From Foreign Text to Local Meaning:

The Politics of Religious Exclusion in Transnational Constitutional Borrowing

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ABSTRACT

Constitutional drafters often look to foreign constitutional models, ideas, and texts for inspiration; many are explicit about their foreign borrowing. However, when implemented domestically, the meaning of borrowed elements often changes. Political scientists and scholars of comparative constitutional law have analyzed the transnational movement of constitutional ideas and norms, but the political processes through which the meaning of foreign provisions might be refashioned remain understudied. Socio-legal scholars have examined the "transplantation" and "translation" of laws and legal institutions, but they rarely scrutinize this process in the context of constitutions. Drawing on an examination of borrowed constitutional elements in four cases (Pakistan, Morocco, Egypt, Israel), this article builds on research in comparative politics, comparative constitutional law, and socio-legal studies to provide a nuanced picture of deliberate efforts to import "inclusive" constitutional provisions regarding religion-state relations while, at the same time, refashioning the *meaning* of those provisions in ways that "exclude" specific forms of religious, sectarian, doctrinal, or ideological diversity. Building on socio-legal studies regarding the translation of law, we argue that foreign constitutional elements embraced by politically embedded actors are often treated as "empty signifiers" with meanings that are deliberately transformed. Tracing the processes that lead political actors to engage foreign constitutional elements, even if they have no intention of transplanting their prior meaning, we highlight the need for detailed case studies to reveal both the international and the national dynamics that shape and re-shape the meaning of constitutions today.

KEYWORDS: constitutions, constitution-making, constitutional borrowing, constitutional identity, Pakistan, Morocco, Egypt, Israel

INTRODUCTION

Constitutional drafters frequently look to foreign constitutional models, ideas, and texts for inspiration; in fact they are often explicit about foreign transplants, publicly citing the external models that inspired them. As foreign constitutional elements travel, however, social scientists have paid relatively little attention to the domestic *political* dynamics that shape what comparative constitutional law experts call constitutional "borrowing."[1] With reference to non-constitutional elements, political scientists have developed useful resources for understanding the movement of legal and policy norms (Finnemore and Sikkink 1998; Dobbin, Simmons, and Garrett 2007; Goldbach, Brake, and Katzenstein 2013). Similarly, socio-legal scholars have examined the ways in which foreign laws and legal institutions interact with local cultures (Falk-Moore 1986; Lazarus-Black 1992; Comaroff 2006). The ways in which foreign *constitutional* provisions are imported and then *politically* refashioned, however, tend to remain understudied (for exceptions, see Skach 2005; Small 2005; Hirschl 2014).

Bridging the gap between comparative constitutional law, political science, and law-and-society scholarship, we focus on the politics of constitutional borrowing in the realm of religion-state relations. How do actors who participate in the formulation and interpretation of constitutional texts use foreign references to achieve their domestic political goals—specifically, their "religious" or "secular" nation- or state-building goals? And, then, having arrived in their new context, how do foreign constitutional references interact with domestic political conditions, changing their meaning as they travel?

Our contribution foregrounds the importance of exploring, from a socio-legal and political rather than a textual or normative perspective, how imported constitutional influences are transformed at the level of practical meaning. Focusing on one area of

constitutional concern (religion-state relations) to facilitate focused comparison while, at the same time, drawing on four cases (Pakistan, Morocco, Egypt, and Israel), we offer a case-centered account of constitutional borrowing and translation, paying close attention to the domestic political dynamics of constitutional *meaning* that scholars have tended to overlook. Our main argument is that broadly "inclusive" foreign constitutional references concerning religion (inclusive in the sense of recognizing the rights and liberties of diverse religious groups or ideological perspectives) are often embraced by politically embedded drafters who, at the same time, treat those references as "empty signifiers," that is, words with politically significant but profoundly unstable meanings (Laclau 1996). We point to cases in which political actors treat those imported references as empty signifiers in ways that allow their meaning to be domestically manipulated and *narrowed*.

This article examines the work of constitutional borrowers (i.e. importers) and interpreters (translators) to advance current socio-legal debates in at least four ways. First, by drawing attention to cases outside of Europe and North America, we expand the horizons of prevailing socio-legal research in the field of comparative constitutional law. We show that borrowing in non-Western cases is not a passive process whereby constitutional exporters take the lead in promoting global "best practice" through activist or expert transmission networks (de Lisle 1999; Hans 2017). On the contrary, the non-Western importers we study actively select or invoke foreign models to suit their domestic political goals, resorting to Western as well as non-Western sources of borrowing. In this sense, we demonstrate how non-Western countries themselves generate constitutional ideas, provisions, and models from which others borrow, even as subsequent patterns of constitutional meaning prioritize the demands of domestic politics over external pressures or global trends.

We also move beyond those who treat borrowing from Western models, particularly in the realm of religion-state relations, as a source of expanding rights (Grim and Finke 2011).

Instead, we show how patterns of borrowing are often bound up with forms of national or constitutional "identity formation" that *narrow* the meaning of imported elements in response to domestic political demands (Jacobsohn 2010).

Second, by stressing the substantive translation of foreign constitutional elements rather than mere textual transplantation, we sidestep two poles in the existing literature on "global constitutionalism." On the one hand, recalling Alan Watson's (1974) work on direct textual transplants, we do not stress growing textual isomorphism or convergence among formal constitutional provisions (in many cases, convergence around a global liberal "model") (see also Law 2008; Gardbaum 2013). At the same time, recalling a well-known response to Watson articulated by Pierre Legrand (1997, 2001), we do not highlight the essential "incommensurability" of specific constitutional traditions (insisting, for instance, that the meaning of a borrowed constitutional principle must unravel or disintegrate as it travels) (see also Berkowitz, Pistor, and Richard 2003; Osiatynski 2003; Arvind 2010; Goldsworthy 2002; Dixon and Posner 2010-11). Extending the work of socio-legal scholars like Ryken Grattet (Phillips and Grattet 2000; Grattet and Jenness 2005) and Lauren Edelman (1992; Edelman et al. 2011) as well as Toby Goldbach et al. (2013) to explicitly *constitutional* settings, we illuminate a less commonly studied middle part of this spectrum—one in which constitutional provisions (even beyond liberal rights) are embraced even as the meaning of those borrowed provisions is later politically reconfigured.[2]

Third, we contribute to the comparative politics literature on religion-state relations with specific reference to comparative studies of religion and constitutionalism. Many of these studies are large-N quantitative or statistical studies that focus on the cross-national textual transfer of constitutional provisions dealing with religion in order to illuminate the historical, political, or institutional conditions under which a given textual formulation may or may not be adopted (Fox and Flores 2008; Ahmed and Ginsburg 2014). This work is

valuable, but it often misses what we see as a key target of new research on the politics of constitutional migration, namely, the movement of substantive *ideas*. Coding the frequency of a textual reference to "secularism," for instance, may be less illuminating than specifying what the political actors who refer to "secularism" understand this important constitutional reference to mean—for example, in a secular United States, a secular France, or a secular Turkey, China, or India.

Lastly, we provide a substantive example of how qualitative research might complement our understanding of the trends revealed by "correlational" quantitative research on textual transfers. Specifically, we build on law-and-society scholarship in which a rich account of legal translation mechanisms shows how the meaning of imported legal elements is politically transformed within particular cases. In effect, we extend existing law-and-society research to the translation of *constitutional* provisions and, in doing so, we supplement the work of Ryken Grattet, Lauren Edelman, and Toby Goldbach et al. with that of Ernesto Laclau (1985)—specifically, Laclau's more explicitly *political* notion of "empty signifiers." This allows us to stress the deeply contextualized political mechanisms that re-make the meaning of migrating constitutional models focused on religion-state relations.[3]

After a brief account of our analytical framework, we trace four different patterns of constitutional borrowing rooted in "empty signifiers" and, thus, the political drivers that underpin shifting forms of constitutional meaning. These include (a) modifications of meaning associated with direct "textual" transfers (Pakistan), (b) the deliberate transmogrification of imported "institutional models" (Morocco), (c) the politically inflected reinterpretation of foreign models via explicit "invocation" (*without* any transfer of text) (Egypt), and (d) the deliberate re-reading of overarching legal models "inherited" from an imperial past before being actively assimilated (Israel). In each case study, relatively "inclusive" foreign constitutional provisions concerning religion-state relations are actively

embraced but, owing to majoritarian or authoritarian political pressures, they are also recast in explicitly "exclusionary" ways. We conclude with a discussion of how our four patterns of constitutional borrowing might be more broadly generalizable.

