COMPARISON OF THE FOUNDING AND BASIC STRUCTURES OF THE CONSTITUTIONS OF INDIA AND OF THE UNITED STATES

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I. INTRODUCTION

This article compares in a panoramic way the founding and basic structures of the Constitutions of the Republic of India and of the United States of America.[1] The Republic of India is the most populous constitutional democracy in the world and the United States of America is the second most populous constitutional democracy in the world. Both countries have much that they can learn from one another. I will focus in this brief essay on a few of the major similarities and difference between the founding and basic structures of Indian and American constitutional law. I should say at the outset that I am inspired in using the Basic Structure concept by the Indian Supreme Court's decision in *Kesavananda Bharati v. State of Kerala*.[2] In that case, the Indian Supreme Court announced that it had the power to annul unconstitutional amendments: i.e. amendments that violated the Basic Structure of the Indian Constitution. The Indian Supreme Court has successfully maintained that power to review constitutional amendments for constitutionality down to the present day.

In the United States, there is no such thing as an unconstitutional constitutional amendment. The U.S. Supreme Court simply does not have that power, and an attempt to assert it would be suicidal. But, what if the U.S. Supreme Court did have the power to strike down constitutional amendments that violated the Basic Structure of the U.S. Constitution? How would I describe the contours of the Basic Structure of the U.S. Constitution? I seek in this essay to positively describe the historical events and the Basic Structures of the U.S. and the Indian Constitutions from the perspective of Comparative Constitutional Law. India

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[1] For a more detailed view, see STEVEN GOW CALABRESI ET AL., THE U.S. CONSTITUTION AND COMPARATIVE CONSTITUTIONAL LAW: TEXTS, CASES AND MATERIALS (2016).

[2] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

and the United States were both initially possessions of the British Empire ruled from abroad by the English Monarch through the mechanism of the Privy Council.[3] This is a point of commonality between our two countries. We are both off-springs of the British Empire, which both nations rebelled against. Moreover, we both recognize English as a national language, and we are both common law countries.

The British governed both the United States prior to 1776 and India prior to 1947 under the very same imperial governing rule. The principle that the Privy Council applied in reviewing the legality of both U.S. and Indian local laws was "whether they were repugnant to the laws of England or whether they merely differed from the laws of England because of differences in circumstances in the U.S. and in India in which case differing laws were okay."[4] In Part I below, I will discuss the circumstances that surrounded the initiation of British rule in both countries and the two countries respective struggles for independence. In the process, I will comment on points of similarity and of difference. In Part II, I will comment sympathetically on the basic structures of the U.S. and Indian Constitutions – both documents that I greatly admire. A short conclusion will follow.

II. INDEPENDENCE AND THE FOUNDING OF THE U.S. AND OF INDIA

A. THE U.S. EXPERIENCE

The American founding occurred between the settlement of Jamestown, Virginia in 1607, the settlement of Plymouth, Massachusetts in 1620, the settlement of the Boston, Massachusetts Bay colony in 1629, the settlement of Providence, Rhode Island in 1636, and the settlement of New Haven, Connecticut in 1638. Because the New England colonies, the southern colonies, and the middle colonies were settled for very different reasons, I will briefly address the settlement of each of them in separate discussions.

The New England colonies of the United States were essentially founded in the period between the settlement in Plymouth, Massachusetts of the Puritan Pilgrims and 1700. The essential reason for the founding of these colonies was that the colonists were ardent Puritans who did not want to worship in the

[3] JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS (1965); P.A. HOWELL, THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL 1833-1876 (1979).
[4] MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE (2004).

Church of England, which was established in that country.[5] Kings Charles I, Charles II, and William and Mary granted the New England colonists colonial charters under which they could govern themselves, subject to Privy Council review and had a free hand in matters of religion. The colonies that became the states of Massachusetts and Connecticut were comprised of ardent Puritan dissenters from the Church of England. When a religious group called the Quakers appeared in Massachusetts, the settlers of Boston executed them. The settlers of Salem tried people suspected of being witches and executed them. The colony of Rhode Island, which is in New England, in contrast adopted a strict separation of church and state from the 1636 on, and people of all religions including Jewish settlers were welcomed in Rhode Island.

The southern colonies of Virginia, North Carolina, South Carolina, and Georgia were not founded for religious reasons. Those colonies were founded so that people could make a better living in the U.S. than they were making in England. Unfortunately, the southern American colonies made widespread use of slavery, which was abolished in 1865 at the end of the American Civil War. The middle colonies of New York, New Jersey, Pennsylvania, Delaware, and Maryland were founded by people of many faiths and were not ardently Puritan like Massachusetts and Connecticut.

From 1607 until 1760, the English government wisely governed the American colonies with a light hand. Only the Monarch's Privy Council governed them and even then only as to mild matters. When King George III came to the British throne in 1760, he was determined to subject the American colonies to parliamentary legislation and taxation even though the colonies were not represented in the British Parliament. George III's actions led directly to the American Revolution, which the colonies won with the aid of Britain's mortal enemy France. In 1783, a peace treaty was signed recognizing American independence. The U.S. and Britain fought a subsequent War of 1812, which ended with Britain again acknowledging American independence. During the American Revolution only about one third of the population favored independence, while another one third were Loyalists. After 1783, 70,000 American loyalists fled mostly to Ontario, Canada. Many Canadian Lockeans moved south the newly created United

[5] PERRY G. E. MILLER, THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY (1939).

States. The British population of North America sorted itself out into a Tory nation in Canada and a Lockean nation in the United States.[6]

A key issue for the Framers of the U.S. Constitution and its Bill of Rights was the profound difference between Puritan New England and Virginia and the southern colonies, which followed the Church of England but had disestablished it. New England was very fearful that there might be a national establishment of religion. Thus, the federal Bill of rights began with the words: "Congress shall make no respecting an establishment of religion, or prohibiting the free exercise thereof." The five State established churches in the thirteen original states were thus constitutionally protected from a national establishment of religion. The Establishment Clause was thus in its origins a states' rights and not an individual's rights provision of the federal Constitution.[7] The Framers were as divided in 1787 over issues of religion as they were over the question of slavery.

