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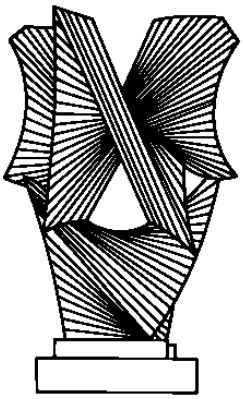

TRANSNATIONAL CONSTITUTIONALISM AND UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS

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TRANSNATIONAL CONSTITUTIONALISM AND UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS

Rosalind Dixon*

Many courts, and constitutions, worldwide recognize the concept of an "unconstitutional constitutional amendment", yet such a concept clearly raises troubling issues from the perspective of the rule of law, or concerns about judicial discretion. This essay addresses this issue – of discretion in the context of a doctrine of substantively unconstitutional constitutional amendments – by considering the possibility of courts limiting the scope of their discretion by linking notions of what is "fundamental" in a domestic constitutional system to common or generic transnational legal practices. This idea of transnational anchoring builds on previous work by scholars in the field, such as Vicki Jackson, but also implicitly advances a new understanding of what it means to engage with transnational legal sources based on the idea of posture of presumptive non-divergence from the transnational.

Since completing *Constitutional Engagement in a Transnational Era*,[1] Vicki Jackson has turned her attention to yet another important area of interest to comparative constitutional scholars: the relationship between the idea of "unconstitutional constitutional amendments" and transnational forms of constitutionalism.[2]

Constitutional amendments, as Professor Jackson notes, may be held unconstitutional by courts for either procedural or substantive reasons – i.e., *either* because they fail to comply with relevant constitutional procedures *or* are deemed inconsistent with certain "basic" substantive constitutional principles or provisions.[3] In some cases, a constitutional court may also rely on a mixture of these grounds, by finding that the substance of an amendment requires that it be passed by a more demanding procedure.

Where courts are involved, all of these versions of the unconstitutional constitutional amendment idea raise important issues of judicial discretion. Concerns about discretion will

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[1] VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (Oxford 2010).

[2] Vicki Jackson, *Unconstitutional Constitutional Amendments: A Window into Constitutional Theory and Transnational Constitutionalism* (Draft, August 2010, on file with author) (Hereinafter *Unconstitutional Amendments*).

[3] Jackson, *Unconstitutional Amendments*, *supra* note 2 at 8-14.

clearly be at their greatest, however, in cases where amendments are invalidated for substantive, as opposed to procedural, reasons; and even greater were review is *wholly* substantive, as opposed, to hybrid in nature.[4]

One obvious response to this is for courts simply to decline to recognize the concept of substantively unconstitutional constitutional amendments. (In India, for example, though the Supreme Court has repeatedly endorsed such a concept, the text of the 1950 Indian Constitution clearly left open such a possibility.[5]) Obviously, such an approach will have potential disadvantages, as well as advantages, which must be weighed by courts according to the particular constitutional context.[6] This is especially true in cases where constitutional amendment procedures are being used by legislatures in order to create undemocratic institutions, or truly "wicked legal systems".[7]

Not all courts, however, will be free to adopt this solution, even where they deem it justified. Many national constitutions, including the 1949 German *Basic Law*,[8] 1995 Constitution of Bosnia and Herzegovina,[9] and 2004 Afghan Constitution,[10] impose explicit limits on the substantive scope of formal powers of constitutional amendment.[11] They also do so in ways that seem to contemplate the possibility of judicial review.[12]

In the case of hybrid review, many constitutions also adopt hurdles to amendment that seem explicitly to call for some form of substantive review by courts. In Iraq, for example, higher amendment thresholds apply to amendments to "the fundamental principles" and "rights

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[4] *Compare id* at 46.

[5] Bert Neuborne, *The Supreme Court of India*, 1 INT. J. CONST. L. 476 (2003); Gary Jacobsohn,. *An Unconstitutional Constitution? A Constitutional Perspective*, 4 INT. J. CONST. L. 460 (2006) (on the purely judicial, or common law, origins of the Basic Structure doctrine in India).

[6] Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*. 22 OXFORD J. LEG. STUD. 275 (2002). Vicki Jackson also repeatedly reminds us about the importance of context in thinking about various constitutional concepts: *see e.g.*, Vicki Jackson, *Methodological Challenges in Comparative Constitutional Law*, 28 PENN. ST. INT'L. L. REV. 319 (2010).

[7] *Cf.* DAVID DYZENHAUS, HARD CASES IN WICKED LEGAL SYSTEMS: PATHOLOGIES OF LEGALITY (Oxford 2d ed 2010); JEREMY WALDRON, LAW AND DISAGREEMENT (1999) (providing arguments for why it is inconsistent with democracy for a democratic body to cede permanent decision-making authority to a non-democratic decision-maker). *Compare* Jackson, *Unconstitutional Amendments*, *supra* note 2 at 14-22 (considering rule of law and democratic arguments for the substantive review of constitutional amendments).

[8] Art 79 (adopting a permissive voting rule for most amendments, but also making "impermissible" amendments to key constitutional provisions, such as those provisions governing the division of Germany into Länder, and protecting the participation of the Länder in the legislative process, and all of the basic rights "principles" laid down in Arts 1-20).

[9] Art 10, par 2 (prohibiting any amendment to the Constitution that would either alter the amendment rule itself or eliminate or diminish any of the rights and freedoms referred to in Article II of the Constitution).

