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I. INTRODUCTION

The modern constitutions of the United States and India, while constructed and forged in two distinct and very unique political and cultural settings, share one important common context—both countries drafted and adopted their respective political instruments after successful independence movements that secured political separation from the British "Raj." Adding one small wrinkle to the story, the American constitutional republic followed a brief (and unsuccessful) interlude of American confederation that highlighted the need for strong central government power in the form of a federal republic with a strong national government. Despite these common historical threads of colonial-revolutionary lineage, the Indian experience also differs in one critical respect—the formation of the Indian Constitution occurred in the context of the political chaos, fragmentation and disorder that resulted from the partition of the former British colony into Hindu India and Muslim Pakistan.[1]

In both of these former British colonies, the Supreme Courts developed doctrines of due process and jurisprudential traditions of activism that expanded

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1. For the definitive history of the framing of the Indian Constitution, *see* GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION (1966).

the scope of fundamental rights. The puzzle this Article seeks to explain is the emergence of due process jurisprudence in the Indian context in the late 1970s, despite the deliberate *omission* of a "due process" clause from Article 21 of the Indian Constitution by its framers, the Constituent Assembly. Various scholars consider the development of due process as a subset of the larger push toward more expansive interpretive approaches in the Indian Supreme Court.[2]

How did the Indian Supreme Court overcome the lack of a due process clause, a prolix Constitution designed to limit the power of the Court and a legacy of positivism and parliamentary sovereignty inherited from British rule to develop a doctrine of due process? As previous scholars have noted, the Constituent Assembly designed the Indian Court to be a relatively weak institution in a system in which the parliament and the executive were supreme,[3] and most justices of the Court in its early years operated in the British traditions of legal positivism and deference to Parliament.[4]

Leading scholarship on Indian law highlights the significant shift from a more formal, positivist interpretive approach to the Indian Constitution, exemplified by the Court's decision in *Gopalan v. State of Madras* (1950), to the more expansive approach adopted by the Indian Court in *Maneka Gandhi v. Union of India* (1978) in which the court adopted an activist approach to interpreting the fundamental rights and effectively created new doctrines of due process and nonarbitrariness.[5] What the literature highlighted as groundbreaking in *Maneka Gandhi* was the court's recognition of "an implied substantive component to the term "liberty" in Article 21 that provides broad protection of individual freedom against unreasonable or arbitrary curtailment."[6]

However, this Article analyzes how the Court's use of foreign precedent underwent a fundamental transformation in a line of cases preceding *Maneka*, which helps to account for the development of substantive due process in the

2. *See, e.g.*, UPENDRA BAXI, THE INDIAN SUPREME COURT AND POLITICS 122-23, 209 (1980); *see* S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS (2002).

3. *See* SATHE, *supra* note 2; Robert F. Moog, *Activism on the Indian Supreme Court*, 82 JUDICATURE 124, 125 (1988). Moog references Rajeev Dhavan, who observed that the Constituent Assembly, which framed the Constitution of India, wanted "an independent, but relatively harmless judiciary" that was subservient to parliament and the executive. Moog also cites to the Constituent Assembly debates, in which Prime Minister Jawarhalal Nehru argued that: "No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there it can point it out, but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately the whole Constitution is a creature of Parliament."

4. Burt Neuborne, *The Supreme Court of India*, 1 INT J CONSTITUTIONAL LAW 476, 480 (2003).

5. *See* Andhyarujina, *infra* note 7 and accompanying text; *see* Neuborne, *supra* note 4, at 480.

6. Neuborne, *supra* note 4, at 480.

specific area of preventive detention and personal liberty. Thus, the *Maneka Gandhi* decision cannot be understood as a sudden, synoptic change. Rather, I contend that the move toward substantive due process was a gradual one, in which universalist approaches gradually overcame particularist ones, through close analysis of a series of key decisions involving personal liberty: *Gopalan v. State of Madras* (1950), *Kharak Singh v. State of Punjab* (1964), *Govind v. State of Madhya Pradesh (1975)*, and *Maneka Gandhi v. Union of India* (1978).

This Article specifically examines how the Indian Supreme Court used U.S. and foreign precedent in its interpretation of the right to life and liberty contained in Article 21 of the Indian Constitution, examining the role of judicial borrowing in the Court's move toward more expansive, substantive interpretive approaches.[7] It then considers several explanatory factors that help shed light on this shift in the Court, including: an emphasis on "borrowing" of American and other foreign legal precedents and norms, institutional changes in the Court, and direct American influence in the development of Indian law, changes in the education, training and background of judges, and finally the changed political environment and context of the post-Emergency period (1977-1979) in India.

This Article proceeds as follows: Part II elaborates on the research puzzle in greater detail and then examines the historical context within which this puzzle emerged. Part III examines different strands of comparative constitutionalism and public law literature. Part IV analyzes a series of Indian cases in the area of personal liberty and preventive detention to develop a greater understanding of how processes of transnational "borrowing" of legal norms work and how borrowing interacts with judicial discourse and institutions to change legal norms. Part V further elaborates the incentive structure for judicial use of foreign precedent and suggests a theoretical framework for explaining the transformation in the use of borrowing in India.

II.
THE HISTORICAL CONTEXT: LIMITING THE SCOPE OF THE FUNDAMENTAL RIGHTS

The Indian Constitution balances the social-aspirational vision of the

7. This Article does not analyze the Court's jurisprudence involving the fundamental right to property contained in Article 31. During the original drafting of the Indian Constitution, the Congress Party-dominated Constituent Assembly of India decided not to provide due process protections related to the right to property, and deleted the term "just compensation" from Article 31 so as to make compensation issues nonjusticiable. This reflected the socialist Congress party's desire to enact redistributive land reform policies without judicial intervention. Notwithstanding the enactment of two amendments by Parliament to eliminate the justiciability of compensation, the Indian Court later ruled that compensation was justiciable and that such amounts could be reviewed in accordance with principles set forth by the Court. *See* T.R Andhyarujina, *The Evolution of Due Process of Law*, *in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA (B.N. Kirpal et al. eds., 2000).

framers, as set forth in the Directive Principles, against the Fundamental Rights, a set of negative rights or limits on government power.[8] The former articulates the "humanitarian socialist precepts. . ." at the heart ". . .of the Indian social revolution," though these principles were originally designated as nonjusticiable.[9] The Fundamental Rights, in contrast, set forth explicit, justiciable negative rights and was modeled in great part on the American Bill of Rights.[10]

In drafting the Indian Constitution, the Constituent Assembly established a Supreme Court with the power of judicial review, broad appellate jurisdiction over the state High Courts and original jurisdiction based on Article 32, which allows for direct suits in the Supreme Court to enforce the Fundamental Rights provisions[11] and empowers the Court to issue writs to enforce these rights.[12] But the Constituent Assembly also placed important limits on the Court's power in the area of property rights and personal liberty by not providing for a due process clause provision for either the property and compensation provisions (Article 31), or in the provisions for life and personal liberty (Article 21).

In addition, the Constituent Assembly appeared to subordinate key provisions within the fundamental rights to larger social goals of preserving order and morality. For example, Article 19, which provides for protections of the freedom of speech and expression, the right to assembly peaceably and without arms, the right to form associations or unions, and the right to move

8. This Article does not analyze the Court's jurisprudence involving the fundamental right to property contained in Article 31. During the original drafting of the Indian Constitution, the Congress Party-dominated Constituent Assembly of India decided not to provide due process protections related to the right to property, and deleted the term "just compensation" from Article 31 so as to make compensation issues nonjusticiable. This reflected the socialist Congress party's desire to enact redistributive land reform policies without judicial intervention. Notwithstanding the enactment of two amendments by Parliament to eliminate the justiciability of compensation, the Indian Court later ruled that compensation was justiciable and that such amounts could be reviewed in accordance with principles set forth by the Court. *See* State of West Bengal v. Bela Banerjee (1954) SCR 558; State of West Bengal v. Subodh Gopal A.I.R. 1954 S.C. 92; Dwarkadas Srinivas v. Sholapur Spinning & Weaving Co., A.I.R. 1954 SC. 119 (1954); see T.R Andhyarujina, *The Evolution of Due Process of Law, in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA (B.N. Kirpal et al. eds., 2000).

9. *See* AUSTIN, *supra* note 1, at 75.

10. *Id.* at 55.

11. *See* INDIA CONST. arts 13-31.

12. Article 32 of Indian Constitution provides, in relevant part:

> Remedies for enforcement of rights conferred by this Part.—(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
>
> (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari,* whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. INDIA CONST. art. 32.

freely throughout India, also contains "provisos" which allow the Government to restrict those rights. Thus Article 19(2), the proviso applying to the freedom of speech and expression, delineates that:

> (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

It is important to note here that the particular structure of Article 19 reflected the framers desire for a constitution modeled on the Irish, not the U.S. Constitution.[13]

Unlike the American system, which was predicated on horizontal separation of powers with separate coordinate legislative, executive and judicial branches, India's constitutional system was rooted in the traditions of British parliamentary sovereignty and legal positivism. Thus, the emergence of a strong Supreme Court challenging parliamentary legislation via substantive due process was unlikely given this traditional historical context. But aside from the historical legacy of British rule and legal positivism, two specific historical factors directly influenced the Constituent Assembly to explicitly omit a due process clause in the section on Fundamental Rights. The first was the influence of United States Supreme Court Justice Felix Frankfurter on Constitutional Adviser B.N. Rau, who traveled to Britain, Ireland, the United States and Canada in 1947 to meet with jurists regarding the drafting and framing of the Indian Constitution.[14] The second factor was the tumultuous and chaotic period of communal violence that gripped Northern India as a result of the partition of Muslim Pakistan from Hindu India, which led the framers of the Indian Constitution to remove the due process clause from their draft constitution for the protection of individual liberty.

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13. *See* AUSTIN, *supra* note 1, at 69. According to A.K. Ayyar, one of the key members of the Rights sub-committee, the Constituent Assembly was faced with a choice between the American approach, in which the scope of very general provisions for civil rights and liberties were effectively broadened or constricted by judges, or the "proviso" approach employed in the Irish Constitution and ultimately recommend in the Karachi Resolution, wherein rights would be defined and precisely limited, thus "compendiously seeking to incorporate the effects of the American decisions."

14. *Id.* at 103.

A. *Frankfurter's Legacy: The Evils of Substantive Economic Due Process*[15]

The Constituent Assembly of India originally included a due process clause in the Fundamental Rights provisions associated with preventive detention and individual liberty in the initial draft version adopted and published in October of 1947.[16] At this point, a majority of members of the Constituent Assembly favored inclusion of a due process clause, because it would provide procedural safeguards against detention of individuals without cause by the government. However, Rau had succeeded in qualifying the phrase liberty with the word "personal," effectively limiting the scope of this clause as applying to individual liberties, and not property rights.[17] After this draft version was published, Rau embarked upon a multi-nation trip to the United States, Canada, and Ireland to meet with jurists, constitutional scholars, and other statesmen. In the United States, Rau met with American Supreme Court Justice Felix Frankfurter, a student of Harvard Law professor James Bradley Thayer, whose writings about the pitfalls of due process as weakening the democratic process had already impressed Rau prior to the visit.[18] In his meeting with Rau, Frankfurter indicated that he believed that the power of judicial review implied in the due process clause was both undemocratic and burdensome to the judiciary, because it empowered judges to invalidate legislation enacted by democratic majorities.[19]

Frankfurter's opposition to inclusion of a due process clause in India reflected the opposition among New Deal liberals in the United States to substantive *economic* due process and the infusion of property rights into the Due Process Clause of the 14th Amendment.In fact, Justice Frankfurter and Judge Learned Hand argued that the United States Supreme Court should exercise judicial restraint and refrain from reading *both* economic and non-economic substantive individual rights into the due process clause. However, other liberal justices during the New Deal and Warren Court eras believed in

15. In the period between independence (1947) and 1956, the framers of the Constituent Assembly and early leaders of India's first constitutional government in 1950 effectively took the right to property out of the courts, putting it solely within the control of Parliament. While this Article focuses on Article 21 and due process as it relates to individual liberty (civil liberties), the framers and early government leaders also removed due process from the fundamental rights provisions for property contained in Article 31.

16. India formally and officially declared its independence from the British empire on August 15, 1947.

17. AUSTIN, *supra* note 1, at 103.

18. *Id.* Austin notes that in Rau's book CONSTITUTIONAL PRECEDENTS, Rau expressed that Thayer and other scholars had highlighted "the dangers of attempting to find in the Supreme Court—instead of in the lessons of experience—a safeguard against the mistakes of the representatives of the people." B.N. Rau, CONSTITUTIONAL PRECEDENTS 23, Third Series (1946). *See also* FELIX FRANKFURTER, FELIX FRANKFURTER REMINISCES 299-301 (1960).

19. *See* AUSTIN, *supra* note 1, at 103.

infusing substantive non-economic individual rights into due process. The Court gradually incorporated many rights through the "incorporation doctrine," through which the various rights contained in the Bill of Rights were read into the 14th Amendment. The United States Supreme Court developed what Robert McCloskey came to refer to as the "double standard" or the "preferred position doctrine" with respect to due process, favoring substantive due process in substantive individual rights, but not economic rights cases.[20]

Frankfurter's advice to Rau and his impact on the framing of the Indian Constitution and development of constitutional law in India represented a curious historical accident in comparative constitutional history. In advising Rau and the Constituent Assembly to eliminate a due process from the Constitution, Frankfurter effectively exported to post-Independence India ideas from an older jurisprudential debate in the United States regarding the problematic nature of substantive *economic* due process, in an era where Indian judges were attempting to broaden the scope of noneconomic individual rights.

