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The Comparative Constitutional Law of Cows and Milk —India and the United States

Mathilde Cohen*

Abstract

India is the largest milk producer in the world, and the United States follows closely along, ranked at number three. These two dairy nations appear to have dramatically different constitutional regimes related to cows. The United States Constitution does not mention cows, but the Supreme Court has developed an elaborate case law on milk, a testament to the central place of milk and farm animals in American life, politics, and culture. Yet none of these cases exhibits concern for the welfare or working conditions of cows. It would be hard to imagine, therefore, a more different constitutional framework than that found in India. In the 1949 Constitution, there is an explicit provision addressing agriculture and cattle welfare, declaring, among other things that “[t]he State shall . . . take steps for prohibiting the slaughter, of cows and other milch and draught cattle.”

This Article makes two contributions. First it argues that despite seemingly opposed constitutional regimes, important similarities can be found in the ways in which India and the United States negotiate cows’ status. Both jurisdictions are interested in cows qua milk producers rather than animals whose welfare is of independent value.

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The focus is on the supposed benefits of dairying for human health and flourishing. Second, it argues that in practice the constitutional predilection for cows and milk has failed to meet its promise to benefit humans. In both countries, milk and cows feature as components of an exclusionary politics used to oppress, reinforcing inequities between racial, social, and religious groups.

Introduction

India is the largest milk producer in the world, and the United States follows closely along, ranked at number three.¹ Milk—historically, culturally, and politically—has proven to be a unique food product in that it crystalizes anxieties about class, gender norms, racial differences, and human-animal boundaries.² These two dairy nations appear to have dramatically different constitutional regimes related to cows and milk. But upon closer inspection, there are important similarities that raise critical questions about what is regulated when milk and cows are the objects of legislation.

Conventional wisdom holds that the United States Constitution does not extend to non-human animals.³ And after a quick glance at the Supreme Court's elaborate case law on milk, this wisdom appears to be correct. Between the 1880s and 2000s, milk and cattle litigation has been a vehicle for the Court to articulate

¹ See ANDREA S. WILEY, CULTURES OF MILK. THE BIOLOGY AND MEANING OF DAIRY PRODUCTS IN THE UNITED STATES AND INDIA 14 (2014).

² See Mathilde Cohen, *Regulating Milk. Women and Cows in France and the United States*, 65 AM. J. COMP. L. (forthcoming); Mathilde Cohen, *Of Milk and the Constitution*, 16 HARV. J. LAW & GENDER 115 (2017).

³ See generally GARY L. FRANCIONE, ANIMALS, PROPERTY AND THE LAW (1995) (documenting the exclusion of animal interests from legal consideration, including from constitutional protections); STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000) (urging for the conferral of legally enforceable rights on animals, including constitutional rights).

central constitutional doctrines such as Congress' taxation and commerce powers, equal protection, due process, and antitrust. The frequency with which milk cases turn up on the Court's docket is a testament to the central place of milk and farm animals in American life, politics, and culture. Litigation involving cows and milk arose out of disputes concerning bovine illnesses, transportation, slaughtering, but also the price, quality, and packaging of milk products.⁴ Yet none of these cases exhibits concern for the welfare or working conditions of cows.⁵

It would be hard to imagine, therefore, a more radically different constitutional framework than that found in India. In the 1949 Constitution, there is an explicit provision addressing agriculture and cattle welfare, declaring, among other things that “[t]he State shall . . . take steps for prohibiting the slaughter, of cows and other milch and draught cattle.”⁶ Though this provision appears in the “Directives Principles to States,” which are nonenforceable guidelines for laws and policies directed toward the national and state governments, here *cows* appear to be bearers of constitutional rights. A number of states have moved forward with their own laws to strengthen anti-bovine slaughter as well as to punish the consumption and storing of beef,⁷ echoing a long history of bans on the slaughter and eating of cows. This movement is not without precedent. During the British Raj (the rule of the British Crown in the Indian subcontinent from 1858 and 1947), a number of “princely

⁴ See *infra*, Appendix.

⁵ But see *infra* note 87 and accompanying text.

⁶ See IND. CONST. ART. 48.