Analytical Framework I: From Text to Meaning

Comparative constitutional lawyers have long examined the travel of constitutional ideas across national borders,[4] and international relations scholars have also begun to study the diffusion of international constitutional norms (Skach 2005; Wiener 2014). However, much of this work has focused on the migration of ideas between judges and courts during moments of constitutional adjudication (Perju 2003, 2012). Emerging scholarship on the travel of constitutional models at the constitutional *drafting* stage has also tended to approach the issue from a strictly textual perspective, focusing on particular clauses that travel or the appearance of international-law provisions in domestic constitutional settings (Goderis and Versteeg 2014; Law 2016). We focus, by contrast, on politically inflected changes in the *meaning* of imported constitutional provisions both during and after their initial adoption.

As noted above, Alan Watson and Pierre Legrand disagreed about the ways in which laws travel, with Watson's focus on direct textual transplants being criticized in terms of what Legrand called the "cultural embeddedness" of law.[5] Legrand insisted that textual transfers typically "fail" owing to intersubjective breaks at the level of legal meaning. Watson and Legrand were interested in private rather than public or constitutional law. But, more recently, Toby Goldbach, Benjamin Brake, and Peter Katzenstein (2013) have noted that, while "public law is [considered] … more resistant [than private law] to being transplanted," constitutional law has nevertheless emerged as "one of the most important areas of public-law legal transplants" (146, 142n2). This observation, however, is buried deep in a footnote;

Goldbach et al. do not focus on constitutional law themselves (see also Langer 2004). Indeed, even when socio-legal scholars have shifted their focus beyond textual "transplantation" to consider the practice of legal "translation," they have rarely discussed the politically inflected translation of imported constitutional provisions.[6]

We address this gap by highlighting the ways in which transnational constitutional borrowing and translation are complex processes closely tied to local political considerations. In doing so, we move beyond the work of legal-diffusion scholars like David John Frank, Bayliss J. Camp, and Steven A. Boutcher (2010), noting that, as a consequence of these political considerations, the global diffusion of specific constitutional provisions is often *divorced* from any strong convergence of legal meaning or practice.[7] In fact we argue that domestic political actors often have clear motivations for invoking or importing foreign constitutional elements, even if they have no intention of faithfully transplanting the prior ("foreign") meaning of those provisions within their own political context (Scheppele 2003).[8]

In this sense, our work returns to that of socio-legal scholars like Ryken Grattet and Lauren Edelman, even though these scholars do not focus on constitutional law themselves (Edelman and Suchman 1997, 499; Grattet and Jenness 2005, 893). Edelman, for instance, examines patterns of employer compliance with American civil rights law, noting that employers rarely accept or reject such laws but instead creatively or discursively adjust them (Edelman et al. 2011). Grattet, similarly, examines how the meaning of a particular statute is often transformed via discretionary patterns of decision-making within whole "fields" of social, organizational, legal, and political action (Phillips and Grattet 2000; Grattet and Jenness 2005). In fact, with Maximo Langer (2004), both Edelman and Grattet show how the practical *meaning* of a legal text is closely tied to work undertaken by deeply contextualized legal "translators."

In the realm of comparative constitutional law, the question of borrowing is often

framed by references to global convergence or isomorphism—as demonstrated, for instance, in the "world polity" tradition or in Günter Frankenberg's "IKEA" theory of global constitutional isomorphism (Beck, Drori, and Meyer 2012; Frankenberg 2010; also Waters 2007; Law 2008; Gardbaum 2013). Frankenberg's model of constitutional migration, however, includes a middle stage of transfer in which constitutional concepts move from a particular local context to a global "IKEA center" before the (now "globalized") idea is adopted in its new location. By contrast, our study does not track patterns of global isomorphism at the level of directly transferable meanings. We highlight, instead, the power of local political dynamics in shaping conceptual transfers. In fact the question with which Frankenberg ends his essay (how do constitutional transfers of *meaning* happen?) is the question with which we begin.

In this context our work returns, once again, to pathbreaking law-and-society scholarship on the relationship between sub-constitutional legal texts and situated forms of legal meaning. Specifically, we show how forms of legal ambiguity growing out of what Ryken Grattet and Valerie Jenness (2005) call a "surplus" of legal meaning (where the same text lends itself to several different meanings all at once) interact with particular social, institutional, and political contexts such that ostensibly common textual elements map onto very different forms of legal practice. Grattet and Jenness confine their attention to domestic contexts in which a surplus of meaning allows ordinary civil and criminal laws to be actively and substantively re-interpreted. [9] We highlight the politics underpinnings of foreign constitutional provisions, focusing on the politically sensitive issue of religion-state relations.

Analytical Framework II: Introducing Empty Signifiers

Combining the work of socio-legal scholars like Edelman, Grattet, Jenness, and Langer

with that of Ernesto Laclau, we stress the ways in which borrowed constitutional provisions, models, and ideas are also translated to reflect the explicitly political concerns of those who borrow them. Specifically, we argue that those seeking to grasp the dynamics of constitutional meaning must appreciate the politically malleable gap that semioticians often illuminate, between a linguistic "signifier" and what it actually "signifies" (that is, between a given term and its meaning).

Social theorists like Ferdinand de Saussure (1959) and Claude Levi-Strauss (1963) have noted that the link between a particular text/word/sound, on the one hand, and its meaning, on the other, is deeply contextualized within a network of conceptual distinctions prevailing in a particular time and place. Highlighting forms of political contingency in particular, Laclau's (1996) notion of "empty signifiers" (alongside so-called "privileged" or "floating" signifiers) ties these insights to our own focus on the politically inflected meaning of borrowed constitutional provisions. Laclau's concepts, we argue, help us clarify the ways in which "politics matter" during episodes of constitutional borrowing.

In Laclau's theory, the meaning of a "privileged" signifier is relatively stable or, at least, widely regarded as stable. Liberal constitutionalists, for instance, often treat a term like "religion" as a privileged signifier when they assume that its meaning is broadly uncontested (thus overlooking the ways in which colonial or postcolonial regimes often struggle to locate the complexity of "customary" spiritual practices within the conceptual domain of "religion").[10] Those writing about global constitutional isomorphism often rely on similar assumptions regarding constitutional terms like "secularism". Across multiple contexts, they treat the meaning of such terms as plain.

Laclau's "floating" signifiers are terms that appear detached from the broader conceptual networks that might otherwise endow them with clear meanings: their conceptual location, and thus their meaning, are thus seen as irredeemably vague. Critical legal scholars

scrutinizing British colonial encounters with Hinduism, for instance, often describe references to "religion" in this context as a floating signifier given their profoundly unstable relationship with ancillary concepts like doctrine, clergy, or conscience.[11] Similarly, scholars writing about "constitutional incommensurability" often treat terms like "religion" or "secularism" as floating signifiers because their ambiguous meanings are thought to render the stable transplantation of such concepts difficult or even impossible.

In this article, we draw on the work of Ernesto Laclau to highlight an intermediate position, focusing on what he calls "empty" signifiers or terms whose meaning is neither stable nor irredeemably vague but rather politically contested (see also Gallie 1955-56). We pay special attention to the ways in which historically and politically situated agents, drawing attention to a particular term (say, "secularism"), wrestle with its multiple meanings and, then, actively press for one—for example, French laïcité rather than Indian equal treatment—as an explicitly *political* act. As Laclau (1996, 44) points out, highlighting the importance of interpretive agents in contexts framed, not merely by organizational discretion (Edelman; Grattet and Jenness) but also by explicit forms of political intervention during key historical junctures, the meaning of an empty signifier "only exists in the various forms in which it is actually realized," that is, the forms in which key political actors *produce* it.

In this sense, the meaning of the borrowed constitutional concepts we examine is neither stable nor untraceable. Meanings are, instead, deliberately *de*-contextualized and, then, actively *re*-contextualized through the deliberate interventions of domestic political actors. This is, in effect, what Maximo Langer (2004, 33) describes as the "translation" of legal ideas owing, in part, to a political struggle "between different actors and groups within the target legal system over the meaning of the translated [text]." We examine this process of translation or "re-signification" in four cases involving the borrowing of constitutional provisions concerning religion-state relations. We demonstrate how borrowed texts, clauses,

concepts, or models are intentionally emptied of their prior content ("de-contextualized") and, then, cast as "empty signifiers" before being filled up again by politically situated agents pressing for new forms of constitutional meaning ("re-contextualized").

Before proceeding, it is important to note that drafters may borrow a foreign model or text they actively contest, engaging in the forms of re-signification we associate with empty signifiers, but then still choose to "re-signify" the borrowed language, provision, or norm with forms of content that are left deliberately vague (to preserve the possibility of more than one interpretation later on). This process involves two overlapping strategies at once: the adoption of an empty signifier and, then, the embrace of an incremental approach to determining its re-signification in the future (Bâli and Lerner, 2017). Still, the empty signifiers we examine are never completely meaningless: their meanings are simply produced within a particular context, with evidence of this playing out in competing *assertions* of constitutional meaning (e.g. "inclusionary" vs. "exclusionary" religion-state relations) in a particular time and place.