Frankfurter had a lasting impression on Rau, who upon his return to India, became a forceful proponent for removing the due process clause, ultimately convincing the Drafting Committee to reconsider the language of draft Article 15 (now Article 21) in January 1948.[21] In these meetings Rau apparently was able to convince Ayyar, the crucial swing vote on the committee, of the potential pitfalls associated with substantive interpretation of due process, which Frankfurter had discussed extensively with Rau.[22] Ayyar, in ultimately upholding the new position on the floor of the Assembly in December 1948, supported removing the due process clause on the grounds that substantive due process could "impede social legislation."[23] With the switch in Ayyar's vote, the Drafting Committee endorsed Rau's new preferred language—replacing the due process clause with the phrase "according to the procedure established by law,"[24] which was apparently borrowed from the Japanese Constitution. Critics alleged, however, that the Japanese version had provided for separate guarantee of certain fundamental rights potentially endangered by the omission of a due

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20. Robert McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial, Supreme Court Review*, 1962 SUP. CT. REV. 34, 34-62 (1962).

21. Rau had also proposed an amendment to his version of the Draft Constitution "designed to secure that when a law is made by the State in the discharge of one of the fundamental duties imposed upon it by the Constitution and happens to conflict with one of the fundamental rights guaranteed to the individual, the former should prevail over the latter; in other words, the general right should prevail over the individual right." RAU, *supra* note 18, at 23.

22. AUSTIN, *supra* note 1, at 104.

23. *Id.* at 106 (citing to the proceedings of the Advisory Committee meeting of April 21, 1947).

24. *Id.* at 104-05. The new version of then Article 15 thus reads: "No person shall be deprived of his life or personal liberty except according to the procedure established by law." This version ultimately was adopted into the final version of the Constitution adopted by the Assembly, and became Article 21 in the Indian Constitution. *Id.*

process clause.[25] The new Article 15 was finally adopted on December 13, 1948, without a due process clause, precipitating a national outcry from political leaders, national and state bar associations, and significant opposition within the Assembly itself.

B. Preventive Detention, Communal Violence, and the Elimination of Due Process

Another significant factor that influenced Ayyar's change of position and the swing toward removing due process was the rise of communal violence and instability in North India that resulted from British partition into Hindu India and Muslim Pakistan. Opponents of due process thus believed that preventive detention policies, without constitutional guarantees for due process, provided the best check on the communal violence that was gripping India at that point, which had only further intensified following Gandhi's assassination on January 30, 1948.[26]

Preventive detention practices were a legacy of British colonial rule in India. The British had used preventive detention laws to detain potential saboteurs or insurgents, without trial and with minimal procedural safeguards. After the Constituent Assembly decided to eliminate due process from Article 15 (now Article 21) of the Constitution, outside pressure from groups including the Indian Law Review of Calcutta and the Calcutta Bar pressured Assembly members to amend Article 15 in an attempt to reinstate some minimal procedural safeguards for individual liberty in preventive detention cases.[27] The result of this pressure was the introduction of a new Article 15A by Ambedkar, which proposed to require that arrested persons be brought "before a magistrate within twenty-four hours of his arrest, informed of the nature of the accusation, and detained further only on the authority of the magistrate."[28] However, these provisions in Article 15A did not apply to detainees under preventive detention legislation passed by Parliament, which could effectively detain individuals for up to three months without any procedural safeguards; after three months, specific procedural safeguards had to be complied with to allow continued detention. These standards included the requirement that an Advisory Board

25. These rights included the right not to be detained except for adequate cause, the right to be immediately informed of charges underpinning detention, the right to counsel, the right to an immediate hearing in court, and the right to be secure against "entry, search, etc., except on a warrant." *See id.* at 105; 7 CONSTITUENT ASSEM. DEBS. 20, 844-45; KENPŌ, arts. 32, 34, 35.

26. AUSTIN, *supra* note 1, at 104.

27. *Id.* at 109. Amendments 52, 53, and 54 of Consolidated List of 5 May 1949; Orders of the Day, 5 May 1949, cited in AUSTIN, *supra* note 1, at 109. The amendments listed were introduced by Z.H. Lari, Mohammed Tahir, and T.D. Bhargava. The amendments proposed numerous safeguards, including prohibiting detention without adequate cause, as well as providing for the speedy and public trial of all detainees.

28. AUSTIN, *supra* note 1, at 109.

composed of judges find sufficient cause for continued detention.[29] Ultimately, however, the government succeeded in amending Article 15A to all but remove judicial interference with executive detention.

Thus, the removal of a due process clause was indicative of a larger orientation of the framers of the Indian constitution toward restricting substantive modes of judicial review to enforce limits on the Government's power, particularly in the area of preventive detention and property rights. The uniquely chaotic and fractious political and social context within which the members of the Constituent Assembly drafted the Indian Constitution had a lasting impact in the Indian Constitution's approach to balancing government power against individual rights. Indeed, the American Constitution fundamentally differs from the Indian in that the American Constitution is animated by and premised on a concern with placing limits on national power through horizontal and vertical separation of powers and the addition of a Bill of Rights. In contrast to this conception of "limited government," this paper contends that the historical realities of social upheaval and chaos had an indelible impact on the Indian Constitution's approach to balancing government power against individual rights—one that differed markedly from the American one in its rejection of the conception of a "limited government." Indeed, the Indian constitution in its final adopted form, lays out a "strong government" system modeled on the strong parliamentary model of the British system, combined with some elements of "limited government" embodied in the incorporation of a Fundamental Rights section comparable to the Bill of Rights in the U.S. However, the removal of a due process clause and other amendments greatly weakened the power of the Court early on, at least in its ability to challenge governmental actions involving fundamental rights.

C. The Fundamental Rights and Directive Principles

In order to contextualize the substantive due process puzzle, it is essential to set forth the textual and historical context within which substantive due process emerged, contained in the provisions for Fundamental Rights and Directive Principles that lie at the heart of the Indian Constitution. Essentially, the Indian Constitution includes both the social-aspirational vision of the Directive Principles, one of positive rights, against the Fundamental Rights, a set of negative rights or limits on government power. The former articulates the "humanitarian socialist precepts. . ." at the heart ". . .of the Indian social revolution."[30] The Fundamental Rights, in contrast, set forth explicit, justiciable negative rights, and was modeled in great part on the American Bill of Rights.[31]

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29. *Id.* at 110.
30. *Id.* at 75.
31. *Id.* at 55.

A demand for both positive rights and negative rights had been central to the impetus for founding the Indian National Congress (the "Congress party"), stemming from a desire among Indians for the same rights enjoyed by their British rulers.[32] The Congress party was comprised of the political leaders who had led India's independence movement from the British, and it remained the single dominant political party that controlled the Central Government of India until the late 1980s, when rival parties emerged as the Congress party grew weaker. A set of Indian pre-independence documents, which largely paralleled the American Declaration of Independence's demand for rights included: the Constitution of India Bill of 1895, the Commonwealth of India Bill of 1925, the Nehru Report of 1828, the Karachi Resolution of 1931, and the Sapru Report of 1945. The Constitution of India Bill set forth a "variety of rights including those of free speech, imprisonment only by competent authority, and of free state education."[33] In addition, "a series of Congress resolutions adopted between 1917 and 1919" called for civil rights and equal status with the British citizens.[34] The Commonwealth of India Bill of 1925, authored by Annie Besant, a freedom fighter and social reformer, set forth seven provisions for fundamental rights, stating that individual liberty, freedom of conscience, free expression of opinion, free assembly, and equality before the law were to be guaranteed.[35] Ultimately, the Fundamental Rights contained in the Indian Constitution were in large part derived from the third document in this series—the Fundamental Rights of the Nehru Report, a product of the Forty-Third Annual Session of the Indian National Congress prior to independence in 1928.[36] The Nehru Report's exposition of Fundamental Rights was based heavily on those "included in the American and post-war European constitutions" and drew explicitly on language contained in the aforementioned Commonwealth of India Bill.[37]

Interestingly, the Karachi Resolution, adopted by a session of Congress in March 1931, extended the sphere of rights from purely negative rights to an articulation of positive obligations to provide the masses "with the economic and social conditions in which their negative rights would have actual meaning."[38] The Congress thus adopted the "Resolution on Fundamental Rights and Economic and Social Change, which was both a declaration of rights and a humanitarian socialist manifesto."[39] The principles adopted here would

32. *Id.* at 52-53.

33. *Id.* at 53. *See also* THE CONSTITUTION OF INDIA, (1895): Shiva Rao, Select Documents, I.

34. AUSTIN, *supra note* 1, at 52-53.

35. *Id.* at 54.

36. *Id.*

37. *Id.* at 55.

38. *Id.* at 54-55.

39. *Id.* at 55.

eventually form the basis for the Directive Principles ultimately adopted by the Constituent Assembly. Finally, the last important document adopted before 1947 was the Sapru Report of 1945, which helped outline a set of fundamental rights that were mainly concerned with the problem of "placating minority fears." The report's key contribution to the evolution of rights jurisprudence was a fundamental distinction between "justiciable" and "nonjusticiable" rights.[40]

In contrast to the United States Constitution, however, the Indian Constitution was also shaped and influenced by a distinctly socialist ideology and worldview that had been championed by Nehru and other leaders of the Congress party. This ideology is reflected in the inclusion of the social-aspirational directive principles, the inclusion of limitations on the right to property contained in Article 31, and the removal of due process protections for the right of property.[41]

The attempt by the framers of the Indian Constitution to restrict the scope of Article 21 also reflected the legacy of British colonial rule in India, with its tradition of parliamentary sovereignty and the chaos and violence that engulfed India following the partition of the nation into India and Pakistan. In terms of constitutional limitations, then, the framers of the Indian Constitution removed due process from Article 21 in order to prevent judges from adopting more substantive approaches to due process that would allow for greater judicial intervention in Central government policymaking. In the landmark decision *Gopalan v. State of Madras* (1950), the Indian Supreme Court examined these constitutional and historical-contextualist limitations on due process in adopting a relatively formalist reading of the text of Article 21. *Gopalan* involved a challenge to the Preventive Detention Act of 1950 by a detainee who alleged that the Act violated his fundamental rights pursuant to Articles 13, 19, 21, and 22.The Court in *Gopalan* adopted a restrictive interpretation of Article 21 and the other fundamental rights based on the majority's analysis of original and historical intent.

III.
THEORETICAL PERSPECTIVES ON JUDICIAL BORROWING FROM COMPARATIVE CONSTITUTIONALISM

In terms of a theoretical framework, this Article examines the development of substantive due process in light of three main strands of literature in the area of comparative constitutionalism. First, this Article looks at the literature on the growing importance of transnational borrowing of legal norms and precedents. Second, this Article examines the literature on "strategic" contexts within which

40. *Id.* at 57-58.

41. *See supra* note 6.

courts operate. Finally, the Article considers institutional approaches toward understanding the development of substantive due process.

Public law scholars increasingly have focused greater attention on explaining the phenomenon of transnational "borrowing" of foreign precedents, especially in light of the recent borrowing trends beginning to surface in American law. Justice Anthony Kennedy's use of foreign precedents from the European Court of Human Rights in the majority opinion in *Lawrence v. Texas*[42], precipitated quite a fervent response not only from Justice Antonin Scalia in dissent, but from academic and legal scholars.[43] Kennedy's use of foreign precedent in *Lawrence* to support implying and extending the privacy right to encompass personal intimate relations for homosexuals, is particularly ironic in the context of this paper's research puzzle, given that it was the Indian courts who crafted a new substantive due process doctrine protecting privacy and liberty based largely on American precedents in the 1960s and 1970s. The ongoing debate over the proper use of foreign precedent in the United States even resurfaced recently during the Senate confirmation hearing of Justice Sonia Sotomayor, who outlined a cautious, yet flexible approach to the use of foreign precedent and law in her testimony. Sotomayor struck a delicate balance in suggesting that while foreign law cannot serve as binding precedent, it may offer comparative guidance to judges. Responding to a question from Senator John Cornyn, Sotomayor argued that "[f]oreign law cannot be used as a holding or a precedent, or to bind or to influence the outcome of a legal decision interpreting the constitution or American Law."[44] But later, the justice suggested that the consideration of foreign law as a comparative guide is acceptable, observing that "in my experience, when I've seen other judges cite to foreign law, they're not using it to drive the conclusion. They're using it just to point something out about a comparison between American and foreign law. But they're not using it in the sense of compelling a result."[45]

A. Universalist versus Particularist Conceptions of Constitutional Identity

In his article *The Permeability of Constitutional Borders*, Jacobsohn highlighted the fundamental theoretical tension between Justice Scalia and those who support his view of "legal particularism," and those advocates for judicial borrowing who favor "universalist" approaches, which seek to achieve "transcendent norms of constitutionalism."[46] Jacobsohn argued that the gap

42. 539 U.S. 558 (2003).