⁷ See Shraddha Chigateri, *Negotiating the ‘Sacred’ Cow: Cow Slaughter and the Regulation of Difference in India* in DEMOCRACY, RELIGIOUS PLURALISM AND THE LIBERAL DILEMMA OF ACCOMMODATION 137, 138 (Monica Mookherjee, ed., 2011) (reviewing the different types of state regulation).

states,” which enjoyed some level of sovereignty, had “made cow killing or, in some cases, selling a cow for slaughter punishable by life imprisonment or death.”⁸

Why compare the United States and India? Despite seemingly opposed legal regimes, three important similarities can be found in the ways in which India and the United States negotiate cows’ constitutional status. First, in terms of constitutional methods, both jurisdictions confer to cows and milk an intermediate legal status: not quite fully constitutional yet not simply statutory. In the United States, the Supreme Court “quasi-constitutionalizes” milk by treating it as a food like no other, imbued with essential nutritional, economic, and moral values. At the same time, the Court refrains from explicitly recognizing a fundamental right to milk for all Americans. In India, cow protection figures among the so-called “directive principles of state policy” of the Constitution. These are broad directives given to the central and state governments, which are not enforceable by any court. Indian cows, therefore, have a “quasi-constitutional” status which is analogous to American milk: the Indian Constitution proclaims their value, falling short of making their protection justiciable on the model of fundamental rights.

Second, in terms of substantive law, both jurisdictions are primarily interested in cows *qua* milk producers rather than *qua* animals whose welfare is of independent value. In both countries, the constitutional discourse on cows is based upon an economic understanding of the use-value of milk and dairy cattle. Both economies were still largely agrarian when this discourse developed—around the turn of the century in the United States and around

⁸ Frederick J. Simoons, et al., *Questions in the Sacred-Cow Controversy*, 20 CURRENT ANTHROPOLOGY 467, 473 (1979).

independence in India. In the early twentieth century, at a time of industrialization and urbanization when many Americans needed affordable and safe sources of nutrition, the U.S. Supreme Court's dairy jurisprudence fostered the interests of the meat and dairy industry so as to make milk accessible to the masses. The Indian constitutional provision was framed in terms of public health and management of animal husbandry, in part to avoid it from being read as an attempt to assert a pan-Hindu agenda on the new secular state. Cow protection, it was said, would boost the supply of dairy foods for the benefit of the food-insecure populace (rather than protecting Hindu nationalist sentiments).⁹

Third, both in the United States where farm animals' welfare ranks at the bottom of the legal hierarchy, and in India, a multicultural state where the majority religion elevates cows to a sacred status, the constitutional framework is inattentive to cows' well-being.¹⁰ In the United States, where the focus is on whether milk is available and safe for human consumers, constitutional interventions focus on the price and quality of milk for the sake of *human* health and welfare. In India, the same goal of protecting milk supply *for humans* is used as a religious-neutral justification to prohibit the slaughter of dairy cattle, not abuse during their lifetime. There is

⁹ See *infra* notes 43-45 and accompanying text.

¹⁰ At the subnational level, both in the United States and in India, certain states have adopted constitutional and statutory provisions that may be more or less protective. Six American states enacted limitations on the space restrictions of confined animals, including calves, through voters' initiatives and legislative bills: Arizona, Oregon, Colorado, California, Maine, and Michigan. See Terence J. Centner, *Limitations on the Confinement of Food Animals in the United States*, 23 J. AGRIC. ENVIRON. ETHICS 469, 473 (2010). Yet, when animals are the objects of constitutional or legislative attention at the state level it is typically not to promote their welfare, but the interests of food producers and consumers. The majority of U.S. states expressly exempt farm animals, or certain farming practices, from their anti-cruelty provisions, making it nearly impossible to provide even meager protections. On India, see Chigateri, *supra* note 7 at 138.

an obvious form of speciesism behind this common milk-centric perspective: constitutional rights are afforded to humans, not non-human animals. The constitutional question remains whether milk is available to *us*, affordable for *us*, healthy for *us*, human consumers.