Four Patterns of Borrowing, Empty Signifiers, and Religion-State Relations: Case Selection

In what follows we examine four different ways in which constitutional actors, having borrowed or invoked foreign provisions, go on to re-make the practical meaning of those provisions in particular contexts. Through selected cases, we highlight specific modes of politicized borrowing focused on religion-state relations.

In choosing our four cases, we sought to challenge a number of common assumptions about transnational constitutional borrowing in the context of religion-state relations. For example, it is common to expect patterns of transnational borrowing in territories formerly

governed by external powers to originate in the traditions or practices of former rulers (Britain vis-à-vis Pakistan and Egypt; France vis-à-vis Morocco and Egypt; the Ottoman Empire vis-à-vis Israel and Egypt; and so on). The cases we have selected, however, reframe this conventional expectation. In Pakistan, for instance, we provide an account of borrowing rooted not in the constitutional traditions of Britain but rather in global networks of anti-British ("home-rule") activism extending from Ireland to India. As such, our cases partially decolonize the study of constitutions and the practice of constitutional borrowing, reaching beyond the colonial and postcolonial frameworks underpinning numerous studies of socio-legal translation to include colonial *and* non-colonial (here, non-Western) sources of constitutional borrowing.

Beyond borrowed texts, it is also common to expect deliberate borrowing from secular republics (e.g. India, France, Turkey) or famously pluralist regimes like the post-Tanzimat Ottoman Empire—itself influenced by post-Enlightenment models borrowed from Europe—to facilitate constitutional orders supporting and legitimating religious, sectarian, doctrinal, or ideological "inclusion." But again, our cases have been chosen to challenge this common assumption. In each case, politically charged translations of constitutional elements from India (in Pakistan), from France (in Morocco), from Turkey (in Egypt), and from the Ottoman Empire (in Israel) push in the opposite direction. Rooted in political processes combining religious pluralism with domestic struggles to frame an independent constitutional identity, constitutional borrowing from secular contexts in these cases facilitated the "exclusion" of religious others.

This exclusionary trend might be expected to vary across different regime types, with civilian-democratic regimes adopting a more "inclusive" approach than military regimes, authoritarian regimes, or monarchies. Yet, again, our cases refute this assumption. In what follows, an "exclusionary" reading of imported constitutional provisions concerning religion-

state relations cannot be traced to any particular regime type: the same exclusionary reading emerges in all four cases. In Pakistan and Israel, constitutional borrowing overlaps with popular bottom-up translations that feed exclusionary forms of majoritarian religious nationalism (Pakistani "Muslim" nationalism excluding a heterodox religious group known as the Ahmadiyya; Israeli "Jewish" nationalism marginalizing non-Jews and non-Orthodox Jews). In monarchical Morocco and authoritarian Egypt, the same exclusionary outcome emerges via top-down forms of authoritarian state-formation (Morocco's Muslim king borrows from secular France whilst restricting electoral democracy; Egypt's secular military references a "Turkish" constitutional model prevailing under Turkey's Islamist Justice and Development Party [AKP] whilst constraining the electoral prospects of Egypt's Muslim Brotherhood).

In what follows, the case of Egyptian borrowing vis-à-vis "the Turkish model" also shows how what we call foreign "borrowing" (combining references to foreign constitutional elements with domestic political debates that alter the *meaning* of those elements) is not confined to a narrow account of direct textual transfers. Like the rejected ("negative") constitutional models studied by Kim Scheppele (2003), we argue that cases of foreign invocation *without* any transfer of constitutional text *also* illuminate an important feature of transnatioal constitutional borrowing (see also Salam 2018, 3).[12] Egypt's public debate regarding religion-state relations, for instance, was repeatedly marked by rival invocations of the Turkish "model," often by actors who selected very different aspects of that model to signal the (domestic) legitimacy of their own opposing political positions. The fact that Egyptian drafters later opted to *avoid* any direct textual transfers from Turkey does *not* diminish the power of the Turkish model as a borrowed constitutional "empty signifier." On the contrary, the Turkish model was in fact borrowed and politically re-signified in ways that directly shaped the meaning of religion-state relations in Egypt's constitutional debates.

The four patterns of constitutional transfer and re-signification illustrated by our case studies can be summarized, briefly, as follows.

Direct Textual Transfers. The first mode of borrowing refers to explicit and acknowledged textual transfers involving substantive religion-state provisions that travel from one country to another. In what follows we track provisions concerning religious freedom from Ireland, via India, to Pakistan. Owing to particular political demands in Pakistan, however, these provisions later changed their meaning from a concern for individual rights (including minority rights) to a much narrower focus on protecting the rights of majoritarian doctrinal groups. We focus on Pakistan but, in a comparative sense, this mode of borrowing followed by politically exclusionary re-signification can also be found, with reference to religious-freedom provisions, in Malaysia. Like Pakistan, Malaysia borrowed key elements of its constitutional religious-freedom provisions from India before *reinterpreting* those provisions to privilege the country's Muslim majority (Moustafa 2018; Nelson 2019).

Imported Institutional Models. Our second mode of borrowing considers the deliberate transfer and politically situated reinterpretation of broad institutional forms or models. In this case, we note that Morocco's constitutional drafters borrowed institutional forms of presidentialism from France's secular and republican constitution while setting the stage for a more narrowly defined religious and political understanding of Morocco's "Islamic" monarchy. We focus on patterns of constitutional borrowing and resignification in Morocco, but this mode of transnational borrowing can also be found—with reference to religion-state relations—in Iran's post-revolutionary effort to flesh out the institutional parameters of its Guardian Council via nuanced references to France's 1958 *conseil constitutionnel* (Arjomand 2012, 158, 161).

Invocations without Any Transfer of Text. In our third case study, we take up cases of constitutional borrowing that involve references to foreign constitutional models *without* any

transfer of text. As noted above, this pattern figured prominently in the diverse meanings associated with "the Turkish model" during post-Arab Spring constitution-making in Egypt. Still, invocations of the Turkish model (sometimes signifying greater participation by Islamist parties) did not result in a more "inclusive" space for the electoral participation of Islamist parties like Egypt's Muslim Brotherhood. Instead, the Brotherhood was deliberately excluded by post-uprising leaders like General Abdel Fattah el-Sisi, who reverted to an authoritarian model of governance that echoed countervailing invocations of the Turkish model as a constitutional system of military tutelage. This mode of transnational invocation and political re-signification (withoug any transfer of text) also exists outside of Egypt. In Pakistan, judges have invoked the Indian concept of an unwritten constitutional "basic structure"—which, in India, has been used to advance *secular* commitments—to defend, in Pakistan, a parliamentary form of government blended with *Islamic* provisions (Nelson 2018).

Assimilation of "Inherited" Models. Our final mode of borrowing involves the movement of constitutional empty signifiers in cases of entirely unwritten constitutions. This occurs whenever borrowed legal ideas become entrenched even as their specific meaning is changed through ordinary legislation. This was the case in Israel, where the Ottoman *Millet* system of pluralism in the realm of religious personal law was actively "re-signified" first via the British Mandate and then through ordinary post-independence legislation. Under the Ottoman Millet system, non-Muslim minorities enjoyed religious autonomy, especially with regard to family law. But, in independent Israel, this inherited system of legal pluralism served as a tool for the exclusion of marriage practices associated with non-Orthodox Jews and those *not* conforming to specific state-recognized faiths. Although passed as ordinary laws, these more narrowly defined quasi-constitutional arrangements have resisted change for decades.

Again, these four modes of borrowing are not exhaustive. Even in the domain of

religion-state relations, judges involved in forms of constitutional adjudication can also revert to meanings that *resemble* those prevailing in the countries from which key provisions were imported. And, of course, the work of empty signifiers can also unfold in more "inclusive" ways. Ireland's approach to group-based religious freedoms, for instance, was originally borrowed from Poland and, constitutionally, both countries continue to recognize that each religious denomination is entitled to (a) "conduct independently its religious affairs" (Poland) or to (b) "manage its own affairs" (Ireland) (see Keogh 2007, 154, 389). Even as Poland relies on this provision to prevent same-sex marriages for its Catholic (majority) citizens, however, Ireland has reinterpreted this borrowed provision in a more inclusive direction, moving beyond civil partnerships to prevent any form of marital discrimination vis-à-vis same-sex couples.

Drawing on archival materials and contemporary records prepared by those closely tied to key constitutional debates and relevant political events in Pakistan, Morocco, Egypt, and Israel, our research is rooted in primary source materials presented in English and, crucially, in Urdu, French, Arabic, Turkish, and Hebrew. From colonial records to Constituent Assembly debates to parliamentary transcripts and official government archives, we link archival data to personal memoirs and contemporary press coverage, bringing a detailed account of specific constitutional transfers together with an account of the political drivers that framed patterns of constitutional resignification later on. Combining primary sources with existing scholarship, we highlight the *political* circumstances underpinning an exclusionary *reinterpretation* of external constitutional provisions.

