CONSTITUTIONAL NARRATIVES: CONSTITUTIONAL ADJUDICATION ON THE RELIGION CLAUSES IN AUSTRALIA AND MALAYSIA

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INTRODUCTION

Constitutions are, in part, a story that a country tells about itself.[1] It tells the world that a country is: democratic and rights respecting;[2] revolutionary and radical;[3] religious and righteous;[4] traditionalist and lawyerly.[5] Yet the story is not static and, in most cases, there is not a single story about the broader place and purpose of the constitution. There may be a dominant story at a particular point in time, but there are usually other stories that contest that dominance and, particularly at times of constitutional controversy, may lead to the rise of a new dominant narrative.

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[1] The preambles often provide space for the clearest expression of these stories, and examples are given from a variety of preambles in the footnotes that follow.

[2] *See, e.g.*, U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.").

[3] *See, e.g.*, CUBA CONST. pmbl. ("HAVING DECIDED to carry forward the triumphant Revolution of the Moncada and of the Granma of the Sierra and of Girón under the leadership of Fidel Castro, which sustained by the closest unity of all revolutionary forces and of the people won full national independence, established revolutionary power, carried out democratic changes, started the construction of socialism and, with the Communist Party at the forefront, continues this construction with the final objective of building a communist society[.]").

[4] *See, e.g.*, Qanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980] pmbl. ("The Constitution of the Islamic Republic of Iran sets forth the cultural, social, political and economic institutions of the people of Iran, based on Islamic principles and rules, and reflecting the fundamental desires of the Islamic people.").

[5] *See, e.g.*, AUSTL. CONST. pmbl. ("Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows[.]").

In this Article, I argue that it is possible for constitutional scholars to gain a richer, deeper insight into what interpretative decisions judges make and why they make them if attention is paid to this idea of constitutional narrative in judicial interpretations of the constitution. Constitutional narrative in this context is a culturally and legally created story about the role, purpose, history, and relevance of the constitution in a particular society. This use of narrative or story-telling is related to, but distinct from, concepts such as culture, ideology, or politics, which have already been explored in some detail in constitutional theory.[6] As Robert Cover put it in his famous discussion of *nomos* and narrative: "Every prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose."[7] Narrative supplies this location of constitutional prescriptions within its broader context and purpose.

One of the powerful potentials of a narrative is its role in making sense of what might otherwise be a collection of random information—of bringing coherence to chaos or meaning to what otherwise might be meaningless. In doing so, it invariably requires a creative element to weave together a disparate group of characters, settings, activities, and tensions into a meaningful whole. Characters are sifted into minor or major; good or evil; passive or active. Potential interactions between them are restricted to those which drive the narrative, and key dilemmas or tensions are delimited.

Judges in constitutional cases are also potentially faced with a chaotic universe of relevant factors.[8] First, there are higher-order interpretative decisions about the classes of materials that they will look at, such as constitutional drafting debates, the decisions of previous courts, the decisions of foreign courts, international law, religious law, the views of the population at the time of constitution making, and the views of the population now. These higher-order decisions may be made consciously and articulated as a commitment to a particular theory of constitutional interpretation; in Australia, for example, Justice Kirby has placed himself in the progressivist interpretative tradition,[9] and Justice Heydon has placed himself in a particular form of

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[6] *See, e.g.*, Robert M. Cover, *The Supreme Court, 1982 Term–Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 6–11 (1983).

[7] *Id.* at 4–5.

[8] *Id.* at 54–55.

[9] Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 MELB. U. L. REV. 1 (2000); Michael Kirby, *Living with Legal History in the Courts*, 7 AUST. J. LEGAL HIST. 17, 21–24 (2003).

originalism.[10] However, many other judges reject any comprehensive theory of constitutional interpretation and simply use or refuse to use particular methods in particular cases; even judges who subscribe to particular theories of interpretation rarely maintain a purity of approach across all cases.[11]

Judges must also make middle-order interpretative decisions. For example, when judges look to foreign law they must decide with which jurisdictions they will make comparisons. Judges who draw on international law must decide whether a United Nations human rights declaration should be used as a source of international law in addition to formal treaties. Originalists must consider which aspects of the historical record count—do the private views of constitutional drafters count or must they limit themselves to publicly expressed views?[12] There is, of course, a vast quantity of highly sophisticated scholarly work debating these very points—justifying not only originalism but a form of enactment rather than intention originalism[13] or justifying comparativism and engaging with the question of the scope and limits of permissible forms of comparison.[14] While at one level this can be of assistance and guidance to judges (some of whom directly or indirectly refer to such scholarship), it also adds to the ever-extending universe of factors that are to be taken into account by often overstretched, time-poor judges. The task of constitutional adjudication begins to look formidable indeed.

Constitutional narrative can be a way for judges to navigate some of the difficulties of this task.[15] Most judges do not consciously and deliberately adopt a story of the constitution in the way that they might adopt a particular interpretative theory or political philosophy, which are both possible responses to the complexities of making constitutional decisions. Rather, the narratives work below the level of conscious decision-making in most cases, affecting the decision to adopt more specific interpretative approaches, and informing the judicial approach to the 'big picture' questions of constitutionality around the purpose of the constitution and the role of the key constitutional actors.

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[10] *See* Roach v. Electoral Comm'r (2007) 233 C.L.R. 162, 224–25 (Austl.) (Heydon, J.).

[11] *See, e.g.*, Susan Kenny, *The High Court on Constitutional Law: The 2002 Term*, 26 UNIV. NEW SOUTH WALES L.J. 210, 222–23 (2003).

[12] *See* Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 FED. L. REV. 1, 10–11 (1997).

[13] *Id.*; Jeffery Goldsworthy, *Interpreting the Constitution in its Second Century*, 24 MELB. U. L. REV. 677 (2000).

[14] Vicki Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005).

[15] *See generally* Cover, *supra* note 6, at 19–20.

Different narratives justify different forms of judicial interpretation and legitimize certain forms of adjudication. As Cover puts it, the meaning of authoritative texts is always "'essentially contested,' in the degree to which this meaning is related to the diverse and divergent narrative traditions within the nation."[16] Judges are themselves storytellers under this approach—particularly at constitutional moments when some judges attempt to break away from the traditional modes of interpretation or when there is a struggle in the court over the best way to interpret the constitution. In such circumstances, judges often do not merely assert the correctness of a particular interpretative theory in the abstract, but attempt to construct a narrative of the constitution that allows for such an interpretive approach to appear legitimate.

Constitutional narratives are not the sole creation of judges and legal theorists, but are also culturally and politically created conceptions.[17] Thus, constitutional narrative is created—sometimes deliberately and sometimes not—by governments, legislators, litigants, religious leaders, historians, civil society movements, and newspaper editors who at various points attempt to push the narrative of the constitution in one direction or another. However, the judge is the primary storyteller in constitutional adjudication and does not merely unwittingly reflect back whatever cultural, political, or other social values happen to exist at the time; the constitutional narrative has to be compelling to the legal mind as well.

There are a number of insights gained from paying attention to the role of constitutional narrative. In this Article, I highlight three.

First, narrative can help to explain the approach that judges take to both higher-order and middle-order interpretative choices. If, as is often the case, constitutional adjudication in reality is under-theorized or engaged in by judges in an inconsistent and *ad hoc* manner, what explains why a particular set of choices are made in a particular case? There are doubtless numerous factors, and many, such as culture, politics, gender, race, religion, and so forth, have been analyzed by both legal and political scholars. However, uncovering the competing constitutional narratives can also assist in understanding some of the important debates in constitutional adjudication.

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[16] *Id.* at 17.

[17] *Id.* at 26–40 (discussing the way in which interpretative communities, in this case religious communities, can create competing constitutional narratives).

Second, narrative helps to explain why some political and cultural movements influence constitutional interpretation at particular times whilst others do not. A compelling, captivating story is more powerful in its influence on constitutional adjudication than one that is merely objectively true. An uninspiring "true" history has less narrative power than a more stirring, but less accurate, history. Forces external to the court that successfully create and propagate a story that captures the imagination and locks in to one of the existing, but perhaps subordinate, stories of a constitution can have a considerable impact on judicial interpretation of that constitution. The term "compelling" here is not used to signify only positive stories; a compelling narrative may be a horror story. Narrative has a demonstrably dark side even though it is sometimes used for progressive ends. A particularly powerful narrative playing in many countries at the present time, for example, is that of a nation under threat—an embattled people struggling for survival against a fearsome "other." The constitution in such times, or so the story goes, must act as a shield—a way of protecting vulnerable "us" and not a sword to be placed in the hands of dangerous "them." By paying attention to which popular narratives of the nation impact the judiciary, constitutional scholars can better understand the complex link between popular and political culture and constitutional adjudication.

Third, narrative reinforces the comparative law scholarship on the problems of legal transplants. Taking the words of one constitution and transplanting them into another constitution with a completely different narrative can result in substantially different outcomes in constitutional adjudication.[18] The problems and unexpected outcomes with legal transplants have been made in many contexts before,[19] but the idea of narrative helps to add another level of understanding as to why these problems arise.