43. Jacobsohn, *infra* note 46, at 1767-1770.

44. Adam Liptak, *Analysis: Sotomayor on Foreign Law*, N.Y. TIMES, July 17, 2009, *available at* http://thecaucus.blogs.nytimes.com/2009/07/17/analysis-sotomayor-on-foreign-law.

45. *Id.*

46. Gary L. Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763 (2004).

between the aspirations of a society and the actual constitutional rules in place result in a "disharmonic jurisprudential context." Disharmony between these aspirational norms, and the status quo, creates incentives, opportunities, and costs for looking abroad for foreign precedents that may assist in closing this gap.[47] Jacobsohn observed that the Constituent Assembly forged a "disharmonic constitution" which sought to radically transform Indian society by ameliorating social, economic, and political inequality. Although he used "thick description" to examine borrowing in Indian cases dealing with religion and secularism, and the basic structure doctrine first espoused in the *Kesavananda* decision,[48] he did not examine the Court's use of borrowing in the context of substantive due process. It is in this area that this Article seeks to make a contribution to the literature by examining and analyzing how the Indian Court has used foreign precedent, especially American and British precedent and law to develop its substantive due process doctrine.

Jacobsohn also identified two main critiques of transnational borrowing of foreign precedents by judges: a "cultural" objection and a "juridical" objection. The cultural objection is based on the idea that use of foreign precedents and legal norms can undermine and interfere with indigenous political and cultural ideas, values, theories and norms that constitute a particular body politic.[49] The juridical objection relates to the role of judges and courts from a democratic theory perspective: these critics posit that justices use foreign precedents "in order to legitimate outcomes that would otherwise be defeated if confined to domestic sources."[50] These two types of objections nicely capture one of the main problems that legal particularists highlight—the "problem of translation," which refers to "the difficulty in assigning legal significance to critical terms and concepts whose meaning is culturally determined."[51]

Two additional critiques are worth noting here. First, critics of borrowing point to difficulties in transplanting a "discourse of rights" in new contexts. Jacobsohn cited the work of Mary Ann Glendon, who has written on the deleterious impact on the American body politic of an "impoverished" discourse of rights that tends to focus on overbroad interpretation and an absolutist vision of rights. According to Glendon, this works to harm and undermine communitarian aspirations by reconfiguring political discourse with an emphasis

47. *Id.* at 1767.

48. For discussion of the early development of the basic structure doctrine in India, *see* Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine*, *in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 110 (B.N. Kirpal et al. eds., 2000); *See also* SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE (2009).

49. Jacobsohn, *supra* note 46, at 1814.

50. *Id* at 1816.

51. *Id.* at 1810 n.222, citing Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, 14 CARDOZO L. REV. 865, 879 (1993).

on absolute individualism, at the expense of social, community, and group norms and values.[52]

A second additional critique that appears to flow out of the cultural and juridical objections is the idea that there is a "liberal bias" inherent in judicial borrowing. Scholars such as Robert Bork maintain that constitutional borrowing, at least in the United States, has become a prime strategy of the "liberal wing of Court."[53] Thus, Jacobsohn noted that critics (including Bork) argue that justices use foreign precedents to escape the constraints of both textualism and original intent.[54] Furthermore, Jacobsohn suggested that a broader theoretical implication of the "liberal bias" flows out of E.E. Schattschneider's work in American politics. Schattschneider wrote that, "the most important strategy of politics is concerned with the scope of conflict."[55] Thus, "all efforts to expand or contract the scope of conflict . . . have a bias attached to them, with socialization of conflict associated with liberal causes and with privatization as a defense of the status quo."[56] Jacobsohn's extension of Schattschneider's model to judicial borrowing suggests that borrowing has an anti-status quo bias, and is primarily used to upset the status quo.

This Article examines the transnational borrowing of foreign precedent that characterized the Indian Supreme Court's substantive due process jurisprudence between 1950 and 1978, focusing on how American legal precedents and norms seeped into Indian legal doctrine and discourse. It seeks to contextualize this discussion within the larger particularist-universalist tension identified by Jacobsohn, as well as the cultural and juridical objections raised by those concerned with borrowing.

B. A Third Way to Borrow? The Contextualist Approach

In navigating the pathway between both universalist and particularist theories or approaches, Jacobsohn counsels against the use of foreign legal precedents or sources by judges without proper and careful attention to the unique and particular national and cultural context in which they are being applied, warning against the "pitfalls of failing to situate the universal in the particular in the course of seeking guidance from abroad."[57]I refer to Jacobsohn's description of this ideal-type approach herein after as

52. Jacobsohn, *supra* note 46, citing MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

53. *Id.* at 1813 n. 232, citing Robert H. Bork, *Whose Constitution Is It Anyway?*, NAT'L REV., Dec. 8, 2003.

54. *Id.* at 1812-1813.

55. *Id.* at 1813, citing E.E. SCHATTSCHNEIDER, THE SEMI-SOVEREIGN PEOPLE (1960).

56. *Id.* at 1813.

57. *Id.* at 1768.

"contextualism"—the practice of situating universal legal norms as captured in foreign precedents within the particular context of a country's unique national identity, political context, and cultural condition.

In contrast to Jacobsohn's contextualist conception of judicial borrowing, Sujit Choudhry suggests a more protectionist alternative: a "middle range" conception between universalism and particularism, which he calls a "dialogical" approach. Choudhry argues that judicial actors examine foreign legal sources as a foil of sorts to help clarify their understanding of their own legal system.[58] In examining the Indian Supreme Court's encounter with foreign legal sources in landmark cases on privacy and preventive detention, I suggest that one finds shades of both contextualist and dialogical interpretive modes in the justices' written opinions.

This Article examines the transnational level of borrowing of "norms" that characterizes the Indian Supreme Court's substantive due process jurisprudence between 1950 and 1978, by focusing on how American legal precedents and norms seeped into Indian legal doctrine and discourse. It seeks to contextualize this discussion within the larger particularist-universalist tension identified by Jacobsohn, as well as the cultural and juridical objections raised by those concerned with borrowing. By examining the use of foreign legal sources in Indian substantive due process cases dealing with preventive detention and personal liberty, this paper seeks to apply Jacobsohn's idea of the "disharmonic jurisprudential context."[59] This Article thus seeks to make a contribution to the literature by building on the work of Jacobsohn through a study of the development of substantive due process in India, and by testing the applicability of Jacobsohn's theoretical framework through an empirical analysis of Indian Court's use of foreign legal sources. This Article thus attempts to build on the work of Jacobsohn and Choudhry in offering a dynamic explanatory approach that helps account for the evolution and change in the Supreme Court's use of foreign legal sources over time in its due process jurisprudence.

C. An Institutionalist Perspective: Judicial Receptiveness to the Use of Foreign Precedent

Writing a little over two decades ago about the Indian Supreme Court, legal scholar Mark Galanter was struck by the formalistic style of the Court, observing that Indian judges "expatiate on the inherent meaning of words; they elicit definitive answers from textual passages; they portray themselves as controlled by inexorable rules of procedure and precedent."[60] He went on to

58. Sujit Choudhry, *Globalization in Search of a Justification*, 74 IND.L.J. 819, 835-36 (1999).

59. Jacobsohn, *supra* note 46, at 1767.

60. MARC GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA 483 (1985).

note that for judges in the Indian system, "making choices is a matter of professional knowledge and skill rather than of personal values or political commitments."[61] Another scholar of the Indian court writing at about the same time, George Gadbois, critiqued Indian legal culture for its "procedural nitpicking," "hair splitting legalisms," excessive adherence to "literal interpretation" and its "concern for form, not policy or substance."[62] However, while both scholars' depictions were largely accurate in the time they were writing, they would not be entirely accurate in describing the modern court post-1978, given the substantive due process revolution in the Indian Supreme Court.

I argue here that the institutionalist approach can help explain changes in the Court's receptivity to using foreign precedent in judicial decisions, as well as the broader shift toward greater activism in fundamental rights cases. Institutionalist models of public law posit that institutions play a critical role in shaping both the development of the preferences of political actors, as well as in the "constitution of a normative order."[63] Judges' approaches to particular cases or controversies can thus be shaped by their experience on the court.[64] Furthermore, some "historical-institutionalist" scholars adopt an even broader conception of institutions, suggesting that institutions include not just the "formal rules and norms of rational choice institutionalism, but also cognitive structures, habits of thought, routines, and traditions of political discourse.[65]

Broadly speaking, this Article suggests a synthesis of these multiple theoretical approaches. Specifically, Jacobsohn suggested that the "disharmonic jurisprudential context" of a nation, that is the gap between societal aspirations and the actual or "real" rules and constitutional constraints that comprise the status quo, will help structure the "incentives, opportunities, and costs inhering in the practice of looking abroad for interpretive inspiration."[66] In addition, I argue in this Article that any theoretical analysis of the use of foreign precedent by judges in India must also account for institutional changes in legal education, training and the socialization of judges, as well as broader changes in the political system that may affect or shape judges' worldviews and perspectives. As illustrated in Part V, these factors can help account for a shift in the Court's use of foreign precedent in developing a due process jurisprudence.

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61. *Id.* at 484.

62. *Id.* at 484, citing George H. Gadbois Jr., *Indian Supreme Court Judges: A Portrait*, 3 LAW & SOC'Y REV. 317-336 (Nov. 1968-Feb. 1969).

63. Keith Whittington, *Once More Unto the Breach: PostBehaviorialist Approaches to Judicial Politics*, LAW & SOCIAL INQUIRY 601, 615 (2000).

64. *Id.* at 615.

65. THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS 30 (Howard Gilman & Cornell Clayton eds., 1999).

66. Jacobsohn, *supra* note 46, at 1767.

IV.
THE PATH FROM *GOPALAN* TO *MANEKA GANDHI*: FOREIGN PRECEDENT AND THE PATH TO DUE PROCESS

A. Gopalan v. State of Madras (1950)

Gopalan v. State of Madras was a significant decision because it represented the first case in which the Court meaningfully examined and interpreted key Fundamental Rights provisions of the Constitution, including Articles 19 and 21.[67] The key issue raised in *Gopalan*, through a petition for habeas corpus, was whether several provisions of the Preventive Detention Act of 1950, under which Gopalan was detained, violated his fundamental rights pursuant to Articles 13, 19, 21, and 22. In order to decide this issue the various judges in the majority of this early case each consider alternative interpretive approaches for determining the scope of the term "personal liberty" contained in Article 21, and whether the preventive detention statute impermissibly infringed on the petitioner's freedom of movement under Articles 19 and 21. Writing for the majority, Chief Justice Kania effectively restricted the scope of fundamental rights by reading the fundamental rights in isolation and separately from Article 21 (the "procedure established by law" provision), and Article 22, which provided guidelines for preventive detention.[68] Interestingly, the *Gopalan* decision was noteworthy for its use and consideration of foreign precedent, especially British and American cases, in ultimately concluding that Article 21 did not provide for an expansive source of fundamental rights through personal liberty.

An examination of the various opinions in *Gopalan* illustrates how the first justices of the Indian Supreme Court used foreign precedent as an interpretive tool in their respective analyses of original intent. For example, Chief Justice Kania compared the term "procedure established by law" in Article 21 to the due process clause contained in the 5th and 14th Amendments, to demonstrate the exceptionalism of the design of the Indian Constitution vis-à-vis its American counterpart:

> No extrinsic aid is needed to interpret the words of Article 21, which in my opinion, are not ambiguous. Normally read, and without thinking of other

67. Gopalan v. State of Madras, 1950 S.C.R. 88 (1950).

68. *See id.* I am aware that some Judges have expressed a strong dislike for the expression "natural justice" on the ground that it is too vague and elastic, but where there are well-known principles with no vagueness about them, which all systems of law have respected and recognized, they cannot be discarded merely because they are in the ultimate analysis found to be based on natural justice. That the expression "natural justice" is not unknown to our law is apparent from the fact that the Privy Council has in many criminal appeals from this country laid down that it shall exercise its power of interference with the course of criminal justice in this country when there has been a breach of principles of natural justice or departure from the requirements of justice.

> Constitutions, the expression "procedure established by law" must mean procedure prescribed by the law of the State.If the Indian Constitution wanted to preserve to every person the protection given by the due process clause of the American Constitution there was nothing to prevent the Assembly from adopting the phrase, or if they wanted to limit the same to procedure only, to adopt that expression with only the word "procedural" prefixed to "law."

Kania here relied on both an analysis of original intent and textualism to restrictively interpret Article 21. Furthermore, Kania in his opinion argued that the framers exclusion of the term "due process" in Article 21 was also aimed at preventing the courts from engaging in substantive due process analysis in determining the reasonableness of the level of process provided by the legislature:

> The word "due" in the expression "due process of law" in the American Constitution is interpreted to mean "just," according to the opinion of the Supreme Court of U.S.A. That word imparts jurisdiction to the Courts to pronounce what is "due" from otherwise, according to law. The deliberate omission of the word "due" from article 21 lends strength to the contention that the justiciable aspect of "law", i.e., to consider whether it is reasonable or not by the Court, does not form part of the Indian Constitution. The omission of the word "due",the limitation imposed by the word "procedure" and the insertion of the word "established" thus brings out more clearly the idea of legislative prescription in the expression used in article 21. By adopting the phrase "procedure established by law" the Constitution gave the legislature the final word to determine the law.[69]

Here, Kania uses both original intent and textual analysis to support a narrow view of Article 21, and the limited role of courts vis-à-vis Parliament envisioned by the framers who drafted that Article.[70]

Furthermore, Kania's opinion also examined the historical record, including the drafting of other constitutions for interpretative guidance. In examining the framing of the Indian Constitution, Kania references the framing of the Irish and Japanese Constitutions, to marshal evidence for the assertion that Article 21 was not intended to incorporate principles of natural law or justice, but rather was intended to have been construed in a much more limited fashion in accordance with British precedent. Specifically he observed that in an Irish decision, the Irish courts construed "due course of law" in a much more limited fashion.[71] Kania also noted that the term "procedure established by law" was derived directly from the Japanese constitution, which was framed by

69. *Gopalan*, *supra* note 67, at 108.