B. INDIAN INDEPENDENCE

India initially was colonized by the British East India Company, which was a trading company of vast wealth and which was independent of the British government. The British East India Company was founded in 1600, and it is the only example I am aware of a private corporation conquering and governing an empire – in this case in India. The British government and people never set out to conquer and govern India at all. This feat was entirely accomplished by a private British corporation, a fact which is quite extraordinary. India, unlike the United States was a densely settled country when it was conquered by the British East India Company. Accordingly, it was necessary from the beginning not simply to import British law, as happened in the U.S., but to adjudicate disputes according to Hindu and Islamic law for the native population. Eventually, this task became too great for the British East India Company to accomplish.

In 1857, India rebelled against the rule of the British East India Company in the Sepoy Rebellion. The British government brutally put down the Sepoy Rebellion killing some 800,000 people in the process. After the Rebellion's end, the British government assumed direct control of India, declared itself to be an Empire, and appointed a British Viceroy to govern all of India. The British East India Company was essentially dissolved. The British Viceroy of India, who represented Queen Victoria who took the title of

[6] SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD (1996).
[7] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

Empress of India, gathered some supportive Indians to form a pseudo legislature. In 1862, the British created a High Court in Calcutta, and eventually High Courts in Madras, Mumbai, Kolkata, and Allahabad. These courts began with only British judges, but as Indians came to be trained as barristers, native Indians were appointed to the High Courts as judges. By the 1940's, more than four-fifths of the judges on the High Courts were Indians. But, Britain's rule could be brutal and corrupt on many occasions as it had been between 1760 and 1776 in the United States.[8] Indian cases in huge numbers were appealed to an imperial Supreme Court sitting in London called the Judicial Committee of the Privy Council. This court had judges who were experts on Hindu and Islamic law so that they could professionally decide cases appealed from India. The quality of justice in the Judicial Committee of the Privy Council was absolutely first rate.[9]

The resistance to British Rule began in 1885 with the foundation of the Congress Party. By the 1920's, the party under the leadership of Mahatma Gandhi had over 15 million members and over 70 million participants – all devoted to the cause of Indian independence. The Congress Party was a secular liberal party on the center-left of Indian politics. In 1865, the British Parliament had passed a statute called "The Colonial Laws Validity Act 1865 (28 & 29 Vict. C. 63), which provided that colonial laws were valid and of governing authority so long as they were not repugnant to the laws of England but responded to local conditions. This Act had the effect in 1865 of strengthening the positions of Britain's colonial legislatures while affirming British and Parliamentary supremacy. In the statute of Westminster 1931, the British Parliament repealed the Colonial Laws Validity Act 1865 affirming that the Dominions of Canada, Australia, and South Africa had become free and independent nations whose laws and foreign policy could contradict or not coincide with British law or foreign policy. As to India, the statute of Westminster 1931 gave to the Indian legislature freedom to deviate from British law but not independence. In the Government of India Act 1935, the British government set up a parliamentary system of governance for India with a Council of the People and a Council of the States as the national parliament, and it conferred Dominion status on India putting it clearly on a path that would lead to Indian independence. The British ultimately divided British India into the Princely States and the territories that would eventually become the separate nations of India, Pakistan, Bangladesh, and Myanmar. Those four portions of British India all became independent nations with the passage of time, and British imperial India as a unified territory was

[8] JON WILSON, INDIA CONQUERED: BRITAIN'S RAJ AND THE CHAOS OF EMPIRE (2016).
[9] HOWELL, *supra* note 3, at 7, 9-10, 15-16, 40-44, 90-91, 96, 104, 134, 156-158, 194, 204-205, 215, 216, 229.

rendered an historical anomaly. The Government of India Act, 1935 acknowledged the domestic independence of 565 Princely States. These were territories whose foreign policy was handled by Britain but whose domestic matters were handled by an Indian Prince. The continued existence of the Princely States dated back to the days of the British East India Company, which had had free trade agreements with these independent entities, but which did not control their internal affairs. From the Sepoy Rebellion of 1857 on, the British government had governed directly the parts of India, which had been under the direct rule of the British East India Company, but it allowed the Princely States domestic independence as had the British East India Company.

In 1934, an Indian political leader, M.N. Roy, demanded that a Constituent Assembly of India be established, and this became an official demand in 1935 of the Congress Party. In August 1940, the Indian Viceroy offered to allow Indians to elect their own Constituent Assembly. Under the Cabinet Mission Plan of 1946, the people of India elected the Constituent Assembly. They did so by having provincial assemblies elect members of the Constituent Assembly using a single transferable vote system of proportional representation. The Constituent Assembly was founded on December 6, 1946, and it replaced an Imperial Legislative Council, governed until January 24, 1950, and was succeeded by the Parliament of India. Arguably, the election and assembling of the Constituent Assembly on December 6, 1946 was, itself, a revolutionary act, by which India became independent.[10] The elections led to the Congress Party winning 296 seats, while the Muslim League won 73 seats. The Muslim League demanded its own separate Constituent Assembly, and Lord Mountbatten, the last Viceroy of India scrapped his Cabinet Mission plan on June 3, 1947 amid much rioting between Muslims and Hindus. The Indian Constitution thus gestated during the period between the Government of India Act 1935 and January 26, 1950, when the new Constitution of India went into effect. This fifteen year process is comparable to the fifteen year gestational process between the adoption of the U.S. Declaration of Independence, in 1776, and the final ratification of the federal Bill of Rights to the U.S. Constitution, in 1791. Great constitutions are not usually born slowly or all at one time.