[10] Art 149 (providing that "the amendment of the fundamental rights of the people [is] permitted only in order to make them more effective").

[11] *Compare* Jackson, *Unconstitutional Amendments*, *supra* note 2 at 7-14.

[12] One possibility is, of course, for courts to treat the degree to which limits are observed as a purely political question. However, the political question doctrine tends to have a much more limited application in many constitutional democracies, compared to in the U.S., especially in contexts which may be thought to implicate the enjoyment of fundamental rights: see e.g. *President of the Republic of South Africa and Another v. Hugo*, [1997] ZACC 4.

and liberties" found in ss. 1 and 2 of the Constitution,[13] and amendments that "tak[e] away from the powers of the regions that are not within the exclusive powers of the federal authorities".[14] In South Africa, the 1996 Constitution imposes higher supermajority requirements for amendments that alter "fundamental constitutional principles" found in s. 1 of the Constitution.[15] And in many states in the U.S., such as California, there are different requirements for the passage of "amendments", as opposed to "revisions", of the constitution.[16]

For many courts, therefore, there will be no simple way to avoid the problem of discretion created by the power to review the substance of constitutional amendments. Instead, in the case of both purely substantive and hybrid review, the question will simply be how to minimize this problem.

In her own work in this area, Vicki Jackson has suggested that a process of "transnational engagement" by judges may offer one modest, yet important, way in which courts can address this problem.[17] The process of engagement with transnational constitutional norms, Professor Jackson suggests, can both "function as an intellectual check on constitutional moral blindness" on the part of domestic judges and help "promote attitudes of moderation and humility, of not being too sure one is right" in a domestic constitutional setting.[18] It can thereby also play a "salutary role" in aiding judges make more appropriate use of their interpretive discretion when deciding whether to declare an amendment unconstitutional.[19]

In this short essay, my purpose is to focus on this relationship – between transnational constitutional engagement and the scope of judicial discretion in the review of constitutional amendments by courts—with a view to asking whether it is in fact possible for transnational constitutional norms to play an even stronger, salutary role in limiting domestic judicial discretion than Professor Jackson suggests.

My basic argument is that such a result is possible: providing courts treat inconsistency between an amendment and "generic" transnational constitutional principles[20] as a presumptively necessary—if not sufficient—requirement for striking down an amendment on substantive grounds. In order for this kind of "transnational anchoring" of domestic judicial discretion to occur, however, I suggest that courts must first acknowledge the possibility of a fourth logical posture toward transnational sources, in addition to the three key postures of "resistance",

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[13] Art 122 (2).

[14] Art 122(4).

[15] S. 74(1), (3). It is clearly open to debate whether such requirements apply to amendments that effectively alter these principles, as well as to amendments that formally purport to do so.

[16] See California Constitution, Art XVIII. For discussion, see Jackson, *Unconstitutional Amendments*, *supra* note 2 at 23, 41-44.

[17] Jackson, *Unconstitutional Amendments*, *supra* note 2 at 37

[18] *Id*.

[19] *Id* at 54.

[20] *Compare* Gary Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT'L. J. CON. L. 460 (2006).; David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005). *See also* discussion in Jackson, *Unconstitutional Amendments*, *supra* note 2 at 55.

"convergence" and "engagement" identified by Professor Jackson, namely: a posture of presumptive *non-divergence*.[21]

While the strength of such a presumption may vary, according to whether judicial review is purely substantive or hybrid in nature, it will consistently differ from a posture engagement in two key respects: first, by affording greater weight to the overall pattern of, as opposed to underlying reasons, for global constitutional practices; and second, by creating greater pressure for consistency between national and global constitutional norms.[22] At the same time, it will also differ from a posture of convergence, in that it does not entail any commitment to a "normatively progressive process of transnational norm convergence", or the achievement of cosmopolitan ideals.[23] Instead, for those committed to such a posture, the degree of agreement, or overlap, among global constitutional systems will be a fact that is largely exogenous and historically-given, and to be understood for purely instrumental, domestic purposes.

A posture of non-divergence is this kind may not have broad application beyond the confines of review by courts of the constitutionality of constitutional amendments. It does, however, have implicit precedent in the jurisprudence of the Supreme Court of India, as well as at least one justice of the Supreme Court of California. It also has further potential application in the context of courts' assessment of the rationality, or legitimacy, of states' reasons for limiting constitutionally protected interests. By paying attention to this variant of the engagement model,[24] we may also be able to advance arguments that concerns about judicial discretion do not always cut in exactly the direction critics of transnational engagement suggest.

The essay is divided into three parts. Part I explores further the concern about judicial discretion as it relates to the concept of substantively unconstitutional constitutional amendments, and draws on a hypothetical case study from Germany, involving abortion, by way of illustration. Part II sets out the concept of "transnational anchoring", identifies potential precedents for such an approach in existing constitutional jurisprudence, and explains how it might have helped cabin judicial discretion in a case such as that set out in part I. Part III concludes by considering the degree to which – by virtue of its commitment to non-divergence – transnational anchoring of this kind may be able to help answer broader skepticism about the 'salutary' relationship between transnational engagement and judicial discretion.

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[21] For the basic definition of these three postures, see JACKSON, *supra* note 1 at 8-10.

[22] *Compare id* at 9 (defining engagement as "open to possibilities of either harmony or dissonance between national self-understandings and transnational norms"); 72.