Constitutional Provisions as Empty Signifiers: Religious Freedom from Ireland via India to Pakistan

The most direct form of constitutional borrowing involves constitutional drafters

importing explicit textual provisions from other countries. In 1922 Ireland's Provisional Government published a book entitled *Select Constitutions of the World* with constitutions from the United States of Mexico, the Russian Socialist Federal Soviet Republic, and sixteen other countries to inform its constitutional drafters. Reflecting transnational networks rooted in anti-colonial activism, the book was republished in 1934 to assist India's Constituent Assembly (CA). This book was also combined with a second volume entitled *Constitutions of Eastern Countries* (1951) and used by the Constituent Assembly of Pakistan. Within Pakistan, these compendia set the stage for direct forms of borrowing—and, later, refashioning—foreign constitutional models (Nelson 2019).

Archival records from India and Pakistan reveal extensive borrowing focused on religion-state relations and, specifically, enumerated and enforceable rights pertaining to religious freedom. Judicial and parliamentary records, in turn, reveal the ways in which grassroots violence perpetrated by conservative religious groups like the Majlis-e-Ahrar-e-Islam (Association of "Free" Muslims) informed mainstream constitutional debates in ways that later *reconfigured* prevailing forms of interpretation vis-à-vis Pakistan's borrowed provisions. Briefly, grassroots violence inspired majoritarian notions of "Muslim nationalism" in which key state actors recast borrowed religious-freedom provisions in an increasingly exclusionary mold.

Between 1922 and 1937, constitutional reformers in Ireland built on post-WWI constitutions in Eastern Europe—specifically, Poland's "March" Constitution (1921)—to balance the religious freedom of individuals with the freedom of majority and minority groups to "manage" their religious affairs (Keogh 2007, 154, 389). These provisions later traveled to India via transnational anti-colonial activists like Annie Besant, who lifted key provisions directly from the Constitution of the Irish Free State (1922) in her proto-constitutional "Commonwealth of India Bill" (Besant 1926, 212). This Bill directly informed

Article 25 of India's Constitution (1950) concerning individual religious freedom (Austin 1966, 54-55). India's CA (1946-49) also adopted a provision concerning the rights of religious groups (Article 26) from Ireland's 1937 constitution.

The interim constitution unveiled by Pakistan's first CA (1947-54) clearly revealed the influence of both Ireland and India.[13] In the *Irish* Constitution, Article 8 (1922) and Article 44-2(1) (1937) noted that, with reference to individuals, "the free profession and practice of religion are, subject to public order, …guaranteed to every citizen." *India* began with the phrase "subject to public order" before noting that all persons enjoy "the right freely to profess, practice, and propagate religion" (Article 25). And, finally, *Pakistan* followed suit, explaining that "the right to profess, practice, and propagate religion are guaranteed subject to public order […]" (Article 10).

The Irish Constitution of 1937 also stipulated that "[e]very religious denomination shall have the right to manage its own affairs" and to "own, acquire, and administer property, movable and immovable, … for religious and charitable purposes' (Article 44-2(5)). India's Constitution guaranteed that "every religious denomination … shall have the right … to manage its own affairs in matters of religion … and to administer [its] property in accordance with law" (Article 26). Pakistan again followed suit, noting that "every religious denomination … shall enjoy freedom in the management of its religious affairs including … the acquisition of movable and immovable property for that purpose" (Article 11).

Hindu members within Pakistan's CA tried to delay a debate regarding fundamental rights (including religious freedom) until the Assembly's Committee on Minority Rights had issued its final report. But their colleague Abdulla al-Mahmood deflected their concerns, stressing that Pakistan's efforts to protect the rights of minority groups were already explicitly drawn from Hindu-majority India. "Clause 10 of our Fundamental Rights," he noted, provided "the same thing but on a little wider scale than what has been provided in

Clause 35 [*sic*: 25]" of the Indian Constitution (*CA Debates*, 4 October 1950, 78).[14]

Inclusive efforts to accommodate Pakistan's Hindus via borrowing from India, however, were not unlimited, as Pakistani Hindus failed to persuade their CA colleagues to reject two claims pushing towards a more exclusive, majoritarian, Muslim constitutional identity. The first claim emerged from right-wing religious activists affiliated with a group known as the Majlis-e-Ahrar-e-Islam as well as lay Muslim ideologues associated with Pakistan's Jama'at-e-Islami (Party of Islam). These activists insisted that, because Pakistan sought to construct an Islamic-democratic constitution, a "Muslim" head of state was essential. The second claim emerged from rival politicians within the ruling Muslim League, insisting that non-Muslims should be relegated to a separate "non-Muslim" electorate to prevent their electoral intervention as kingmakers in competitive races between Muslims. [15] On their own, these provisions sought to demarcate a special place for "Muslims" in Pakistan's Muslim-majority "Islamic democracy"; but, over time, they also set the stage for dramatic changes in the meaning of Pakistan's imported Irish-cum-Indian constitutional provisions.

The key issue did not involve the religious freedom of non-Muslim Hindus. Rather, it involved a religious minority known as the Ahmadiyya whose pattern of religious self-identification as "Muslim" was treated as a source of debate. Even before Pakistan's interim constitution was unveiled in 1954, some of those demanding special Muslim rights and privileges (e.g. a Muslim presidency and a separate Muslim electorate) insisted that Pakistan's Ahmadiyya should be relegated to Pakistan's "non-Muslim" electorate owing to their departure from the orthodox view that Mohammad was the final prophet of God. (Some Ahmadiyya recognize a late-nineteenth-century religious reformer named Mirza Ghulam Ahmad as a "prophet.") These right-wing religious activists were excluded from the CA because, in 1946, they did not participate in the provincial elections that underpinned the

CA's late-colonial formation.

Many of these activists, however, resorted to riots and violent pogroms to advance their exclusionary views. A particularly violent stretch in 1952-53 culminated in Pakistan's first martial law—a spate of military intervention that inspired later efforts within Pakistan's CA to shore up the power of parliament (Binder 1961, 259-96; *Report of the Court of Inquiry* 1954; Choudhry 1963, 48).[16] This focus on parliament, however, was offset in 1958 by a coup and more than ten years of military dictatorship. Shortly after the military announced national elections in 1970, however, Pakistan was plunged into a civil war. Culminating in the separation of East Pakistan and the formation of Bangladesh (1971), this war led to the promulgation of Pakistan's current constitution in 1973—a constitution in which the restoration of parliamentary power figured prominently alongside a special focus on the ostensibly unifying features of Pakistani "Muslim" nationalism.

Pakistan's 1973 constitution retained all of the religious-freedom articles initially borrowed from Ireland (via India). At the same time, however, these articles were paired with two constitutional adjustments clarifying the terms of Pakistani Muslim nationalism. The first emerged in the Constitution of 1973 itself, requiring each new President and Prime Minister to swear an oath, not only that he or she was a Muslim, but to clarify, that there could be "no Prophet after [Mohammad]." The second emerged one year later, in Pakistan's second constitutional amendment, wherein Pakistan's Ahmadiyya were constitutionally redefined as "non-Muslims."[17] The logic underpinning these changes was simple: if "Muslims" were endowed with special rights and privileges, the state must be able to distinguish its Muslim from its non-Muslim citizens (Qasmi 2014, 195). To do this, parliament merely sought to clarify, via oaths and constitutional definitions, which groups should be legally defined as "non-Muslim."

Even apart from this basic legal logic, however, the specific political calculations

underpinning these constitutional adjustments were important. Immediately after the approval of Pakistan's new constitution in 1973, the same activists who had challenged the rights of the Ahmadiyya during the 1950s reasserted themselves in another round of violent skirmishes (Qasmi 2014, 175-77). Pakistan's new Prime Minister Zulfiqar Ali Bhutto (1973-77) did not declare martial law. After ten years of military dictatorship, he turned to parliament and its power of constitutional amendment instead.[18] Within this turn to parliament, however, the same activists stressed what they saw as the concerns of the country's religious majority, claiming that, by identifying as "Muslims," Pakistan's Ahmadiyya actively *diluted* Muslim access to Muslim constitutional rights. Bhutto's parliamentary majority did not reject this argument; facing rival coalitions tied to right-wing religious parties in two out of Pakistan's four provinces (Balochistan and the Northwest Frontier Province), they simply coopted it. In effect, Bhutto agreed that Pakistan's parliament was entitled to curtail, by way of constitutional amendments, what his Attorney General described as an Ahmadi "threat" of religious "false belonging".[19]

Public officials facing yet another round of protests by the same right-wing activists later intervened to restrict the fundamental rights of Pakistan's Ahmadiyya even further—this time under the military dictatorship of General Zia-ul-Haq (1977-88), who amended Pakistan's Penal Code (§298) to prohibit the country's Ahmadiyya from using ostensibly "Muslim" words like *masjid* (mosque) or *azaan* (call to prayer), describing any Ahmadi use of such words as a dangerously provocative form of "encroachment" on the special religious "property" of Muslims (Saeed 2011, 88). When this reading was taken up in a landmark Supreme Court case known as *Zaheeruddin v the State* (1993), the Court simply referenced Pakistan's borrowed constitutional provisions. In particular, summarizing the decision, Ahmad Mahmood Khan (2003, 228) notes that, according to Pakistan's Supreme Court, "Ahmadi religious practice[s], however peaceful, angered and offended the Sunni majority,"

so to preserve *public order* (Article 20), "Pakistan would … need to control [them]."