On August 15, 1947, the Republic of India officially declared its independence from the United Kingdom following the June 3, 1947 partition of India and Pakistan into separate nations. The last Viscount of India, Lord Mountbatten turned over the reins of power to Jawaharlal Nehru, and the Congress Party of which he was the head. Nehru and Mahatma Gandhi, both highly trained British barristers of the greatest legal

[10] HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES (2011).

rank, led India into Independence. Prime Minister Nehru tapped Dr. B.R. Ambedkar to lead the Constituent Assembly of India, which drafted and ratified India's Constitution. The people of India never directly ratified the Constitution of India themselves unlike the situation in the U.S. where popularly elected assemblies elected for the sole purpose of ratifying the U.S. Constitution did ratify it in each of the original thirteen states. Dr. Ambedkar was an Untouchable member of the Indian caste system who had earned doctorates from Columbia University and the London School of Economics. In 1956, he converted to Buddhism. He wrote opposition to the caste system and affirmative action for members of lower castes into the Indian Constitution – an amazing accomplishment for a nation that was more than 80% Hindu!

Meanwhile, from August 15, 1947 to 1948, the newly separate nations of India and Pakistan fought the first of four wars over the territories of Jammu & Kashmir. More than 15 million people moved from one country into the other and between one and two million died in the first Indo-Pakistani war. The government and constitution of India were forged in wartime, which explains its strong national grants of power. Violence and rioting occurred even during the meetings of the Constituent Assembly. Remember here that 53,000 Americans and Britons died in the American Revolutionary War, and another 70,000 American Loyalist fled the newly independent United States with most of them moving to Ontario, Canada, which became the progenitor of English-speaking Canadians. Both the U.S. and India were forged in blood and violence.

III. THE BASIC STRUCTURE OF THE U.S. AND INDIAN CONSTITUTIONS

I will now discuss briefly the basic structures of the U.S. and Indian Constitutions and some ways in which they differ. As I said above, I have borrowed the idea of the Basic Structure of the two Constitutions from the key Indian case, *Kesavananda Bharati v. State of Kerala*. In that case, the Supreme Court of India identifies a portion of the Constitution of India, its Basic Structure, as being unamendable. I think this concept is very useful descriptively, and so I have tried to describe what I think is the Basic Structure of the U.S. Constitution with some observations about what the Indian Supreme Court either has said, or might say, about the Basic Structure of the Constitution of India. Under Article V of the U.S. Constitution, there is no such thing as an unamendable Basic Structure. My observations below about the Basic Structure of the U.S. Constitution are positive and descriptive and not normative. I am simply trying to convey similarities

and differences between the world's two most populous democracies. This discussion is only a cursory overview, but I think it is helpful nonetheless in illustrating some key similarities and differences between the Constitutions, as amended, of the world's two most populous democracies both of whom are members of the G-20 nations, which together produce 85% of the world's GDP.

A. THE CONSTITUTION OF THE UNITED STATES

The American constitutional experience germinated from the founding of Jamestown in 1607 until American independence in 1776. During this 169 year period, the American colonies became accustomed to having a Royally-appointed Governor, who exercised the executive power. These governors were advised by a Governor's Council, picked by the Governors and officials in London, and which ultimately became the State senates after 1776. The Governor in Council appointed and removed all colonial executive officers and judges. The people of the colonies were represented in a colonial House of Representatives, which had the sole power to raise taxes and spend money. In Massachusetts, the House refused to pay a permanent salary to the royal governor choosing instead to pay him as much or as little as his behavior during the previous year seemed to warrant. In the 169 year colonial period, the American colonists became very used to having a lower house of the legislature, a governor's council, which became the upper house of the bicameral colonial legislatures, and a separately selected chief executive. It is thus not surprising that, in 1787, Americans set up a constitution with a separately elected president, senate, and House of Representatives.

The basic structure of the U.S. Constitution was also, in part, the result of two dystopias: the first was the Imperial Tyranny of 1776 and the Second was the Village Tyranny and the collective action problems experienced by the states in the period running up to 1787. In 1776, Americans thought they were the victims of an imperial tyranny conducted by a government 3,000 miles away across the Atlantic Ocean and presided over by a tyrannical King who wanted to undo the limits on royal power created by the English Glorious Revolution of 1688. Colonial Americans were against imperial or national power and they were against executive power and in favor of legislative power. They thought the people elected the legislature while the imperial King appointed their governors. They also thought the people's legislature would never

abuse power because the people unlike Governors loved liberty.[11] This faith in the people quickly showed itself to be quite naïve.

As a result of these beliefs, Americans between 1776 and 1787 wrote eleven state constitutions: one for each of the 13 states except for Connecticut and Rhode Island, which opted to retain their Royal Charters as constitutions. Of the eleven state constitutions written between 1776 and 1787, all but New York provided for only a one year term for the state governors. Governors were stripped of their veto power (except in Massachusetts), of their appointment power, and of their pardon power. State legislatures were made all powerful. The national constitution, which was called the Articles of Confederation, did not give the national Congress the power to tax, the power to regulate commerce, or the power to directly legislate on the citizens of the states. Under the Articles of Confederation, each of the thirteen states cast one vote in the Continental Congress. Amendments to the Articles of Confederation required the unanimous consent of all thirteen states. An amendment to give the Continental Congress the badly needed power to regulate commerce failed because, although 12 states ratified it, tiny Rhode Island vetoed the amendment. At the time, Rhode Island had 1/58th the population of Virginia, the most populous state.

These constitutional arrangements were disastrous. Legislatures bickered over who to appoint to offices, passed bills creating inflationary paper money, and rode roughshod over the citizens liberties. In Massachusetts, debtor-farmers led a civil war, called Shays' Rebellion, against Boston bankers, which was barely put down. The federal government was broke because all it could do was ask the states for money, which the states refused to provide. The country went into an economic downturn because Congress lacked the power to protect commerce among the states or to negotiate trade treaties with foreign nations such as Britain and France. All of these events led to the Village Tyranny and the 13 states' collective action problems of 1787. These problems were addressed by a convention of delegates from 12 states, every state but for recalcitrant Rhode Island. The Convention met in Philadelphia, Pennsylvania, and it drafted the present Constitution of the United States, which went into effect in 1789. The Philadelphia Convention was supposed only to draft amendments to the Articles of Confederation, but under the chairmanship of George Washington, it became a runaway convention, which drafted a whole new

[11] CHARLES C. THACH, THE CREATION OF THE PRESIDENCY, 1776-1789: A STUDY IN CONSTITUTIONAL HISTORY (1922).