70. *Id.* In fact, Kania used decisions from Australia, England, and the U.S. as guidelines for proper use of original intent, invoking these precedents to support the idea that while it is improper to consider the opinions of individual members of the Constituent Assembly in the framing debates, limited use of such opinions is allowed to ascertain whether a particular phrase or provision was up for "consideration at all or not."

71. *Id.*

American jurists.[72] This connection suggests a caveat or corollary to Jacobsohn's analysis of borrowing —borrowing is not just used by those who seek to challenge the status quo on such issues as fundamental rights. Rather, both sides of an interpretive approach may use borrowing when there is a debate over an ambiguous area of law.

Justice Mukherjea's concurring opinion in *Gopalan* went beyond Chief Justice Kania's opinion in its recounting of the history of the development of substantive due process in England and in the United States. Murkherjea leveraged foreign precedent to support a restrictive reading of Article 21. First, he cited British scholars like Dicey (who is held out to be an expert on the subject of "personal liberty") who wrote that the term personal liberty specifically means "a personal right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification," and "not mere freedom to move to any part of the Indian territory."[73] Second, Mukherjea recognized a textual distinction in the phrase "personal liberty," arguing that the inclusion of the modifier "personal" suggests that the phrase specifically refers to "freedom from physical restraint of person by incarceration or otherwise."[74] According to Mukherjea, the term "personal liberty" must be read far more restrictively than the manner in which the United States Supreme Court interpreted the term "liberty" in the 5th and 14th Amendments to the United States Constitution.[75] Third, Mukherjea examined the Irish and City of Danzig Constitutions to support a non-structural reading of Articles 19 and Article 21.

In contrast to the majority, Justice Fazl Ali's dissenting opinion adopted a much more expansive interpretation of the phrase "procedure established by law" in Article 21. Whereas the majority read Articles 19, 21 and 22 as being separate, Justice Fazl Ali argued for a broad, structural reading of the Constitution whereby the fundamental rights contained in Article 19 are read in conjunction with Articles 21 and 22, which provide, respectively, for procedure established by law and for specific procedures for preventive detention. Additionally, Justice Fazl Ali's decision cited primarily to British and American, but also German (the city of Danzig) precedents to support a much broader reading of the term "personal liberty" in Article 21 of the Indian Constitution as encompassing the freedom to move and travel that is recognized in Article 19(1)(d):

> There is however no authoritative opinion available to support the view that this freedom is anything different from what is otherwise called personal liberty. The problem of construction in regard to this particular right in the Constitution of

72. *Id.* at 262.

73. *Id.*

74. *Id.*

75. *Id.*

> Danzig is the same as in our Constitution. Such being the general position, I am confirmed in my view that the juristic conception that personal liberty and freedom of movement connote the same thing is the correct and true conception, and the words used in article 19 (1) (d) must be construed according to this *universally accepted legal conception* (Italics added).[76]

Justice Fazl Ali's opinion thus endorsed a "universalistic" legal norm by marshalling various foreign precedents for support. In this respect, his dissent was far ahead of its time, since the majority of justices, both on this decision, and on the judiciary writ large, subscribed to a much more particularistic approach toward interpreting Article 21. The traditional view adhered closely to original and historical intent, and only used foreign precedent to support this very limited conception, both through comparing India to the Japanese constitution on which it was modeled, and to the American model which was very different.

In addition to recognizing a broad conception of personal liberty, Justice Fazl Ali's dissent broadly construed the provision "procedure established by law" in Article 21 to encompass higher principles of natural law and justice, and not just statutory law. While Justice Fazl Ali's opinion acknowledged that the framers of the Indian constitution intended to incorporate the same language as the Japanese Constitution (which was framed by Americans), and thus encompass more of a "procedural due process" conception, he still cited to American, British, and other foreign precedent to support a much more expansive view of due process.[77] This interpretation was based on Fazl Ali's reliance on principles of natural justice in interpreting Article 21. In his opinion, Fazl Ali highlights how in a series of U.S. decisions, the U.S. Supreme Court

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76. *Id.* at 151. Article 19(1)(d) recognizes the right to "move freely throughout the territory of India." However, Article 19(5) allows the State to impose "reasonable restrictions" on this right. *See infra* note 131. It is worth noting here that while Fazl Ali recognized that the right to freedom of movement in Article 19(1)(d) was a part of personal liberty, he went on to hold that laws (such as the Preventive Detention Act) infringing upon this right would have to be tested for reasonableness under Article 19(5), and not under the higher standard of scrutiny associated with substantive due process.

77. *Gopalan*, *supra* note 67, at 160-163. *See* EDWARD MCWHINNEY, SUPREME COURTS AND JUDICIAL LAW-MAKING: CONSTITUTIONAL TRIBUNALS 95-96 (1986). In terms of the development of due process doctrine in the Indian Supreme Court, a brief discussion about the distinction between procedural due process (which focuses on the adequacy of the level of process provided by the State to an individual) and substantive due process (which recognizes that certain substantive rights are also protected by due process and that laws that violate or infringe upon these rights must be held invalid) is necessary. Fazl Ali's conception of procedural due process in *Gopalan* should be distinguished from the conception of substantive due process embraced by the Court in the dissenting opinion in *Kharak Singh*, and the majority opinions in *Satwant Singh Sawnhey* (1967) and *Maneka Gandhi (*1978). In *Sawhney* and *Maneka Gandhi*, the Court effectively recognized that the term "liberty" in Article 21 had a substantive component through which certain substantive rights could be read into the provision. In addition, the Court in *Maneka Gandhi* went much further than *Sawhney* in creating a doctrine of "nonarbitrariness" based on an activist interpretation of Article 14, which allowed the Court to review all state laws and actions for their unreasonableness. *See* ANDHYARUJINA, *infra* note 135, at 32-34.

recognized that the word "law" does not exclude certain fundamental principles of justice "which inhere in every civilized system of law." Drawing on British and American legal sources, Fazl Ali argued for incorporating procedural due process into Article 21, guided by principles of natural law and justice, in accordance with universal, transnational legal norms.[78]

B. Kharak Singh v. State of Punjab (1964)

In *Kharak Singh v. State of Uttar Pradesh*,[79] the court considered the constitutionality of five provisions of an Uttar Pradesh State Regulation 236, which delineated procedures for nighttime "domiciliary visits" and police surveillance of a suspect's home. Writing for the majority, Justice Ayyangar held that the domiciliary visits provision violated Article 21 of the Indian Constitution, because, based on American case *Wolf v. Colorado*, "an unauthorised intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man—an ultimate essential of ordered liberty, if not of the very concept of civilization."[80]

While adopting a broad interpretation of liberty, the majority's holding seemed to be based on a procedural due process rationale: "cl. (b) of Regulation 236 is plainly violative of Art. 21' and as there is no 'law' on which the same could be justified it must be struck down as unconstitutional."[81] However, the four judge majority upheld the rest of Regulation 236's provisions, including those authorizing police surveillance of a suspect's home at night, on the ground that that there was no implied right of privacy in the constitution: "the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right."[82] The majority went on to note that when a fundamental right such as the right to free movement or personal liberty is implicated, "that only can constitute an infringement which is both direct as well as tangible and it could not be that under these freedoms the Constitution-makers intended to protect or protected mere personal sensitiveness."[83] Here, the majority adopted a restrictive conception of liberty that only extended to direct infringement of the freedom of movement, and refused to recognize the existence of a right to privacy. As a result, the Court only invalidated the domiciliary provision of Regulation 236, on the grounds that domiciliary visits constituted a direct infringement of liberty

78. *Gopalan*, *supra* note 67, at 160-163.

79. Kharak Singh v. State of Punjab, 1964 S.C.R. 332, 349.

80. *Id.* at 349.

81. *Id.*

82. *Id.* at 351.

83. *Id.* at 341.

in Article 21.

What is interesting in this case is the use of American substantive due process opinions or precedents in both the majority and dissenting opinions. Both opinions extracted language out of U.S. Supreme Court Justice Stephen Field's *dissenting* opinion[84] in the U.S. decision *Munn v. Illinois*, an early economic regulation of property rights decision, in which the majority actually upheld state regulation fixing the price of storage rates for grain elevators and requiring licensing for such facilities, on the ground that the property at issue "was affected with a public interest."[85] Justice Field's dissent in *Munn*, was one of the first decisions in American constitutional history to articulate a conception of substantive due process whereby courts must closely review legislation exercised pursuant to states' police powers where that legislation impinges upon a fundamental right such as the right to property.[86] While the majority in *Kharak Singh* relies on the *Munn* decision to support a broader conception of the term "personal liberty" than presented in the *Gopalan* decision, the majority follows the same understanding and construction of the term "procedure established by law" in Article 21 as did the majority in *Gopalan*. Both majorities refused to recognize that this provision means "due process" and requires notice, opportunity to be heard, a right to an impartial tribunal, and regularized procedures, in addition to allowing for consideration of principles of natural law and justice.[87]

Unlike the majority in *Singh*, Justice Subba Rao, joined by Justice Shah, argued that all of the provisions of Regulation 236, including those involving police surveillance, were unconstitutional as violative of Article 19(1)(d)[88] and Article 21. In his dissent, Subba Rao began with a substantive-due-process-based argument:

Therefore, the petitioner's fundamental right, if any, has to be judged on

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84. This highlights an interesting trend in the use of foreign precedent by the Indian Court. Based on the author's analysis of a large number of landmark decisions, both majority opinions and dissents of foreign jurisdictions can carry equal weight in the Indian court, as justices merely pull out arguments and language out of opinions to support their own, irrespective of the binding nature of the precedent in the U.S.

85. Munn v. Illinois, 94 U.S. 113 (1876).

86. Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 653 (1909); Howard Jay Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L.J. 851, 843 (1941).

87. *See* SHAILJA CHANDER, JUSTICE V.R. KRISHNA IYER ON FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES (1992).

88. Article 19 of the Indian Constitution stipulates that:

1) All citizens shall have the right -

(a) to freedom of speech and expression; (b) to assemble peaceably and without arms;

(c) to form associations or unions; (d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; [and] (g) to practice any profession, or to carry on any occupation, trade or business.

> the basis that there is no such law. To state it differently, what fundamental right of the petitioner has been infringed by the acts of the police? If he has any fundamental right which has been infringed by such acts, he would be entitled to a relief straight away, for the State could not justify it on the basis *of any law* made by the appropriate Legislature or the rules made thereunder.[89] (italics added)

Perhaps more noteworthy was Subba Rao's willingness to imply or infer a right of privacy out of personal liberty: "It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security." [90] He also noted that "[i]n the last resort, a person's house, where he lives with his family, is his 'castle': it is his rampart against encroachment on his personal liberty."[91] In further articulating a definition of liberty, Subba Rao cited to the same citation used by the majority from Field's dissent in *Munn*, in which Field defined the term "life" as

> Something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any organ of the body through which the soul communicates with the outer world.[92]

Additionally, Justice Subba Rao's dissent also made reference to two other decisions— *Wolf v. Colorado*,[93] a case dealing with the permissibility of using illegally seized evidence in state courts under the Fourth and Fourteenth Amendment, and *Bolling v. Sharpe*,[94] in which the U.S. Supreme Court ruled that segregating students by race in public schools in the District of Columbia constituted a denial of due process under the Fifth Amendment. The use of language from these opinions to support a particular understanding of the term "personal liberty" is quite different from traditional American use of precedent, given that in both cases, the particular language referenced by Subba Rao was either not central to the Court's decision itself[95] (as in *Wolf*), or used in a

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89. *Kharak Singh, supra* note 79, at 352.

90. *Id.* at 359.

91. *Id.*

92. *Id.* at 357 (Subba Rao, J., dissenting.). In later cases that followed *Maneka Gandhi*, the Court often used the *Munn* dissent citation from *Kharak Singh* to support substantive due process for privacy and autonomy (*see, e.g.,* Sunil Batra v. Delhi Administration, 1979 S.C.R. (1) 392 (1979)). This illustrates how American precedent, even dissents, can become embedded in Indian cases effectively becoming controlling precedent in a new context.

93. 338 U.S. 25 (1949).

