revisited*, 113 Ethics 106 (2002).

[57] John Rawls, The Law of Peoples 62–77 (Harvard Univ. Press 1999).

[58] Dworkin, Life's Dominion, *supra* note 35, at 179–217.

[59] Dworkin, Sovereign Virtue, *supra* note 37, at 427–52.

[60] Upendra Baxi, The Future of Human Rights 132–66 (Oxford Univ. Press 2002).

3.8. Role of public intellectuals

Dworkin's vigorous interventions in popular (as against merely erudite) discourse necessarily invite comparison with Noam Chomsky. If Dworkin may be said to be concerned with critiquing American constitutionalism's introversion (from an internal perspective), Chomsky signifies the extroversion of typically American jurisprudential and public policy concerns.

To be sure, both public philosophers mourn infidelities to American constitutionalism. Dworkin laments the fact that American politics "are a disgrace, and money is at the root of the problem,"[61] its democracy is "a parody of democracy,"[62] and "when politics is drenched with money, as our politics are now, then we risk not simply imperfection but hypocrisy."[63] But any exuberant south admiration proves ephemeral. Dworkin's lament remains reminiscent of the funeral oration of Mark Antony; his corpus, overall, celebrates the global virtues of a two-hundred-year-old constitutionalism, both at home and aboard.

In contrast, Chomsky mourns the lack of "fit" between constitutional democratic virtues broadly practiced at home and their grotesquely cruel violation abroad that affects, often lethally, the career and future of actually existing south democratic societies.[64] For him, the profoundly antidemocratic global politics of the United States signify an extroversion of constitutional "virtues" displayed at home, not as a caricature but rather as its "essence."[65] Similarly, we look in vain in Dworkin's discourse for any engagement with Michael Hardt and Antonio Negri's evocative *Empire*.[66] Despite his normative cleansing of that notion, any endeavor to situate Dworkin evokes anxieties born of lived experiences of global imperialism.[67]

3.9. Global economic constitutionalism

Existing south democratic constitutionalism stands besieged by the forms of global economic constitutionalism.[68] These dictate formal constitutional

[61] Dworkin, Sovereign Virtue, *supra* note 37, at 351.

[62] *Id.* at 369.

[63] *Id.* at 385.

[64] Noam Chomsky, Deterring Democracy (Noonday Press 1992).

[65] Professor Chomsky's corpus indefatigably archives the authorship of many a south state failure to the vast, judicially sanctioned reservoirs of U.S. executive power, especially in the spheres of economic diplomacy and outright use of military force.

[66] Michael Hardt & Antonio Negri, Empire (Harvard Univ. Press 2001).

[67] Professor Dworkin recently wrote an article concerning the basic departures from classic due process standards and values in bringing to "justice" suspected terrorists. It remains susceptible to Chomskian critique. *See* Ronald Dworkin, *Threat to Patriotism*, New York Review of Books, Feb. 28, 2002.

[68] *See* David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 L. & Soc. Inquiry 757 (2000).

amendments[69] and large-scale macroeconomic changes affecting constitutional conceptions of governance and development (I call these the three Ds of globalization: denationalization, disinvestment, and deregulation). These changes also constrain justices to abandon, without reasoned elaboration, the new rights they themselves enunciated,[70] and to generate a tender solicitude for the rights (guaranteed by multilateral trade agreements of which the WTO is an exemplar) of the multinational corporations and of the "community" of direct foreign investors even at the cost of the not so "benign neglect" of the fundamental rights of Indian citizens. Relatively autonomous national adjudicature now remains increasingly dependent on the external legitimation emanating from the ethically unreflexive "communities" of power—*not* principle—typified by unaccountable and undemocratic global financial institutions and their normative cohorts. These generate powerful conceptions of economic rationalism that also facilitate the "structural adjustment"[71] of judicial review and activism. The American Supreme Court is not subject to such external modes of legitimation. This leads south readers to ask: Are there ways to glean from Dworkin's corpus elements for a critique of the new economic global constitutionalism?

One aspect of the global economic constitutionalism concerns the juridification regime of archetypal mass disasters such as Bhopal and Ogoniland. The Bhopal catastrophe raised distinct concerns about rights interpretation before the Supreme Court of India, in ways perhaps unthinkable in the U.S.[72] It held absolutely liable corporations engaged in ultrahazardous processes,

[69] As in Mexico upon accession to NAFTA. *See id.* at 765–67.

[70] Rights of un-, or rather more accurately dis-, organized labor. *See* Steel Authority of India Ltd. v. National Union of Waterfronts Workers, (2001) 7 S.C.C. 1.

[71] *See* Upendra Baxi, *The Avatars of Judicial Activism: Explorations in the Geography of (In)justice, in* Fifty Years of the Supreme Court of India: Its Grasp and Reach 101–56 (Shashi Kant Verma & K. Kusum eds., Oxford Univ. Press 2000).

[72] First, the Indian Parliament enacted the Bhopal Act under which it personified the Indian government as an injured community and authorized it to pursue damage claims against the corporation. Second, India sued Union Carbide as a sovereign plaintiff in the Second Circuit and obtained a conditional compliance (under the *forum non conveniens* doctrine) from Union Carbide to submit to Indian courts. Third, both before the United States and Indian courts, the Indian plaintiff innovated a principle of absolute corporate liability for any harm and damage arising out of an ultrahazardous process or manufacture. Fourth, it finally participated in (some would say sponsored) a judicial order of settlement ($470 million as against the claim of $3 billion). Fifth, it continues (under occasional supervision by the Supreme Court) in *parens patriae* jurisdiction to remain responsible for the disbursement of compensation and related claims. For the judicial and related materials, see Mass Disasters and Multinational Liability: The Bhopal Case (Upendra Baxi & Thomas Paul eds., N. M. Tripathi 1986); Inconvenient Forum and Convenient Catastrophe: The Bhopal Case (Upendra Baxi ed., N. M. Tripathi 1986); Valiant Victims and Lethal Litigation: The Bhopal Case (Upendra Baxi & Amita Dhanda eds., N. M. Tripathi 1990). *See also* Jamie Cassels, The Uncertain Promise of Law: Lessons of Bhopal (Univ. of Toronto Press 1993).

manufacturing, or industry[73] in an innovative interpretation of the fundamental right to life and liberty.[74] It also validated the state's assumption of *parens patriae* status, superseding its prior victim standing, even when it extends to state endorsement of a settlement without consultation with the victims before the Court. The Court justified the denial of due process thus entailed[75] by invoking *Macbeth:* to do a great right a little wrong is justified![76]

This licit and illicit judicial complicity with global capitalism remains legible in a materialist or critical state theory, but not legible on the Dworkinian lexicon. How may we relate Dworkin's preliminary reflections concerning group liability in terms of "personification" of communities at work,[77] in ways that take "the corporation seriously as a moral agent"[78] in order to discipline aggressive formations of global capital? How far, and under what conceptions of rights and fairness, may American and Indian justices constitutionalize cosmopolitan principles of tort liability? Further, how may justices construct this agency in terms of obligations of cosmopolitan notions of justice and fairness that "legislate" coequal concern for *nonnationals* affected by multinational corporations?[79]

Sovereign Virtue offers a ray of hope when it contests of "a theory of justice" that counsels that we "should make no private demands on citizens living in great affluence in an unjust society"; not merely would "our lives go worse if we live amid injustice" but, further, he insists "... we should say ... of our indelible partiality in the private perspective, not that it conflicts with a genuinely egalitarian politics but rather that it conflicts with any other kind of politics."[80] May we read in this observation the rebirth of Dworkin as a cosmopolitan theorist of global justice?