[23] *Id* at 8. Similarly, it also differs from relational versions of engagement, where decision-makers "strive to meet international standards" for reasons related to their membership in some form of transnational community or relationship: *compare id* at 80.

[24] Jackson herself acknowledges the possibility of "strong" forms of engagement, or hybrid postures – in between convergence and engagement: *see e.g.*, JACKSON, *supra* note 1 at 9.

I. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS AND JUDICIAL DISCRETION

One of the key functions of formal constitutional amendment procedures, I have argued elsewhere, is to allow legislatures to "trump" courts' interpretation of open-ended constitutional standards.[25]

By performing this function, amendment procedures directly help address democratic objections to the practice of judicial review, or the so-called "counter-majoritarian" difficulty associated with courts interpreting open-ended constitutional provisions.[26] They also provide a response to rule-of-law based concerns about judicial interpretive discretion: while the open-ended nature of such provisions gives judges extremely broad interpretive discretion *ex ante*, a legislative trumping power helps cabin the effect of this discretion *ex post*.[27]

From this perspective, the problem with allowing courts to invalidate constitutional amendments is that it creates far greater potential for unbounded judicial interpretive discretion– *ex post*, as well as *ex ante*.

Almost all decisions that declare a constitutional amendment unconstitutional on substantive grounds rely on the notion of what is "fundamental", "basic" or "essential" in a particular existing constitution. The basic structure of a constitution is also rarely defined by the text of the constitution itself: even constitutions that explicitly list of set of fundamental or basic principles generally do so at a level of generality that means it is extremely difficult to determine when those principles are implicated.

Consider the 1990 amendments to the German Basic Law allowing East Germany to maintain its abortion laws pending further regulation by a unified parliament.[28] In the *Abortion I* case in Germany, the GFCC struck down the German Abortion Reform Act of 1974 legalizing abortion on demand (subject to certain counseling requirements) within the first trimester of pregnancy as incompatible with Germany's Basic Law. The First Senate's reasoning was that the Act impermissibly burdened the right to life of the fetus under the Basic Law, and further, that affirmation by the state of such a right was integral to its duty to respect "human dignity [as] the center of the value system of the constitution".[29]

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[25] Rosalind Dixon, *Constitutional Amendment Rules: a Comparative Perspective*, *in* THE RESEARCH HANDBOOK IN COMPARATIVE CONSTITUTIONAL LAW (Rosalind Dixon & Tom Ginsburg, eds.) (forthcoming 2011).

[26] For a wonderful summary of this concern see BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009). For my own attempt to connect amendment powers to this concern, *see also* Dixon, *supra* note 25.

[27] On the rule connection between concerns about broad judicial discretion and rule of law ideals, *see* Antonin Scalia, *Rule of Law as Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). Of course, in some constitutional systems, other legal mechanisms can also play this role, and this is clearly a factor that courts should consider in determining the strength of any presumption of non-divergence in this context.

[28] A similar actual case came the Supreme Court of Ireland in *Article 26 and the Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill 1995* [1991] 9 IESC 38, though the amendment in that case was not a direct attempt to "trump" a prior decision of the Irish Supreme Court. *See e.g.* discussion in Jacobsohn, *supra* note 5 at 468-70.

[29] As discussed further below, this was also the axis according to which the Court suggested fetal interests should be viewed. *See infra* note 56.

While in the short-term, the GFCC's decision met with limited opposition,[30] over time, the decision became increasingly controversial, in large part due to opposition from East German women, and legislators.[31] This opposition also had a distinctly constitutional, as well as political, character, given that opponents of the *Abortion I* decision seemed simply to reject the idea that a fetus, and woman seeking an abortion, had *equal* dignitary claims.

The result of this opposition was that in 1990, as part of the unification process, the Basic Law was amended to allow the German Democratic Republic (GDR) to "deviate" from certain provisions of the Basic Law, until December 31, 1992.[32] This, as Donald Kommers notes, also raised a potential question of an unconstitutional constitutional amendment, because Art 79 of the Basic Law prohibits any amendment "affecting" the principles in Art 1-20 of the Basic Law, including the principle of respect for human dignity and that no law may encroach on the "essence" of basic rights.[33]

What would this have meant from the perspective of judicial discretion, if the GFCC had actually heard such a case, and struck down the validity of these amendments to the Basic Law? In essence, the GFCC would have conferred on itself a wholly unreviewable power to decide (at least for some period) the relative priority to be given to fetal and maternal rights to dignity under the Basic Law. Such a decision would also, quite clearly, have involved a significant exercise of interpretive discretion.[34]

While the principle of respect for human dignity is explicitly protected against repeal by Arts 1 and 79 of the German Basic Law, the text of Art 1 itself in no way makes clear whether this principle should be understood to prevent the GDR from maintaining laws permitting access abortion, on demand, in the first trimester of pregnancy. Other provisions of the Basic Law also offer few "objective guideposts"[35] in answering this question. Unlike some constitutions (such as, for example, the constitutions of Ecuador and Ireland[36]), the Basic Law does not explicitly recognize a right to fetal life, beginning at conception. Constitutional courts around the world have also consistently disagreed as to whether a more general right to life confers legal rights on

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[30] The federal parliament, for example, in 1976 adopted legislation recriminalizing abortion throughout pregnancy, subject only to certain exceptions based on medical and social indications endorsed by the GFCC in the *Abortion I* case. *See* discussion in Donald P. Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 J. CONTEMP. HEATH L. & POL'Y 1, 10 (1994).