As such the state drew on Irish and Indian provisions protecting a right to religious freedom "subject to public order," suggesting that formal legal restrictions on the fundamental rights of the Ahmadiyya were necessary to prevent any possibility of religious provocation, outrage, or "disorder" within the country's Muslim majority. The specific language of Irish and Indian religious-freedom clauses was, in effect, emptied of its prior legal content and used to support an increasingly exclusionary reading in which Pakistan's religious-cum-political majority actively reconfigured the meaning of Pakistan's borrowed constitutional provisions.

Constitutional Institutions as Empty Signifiers: French Constitutional Structures in the Service of Islamist Monarchy in Morocco

Beyond this focus on the transfer of explicit constitutional clauses, a second type of borrowing in the realm of religion-state relations involves the unacknowledged adoption—and, then, adaptation—of foreign constitutional ideas regarding state institutions. Morocco's transfer of constitutional structures from the 1958 French Constitution offers one example. Moroccan political actors drew on institutional elements from a democratic and secular European republic to legitimate, even sacralize, their country's Muslim monarchy.

Perhaps because of its non-elected monarchical head of state, or its habit of frequent top-down constitutional drafting, Morocco has rarely been the focus of comparative constitutional analysis.[20] Yet, particularly when juxtaposed with other Arab constitutions, Morocco's postcolonial documents (each approved by a popular referendum) show several noteworthy features—most obviously, a pattern of imbuing the country's ruling monarchy with "Islamic" forms of legitimacy (the king is referred to by the caliphal title *amir el-mu'minin* or "Commander of the Faithful")—even as each constitution also references

minority cultural influences and a pluralized understanding of rights.

There are several accounts of this explicit effort to infuse Morocco's leader with quasi-sacred status alongside a push to highlight the country's religio-cultural pluralism (Waterbury 1970; Geertz 1971; Tozy 1999; Mednicoff 2017). Yet, there is also a rarely noticed facet of Morocco's constitutional origins that may help to connect these ostensibly divergent substantive elements. Morocco's constitutions contain similarities of both language and structure with the 1958 constitution that established the French Fifth Republic. This is no coincidence, given France's colonial and postcolonial influence on Morocco and Hassan II's close ties to France, French political culture, and French constitutional experts.

Within postcolonial Morocco, the evidence of actual constitutional borrowing from the country's former French colonizer is strong, if circumstantial. A new king seeking to restore Moroccan political autonomy and establish his own authority after a vocal independence struggle would hardly be expected to admit that he had relied on French texts or advisors to compile his country's first postcolonial constitution. Indeed, King Hassan II claimed that the constitution came from "his own hand."[21] Yet the 1962 Moroccan constitution included provisions very similar to those from the 1958 constitution in France. Specifically, the Moroccan document seemed to draw on French provisions for states of exception,[22] the ruler's ability to call a popular referendum (going over the heads of his elected parliament),[23] and, in general, a comparatively high level of authority associated with the head of state.

Prominent French political scientists who advised the Moroccan throne, such as Maurice Duverger, devoted time to arguing for the new Moroccan constitution (Beling 1964, 172).[24] Another French jurist with strong ties to Morocco and Hassan II noted significant textual overlaps and similar chronological histories, both in the constitutions' initial promulgation and in their subsequent revisions (Vedel 1993, 363-5). A contemporary

database comparing major structural features of the world's constitutions finds significant similarities between France and Morocco in their high level of executive authority and their (correspondingly) low levels of parliamentary or legislative autonomy.[25]

De Gaulle's brand of executive-centered politics was both a model familiar to the strongly Francophile Hassan II and an obvious (Western) template for a government centered on a strong ruler. If codifying monarchical advantage was Hassan's purpose, then finding a familiar model that carried a strong flavor of global political legitimacy while, at the same time, translating Western institutional forms into Morocco's institutional context was a sensible strategy. In fact, decades after the 1962 Constitution, Hassan II actually confessed that his constitution was inspired by the Fifth Republic, which, he argued, was a corrective to centuries of French political confusion as to the whether their executive or their legislature was supreme (Laurent 1993, 73-4). This also helps to explain the late king's serial constitutionalism. While maintaining a strong executive, the Moroccan ruling cadre found that it could use constitutional redrafting to respond to social changes and demands for rights and pluralism in a manner that periodically fine-tuned the powers of a monarchical regime.

Early Moroccan constitutionalism was thus a case of direct if deliberately unacknowledged institutional borrowing from the 1958 French Fifth Republic's basic law.[26] Yet the king and his constitutional advisors claimed inspiration, and borrowed, from a highly secularized French society—one in which the strong chief executive was elected through a contested democratic process. When Hassan II confessed that his constitution was inspired by the Fifth Republic,[27] he went on to note that, although he had authoritarian tendencies, he had grounded his constitutional politics in the popular will of the people. In short, he used specific institutional models from a democratic state's constitution to secure popular legitimacy for the underpinnings of an authoritarian monarchy.

In this context, the Moroccan system that borrowed from France's constitution did so

in the explicit service of, and alongside detailed provisions for, a non-elected monarchy that established *a* state religion (Islam) from which it derived its popular legitimacy. Indeed, Morocco's set of constitutions under Hassan II and, to only a slightly lesser extent, those introduced by his successor, Muhammed VI, clearly established the king as the hereditary embodiment and symbolic head of Islam. Accounts of Morocco's constitutional identity and meaning stress these functions and procedures around the king's codified status as the *amir el-mu'minin* (Benjelloun 2002). Indeed, while Hassan II was careful to deploy both secular and sacred legitimizing discourses, he stressed that his link to the population was one of "allegiance," the Arabic term for which, *bey'a*, refers to a religio-political ceremony in which the country's leaders pledge fealty to him as *amir* (Laurent 1993, 76).

Hassan II took language and specific institutional arrangements from France's constitution out of their democratic and secular context in a deliberate effort to straddle the line between a European system and Morocco's. Again, this was part of a broader political strategy that sought to maintain close ties to France while at the same time establishing Hassan, and the monarchy, as essential to Morocco because they fused a new nation-state with forms of traditional authority rooted in a religio-political lineage of 'Alawi rulers. Hassan II's father, Muhammed V, had emerged as the country's pre-eminent political force and a major nationalist symbol during Morocco's independence struggle. When Muhammad V died unexpectedly in 1961, his relatively unknown 32-year-old son Hassan II felt compelled to block the influence of competing nationalist parties like Istiqlal ("Independence") and the more radically socialist and republican Union Nationale des Forces Populaires (UNFP) by reinforcing the historical and specifically religious salience of the monarchy.

The king's consultation with prominent French constitutional scholars, and his appropriation of phrases and frameworks from the French constitution, thus served a political

purpose: demarcating Morocco under the monarchy as comparable to France—a "modern" state—whilst simultaneously pushing aside the secular Moroccan political parties jockeying for postcolonial power.[28] In effect, the king's resignification of French constitutional structures allowed him to reference the trappings of European political legitimacy without simultaneously conceding to democratic or republican forms of power.

Within the Moroccan document, this recontextualization and re-signification of constitutional elements from France offered modern constitutional cover for direct monarchical links to religious history, effectively buttressing the political legitimacy of the king with rural and traditional Moroccans (Leveau 1976). Efforts to imbue the monarchy with quasi-sacred status also helped to justify the absence of any provisions for judicial review in the 1962 constitution (and subsequent constitutions under Hassan II), thus precluding any judicial reinterpretation of the king's constitutional push to balance Western modernity with quasi-Islamic traditionalism.

Morocco's constitutional system attaches the legalized status of a quasi-sacred monarchy to the political institutions of France's Fifth Republic. This link has persisted through multiple Moroccan constitutions as well as a gradual expansion of non-monarchical institutional powers. What French drafters likely viewed as a set of institutional provisions concerning executive power serving the needs of a relatively centralized democratic secular order was carried over by Moroccan ruling elites as an "empty signifier" that was politically "re-signified" by a king and his advisors to amplify the authority of a non-elected monarchy imbued with quasi-religious power.