94. Bolling v. Sharpe, 347 U.S. 497 (1954).

95. Justice Frankfurter made the argument cited by Subba Rao as a side-note in ruling that the propriety of such invasions are a different question from the issue of how to enforce such rights, including through exclusionary evidentiary rules Justice Frankfurter wrote in *Wolf*:

> The security of one's privacy against arbitrary intrusion by the police—which is at the

context that was completely different from the issue at hand in *Kharak Singh* (as in *Bolling*). Justice Subba Rao used Chief Justice Earl Warren's definition of the term "liberty" in *Bolling*, which "is not confined to mere freedom from bodily restraint. Liberty under the law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."[96]

Additionally, Subba Rao's dissent also located authority for substantive review of legislation in Article 19(2).[97] Subba Rao thus held that all parts of Regulation 236 are unconstitutional as they violate fundamental rights in Articles 19 and an expansive conception of liberty in Article 21:

> If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Art. 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures.

Subba Rao here observed that the term personal liberty must be interpreted broadly to encompass both direct and indirect infringements on personal freedom and privacy. By recognizing that privacy was a subset of liberty, Subba Rao's dissent marked a significant break from the majority's restrictive conception of liberty in Article 21, and from earlier precedent. Subba Rao's dissent thus helped to lay the foundation for the Court's decisions in *Satwant Singh Sawhney* (1967), and *Maneka Gandhi* (1978). In both decisions, the Court embraced and built on Subba Rao's activist approach in expanding the

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> core of the Fourth Amendment—is basic to a free society. It is therefore implicit in the concept of ordered liberty, and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and basic constitutional documents of English-speaking peoples.

One might go as far as arguing that these references are often in dicta in American cases. *Wolf*, 338 U.S. at 28.

96. *Bolling*, 347 U.S. at 500.

97. Article 19(2) stipulates that:

> Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Justice William Douglas observed that the "reasonableness" requirement in Article 19 conferred on Indian courts similar powers to the American courts in reviewing laws regulating property rights. *See* JUSTICE WILLIAM O. DOUGLAS, WE THE JUDGES: STUDIES IN AMERICAN AND INDIAN CONSTITUTIONAL LAW FROM MARSHALL TO MUKHERJEA 297 (1956).

scope of personal liberty in Article 21.

C. Satwant Singh Sawhney v. Union of India (1967)

Just three years after his dissent in the *Kharak Singh* decision, Chief Justice Subba Rao' dissenting position in *Kharak Singh* effectively became the majority opinion in *Satwant Singh Sawhney,* a case dealing with a decision by the Indian Government to withdraw passport and travel privileges from an import/export businessman. In impounding Sawhney's passport the Ministry of External Affairs alleged that Sawhney had violated conditions of the import license that had been granted to him by the Indian government, was under investigation for offences under the Export and Import Control Act, and was likely to flee India to avoid trial. Sawhney challenged the action on the grounds that it infringed upon his fundamental rights under both Article 21 and Article 14 of the Constitution. In a 3-2 decision, the majority (which included Chief Justice Subba Rao, Justice C.A. Vaidalingam, and Justice J.M. Shelat), invalidated the Government's withdrawal and impoundment of Sawhney's passport on the grounds that such actions violated both Articles 14 and 21.[98]

Chief Justice Subba Rao's majority opinion in *Sawhney* marked a turning point in the Court's use of foreign precedent in this area of law – for the first time, the Court was able to author a majority decision and binding precedent in the area of personal liberty that built and relied on foreign precedents dealing with substantive due process. Moreover, Chief Justice Subba Rao used a combination of American precedents, along with the opinions in *Kharak Singh*, to rule that the term "personal liberty" is as broad in India as the term "liberty" is in the 5th Amendment of the U.S. Constitution.

Subba Rao leveraged foreign precedent to support two key legal arguments. First, he invoked two U.S. Supreme Court decisions dealing with passports and the right to travel, *Kent v. Dulles*, 357 U.S. 116 (1958), and *Aptheker v. Secretary of State*, to support the proposition that "in America the right to travel is considered to be an integral part of personal liberty."[99] His decision also notes that the United States Supreme Court, in *Kent v. Dulles*, effectively affirmed "that the right to travel is a part of the liberty of which the citizen cannot be deprived without due process of law under the Fifth Amendment." Subba Rao also relied on an article in the Yale Law Journal to support this larger point of the right to travel as part of a conception of personal liberty, and cites to the Magna Carta, Blackstone's Common Law, and other British precedent to

98. Satwant Singh Sawhney v. Ramanathan, 3 S.C.R. 525 (1967). Subba Rao ruled that the Government's actions were arbitrary and therefore violated Article 14, which contains the right of equality and equal protection. According to Subba Rao, the right to equality in Article 14 was a corollary to the rule of law, which forbids arbitrary government actions. In many ways, this holding was an early precursor to the doctrine of nonarbitrariness that was created in *Maneka Gandhi*.

99. *Id.* at 540.

support the same claim.[100]

To drive home his point, Subba Rao relied on both the majority and dissenting opinions in *Kharak Singh* to demonstrate that the term liberty encompassed the same scope of rights in India as it did under the U.S. Constitution: "It is true that in Article 21 as contrasted with the 4th and 14th Amendments in the U.S., the word 'liberty' is qualified by the word 'personal' and therefore its content is narrower. But the qualifying adjective has been employed in order to avoid overlapping between those element or incidents of 'liberty' like freedom of speech or freedom of movement etc., already dealt within Article 19(1) and the 'liberty' guaranteed by Article 21. . ."

Subba Rao thus concluded that the Court's decision in *Kharak Singh*:

> . . .is a clear authority for the position that "liberty" in our Constitution bears the same comprehensive meaning as is given to the expression "liberty" by the 5th and 14th Amendments to the U.S. constitution and the expression "personal liberty" in Article 21 takes in the right of locomotion and to travel abroad, but the right to move throughout the territories of India is no covered by it inasmuch as its specially provided in Article 19.[101]

Chief Justice Subba Rao thus skillfully incorporated Justice Field's definitions of "life" and "liberty" into the stream of majority doctrine in *Satwant Singh Sawhney* by relying on his own dissenting opinion (albeit a dissenting one) as well as the majority opinion in the *Kharak Singh* decision, to affirm in *Satwant Singh Sawhney* that Article 21's provision for "personal liberty" is an expansive one that includes the right to travel abroad.

Writing in dissent, Justice M. Hidayatullah (joined by Justice R.S. Bachawat), voted to uphold the Government's impoundment of Sawhney's passport. Hidayatullah advanced a particularist argument that criticized Subba Rao's majority opinion for relying on American legal precedents, instead of Indian law, to establish a right of travel based on an expansive reading of the term liberty in Article 21. The dissent was also critical of the majority for treating Subba Rao's dissenting opinion in *Kharak Singh* as controlling precedent.

D. Govind v. State of Madhya Pradesh (1975)

In *Govind v. State of Madhya Pradesh*,[102] the Court considered the constitutionality of certain Madhya Pradesh Police Regulations, which provided for similar police surveillance and domiciliary visits as those at issue in *Kharak Singh*. Writing for a unanimous panel, Justice K.K. Mathew upheld the regulations and refused to read a fundamental right to privacy into the

100. *Id.* at 536-537.

101. *Id.* at 526.

102. Govind v. State of Madhya Pradesh, 3 S.C.R. 946 (1975).

constitution. Mathew's decision took account of the litany of substantive due process cases decided by the United States Supreme Court dealing with privacy and autonomy between 1965 and 1975. He analyzed such landmark decisions as *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a state law criminalizing the use of contraceptives was unconstitutional on the grounds that it interfered with the fundamental right of privacy of married couples) and *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a limited right to abortion is encompassed within an implied right of privacy, which must be balanced against competing state interests in protecting the life of the child).[103] Mathew's extraordinary opinion is novel not only in its description of how the American justices in these decisions inferred a right of privacy emanating out of the "penumbras" of various amendments in the Bill of Rights, but in its extensive citation to and use of American law review articles by Justice Brandeis and Charles Warren ("The Right to Privacy"), John Hart Ely ("The Wages of Crying Wolf: A Comment on Roe v. Wade"), and Milton R. Konvitz ("Privacy and the Law: A Philosophical Prelude"), among others.

However, after summarizing this literature and the development of an implied right to privacy in the United States, Mathew then argued that even if the fundamental rights in Article 19 and 21 may have "penumbras" which imply a fundamental right to privacy, this does not necessarily require holding that the police surveillance regulations at issue in *Govind* were unconstitutional, for several reasons. First, he held that "the right to privacy in any event will necessarily have to go through a process of case-by-case development," and that as a consequence, the right to privacy cannot be characterized as an absolute right.[104] Second, employing Article 8 of the European Convention on Human Rights, Mathew ruled that even if privacy is deemed to be an implied fundamental right flowing out of the penumbras within Article 19, "that fundamental right must be subject to restriction on the basis of compelling public interest" [105] and because the regulations at issue have "the force of law" there is no violation of Article 21 given that it stipulates that no person shall be deprived of life or personal liberty except by "procedure established by law."[106]

The *Govind* decision was thus problematic in that it recognized the idea of penumbras and implied fundamental rights, but then refused to accord those rights the same constitutional protection (and the corresponding level of scrutiny applied to regulations restricting the right).[107] In effect, the result was to apply

103. *Id.* at 951-955.

104. *Id.* at 954-55.

105. *Id.* at 956.

106. *Id.* at 955-56.

107. However, one could posit that *Govind* is actually consistent with Douglas's decision in *Griswold*. The penumbras of liberties and rights that Douglas refers to in *Griswold* are based on a structural-historical intent view of constitutional interpretation—that is, we look at the various

a lower level of scrutiny in which the presence of a regulation that serves some compelling public interest is constitutional even if it restricts a fundamental right. Thus, *Govind* applied the same restricted view of Article 19 and Article 21 as the *Kharak Singh* majority, and effectively rejected the development of substantive due process in privacy and autonomy cases in the U.S., adopting much more of native, particularist view of the law. However, one might also recognize that *Govind* indeed borrowed from the structuralist approach toward interpreting the Constitution from the US—but because of structural differences, the Court could not reach the same outcomes as Justice Douglas did in *Griswold.*

E. Maneka Gandhi v. Union of India (1978)

The post-Emergency era was a critical transition period in Indian politics. Prime Minister Indira Gandhi's declaration of Emergency rule in 1975 was a direct response to an Allahabad state court's conviction of Gandhi for election fraud, and to the ensuing national agitation by leaders in the political opposition calling for her ouster. During the Emergency, Gandhi imprisoned prominent political opponents using the Maintenance of Internal Security Act, and also restricted civil liberties and the freedom of press. Gandhi's Emergency regime sought to restrict the activities of the political opposition through the enactment of the Maintenance of Internal Security Act, and restricted fundamental rights and curbed the power of the Indian Supreme Court by enacting a series of constitutional amendments: the 38th, 39th, 40th, and 42nd amendments. The 42nd Amendment was arguably the most controversial of the four amendments. The amendment fortified Central government power by authorizing the government to dissolve state governments under certain conditions, and attacked judicial power, by barring judicial review of the 1971 elections (including Gandhi's), overturning the Court's landmark decision in *Kesavananda* by stripping the Court's power to review the validity of constitutional amendments, and requiring two-thirds majorities of Court benches to invalidate statutes. In addition, the amendment barred the Supreme Court from reviewing the validity of state laws (and state courts from reviewing the validity of central laws); stipulated that implementation of the Directive Principles would take precedence over enforcement of the Fundamental Rights; mandated seven-judge benches for cases dealing with constitutional issues; and stipulated that certain types of anti-national activities would not be protected by Article 19's provisions for free speech and expression.[108]

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amendments in the Bill of Rights to infer whether there are larger structural goals, such as protecting privacy, out of the penumbras of these rights. Similarly, it could argued that the justices decided *Govind* correctly and consistently with *Griswold*, given that it is much more difficult to infer such penumbras in the analogous provisions of the Indian Constitution.

108. *See* Neuborne, *supra* note 4, at 494-495.

In the election of 1977, the Congress Party was defeated for the first time in post-independence Indian history, by the Janata Party coalition. The mandate of the elections was a clear one: the Indian electorate had rejected the excesses of Indira Gandhi's Emergency regime.[109] The Janata Party coalition had campaigned on an agenda calling for the lifting of the Emergency and repeal of the draconian MISA; rescinding of the constitutional amendments enacted by the Emergency regime; and the restoration of democracy, fundamental freedoms, and constitutionalism.[110] During the Emergency, the Indian Supreme Court had acquiesced to the regime's suspension of democratic rule and fundamental rights, including the suspension of habeas corpus for detainees under the Maintenance of Internal Security Act,[111] and to the regime's attacks on the Court's jurisdiction and power. Moreover, the Supreme Court upheld the regime's suspension of habeas corpus and preventive detention regime in the *Shiv Kant Shukla* and *Bhanudas* decisions.[112]

Fundamental rights emerged as a salient issue in the post-Emergency era, as the Janata regime moved to restore democratic rule and judicial power by repealing the anti-democratic constitutional amendments passed by the Emergency regime. The Janata Party regime was a coalition of conservative "old guard" Congress (O) faction that had opposed Gandhi, the Hindu-right Jana Sangh party, the pro-business (and constitutionalist) Swatantra Party, the Samyukta Socialist Party (led by Jayaprakash Narayan), and the Bharitya Lok Dal.[113] This diverse coalition of parties came together with the express purpose of defeating Gandhi and ending the Emergency, and restoring constitutional democracy and fundamental rights.[114] By passing the 43rd and 44th Amendments, the Janata government repealed most of the provisions of the Emergency amendments.[115]

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109. *See* GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION, 391-94 (1999).