[31] Andrea Wuerth, *Re-unification and Reproductive Rights: Abortion in the German Public Sphere*, 1989-1990 (Working Paper, 1997), online at: http://www.unc.edu/depts/eucenter/papers/wuerth_andrea2.PDF

[32] Basic Law Art. 143.

[33] Basic Law Art. 19 §2; Basic Law Art. 79 §3. See further Kommers, *supra* note 30 at 1.

[34] The long-term consequences of this would not necessarily have been as great, given the way in which the GFCC shifted its position (toward showing greater deference to the legislature) in the *Abortion II Case: see e.g.*, discussion in Kommers, *supra* note 30 at 18-25. See also Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse, and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 273 (1995). The consequences, however, would clearly have been extremely significant, had this decision been decided differently.

[35] *Cf. Washington v. Glucksberg*, 521 U.S. 702 (1997).

[36] 2008 Constitution of Ecuador, Art. 66 §§9, 10; Constitution of Ireland, Art. 40, §3.

a fetus: courts such as the Polish and Spanish constitutional courts have endorsed this understanding,[37] but other courts, in Canada and the U.S., for example, have rejected it.[38]

Unlike in Germany, in some jurisdictions, a decision by a court to strike down a particular amendment will not always preclude the legislature from further attempts to trump a court. Because, in cases of hybrid review of this kind, legislators (or citizens) retain a clear formal power to trump a court by means of more demanding amendment procedures, concerns about judicial discretion will also clearly be less severe.[39]

Concerns about judicial discretion may nonetheless remain real, however, where partisan political dynamics have the capacity to block the ability of democratic majorities – or indeed super-majorities – to override a court by means of more demanding amendment procedures.[40]

Take the decision of the Supreme Court of California *In Re Marriage Cases*,[41] in 2008, striking down a state law distinguishing between opposite- and same-sex couples for the purposes of marriage. A majority of the Court in that case adopted what was clearly a contested interpretation of the state constitution's guarantee of equal protection and due process. (The Court itself divided 4-3 on these issues,[42] and several other state courts have reached a quite different view of this first question in particular.[43]) A majority of California voters also expressed quite clear disagreement with this reasoning, by almost immediately passing a popular amendment (Proposition 8) providing that "only marriage between a man and a woman is valid or recognized in California".[44] In *Strauss v. Horton*,[45] the Supreme Court of California was then implicitly asked to reassert its prior interpretive judgment, by striking down Proposition 8 as a form of "revision" to the constitution that could not be passed by popular initiative alone.

The argument of the petitioners in this context was also that, in theory, it was open to the state *legislature* to overturn the decision of the Court in the *In Re Marriage Cases*, providing it

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[37] *See e.g.*, Polish Abortion Case, Constitutional Court of Poland, OTK Z.U. z.r. 1997, Nr. 2, 1; 1985 Spanish Constitutional Court Judgment No. 53/1985.

[38] *See Tremblay v. Daigle*, [1989] 2 S.C.R. 530; *see e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973). Other courts have rejected the same argument on related grounds: *see e.g.* Austrian constitutional decision of 11 October 1974, rejecting such an argument based on state action grounds. For further information, *see Abortion Policy in Austria*, available at: www.un.org/esa/population/publications/abortion/doc/austri1.doc.

[39] A similar position would apply applies in countries, such as the UK, where a decision to "invalidate" a particular amendment is not in fact a decision to deprive it of direct legal force, but rather an indication of inconsistency Human Rights Act UK, s. 4.

[40] For a broader exploration of the ways in which blockages in the political process can impair the expression of majority democratic preferences, see also Einer R. Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review?, 101 YALE L. J. 31 (1991); Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993), Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947 (2008). (Hereinafter *Democratic Theory*)

[41] 43 Cal..4th 757 (2008).

[42] *See id* at 784; *id* at 872-73 (Baxter concurring in part and dissenting in part, explicitly rejecting the application of strict scrutiny); *id* at 882 (Corrigan, dissenting, implicitly endorsing a standard of rational basis review).

[43] *See e.g.*, *Goodridge v. Dept. of Public Health*, 798 N.E. 2d 941 (Mass. 2003); *Hernandez v. Nobels*, 7 NY 3d 338 (NY 2006); *Lewis v. Harris*, 188 N.J. 415 (NJ 2006); *Anderson v. King County*, 198 P. 3d 963 (Wash. 2006) . *See also Romer v. Evans*, 517 U.S. 620 (1996) (applying rational basis review to classifications based on sexual orientation).

[44] Cal. Const, §7.5.

[45] 207 P. 3ed 48 (Cal. 2009). *See also* discussion in *Recent Cases*, 123 HARV. L. REV. 16 (2010).

could obtain the two-thirds super-majority necessary to pass a revision to the state constitution (either directly, or by means of a constitutional convention).[46] In practice, however, it seems extremely unlikely that the legislature could have been expected to take this path.