Constitution to replace the Articles of Confederation. That Constitution is both the oldest and the shortest Constitution in the history of the world.

The Constitution tried to create a much stronger and more effective national government that would not be imperialistic the way the British government had been in the years between 1760 and 1776.[12] It also created a strong executive, the President, who was a greatly tamed version of King George III – so tamed that he could never become and has never become a tyrant. It set up a system of bicameralism whereby the states were equally represented in the Senate and whereby representation was based on population in the House of Representatives. It set up an independent judiciary of life tenured judges with no mandatory retirement age. It allowed for constitutional amendments if two-thirds of both houses of Congress and three-quarters of the states concurred. To reassure those who were wary of the power of the new national government a federal Bill of Rights was adopted in 1791. The underlying principle of the U.S. Constitution is that sovereignty resides in "We the People of the United States" who made the Constitution our highest law. It is for this reason that no court in the United States could ever have the power of "We the People" to make and change our constitutional law. The other underlying principle of the U.S. Constitution was and still is one of checks and balances.

Congress can check the President and the Supreme Court because it alone has the Power of the Purse. The President cannot buy a light bulb for the Oval Office without an appropriation from Congress. Nor can the President build a wall between the U.S. and Mexico, as President Trump is now finding out, without an appropriation from Congress. Congress can impeach the President, the Vice President, the Cabinet Officers, and all federal judges by a majority vote of the House of Representatives and the concurrence of two thirds of the Senate. Congress can even pass a law over the President's veto by a two thirds vote of both houses.

The President can and does check Congress and the Courts because he alone has the Power of the Sword. He is also Commander-in-Chief of the U.S. Military, which today has 2 million active and reserve personnel. As Commander-in-Chief, the President can deploy the military in North Korea or in Iran if he wants to do so. Congress's enumerated power to declare war in the international law sense of that term is confined to triggering the treaty support from our allies. This interpretation of the Commander-in-Chief power is far broader than the Framers intended in 1787, but it is confirmed by the settled practice of the

[12] GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969).

Republic from 1789 to 2018.[13] The President is also the Chief Law Enforcement officer of the government, and the Attorney General and all other prosecutors technically report to the president although in practice they are often quite independent as Robert Mueller is currently proving.[14] The President has broad power to start and stop wars contrary to the text and original meaning of the Constitution but pursuant to the practice under the Constitution since 1789. He can veto acts of Congress, and the President alone nominates all executive branch principle officers of the United States as well as all Article III federal judges including Supreme Court justices. Eighty per cent of all presidential Supreme Court nominees have been confirmed, and nominations to executive offices are probably almost always confirmed.[15] The Appointment Power, along with the Power of the Sword, make the President the most powerful man in the whole world.

The Supreme Court can check Congress and the President by declaring their acts unconstitutional. The Court also "construes and interprets" what acts of Congress and executive orders really mean. This is all by itself a formidable power. Supreme Court judgements are treated with the highest respect, and the Supreme Court is consistently, in public opinion polls, the most popular institution in the government. Congresses and presidents who fight with the Supreme Court usually lose. The Supreme Court is a very elite institution with all nine of its members having currently attended either Yale or Harvard Law Schools. Lawyers, in general, are a wealthy elite, and this is especially true of the slightly more than 800 lawyers who graduate each year from Yale and Harvard out of more than 30,000 lawyers each year who graduate from an American law school. Only the very best and most moderate Yale and Harvard Law school graduates get appointed to the Supreme Court. The Supreme Court is what Thomas Jefferson would have called a natural aristocracy of talent. The Senate, which confirms Supreme Court nominees, is also a natural aristocracy of talent. The vast majority of Senators are millionaires, and as of 2018, even most members of the House of Representatives are millionaires. Jefferson's self-made aristocracy of talent and merit rules the land.

[13] For an argument that the Framers meant for the President to have the foreign policy and war powers he has, see SAIKRISHNA PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE (2015).
[14] STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008).
[15] HENRY ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II (1999).

The national government is one of very broad enumerated powers, but the 50 State governments still retain substantial power. Most American presidents arrive in the presidency as former Governors, which shows the continuing importance of the States in national politics. James Monroe; Martin Van Buren; John Tyler; Andrew Johnson; Grover Cleveland; William McKinley; Theodore Roosevelt; Woodrow Wilson; Calvin Coolidge; Franklin D. Roosevelt; Jimmy Carter; Ronald Reagan; Bill Clinton; and George W. Bush were all state governors prior to their being elected president of the United States. Of these 14 Governor-Presidents, eight won two presidential elections! The path to the White House usually leads through state house politics. The states are weakened because, although most federations around the world have about 25 member states, the United States has 50 member states.[16] This creates insurmountable collective action problems for States trying to bargain with the federal government about national power rules in the Constitution.

The states also retain great power because they are equally represented in the Senate and because the Senate is more powerful than is the House of Representatives. The Senate has sole power to confirm presidential nominees to the Cabinet or to the Supreme Court or to the lower federal courts. Any subordinate executive officer or judge who wants a promotion simply must curry favor with the Senate as well as with the President. Moreover, the Senate must ratify treaties by a two-thirds vote. Senators and Presidents with States rights views have named five of the nine current Supreme Court justices. It could rightly be said of the U.S. Senate that it is the cornerstone of the Constitution.

Vital amendments were added to the Constitution after the Civil War; during the Progressive Era; and during modern times without which the Constitution would not be a desirable form of government. That being said, we might note that the United States is the fourth largest country in the world, the third most populous country in the world after India; and the U.S. has the highest GDP per capita of any of the G-20 nations as well as still having a larger economy than that of China even though China has four times as many people as does the United States. The system of constitutional checks and balance which underlies the U.S. Constitution explains why millions of people around the world want to emigrate to the United States but almost no Americans want to leave the United States to move to another country.

[16] Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 FLA. L. REV. 1, 1-45 (2011).