3.10. Resolute nonpostmodernism

Apart from theories about reading and interpretation,[81] Dworkin is resolutely unpostmodernist. His "artificial kinship" has absolutely no conversation with

[73] Union Carbide Corporation v. Union of India, A.I.R. 1992 S.C. 248. *See also* M. C. Mehta v. Union of India, A.I.R. 1987 S.C. 1086 (Shriram Fertilizer Case) (adopts the enunciation of the principle urged by the Indian plaintiff in the Bhopal Case).

[74] India Const. art. 21.

[75] *See* Union Carbide Corporation, A.I.R. 1992 S.C. 248.

[76] *Id.* (opinion of Justice Venkatachaliah).

[77] Dworkin, Law's Empire, *supra* note 14, at 170–71. *But see* Upendra Baxi, *Bringing Judas Back to the Last Supper?: Republican Criminology at the Service of Globalization, in* Punishment and the Prison: Indian and International Perspectives 344–69 (Rani Dhavan Shankardass ed., Sage Publications 2000).

[78] Dworkin, Law's Empire, *supra* note 14, at 171.

[79] *See* Charles Jones, Global Justice: Defending Cosmopolitanism (Oxford Univ. Press 2001).

[80] Dworkin, Sovereign Virtue, *supra* note 37, at 281.

[81] *See* Ronald Dworkin, *Law as Interpretation*, 60 Tex. L. Rev. 527 (1982). For an analysis of this article, see Stanley Fish, Doing What Comes Naturally: Change, Rhetoric, and the Practice of

his lexical cousin Derrida concerning the aporia of law and justice, and with Walter Benjamin, concerning the "foundational" and "reiterative" violence of the law.[82] Still less does he engage founding ethical figures such as Emmanuel Levinas.[83] Some American pragmatists understandably praise this wall of separation. South theorists may worry whether this much-vaunted Anglo-American virtue in keeping aloof from postmodernist thought when doing constitutional and political theory, is enabling or disabling.

3.11. Clarity as human rights resource

Exemplary clarity is, for Dworkin, a precious resource for the protection and promotion of human rights cultures. What H. L. A. Hart said about John Austin extends equally to Ronald Dworkin: Austin, Hart wrote, was always clear, indeed, so much so that when he was wrong he was also clearly wrong.[84] It is a moral virtue that one is clearly wrong rather than deviously right. By the same token, and because of his indubitable eminence, "insofar as he falls short, he falls from a much greater height."[85]

Not ungraciously, I may add that Dworkin's intertextuality often raises obdurate difficulties: for example, cognate texts in *Life's Dominions* and *Freedom's Law* mark subtle shifts of interpretation of many of his positions concerning the distinction between "linguistic" and "expectation" originalism; it is a matter of some consolation for me that some of his distinguished compatriots encounter similar difficulties.[86] Given the vigor of his pluralist perspectives the discovery of an Archimedean point in his corpus remains a formidable enterprise.

3.12. Elucidation of the styles of doing American constitutional jurisprudence

Finally, in a sense, and to adapt the Japanese television Onida's sales campaign line, Ronald Dworkin's courage, craft, and contention symbolize the "owner's pride and the neighbor's envy!" The courage is eminently manifest in the contrast between majoritarian and constitutional democracy; the craft in the elegance of his writing; and contention in his lively engagement with his critics.

Theory in Legal and Literary Studies 87–119 (Duke Univ. Press 1989). *See also* W. J. T. Mitchell, The Politics of Interpretation (Univ. of Chicago Press 1983).

[82] Jacques Derrida, *Force of Law: "The Mystical Foundation of Authority," in* Deconstruction and the Possibility of Justice 3 (Drucilla Cornell, Michel Rosenfeld & David Gray eds., Routledge 1992).

[83] Emmanuel Levinas, Totality and Infinity: An Essay on Exteriority (Alphonso Lingis trans., Duquesne Univ. Press 1969).

[84] H. L. A. Hart, The Concept of Law (Clarendon Press 1961).

[85] *See* Foley, *supra* note 55, at 464.

[86] *See* Ara Lovitt, *Constitutional Confusion?* 50 Stan. L. Rev. 565, 578–86 (1998) (book review of Dworkin's *Freedom's Law*).

Rightly, perhaps, it has been said, we should all become chain novelists:

> We should stop arguing at or against Ronald Dworkin and start arguing with him. . . . Dworkin has consistently stood up for what is best in liberal society. . . . Dworkin has done his part . . . openly and honestly, in crafting *Law's Empire*. . . . The empire can exist, but not without many laborers, great and small. It is time to stop insulting the architect and to get started on our own considerable part of the work.[87]

4. The role of history

4.1. Text

"History" emerges in Indian and American constitutional interpretation in different strokes. Textual fidelity attempts to ground legitimacy and constraint all too often in quicksilver modes, simply because a constitution remains corpus or a genre containing diverse *texts*, which exist both within the whole and yet also in relation to others, aspiring both to autonomy and even suzerainty. Without discerning distinctions, this totality misleads.[88] After all, the "corpus" includes diverse texts, such as original and amending texts, "written" and "unwritten" texts, rights and justice texts, governance and security texts, development and aspirational texts. This internal differentiation (or rupture) affects judicial practice in India and the U.S.[89]

The constitutional corpuses, and their preparatory work, vary enormously. The sheer bulk,[90] as well the stunning verbosity,[91] of the Indian Constitution remains unparalleled in the annals of contemporary constitutionalism. But parsimonious constitutional texts (C1) yield like results in terms of the enormity of textual production at the second level (C2—"postinterpretive" texts—contrasting with C—the "preinterpretive" ones, as it were).[92] The dialectical

[87] Edward J. McCaffrey, *Ronald Dworkin, Inside Out*, 85 Cal. L. Rev. 1043, 1086 (1997) (book review of Dworkin's *Freedom's Law*).

[88] *See* Baxi, *State Formative Practices, supra* note 52.

[89] In the United States, this diversity has been mapped variously. *See generally* Responding to Imperfection: The Theory and Practice of Constitutional Amendment (Sanford Levinson ed., Princeton Univ. Press 1995); Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution (Harvard Univ. Press 1991); Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction (Yale Univ. Press 1998); Bruce Ackerman, We the People (The Belknap Press 1991).

[90] The constituent assembly debates and subsequent archive (including reports of joint select committees of parliament and long-drawn legislative debates) concerning amendments to the Constitution furnish a somewhat bewildering archive from which to glean the original intent.

[91] India's is probably the longest written Constitution in the annals of contemporary constitutionalism, with 395 articles, 12 schedules, and 84 amendments.

[92] *See* Rosenfeld, *supra* note 6.

relations among these testify to differentials in hybrid cultural productions. When we add to C1 and C2 the complex and contradictory relationships with C3 (constitutionalism, per se, by which I mean political theory/ideology), the corpus itself loses any pretension to "ontological" robustness.[93]

The multiple "authors" of C1 seek to crystallize diverse, and often conflicting, histories and intentions in politically negotiated legal texts. Constitutional texts understandably (to paraphrase the important insight of Barry Hammond) do not displace "rival principles" or reconcile them but, rather, become their "dialectical arena."[94] The search for "justifiable" patterns of C2 (regimes of interpretive constraints) unsurprisingly bears the birthmarks of various interpretive insurgencies.[95] Judicial creationism extends to the quest of constitutive intents even in a hermeneutic disguise.[96] Indian and American justices do not *discover* but *ascribe* intentions.[97]

This is so because a constitutional text, like a literary text,

> is not a line of words releasing a single "theological" meaning (the "message" of the Author-God) but a multi-dimensional space in which a variety of writings, none of them original, blend and clash. The text is a tissue of quotations drawn from innumerable centres of culture. . . . the writer can only imitate a gesture that is always anterior, never original. His only power is to mix writings, to counter the ones with the others, in such a way as never to rest on any one of them.[98]

[93] *See, e.g.*, Michel Rosenfeld, *Introduction*, George P. Fletcher, *Constitutional Identity*, and M. M. Slaughter, *The Multicultural Self: Questions of Subjectivity, Questions of Power, in* Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives 3–38, 223–32, and 369–82, respectively (Michel Rosenfeld ed., Duke Univ. Press 1994).