California voters are not only closely divided on the issue of same-sex marriage.[47] The issue of same-sex marriage has also become a focus of intense inter-party competition among Democrats and Republicans in California: a Democratic majority in the state assembly, for example, twice voted prior to 2008 to recognize same-sex marriage, but each time, a Republican governor (Gov. Schwarzenegger) vetoed the legislation.[48] When considering any proposal to amend the state constitution in this context, members of the state assembly would therefore very likely vote along party lines. By itself, this would also almost certainly be sufficient to defeat any trumping amendment, because against the backdrop of a 2/3 super-majority requirement, *any* form of party-based voting will tend to undermine the changes of successful amendment, even where (unlike in this case) proponents of an amendment hold a large share of seats in the legislature.[49]

II. TRANSNATIONAL ANCHORING

A. A Presumption of Non-Divergence

One way in which a court, such as the GFCC or Supreme Court of California, can respond to this problem of interpretive discretion is by engaging with transnational constitutional sources. As Professor Jackson notes, engagement by judges with transnational sources can help both "improve[e] a justice's distance on the interpretive problem before" them, and prompt them to engage in a more searching, comprehensive process of reasoned deliberation and justification.[50] This can also help ensure more reasoned and appropriate uses of judicial interpretive discretion in a wide variety of constitutional contexts, including in the context of substantively unconstitutional constitutional amendments.[51]

In fact, if courts engage with transnational constitutional sources in a particular way, they may actually be able to go even further toward addressing the problem of interpretive discretion in the context of a doctrine of unconstitutional constitutional amendments.

Imagine that a court were to adopt a presumptive commitment to "transnational anchoring" when reviewing the (substantive) constitutionality of constitutional amendments. The basic premise of such an approach would be that a court would, in some way, tie its definition of

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[46] Art 18 §§,2, 4.

[47] *See e.g.*, Jeffrey M. Jones, *Majority of Americans Continue to Oppose Gay Marriage* (Gallup, May 27, 2009), online at: http://www.gallup.com/poll/118378/majority-americans-continue-oppose-gay-marriage.aspx;see also the Proposition Eight Results themselves, in which 52.8 percent of voters voted "yes" for Prop 8 while 47.8 percent of voters voted against the ban.

[48] *See e.g.*, Adam Tanner, *Judges Seem Divided in Key Cases, California supreme court ruling could influence states across the U.S.*, The Gazette A18 (Montreal) (March 5, 2008).

[49] *Compare* JANE MANSBRIDGE, WHY WE LOST THE ERA (1986)

[50] See JACKSON, *supra* note 1 at 48 (citing arguments by foreign appellate judges in support of this position); 114-116.

[51] See note 17, *supra*.

constitutional "fundamentals" to those constitutional practices common to a majority – or indeed even super-majority – of foreign constitutional systems.

In cases of purely substantive review, the existence of an inconsistency between an amendment and such transnational practices would then be a *necessary* condition for a decision by a court to invalidate a particular amendment. A court might still decline to invalidate an amendment where such pre-conditions existed. (A court might, for example, believe that a particular amendment was justified by relevant exigent circumstances, or likely to foster worthwhile forms of constitutional innovation. Alternatively, it might believe that adequate levels of "political review" of an amendment had already occurred in a multi-party democratic system, or conversely, that a decision to invalidate a particular amendment was simply likely to lead to even worse consequences for democracy, the independence of the judiciary and the rule of law.[52]) However, absent such a showing of transnational support, it would not have a legitimate basis for striking down an amendment.

In cases of hybrid review, because such review raises less pressing concerns about judicial discretion, the presumption of non-divergence could clearly be somewhat weaker.[53] A weaker presumption would also be justified, in such a context, by the fact that many constitutions give heightened protection against amendment to a range of specific, historically-contingent political compromises, as well as to more fundamental constitutional values and structures.

However, in both cases, such a presumption will impose at least *some* additional objective (or at least quasi-objective) constraint on the scope of a court's discretion to declare amendments unconstitutional, in a way that directly addresses potential rule of law concerns.

Consider a hypothetical case, such as 1990 German case described in part I, and the competing claims in this context of the rights of the fetus to life (a general right recognized by 71%, and specific right recognized by 7%, of constitutions in 1996) and of a woman to privacy (or development of personality/decisional autonomy) and equality (rights recognized by 94% and 95% of constitutions, respectively, in 1996).[54] If one were to treat all abortion laws worldwide as *plausibly* constitutional, or quasi-constitutional,[55] it is clear that in 1990 the GFCC would have faced enormous variation in national constitutional practices, even among those states that

[52] This might, for example, be a possible consequence of a decision to strike down certain politically freighted amendments in Pakistan (assuming the transnational preconditions for such a decision were met, which seems not to be the case).

[53] Given this, concerns about the need for adequate constitutional deliberation, or minority protection, in the process of constitutional amendment will also tend far more readily to outweigh the costs to democracy, or the rule of law, from courts striking down constitutional amendments.

[54] *See* David Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV (forthcoming 2011).

[55] One could define constitutional, or quasi-constitutional norms, in at least three ways in this context, as norms that are either (i) in some way entrenched or 'sticky'; (ii) important to limiting government power; regarded as fundamental or constitutive inn some broader sense. See e.g. Rosalind Dixon & Eric Posner, *The Limits of Constitutional Convergence*, CHI. J. INTL. L (forthcoming 2011); Rosalind Dixon & Tom Ginsburg, Introduction, *in* THE RESEARCH HANDBOOK, *supra* note 25

explicitly committed to the idea of human dignity (as evidenced, for example, by their ratification of various international human rights treaties[56]).