110. *Id.*

111. *See* A.D.M. Jabalpur v. Shivkant Shukla, A.I.R. 1976 S.C. 1207 (Supreme Court upheld Government's suspension of habeas corpus under MISA, and ruled that no individual had locus standing to file a writ petition under Article 226 [for habeas corpus or any other writ or order] to challenge the legality of an order of detention on the grounds of illegality or mala fides); *see also* Union of India v. Bhanudas, A.I.R. 1977 S.C. 1027 (Supreme Court ruled that it could not examine whether conditions of detention were in compliance with prison legislation and legal and constitutional requirements during a period of Emergency rule).

112. A.D.M. Jabalpur v. Shiv Kant Shukla [1976] A.I.R. S.C. 1207; Union of India et. al. v. Bhanudas Krishna Gawde et. al., [1977] A.I.R. 1027.

113. In a significant development, the Janata coalition also succeeded in gaining the support of the Communist Party of India (Marxist) (CPI-M) and other leftist parties in the 1977 campaign, which had been reluctant to join the Janata coalition of parties because of its ties to the Hindu right and conservative elements.

114. MADHU LIMAYE, JANATA PARTY EXPERIMENT: AN INSIDER ACCOUNT OF OPPOSITION POLITICS 216 (1994).

115. The one exception was the Janata regime's failure to repeal Sections 4 and 55 of the 42nd Amendment, a result of intense opposition in the Rajya Sabha (the upper house of the Parliament),

In addition, the Janata government launched investigations into alleged crimes and abuses of rights committed by the Emergency regime, and established special courts to prosecute offences committed by political officials under that regime.[116] The national media also began extensively covering abuses of human rights and repression of civil liberties in this period, in contrast to its coverage during the Emergency period, which had been heavily restricted by government censorship.[117] In this crucial period of political transition, the Janata regime faced a Court that had been entirely shaped by appointments under Indira Gandhi, from 1966 to 1977.[118] Unlike the Nehru regime, Gandhi's regime did not defer to the Chief Justice of India in appointment matters, or to the seniority convention that had previously determined selection of Chief Justices.[119] Instead, Gandhi's regime politicized the appointment process by selecting justices perceived to be committed to supporting the social-egalitarian and populist agenda of her government.[120] During this period, the Indian Supreme Court played a critical role in adjudicating key cases related to the Janata regime's efforts to restore constitutional rights and judicial power, and in that regime's efforts to investigate, prosecute and punish leaders of the Emergency regime.[121]

The Court launched a new activist approach to interpreting the fundamental rights in *Maneka Gandhi v. Union of India* (1978),[122] the first major decision of the Supreme Court involving personal liberty in the post-Emergency period.[123] In this case, Maneka Gandhi, the daughter-in-law of Indira Gandhi, challenged

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which remained under the control of the Congress party during the Janata interlude of 1977-1979. Ultimately, the Court itself invalidated these provisions in Minerva Mills v. Union of India, A.I.R. 1980 S.C. 1789.

116. *See* Baxi, *supra* note 2, at 122-123, 209.

117. *See* Upendra Baxi, *Taking Suffering Taking Suffering Seriously—Social Action Litigation in the Supreme Court of India*, *in* N. THIRUCHELVAM AND R. COOMARASWAMY, THE ROLE OF THE JUDICIARY IN PLURAL SOCIETIES 32 (1987).

118. In March 1977, the senior leadership of the Court was headed by Chief Justice M.H. Beg, and Justice Y.V. Chandrachud (appointed in 1972), Justice P.N. Bhagwati (1973) and Justice V.R. Krishna Iyer (1973), and Justice P.K. Goswami-all Gandhi appointees.

119. Although the Indian Constitution had established an appointment mechanism in which the Prime Minister and Cabinet had the primary responsibility for making appointments after consultation with the Chief Justice and other Supreme Court and high court judges, there was some ambiguity as to the exact role and influence of the Chief Justice and other judges and government officials in this process. As a result, under the Nehru Congress regime (1950-1966), the Government largely deferred to the Chief Justice in appointment of justices to the Court in light of existing conventions. See AUSTIN, *supra* note 1, at 125.

120. In an interview with Austin, Justice Reddy, a member of the *Kesavananda* majority, suggested that Gandhi started packing the Court in 1971 with the goal of overturning the Court's earlier pro-property rights decision in *Golak Nath*. *See* AUSTIN, *supra* note 1, at 269.

121. *See* Baxi, *supra* note 117; *see* AUSTIN, *supra* note 1, at 409-411.

122. (1978) 2 SCR 621.

123. *See* Baxi, *supra* note 2, at 151.

the seizure of her passport by the Janata Government under the Passports Act of 1967.[124] Gandhi challenged the seizure on the grounds that the action violated Articles 14 and 21 of the Constitution by not providing notice or a hearing prior to the impoundment of her passport. The External Ministry of the Janata Government had impounded Ms. Gandhi's passport, partly because the government feared Gandhi was planning to leave the country to avoid giving testimony to the ongoing investigation into alleged crimes committed by her husband Sanjay.

In doctrinal terms, the *Maneka Gandhi* decision was ground-breaking, in that a six judge majority (with one dissent) voted to broaden the scope of Article 21,[125] the right to equality in Article 14,[126] and the seven "fundamental freedoms" in Article 19.[127]

Maneka turned away from the more legalistic approach that held the field since the Court's decision in *Gopalan v. State of Madras* (1950).[128] Writing the lead majority opinion, Justice P.N. Bhagwati held that the Court should "expand the reach and ambit of the fundamental rights rather than to attenuate their meaning and content by a process of judicial construction."[129] The Court broke with the *Gopalan* approach in broadly interpreting the terms "life" and "personal liberty" in Articles 19[130] and 21, building on its earlier decisions in *Kharak*

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124. The Act had been reformed following an earlier challenge in *Sawhney v. Union of India* (1967), in which the Court held that the right to travel was a part of the "personal liberty" guaranteed under Article 21, and consequently that it could only be limited by a law that provided for adequate procedures under the law, and not under the exercise of unlimited executive discretion.

125. Article 21 provides as follows: Protection of Life and Personal Liberty--"No person shall be deprived of life or personal liberty except according to procedure established by law."

126. Article 14 reads as follows: "Equality before law.-The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

127. Article 19 (1) provides as follows:

Protection of certain rights regarding freedom of speech ,etc.—

(1) All citizens shall have the right –

(a) to freedom of speech and expression;

(b) to assembly peaceable and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

(f) *to acquire, hold, and dispose of private property* (repealed by 44th Amendment)

(g) to practice any profession, or to carry on any occupation, trade or business.

128. Six of the seven justices, including Justice Bhagwati, upheld the Passport Act and the government's order, in light of the government's willingness to provide Gandhi with a hearing. Justice Beg ruled that the Act and order should have been invalidated. Only Justice Kailasam dissented with respect to the Court's activist overruling of *Gopalan*.

129. Maneka Gandhi v. Union of India, (1978) 1 SCC 248, 670.

130. Article 19(1) provides as follows:

19. Protection of certain rights regarding freedom of speech, etc.—

Singh and *Satwant Singh Sawnhey*, in holding that the right to travel outside the country was part of personal liberty. Bhagwati argued that, "[t]he expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19."[131]

Second, the majority in *Maneka* read an expansive conception of due process into Article 21 of the Constitution (which the Court refused to do in *Gopalan*). The majority held that any procedures implicating the rights to life and liberty in Article 21 must be "right and just and fair and not arbitrary, fanciful or oppressive" to pass Article 21 scrutiny.[132] Bhagwati broke from earlier doctrine in holding that principles of natural justice must be read into Article 21 of the Constitution and require that a petitioner be afforded with reasons a hearing in passport revocation matters.[133] Invoking a familiar technique in Indian constitutional law, Bhagwati interpreted Section 10(c)(3) of the Act expansively to uphold it, and held that the Act implies just and fair procedures that comply with the dictates of natural justice. Third, the majority overturned *Gopalan* in ruling that laws that restrict personal liberty would have to pass scrutiny not only under Article 21's requirement of procedural due process, but also under Article 19 (personal freedoms), and Article 14 (nonarbitrariness). As a result, laws or regulations restricting personal liberty must also satisfy the "reasonableness" standard set forth in Article 19.[134]

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(1) All citizens shall have the right—

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and...

(g) to practice any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

(Clauses 3 through 6 are similar to clause 2 but apply to 19(1)(b-g)).

131. *Maneka Gandhi* at 670.

132. *Id.* at 673.

133. *Id.* at 680-681.

134. Article 19, after setting forth protections for various individual freedoms in 19(1), then introduces several limiting clauses allowing the state to limit each of those rights by imposing reasonable restrictions in clauses 2 through 6. For example, Article 19(3) states: Nothing in sub-clause (*b*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of

In adopting an expansive, structural approach to interpreting the Constitution, the Court effectively created a higher mode of judicial scrutiny, in the form of a new doctrine of nonarbitrariness, based on Article 14 and 21.[135] To support that approach, Bhagwati's leading opinion, building on his own concurring opinion in an earlier case, *E.P. Royappa v. Tamil Nadu* (1974),[136] developed an expansive view of equality in Article 14:[137]

> We must reiterate here what we pointed out in *E.P. Royappa v. State of Tamil Nadu* namely, that "from a positivistic point of view, equality is antithetical to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.[138]

In this passage, Justice Bhagwati masterfully conjured up a new source of judicial power—a new doctrine of nonarbitrariness that empowered the Court to scrutinize key aspects of governance and policy-making, and rein in government illegality.[139] In perhaps one of the most famous passages in Indian constitutional law, Bhagwati references Justice Holmes in articulating the doctrine of nonarbitrariness:

> The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a *brooding omnipresence* and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied.[140]

The Court's decision in *Maneka Gandhi* was groundbreaking in that it effectively incorporated a due process requirement into Article 21, and also held that the procedures contemplated by Article 21 must also satisfy the requirement

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India or public order, *reasonable restrictions* on the exercise of the right conferred by the said sub-clause (italics added).

135. *See* T.R. ANDHYARUJINA, JUDICIAL ACTIVISM AND CONSTITUTIONAL DEMOCRACY 30 (1992).

136. E.P. Royappa v. Tamil Nadu (1974) (dismissing writ petition of officer the Indian Administrative Services (IAS) challenging an order of transfer to lesser position as violative of Article 14, on the grounds that no mala fides could be established). Bhagwati's opinion in *Royappa* was a concurring opinion, which differed from the majority opinion in that it invoked the "new dimension" of Article 14, rather than the mala fides rationale relied upon by the majority.

137. Article 14 reads as follows:

> 14. Equality before law.—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

138. *Maneka Gandhi* at 283, citing E.P. Royappa v. State of Tamil Nadu, (1974) 4 S.C.C. 3 at 38-39. *See* ANDHYARUJINA, *supra* note 7, at 30-32 (arguing that arbitrariness is "not necessarily opposed to equality").

139. *See* ANDHYARUJINA, *supra* note 7, at 30.

140. *Id.*

of nonarbitrariness mandated under the Court's expansive interpretation of Article 14.

The majority opinions use of foreign precedent was noteworthy in that each articulated different approaches toward interpreting Article 21, including different methods for using foreign precedent. Justices Bhagwati and V.R. Krishna Iyer were more receptive to incorporating American precedent into their opinions, while Justice Chandrachud expresses some hesitation on this point, noting the crucial differences between the 5th and 14th Amendment in the United States, and Article 21 in the Indian Constitution. It is also worth noting that Bhagwati's majority opinion did not rely on the substantive due process precedents in the U.S. that established a fundamental right to privacy and expansive conception of liberty—namely *Griswold* and its progeny.

Justice P.N. Bhagwati's majority opinion is revolutionary to the extent it actually weaves together the particularist, indigenous conception of Indian law, with the universalist legal aspirations of foreign precedents and transnational norms.[141] The opinion begins by noting that the fundamental rights provisions in Part III of the constitution "represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to its fullest extent."[142] However, although Bhagwati used foreign precedent sparingly, he did hold that the Court should build on the more expansive conceptions of personal liberty offered in the majority and dissenting opinions from *Kharak Singh*, and that the Court should aim to "expand the reach and ambit of the fundamental rights rather than to attenuate their meaning and content by a process of judicial construction."[143]

Maneka Gandhi thus relied indirectly on American precedent in two critical respects. First, the court accepts the broad and expansive interpretation of personal liberty in Article 21 employed in *Kharak Singh*, which relied on Justice Field's broad definitions of life and liberty in the 5th Amendment, and in *Satwant Singh Sawnhey*, in which the Court relied on Field's *Munn* dissent, as incorporated in *Kharak Singh*, to find that Article 21 encompasses a right to travel abroad, and "consequently no person can be deprived of this right except according to procedure prescribe by law."[144] In fact, Bhagwati's decision explicitly recognizes that Subba Rao's approach to interpreting Article 21 in his *Kharak Singh* dissent is now controlling:

In Kharak Singh's case the majority of this Court held that 'personal liberty' is

141. It should be noted here that the decision relies on American decisions, including Kent v. Dulles, 375 U.S. 116 (1958), and Apthekar v. Sec. of State, 378 U.S. 500 (1964), in developing the argument that a fundamental right to travel exists in the Indian constitution.