[94] Barry Hammond, Banks and Politics in America 120 (1957) *cited in* Sanford Levinson, *Law as Literature, in* Interpreting Law and Literature: A Hermeneutic Reader 155, 171 (Sanford Levinson & Steven Mailloux eds., Northwestern Univ. Press 1998) [hereinafter Interpreting Law and Literature].

[95] As concerns India, see Upendra Baxi, *The (Im)Possibility of Constitutional Justice: Seismographic Notes on Indian Constitutionalism, in* India's Living Constitution: Ideas, Practices, Controversies 31–63 (Zoya Hasan, E. Sridharan & R. Sudarshan eds., Permanent Black 2002).

[96] The notion of authorial intent has, incredibly, survived Michel Foucault's celebration of the Death of the Author and the insight of Roland Barthes that concludes that the birth of a reader entails the death of the author. *See* Roland Barthes, Image, Music, Text 141–48 (Stephen Heath trans., Noonday Press 1977).

[97] *See* K. K. Mathew, Democracy, Equality, Freedom (Upendra Baxi ed., Eastern Book Co. 1974); Dworkin, Life's Dominion, *supra* note 35. By way of an example, Indian Supreme Court justices often cite the selfsame constituent assembly debates' discursivity to sustain very divergent interpretive reasoning and outcome. Moreover, Indian justices regularly resort to the United States Supreme Court's ways of understating the "original intent." The practice is so inveterate as to render detailed citation impossible.

[98] Barthes, *supra* note 96, at 32.

Constitutional texts secure the "guarantee of the written object," which safeguards "the stability and permanence of inscription" by the "legality of the letter."[99] It is this "legality of the letter," of the words that bind[100] as well as liberate, that constitutes a constitutional "text as a weapon against time, oblivion and the trickery of speech, which is so easily taken back, altered, denied."[101] Constitutional interpretation thus remains a site (upon the plane of "pain and death"[102]) where judicial beings serially (now as figures of peace, now as dispensers of violence) renegotiate the claims of the "permanence" of inscription within ordered arts, crafts, and technologies of reinscription. Law as integrity and "moral reading" may not escape this dialectic of dialogical reading.

I need add only two complicating textual footnotes to feats of intertextuality in law as well as literature, a theme that has been variously and vigorously pursued.[103] Extending Mikhail Bakhtin, one may say, C1 texts express new "typifying languages" that articulate "the co-existence of socio-ideological contradictions between the present and the past, between differing epochs of the past, between different socio-ideological groups in the present, between tendencies, schools, circles and so forth, all given a bodily form."[104] The text emerges as a *body*, its surface a multitude of inscriptions/reinscriptions.[105]

Practices of reading constitutions, furthermore, engage us in what Julia Kristeva defines as an *idiologeme*[106] (Engels named this the "world juridical outlook"[107]) within which interpretive communities have their being and flourish. Kristeva, however, links a psychoanalytical with juridical/political

[99] Roland Barthes, *Theory of the Text, in* Untying the Text: A Poststructuralist Reader 31, 32 (Robert Young ed., Routledge & Kegan Paul 1981).

[100] *See* John Arthur, Words that Bind: Judicial Review and the Grounds of Modern Constitutional Theory (Westview Press 1995).

[101] Barthes, *supra* note 99, at 32.

[102] Robert Cover, *Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1987).

[103] *See, e.g.*, Mitchell, *supra* note 81; Interpreting Law and Literature, *supra* note 94; and Guyora Binder & Robert Weisberg, Literary Criticisms of Law (Princeton Univ. Press 2000).

[104] Mikhail Mikhailovich Bakhtin, The Dialogic Imagination: Four Essays 291 (Michael Holquist, ed., Caryl Emerson & Michael Holquist trans., Univ. of Texas Press 1981).

[105] Any approach to moral reading of constitutions needs also to be in constant conversation with forms of biopolitics. *See* Giorgio Agamben, Homo Sacer: Sovereign Power and Bare Life (Daniel Heller-Roazen trans., Stanford Univ. Press 1998).

[106] "[W]here knowing rationality grasps the transformation of *utterances* (to which the text is irreducible) into a totality (the text) as well as the insertions of this totality into the historical and social text. . . ." Julia Kristeva, Desire in Language: A Semiotic Approach to Literature and Art 37 (Leon S. Roudiez ed., Thomas Gora, Alice Jardine & Leon S. Roudiez trans., Columbia Univ. Press 1980).

[107] *See* V. A. Tumanov, Contemporary Bourgeois Legal Thought: Marxist Evaluation of the Basic Concepts 40–66 (Progress Publishers 1974).

theory of reading. The resistance to this is understandable because of the fear of the unknown involved in refiguring American Supreme Court justices as analysts and law professors as symptomatic readers! But for both the analysands and the jurist it remains true that: "*There is meaning, and I am supposed to know it to the extent that escapes me*."[108]

Put together, constitutional texts remain multidimensional spaces of inscription; their "bodily form" constitutes a site of contradictions at many levels of ideology and history; and moreover, they coalesce many narratives concerning the past into a "totality," "irreducible to utterance."[109] They remain everywhere hybrid cultural productions with multitudes of "original intent," some stillborn (as, for example, a radical interpretation of the American Constitution as ensuring redistribution of wealth and income) and others endowed (to use a phrase from stem cell research) with a plenitude of "totipotency."[110]

The sources and histories of hybridity or the multidimensionality of constitutional texts remain important, even decisive. What these constitutional authors say, and what they may be then said to mean or intend to achieve with what they say, remains mired in the ways they "incorporate" the texts of high colonial administration, which leaves historic residues that must be somehow worked with,[111] and mired as well in the voluntary "reception" of the "founding" texts of American and other forms of Euroamerican constitutionalisms.

When the Indian constitution makers thus model with considerable modification American Bill of Rights–type provisions, they craft hybridities of narratives of origin. A similarly ambivalent politics of desire is archived when they adapt the Irish constitutional original intent through the enunciation of the Directive Principles of State Policies[112] (part IV of the Indian Constitution that travels further to many south constitutionalisms); redesign their Commerce Clause in the images of intent of the Old Commonwealth countries (Australia and Canada, for example); and retool and recraft the British paradigm of parliamentary sovereignty to suit distinctive Indian state-formative practices. This carnival of "original intents" marks the moment of mimesis as well of originality in some bewildering proportion. Multicultural hybridities shape the text, interpretations, and tradition in different modes from those apparent in relatively monocultural constitutional productions.

[108] *See* Julia Kristeva, *Psychoanalysis and Polis, in* Mitchell, *supra* note 81, at 83, 90. For the justices, as well as academic lawyers and psychoanalysts, the problem is similar: "the heterogeneous in meaning, the limitation of meaning, its incompleteness." *Id.* at 92.

[109] Kristeva, *supra* note 106, at 37.

[110] *See* National Institute of Health, A Stem Cell Primer (2000).

[111] *See* Austin, Cornerstone, *supra* note 5. Austin observed that "history" had done much work for the makers of the Indian Constitution for which a governance silhouette stood provided by the Government of India Act of 1935.

[112] *See* India Const. part IV, arts. 39–51.