A survey of global abortion laws by the Guttmacher Institute in 1997, for example, showed three broad positions among countries in this area–none of which commanded even close to majority support. Fifty four countries, among the 152 Guttmacher surveyed, allowed abortion in extremely narrow circumstances, either to save a woman's life, or in a smaller number of cases, in the case of rape or incest. A different set of 54 countries permitted abortion in broad circumstances, either on demand during some period of pregnancy, or on socio-economic as well as health-based reasons. A third group of countries adopted an intermediate position, which allowed access to abortion on life and health-based grounds, where "health" was defined by roughly 22 countries to include mental health, and by 20 countries as restricted to physical health. Also, of these 152 countries, only three (i.e. Cambodia, Hungary and Poland) changed their law in a material way between 1991 and 1997.

Given this variation in global practices, only two plausible paths would have been open to the GFCC in such a hypothetical case: it could have found either that there was no clear relationship between the idea of respect for human dignity and the regulation of abortion, or that the idea of human dignity requires *some* form of restriction on access to abortion, though not any particular form of restriction.

In either case, the GFCC would have been limited to invalidating the relevant amendments on the narrowest of grounds – i.e. on the basis that they permitted access to abortion in the first trimester in the GDR without *any* form of legal restriction – where otherwise they would have been free to reassert their own much broader judgment in the *Abortion I Case* that respect for human dignity requires a particular form of legal restriction on access to abortion (i.e. some form of general criminalization).

This is not to say, of course, that transnational sources will always be correctly interpreted by courts,[57] or that there is no discretion involved in how courts choose to characterize foreign practices. Two important factors, however, serve to limit the potential problem of interpretive discretion this (re)introduces in the context of transnational anchoring: first, the degree of variation that exists in global constitutional practices; and second, the fact that it will generally be difficult for judges to show actual inconsistency between an amendment and global constitutional practices, if those practices are characterized at an overly high level of generality.

Take recent evidence provided by David Law and Mila Versteeg regarding the prevalence of various explicit constitutional rights protections in constitutions, post-World War

[56] See Office of the High Commissioner for Human Rights, CCPR General Comment No. 20 (1992), available online at: http://www.unhchr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5?Opendocument (Art 7 of the International Covenant on Civil and Political Rights prohibits state connect that is "cruel and inhuman", and this, according to the Committee, prohibits states party from any action which infringes "the *dignity* and the physical and mental integrity of the individual"); *Llantoy Huamán v. Peru* (1153/03) (Where carrying a fetus to term would involve significant physical or psychological harm to a woman, the Committee has further held, this will directly violate this guarantee of individual dignity and integrity in Art 7).

[57] See Jackson, *Unconstitutional Amendments*, *supra* note 2.

II: while constitutional similarity along this dimension has clearly increased over the last 60 years, by 2006, there were only 34 rights recognized by more than 50% of countries worldwide.[58] Many common constitutional rights are recognized by far smaller sub-set of countries, in a way that limits the potential for such rights to be included in the definition of a constitution's basic structure.

In most cases, attempts by courts to use abstraction as a technique for generating transnational consensus will also be self-limiting. Abstraction of this kind tends itself to undermine the chances of showing inconsistency between a given constitutional amendment and transnational constitutional principles. As a means of generating support for a decision to invalidate an amendment, it therefore also has clear disadvantages.

Take the hypothetical abortion case before the GFCC involving the GDR's abortion laws. Up to some point, adopting a more abstract approach to global constitutional principles would clearly have helped the GFCC identify support for a decision to invalidate the relevant amendments allowing such laws. Such an approach, however, would only have succeeded in justifying a quite narrow decision to invalidate the relevant amendments– i.e. a finding that *some* form of restriction on access to abortion was required, as part of a constitutional commitment to human dignity – and not any broader decision to invalidate the relevant amendments. Beyond this, any greater use of abstraction would also simply have served to undermine, rather than strengthen, the basis for invalidating the relevant amendments, because the mere existence of abstract right to life guarantees, or protections for human dignity, in foreign constitutional could not plausibly be cited as support for a decision finding that such rights require the protection of fetal life by means of the criminal law: the existence of such rights simply begs, rather than answers, this question.

B. Non-Divergence v. Other Approaches to the Transnational

For this kind of transnational anchoring to succeed in cabining discretion, a court must first be willing, however, to affirm a quite distinctive understanding of what it means to "engage" with the transnational.

It will not be enough, under an approach, for a court simply to affirm the need to give respectful consideration to a variety of foreign and international norms, as is the often case under existing understandings of transnational engagement.[59] Instead, it must commit itself to considering the *full* range of constitutional sources it is able to access, at least within the universe of constitutional democracies.[60] Depending on the context, it must also give some form of presumptive weight (i.e. either strong or weak presumptive force) to any clear majority or super-majority patterns that these sources reveal.

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[58] Law & Versteeg, *supra* note 54.

[59] *See* note 1, *supra*.

[60] For arguments about when and why it might be valid to adopt such a restriction, *see* Dixon, *Democratic Theory*, *supra* note 40; JACKSON, *supra* note 1 at 178-84.

At the same time, a non-divergence model will also differ in important respects from most versions of the convergence model identified by Professor Jackson.[61] For one thing, the focus of such a model is on horizontal constitutional practices at a quite concrete level, rather than on more vertical, abstract international human rights obligations.[62] For another, the reasons for adopting such a model will generally be purely domestic reasons, based on concerns about discretion and the rule of law at a national level, and not related to any broader commitment to advancing the cosmopolitan sphere, or international law *qua* international law.