The philosopher Aristotle wrote that the ideal Constitution was a Mixed Regime, which contained the best forms of monarchy, aristocracy, and democracy. These best forms are: the energy in foreign policy and in defense that a good monarchy provides; the wisdom in policy that a good aristocracy provides; and the passion for liberty that a good democracy provides. A good rule by One person is a philosopher king not a tyrant. A good rule of the Few is rule by the best, the *aristoi*, not rule by corrupt oligarchs. A good rule of the Many is the liberal government of Pericles' Athens, not the mob rule of present-day Venezuela. Aristotle[17] thought that if you could combine the three estates of society – monarchy, aristocracy, and democracy into one constitutional regime of the One, the Few, and the Many you would have a perfect polity. Eighteenth Century England thought it had such a "Balanced Constitution", but the British failed to realize that hereditary monarchs and aristocrats were inconsistent with the principles of the Enlightenment, which were sweeping across the world in the Eighteenth Century.

The Framers of the U.S. Constitution completely and rightly rejected hereditary rule in favor of rule by the Many since all men are, as the Declaration of Independence says, created equal. But, the Constitution the Framers wrote has an institution of the One, in the form of the President; an institution of the Few in the form of the Senate and Supreme Court; and an institution of the Many in the form of the House of Representatives. But – and here is the crucial point to absorb – in the United States the Many get to pick and elect both the One and the Few in staggered intervals.[18] We thus are a complete democracy that benefits from the Aristotelian idea that the ideal Constitution is a Mixed Regime of the One, the Few, and the Many. Our President is the most powerful chief executive in the world, but we have never had a coup d'etat or a state of emergency. Our Senate is filled with a natural aristocracy of talent with the vast majority of its members being millionaires and all nine of our Supreme Court justices attended Yale or Harvard Law Schools, but we have no corrupt Putinesque Oligarchs. And, our House of Representatives and state governments are full of common men with a love of liberty. Given all of this, it is no wonder that millions of people want to come to the United States, but no one wants to leave it.

B. THE CONSTITUTION OF THE REPUBLIC OF INDIA

[17] ARISTOTLE, THE POLITICS (2000). Aristotle's advocacy of Mixed Regimes was echoed by the Greek philosopher, Polybius; the Roman philosopher, Cicero; the medieval Christian philosopher, St. Thomas Aquinas; and the Florentine philosopher, Machiavelli. Steven G. Calabresi et al., *The Rise and Fall of the Separation of Powers*, 106 NW. U. L. REV. 527-549 (2012).
[18] *Id.*

The Constitution of the Republic of India is also a miracle of the ages. It was written to govern a substantial portion of what had been British India, but which had never before in history been a united nation within the present borders of India. The Framers of India early in its history got rid of the of the 565 Princely States creating one unified nation with twenty nine states and seven union territories. India is the most populous democracy in the world, it is the second most populous nation in the world, and it is the seventh largest nation by territory in the world. Its population is infinitely more diverse than that of the United States because India contains dozens of religious groups that use many different languages and dialects. It is home to Hindus, Muslims, Sikhs, Christians, Jains, Zoroastrians, and a Jewish community. Its Constitution is 68 years old, and it is unique among former colonies of the British Empire because it copies both the British Parliamentary system and the American love of a very powerful and prestigious judiciary that enforces a Bill of Rights that goes much farther than does the U.S. Bill of Rights.

The structural portions of the Constitution of the Republic of India borrow greatly from the British Government of India Act 1935 and set up a bicameral legislature with the lower house representing the people and electing the Prime Minister and the much weaker upper house representing the States. There is a ceremonial President of India who exercises no power and the executive power is effectively in the hands of the Prime Minister and his cabinet who are accountable to the lower house of the legislature. The Supreme Court of India is a highly respected and uniquely powerful governmental entity. It hears cases that are appealed from the 24 regional High Courts and from a huge number of federal trial courts. The Constitution of India is the longest Constitution in the world. This reflects, in part, the great diversity of that country.

Nominally, the Indian Constitution creates a stronger national government relative to the states than does the U.S. Constitution. The U.S. Constitution enumerates and lists some very broad national powers and then the Tenth Amendment states the truism that all the powers that have not been delegated are retained. The Indian Constitution, in contrast, enumerates national power, state power, and concurrent power with residuary powers being vested in the national government. As a practical matter, the national governments of both India and the United States can legislate on almost every matter they want to legislate on. The Indian government does not give to its upper house, the Counsel of States, the important powers of confirming cabinet and judicial nominees, and so the states are noticeably less powerful in India than in the U.S. This is counter-balanced to some extent because the huge number of states in the U.S. – 50 – renders almost all forms of state competition with federal power impossible to execute. Moreover, while each state

has an equal number of senators, the direct popular election of senators has largely severed them from their original role of being ambassadors from the several states.

India did prior to the decision in *S.R. Bommai v. Union of India*[19] dissolve state governments more than 90 times when the national government was in the hands of a different political party than was a state government. That practice has been greatly reduced since the *Bommai* case was handed down and the U.S. Congress has intervened in its own ways to affect state governments much more often than people generally know. For example, the U.S. Congress has, ever since it admitted Vermont to become the fourteenth state, in 1791 passed on whether the proposed state constitution was "republican in form." Article IV, Section 4 of the U.S. Constitution reads that:

> "*The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them from invasion; and on the Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence*."[20]

Congress invoked this Clause in scrutinizing every one of the State constitutions of the thirty-seven states that have joined the union since 1791 to make sure their constitutions were "republican in form." In 1841, this Clause was invoked when President Tyler put down Dorr's Rebellion in Rhode Island. In 1861, Abraham Lincoln stated as one of his justifications for fighting the Civil War his need to be able to guarantee to the eleven Confederate States a "republican form of government." Congress justified its Reconstruction of the South based on its need to guarantee to the Confederate States "a republican form of government", and Congress forced the eleven Confederate states to ban racism in their State constitutions as a condition of allowing them to resume representation in the House of Representatives and in the Senate. In the 1880's and 1890's, several states including Utah and Idaho were forced to ban polygamy in their State constitutions as a condition of attaining statehood. And, in the 1960's, the Warren Court forced the States to adopt a rule of one person, one vote not only for federal house of representatives districts but also for seats in both houses of the state legislatures. Although that case was based on the Equal Protection Clause of the Fourteenth Amendments, most scholars believe the case was a "republican form of government" case under Article IV, Section 4.