I will illustrate these claims by reference to constitutional interpretation by Australian and Malaysian judges, particularly in the context of the religion clauses of their respective constitutions.[20] The heightened political and cultural sensitivities around religious cases tend to bring these issues to the forefront quite clearly, and they are thus a useful illustration of the point. This Article begins with a brief history of some of the similarities and differences in the constitutional creation process in Australia and Malaysia and of two

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[18] *See generally* Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997).

[19] *See, e.g., id.*; Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335 (1996).

[20] *See* AUSTL. CONST. § 116; MALAY. CONST. art. 11.

competing narratives of each constitution that begin at the time of their formation and then change over time. It then examines two highly controversial cases about the scope of the religion clauses in each constitution. It concludes by drawing the links between these two case studies and the three claims about narrative outlined above.

I. CONSTITUTIONAL HISTORY AND NARRATIVE: AUSTRALIA

Malaysia and Australia share certain commonalities in their constitutional history, in particular being federated nations created from former British colonies.[21] Their dissimilarities are sufficiently significant, however, that they are worth treating separately. As Australia's Constitution was created more than fifty years before the Malaysian Constitution, it is examined first.[22]

The six British colonies that were established on the continent of Australia at the time of federation certainly had their cultural and political differences, but they also had much in common. Work toward federation began in 1847, some seventy years after the first white settlement was established.[23] The movement in the 1850s was a rather "top down" affair with little sense of how to shift from federal aspirations and ideas to a political and legal federation.[24] There was little urgency in the work and a good deal of opposition to the idea of federation in some quarters.[25] The driving forces were not terribly strong. They were largely economic—concern about internal tariffs, problems in transport caused by the use of different train gauges, etc.[26] There was also an underlying fear of foreign invasion, particularly from the French and the Germans,[27] as well as some latent sense of national pride and a British solidarity in the far flung reaches of the Empire.[28] There were many who saw federation as an opportunity to develop a more distinctive national identity that could be used to counter pressure from the British that ran against Australia's

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[21] *See generally* T. Baty, *Sovereign Colonies*, 34 HARV. L. REV. 837 (1921); Aaron Davidson, *"I Want My Censored MTV": Malaysia's Censorship Regime Collides with the Economic Realities of the Twenty-First Century*, 31 VAND. J. TRANSNAT'L L. 97 (1998).

[22] Myint Zan, *The Three Nixon Cases and Their Parallels in Malaysia*, 13 ST. THOMAS L. REV. 743, 783 (2001); George Williams, *Why Australia Kept the Queen*, 63 SASK. L. REV. 477, 479 (2000).

[23] HELEN IRVING, TO CONSTITUTE A NATION: A CULTURAL HISTORY OF AUSTRALIA'S CONSTITUTION 2 (1999).

[24] *Id.* at 3.

[25] J. A. LA NAUZE, THE MAKING OF THE AUSTRALIAN CONSTITUTION 1–2 (1972).

[26] PATRICK PARKINSON, TRADITION AND CHANGE IN AUSTRALIAN LAW 127 (2d ed. 2001).

[27] *Id.* at 128.

[28] IRVING, *supra* note 23, at 30.

interest[29]—particularly pressure to provide better treatment for indigenous and other non-white people. But at the same time, the idea of being Australian was broadly consistent with a sense of being British and part of a broader empire.[30] The overwhelming majority of those who first met to draft the Constitution had been born in Britain[31]—at the close of the first constitutional drafting Convention, a number of speeches were made about national pride, being tired of being treated as colonials, and the distinctive Australian experiment; but they also acknowledged the bonds of the empire and rejected separation.[32] The evening included a rousing rendition of a "Fine Old English Gentleman."[33]

In the late nineteenth century, the federation movement proceeded in earnest and with a clearer political and legal project of drafting over the course of three Constitutional Conventions.[34] In 1891, the first Convention was held.[35] Its participants were drawn from the legislatures of the six colonies, as well as from New Zealand.[36] It resulted in an influential draft of the Constitution,[37] but it gained insufficient political legitimacy or support and an attempt to pass the resulting Constitution lapsed in the New South Wales ("NSW") Parliament.[38] In 1895, it was agreed by the colonial Premiers to establish an elected Convention, and this Convention met between 1897 and 1898 and developed and modified the draft of the 1895 Constitution.[39] Their efforts were ratified by a further vote by the people of each colony.[40] The colonies were asked to vote on the draft Constitution developed during the Conventions. Victoria, Tasmania, and South Australia were strongly in favor.[41] NSW voted in favor, but with insufficient voter numbers, and Western Australia and Queensland remained largely outside the process because of disagreements with the draft.[42] After some negotiation and re-drafting, the draft was again put to referendum and passed by the legislatures in every

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29 PARKINSON, *supra* note 26, at 119–33.
30 LA NAUZE, *supra* note 25, at 33–34.
31 *Id.* at 30.
32 *Id.* at 34.
33 *Id.*
34 PARKINSON, *supra* note 26, at 128.
35 *Id.*
36 *Id.* at 129–30
37 *Id.*
38 *Id.*
39 *Id.* at 130–31.
40 *Id.* at 131–32.
41 *Id.* at 131.
42 *Id.*

colony except Western Australia.[43] Western Australia only joined at the last moment, and the Constitution reflects this in its wording.[44]

While there was far from overwhelming support for the Constitution, the process gave some degree of political legitimacy to the constitution-making. It did not, however, in the perceptions of those officials of the time, give it legal legitimacy.[45] For that, the Constitution had to be passed by the British Parliament and signed by Queen Victoria. Minor amendments were required by the British to preserve their position,[46] and the Constitution of Australia came into force as an annex to the Act of the British Parliament.

How then do these bare facts become a narrative of the Australian Constitution? The first point to make is that they are not particularly powerful material for a story. This may be one of the reasons why very few Australians have much knowledge about the Australian Constitution or its history. Quite a number of Australians are still unaware of the fact that Australia has a written Constitution, and those who do know have only a limited understanding of its contents.[47]

Yet even these limited historical bones contain the potential to develop multiple stories. One such set of competing stories is about whether the drafting of the Australian Constitution was a democratic, inclusive process. Even at the time of federation this was contested, particularly by women's groups.[48] On one level, it was a very democratic process for the time. For example, in most colonies, the people were involved in both selecting representatives and ratifying their draft—and this ratification could not be taken for granted, as the need to negotiate a new draft after the failure of the first referendum demonstrated.[49] The franchise was, for the time, quite

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[43] *Id.*

[44] *Id.* at 132. The third covering clause of the Australian Constitution says that Western Australia shall be part of the Commonwealth of Australia "if Her Majesty is satisfied that the people of Western Australia have agreed thereto." AUSTL. CONST. pmbl., cl. 3.

[45] PARKINSON, *supra* note 26, at 130–32.

[46] *Id.* at 132.

[47] George Williams, *Five Reasons to Rewrite the Constitution*, *in* THE BIG MAKEOVER: A NEW AUSTRALIAN CONSTITUTION 35, 37 (Glenn Patmore ed., 2002) (quoting the Constitutional Commission's 1987 survey which stated that 47% of respondents did not realize that Australia had a written constitution); Justine Ferrari, *Students Do Badly in the Study of Civics*, AUSTRALIAN, Feb. 18, 2009, at Local 7, http://www.theaustralian.com.au/news/nation/students-do-badly-in-study-of-civics/story-e6frg6nf-1111118883994. In a survey released earlier this year, it was revealed that only 34% of Year 10 students understood the purpose of the Constitution. *Id.*

[48] IRVING, *supra* note 23, at 171–95.

[49] PARKINSON, *supra* note 26, at 130–32.

extensive. Women in South Australia voted,[50] and one even ran—unsuccessfully—for election to the Convention (although women did not have the vote in any other colony).[51] By the time of the referendum on the Constitution itself, women in South Australia and Western Australia were able to vote.[52] Aboriginal people had the vote in several colonies, although laws had progressively stripped them of these rights. Also, they were not encouraged to vote or register to vote, and there were substantial practical problems for them in exercising their right.[53]

There is, however, at least one competing story that is far less democratic. It involves a democracy based around a very limited group—overwhelmingly male, overwhelmingly white, overwhelmingly drawn from political and economic elites.[54] One eminent historian of the constitution-making process, examining the photographs of the bearded constitutional drafters, noted that the Australian Constitution was drafted by "hairy men."[55] There were no women among the drafters, no Aborigines, none of the Chinese or Indians who had made significant economic contributions to the country, and only one person who could be said to represent the working men's organizations.[56] This was in part because of franchise laws expressly designed to exclude such people from voting and representation in the colonies.[57] This led to a Constitution that largely—though not wholly—excluded the issues that were important to the women's movements of the time;[58] a Constitution that would prove dangerous to the rights of racial minorities, including Aborigines;[59] and a Constitution that rejected an equal protection clause framed along the same lines as the U.S. Constitution for fear that it would require white men to deal with those of other races on terms of equality.[60] One of the first acts of the new Australian

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[50] IRVING, *supra* note 23, at 172.