Constitutional "Models" as Empty Signifiers: The Turkish Model in Post-Arab Spring Egypt

A third pattern of empty-signifier-based borrowing involves invocations of foreign

constitutional models—*without* any explicit transfer of text—to mark out key positions in a domestic constitutional debate. After the Arab-Spring uprisings of 2011, Egyptians invoked Turkey's constitutional model as a guide for a domestic political transition, but they did *not* adopt any Turkish constitutional text.

When the Turkish model was invoked by Arab publics demanding constitutional and political reform during and after the Arab Spring uprisings, the reference was generally linked to notions of sociopolitical "inclusiveness"—that is, the inclusion of Islamist political parties. With the governing Turkish AKP standing as a marker of this Islamist inclusion, such references regularly surfaced in the Egyptian press between the fall of 2011 and the end of 2012 (*Al-Masry al-Youm* 3 July 2011). Specifically, the success of the AKP in Turkey's national and local elections (2002 – 2011) created the impression that the Turkish republic's history of assertive secularism had given way to a pluralist vision of democratic inclusion (Kuru 2013). In this sense, Turkey stood for a constitutional solution to one of the many problems faced by post-2011 Arab states—the problem of allowing more explicit Islamic political influence while, at the same time, striving for a stable democratic system. Reviewing the appeal of the Turkish model, one Cairo University professor cited the AKP's ability to secure "democratic" stability under an "Islamic-oriented" ruling party (Nafaa 2011).

The notion that Turkey could serve as a model might have suggested that reformers would borrow directly from Turkey's constitution. In fact, invocations of the Turkish model were offered by key figures directly involved in Egypt's constitutional drafting process, including Mohamed Morsi, the Muslim Brotherhood politician who became Egypt's first democratically elected president.[29] When Morsi visited Turkey for an AKP convention in 2012, he explicitly highlighted his admiration for the Turkish model even as the constitution-drafting process led by his own party was still unfolding in Egypt (*Dünya* 1 October 2012). The specific meaning of the Turkish model, however, was slowly de-coupled from any

specific Turkish constitutional provisions; in fact, at one point, the idea that textual elements of the Turkish model could be transplanted or replicated was flatly rejected.[30] None of the key players in Egypt's constitutional debate—neither drafters (like Morsi) nor pundits nor the general public—sought to adopt specific provisions of the Turkish constitution. When the Turkish Prime Minister, Recep Tayyip Erdogan, traveled to Cairo in September 2011 and suggested that specific aspects of the Turkish model of secularism could be adopted in Egypt, the idea was rejected by members of the Muslim Brotherhood and other Egyptian officials who, in the past, had themselves invoked the merits of "the Turkish model."[31]

Following the earliest invocations of the Turkish model in broader debates across the Arab world, Egyptian political figures expressed ambivalence about which aspects of the Turkish example might be worth emulating, particularly given the fact that Turkey's actual constitution had been written under military tutelage in 1982 and amended over a dozen times. Typically, the success of the Turkish model was judged in light of perceptions regarding its political outcomes and, specifically, its outcomes in the realm of religion-state relations: on the one hand, Islamists who admired the ability of Turkey's secular state to accommodate Islamist political parties; on the other, a more explicitly authoritarian appreciation for the ways in which Turkey's military guarded the secular character of the state. Recalling Maximo Langer's (2004, 33) description of legal translation owing to a struggle "between different actors and groups within the target legal system," which of these elements was emphasized depended on the domestic interests of the Egyptian political actors who sought to embrace the "model" (Ottaway and Brown 2012).

While grassroots popular perceptions focused on the electoral successes of a moderately Islamist political party, non-Islamist elites tended to focus on the secular facets of Turkey's political trajectory. Specifically, Egyptian military and business elites were less enamored of the post-2002 AKP model of Islamist inclusion than a pre-2002 model of

Turkish politics characterized by a strong and centralized executive.[32] Indeed, even as President Morsi was praising the model as an important reference point for Islamist inclusion, prominent Arab columnists described the Egyptian military as adopting the Turkish model "to check Morsi" (*Al-Monitor* 15 June 2012).[33] The Turkish model was, as such, an "empty signifier" with many possible meanings—indeed, a "surplus" of meaning. The specific *content* of its meaning, following Ernesto Laclau, emerged as a function of the *political* preferences of those who intervened to invoke it.

Of the various ways in which Turkey was invoked, however, the one that ultimately had the most influence in Egypt was the least inclusionary interpretation of what Turkey's system represented. Specifically, an understanding of the Turkish model as according a preeminent role to the military in civilian governance was embraced by the leadership of the Supreme Council of the Armed Forces (SCAF) during Egypt's post-uprising transition.[34] The draft constitution adopted under the leadership of President Morsi in December 2012 did not reflect this version of the model, offering no formal tutelary role to the military in civilian governance. But, within six months, President Morsi was ousted in a military coup, and the constitution drafted during Egypt's brief democratic interlude was abrogated then replaced (Brown and Dunne 2013). The new ruler, General Abdel Fattah el-Sisi, viewing Turkey as a major sponsor of the ousted Muslim Brotherhood, privileged a different version of the same Turkish "model" that radically curtailed Islamist political participation, giving the military a key role in defining the nature of Egyptian religion-state relations (*Reuters* 30 November 2013; *Al-Jazeera* 8 March 2014).[35]

As an "empty signifier," the Turkish model came to signal the legitimacy of (contradictory) Egyptian positions for the purpose of domestic political debate. In fact, invocations of the Turkish model served as a type of shorthand for the political positions taken by an array of drafters making divergent appeals to mobilize their domestic audiences.

In the end, the course of constitutional drafting in Egypt came to reflect the most exclusionary version of the Turkish model—a constitution drafted in the wake of a military coup to regulate religion-state relations through top-down imposition and, crucially, the exclusion of Islamist parties.

Inheriting Empty Signifiers: The Ottoman Millet System from Inter-religious to Intra-religious Regulation in Israel

Our fourth case study concerns the Ottoman Millet system of legal pluralism in the area of religious family law as it moved from the Ottoman Empire through the British Mandate to the quasi-constitutional architecture of Israel. This example differs from the preceding modes of constitutional movement in two key respects. First, it represents a case of constitutional *inheritance* from a prior legal system (common in postcolonial state-building) rather than any pro-active search for constitutional "imports" from other countries. Second, since Israel lacks a written constitution, this example illuminates some of the ways in which foreign models of religion-state relations might be assimilated via ordinary legislation. Legislation might be considered more flexible than formal constitutional provisions, but the basic regulatory structure of legal pluralism in Israel, inherited from the Millet system and adapted during the first few years of the state, remains largely unamended even after several decades. As such, we describe Israel's regulation of marriage and divorce as "quasi-constitutional."[36] Since the religious monopoly on marriage and divorce that emerged from Israel's inheritance of the Ottoman Millet system has come to represent a core principle of religion-state relations in Israel, we use it to illuminate a pattern of constitutional assimilation and, then, constitutional re-signification.

The term "millet" emerged in the early-nineteenth century to designate recognized non-Muslim communities living within the Ottoman Empire (Quataert 2005, 175-6). While

contemporary legal and political scholars often regard the Millet system as representing a highly pluralistic system of religious law, more recent historical research has emphasized the term's versatility, which, already during Ottoman times, was influenced by centralizing reforms with a (Muslim) majoritarian flavor as well as external political pressures from Europe. Before the nineteenth century, different religious communities across the empire operated under distinct legal arrangements within the Ottoman state, with separate courts, judges, and legal principles. Following a set of mid-nineteenth-century Ottoman reforms known as the Tanzimat reforms, however, a more centralized structure gradually replaced the empire's differentiated legal system, culminating in 1917 with the publication of an Ottoman Family Code that was partly meant to unify family regulations on a territorial (rather than a religious or communal) basis (Agmon 2016-18).[37] This new legislation, however, was never fully implemented due to the outbreak of WWI and, thereafter, the collapse of the Ottoman Empire.

When the British occupied Palestine, they generally preserved the system of differentiated religious tribunals, with some exceptions.[38] Whilst claiming mere continuation of the Millet system, for instance, the British reversed emerging Ottoman reforms that strove for a more unified and territorially-based family code. Whereas under Ottoman rule Jews were free to appeal to Muslim courts, the British established an exclusive Rabbinical court defined as the sole religious authority for all of the Jews in Palestine. Moreover, the British recognized the 1917 family code, which was developed by the Ottomans as a territorial state code, as a "Muslim Family Law" to be applied to Muslims alone, erasing all of the inclusive articles referring to Christians and Jews (Agmon 2016-18, 17-18).