Yet, this Article argues that in practice the constitutionalization of milk and cows may *not* be beneficial for us, its intended human beneficiaries. Or at least not equally beneficial, as certain humans are more harmed by cows and milk's prominence than others. In both the United States and India, the prioritization of cows and milk in constitutional discourse has reinforced inequities between racial, social, and religious groups. Milk and cows are hot button political issues, used to exclude and oppress minorities. In the United States, the quasi-constitutionalization of milk has sanctioned its federal subsidization and omnipresence in dietary guidelines, school snacks and lunches, as well as various food assistance programs. Yet milk is an inadequate food for about a quarter of Americans who are "lactase impersistent"—that is, who have low levels of the enzyme lactase, which is necessary to digest milk.¹¹ Lactase impersistence, commonly known as "lactose intolerance," is disproportionately found certain racial and ethnic minorities such as Native Americans, African Americans, Asian Americans, and Latino-Americans. These groups which, historically, have been the victims of systemic discrimination and still suffer from actual, structural, and symbolic discrimination are also those most harmed by milk's privileged legal position. In India, the concept of the sacred cow in Hindu religions, which arguably motivated the 1949 Constitution's cow protection provision, helped to mobilize forces in the

¹¹ Andrea S. Wiley, "Drink Milk for Fitness": *The Cultural Politics of Human Biological Variation and Milk Consumption in the United States*, 3 AM. ANTHROPOLOGIST 506, 510 (2004).

independence movement against the British colonial power. The doctrine of the sanctity of the cow encompasses a wide variety of beliefs and practices, but at its core, it requires that the cow be protected from slaughter and that its products, in particular milk, be cherished as purifying substances. In other words, while cows' flesh (beef) should not be eaten, cows' milk should be avidly consumed. Cow protection served as a rallying cry in the emancipation from the British, but it was also a symbol of the dominant caste pan-Hindu identity at the expense of beef-eating minorities, especially Muslims and non-dominant castes.

This Article proceeds in three parts. I begin in Part I by analyzing the United States and India's constitutional law when it comes to cows and milk. Despite apparently vastly different outlooks on the ontological status of cows, both legal frameworks primarily treat them as economic objects. In Part II, I claim that in both constitutional discourses milk has been constructed as an essential element of the national diet, leading to a boom in milk production and the accompanying deterioration in cows' quality of life. Part III argues that the constitutionalization of cows as milk machines not only harms non-human animals, but also certain segments of the human population.

Part I. Constitutionalizing Cows and Milk: An Economic Agenda

This Part presents the U.S. and the Indian constitutional landscapes pertaining to cows and milk. Though the two countries embrace seemingly opposed constitutional *Gestalts* on the issue, their regulation of cows and milk is similarly driven by an economic agenda.

A. The U.S. Bovine Jurisprudence

The United States Constitution is a notoriously short document, known for establishing a tradition of “negative” rights against the government rather than “positive” rights obliging the government to take certain actions. It is silent on the subject of animals. Raising animals for meat, milk, or eggs is apparently not a matter of constitutional law. Yet between the 1880s and 2000s, the Supreme Court has issued dozens of opinions on the merits on cases involving cattle and milk.¹² In previous scholarship I referred to the Supreme Court milk case law as a “dairy jurisprudence,”¹³ but the inclusion of cases pertaining to cattle more generally rather than just milk warrants the expansion of the category and a correspondingly broadened name, “bovine jurisprudence.”

Though cows and milk are not mentioned in the Constitution, historically, litigation over cattle, especially dairy products, has been a vehicle for the Justices to articulate central constitutional doctrines such as Congress’ taxation and commerce powers, the states’ police powers, equal protection, due process, the delegation of legislative or judicial power to administrative officials, the states’ licensing powers, the taxing powers, eminent domain, and antitrust principles. The frequency with which cows and milk cases turn up on the Court’s docket is a testament to the central place of beef and dairy cattle husbandry in everyday American life, reflecting the Justices’ own economic and societal food ideology. Through this bovine jurisprudence, I argue that the Supreme Court bestowed milk a quasi-constitutional status.

¹² See *infra*, Appendix, listing the cases upon which this Article focuses.

¹³ See Cohen, *supra* note 2.