[51] Susan Eade, *Catherine Helen Spence (1825–1910)*, *in* 6 AUSTRALIAN DICTIONARY OF BIOGRAPHY 167–68 (Bede Nairn ed., 1976), *available at* http://adbonline.anu.edu.au/biogs/A060190b.htm.

[52] Constitution Amendment Act, 1894, 57 & 58 Vict., c. 613, § 2 (Austl.) (granting women the right to vote in South Australia); Constitutions Acts Amendment Act, 1899, 63 Vict., c. 19, §§ 3, 15 (Austl.) (granting women the right to vote in Western Australia).

[53] Pat Stretton & Christine Finnimore, *Black Fellow Citizens: Aborigines and the Commonwealth Franchise*, 25 AUSTL. HIST. STUD. 522, 530–31 (1993); *see also* IRVING, *supra* note 23, at 127–28.

[54] LA NAUZE, *supra* note 25, at 30–32.

[55] *Id.* at 30.

[56] *Id.* at 29–32.

[57] IRVING, *supra* note 23, at 127–28.

[58] *See generally id.* at 171–95.

[59] *See, e.g.*, TONY BLACKSHIELD & GEORGE WILLIAMS, AUSTRALIAN CONSTITUTIONAL LAW AND THEORY 176–81 (3d ed. 2002).

[60] *See, e.g.*, AUSTL. CONST. § 51(xxvi) (providing for the "races power").

Parliament was to create a uniform franchise law which was relatively progressive in enfranchising women, but which excluded "any aboriginal native of Australia, Asia, Africa or the Islands of the Pacific, except New Zealand" unless they were already registered on the state electoral rolls.[61] The draft Constitution inspired so little democratic engagement that New South Wales could not get a sufficient number of electors to vote in the first referendum.[62] Moreover, the final decision about the scope of the Constitution was made by the (partly unelected) British parliament, and formalized by the signature of a wholly unelected Queen.[63]

II. CONSTITUTIONAL HISTORY AND NARRATIVE: MALAYSIA

The constitution-making process in Malaysia differs in many key respects from the Australian experience. The various constituent parts of what is now Malaysia had been subject to a range of colonial rulers—culminating in the British, and then endured Japanese occupation during World War II.[64] The experiences of colonialism, combined with the events of World War II and the postcolonial movement that swept the world in the late 1940s and early 1950s, led to popular demands for greater autonomy for Malaya (as it was known then).[65]

The British accepted the need to move toward independence, and a constitution-making process was developed.[66] While the independence movement was a popular one, the constitution-making process was not as democratic or populist as that in Australia. The British government, at the request of the governing United Malays National Organisation ("UMNO"), established what became known as the Reid Commission ("Commission") to

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[61] The relevant provisions appear in Section 4 of the Commonwealth Franchise Act of 1902. Commonwealth Franchise Act, 1902, § 4 (Austl.).

[62] BLACKSHIELD & WILLIAMS, *supra* note 59, at 149.

[63] *Id.*

[64] Andrew Harding, *The Keris, the Crescent and the Blind Goddess: The State, Islam and the Constitution in Malaysia*, 6 SING. J. INT'L L. & COMP. L. 154, 159 (2002); PAUL H. KRATOSKA, THE JAPANESE OCCUPATION OF MALAYA: A SOCIAL AND ECONOMIC HISTORY (1997).

[65] A. J. Stockwell, *British Imperial Policy and Decolonization in Malaya, 1942–52*, *in* 5 SOUTH EAST ASIA: COLONIAL HISTORY 210, 211 (Paul H. Kratoska ed., 2001).

[66] J. Norman Parmer, *Constitutional Change in Malaya's Plural Society*, *in* 5 SOUTH EAST ASIA: COLONIAL HISTORY, *supra* note 65, at 231.

draft the Constitution.[67] The Commission was headed by Lord Reid, a British judge. Its other members were: Sir Ivor Jennings, another Englishman; Sir William McKell of Australia; Justice B. Malik of India; and Justice Abdul Hamid of Pakistan.[68] There was no representative of Malaysia, but the Commission did engage in a process of consultation that included receipt of 131 memoranda from groups and individuals and 118 meetings in various parts of Malaysia.[69] Particularly prominent and influential in these deliberations were the views of the traditional monarchs from each state and also the views of the Alliance—a powerful nationalist bloc made up of the UMNO, the Malayan Chinese Association, and the Malayan Indian Congress.[70] The Reid Commission produced a draft of the Constitution and a report on its work. Much of the original Malaysian Constitution traces its origins back to this document, including Article 11, which protects religious freedom and is discussed in greater detail below.[71]

However, this draft document was not adopted uncritically.[72] There were several issues upon which the Commission took a different viewpoint from the Alliance.[73] The most important of these issues for current purposes was the view of the Alliance that a section should be inserted into the Constitution that stated that Islam is the religion of Malaysia.[74] The Commission noted that the Alliance, in proposing this inclusion, stated that the "observance of this principle shall not impose any disability on non-Muslim nationals professing and practicing their own religion and shall not imply that the State is not a

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[67] REPORT OF THE FEDERATION OF MALAYA CONSTITUTIONAL COMMISSION ¶¶ 1–3 (1957) [hereinafter REID COMMISSION REPORT] (providing background on the establishment of the Commission); *see also* Parmer, *supra* note 66, at 233–36.

[68] REID COMMISSION REPORT, *supra* note 67, ¶ 2.

[69] *Id.* ¶¶ 7–12.

[70] *Id.* ¶¶ 15, 32.

[71] *Id.* ¶ 162. The Reid Commission did not recommend a full Bill of Rights but did recommend the entrenchment and judicial protection of several rights where apprehensions had been expressed as to the future. *Id.* This resulted in the following proposal:

> [F]reedom of religion should be guaranteed to every person including the right to profess, practice and propagate his religion subject to the requirements of public health, order and morality and that, subject also to these requirements, each religious group should have the right to manage its own affairs, to maintain religious or charitable institutions including schools, and to hold property for these purposes.

Id.

[72] *See generally* Parmer, *supra* note 66, at 231–44.

[73] *Id.*

[74] *Id.* at 236.

secular State."[75] It is likely that the minority representatives in the Alliance Party agreed to the inclusion of the Islam provision on the basis of this clarification.[76] The Reid Commission, however, rejected the idea. The reason given in the formal report was because the monarchs put forth the view that this would interfere with the role of the states and their own role as the heads of Islam for their particular states.[77] In other papers, however, it is also clear that the Commission members were concerned about how this would sit with the protection of religious freedom and the secular state and the rights of the racial and religious minorities in Malaysia.[78] Justice Hamid dissented on this point, arguing that such a declaration should be included on the basis that it would be "innocuous" and was present in at least fifteen other Muslim constitutions.[79] The Reid Commission draft was published on February 20, 1957, and presented to the Alliance government, the Malay Rulers, and the Colonial Office.[80]

The Reid Commission draft was then subject to a process of political negotiation in a Working Party made up of representatives of the Alliance government, the Malay Rulers, and the High Commissioner, Sir Donald MacGillivray.[81] It was during this process that Article 3, which states that Islam is the religion of Malaysia, was inserted into the Constitution, after an assurance by the UMNO head Tunku Adbul Rahman that the state would remain secular even with such a provision, and that the civil and political rights of non-Muslims would be protected.[82] After further negotiations at the London Conference (where concerns at the colonial office over Article 3 were calmed by an undertaking that it was intended to have a more political than practical significance and would not lead to a theocracy[83]), the draft version of Article 3 was largely maintained in the final draft, which only made some minor

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75 REID COMMISSION REPORT, *supra* note 67, ¶ 169.

76 Joseph M. Fernando, *The Position of Islam in the Constitution of Malaysia*, 37 J. S.E. ASIAN STUD. 249, 255 (2006) (stating that the Commission did, however, receive numerous submissions from other non-Muslim groups concerned with ensuring the secular state and protecting religious freedom; other Muslim groups argued for Islam to be made the state religion).

77 REID COMMISSION REPORT, *supra* note 67, ¶ 169; *see also* Fernando, *supra* note 76, at 253 (stating the opposition was not based on concern for religious freedom as such but for the protection of their own positions and the centrality of the State rather than central government in religious issues).

78 Fernando, *supra* note 76, at 254–55.

79 REID COMMISSION REPORT, *supra* note 67, at 100 (noting dissent by Justice Hamid).

80 Harding, *supra* note 64, at 161–63.

81 Fernando, *supra* note 76, at 252.

82 *Id.* at 257.