With independence in May 1948, Israel's Jewish leadership faced questions about the extent to which Ottoman or British family-law arrangements should be preserved or reformed. From the early stages of the debate, however, the dilemma was structured around *intra*-Jewish considerations initiating a further stage of legal "re-signification" surrounding the state's

inherited Millet model. Israel's new political leadership never seriously doubted the general Millet principle of legal pluralism, which allowed complete autonomy in the area of family law for all recognized religious communities. Still, intense debates took up the question of whether the Jewish rabbinical court established by the British mandate should retain its monopoly over family law for all Jewish citizens. (Non-Jews had limited representation in the Knesset and hardly participated in these debates regarding the "constitutional identity" of Israel as a Jewish state and whether it should be understood in religious or cultural/national terms.)

Ultimately, Israel's "borrowing" of the Ottoman Millet model and its later re-signification occurred in two stages. The first stage involved Israel's first legislation, passed by the Provisional State Council in 1948, three days after independence, preserving the general contours of British Mandate law.[39] The drafting of the Bill had begun even before independence, and the debate concerned the extent to which Jewish Law should be incorporated into state law (Radzyner 2010). During the first meeting of the Provisional Council (one day after independence) a representative of the Communist party criticized the Bill for its failure to separate the state from religion. But, within the Council, this claim represented a small minority.[40] The final version of the Bill neither increased nor decreased the role of Jewish law compared with previous Mandate arrangements (Radzyner 2010).

Yet the application of a Millet-style system of legal pluralism in the context of a Jewish-majority state created new bureaucratic problems. Under both Ottoman and British rule, rabbinical courts could apply Jewish law only to those who were officially registered as members of the Jewish community. Because the State of Israel ceased to maintain such official registration, the question of official membership in the Jewish religion became extremely controversial. New legislation was required; and, in 1953, five years after independence, the government proposed the Jurisdiction of Rabbinical Tribunals (Marriage and Divorce) Bill, stirring intense political controversy.

During Knesset debates on the proposed bill, Jewish religious parties claimed that a unified system of marriage and divorce amongst Israeli Jews, dictated by Halachic rule, would be essential to preserve a unified identity among the Jewish people. Otherwise, they argued, religious Jews would not be able to marry the descendants of those who had married *without* a ceremony according to Halachic provisions.[41] In contrast, many in the majority secular/liberal camp argued against the bill's failure to allow for civil or interfaith marriage.[42] The Rabbinical Authority, it was argued, did not recognize gender equality and followed "medieval traditions."[43] Others opposed any infringement on "freedom of conscience," arguing that the law would force non-religious citizens to act against their secular worldview."[44] Eventually, however, and despite this criticism, a majority of the Knesset led by Prime Minister David Ben Gurion and the Mapai Party voted *for* the 1953 Rabbinical Courts Act. This 1953 Law formalized a monopoly for the Orthodox rabbinate on personal-status laws regarding Jewish marriage and divorce even as it limited the scope of rabbinical authority with regard to other aspects of family law.[45]

Whereas the Millet system under Ottoman rule encouraged formal state recognition of diverse religious traditions and allowed various forms of religious self-governance, under Israeli law this inherited order was transmogrified into a centralizing mechanism of religious imposition and national homogenization for the state's majority Jewish population. Rather than protecting religious minorities from potential abuse by the majority, the pluri-legal system of religious autonomies in the realm of marriage and divorce was refashioned—in part—to *limit* a right of marriage for certain parts of the population (including inter-faith couples) and to regulate intra-religious relations within the dominant (Jewish) community (Amir 2016).

Why would the secular/socialist leadership of the Mapai Party support such religious legislation, which conflicted with their personal commitment to religious freedom and entrenched an exclusivist resignification of the Millet system?[46] Archival materials reveal that

the 1953 Law was part of a coalitional agreement within the Knesset between the Mapai majority and various religious parties.[47] The two sides agreed to pass the Rabbinical Tribunals Bill hand in hand with another bill establishing a mandatory national service for religious women (in lieu of military service). Another consideration involved efforts to avoid conflicts with the more religious parts of world Jewry that might be expected to immigrate to Israel.[48] The records of the Mapai party and government meetings also reveal that many party members viewed the 1953 Rabbinical Courts Act as a temporary compromise; they did not intend to entrench religious personal-status regulations as a quasi-constitutional regulation for decades to come. Leading members of Mapai even explicitly raised the option of future reforms, including a civil marriage bill.[49]

Nevertheless, the bill played a central role in national debates regarding Israel's "constitutional" identity. In the eyes of many, the rabbinical monopoly on marriage and divorce was designed to promote a homogenization of Jewish identity, on the one hand, while differentiating non-Jewish identities, on the other (Shafir and Peled 2002; Triger 2014; Gal 2014). As such, the meaning of Israel's inherited Millet system was actively translated and narrowed—from a policy protecting diversity and pluralism between religious groups to a centralized mechanism of religious homogenization targeting the members of Israel's Jewish majority.

CONCLUSION: POLITICS DRIVES TEXTUAL MEANING

These four cases suggest the complex ways in which foreign constitutional provisions, institutions, and concepts are borrowed, invoked, or self-consciously inherited during constitution-drafting processes and then actively engaged during politically charged moments of constitutional contestation, re-interpretation, and translation. Our main argument is that,

well beyond the borrowing of constitutional "text," the *politics* surrounding borrowed constitutional elements often shapes the *meaning* of those ideas and, therein, the significance of borrowing itself.

Constitutional borrowing, in this sense, is a political process that leaves room for local actors to introduce normative slippage, institutional adaptation, and new meaning. We do not see these new and narrower meanings as cases of "unsuccessful" borrowing.[50] Instead, we see them as contested constitutional and political choices. As such, our focus on empty signifiers moves beyond the forms of organizational decision-making that feature in recent accounts of domestic legal translation (Edelman; Grattet) to examine explicitly *transnational* contexts of constitutional borrowing underpinned by explicitly *political* decision-making (Laclau).

Of course, not all cases of borrowing rely on empty signifiers. Where the meaning of a borrowed text or model is clearly bound by its prior usage (as in South African constitutional references to provisions of the International Covenant on Economic and Social Rights), it makes little sense to move beyond the notion of stable "privileged" signifiers to highlight the intervening influence of politically inflected "empty" signifiers (Young 2008-09). As noted above, there is also a distinction to be drawn between the contested meanings we associate with empty signifiers and instances in which the meaning of a given text or norm is left deliberately "floating" or vague, as in persistent Indian debates regarding the meaning of a constitutional principle like "secularism" or the refusal, by Léopold Sengohr and later politicians and judges in Senegal, to define an important constitutional term like "laïc" (Sen 2010; Diagne 2017).

In all four of the cases we examine, domestic political dynamics explain the shifting meaning of constitutional empty signifiers. In Pakistan, domestic legislators and judges shaped the meaning of both Irish and Indian constitutional provisions regarding religious

freedom in ways that became more closely tied to forms of parliamentary majoritarianism and a cynical effort to bind Pakistan's "Muslim" community together via forms of juxtaposition vis-à-vis the country's Ahmadi minority. In Morocco, domestic political elites underpinned the re-signification of French constitutional provisions in ways closely tied to the codification of quasi-religious monarchical advantage against domestic political challengers. In Egypt, the political underpinnings of the so-called "Turkish model" harbored a surplus of meaning that pointed in two directions at once—towards bottom-up forms of Islamist political inclusion as well as top-down forms of secular authoritarianism—with the latter coming to prevail, via the military coup of General Abdel Fattah el-Sisi, after 2013. In Israel, core political dynamics underpinned a shift in the meaning of a quasi-constitutional personal-law system inherited from the Ottoman Empire via the British mandate. This system was reframed by Jewish political leaders to advance their goals regarding both inter-religious and intra-religious relations in the realm of marriage and divorce. With reference to borrowed constitutional provisions in the realm of religion-state relations, further research will undoubtedly help to isolate the mechanisms that drive politically inflected patterns of "re-signification", not only in the direction of religious exclusion, but also, at least potentially, in the direction of greater inclusion.

Centering our analysis on the active *importers* of constitutional concepts, rather than exporters,[51] our study challenges trends highlighting the degree to which travelling constitutional texts might point to global constitutional isomorphism or convergence. Constitutional borrowing, we argue, is closely tied to the idiosyncratic political circumstances surrounding the deliberate choices of importers—to provide political signals, borrow symbolic capital, or invoke patterns of domestic constitutional legitimacy—*without* any associated commitment to reproducing the "original" meaning of a particular constitutional text, institution, or idea. Grasping the subtleties of local political contestation, we argue, is essential for those with an

interest in illuminating the conceptual modulations that underpin the meaning of borrowed constitutional texts.

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[1] Different terms may be used to reference the same phenomenon, including constitutional "appropriation," "cross-pollination," "transplantation," and "transfer." We distinguish structural processes of constitutional "diffusion" from agent-driven processes of "borrowing".

[2] See also Chen-Wishart 2013: "[w]here [a] law evolved in one society is parachuted into another society, the result may range along the entire spectrum or continuum between rejection and smooth reception."