The question a judge will ask in the context of such a model, therefore, will not be "how can I better promote consistency in global constitutional practices?", but rather "what if any consistent global constitutional patterns are there that may constrain me in my decision-making?"

Asking the former question inevitably involves making highly speculative, evaluative judgments about how constitutional change in one country affects change in another: striking down an amendment, for example, may help maintain the global *status quo*, but may also raise the salience of an issue elsewhere in a way that leads to opposite forms of constitutional change. As a result, it also tends directly to enhance, rather than limit, a judge's discretion to rely on her own personal judgments about the normative desirability of particular constitutional amendments. The second question, by contrast, invites a far more limited, backward-looking inquiry on the part of a judge, which if conducted properly, can provide an important potential "objective guidepost" in delineating the scope of her own individual interpretive discretion.

III. CONCLUSION: NON-DIVERGENCE, COMPARISON AND JUDICIAL DISCRETION (MORE GENERALLY)

Critics of comparative constitutional engagement in the U.S. often suggest that it is problematic both because it is incompatible with commitments to democracy, and because it is likely to expand judicial discretion in troubling ways.[63]

Judge Posner, for example, argues that because global constitutional sources are so numerous and diverse "[i]f foreign opinions are freely citable, any judge wanting a supporting citation has only to troll deeply enough in the world's copora juris to find it".[64] Chief Justice Roberts likewise suggests that a core problem with comparative engagement is that it "allows the judge to incorporate his or her own personal preferences [and] cloak them with the authority of

[61] A posture of non-divergence will clearly have some important similarities with the kind posture of "convergence" identified by Professor Jackson. Indeed, she explicitly notes in her book that certain versions of a convergence model may have some ability to "constrain [a judge's] discretion to a greater extent than if the standard were one of fair consideration": see JACKSON, *supra* note 1 at 48.

[62] This is one potential answer to the concern Professor Jackson expresses in the context of discussing the relationship between convergence models and ideas of judicial discretion that "there is considerable room for national discretion …and thus for indeterminacy" in the interpretation of many international law instruments: *see* JACKSON, *supra* note 1 at 48.

[63] Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32 (2005); Atkins v. Virginia, 536 U.S. 304, 347-48 (2002) (Scalia J., dissenting)

[64] *Id* at 86. *See* discussion in JACKSON, *supra* note 1 at 26.

precedent" in a way that clearly "expands the discretion of the judge" in the interpretation of the Constitution.[65]

Professor Jackson provides two important answers to this objection in *Constitutional Engagement in a Transnational Era.* First, she suggests, there is in fact no particular reason to think that foreign sources will necessarily be more diverse in scope or range than domestic legal sources, particularly in a complex, decentralized legal system such as the U.S.[66] In this way, she helps refine our understanding of the potential objection about discretion: it is surely most powerful if it relates to the potential for foreign sources to change the *balance* of legal arguments (or opinions) in favor of a particular justice's preferred position, rather than simply expand the range of plausible legal arguments in a case.[67]

Second, and even more important, she argues, if courts *engage* with transnational sources appropriately, there is no reason, why the citation of foreign law should lead to an increase in either judges' actual discretion or their perception of discretion.[68] In fact, as noted at the outset, it may actually help cabin inappropriate or unthinking uses of judicial discretion.[69]

Unfortunately, however, these answers do not seem to satisfy many who criticize the Supreme Court's recent use of transnational sources,[70] in part because many critics of comparison are not convinced that the Court is in fact practicing Professor Jackson-style engagement—i.e. actually just engaging with, rather than giving more definitive weight to, transnational constitutional practices.[71]

If this is true, focusing on the idea of non-divergence may also offer a useful additional answer to critics, because it suggests at least the *possibility* that the Court may be able to "count [foreign] heads" and still reduce, rather than increase, the scope of its interpretive discretion.[72]

Non-divergence was not, of course, the actual posture of the Court in cases such as *Roper v. Simmons*[73] and *Kennedy v. Louisiana.*[74] (In those cases, the Court was simply asking whether

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[65] *See* Transcript of Day Two of John Robert's Confirmation Hearing (Sept. 13, 2005), questioning from Senator Kyl, available at: http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301210.html. Other judicial critics of comparative engagement have also made similar arguments: *see e.g.*, Justice Scalia in his debate with Justice Breyer on the Constitutional Relevance of Foreign Court Decisions (debate held at American University Jan. 13, 2005, transcript available at: http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument) (suggesting that "what does the opinion of a wise Zimbabwe judge or a wise member of the House of Lords law committee, what does that have to do with what Americans believe, unless you really think it's been given to YOU to make this moral judgment, a very difficult moral judgment? And so in making it for yourself and for the whole country, you consult whatever authorities you want); Knight v. Florida, 528 U.S. 990, 990 (1999) (Thomas J, concurring from the denial of certiorari, suggesting that it would be "unnecessary" for particular justices to engage with transnational sources if there were in fact adequate support for their interpretation of the Constitution "in our own jurisprudence").

[66] JACKSON, *supra* note 1 at 26.

[67] *See e.g.*, *Roper v. Simmons*, 543 U.S. 551, 605 (2005) (O'Connor dissenting). *Compare also* Ernest A. Young, *Foreword - Comment: Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005).

[68] JACKSON, *supra* note 1 at 144.

[69] JACKSON, *supra* note 1 at 48 (citing arguments by foreign appellate judges in support of this position); 114-116.

[70] Posner, *supra* note 63; Scalia, *supra* note 63.