83 *Id.* at 260.

changes to the language for drafting purposes.[84] The Constitution was then passed by the British Parliament, the Malay Parliament, and all of the states that made up the Federation of Malaya.[85] In a White Paper tabled in the Malaysian Parliament, it was reiterated that Article 3 would "in no way affect the present position of the Federation as a secular State."[86] Despite this assurance, several members of Parliament expressed concern with the provision, its potential implication for minorities, and the potential harm to Islam if it was too closely associated with the State.[87] The provision nonetheless passed.[88]

Again, at least two narratives can be derived from these historical facts. On the one hand, the Malaysian Constitution was drafted to create a largely secular, Westminster-style constitutional monarchy. It was drafted by a group of men who shared a common law, Westminster government background—all of the members of the Reid Commission were members of common law, Commonwealth countries, only one of which was a Muslim-majority country.[89] The Constitution creates a Westminster-style parliament, executive, and judiciary.[90] The monarchy is a more complicated one than the British Crown because it rotates among the sultans, and the traditional monarchical powers are to some degree shared between them in the Conference of Rulers.[91] However, just as with the British monarch, the role of the rulers is usually constrained, and they act on the advice of their elected ministers. Also similar to the British Crown, they are at the head of the religious system in their States.[92] While there is a written constitution, it protects only limited rights and gives significant power to the Parliament, similar to the British Constitution.[93] This narrative is one of continuity and connectedness to the community of British former colonies, with some indigenous elements to recognize the particularities of Malaysian culture and history and give some protection to Malays who were at a serious economic disadvantage compared

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[84] *Id.* at 261.

[85] *Id.* at 264–65.

[86] *Id.* at 262 (citing Legislative Council Paper No. 42 of 1957, *in* FEDERATION OF MALAYA CONSTITUTIONAL PROPOSALS (WHITE PAPER) 1957, at 18–19 (1957)).

[87] Fernando, *supra* note 76, at 264.

[88] *Id.* at 265.

[89] *See id.* at 249 n.2.

[90] *See* MALAY. CONST. arts. 14–28a.

[91] *See id.*

[92] *Id.* arts. 3(2), 3(3), 3(5).

[93] ABDUL AZIZ BARI, MALAYSIAN CONSTITUTION: A CRITICAL INTRODUCTION 143–46 (2003).

to their Chinese compatriots.[94] It created a ceremonial role—relating largely to rituals and ceremonies—for Islam, as protected in Article 3.[95] The compromises around the position of Islam and religious freedom are portrayed as being part of a "social contract" between Muslims and minority groups that was agreed to in the context of general continuity with many of the British traditions.

The competing narrative is one of discontinuity—the constitutional moment was one of breaking away from the British colonial power and the establishment of a new state based on pre-colonial, Islamic traditions.[96] The role of the Reid Commission in this narrative is more symbolic of a final colonial attempt to constrain Malaysian power and its distinctively Islamic heritage.[97] The dissenting report of Judge Hamid is given more status because he was the only Muslim on the Commission, and the role of the post-Reid discussions is given more status because of the greater involvement of Malays.[98] But sometimes this narrative argues that even these constitutional antecedents are too corrupted by the involvement of the British and of Malaysians with too much vested interest in the status quo. In this light, the Constitution is best interpreted bearing in mind Malaysia's pre-colonial history, which is portrayed as more homogenously Islamic than perhaps the historical record bears out. In this narrative, the role of the Malaysian rulers as responsible for religion becomes much more significant. Malaysia's Islamic

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[94] REID COMMISSION REPORT, *supra* note 67, ¶ 165 (stating that the Commission was not wholly at ease with the formal system of preferences but accepted the need for it as a strictly temporary measure).

[95] *See generally* Che Omar bin Che Soh v. Public Prosecutor, [1988] 2 Malay. L.J. 55. This was the first case to consider the meaning of Article 3. *Id.* It came in the peculiar context of an argument being made by non-Muslim counsel that Islam does not allow the death penalty to be imposed for drug trafficking because it is not *huddud* or *qisas*. *Id.* The Lord President of the Court Tan Sri Mohamed Salleh Abas recognized the importance of Islam in the law prior to colonization, but held that the impact of colonization and secularization on the law during the colonial period meant that the Constitution should be interpreted as referring to Islam only in the limited sense that it meant at the end of the colonial period. *Id.*

[96] *See, e.g.*, Mohammed Imam, *Making Laws Islamic in Malaysia: A Constitutional Perspective*, 2 CURRENT L.J. vii (1994) (making a strong argument that Muslims are denied their religious freedom unless they can live in a state governed by Islamic law and that freedom of religion in the Constitution is intended to protect this right). Imam concludes that a combination of Articles 3 and 11 mean that the State ought to "enable [Muslims] to order their lives according to the injunctions of Islam. Islamisation of law may thus be seen, not as a discretion of, but a positively enjoined duty upon, the Federation . . . ." *Id.*

[97] *See, e.g.*, Abdul Aziz Bari, *Freedom of Religion in Malaysia: It's Not Complicated*, L. REV. 263, 266 (2005). The author dismisses the relevance of the Reid Commission by saying that the Commission "did not say anything on the alleged secular nature [of the Constitution]; only certain members of the Commission mentioned the secular nature of the Constitution in passing." *Id.* Presumably, here "certain members" means the majority of the commission given that only Justice Hamid dissented on this point.

[98] Mohammed Imam, *Freedom of Religion Under Federal Constitution of Malaysia—A Reappraisal*, 2 CURRENT L.J. lvii (June 1994).

identity is also far more important. Rather than a secular, Westminster-style Constitution, those who support a more Islamic narrative point to the distinctively Muslim aspects of the Constitution and the Malaysian society.[99] They argue that the Constitution is and should be more open to Islamic jurisprudence because it is a distinctively Islamic constitution.[100] Westminster-style continuity is portrayed as ongoing colonization and tantamount to the denial of religious freedom to Muslims.[101]

As with Australia, these competing conceptions of constitutional history have influenced both higher-order and middle-order interpretative decisions in constitutional cases. Some of the earlier constitutional decisions adopted the orderly transition argument, sometimes reflecting with some regret on the effect of colonization on Islam in Malaysia (demonstrating the strength the competing narrative had even on those who ultimately rejected it).[102] Ten years ago, Professor Andrew Harding described three basic principles of interpretation that underlie constitutional interpretation in Malaysia; three principles that he rightly describes as common to many Westminster-style constitutions and, thus, well integrated into the continuity narrative.[103] The first principle is that the Constitution is interpreted within its own four walls—examples from other countries can be and are looked to, but they are not determinative.[104] Second, the Constitution must be interpreted broadly and generously rather than narrowly as a statute.[105] Finally, there is a presumption that a statute is constitutionally valid.[106] While this last principle sits very comfortably with the conception of the Constitution that the Malaysian executive holds, it is also a clear continuation of the very English concept of parliamentary sovereignty that influenced the first generation of post-

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[99] This is demonstrated in the discussion of *Lina Joy*, *infra* note 154.

[100] *See* Li-ann Thio, *Beyond the Four Walls in an Age of Transnational Judicial Conversations*, 19 COLUM. J. ASIAN L. 428, 493–94 (2006) (citing Meor Atiquulrahman v. Fatimah bte Sihi, [2000] 5 MALAY. L.J. 375 (Seremban High Court)). The Seremban High Court ruled that the ban on four students for wearing the Islamic turban, the *serban*, was unconstitutional. *Id.* In so doing, the judges drew freely on their own interpretation and understanding of Islam in interpreting and applying the Constitution. *Id.* Although forced to look to Indian law for a definition of religion, Judge Mohd Noor Abdullah regretted that he was unable to refer to the Constitution of Pakistan as more "accurate and relevant" because no copy was available in the Court library. *Id.* While he does not state his reasons explicitly, it is easy enough to infer that the reason for preferring Pakistan's constitutional law was because of the religious basis of that constitution. *Id.*

[101] *See id.*

[102] *See* ANDREW J. HARDING, LAW, GOVERNMENT AND THE CONSTITUTION IN MALAYSIA 132–33 (1996).

[103] *Id.*

[104] *Id.*

[105] *Id.* at 133.

[106] *Id.*

independence judges and lawyers who were trained in the English legal traditions. This is despite the significant shift that arguably should have occurred with the drafting of a formal, supreme constitution.[107]

The Westminster narrative, with its deference to parliamentary sovereignty and executive authority, suited the security-conscious Malaysian courts and executive for some time. Not only did such a continuity narrative fit with the nation-building project of the government, but it allowed for the deflection of criticism by reference to its British heritage while still claiming independence and a certain distance from other legal systems.[108] While comparativism in many Western constitutional traditions is associated with progressivism, in Malaysia it was part of a relatively conservative narrative of the continuity of a strong, central government. As Professor Li-ann Thio noted with respect to Singapore and Malaysia, "in contrast to liberal democracies, courts in non-liberal jurisdictions utilize transnational sources to buttress public order concerns rather than expand rights."[109] The narrative also helped with middle-order decisions about which jurisdictions should be given more emphasis. Professor Harding notes that English cases tended to be given priority over more rights-protective Indian cases.[110] In one leading Malaysian case, the more "realistic" position of English judges on preventative detention was preferred to that of Indian judges who were described as "indefatigable idealists seeking valiantly to reconcile the irreconcilable whenever good conscience is pricked by an abuse of executive powers."[111] Over time, however, European influence, particularly the European Court of Human Rights and its domestic counterpart, the Human Rights Act, has been invoked

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[107] *See generally* BARI, *supra* note 93, at 227–38; KEVIN Y.L. TAN & LI-ANN THIO, CONSTITUTIONAL LAW IN MALAYSIA AND SINGAPORE 159–80 (2d ed. 1997).