[19] S.R. Bommai v. Union of India, (1994) 2 SCR 664.
[20] U.S. CONST. art. IV, § 4.

The point of this comparison is not to excuse the Indian practice before the *Bommai* case, but is rather to show that the U.S. practice is not as federalism-friendly as some Americans may think it is. Federalism scholars say the U.S. is more federal than is India, but this is only by a matter of degree. James Madison, the father of the U.S. Constitution and Bill of Rights wrote in The Federalist, No. 39 that the U.S. Constitution is partly national, and partly federal. This is true. American federalism is balanced between national and state power. It is still the case today in the United States that 95% of all the judicial cases, which are heard in the U.S. are decided by state courts and not by federal courts. India, in contrast, is mostly national and only quasi-federal. This reflects the need for national power in the tumultuous politics out of which the nations of India and Pakistan were born.

The parliamentary system in India is similar to most commonwealth countries, which have parliamentary systems. There is a fusion of the executive and legislative power in the government and members of the Cabinet must also have seats in parliament. This is in contrast to the rule in the United States whereby Members of Congress are constitutionally barred from holding any executive branch or judicial position.

For most of its 68 year history, India has been dominated by the Congress Party leadership, which obtained independence. Jawaharlal Nehru was Prime Minister for almost seventeen years prior to his death in 1964. His daughter, Indira Gandhi, was Prime Minister for fifteen years with a period of time when she was voted out of power for having declared a state of emergency rule. She was succeeded by her son Rajiv Gandhi who served as Prime Minister for five years. Manmohan Singh ruled as Prime Minister for ten years during which time Sonia Gandhi, the Italian-born daughter-in-law of Indira Gandhi was the real power behind the throne. The Nehru family has thus controlled the government for 57 out of the last 68 years while in the remaining 11 years the Congress Party has sometimes controlled the government sporadically.

From the perspective of liberal constitutionalism, which eschews hereditary office-holding, this dominance of the Nehru clan is in sharp contrast with the behavior of the first American president, George Washington, who gave up power after two terms as president to set an anti-monarchical precedent. Washington did not want to die in office like a king. Nehru, Indira Gandhi, and Rajiv Gandhi, in contrast, all died in office with the latter two being assassinated. It must be pointed out, however, that George Washington was almost certainly sterile since he had no children of his own, and his wife, who he married

at the fertile age of 26, had had two children by her first husband. We thus cannot know what George Washington might have done if he had had children nor can we know what those children would have aspired to.

Moreover, Thomas Jefferson who served as president from 1801-1809; James Madison, who served as president from 1809-1817; and James Monroe, who served as president from 1817-1825 all had daughters and no sons in a democracy in which women could not vote or run for office. They too were not tempted to favor their kin. Jefferson, Madison, and Monroe, however all lived a short horse ride or walk away from one another near Charlottesville, Virginia. They thus favored their friends in successive presidential elections even if they could not favor the sons they never had. In fact, the only one of the first five U.S. presidents to have a son was John Adams, 1797-1801, and his son John Quincy Adams was elected as president from 1825-1829! So, in the first forty years of American history, the Founding Fathers of the United States ran the country as their own club every bit as much as the Nehrus ever did. This is especially true when we realize that the Jacksonian presidents who held the presidency from 1829 to 1861, but for two four year interludes, were followers of Jefferson and Madison's very skeptical ideas about the scope of national power or the wisdom of government intervention in the economy.

The structural features of the Indian Constitution were thus parliamentary government, as described in the Government of India Act 1935, and it could be fairly said that other than Nehru replacing Lord Mountbatten and an Indian Cabinet replacing a British one, the government of India really did not change that much on August 15, 1947. Abhinav Chandrachud observes that eleven of the thirteen members of the Bombay High Court in 1947 were already native Indians. He argues this was the case generally throughout the Indian judicial system, the bureaucracy, and the armed forces, which explains why Jawaharlal Nehru never engaged in a denazification or debathification campaign upon becoming Prime Minister of India. India was already mostly independent on August 15, 1947, and the main changes were symbolic: Nehru replacing Mountbatten; Indian justices replacing British justices as Chief Justices of the High Court; the Supreme Court of India replacing the Judicial Committee of the Privy Council. There were no changes

made at all to the membership on the High Courts, in the bureaucracy, or in the Indian Armed forces. Nehru took over British Imperial India as a going concern, and he made minimal changes to it.[21]

The biggest differences between the Indian Constitution and the British Constitution can be seen in the Preamble of the Indian Constitution; in its Bill of Rights; and in its set of Directive Principles. India's Preamble and Bill of Rights reflect the admiration of Dr. Ambedkar for the U.S. Constitution. Consider the language of the Preamble of the Constitution of India:

"WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:
JUSTICE, social, economic and political;
LIBERTY of thought, expression, belief, faith and worship;
EQUALITY of status and of opportunity; and to promote among them all
FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;
IN OUR CONSTITUENT ASSEMBLY this 26th day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."
To read these words is to hear an echo of very different events in Philadelphia, Pennsylvania at the U.S. Constitutional Convention of 1787. Admittedly, the Framers of the U.S. Constitution were not socialists by any means, but they would have agreed otherwise with this remarkable Indian document except for the failure to submit it for ratification by the People of India.

The Indian Constitution also contains a very broad classical liberal Bill of Rights. It protects an individual's right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights, and right to constitutional remedies. The only classical liberal right that was once protected, but which has since been removed from the Indian Constitution was the right to property. The removal of this right was made necessary by the urgent need of a very densely populated country for land reform. In the United States, land reform was a non-issue because people could always move left and farm vacant land acquired as a result of the killing of the Native Americans. Americans should reflect on that fact before being too critical of the Republic of India's land reform efforts. We, in fact, should have engaged in land reform ourselves in 1865 when we should have carved up the southern plantations and

[21] ABHINAV CHANDRACHUD, AN INDEPENDENT COLONIAL JUDICIARY: A HISTORY OF THE BOMBAY HIGH COURT DURING THE BRITISH RAJ, 1862-1947 (2015).

divided them among the freed African American slaves. We Americans are still paying the price for this down to the present day.