[3] On the *politics* of shifting meaning, see also Örücü 2002.

[4] This literature is vast; for leading examples see Choudhry 2002 and Hirschl 2014.

[5] On Watson v. Legrand debates, see Cohn 2010 and Cairns 2013.

[6] On state-based translations of indigenous laws, and indigenous translations of state-based institutions, processes, or statutes, see for example Cohn 1961 and Nader 1989.

[7] On diffusion and diverse forms of legal practice, see also Hans 2017.

[8] Scheppele notes that drafters borrow *and reject* foreign examples; we offer a more systematic approach to the non-binary politics of borrowing.

[9] Both Grattet and Edelman work at the intersection of ordinary and constitutional law in domestic settings; whereas Edelman focuses on civil anti-discrimination laws and constitutional notions of "equality," Grattet focuses on hate-crime laws and constitutional protections for "conscience," "speech," "equal protection," and "due process." See Edelman (1992, 2011); Phillips and Grattet (2000); Grattet and Jenness (2005).

[10] On "liberal" struggles to address the diversity of customary spiritual practices in India, see Mani 1998 and Chatterjee 2010.

[11] On British colonial encounters with diverse "Hindu" customs, see Baird 2005.

[12] Like Edelman and Rykett, Salam 2018 examines sub-constitutional rather than constitutional engagements; but, again, he describes cases in which external (human-rights)

ideas matter even when they *cannot* be seen at the level of the (Islamic) juridical texts that incorporate them.

[13] British India's *Government of India Act* (1935), which laid the foundation for much of Pakistan's CA debates, did not enumerate fundamental rights. These rights were transplanted from anti-colonial Ireland and India.

[14] The Constitution Commission that drafted Pakistan's second Constitution under General Ayub Khan (1962) recommended retaining Articles 10 and 11 (from India). When Khan relegated these rights to a set of (nonjusticiable) 'Principles of Law-Making', enormous protests prompted a speedy reversal (1963); see Braibanti 1965. In Pakistan's third Constitution (1973), Articles 10 and 11 were renumbered as Articles 20(a) and 20(b).

[15] On the introduction of Pakistan's "Muslim" head of state, see Binder 1961, 121-23. On the introduction of a separate "non-Muslim" electorate, see *CA Debates*, 19 April 1952, 220.

[16] Binder 1961, 293 cites *Dawn* newspaper reports 9-12 January 1953.

[17] Pakistan's 1st Amendment recognized the sovereign state of Bangladesh.

[18] See Qasmi 2014, 178-84 citing *Proceedings of the Special Committee* 1974.

[19] See Qasmi 2014, 193 citing *Proceedings of the Special Committee* 1974, 74.

[20] Morocco's late King Hassan II supervised the promulgation of new constitutions in 1962, 1970, 1972 and 1992; King Muhammed VI responded to the Arab Uprisings with a new constitution in 2011.

[21] Beling 1964 (172n27) citing *New York Times* 19 November 1962.

[22] Article 16 of the 1958 French Constitution begins, "When the institutions of the Republic, the integrity of its territory… are threatened… the President takes measures expected under the circumstances." The article allows for a state of exception in consultation with the Prime Minister and Parliamentary heads. Article 35 of the 1962 Moroccan Constitution begins, "When the integrity of national territory is threatened… the King can, after having consulted

with the presidents of the two (Parliamentary) chambers…, proclaim… a state of exception" (translations from French and Arabic by David Mednicoff).

[23] See Article 11 (France) and Article 26 (Morocco).

[24] Duverger's role is also noted in Gallagher 1963, 5.

[25] See similar rankings on legislative power and judicial independence (low) and executive power (high) at <http://comparativeconstitutionsproject.org/ccp-rankings/>

[26] This borrowing is acknowledged by Moroccan law professors Aziz Hasbi and Saïd Ihrai in Basri, Rousset, and Vedel 1993, 34-43.

[28] Georges Vedel was a frequent consultant and constitutional cheerleader for Hassan II, even commenting on the similarities between successive French and Moroccan constitutions; see Basri, Rousset, and Vedel 1993, 363-91.

[29] Ties between Egypt's Muslim Brotherhood and Turkey's AKP were addressed before and after Morsi's ouster in 2013; see Campion and Bradley 2011 and Kader 2013.

[30] See Nafaa 2011, 37: "the AKP's experience in Turkey [i]s a 'success story' that may be inspiring to the Arab peoples at this … stage in their history, but not necessarily as a model that can be transferred and replicated."

[31] "Erdogan, in Cairo, Touts Turkey as Model for Arab World," *Associated Press,* 15 September 2011 (noting that Erdogan "fueled debate … on whether the Turkish model was really applicable [in Egypt]" and that "Amr Shobaki, a columnist for … *Al-Masry Al-Youm,* wrote that while Egypt can't copy Turkey it should be 'inspired' by its experience"), (reprinted in *Haaretz*), https://www.haaretz.com/1.5176047; "Misir'da Erdogan'a laiklik elestirisi" [In Egypt Erdogan Critiqued for Secularism], *Deutsche Welle Turkish*, 15 September 2011.

[32] On Turkey's military as a model, see Springborg 2014. On the changing meaning of the

Turkish model as invoked by different elites between 2011 and 2013, see Sallam 2013.

[33] See also Ghannoushi 2011, citing Egyptian Major-General Mamdouh Shaheen: "We want a model similar to that found in Turkey…. Egypt, as a country, need[s] to protect democracy from Islamists…").

[34] In Egypt, SCAF leader Mohamed Hussein Tantawi met with Turkish President Abdullah Gül less than a month after the overthrow of President Hosni Mubarak. "The Turkish experience is the closest experience to the Egyptian people," Tantawi remarked. "Turkey is the model to inspire from," quoted in Ülgen 2011, 3.

[35] On collapsing relations between Turkey and Egypt following the coup, and the attendant decline in public references to a Turkish Model, see Ezzat 2013.

[36] Minor reforms were introduced over the years through judicial or bureaucratic means (e.g. state recognition for marriage abroad, common marriage or couplehood agreements for citizens not adhering to any religion), yet the religious monopoly on personal-status law remained unchanged; see Lerner 2014.

[37] The impact of Western countries was dual. On the one hand, principles of centralized government were influenced by European models; see Quataert 2005, 63-65. At the same time, the main obstacle to codification and the unification of the Ottoman legal system was pressure by European governments to allow special protections and legal autonomy to non-Muslims under Ottoman rule, known as the Capitulation system; see Agmon 2016-18, 13-14.

[38] The Palestine Order in Council 1922, Paragraph 83 in Drayton, *Laws of Palestine*, Vol. III, 2587; Agmon 2016-18, 17.

[39] Except for minor changes such as British limitation of Jewish immigration to Israel: Law and Administration Ordinance, No.1 of 5708-1948, 1 LSI 7 (1948) (Isr.).

[40] As stated by Rabi Kalman Kahana, cited by Radzyner 2010, 149n136.

[41] Moshe Una (Hapoel Hamizrahi): "Similarly to any other legislation, this law includes

limitations on individual liberties, yet the larger and holy goal of national unity certainly justifies it." Knesset Records 1953, 1410, 1460, 1466-69 (Translations from Hebrew by Hanna Lerner.)

[42] For example, David Bar-Rav-Hai (Mapai): "I may agree that [interfaith marriage] is an unwelcome phenomenon given the current conditions of the state of Israel, yet I cannot perceive in the 20th century a state which prohibits such an option." Knesset Records 1953, 1458.

[43] Beba Idelson (Mapai): "We should remember that we live in 1953 and not in the Middle Ages." Knesset Records 1953, 1460-61.

[44] Moshe Sneh (Left Socialist Party), Knesset Records 1953, 2549.

[45] Rabbinical Court Jurisdiction (Marriage and Divorce) Law 1513-1953 <https://www.knesset.gov.il/review/data/eng/law/kns2_rabbiniccourts_eng.pdf>

[46] *Mapai Party Meeting*, 26 August 1953, 10.

[47] Chaim Cohen, Israel's Attorney General, admitted that "our hands are tied" by the coalitional agreement. *Mapai Party Meeting*, 1 June 1953.

[48] Government meeting minutes, 25 August 1953; Mapai Party Meeting, 26 August 1953; also, interview with Ben Gurion, *Davar*, 24 July 1970, cited in Amnon Rubinstein and Barak Medina, *The Constitutional Law of Israel. Vol. 1: Basic Principles*, Jerusalem: Shocken, 2005, 379 (in Hebrew).

[49] *Mapai Party Meeting*, 26 August 1953; also Lerner 2014.

[50] For an approach defining "successful" constitutional borrowing in terms of reproducing the same institutional or normative effects as were present in the original context, see Osiatynski 2003, 251 and Small 2005.

[51] For a critical account of exporters, particularly in the "law and development" literature, see Tamanaha 2011 and Kroncke 2012.