[108] Government of Kelantan v. Government of the Federation of Malaya & Tunku Abdul Rahman Putra al-Haj, [1963] 1 MALAY. L.J. 355, 357. "[T]he Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia." *Id.* Even in that judgment, however, the court went on to say that it could be useful to look at relevant foreign caselaw, but such caselaw could not be determinative. *Id.*

[109] Thio, *supra* note 100, at 431.

[110] HARDING, *supra* note 102, at 133.

[111] Karam Singh v. Menteri Hal Ehwal Dalam Negeri [Minister of Home Affairs], [1969] 2 MALAY. L.J. 129, 141. This did not lead to a rejection of comparativism but rather a reliance on the "more realistic view" of the importance of preventative detention taken by British judges. *Id.* However, Canadian authority that might have led to greater free speech was also rejected, in part on the basis that the influence of the Charter made the Canadian law of less relevance to Malaysia. Attorney General v. Manjeet Singh Dhillon, [1991] 1 MALAY. L.J. 167, 176. One commentator noted that, in selecting comparators, "local judges seem so steeped in English positivism and this is even evident in the rulings handed down by judges who graduated from local law schools." BARI, *supra* note 93, at 230.

by several Malaysian judges to de-legitimize the current British jurisprudence, particularly jurisprudence that is often inconveniently limiting of executive power.[112]

The continuity narrative, however, was always in tension with the narrative about the new Islamic state. The old narrative came under increased attack with the rise of Islamization in which the government strove to fend off an attack by the religious PAS party by emphasizing its own religious credentials[113]—it was during this process that Prime Minister Mahathir Mohamed claimed that Malaysia was already an Islamic state and indeed even a fundamentalist Islamic state.[114] Efforts by Muslim groups across politics, education, popular culture, and law sought to legitimize the idea of Malaysia as an Islamic country, often referring to Article 3 of the Constitution to bolster their case.

The judges who adopted this narrative tended to make one important higher-order interpretative choice—they began to include direct reference to religious sources (invariably only Muslim) in order to interpret the Constitution.[115] This does not mean that they utterly rejected the previous higher-level interpretative choices, but it did affect the way they implemented those choices.[116] Thus, they still looked at the history of the provisions (at least to some extent) and certainly still looked at comparative materials, but now selected jurisdictions with which to compare by giving regard to their religious credentials, rather than their common law background.[117]

Chief Justice Hamid Sultan Abu Backer encapsulated this viewpoint in his decision in *Yong Fuat Meng*, where he rejected ordinary principles of common law interpretation when it came to religious clauses in statutes or

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[112] Kok Wah Kuan v. Pengarah Penjara Kajang, Selangor Darul Ehsan, [2004] 5 MALAY. L.J. 193, 207–08 (Kuala Lumpur, High Court) (holding that because of the Human Rights Act, the U.K. courts were "no longer dominated by a search for the intention of Parliament" but rather tried to "adopt any possible construction which is compatible with Convention [of Human Rights] rights").

[113] Albert Sundararaj Walters, *Issues in Christian-Muslim Relations: A Malaysian Christian Perspective*, 18 ISLAM AND CHRISTIAN-MUSLIM RELATIONS 67, 69 (2007). For a discussion of other factors influencing Islamization, see MAUREEN K.C. CHEW, THE JOURNEY OF THE CATHOLIC CHURCH IN MALAYSIA, 1511–1996, at 264–69 (2000).

[114] Walters, *supra* note 113, at 69; *see also* Mohamed Azam Mohamed Adil, *Law of Apostasy and Freedom of Religion in Malaysia*, 2 ASIAN J. COMP. L., 1, 12 (2007), http://www.bepress.com/cgi/viewcontent.cgi?article=1060&context=asjcl.

[115] *See* Yong Fuat Meng v. Chin Yoon Kew, [2008] 5 CURRENT L.J. 705, 712 (Saba and Sarawak, High Ct.) (Malay.).

[116] *Id.*

[117] *Id.*

constitutions.[118] He concluded: "When the Federal Constitution states Islam is the religion of the Federation, failure to take into consideration Islamic principles and laws when interpreting statutes or constitutions in matters relating to the religion or Islam is likely to create confusion, criticism and hardship to the public."[119] He thus relied heavily on his direct interpretation of the requirements of Islam in making a determination with respect to jurisdiction over divorce matters between the civil and *Shari'a* courts.[120] The argument was that the narrower definition of Islam, accepted by the courts in earlier cases on Article 3, was decisively dismissed on the basis of the definition of Islam in a *hadith* as interpreted by a scholar of Islam.[121] The Chief Justice concluded: "It must be emphasised here that the Islamic Jurisprudence and/or community will not accept any definition which has already been dealt with by the Holy Qur'an and/or the Holy Prophet."[122] Despite engaging in a fairly superficial analysis of the Islamic sources, the Chief Justice rejected the argument that these laws are only relevant in *Shari'a* courts where they can be applied by trained jurists.[123] Instead he held that "the religion of Islam is a universal religion. In consequence, the principles, practice and its jurisprudence are easily understandable by any literate person provided he ventures into reading the text and materials on the subject matter. And all His Majesty's judges are equally competent to deal with the matter."[124]

The Malaysian constitutional narrative is thus caught between competing stories[125]: the anti-colonial story of a largely Muslim people's movement that overthrew colonial rule and the evolutionary story of an orderly transition of power from British to Malay rulers.[126] The narratives play out in constitutional adjudication with real significance for the outcomes of cases in which different approaches are taken.

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118 *Id.*

119 *Id.*

120 *Id.* The rejection of the limited, ceremonial role of Islam is on the basis that "everyone understands" that Islam is more all embracing than this. *Id.* at 727.

121 *Id.*

122 *Id.* at 729.

123 *Id.* at 729–34.

124 *Id.* at 734.

125 *See generally* Vanitha Sundra Karean, *The Malaysian Constitution and its Identity Crisis—Secular or Theocratic?*, LAWASIA J., 2006, at 47.

126 For a useful overview of the debate over different meanings of Article 3, see Fernando, *supra* note 76, 250–52.

III. THE RELIGION CLAUSE CASES

These general observations about the competing narratives can be illustrated more concretely by looking at a specific case from each jurisdiction that illustrates the way in which constitutional narrative shapes judicial interpretative approaches. This section examines one case on the religion clauses from both Australia and Malaysia. Each case was highly politically contentious at the time and divided the court and the commentators. They thus bring out the competing narratives at stake.

A. *Australia:* Attorney-General of Victoria *ex rel.* Black v. Commonwealth, *High Court of Australia*

The Australian case is *Attorney-General of Victoria* ex rel. *Black v. Commonwealth.*[127] The case was brought against the Commonwealth by a group called Defence of Government Schools ("DOGS"), and thus the case is commonly known as the "*DOGS Case*."[128] The group challenged the expenditure of Commonwealth funds on private schools, which were overwhelmingly religious (and, perhaps not irrelevantly from the DOGS's point of view, predominantly Catholic).[129] The Commonwealth granted substantial sums of money each year to the states for the purpose of supporting the private, religious school system—as it is, the states have responsibility for school funding; the funding at that time was not given directly to the schools themselves.[130] DOGS challenged this on the basis that it was a breach of Section 116 of the Australian Constitution.[131]

Section 116 was consciously modeled on the religion clauses of the United States Constitution, with some modifications.[132] It reads:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be

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[127] Att'y Gen. of Victoria *ex rel.* Black v. Commonwealth (*DOGS Case*) (1981) 146 C.L.R. 559 (Austl.).

[128] For a more detailed discussion of this case, see Stephen McLeish, *Making Sense of Religion and the Constitution: A Fresh Start for Section 116*, 18 MONASH U. L. REV. 207, 210 (1992); Joshua Puls, *The Wall of Separation: Section 116, the First Amendment and the Constitutional Religious Guarantees*, 26 FED. L. REV. 139, 143–45 (1998).

[129] *DOGS Case*, 146 C.L.R. at 575–76 (Barwick, C.J.).

[130] *Id.*

[131] For a full exposition of the facts, see *id.* at 635–48 (Wilson, J.).

[132] *Id.* at 598 (Gibbs, J.); *see also* William Rich, *Constitutional Law in the United States and Australia: Finding Common Ground*, 35 WASHBURN L.J. 1, 21–22 (1995).