Their "nature" (or its lack) stands provocatively formulated by Gayatri Chakravorty Spivak when she insists that the "regulative political concepts" of the actually existing postcolonial constitutions are symptomatic of "catachreses," that is, "concept-metaphors without an adequate historic referent" outside the "*supposedly* authoritative narrative . . . in the social formations of Western Europe."[113] This double move deepens the riddle of constitutionalism as catachresis that denies to it any authority of "history." (We revert to this subject later, all too briefly.) But in a lesser deconstructive register, it remains possible to say that the only "history" (excluding the possibility that the Iroquois imparted the imagination of federalism to the makers of the American Constitution[114]) that informs the making of the original American Constitution is that of Britain, and indeed in some wholesome ways,[115] a theme beyond the scope of this article.

4.2. Originalisms

This formidable frontier (especially for those relatively untutored in American constitutional theory) may initially be crossed with Dworkin's only happy moment of agreement with Judge Robert Bork. Because the "text, structure, and history" of the Constitution, writes Bork (and one may add the interpretive tradition "itself"), provide the judge "not with a conclusion but with a major premise," it is unsurprising that "two judges equally devoted to the original purpose may disagree about the reach or application of the principle at stake and so arrive at a different result."[116] As already noted, Indian justices all too often rely on the same passages from the constituent assembly debates to structure wholly different outcomes.[117] But this does not answer the important question of how one should construct the major premise.

Dworkin's distinction between a "constitution of *principle*" and a "constitution of *detail*" seems to provide an answer. The former stipulates "general comprehensive moral standards"; the latter is an archive of "independent historical views and opinions unlikely to have great unity or even complete consistency."[118]

[113] Gayatri Chakravorty Spivak, *Postculturalism, Marginality, Postcoloniality and Value, in* Contemporary Postcolonial Theory: A Reader (Padmini Mongia ed., Oxford Univ. Press 1966).

[114] *See* Bruce E. Johansen, Forgotten Founders: Benjamin Franklin, Iroquois, and the Rationale for American Revolution (Gambit Publishers 1982).

[115] *See* William H. Ricker, *Civil Rights and Property Rights, in* Liberty, Property, and the Future of Constitutional Development 49–64 (Ellen Frankel Paul & Howard Dickman eds., State Univ. of New York Press 1990).

[116] Robert Bork, The Tempting of America: The Political Seduction of the Law 162–63 (Collier Macmillan 1990), *quoted in* Dworkin, Life's Dominion, *supra* note 35, at 142.

[117] *See* Union of India v. H. S. Dhillon, (1971) 2 S.C.C. 779; Kesavananda Bharathi, A.I.R. 1973 S.C. 1461.

[118] Dworkin, Life's Dominion, *supra* note 35, at 119.

Indeed, the archive of "more detailed convictions" is a menu from which we may all eclectically, as it were, choose the daily diet of law's integrity.[119] Significant sources of interpretive constraints arise only when we refine the distinction between abstract ideals and the "more detailed convictions." Here, the task of justices is "to do their best collectively to construct, reinspect, and to revise, generation by generation, the skeleton of freedom and equality of concern that its great clauses, in their majestic abstraction, command."[120]

Because constitutional paleontology has yet to emerge, the "skeletal" frameworks of "freedom and equality of concern" reek with immense possibilities of an uncanny mix of "principle" and "detail," inviting similarity (even as I write) with the logic of the Beijing discovery of a "flying dinosaur." This mix is a heady cocktail: the fact that judicial practices find ways to privilege some parts or aspects over others also becomes a source of value. This contingent necessity counsels justices to "support the principles rather than the detailed understanding of the Constitution,"[121] within, of course, the problem of levels of generalizability.[122] The relationship between freestanding principles and "more detailed convictions . . . at different levels of abstraction and concreteness"[123] entails this prescription: judges ought to "pay attention not to what the constitutional authors meant to *say*; but to what these authors intended to *achieve* by saying what they did."[124] Thus, what matters are not the textual fragments but the principles "unifying" the constitution as a whole, a kind of juridical equivalent of the human genome project, in which the search for "correct interpretation of these principles depends upon moral sense, not linguistic rules."[125]

The Indian constitutional corpus does not merely remain rather short on "majestic" generality but Indian judicial practices add post- and cotextual quotients that complicate these. Equality and liberty rights (articles 14 and 21)[126] now generate a whole range of judicially enunciated rights, such as the right to privacy, speedy trial, bail, prohibition of solitary confinement, dignity in prisons and other custodial institutions, protection and punishment for workplace-related sexual harassment, literacy and education, shelter, environmental integrity, immunity from public corruption,[127] and this is scarcely

[119] *Cf*. Dworkin's own example. *Id.* at 154–55.

[120] *Id.* at 145.

[121] *Id.* at 122. Although here formulated as a statement of actual judicial practice, there is much in Dworkin's prose to suggest a prescriptive reading.

[122] *Id.* at 129–43. *See also* Tribe & Dorf, *supra* note 89.

[123] Dworkin, Life's Dominion, *supra* note 35, at 137–38. *See id.* 129–41.

[124] *Id.* at 136.

[125] *Id.* at 130.

[126] *See* India Const. arts. 14, 21.

[127] For reasons of space, I do not provide here detailed case citations. For discussion of the relevant jurisprudence, see Burt Neuborne, *The Supreme Court of India*, 1 Int'l J. Const. L. (I·CON) 476

an exhaustive listing. This multiplicity becomes possible through an imaginative retooling of the doctrines of standing and justiciablity that materializes Dworkin's notion of a "partnership democracy," bonding justices with human rights and social movements.

But the Indian Court's interpretive performance achieves *more*. It reinscribes fundamental rights that were specifically *excluded*, upon due deliberation, by the constitution makers. The two most conspicuous examples are the incorporation of the right to speedy trial in the Bill of Rights (part III), which was canvassed for inclusion but specifically rejected by the constituent assembly,[128] and the judicial reading of article 21 (rights to life and liberty) that now inscribes the originally and deliberately excluded phrase "due process of law."[129] These are not situations that creatively redress *silences* in the constitutional text but performances that retrospectively deny the constitution maker's *speech*.

Aggravating Dworkinian extensions, the Court reverses, with a sting of comparative familiarity, nearly a quarter century of absolutist protection of the right to property (enshrined in article 31, which was repealed in 1978).[130] This was accomplished through suggestive jurisprudence insisting that the original incorporation of the right to property was a serious moral *mistake*. In *Kesavananda*, Justice H. R. Khanna is the most explicit in suggesting that the right to property and the jurisprudence of takings ought *not* to have been *ever* taken seriously in the first instance by the makers of the Constitution.[131] This judicial wisdom provides, in turn, further histories of constitutional legitimacy.

All this raises imponderables that sit uneasily with law as integrity. How may we measure the first two situations with regard to the distinction between what the constitution makers meant to *say* as distinct from what they might have *intended*, after all, to *achieve*? Ought judicial interpretation extend beyond *interpretation* of any original "intent," no matter how well meaning and well

(2003); S. P. Sathe, Judicial Activism in India: Transgressing Borders and Enforcing Frontiers (Oxford Univ. Press 2002); C. B. Reddy, Judicial Activism in India (Gogia Law Agency 2001); S. K. Agarwala, Public Interest Litigation in India (Indian Law Institute 1985); K. L. Bhatia, Judicial Review and Judicial Activism (Deep & Deep Publications 1997); Upendra Baxi, The Indian Supreme Court and Politics (Eastern Book Company 1980) [hereinafter Politics].