The Indian Constitution goes beyond the U.S. Constitution in setting up a series of Directive Principles – entitlements to affirmative government aid – that were originally supposed to be non-justiciable, but which are now judicially enforced. These directive principles obligate the government to provide jobs, equal pay to men and women, retirement benefits, free public school education, and many other such aspects of the socialism and justice referred to in the Preamble of the Indian Constitution. The significance of the Indian Bill of Rights and of its Directive Principles lies in the fact that they are enforced by the Supreme Court of India, which is quite simply the most powerful court in the world. The Supreme Court has written a sexual harassment law for India[22] and a Euthanasia law[23]. The Supreme Court of India has even assumed the power to review the constitutionality of constitutional amendments insofar as they conflict with the Basic Structure of the Constitution. The Supreme Court has asserted this power on many occasions, and the other branches of the government of India and more importantly the people of India have accepted the proposition that the Supreme Court has to have this power – in part because otherwise the Constitution of India would be too easy to amend. I have borrowed this Basic Structure idea to describe positively the U.S. Constitution in this essay, even though in the United States there is no such thing as an unconstitutional constitutional amendment. The mere concept of the Basic Structure doctrine is an important contribution of Indian jurisprudence to modern constitutional thought, and I hope that is reflected in my essay.

More controversially, the Supreme Court of India has also successfully claimed the power to appoint its own successors. It was able to, and had to, claim this power after former Prime Minister Indira Gandhi's State of Emergency in which she sought to punish Supreme Court justices by passing over in seniority those who had ruled against her in picking a Chief Justice. The public was outraged by Indira Gandhi's effort to politicize the Supreme Court, and it backed the Supreme Court over the corrupt politicians so the Supreme Court of India is today a self-perpetuating body like a law school faculty. New Supreme Court justices are picked by a five member commission of which three of the members are always the three most senior justices on the Supreme Court. As a result, it can be fairly said that the Supreme Court itself picks

[22] Vishaka v. State of Rajasthan & Ors., (1997) 6 SCC 241.
[23] Aruna Ramachandra Shanbaug v. Union of India, (2011) 4 SCC 454.

its own successors. Imagine a U.S. Supreme Court, which had its three most senior members – Chief Justice John Roberts; Justice Anthony M. Kennedy; and Justice Clarence Thomas – fill new vacancies on the Supreme Court. The American people would rightly revolt against such a situation, but in India and in the United Kingdom and in Israel this is the way in which new Supreme Court justices are selected. Talk about an aristocracy of the robe!

Finally, and of equal importance, the Supreme Court of India held in *M.C. Mehta and Anr. v. Union of India and Ors.,*[24] that it could assume jurisdiction over a matter simply by a justice reading about it in a letter to the editor of a newspaper. This is an extraordinary abolition of standing to sue in court compared to what is required in the United States. In the U.S., individuals have standing to sue if: 1) they have suffered a concrete, discernible legal injury that is not merely conjectural or hypothetical; 2) that has been caused by the defendant; and 3) that can be redressed by an Article III federal court. What this reflects is that both the United States and India suffer from a problem of judicial activism, which is exacerbated by the people's faith in their courts and skepticism of their elected representative. In the United States, judicial activism manifested itself in *Roe v. Wade*,[25] a case where the Supreme Court decided national abortion law setting off a 45 year-long fight between liberals and conservatives over who should be appointed to the Supreme Court. In India, judicial activism was unleashed by the abolition of standing law. The U.S. has the toughest standing rules in the world and India has the loosest. Where do the countries in between come out? I will not offer an exhaustive survey, but I will mention what I know about standing to sue in Canada and in Germany, which is at least a good start. This comparison will suggest some ways in which Indian standing law might be cut back.

In Canada, standing to sue by a private person requires that he or she has suffered an injury to a legally protected right. Not every bad thing that hurts your feelings can be the basis of a lawsuit. You cannot sue your friend if he painfully ends a longstanding friendship with you nor can you sue if you are not invited to a dinner party at someone's home, which you very much like to attend. You can sue more readily in Canada than in the U.S. over damage to the environment. A Canadian court is less likely to dismiss environmental harms as being conjectural or hypothetical than would be a U.S. court. More importantly, however, Canadian standing law is very different from American standing law if the government wants an advisory opinion from a court. In Canada, either the federal government or a provincial government can

[24] M.C. Mehta and Anr. v. Union of India and Ors., (1986) 2 SCC 176.
[25] Roe v. Wade, 410 U.S. 113 (1973).

request, and can get, an advisory opinion from the Supreme Court of Canada or from a lower Canadian court. Thus, when Quebec Province held a referendum in 1995 on whether it should secede from Canada, the referendum favoring secession failing by the close margin of 50.58% voting "no" and 49.42% voting "yes." In the wake of this squeaker, the government of Canada asked the Supreme Court of Canada for an advisory opinion on what would be the legal consequences in the future if such a referendum in Quebec Province were to pass?

The Canadian Supreme Court replied in a lengthy answer in *Re: Secession of Canada*.[26] The Court said that if such a referendum were to pass Canada would have to enter into serious secession negotiations with Quebec Province, but Quebec Province could not secede with its current boundary lines intact, without giving hard proof that it would treat fairly its English-speaking minority, and that Quebec would have to assume its share of Canada's national debt and of its obligations to aboriginal people. The Canadian Supreme Court's opinion has something in it for everyone and it seems to have calmed the waters of secession quite successfully.