> required as a qualification for any office or public trust under the Commonwealth.[133]

DOGS argued that the funding of religious schools was a clear breach of the Establishment Clause and relied on American caselaw to support their case.[134] By a majority of six to one, with Justice Murphy dissenting, the Court rejected the claim.[135]

There are several important points to note about the reasoning in the case. First, all seven justices take a common approach to a number of higher-order interpretative choices. All of them use comparativism, and indeed, all use comparisons with similar jurisdictions, particularly the United States and the United Kingdom, although they draw rather different lessons from those comparisons.[136] Second, all make some use of the historical record. Four of the seven justices (with Justice Aickin concurring with the judgments of Justices Gibbs and Mason) stick to the orthodox principle of both statutory and constitutional interpretation of the time: that the Convention debates themselves could not be used as an interpretative aid.[137] Justices Mason and Murphy, despite coming to different results, clearly consulted the record of debate, even if they did not make this explicit in their judgments.[138] The orthodoxy changed not long after this case to permit direct reference to the debates. However, even though they did not look to the debates directly, the other justices looked extensively at the historical record of the time and used this to infer the purpose of the constitutional provisions.[139]

So while there was some dispute about what elements of the historical records could be consulted, the justices did not divide along originalist versus progressivist, comparativist versus localist, or any other higher-order constitutional interpretative lines.[140] Instead, the decisive difference is between two rather different stories of the role of the Australian Constitution

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133 AUSTL. CONST. § 116.

134 *DOGS Case*, 146 C.L.R. at 578 (Barwick, C.J.).

135 *Id.* at 559.

136 *Id.* at 561 (Barwick, C.J.), 598–603 (Gibbs, J.), 609–11 (Stephen, J.), 613–16 (Mason, J.), 625–32 (Murphy, J.), 635 (Aickin, J., concurring with Gibbs & Mason, JJ.), 651–53 (Wilson, J.).

137 Chief Justice Barwick, for instance, stated that this principle was a "settled doctrine." *See id.* at 577 (Barwick, C.J.). This seems to have been the High Court's position since it was first constituted. *See* Tasmania v. Commonwealth (1904) 1 C.L.R. 329, 333 (Austl.) (Griffith, C.J.); Municipal Council of Sydney v. Commonwealth (1904) 1 C.L.R. 208 (Austl.).

138 *See, e.g.*, *DOGS Case*, 146 C.L.R. at 612, 614 (Mason, J.), 627 (Murphy, J.).

139 *See id.* at 577–78 (Barwick, C.J.), 602–04 (Gibbs, J.), 607–08 (Stephen, J.), 654–55 (Wilson, J.).

140 *Id.*

and, in particular, the relationship between the Constitution and the people of Australia, including the rights of those people.

The quite different approaches that the majority and Justice Murphy take to parliamentary sovereignty are illustrative of this difference and its importance in practice. Several quotations taken from the majority justices demonstrate a clear commitment to the traditional British notion of parliamentary sovereignty (even when interpreting a constitution that necessarily limited that sovereignty):

> Some things about the section are self-evident. It is not, in form, a constitutional guarantee of the rights of individuals; . . . [s. 116] instead takes the form of express restriction upon the exercise of Commonwealth legislative power.[141]
>
> [S. 116] cannot readily be viewed as the repository of some broad statement of principle concerning the separation of church and state, from which may be distilled the detailed consequences of such separation. On the contrary, by fixing upon four specific restrictions of legislative power, the form of the section gives no encouragement to the undertaking of any such distillation.[142]
>
> Here, however, we are dealing, not with a grant of legislative power, but with a prohibition against the exercise of legislative power. In such a context "for" is more limiting than "respecting"; "for" connotes a connexion by way of purpose or result with the subject matter which is not satisfied by the mere circumstance that the law is one which touches or relates to the subject matter. In this respect the first prohibition in s. 116 is narrower than its American counterpart.[143]

This first set of quotes demonstrates a narrative of the Australian Constitution that is, to the largest extent possible, one of continuity. While limits on the power of any parliament in a federal system such as Australia's must exist, the ongoing story of parliamentary sovereignty and Westminster-style deference to the legislative arm is preserved—even in the face of a provision that appears to cut across that story. In this narrative, the government and parliament are largely trustworthy, the Constitution is not revolutionary but evolutionary, and constitutional law is largely about the orderly division of power between different levels and branches of government. Thus, whatever the wording of

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141 *Id.* at 605 (Stephen, J.).

142 *Id.* at 609.

143 *Id.* at 615–16 (Mason, J.).

Section 116, its role in the constitutional story is not the heroic role of preserver of rights; the judicial role is likewise modest and deferential. Section 116 protects against the worst legislative abuses rather than lifting the standards of government to fully comply with human rights.

This approach can be contrasted with the following quotation from Murphy:

> The guarantees of personal freedom against the imposition of any religious observance and the prohibition of free exercise of any religion and the requirement of any religious test should be read widely consistently with their brevity and with constitutional usage. As I said in *Attorney-General (Cth); Ex rel. McKinlay v. The Commonwealth* "Great rights are often expressed in simple phrases." It would detract greatly from the freedom of and from religion guaranteed by those clauses if they were to be read narrowly. In the same way the establishment clause should be read widely. To refuse to read the establishment clause with generality because so read it covers some of the ground covered by the other guarantees in s. 116 is to interpret s. 116 as if it were a clause in a tenancy agreement rather than a great constitutional guarantee of freedom of and from religion.[144]

This narrative is one where the enacting of the Australian Constitution is a moment of transformation. The addition of Section 116 is a story about the deliberate inclusion of right-protection mechanisms, derived from the United States, and a break with the past. Justice Murphy derides the interpretative position of the majority as unduly technical and legalistic.[145] In the Murphy narrative, the judge plays a far more central and heroic role, and the new constitutional order is to be understood as more protective of the individual and less deferential to the parliament than what came before it. In his story, there is a close and direct connection between constitutional rights and the people that they aim to protect.

While the majority and Justice Murphy make similar higher-order interpretive choices, they make different middle-order interpretative decisions, particularly about how to use comparative law.[146] The majority judgments do look to the religion clauses of the United States Constitution, but largely to demonstrate the distinctions between these clauses and Section 116 in both

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144 *Id.* at 623 (Murphy, J., dissenting).
145 *Id.* at 619–34.
146 *Id.* at 559–634.

language and context.[147] In some judgments, the caselaw of the United States is even seen as a warning of the problems that Australian judges would encounter if they adopted a wider definition of establishment.[148] The extensive scrutiny of the wide range of legislation implicated by the United States Supreme Court's interpretation of the Establishment Clause did not fit well into the continuity and deference narrative of the majority. Thus, the main comparator for the majority is not the United States Constitution, upon which the language of Section 116 was deliberately modeled, but rather the definition of establishment from the United Kingdom caselaw, which they argued was the example that the founders were seeking to avoid:

> The text of s. 116 more obviously reflects a concern with the establishment of one religion as against others than the language of the First Amendment which speaks of the "establishment of religion", not the "establishment of any religion". And, as we shall see, the history of the relationship between church and state in the United Kingdom and in the Australian colonies in the nineteenth century suggests that the first clause in s. 116 was the expression of a profound sentiment favouring religious equality in the Australian colonies.[149]

> [T]here is here a divergence both in word and context. The context is different in that the provision does not form part of a Bill of Rights. The plaintiffs' claim that it represents a personal guarantee of religious freedom loses much of its emotive and persuasive force when one must add "but only as against the Commonwealth". . . . "I accept that the word "establishment" has no fixed connotation, but having regard to the other clauses which are contained in s. 116, and to the precise manner of their expression, I infer a legislative intent to adopt a narrow notion of establishment, namely, that which requires statutory recognition of a religion as a national institution. . . . The nature of the responsibility of the state towards an established church is clearly exposed in the judgments of their Lordships in the House of Lords' decision in *General Assembly of Free Church of Scotland v. Lord Overtoun* (1904) AC 515.[150]

By contrast, Justice Murphy embraces and follows the United States Establishment Clause jurisprudence that existed at that time, dismissing differences in language between the two and quoting Jefferson to warn against

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147 *Id.* at 598–603 (Gibbs, J.), 609–10 (Stephen, J.), 613–16 (Mason, J.), 652–53 (Wilson, J.).

148 *Id.* at 601–02 (Gibbs, J.).

149 *Id.* at 615 (Mason, J.).