142. *Maneka Gandhi* at 752.

143. *Id.* at 670.

144. *Id.* at 671.

> used in the Article as a compendious term to include within itself all varieties of rights which go to make up the personal liberties of man other than those dealt with in several clauses of Article19(1). The minority however took the view that the expression personal liberty is a comprehensive one and the right to move freely is an attribute of personal liberty. The minority observed that it was not right to exclude any attribute of personal liberty from the scope and ambit of Art. 21 on the ground that it was covered by Art. 19(1). . .The minority view was upheld as correct and it was pointed out that it would not be right to read the expression 'personal liberty' in Art. 21 in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt with in Art. 19(1).[145]

Second, Bhagwati's opinion relied on three U.S. Supreme Court decisions—*Kent v. Dulles, Aptheker v. United States,* and *Zemel v. Rusk*—to reject using a "penumbra" approach to reading in peripheral rights into Article 19. Although his opinion in *Maneka Gandhi* advanced a broad conception of personal liberty, Bhagwati was careful to note that the right to travel abroad was rooted in Article 21's provision for personal liberty and not through a structural reading of Article 19.[146] Bhagwati thus advanced a similar line of reasoning as Justice Mathew in the *Govind* decision, in rejecting a penumbra-based approach to individual rights. This last distinction is a critical one, as it demonstrates that the substantive basis of the right to travel in *Maneka Gandhi* has its genealogical roots in an earlier set of American precedents in the area of substantive due process—namely, Justice Field's broad conception of life and liberty in his dissenting opinion in *Munn*. The Court's approach here resembles the opinions of Justices Harlan and White in the *Griswold* decision.

Perhaps the greatest doctrinal leap in Bhagwati's opinion is the development of a new "nonarbitrariness" standard based on an activist reinterpretation of Article 14's guarantee of equality. As Bhagwati noted:

> We must reiterate here what was pointed out by the majority in *E.P. Royappa v. State of Tamil Nadu* . . . namely, that "from a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. When an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14. . . . The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14.[147]

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145. *Id.* at 669.

146. Bhagwati mainly relies upon a series of U.S. decisions, including Kent v. Dulles, 357 U.S. 116 (1958) and Aptheker v. Sec. of State, 378 U.S. 500 (1964) for the proposition that the right to travel cannot be read into Article 19 merely because it is a "peripheral" right to the core rights enumerated in Article 19(1)(a) or Article 19(1)(g) protecting the rights to freedom of expression.

147. *Maneka Gandhi* at 673.

Bhagwati in his earlier opinion in *Royappa* based this broadened interpretation of equality, and construction of a new doctrine of nonarbitrariness contained in Article 14, on the larger egalitarian ethos that animates the Indian Constitution, in addition to universalist notions of reasonableness and the rule of rule of law.

Justice V.R. Krishna Iyer's opinion arguably went the furthest in relying on foreign precedent and international legal norms, and was remarkable in its use of almost literary prose, citation and reference to eclectic sources.[148] Krishna Iyer also explicitly adopts an interpretive mode that takes account of foreign precedents and universal norms so as to bring Indian constitutional norms in line with universal, transcendent norms of constitutionalism, the rule of law, and protection of human rights. In his opinion, Iyer made reference to changes in "global awareness," and how the right to travel is a universally recognized one that is part of the personal liberty guaranteed in Article 21.

In contrast to Bhagwati's and Krishna Iyer's decision, Justice Chandrachud was more cautious in relying on foreign precedent—particularly U.S. Supreme Court decisions—in his concurring majority opinion. In responding to Bhagwati's opinion, Chandrachud observed that the lack of a due process clause in the Indian Constitution required that the Court adopt a more restrained approach:

> Brother Bhagwati has, on this aspect considered at length certain American decisions like *Kent v. Dulles, Aptheker v. Secretary of State, and Zemel v. Rusk* and illuminating though his analysis is, I am inclined to think that the presence of the due process clause in the Fifth and Fourteenth Amendments of the American Constitution makes significant difference to the approach of American judges to the definition and evaluation of constitutional guarantees. The content which has been meaningfully and imaginatively poured into "due process of law" may, in my view, constitute an important point of distinction between the American Constitution and ours which studiously avoided the use of that expression . . . Our Constitution too strides in its majesty but, may it be remembered, without the due process clause."

The Court's decision in *Maneka Gandhi v. Union of India* was a groundbreaking one in that it reversed the restricted view of the Gopalan majority of the terms "personal liberty" and "procedure established by law" in Article 21, in holding that the right to travel was part of the broad ambit of liberty, and that regulations restricting that right were subject to judicial scrutiny and invalidation where those regulations were held to be arbitrary and unreasonable.[149] The court overturned and invalidated regulations under the Passport Act of 1967, on the grounds that the seizure of petitioner's passport was arbitrary and unreasonable and infringed on her fundamental right of travel.

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148. The opinion weaves together the work of Plato in his Dialogues, Rudyard Kipling's poetry, the Magna Carta, excerpts from Chief Justice Earl Warren's biography, as well as excerpts from the European Convention on Human Rights and the Universal Declaration of Human Rights.

149. Neuborne, *supra* note 4, at 500.

Maneka Gandhi thus incorporated substantive due process into Article 21.

The majority opinions' use of borrowing are noteworthy in that they do not use the substantive due process precedents in the U.S. that established a fundamental right to privacy and expansive conception of liberty—namely *Griswold* and its progeny, nor do these opinions cite to *Munn*, *Lochner*, or any of the economic substantive due process cases dealing with "liberty" that were referenced in *Gopalan*, *Kharak Singh*, and *Govind*. Instead, the majority opinions focus mainly on foreign and Indian laws and regulations regarding the right to travel, and in rather unprecedented fashion weave together foreign precedents in this area with indigenous, Indian legal and historical precedents in this area. My analysis here focuses on the opinions of Justices P.N. Bhagwati, who penned the majority opinion in this case, and Justice V.R. Krishna Iyer.

Justice P.N. Bhagwati's majority opinion is revolutionary to the extent it actually weaves together the particularist, indigenous conception of Indian law, with the universalist legal aspirations of foreign precedents and transnational norms. Bhagwati's opinion begins by noting that the fundamental rights provisions in Part III of the constitution "represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to its fullest extent."[150] However, although Bhagwati uses foreign precedent sparingly, the opinion goes on to rule that the Court should build on the more expansive conceptions of personal liberty offered in the majority and dissenting opinions from *Kharak Singh*, and that the Court should aim to "expand the reach and ambit of the fundamental rights rather than to attenuate their meaning and content by a process of judicial construction."[151] The opinion thus implicitly relies on the use of foreign precedent in Subba Rao's dissent in *Kharak Singh*, which is ultimately validated in *Maneka Gandhi*. Additionally, Bhagwati contends that the personal liberty in Article 21 is not mutually exclusive of the rights in Article 19, and thus both should be read together in concert.[152]

In particular, Justice V.R. Krishna Iyer's opinion is remarkable and novel in its use of almost literary prose, citation and reference to eclectic sources,[153] and rich historical description. Krishna Iyer also explicitly supports an interpretive mode that takes account of foreign precedents and universal norms

150. *Maneka Gandhi* at 627.

151. *Id.* at 628.

152. *Id.* Bhagwati's opinion also builds on several cases, including the Bank Nationalization Case (R.C. Cooper v. Union of India, A.I.R. 1970 S.C. 564 (1970)), in which the court developed a test of "reasonableness" in scrutinizing regulations impinging upon fundamental rights.

153. The opinion weaves together the work of Plato in his Dialogues, Rudyard Kipling's poetry, the Magna Carta, excerpts from Chief Justice Earl Warren's biography, as well as referencing the European Convention on Human Rights, and the Universal Declaration Convention on Human Rights.

and seeks to bring Indian constitutional norms in line with the universal. His opinion refers to changes in "global awareness," and how the right to travel is a universally recognized one that is part of the personal liberty guaranteed in Article 21.

V.
UNDERSTANDING THE TRANSFORMATION IN THE USE OF FOREIGN PRECEDENT

The foregoing analysis of borrowing in Indian cases between 1950 and 1978 naturally yields two questions. First, how do we explain the transformation in the use of borrowing to support more expansive and substantive interpretive approaches in the area of personal liberty and preventive detention? Second, how does the Indian Supreme Court's use of borrowing help contribute to a larger understanding of borrowing by constitutional courts generally? In answering the first question, I consider several explanatory hypotheses for the "transformation" or change in the way foreign precedents were used by the Court to support expansive, substantive interpretive modes.

A. Americanization

One factor influencing the shift in the Court's increasing reliance on and greater receptivity to the use of U.S. precedents in the 1960s was the increasing influence of American law in India. A deep-seated and well-versed understanding of American law was imported in the 1950s and 1960s via the return of many Indian legal scholars, who had been educated at Harvard, Yale and a few other schools, to teach law at the prominent law colleges in India and "though a new burgeoning scholarship in legal academia which emphasized doctrinal and black letter law currents, emerged, its impact was limited and overshadowed by non-academic, practitioner-centered works."[154] In addition, the establishment of the Indian Law Institute (literally across the street from the Supreme Court), heavily funded by the Ford Foundation and other groups, was a critical development. The Institute was provided with the most extensive law library in the nation, and given copious funding to fund "new patterns of research" by its research staff; the Institute helped to advance American-style "black letter law in a much more respectable and systematic way."[155]

The result of these influences was that Indian judges gradually gained greater familiarity with U.S. legal doctrine in the 1960s. This is evidenced in the opinions of Chief Justice Subba Rao, who demonstrated a greater facility with U.S. doctrine than earlier justices of the Court. Supreme Court Advocate

154. Rajeev Dhavan, *Borrowed Ideas: On the Impact of American Scholarship on Indian Law*, 33 AM. J. COMP. L. 505, 514 (1985).

155. *Id.* at 518-519.

and Indian legal scholar Rajeev Dhavan suggested that Justice K. Subba Rao was one of the first Indian justices to use American precedent "imaginatively," noting that many citations in earlier decisions were used out of context: "American precedent rather than American legal doctrine was the relevant marketable commodity."[156] Thus, the shift toward greater reliance on U.S. foreign precedent in the Indian Court must be understood in the context of international borrowing from American law and American legal research methods, but also in light of the infusion of American legal "infrastructure" into India during this time period.

B. Universalism v. Particularism: The Legacy of British Colonial Rule

The *Gopalan* majority's rejection of British and U.S. precedents in the area of substantive due process may be properly understood as an early assertion of Indian particularism against the hegemony of British and American legal doctrine and ideals. But in many ways this particularist-universalist dichotomy was reflected of the complexity of the legacy of British colonial rule and legal institutions in India. Indeed, the *Gopalan* opinion was a critical decision that tested Indian justices, who had to negotiate between conflicting pressures and influences rooted in British traditions. On the one hand, the worldview of these justices was informed by a tradition of parliamentary supremacy in which courts were intended to play a relatively minor and subservient role, the tradition of positivist jurisprudence in England, and by the original intent of the framers of the Indian Constitution, who envisioned a Court that would not interfere with Parliament's power to enact policies that would effect a collectivist, socialist transformation.

At the same time, the justices on the *Gopalan* bench also served on high courts in the years leading up to independence and applied British common law doctrine that embraced principles of natural law and justice. Thus, Fazl Ali's acceptance of some variant of due process in *Gopalan* was based in part on a common law understanding of the term "natural justice" that predated independence in India.[157][158] Ultimately, Justice Subba Rao's groundbreaking decisions in *Kharak Singh* and *Satwant Singh Sawhney* marked a turning point in the Court's history, as Subba Rao steered the court toward the latter conception of British common law and doctrine. Like his predecessor Fazl Ali, Subba Rao employed both U.S. precedents, as well as British precedent and legal and constitutional history to support a broader, expansive understanding of liberty and due process. But Subba Rao's approach differed from Fazl Ali's in

156. *Id.* at 517.

157. *See* Gerald E. Beller, *Benevolent Illusions in a Developing Society: The Assertion of Supreme Court Authority in Democratic India*, 36 W. POL. Q. 513, 515-518 (1983).

158. *Gopalan, supra* note 67, at 89.

its reliance on 19th century American substantive due process opinions, such as *Munn v. Illinois*, to support a broader interpretation and understanding of the terms "life" and "liberty" in Article 21.

Finally, while Justice Bhagwati ultimately relied on Justice Subba Rao's dissent in *Kharak Singh* and majority opinion in *Satwant Singh Sawhney* in *Maneka Gandhi*, he also heavily relies on both a particularist conception of equality unique to the Indian Constitution's ethos, as well as universalist conceptions of reasonableness and the rule of law to construct a doctrine of "nonarbitrariness" in reviewing governmental actions to effectively replicate the concept of substantive due process. Bhagwati's opinion, then, reflects a careful balancing of both universalist and particularist norms. Indeed, Bhagwati goes so far as to *reject* U.S. precedents that suggest the use of penumbras in the interpretation of rights provisions.