Yet, the U.S. Supreme Court would never answer such a question posed to it by the President, a House of Congress, or a Member of Congress. In the early 1790's, President Washington asked Secretary of State Thomas Jefferson to write Chief Justice John Jay asking for an advisory opinion on 27 legal questions mostly arising out of U.S. relations with revolutionary France. Chief Justice Jay promptly wrote back that it would violate the separation of powers for the court to opine on legal matters unless there was: 1) an actual controversy between two adverse parties; and 2) a substantial likelihood[27] that a court ruling would make an important difference in the real world by redressing some harm cause by some defendant to some plaintiff's legal rights. In *Raines v. Byrd,*[28] the U.S. Supreme Court ruled that former Senator Robert Byrd lacked standing to challenge the constitutionality of a statute that he had voted against and which he thought unconstitutionally reduced the powers of the U.S. Senate. The Court said that just because Byrd was a Senator, he was not legally injured about a statute that he thought unconstitutionally reduced the power of the Senate even if he was pretty damn mad about it. When President Clinton then used that statute, the line item veto act, to deny federal funds to the Republican mayor of New York City, Rudy

[26] Re: Secession of Canada, 2 S.C.R. 217 (1998).
[27] See Hayburn's Case, 2 U.S. 409 (1792).
[28] Raines v. Byrd, 521 U.S. 811 (1997).

Giuliani, the Supreme Court held that a loss of money was a legal injury, that Giuliani thus had standing to sue, and it held the line item veto act to be unconstitutional.[29]

The Canadian practice of issuing advisory opinions when the government, but not a private citizen, asks for them has deep roots. In *Attorney-General for Ontario v. Attorney-General for Canada (Reference Appeal Case),*[30] their Lordships of the Judicial Committee of the Privy Council held in a judgment announced by Earl Loreburn L.C. that the Canadian courts had been issuing such advisory opinions for three-quarters of a century, that these opinions had been reviewed by the Judicial Committee of the Privy Council, and that no one had ever questioned the judicial practice of giving the legislature advisory opinions. Moreover, their Lordships noted that in England itself the House of Lords in its legislative capacity could quite certainly ask the Law Lords for advisory opinions to aid them in their work of writing legislation. For these two reasons the Judicial Committee of the Privy Council in 1912 came down in favor of governmental power to request advisory opinions. Their Lordships finally implied that the Governor General of Canada in parliament with the Senate and the House of Commons in Canada was sovereign and could therefore do anything it liked. The implication was that the King-in-Parliament in England could ask his judges for and would receive an advisory opinion so therefore the Canadian government could do the same thing. In the United States, sovereignty lies with "We the People" so the President-in parliament with the Senate and the House of Representatives would lack the power to command the U.S. Supreme court to produce an advisory opinion. Chief Justice John Jay's curt reply to President George Washington and Secretary of State Thomas Jefferson shows what a difference the separation of powers can make.

In Germany, standing doctrine is a great deal looser than in Canada. Any of the 16 German states, called the Lander, have standing to raise any constitutional question they want to raise before the Constitutional Court. In contrast, in *Massachusetts v. Mellon,*[31] the court denied that states in the U.S. could challenge the constitutionality of any statute. In Germany, individuals can file constitutional complaints. In *Frothingham v. Mellon,*[32] the U.S. Supreme Court denied that American taxpayers had standing to bring such suits – a holding which remains good law today. In Germany, members of parliament who have voted against a bill often have standing to sue. And, finally, of course, when constitutional issues arise in German civil or criminal cases, they can be referred for decision of the Constitutional Court.

[29] Clinton v. City of New York, 524 U.S. 417 (1998).
[30] Attorney-General for Ontario v. Attorney-General for Canada (Reference Appeal Case), (1912) A.C. 571.
[31] Massachusetts v. Mellon, 262 U.S. 447 (1923).
[32] Frothingham v. Mellon, 262 U.S. 447 (1923).

German standing law is famously liberal, but it is not as liberal as the standing law of India. A German citizen can bring a constitutional complaint, but he needs to write it up and send it to the court, which then reviews it following an organized procedure. In contrast, in India a case can be initiated by writing a letter to the editor of a newspaper that an Indian judge happens to read and thinks is actionable. The Indian rule is thus considerably looser than is even the German rule. Nonetheless, the people of India like this looser standing, and they perceive the courts as powerful friends who stand up for individual rights against corrupt government officials and businessmen.

CONCLUSION

I am not going to pass judgment on the merits of American, Indian, Canadian, or German standing law just as I will not pass judgment on any of the other issues of constitutional law or performance I have described in this essay. Each country may very well have derived the rules of standing that best compart with its own constitutional history and structure. India is a hugely important country in the world today for many reasons. It is not only the world's largest democracy, but it is also about to become the most populous nation in the world. India is blessed with a multiplicity of religions, ethnic groups, races, and linguistic groups living peacefully side by side – a model that should be the envy of the Middle East or of Africa. India is growing economically at a very fast pace, and we should all pray that it will succeed in eliminating poverty first within its borders and second within its region. India is closely tied to the United States by its diaspora of emigrants who have settled in the United States. Two of my own best friends, Akhil Amar and Saikrishna Prakash, are a part of that diaspora. So too is Nikki Haley, the United States' current ambassador to the United Nations.

I think the reason Indians have made their Supreme Court so incredibly more powerful than is the U.S. Supreme Court is because the reputation of politicians is so much lower in India than it is in the United States. In the U.S., we have evolved powerful and largely independent and professional U.S. Attorney's Offices with staffs in the hundreds in major cities. Most of these prosecutors are well protected by civil service laws, and they will prosecute corruption vigorously at the first hint of it, and no presidentially appointed U.S. Attorney will dare for partisan reasons to stop such a case.

India does not yet have a cadre of professional equivalents who cannot be corrupted and will prosecute vote fraud or bribery zealously. As a result, Indians trust the Supreme Court more than they trust election results or politicians, and I can hardly blame them. There is moreover a lack of energy in the executive because of the absence of a presidential system. That too may, however, be necessary because the period of emergency rule by Indira Gandhi may have proven that presidentialism would not work in India just as it has not worked in Latin America, Indonesia, South Korea, the Philippines, and the Russian Federation. In all those countries, presidentialism led to dictatorship. Better a corrupt parliamentary democracy, which is free, than a dictatorship, which is not.