150 *Id.* at 652–53 (Wilson, J.).

narrow interpretations of rights.[151] For Justice Murphy, the story of the Australian Constitution has much more in common with its revolutionary cousin in the United States than with its counterpart in the conservative United Kingdom.[152] Even though much of the relevant United States caselaw post-dates the drafting of the Australian Constitution, the spirit of the two provisions is the same and should be interpreted in this light. He is not fearful in the least that this might lead to too large a role for judges and too little deference for parliament—in his narrative, the judge plays the role of the defender of the individual against the powerful state. Such a role is necessary if the rights of the individual are to be protected:

> The United States' decisions on the establishment clause should be followed. The arguments for departing from them (based on the trifles of differences in wording between the United States and the Australian establishment clauses) are hair-splitting, and not consistent with the broad approach which should be taken to constitutional guarantees of freedom.[153]

B. *Malaysia:* Lina Joy v. Federal Territory Islamic Council, *Federal Court of Malaysia*[154]

The case from Malaysia is more recent and has gained some international notoriety, as well as creating considerable debate in Malaysia.[155] The case is known as the *Lina Joy Case*, which was finally decided (after two levels of appeal) by the Federal Court of Malaysia.[156] The case involved a young woman's application to have her name changed on her identity card from the

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[151] *Id.* at 633 (Murphy, J., dissenting).

> A reading of s. 116 that the prohibition against "any law for establishing any religion" does not prohibit a law which sponsors or supports religions, but prohibits only laws for the setting up of a national church or religion, or alternatively prohibits only preferential sponsorship or support of one or more religions, makes a mockery of s. 116. Jefferson warned against this tendency. "Our peculiar security is the possession of a written Constitution. Let us not make it a blank paper by construction" . . . . We should heed his warning.

Id. (quoting JEFFERSON, WRITINGS 506 (Washington ed., 1859)).

[152] *Id.* at 624.

[153] *Id.* at 632.

[154] Lina Joy v. Fed. Territory Islamic Council, [2007] 4 MALAY. L.J. 585, *translated at* http://www.becketfund.org/files/1f27b.pdf?PHPSESSID=c81724a218b48bdd2293883303186739 [hereinafter Lina Joy Majority Opinion]. The majority opinion's holdings and the dissenting opinion are available in English in the official reporter.

[155] *See, e.g.*, The Beckett Fund For Religious Liberty, Malaysia—State Imposed Religious Designations—Lina Joy, http://www.becketfund.org/index.php/case/107.html (last visited Jan. 17, 2009).

[156] Lina Joy Majority Opinion, *supra* note 154, ¶ 2 (Ahmad Fairuz, C.J. & Alauddin, J.).

Muslim name by which she was first known to another name (Lina Joy).[157] She originally gave no reason for this but later said that she had converted to Christianity (she was engaged to be married to a Christian but could not marry under Malaysian law if she remained a Muslim).[158] The name change was eventually agreed to, but her stated religion on the card, pursuant to a statutory change, was Muslim.[159] She asked for this to be removed, but the relevant authority refused to do so unless she presented them with a formal certificate of apostasy from the local *Shari'a* court.[160] This refusal was the decision that she challenged.[161] Much of the case was fought as an administrative law decision, but the constitutional issues clearly frame the administrative law issues. This was particularly the case because in some Malaysian states apostasy is punishable as a crime (in at least three it requires forced rehabilitation),[162] and the government in the *Lina Joy Case* did not produce any evidence that the courts ever granted these certificates, considering apostasy is a serious sin in Islamic law and one that the community of believers is obliged to prevent.[163]

In her arguments, Lina Joy stated that the requirement that her conversion be ratified by a religious court was a breach of Article 11, the religious freedom provision of the Malaysian Constitution.[164] In response, it was argued that Article 11 had to be read in light of Article 3.[165] The court split two-to-one and rejected her appeal, holding that the authority was correct to refuse to change her registration without the *Shari'a* court granting a certificate of apostasy.[166]

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157 *Id.*

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.* For a critical analysis of apostasy laws in Malaysia, see Mohamed Azam Mohamed Adil, *Law of Apostasy and Freedom of Religion in Malaysia*, 2 ASIAN J. COMP. L. 1 (2007).

162 *Id.* at 22–23 (noting that in Sabah and Kelantan, a person who leaves or intends to leave Islam can be detained at a faith rehabilitation center for up to thirty-six months and in Malacca for six months) (citing Sabah Islamic Criminal Offences Enactment, § 63(1) (1995); Kelantan Council for Muslim Religion & Malay Custom Enactment, § 102 (1994); Malacca Administration of Islamic Law Enactment, § 66 (1991)).

163 *See* Lina Joy Majority Opinion, *supra* note 154; *see also* Adil, *supra* note 161, at 1–8 (discussing various views of apostasy among Islamic scholars).

164 Lina Joy Majority Opinion, *supra* note 154, ¶ 2.

165 *Id.* ¶ 17.4.

166 *Id.* ¶¶ 17.5 & 18.

Article 11 provides protection for freedom of religion in Malaysia.[167] It reads:

> (1) Every person has the right to profess and practice his religion and, subject to Clause (4), to propagate it.
>
> (2) No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own.
>
> (3) Every religious group has the right -
>
> (a) to manage its own religious affairs;
>
> (b) to establish and maintain institutions for religious or charitable purposes; and
>
> (c) to acquire and own property and hold and administer it in accordance with law.
>
> (4) State law and in respect of the Federal Territories of Kuala Lumpur and Lubuan, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.
>
> (5) This Article does not authorize any act contrary to any general law relating to public order, public health or morality.[168]

There is some tension between the provisions of this Article and Article 3, the relevant provisions of which read:

> (1) Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.
>
> . . . .
>
> (4) Nothing in this Article derogates from any other provision of this Constitution.[169]

The sections of the judgment dealing with constitutional issues are brief but illustrate the starkly different constitutional narratives driving Malaysian constitutional law in this area.[170] While the majority's constitutional judgment is thin in terms of reasoning, the story becomes clearer when the counsel's argument and the decision of the Court of Appeal are taken into account.

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167 *See* MALAY. CONST. art. 11.

168 *Id.*

169 MALAY. CONST. art. 3.

170 Lina Joy Majority Opinion, *supra* note 154, ¶¶ 14–17.

The story is perhaps most clearly expressed in the submissions by the lawyer for the Council of Islamic Religion, which is a state statutory body directly under the Sultan of the state and an intervener in the case:

> We have to take into account the historical basis that Islam was here in the Malay Peninsula . . . from as early as the 13th Century. And the Sultanate . . . became Muslims, the people of those Sultanates also became Muslims, the law of those Sultanates . . . was Islamic Syariah and Malay adat. And they were tried by Courts that applied Islamic Syariah and Malay adat. So the history of Syariah Court in Malaysia . . . did not start with the Constitution. It predated the Constitution by several centuries my Lords. And in the course of time Malaysia would have become fully Islamic and with full Islamic law applied except that this process of evolution in our laws and in our system was interrupted by the intrusion of the colonial power.[171]

This argument is literally a story: A counter-factual narrative of an imagined, non-colonized Malaysia is developed as though there was only one possible, natural development of Malaysian society absent colonialism. From this powerful narrative, counsel advances an argument about the Constitution that is rooted firmly in this narrative rather than in the actual history of the Constitution. The lawyer for the Council of Islamic Religion concludes:

> The religion of the Federation is Islam. If the Federation itself is Muslim, then it follows that every Government arm as well must be Muslim as well. . . . [W]here you have a statement under Article 3 that Islam is the religion of the Federation, then it must mean that all instrumentality of the Federation as well are Muslim . . . .[172]

Although the Federal Court does not explicitly accept this narrative,[173] the majorities of both the Court of Appeal[174] and High Court[175] do so implicitly. Those judges interpret the Constitution as part of a Muslim story told by Muslim judges to a Muslim audience.[176] The majority of the Federal Court, adopting the reasoning presented by several intervening Muslim associations, held that "[a] person may renounce Islam but must follow its procedure. If a person is allowed to do so according to his whims and fancies it would create

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171 Brief for the Council of Islamic Religion, Lina Joy v. Fed. Territory Islamic Council, [2007] 4 MALAY. L.J. 585, *in* Benjamin Dawson & Steven Thiru, *The Lina Joy Case and the Future of Religious Freedom in Malaysia*, LAWASIA J. 151, 158 (2007).

172 *Id.*

173 Lina Joy v. Fed. Territory Islamic Council, [2007] 4 MALAY. L.J. 585, 594.

174 Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Ors, [2005] 6 MALAY. L.J. 193.

175 *See* Lina Joy v. Majlis Agama Islam Wilayah & Anor, [2004] 2 MALAY. L.J. 119.

176 *Lina Joy*, 6 MALAY. L.J. at 194; *Lina Joy*, 2 MALAY. L.J. at 126.

chaos among Muslims."[177] The Malaysia created in these judgments often appears largely mono-religious because only the reaction in, or beliefs of, the Muslim community are given any serious weight.