[71] Posner, *supra* note 63; Young, *supra* note 67. *See also* Dixon, *Democratic Theory*, *supra* note 40.

[72] *Compare* Young, *supra* note 67.

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

transnational sources helped establish a national consensus against the use of the death penalty for juvenile offenders, or for crimes less than murder.) It is, however, a posture one could imagine the Court taking in a future hypothetical case, where a state sought retreat from a prior national consensus recognized by the Court.

Such an approach has arguably been implicitly adopted in India by a majority of the Supreme Court in *Kesavananda Bharati v. The State of Kerala and Others,*[75] and in California, in modified form, by Justice Werdegar in her concurring judgment in *Horton*.

The Supreme Court of India in *Kesavananda* was asked to rule on the validity of 25th Amendment to the Indian Constitution, under which Parliament sought to provide that where the compulsory acquisition of property required Parliament to give to the owner of the property "an amount fixed by law", no law could "be called into question in any court on the ground that the amount so fixed or determined [was] not adequate or that the whole or any part of such amount [was] to be given otherwise than in cash".[76] Unlike the Court in the previous case of *I.C. Golaknath v. State of Punjab,*[77] the Court in *Kesavananda* rejected the idea that amendments could be found constitutional simply because they sought to alter definition of fundamental rights in the Constitution, as they had previously been interpreted by the Court itself. Instead, the Court held that amendments could be invalid only in cases where they sought to alter the "basic structure" of the Constitution, which a majority of the Court held, did not include any requirement that takings of property be accompanied by *full* market compensation.

The understanding the Court adopted in this context of what represented a "basic" form of constitutional protection for property rights directly accorded with prevailing global constitutional norms. If one examines data from the Comparative Constitutions Project, for example, it is clear that in 1967 an overwhelming majority of national constitutions permitted the taking of property to occur without the payment of full market compensation: out of 78 constitutions that explicitly protected the right to property (29 did not), 17 contained no explicit requirement governing the level of compensation; 48 required compensation to be "fair", "just", "appropriate" or "adequate", and only 6 required the payment of "full" market compensation.[78] A similar pattern also remains the case today.[79]

A similar, if more 'domesticated' version of this approach was also adopted by Justice Werdegar in her concurring judgment in *Horton.*[80] In upholding Proposition 8, in *Horton,* Justice Werdegar relied on what was clearly a form of extra-territorial anchoring: she suggested, first of all, that revisions were forms of amendment touching on "foundational principles of social organization in free societies";[81] and, second, gave content to that notion by looking (if only

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[74] 554 U.S. 407 (2008).
[75] AIR 1973 SC 1461
[76] *Id*. at par. 5 (2).
[77] 1967 AIR 1643.
[78] *See* Comparative Constitutions Project, available at: http://www.comparativeconstitutionsproject.org/. See appendix 1 on file with author.
[79] *See id* – appendix 2, on file with author.
[80] 207 P. 3ed 48 (Cal. 2009). *See also* discussion in *Recent Cases*, 123 HARV. L. REV. 1516 (2010).
[81] 207 P. 3d 48, 124 (Cal. 2009).

briefly) to the practices of other U.S. states.[82] A closer examination of both state-based constitutional practices elsewhere in the U.S., and also of foreign states, also confirms the correctness of this understanding, because whatever the position in regard to recognition short of marriage, for same-sex couples, marriage is clearly not widely recognized by other states as a constitutional requirement.[83]

Non-divergence is also a posture that both the Supreme Court and other constitutional courts could conceivably take in other contexts, such as when deciding whether a particular government interest counts as "rational" or legitimate.

In South Africa, for example, in considering whether prohibitions on prostitution were constitutional in *Jordan v. the State*,[84] Justices O'Regan and Sachs first noted that "open and democratic societies adopt a variety of different ways of responding to prostitution, including outright prohibition" and then held that this directly "support[ed] finding" that South Africa's prohibition had a rational basis. [85] They could thus be read to have endorsed the idea that state interests may only be deemed irrational by courts where those interests diverge from broadly shared global norms – or that courts should be tied to a norm of presumptive non-divergence from global norms in the context of deciding what counts as a "rational" government interest.

Of course, the mere fact that transnational anchoring of this kind has the *potential* to reduce problems of domestic interpretive discretion does not mean that, once they are shown such a model of engagement, critics of comparison will necessarily be persuaded that *all* forms of transnational engagement by courts are legitimate, or appropriate. (Nor, indeed, should they necessarily be persuaded that this is the case.[86])

The hope is simply that, by highlighting additional ways in which transnational engagement can be reconciled with concerns about judicial discretion, such a model will help persuade critics of comparison in the U.S. in particular that it is time to join the conversation on our – or rather, Vicki Jackson's – terms, namely: on terms where the central debate is about *when* and *how* to engage comparatively, rather than whether we should engage at all.[87]

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[82] *Id*. at 128 (suggesting that the right to marriage was not a foundational principle of a free society in part because it had only "recently and rarely [been] recognized in American constitutional law" and was disputed "both here and throughout the United States").

[83] *See* state by state chart detailing each state's approach to same-sex marriage and civil unions (on file with author. My thanks to Justine Fox-Young for compiling this data).

[84] CCT 31/01

[85] CCT 31/01 par 56.

[86] Dixon, *Democratic Theory*, *supra* note 40.

[87] *See e.g.*, JACKSON, *supra* note 1 at 161-196.

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