[128] Hussainara Khatoon v. Home Secretary, State of Bihar, A.I.R. 1979 S.C. 1369; Crisis and Change in Contemporary India (Upendra Baxi & Bhikhu Parikh eds., Sage Publications 1995). *But see* State of Maharashtra v. Champak Lal Punjaji Shah, A.I.R. 1982 S.C. 791; and Upendra Baxi, *Right to Speedy Trial: Geese, Gander and Judicial Sauce—State of Maharashtra v. Champak Lal*, 25 J. Indian L. Inst. 90 (1983).

[129] Maneka Gandhi v. Union of India, A.I.R. 1978 S.C. 597; Baxi, Politics, *supra* note 127; Sathe, *supra* note 127.

[130] *See* Baxi, Politics, *supra* note 127; *see also* Upendra Baxi, Courage, Craft, and Contention: The Indian Supreme Court in the Eighties (N. M. Tripathi 1985) [hereinafter Courage, Craft, and Contention].

[131] Kesavananda Bharathi v. State of Kerala, A.I.R. 1973 S.C. 1461.

crafted, to wholesale *replacement*? Should justices regard as eligible for restoration those rights deliberately excluded in the original Constitution? Outside the comparable attenuation of the jurisprudence of takings,[132] how may we evaluate, on Dworkinian premises, the judicially inspired, and eventually blessed, demotion of a fundamental right to property (the original article 31) to a mere constitutional right (now article 300A)? The Indian feat can be said to restore "preconditions of legitimate democracy" but only by reconstituting the Supreme Court itself as a constituent assembly in permanent session. I remain wholly comfortable with this imagery in the Indian political conjuncture. I am not sure, though, that Dworkin's positions authorize any such precocious collective judicial assertion, even on the basis of a distinction between plebiscitary and constitutional democracy. This cryptic observation will have to do, for the moment, until we explore the silences in the Dworkinian corpus concerning the conceptual distinction (or indistinction) between "interpretation" and "amendment."

4.3. Reading "constitutional" and "social" pasts

This interlocution takes us beyond originalisms' fungible accounts, in the construction of the constitutional past,[133] to tasks of the best possible constructions of the social past.[134] The "past," in the practice of history, is an archive of completed events that we have no power to alter, even when we may justifiably reconstruct these events in the eternal present, as it were.[135] Narratives concerning what *actually* happened vary and on Dworkinian premises good history is the one that offers the best account of what actually happened, and the one that achieves the best fit with modes of narrating the past. The historian, no less than the judge, is engaged in a process of interpretation as integrity, although she may entertain and elaborate very different notions of that virtue.[136]

The normative difference, then, between the craft of a historian and of a judge presents the question that seriously interests Professor Dworkin. From the American Declaration of Independence, enshrining the freedom and equality of

[132] *See* Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy (Univ. of Chicago Press 1990).

[133] By social past, for the present purposes, I signify a timespace much larger than that entailed in the making of the constitution.

[134] By constitutional past, I signify the labor of reading the constitutional text, structure, history, and jural traditions.

[135] The problem of Holocaust denial narratives suggests some crucial limits for this narrative genre.

[136] Pierre Nora, Realms of Memory: Rethinking the French Past 3 (Arthur Goldhammer trans., Columbia Univ. Press 1996). *See also* Upendra Baxi, Memory and Rightlessness, J. P. Naik Memorial Lecture, Centre for Women's Development Studies, (forthcoming 2003).

all human beings to the New Deal jurisprudence and eventually to *Brown*[137] and *Roe*[138] (as well as to *Hardwick*[139] and *Romer*[140]), the constitutional past emerges always as more than a historical past; there is always an excess, a surfeit, indeed, it speaks to what Koselleck describes as "futures past."[141] On this sort of account, the constitutional past is normative or not at all.

The notion of constitutional "past" or "history" as deeply normative is indeed attractive as directing attention to a history of ideas and ideals that live on, as it were, in the fractured careers and futures seen in judicial politics. Dworkin exemplifies the practice of conceptual history superbly, though diversely, both as the Dworkin of the Fit and the Dworkin of the One Right Answer.[142]

The practice of conceptual history, as Reinhart Koselleck reminds us, goes beyond a simpleminded contrast between history of ideas and history of events. A privileged narrative guides this conceptual history. In this genre, the "categories of the space of experience and the horizon of expectation" diverge, fashioning a "modern time" of history in which "[p]olitical and social concepts have a temporal internal structure which tells us that since the eighteenth century the weight of experience and the weight of expectation have shifted in favor of the latter."[143] If, from "Aristotle to the Enlightenment . . . the concepts of political language have primarily served to collect experiences and develop them theoretically," a radical transformation has occurred since then in terms of which "experiences became a concept of expectation."[144] Put another way, modern constitutionalism is an archive of the creation of concepts: "[A]t the time [they] were created, they had no content in terms of experience. . . . The lower their content in terms of experience, the greater were the expectations they created . . ."; these embody a movement in which "[p]olitical and social concepts become the navigational instruments of the changing movement of history."[145] They "do not only indicate or record given facts.

[137] Brown v. Board of Education, 349 U.S. 294 (1955).

[138] Roe v. Wade, 410 U.S. 113 (1973).

[139] Bowers v. Hardwick, 478 U.S. 186 (1986).

[140] Romer v. Evans, 517 U.S. 620 (1996).

[141] Reinhart Koselleck, The Practice of Conceptual History: Timing History, Spacing Concepts (Todd Samuel Presner et al. trans., Stanford Univ. Press 2002).

[142] *See* Michael M. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 Fordham L. Rev. 1269 (1997). *See also* Ken Kress, *Why No Judge Should Be a Consistent Dworkinian Coherentist*, 77 Tex. L. Rev. 1375 (1999).

[143] Koselleck, *supra* note 141, at 126, 127, 128.

[144] *Id.* at 128.

[145] *Id.* at 129.

They themselves become factors in the formation of consciousness and control of behavior."[146]

If this is what we may imagine conceptual history to be, following Koselleck (and not Spivak), Dworkin remains its most reflexive practitioner. The constitutional past is a judicial and juridical workshop where "the navigational instruments" are forged and recreated. Once securely in place, these furnish the moral compass that guides justices to relatively safe harbors on the bench (as well as de facto "justices" off the bench who make it their "business" to judge the judges) in their stormy voyages of interpretation. The spatiotemporality for "political and social concepts" somehow redresses the growing imbalance, at times explosive, between the "weight of experience and the weight of expectation."[147] Put another way (and in the phrase regime of Niklas Luhmann),[148] the task of conceptual constitutionalism lies in sustaining "normative expectations" whose being, as it were, lies not merely in their survival in the face of disappointment but in the renewal of strength of constitutional conceptions of governmentality as a principled ordering of equal respect and concern for all citizens. As Dworkin says:

> The Constitution is America's moral sail, and we must hold to the courage of conviction that fills it, the conviction that we can all be equal citizens of a moral republic. That is a noble faith, and only optimism can redeem it.[149]

To the subaltern indictment[150] that the promises of progress stand betrayed by governmental and adjudicative action—the lament of the rightless people—Dworkin's response may be similar to Koselleck's: the intertemporality of constitutional time is *all* that we may have. Judicial activism, in its best and brightest moment, may forge political and social conceptions that become "navigational instruments." Judicial activism in the best and brightest moment may forge incandescent political and social conceptions but compliant social conduct occurs waywardly and takes large quotients of historic time.[151] *Brown*'s "all deliberate speed"[152] reincarnates the image of Edmund Burke: "growth by insensible degree."[153] Indeed, the Dworkinian "fit" and

[146] *Id.*

[147] *Id.* at 128.

[148] Niklas Luhmann, A Sociological Theory of Law (Martin Albrow ed., Elizabeth King & Martin Albrow trans., Routledge 1985).

[149] Dworkin, Freedom's Law, *supra* note 53, at 38.