This is reiterated in the majority's interpretation of the right to practice and profess a religion in Article 11.[178] Article 11 is interpreted to mean that a Muslim "*must comply* with the Islamic law which has prescribed the way to embrace Islam and converting out of Islam. That is the meaning of professing and practicing Islam."[179] Thus a *right* to practice and profess a religion becomes interpreted as an *obligation* to comply with religious practices even for severing a relationship with a religion and even when that may give rise to punishment.[180]

The majority's approach seems to be a result of the judges reading Article 11 in light of the provision in Article 3 that the religion of Malaysia is Islam. The term "Islam" in Article 3 is given a religious meaning, and the judges assert that "Islam is not only a collection of dogma and rituals but it is also a complete way of life comprising of all kinds of human, individual or public, legal, political, economic, social, cultural or judicial activities."[181] This is a reasonable claim to make from inside Islam about the scope and reach of the religion or as a theological matter; it is a defensible Islamic narrative. It is not clear, however, how the judges justify the claim as a matter of the proper interpretation of the Malaysian Constitution when Article 3 historically had a more limited and specific meaning of Islam.[182] Rather than interpreting the word "Islam" in a constitutional context, the judges interpret the Constitution as part of an Islamic narrative.

The dissenting opinion of Justice Richard Malanjum is based on the historical record of constitution-drafting in Malaysia outlined earlier.[183] He works his way through the text of the Constitution, noting that "[Article] 3(4) clearly provides that nothing in the Article derogates from any other provision of the Constitution thereby implying that [Article] 3(1) was never intended to override any right, privilege or power explicitly conferred by the

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177 Lina Joy Majority Opinion, *supra* note 154, ¶ 13(a) (emphasis added).
178 *Id.* ¶ 17.2.
179 *Id.* (emphasis added).
180 *See id.* ¶ 14.
181 Lina Joy v. Fed. Territory Islamic Council, [2007] 4 MALAY. L.J. 585, 595.
182 Fernando, *supra* note 76, at 257–58.
183 *Lina Joy*, 4 MALAY. L.J. at 619, 623–24 (Malanjum, J., dissenting).

Constitution,"[184] and holds that the legislative lists of power granted to the parliament in the Schedule to the Constitution are "subordinate to the fundamental liberties provisions enshrined in the Constitution."[185] The Malaysian Constitution, in his opinion, is a common law constitution to be interpreted as any other constitution, within the framework of the protection of individual rights and secularism.[186]

In this case, while there is overlap between the majority and dissenting opinions in some higher-order interpretations, there is also a distinction based on the competing narratives. Both opinions embrace comparative law and rely heavily on Malaysian and English decisions.[187] However, the majority opinion introduces an element of public policy, albeit with a narrow definition of "public"—in terms of the harm that would be done to the Muslim community if conversion was permissible without the formal process of apostasy.[188] It also introduces elements of religious reasoning—particularly in defining Islam—that fit well with the narrative of Malaysia as a Muslim country under a Muslim constitution.[189] Justice Malanjum, however, adopts an originalist approach to the meaning of Article 11 and relies heavily on textualism and precedent as the foundation of his argument.[190]

CONCLUSION

In the constitutional caselaw in both Australia and Malaysia, and particularly in the cases outlined above, the differences between the various judges cannot simply be attributed to their adoption of different methods of interpretation. While there are some sharp distinctions, all the judges discussed use comparative law, some form of originalism (or at least historical purpose), and some form of textualism. However, in Malaysia, only certain judges use religious reasoning. While constitutional cases sometimes turn on particular judges adopting particular higher-order interpretative choices, this is not the only ground of distinction. There is significant explanatory power in the argument that sometimes majorities and minorities are engaged with

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184 *Id.* at 624.

185 *Id.* at 624–25.

186 *Id.* at 596–637.

187 *See generally* Lina Joy Majority Opinion, *supra* note 154; *Lina Joy*, 4 MALAY. L.J. at 619–37 (Malanjum, J., dissenting).

188 *See Lina Joy*, 4 MALAY. L.J. at 595–96.

189 *Id.*

190 *Id.* at 619–37 (Malanjum, J., dissenting).

different constitutional narratives. These constitutional narratives create the frameworks that assist judges in making crucial middle-order interpretative choices and in creating coherent accounts of how particular constitutional provisions should be interpreted. These narratives legitimize comparisons with some legal systems more than with others. They encourage judges to view their roles as apolitical adjudicators on some occasions and as vigorous rights protectors or as quasi-religious authorities on others.

How, then, do these case-studies illustrate the three claims made at the beginning of this Article?

First, both higher-order and middle-order interpretative decisions are influenced by different constitutional narratives. In terms of higher-order interpretative choices, in Malaysia, the increasing references to *shari'a* in the interpretation of the constitution can only be explained by the notion that judges accept the story that the Constitution creates an Islamic state and not merely a state which has Islam as the ceremonial or majority religion. This use of religious doctrine and understandings has been decisive in a number of cases, including the *Lina Joy Case*. No such interpretative choice has been or is likely to be seen in Australian constitutional interpretation partially because religion plays a minor role in Australia's constitutional narrative.

The influence of narrative on middle-order interpretative choices can also be seen in the cases discussed. In both Australia and Malaysia, judges in the majority and the minority frequently use comparative law, but there are significant distinctions regarding which bodies of law are chosen and how they are used.[191] For Justice Murphy, the American caselaw on religious establishment represented a path towards a constitution that better fulfilled its role as a protector of individual rights and liberties.[192] For the majority, the American experience was peripheral to understanding the Australian Constitution and, at best, represented a useful warning—a morality play of the problems that could result if judges set the test for establishment too low.[193]

Second, the strength of a compelling story and the limited relationship that a story has to have with historical or current facts is well illustrated in the *Lina*

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[191] *See* Lina Joy Majority Opinion, *supra* note 154; *Lina Joy*, 4 MALAY. L.J. at 619–37 (Malanjum, J., dissenting); Meor Atiqulrahman v. Fatimah bte Sihi, [2000] 5 MALAY. L.J. 375; Government of Kelantan v. Government of the Federation of Malaya & Tunku Abdul Rahman Putra al-Haj, [1963] 1 MALAY. L.J. 355, 357; Att'y Gen. of Victoria *ex rel.* Black v. Commonwealth (*DOGS Case*) (1981) 146 C.L.R. 559 (Austl.).

[192] *DOGS Case*, 146 C.L.R. at 623 (Murphy, J., dissenting).

[193] *Id.* at 601–03 (Gibbs, J., concurring).

Joy Case. The systematic rewriting of Malaysian constitutional history has been carried out by multiple storytellers from Prime Minister Mahathir, who claimed that Malaysia was already a fundamentalist Islamic State, to the Human Rights Commission, which claimed that Malaysia's Constitution was created entirely by Muslims,[194] to various Muslim lawyer's groups and bloggers, who assert that the Constitution requires an Islamic government and that other provisions of the Constitution must be read in light of this requirement.[195] These non-judicial storytellers have developed a narrative that is very attractive to part of the Malaysian judiciary. The systemic analysis of the historical record and caselaw by Justice Malanjum seems tepid in comparison.[196] He attempts to give life to his judgment by linking the Malaysian constitutional narrative to the broader human rights story and a strong defense of a limited judicial role, but his story lacks resonance.

Over time, the narrative of a Muslim Malaysia may become a reality as the Malaysian Constitution is increasingly interpreted as a Muslim constitution, creating a Muslim state in which certain limited rights and freedoms are carved out for those born into a religious minority group. In time, the story of the Constitution as a social contract between people of different races and religions underwritten by secularity and human rights may diminish into a minor story, although the story will, no doubt, remain powerful in certain communities who will await the moment at which it may become dominant again.

Finally, the limited effectiveness of legal transplants is illustrated strongly by the Australian High Court's rejection of the United States Supreme Court's jurisprudence. Despite the fact that Section 116 of the Australian Constitution was deliberately modeled after the United States religion clauses,[197] it was located in a Constitution with no Bill of Rights and interpreted by a group of justices whose constitutional understandings were firmly anchored within a British narrative.[198] As a result, despite the significant linguistic, cultural, legal, and economic similarities between Australia and the United States, the caselaw on religious establishment has moved in very different directions. Similarly, the insertion of religious freedom provisions based on human rights

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194 HUMAN RIGHTS COMMISSION OF MALAYSIA, ANNUAL REPORT (2003), *available at* http://www.digitalibrary.my/dmdocuments/malaysiakini/441_annual%20report%202003.pdf.

195 Tun Hanif Omar, The Status of Islam in the Constitution (July 16, 2006), http://www.myislamnetwork.net/component/content/article/1-artikel-pilihan/12-the-status-of-islam-in-the-constitution.html.

196 *Lina Joy*, 4 MALAY. L.J. at 619–37 (Malanjum, J., dissenting).

197 BLACKSHIELD & WILLIAMS, *supra* note 59, at 1099.

198 *Id.*

principles into the Malaysian Constitution has had a radically different result than was intended by those who drafted the Constitution.

Stories are powerful, potentially transformative, and sometimes dangerous. They are capable of capturing the imagination and the agenda of even the sober, rational men and women who undertake constitutional adjudication. In controversial, politically charged areas like religious freedom, the influence of narrative is particularly clear. By paying attention to the underlying, competing narratives in constitutional adjudication, it is possible to develop a fuller, deeper understanding of constitutional decisions and come closer to understanding the complete story of constitutional interpretation.