C. *The Logic of Borrowing*

The Indian experience with judicial borrowing between 1950 and 1978, at least in the area of substantive due process and personal liberty/preventive detention, challenges the anti-status quo, liberal bias hypothesis suggested by the Schattschneider model (at least as extended by Jacobsohn into the realm of judicial borrowing).[159] Early on, justices in the majority opinions in *Gopalan* (and *Kharak Singh* to a lesser extent) cite to foreign precedents and scholarship, including American case law, to bolster and reinforce the particularist status quo, rejecting universalist norms of substantive due process and expansive "rights discourse." The early use of borrowing by Indian jurists suggests that in the initial stages of constitutional development, judges may be reluctant to use foreign precedents to bring in universal norms. In this sense, the early Indian jurists appeared to follow Glendon's approach which counseled and cautioned against destructive judicial "rights discourse," and suggested that foreign precedents can instead serve as a useful "foil" or mirror to help guide courts in understanding how to solve problems in a particularist context.[160] The early experience of Indian justices also supports Sujit Choudhry's conception of "dialogical interpretation," which refers to the use of "comparative jurisprudence [as] an important stimulus to self-reflection."[161]

The *Kharak Singh* and *Govind* decisions' use of precedent also suggests that the process of judicial borrowing can be a contentious one, and that the commitment to legal particularism may lead to often uneven and erratic use of foreign precedents and norms. The tussle between the *Kharak Singh* majority

159. Jacobsohn, *supra* note 46, at 1812-1813.

160. Jacobsohn, *supra* note 46, at 1811 (citing MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991)).

161. *Id.*

and Justice Subba Rao in dissent over the use of American precedents to support their competing particularist and universalist interpretations reflected broader tensions between formalist and emerging activist interpretive approaches to constitutional interpretation within the Court.Indeed, Justice Subba Rao was an early proponent of more expansive, "elastic" [162] interpretive approaches toward interpreting the constitution, in contrast to approaches that adhered more closely to original and historical intent.[163] The majority and dissenting opinions in *Kharak Singh* also used economic property rights decisions like *Munn* out of context. But once these precedents become embedded in case law, they can take on new life and meaning in a foreign context.[164]

The *Govind*'s decision's use of post-1965 American substantive due process cases in the area of individual privacy and autonomy, including *Griswold* and *Roe* is problematic and perhaps reflects Schauer's concerns about the problem of legal translation.[165] In particular, the Court's recognition of possible "penumbras" of rights, and then simultaneous rejection of a fundamental right to privacy and substantive due process, is particularly telling in the novel means by which the court asserts a particularist approach. The majority first argued that while there may be penumbras that imply rights such as privacy, these rights must go through a case-by-case process of adjudication before they can become "absolute" rights. This argument suggests that the

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162. This is particularly evident in the Court's jurisprudence in the area of affirmative action and reservations, and in decisions dealing with the determination of which groups should be considered part of the "Other Backward Classes" that were entitled to particular government preferences and reservations in employment and education. According to Subba Rao,

> ...backward class is more comprehensive than the backward caste or community...The expression 'class' is wider...in expression than 'caste' or 'community;' it takes in, in addition to 'caste,' other groups based on language, race, religion, occupation, location, poverty, sex, etc. Caste is also a class; ...The expression 'backward class' is an elastic and changing concept. It takes in not only the classes existing before the Constitution but also those formed after the Constitution.

Speech delivered by Chief Justice Subba Rao, Jurists Seminar on Backward Classes, 1 Government of Karnataka 66, 67 (1975).

163. The "historic" view was advocated by Justice Hegde. According to this view, the term "class" contained in Article 15(4) and Article 340 must "refer to the existing organized sections of the society, and not any new groupings of individuals" (Speech delivered by Justice Hegde at Jurists Seminar on Backward Classes, Bangalore, September 1973, reprinted in 1 Government of Karnataka 65 app. 8 (1975), cited in GALANTER, *supra* note 60, at 205). Thus, the historic view adopted a highly restrictive reading of the term "backward class" rejecting the idea that the state could construct new backward classes based on various newly adopted criteria. *See* GALANTER, *supra* note 60, at 206.

164. In *Sunil Batra*, a 1978 decision dealing with personal liberty and the constitutionality of the Prisons Act of 1894, the court applied Subba Rao's use of Justice Field's dissent in *Munn* to support an expansive conception of personal liberty under Article 21. *See* Sunil Batra v. Delhi Adm., 1978 A.I.R. 1675 (1978).

165. *See* Jacobsohn, *supra* note 46, at 1810, n.222.

American precedents cannot be incorporated because they uniquely evolved and developed over time in a unique doctrinal context, and that a similar process would have to take place in the soil of Indian legal culture to fully develop absolute rights. Additionally, the text and history of Article 21's "procedure established by law" limits the Court from applying substantive due process, according to the Court. The *Govind* majority's response to foreign precedent thus suggests a "defensive strategy" against foreign precedents that justices may use to retain particularism in constitutional interpretation, and one that appears to echo the approach outlined by Judge Sotomayor's toward the use of foreign precedent and law in her recent testimony before the Senate during her confirmation hearing.

D. Rehabilitating Legitimacy: An Institutionalist Account of Activism in Maneka

Previous scholarship has suggested that the Court's decision in *Maneka* must also be understood in terms of broader changes in the political climate, and institutional forces within the Court. Leading scholars Upendra Baxi and S.P. Sathe both suggested that the Court's activism in *Maneka* was part of the Court's attempt to atone for its earlier acquiescence to the Emergency regime in cases like *Shiv Kant Shukla*.[166] In *Shukla*, the Indian Supreme Court upheld the Gandhi Emergency regime's suspension of access to the courts by political detainees (through habeas petitions), and overturned the decisions of several high courts granting such access.

Baxi argued that the Court's activism in *Maneka* was part of the Court's attempt to atone for its earlier acquiescence to the Emergency regime in cases like *Shiv Kant Shukla*. In *Shukla*, the Court upheld the Emergency regime's suspension of access to the courts by political detainees (through habeas petitions), and overturned the decisions of several high courts granting such access. Commenting on the Court's activist decision in *Maneka*, Baxi observed that:

> The Court thus is able to demonstrate that it is as committed to the high constitutional values as those who formed the new government and as the people who voted them into power in the extraordinary Sixth General Elections. The motivation for such demonstration must have been especially strong for the three justices who participated in the *Shiv Kant* decision: there is thus a certain contextual poignancy concerning the opinions of Justices Beg, Chandrachud and Bhagwati. Any assessment of *Maneka* which ignores this would be flawed to this extent."[167]

Sathe (2001) also agreed with Baxi in observing that the Court's activism in *Maneka Gandhi* was driven by the Court's desire to "atone" for its acquiescence

166. Baxi, *supra* note 117, at 36; Sathe, *supra* note 2, at 41.

167. Baxi, *supra* note 2, at 153.

to the excesses of the Emergency regime and rehabilitate the Court's legitimacy.[168]

In a later article, Baxi reiterated this argument, noting that the Court's activism in *Maneka* and other decisions was driven both by a desire to restore and enhance institutional legitimacy, and to respond to the broader political shift that had taken place following the election of the Janata regime in 1977. According to Baxi, the Court's activism was

> [P]artly an attempt to refurbish the image of the Court tarnished by a few Emergency decisions and also an attempt to seek new, historical bases of legitimation of judicial power. Partly, too the Court was responding, like all other dominant agencies of governance to the post-Emergency euphoria at the return of liberal democracy.[169]

Baxi's assessment of the Court's activism in *Maneka* also suggests that the judges in the *Maneka* majority were attuned to the changed political context following the elections of 1977. As noted earlier, the Janata party coalition had campaigned on a platform of restoring democracy, constitutionalism and fundamental rights, by repealing the draconian MISA law, repealing the anti-democratic amendments enacted by Gandhi's emergency regime. The justices in *Maneka* sought to build popular support through a new rights-based activism that mirrored the political agenda and values of the Janata regime, and also reflected the national electoral mandate of the 1977 elections.

VI.
CONCLUSION: TOWARD A THEORY OF BORROWING? GENERALIZING FROM THE INDIAN CASE

The analysis of the foregoing cases offers some insights into constructing a general theory of borrowing, at least in new developing constitutional regimes that emerge in an international order with older, established, and more developed constitutional systems. Early on, justices in constitutional courts in these new systems may be reluctant to use foreign precedents and international legal norms to undermine the particularist status quo of the constitutional order by adopting universal norms. In fact, the Indian case suggests that justices may use foreign precedents and norms to do just the opposite—to bolster and reinforce a particularist conception, as seen in *Gopalan* (and in *Kharak Singh* and *Govind*, though both seem to acknowledge a slight shift toward universal norms).

Building on Jacobsohn's model of a disharmonic context structuring the incentives, opportunities, and costs for judicial borrowing, this Article suggests that transformation in the use of foreign precedents and norms (toward

168. Sathe, *supra* note 2, at 50.

169. Baxi, *supra* note 117, at 36.

supporting universal aspirations) must be understood both in terms of the internal development of the Court, institutional changes including the increasing influence of U.S. precedent and law, the evolution in normative discourse among judges regarding interpretive approaches, and changes in the broader "political opportunity structure" for judicial activism.[170] Thus, the use of judicial borrowing, in the development of substantive due process in personal liberty cases in India, can be understood as occurring various phases: an initial "reinforcement" phase, in which foreign precedent is largely used to support the particularist status quo, a "contention" phase in which proponents of universalist norms and defenders of particularist norms battle over interpretive approaches and use of foreign precedent to support their conflicting, competing views of the constitution, and finally a "transformational" phase in which justices who support the use of borrowing in support of more transcendent, universal norms ultimately begin dominating judicial course and court majorities.[171]

Ultimately, a confluence of both institutional and political forces helped precipitate a transformation in the use of borrowing in the Indian system. The end of the Indian emergency in 1977 brought with it the end of authoritarian rule and a return to a democratic constitutional order in which a new party—the Janata coalition—helped restore the primacy of the Indian Constitution and the Indian Judiciary. This helped create a political opening for the transformed use of borrowing to support a new and expansive doctrine of substantive due process—an opening that emerged both out of a desire on the part of the Court to restore its legitimacy that may have been damaged in the *Shiv Kant Shukla* case,[172] and from a change to a political regime that was intent on restoring the Court's power and the primacy of the Constitution.

While this political opportunity may have been a necessary precondition to the development of substantive due process, this Article contends that it was not a sufficient one. Rather, it also required the development of a body of earlier precedent based on foreign norms and precedents, a shift in the normative

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170. This concept implicitly builds on the work of political process theorists. *See* Doug McAdam et al., *Introduction: Opportunities, Mobilizing Structures, and Framing Processes – toward a Synthetic, Comparative Perspective on Social Movements*, *in* COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS 1, 1-20 (Doug McAdam, John D. McCarthy & Mayer N. Zald eds., 1996).

171. This proposed model for understanding borrowing is similar to Tom Ginsburg's delineation of strategic models of judicial review, according to which constitutional courts gradually expand power through cautious and strategic exercise of judicial review, moving from a low equilibrium to a high equilibrium of judicial review, in which a larger number of actors contest claims in a constitutional court, and in which the court's decisions are salient and obeyed. *See* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003).

172. *See* Neuborne, *supra* note 4; S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS (2002).

discourse of legal interpretation, as well as a new "mold" of justices that were more willing to rely on and use foreign precedent and international legal norms to advance "universalist" conceptions of rights in developing a doctrine of substantive due process in personal liberty and preventive detention cases.

The foregoing analysis also suggests that borrowing must be understood as a dynamic process that unfolds over time. While it may be difficult to use borrowing to challenge "particular" institutional norms given the preeminence of original and historical intent approaches initially, later on, the "opportunity structure" for borrowing to advance universal norms may open up, as the "push" for such universal norms develops and intensifies, and as changes in training, education, and socialization of judges alters the way judges view and rely on foreign precedent. In particular, the impetus for overturning *Gopalan* in *Maneka Gandhi* reflected the broader post-Emergency political sentiment of a country recovering from two years of authoritarian rule.

Still, *Maneka Gandhi* also reflected gradual change in justices' conceptions of foreign precedent and due process generally. The *Govind* decision demonstrated that the "soil" of judicial activism may need to be properly "seeded" with earlier case law incorporating foreign precedents, which over time which can help develop into a critical mass or catalyst for subsequent decisions to use in overturning particularist conceptions of the law in favor of universal ones. Thus, foreign norms may need to become "embedded" (as in the *Kharak Singh* decision) and accepted by judges initially before they can be used to overturn indigenous, particularist norms.

However, Justice Subba Rao's dissent in *Kharak Singh*, suggests that the move toward substantive interpretation of the Constitution, through the use of borrowing, began well *before* the Emergency Rule period. Rather than view the emergence of substantive due process as a synoptic response to the Emergency, I contend that it must be conceptualized as a gradual evolution that occurred over time—one in which institutional experience and knowledge developed on a case-by case basis through particularized encounters with foreign precedent. In any case, it is clear that the *Maneka Gandhi* decision and the Court's earlier due process decisions, at least in doctrinal terms, cannot be understood simply and solely as a reaction to the Emergency alone, but as a product of the Court's encounter and interaction with the intricate and complex nuances of conceptions of personal liberty, individual rights, and due process in an international context. Indeed, it is this long historical experience that helps to account for how the Court went beyond the formalist aspirations of the framers, who sought to limit the power of the judiciary and provide for parliamentary supremacy, to develop a substantive approach to interpreting the Constitution that has gone beyond anything that B.N. Rau and Justice Frankfurter could possibly have envisioned in modern India.