[150] *See* Baxi, *State Formative Practices, supra* note 52, at 1185–92.

[151] *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibrium*, 99 Colum. L. Rev. 857 (1999).

[152] Brown, 349 U.S. at 301.

[153] Edmund Burke, Reflections on the Revolution in France (J. Dodsley 1790).

"right answer" constitute the only available historical repertoire that the constitutional "past" may offer to the "future." Law as integrity admirably constructs interpretation as a structure of programmatic/pragmatic constraints, implicitly and necessarily resisting blueprints for social revolutions. Because there is no longer available any mode for accelerating constitutionally ordained historic time that "*equitably*" abridges the dissonance between the order of experience and the horizon of expectation, all that remain at hand are visions and images of evolutionary constitutional time and space.

In that sense, Dworkinian labors at fashioning law as integrity bears a family resemblance to Nietzsche's notion of "philosophising with [a] hammer," not in the sense of going "in swinging, wrecking everything" but in the sense of hammering out "a content and essence . . . to sculpt a figure out of stone," "to give things weight and importance *again*."[154] This is the doing of conceptual history, within the liberal fold, in the best sense. Of course, it offers a philosophy of hammer *without* a sickle,[155] a figuration uncongenial to Dworkin's political aesthetic. But south readers, implicated in conditions that perpetuate vicious disenfranchisement and impoverishment of masses of citizens, continue to hope that he will some day find alternate readings worthy of engagement.

5. Textual homes and homelessness

Spivak's general description of postcolonial constitutionalism as catachresis, besides overlooking histories of the Indian struggle for independence and conceptions of equal concern, justice, and political decency, also fails to note the ways in which justices need to enunciate "preconditions of legitimate democracy."[156] The conflicted role of mimesis and originality (amidst the three Ds) emerges as a difficult register for the creative modification of the received colonial heritage. This only enforces the acceleration of future historic time through proclamations of normative war against the millennial, old conceptual histories of caste-based civil society discrimination and forms of violent social exclusion.

Distrustful of judicial power, whose colonial face was oppressive, and whose future visage was illegible, the makers of the Indian Constitution installed detailed conceptions of equality and fraternity, via article 17 (outlawing

[154] Martin Heidegger, Nietzsche, Vol. I, II 66 (David Farrell Krell trans., Harper Collins 1991) (emphasis added).

[155] That is, a history divested of traditional camaraderie arising from functional juridical equivalents of the red flag and salute, which sculpt different images of the "content and essence." *See, e.g.*, Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law (Harvard Univ. Press 1988). In a different vein, see Ulrich K. Preuss, Constitutional Revolution: The Link Between Constitutionalism and Progress (Deborah Lucas Schneider trans., Humanities Press 1995).

[156] Spivak, *supra* note 113.

discrimination arising on the grounds of "untouchability") and article 23 (combating practices of agrarian serfdom), as fundamental rights against exploitation.[157] The Indian parliament, still acting as a constituent assembly, rushed to enact the first amendment, to nullify the Supreme Court interpretation of equality that delegitimated the quota system as a concrete mode of pursuing affirmative action.[158] What is more, it enshrined well nigh irreversible rights of political participation to India's millennially excluded Dalits, the Indian Scheduled Castes and Tribes, in derogation of a constitutional right of adult suffrage (in the sense of the right to contest elections) through the device of legislative reservations.[159]

The Indian Constitution inaugurates the pursuit of four "sovereign virtues": *rights, justice, development*, and *governance*, each intertwined and interlocked with the rest and, in contradictory combination/recombinations with both the constitutional and social past and their future images. Despite the Dworkinian distillations of the American Constitution of principle, Indian judicial practice finds the devil in the details.[160] Indeed, Indian Supreme Court justices enact regimes of interpretive hybridity that mutate across the species barrier, as it were, between the constitution of *detail* and of *principle*.[161] It also raises an issue of reverse comparability: Is the Dworkinian distinction valid and justifiable in its own timespace?[162]

[157] *See* India Const. arts. 17, 23 (prohibition of untouchability, traffic in human beings, and forced labor).

[158] C.I.S. Part III (1951), Constitution (First Amendment) Act of the Indian Parliament, Jun. 18, 1951. *See* Marc Galanter, Competing Equalities: Law and the Backward Classes in India (Oxford Univ. Press 1984).

[159] *See* Galanter, *supra* note 158, at 44–55.

[160] An Indian reader of Dworkin is never quite able to understand, for example, why governance provisions of the constitution ought to be consigned to the realm of the constitution of detail, not that of principle.

[161] Thus, the power to suspend or dissolve the legislatures of states under article 356 on ostensible grounds of a failure of constitutional governance under the Constitution leads the Supreme Court, in *Bommai*, to issue a code of principles that severely attenuates the plenitude of this power. *See* S. R. Bommai v. Union of India, A.I.R. 1994 S.C. 1918. Similarly, the executive prerogative in the appointment of Supreme Court and high court justices (and the power of transferring the latter from one state's high court to another) now wholly belongs to a judicially created collegium of five senior Supreme Court justices, including the chief justice. *See* In re Presidential Reference, A.I.R. 1999 S.C. 1. The Supreme Court has also assumed powers to fix salaries and conditions of service for the judiciary. *See* All India Judges' Ass'n v. Union of India, A.I.R. 1992 S.C. 165. All this has been achieved under an evolving regime of securing democratic preconditions of just governance that safeguards, in diverse proportions and against an overreaching federal executive, the relative independence of state legislatures and of the judiciary.

[162] This is, indeed, a large comparative and historical question. From the standpoint of the contemporary social and constitutional past, Dworkin's moral theory of democratic constitutionalism indeed offers a point of departure. But as he himself concedes, for long time past, it offers only troublesome evidence for reading American interpretive practices as supporting the normative

Further, postcolonial democratic constitutional productions harbor historic insurgencies of the *multitudes* against the dominant and hegemonic *minuscule*, or virtual oligarchy. Made historically possible by radical claims to self-determination (repudiating the claims to a Divine Right to Empire), constitutional conceptions of a new nationhood arrest the diverse unfoldment of that very principle of self-determination. If the Indian constitutional landscape provides scope for autonomy movements, it also authorizes rights-violative legislation pertaining to internal security.[163] As a result, the constitututional state enters an indistinct zone between a civil and a heavily militarized state. Unsurprisingly, postcolonial constitutionalism lacks the power of narrative tidiness that bicentennial forms of constitutionalism manage to attain.

Further, no moral reading of the Indian Constitution remains sensible outside the linkage between human *rights* and human *suffering*. The Constitution is an act of historic protest against colonially imposed human and social suffering. It is also a register of permanent protest against state lawlessness producing new forms of human and social suffering. Indian constitutional interpretation stands confronted with the task of taking human *suffering* just as seriously as it would take human *rights*,[164] a nonhegemonic model that travels to many other postcolonial constitutionalisms.

Textual homes and homelessness for rights thus stand differently constructed. For Dworkin, every appearance of homelessness ought to be denied by disciplined and creative interpretive judicial practice.[165] The Indian case, on the other hand, illustrates a variety of affirmations, as well as denials and displacements, of textual homes. At times, judicial practice consigns the originally formulated rights to a constitutional wilderness, creating textual homelessness;[166] at other times, the extant constitutional homes are refurbished and renovated.[167] What "text,

distinction between the constitution of principle and the constitution of detail. See, for example, Akhil Reed Amar's "structural" reading of the Bill of Rights. AMAR, *supra* note 89.

[163] *See* Neuborne, *supra* note 127.

[164] *See* Upendra Baxi, *Taking Human Suffering Seriously: Social Action Litigation Before the Supreme Court of India, in* THE ROLE OF THE JUDICIARY IN PLURAL SOCIETIES 32 (Neelan Tiruchelvan & Radhika Coomaraswamy eds., St. Martin's Press 1987).

[165] See Dworkin's analysis leading to a rejection of "enumerated" and "unenumerated" rights. DWORKIN, LIFE'S DOMINION, *supra* note 35, at 129–32.

[166] *See* Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802 (enforcement of prohibition on bonded labor on behalf of workers in quarry near Delhi; broad relief ordered, including compensation and rehabilitative services); A. D. M. Jabalpur v. Shiv Kant Shukla, A.I.R. 1976 S.C. 1207 (emergency denial of habeas corpus even on grounds of mistaken identity); Olga Tellis v. Bombay Municipal Corp., A.I.R. 1986 S.C. 180 (providing relief to Bombay slum dwellers whose habitations were threatened by construction of new expressway); Ahmedabad Municipal Corp. v. Nawab Khan, Gulab Khan, A.I.R. 1997 S.C. 152 (pavement dwellers are entitled to right to shelter).

[167] For example, the right to education as a fundamental right. *See* Baxi, *supra* note 71; SATHE, *supra* note 127.

structure, history," and social and (juristic) interpretive tradition as well, can discipline judicial choice and craft on this register?

The Indian C1 structures (see section 4.1 above) "textual homes" if only because part III of the Constitution is also at the same time a code of the parliamentary powers for reasonable regulation. The contrast is cruelly manifested in article 21's due process rights abutted by article 22's authorization of preventive detention! This juxtaposition—apart from the borrowing of strict and relaxed scrutiny standards—affects, for weal or woe, the textual homes of human rights.[168] Further, the rights enunciations emerge as rolled–up statements, which mutate the conceptual distinctions between rights as *principles* and rights as *policies*. Thus, for example, part III enshrines most basic civil and political human rights; part IV paradigmatically crystallizes social and economic human rights subject to a regime of progressive realization; and part IV-A of the Constitution enacts the fundamental duties of citizens. In pure formal interpretive terms, part IV confers no legislative powers, creates no constitutional grounds for remedial jurisprudence, and violates no human rights in the event of manifest state failure. And yet these enunciated rights form the "substance" of the higher law that must inform interpretation and not be open to excision by amendments. Further, the Indian Supreme Court transports part IV rights into part III rights. The convenient ambiguities concerning the idea and practice of self-determination upon decolonization now serve as the *topoi* for de facto judicial *amendment*, in the service of *principles* in ways that unsettle the Dworkinian imagery of law as integrity.[169] Rights as *principles* nestle here with rights as *policies*.[170]

6. The moral reading of constitutions

Dworkin's lifelong dedication to a democratic theory of adjudication[171] needs to be situated in the Indian context, not just as a "travelling theory," to borrow Edward Said's famous phrase, but out of a comparativist desire for a nonhegemonic approach to common problems that justices and courts confront

[168] This oxymoronic enunciation may not be understood outside the forms of Holocaustian practices of politics that marked India's partition and ascension to freedom. India Const. arts. 21, 22.

[169] *See* Baxi, Politics, *supra* note 127; Baxi, Courage, Craft, and Contention, *supra* note 130.

[170] The Court understandably uses part IV provisions as constitutionally mandated strategies that serve as opportunities for creative interpretation. It has thus insisted that directive-fulfilling interpretation should be privileged. Second, the principles ought to fashion content for new judicial enunciation of fundamental rights. Third, in considering the issue of constitutional validity of amendments, part IV values remain salient.

[171] I name it thus because of the important distinction he makes between majoritarian forms of democracy and a human rights–based notion of constitutional democracy. This is, admittedly, an uneasy distinction but still a fecund one. It is uneasy, because political democracy assumes many historic forms, and fecund, because it provides standards of critical morality.

everywhere under conditions of political democracy. His account of what he calls a "moral reading" of the United States Constitution[172] is particularly important in this context.

Elements that constitute performances of the "moral" and of "reading," at the ethnographic and the normative registers, raise the issue of reading Dworkin with "integrity." Because it is ubiquitous, as a matter of everyday judicial ethnography, a moral reading is "not revolutionary in practice."[173] Critical ethnography of the "mainstream constitutional theory" resurrects ways of moral reading denied by the "mainstream constitutional practice in the United States."[174] Dworkin makes at least four sorts of claims.

First, "American lawyers and judges . . . already use the moral reading" in ways that "bring political morality into the heart of constitutional law."[175] Second, moral reading "helps us to identify and explain not only . . . large-scale patterns [of interpretation], but also more fine-grained differences in constitutional interpretation that cut across the conventional liberal–conservative divide."[176] Third, "moral reading is not appropriate to everything a constitution contains,"[177] and, finally, it is a "theory about what the Constitution means, not a theory about whose view of what it means must be accepted by the rest of us."[178] This "internal" point of view has evoked considerable peer group contestation.

Normatively, Dworkin has always pleaded for a fusing of "constitutional law and moral theory," for an American constitutionalism that insists that men and women have "moral rights against the state," and that the rights provisions of a constitution "must . . . be understood as appealing to moral concepts,"[179] thus entailing a conception of the judicial role as one of framing and answering "questions of political morality."[180] Thus it follows that a constitution's majestic generalities should always be read as invoking "moral principles about political decency and justice."[181] The best practices of reading maximize the regime of principles, not that of detailed and specific rules and never

[172] Dworkin, Freedom's Law, *supra* note 53, at 2–3.

[173] *Id.* at 3.

[174] *Id.* at 4.

[175] *Id.* at 2. *See also* Ronald Dworkin, *Moral Reading of the Constitution*, N.Y. Rev. Books., March 21, 1996, at 46 [hereinafter *Moral Reading*].

[176] Dworkin, Freedom's Law, *supra* note 53, at 2. *See also* Dworkin, *Moral Reading, supra* note 175, at 46.

[177] Dworkin, Freedom's Law, *supra* note 53, at 8.

[178] *Id.* at 12.

[179] Dworkin, Taking Rights Seriously, *supra* note 32, at 149, 147.

[180] *Id.* at 147.

[181] Dworkin, Freedom's Law, *supra* note 53, at 2.

as "only . . . coded messages or shorthand statements of very concrete, detailed historic agreements;"[182] at best, these are mere textual, rhetorical *topoi*. Not all principles need textual anchorage. Reflexive adjudication ought to elaborate "background principles." The descriptive and the prospective aspects blend blissfully in the moral reading of the American Constitution.

In any endeavor at cross-cultural extrapolation, even if no part of Dworkinian "original intention," the following questions arise. First, in what ways is the Indian judicial feat a good example of moral reading? Second, how may it inform American constitutional theory and practice, based on the elementary principles of epistemic egalitarianism and discursive equality? Third, how may postcolonial democratic constitutionalists develop their own interpretive ethnographies when reading their constitutions? Is it likely that they may fully adopt any or all of the Dworkinian premises concerning moral reading?[183] Fourth, why may we say that "moral reading is not appropriate to everything that the constitution contains"?[184]

7. Amending interpretations

At stake in lawyerly distinctions between "interpretation" and "amendment" is the ambition to articulate and preserve the difference between reading and writing. Even if they are regarded as *readerly* (*lisible*) rather than *writerly* (*scriptable*) texts,[185] and agreeing that a "text's unity lies not in its origin but in its destination,"[186] constitutional texts still may not be read just as Barthes reads Balzac's *Sarrasine*. Neither "texts of pleasure" or "texts of bliss,"[187]

[182] Dworkin, Life's Dominion, *supra* note 35, at 128.

[183] Thus, for example, the peculiarity of cultural descriptions of justices as "conservatives" or "liberals" may not quite extend to postcolonial constitutional theory and practice, or may miscarry if attempted. (Incidentally, jurimetrics educates us fully in the diversity of judicial behavior, thus forbidding the power of such labelling.) Similarly, considerations about history and structure may turn out to be even more complex in such a landscape. Nor may we find that all justices are engaged in the genre of moral reading, as Dworkin claims to be the case for the United States.

[184] Why should the Commerce Clause of the American Constitution, for example, escape any moral reading whatsoever? What may we say concerning the Indian Supreme Court's performance that regards the federal principle as integrally related to the tasks of the promotion and protection of human rights, so much so that one could maintain that the federal principle and its constitutional details constitute the essential feature of the basic structure of the Indian Constitution? A south reader of Dworkin may be forgiven for asking more from him the way of comparative constitutional and adjudicatory feats of theorizing.

[185] *See generally* Roland Barthes, S/Z (Richard Howard trans., Hill and Wang 1974).

[186] Barthes, *supra* note 96, at 148.

[187] Roland Barthes, The Pleasure of the Text 14 (Richard Miller trans., Hill and Wang 1975).

constitutional texts are texts of authority in the best-case scenario, and, in the worst-case scenario, are texts bloody in tooth and claw.

In American constitutional theory and practice, the issue is: Should one regard interpretation as "organic development" or as "invention" (amendment through the guise of interpretation), with all the problematic claims of putative legitimacy?[188] India's notoriously flexible Constitution confronts its justices and theorists with the dialectic of the constituent power and of constituted power. To regard the power to amend as constituent power (as the forty-second amendment specifically declared it to be) risks rendering the constitution a "plaything of legislative majorities";[189] viewing such power as constituted may be assailed for making the Constitution merely a potter's clay in judicial hands.

Liberal constitutional forms abhor the notion of "permanent revolution"[190] celebrated in the socialist form. But this does not in any way settle forever questions such as: *Who* should wield the power to amend? *How* may it be exercised? *What* may be the scope of the power? *May* it extend to the suspension of the constitution or even its repeal? *May* apex justices ever be justified in extending judicial review over either or both the procedure and the actual content of constitutional amendments? *Can* we understand the power to make, remake, and unmake constitutions (*constituent power*) outside its equally mystical other—the *constituted power*? *If* both derive "legitimation" from some primordial act of founding a political community (that which Hans Kelsen memorably described as the historically given first constitution whose validity the jurist must presume if it be "by and large effective"),[191] does the "constitution of principle" escape an historicist interpretation?

For seventeen long years, the Indian Supreme Court recognized the parliament's amendatory power as plenary. In 1969, it sought to immunize part III from the virus of amending power. In 1973, it modified this approach granting plenary powers that may override rights provisions but subjected this to the discipline of a doctrine of the basic structure of the Constitution that it crafted in terms of broad essential features, that were not tethered to any constitutionally explicit provisions.

Unsurprisingly, the justices in landmark decisions did not speak with one voice; indeed, they make decisions with wafer-thin and shifting coalitions of

[188] Sanford Levinson, *How Many Times Has the Constitution Been Amended? Accounting for Constitutional Change*, *in* Responding to Imperfection: The Theory and Practice of Constitutional Amendment 13, 15 (Sanford Levinson ed., Princeton Univ. Press 1995).

[189] *See* C.I.S. Part II (1976), Constitution (Forty-second Amendment) Act of the Indian Parliament, Dec. 18, 1976; Sajjan Singh v. State of Rajasthan, A.I.R. 1964 S.C. 854, 862.

[190] Agamben, *supra* note 105, at 41. *See generally* Antonio Negri, Insurgencies: Constituent Power and the Modern State (Muarizia Boscagli trans., Univ. of Minnesota Press 1999). *See also* Agamben, *supra* note 105, at 39–62.

[191] Hans Kelsen, Pure Theory of Law (Max Knight trans., Univ. of California Press 1967).

opinions on the bench.[192] But surprisingly, their collective institutional performance does articulate a fiduciary notion of constitutional democracy in which justices have the final say on the limits of amendatory power that the elected "representatives of the people" may not exclusively claim for themselves. Through a marathon of ongoing discourse, they normalize their self-instituted constitutional prowess variously,[193] asserting a conjoint judicial constituent power. Indeed, the Court has examined all, and validated most, past amendments.

The logic of preservation of "essential features" (described in such majestic abstractions as "democracy," "rule of law," "equality before the law," the republican character of Indian constitutionalism, the federal principle, and even the preambulatory values of constitutional "secularism" and "socialism") rests on judicial review as the lynchpin of the basic structure. Any amendment of the amending article itself that seeks to equate amending power with the constituent power, thus excluding judicial review altogether, remains subject to strict scrutiny. Justices have by difficult craft displaced apprehensions of judicial subjectivity and sustained the doctrine of judicial review with scrupulous constitutional rationality, judging most past constitutional amendments intertemporally valid yet determined to hold future amendments to continuing judicial moral superintendence. Even when the present writing resists an extended Indian constitutional safari, may it be said that the Indian judicial feat presciently anticipates and vigorously enacts the Dworkinian distinction between "majoritarian" and "constitutional" democracy? How congenial would Dworkin find the notion that justices ought to wield, or cowield, constituent power? How far would this relate to the constitutive ideas of law as integrity? What if a Levinasian exercise of "difficult freedom,"[194] legitimating the acquisition of constituent power, opens itself to reversal on the grounds that the basic structure rests on a serious moral mistake?

8. Conclusion

I hope that this article, reflecting in equal measure the narrative untidiness of Indian constitutionalism at work and the courage of my own confusion, does not dissuade Professor Dworkin from taking comparative constitutionalism seriously. He is, of course, right to insist that "the argument that ends in general philosophy should have begun in our life and experience, because only

[192] *See, e.g.*, Golak Nath v. State of Punjab, A.I.R. 1967 S.C. 1643; Kesavananda Bharathi, A.I.R. 1973 S.C. 1461.

[193] Kesavananda Bharathi, A.I.R. 1973 S.C. 1461, runs into about 900 pages of judgment!

[194] *See* Emmanuel Levinas, Difficult Freedom: Essays on Judaism 208–20, 226–28, 273–76 (Sean Head trans., Johns Hopkins Univ. Press 1997).

then is it likely to have the right shape, not only to finally help us, but also finally to satisfy us that the problems we have followed into the clouds are, even intellectually, genuine not spurious."[195]

Crucial as this caution is, comparison invites us not to think of the ways of "our life and experience" as sui generis. Our "life and experience," far from being enclosed in the frontiers of *fortuna* (as Machiavelli named it), the accidentally acquired circumstances of nationality and identity, and our contingent epistemic careers thus nurtured, is increasingly shaped by other people's lives and experiences. And, depending on our location on the grid of power/knowledge (as Foucault would name it) the "problems we follow into the clouds"[196] also affect, often devastatingly, other people's lives and experiences (as was the case, for example, with Locke's justification of imperialism and colonization, and as is happening now in the post–September 11 emergence of complex forms of a new world constitutional "ordering."

Comparison suggests that our constitutional "life and experience" (both for the United States and India) celebrate coequally the production and reproduction of human rights as well as of human *rightlessness*. Generations of rightless human beings and peoples in both societies[197] await the development of constitutional cultures based on the Dworkinian "sovereign virtue" of "equal concern and respect." Comparative excursus may, at the very least, yield to them the "consolation of philosophy."

[195] Dworkin, Sovereign Virtue, *supra* note 37, at 4.

[196] Foucault, Power/Knowledge, *supra* note 54.

[197] *See* Baxi, *State Formative Practices, supra* note 52.