What do I mean by “quasi-constitutional” in the context of milk?¹⁴ The concept of quasi-constitutionality is popular in Canadian and European constitutional theory, but lacks a unified meaning among American constitutional scholars.¹⁵ In addition to formally recognized constitutional rights, either enshrined in the text of the Constitution or elevated to the rank of “unenumerated” rights by judicial interpretation, the Court has recognized a number of rights or principles without taking the step of constitutionalizing them. Interpreting the notion of constitutional law broadly, those can be called “quasi-constitutional.” Examples include the right to public education, a healthy environment, public health, and perhaps even national security. Though the Supreme Court is unlikely to use a substantive due process theory to declare these constitutional rights proper any time soon, they are (or were for a time) so frequently articulated in constitutional terms both inside and outside of the courts that they have acquired a quasi-constitutional status. Outside

¹⁴ For a fuller exploration of quasi-constitutionality in the context of milk, see Cohen (2017), *supra* note 2.

¹⁵ See HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 70 (1990) (defining “quasi-constitutional custom” as “a set of institutional norms generated by the historical interaction of two or more federal branches with one another [that] represent informal accommodations between two or more branches on the question of who decides with regard to particular foreign policy matters”); William N. Eskridge & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992) (arguing that the Supreme Court’s use of canons of statutory construction such as clear statement rules to restrict congressional powers have created “quasi-constitutional law” in certain areas). See also for applications to specific areas, Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons From the Clean Air Act*, 62 IOWA L. REV. 713 (1977) (considering cases in which reviewing courts override normal principles of statutory interpretation in order to protect environmental interests, which are nonetheless not recognized as constitutional rights); Mark D. Rose, *Multiple Authoritative Interpreters of quasi-constitutional federal law: of tribal courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479 (2000) (arguing that tribal courts are empowered to provide independent interpretation of constitutional rights and federal law).

the courts, discussions take place through the political process, for example by proposals to amend the Constitution,¹⁶ or within the legal community by way of advocacy in favor of constitutionalization. What truly sets apart quasi-constitutional principles from other aspirants to constitutionalization is their articulation in constitutional terms is frequently found in judicial discourse.

The Supreme Court has identified some rights, such as public education, as candidates for constitutionalization, only to expressly reject them.¹⁷ Yet even those forsaken principles have remained stubbornly persistent in constitutional adjudication, belying their non-constitutional status. Others, such as public health, are more diffuse in the case law, not being explicitly thematized as potential constitutional principles. Yet, there was a time when public health was an operative constitutional standard. Health law scholar Wendy Parmet, for instance, has shown that the Court “constitutionalized” public health during the ante-bellum and Reconstruction periods, using the notion to define and circumscribe the states’ police powers.¹⁸ During the heyday of bovine jurisprudence, milk’s status

¹⁶ Environment quality amendments to the Constitution surfaced in the late 1960s and had their heyday in the 1970s. See J.B. Ruhl, *The Metrics of Constitutional Amendments: and Why Proposed Environmental Quality Amendments Don’t Measure Up*, 74 NOTRE DAME L. REV. 245 (1999). There have been a couple of proposed education amendments, including one introduced by Jackson, Jr. in every Congress from 1999 to 2012 “regarding the right of all citizens of the United States to a public education of equal high quality.”

¹⁷ Education provides a case in point, the Court famously declared in *Brown v. Board of Education*, “[t]oday, education is perhaps the most important function of state and local governments.” *Brown v. Board of Education*, 347 US 483, 493 (1954). Yet it later denied it constitutional status. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (denying appellant claims that unequal education funding violated a fundamental right and the Equal Protection Clause all while singing a paean to education.).

¹⁸ Wendy E. Parmet, *From Slaughter-House to Lochner: The Rise and Fall of the Constitutionalization of Public Health*, 40 AM. J. LEGAL HIST., 476, 478, 502 (1996) (arguing that public health was later “deconstitutionalized” by the New Deal

was reminiscent of that granted to public health. In much the same way that the Court had used public health as an excuse to find a broad governmental authority to protect the health, safety and welfare of the population, it held that ensuring a steady and affordable milk supply for the American public was an interest strong enough to justify the federal and state governments' frequent interventions in the production, pricing, and distribution of milk.

How did so many milk cases reach the Supreme Court? Beginning in the mid-nineteenth century, in the face of a series of sanitary and economic crises affecting the safety and profitability of milk,¹⁹ both state and federal governments began to intervene massively in milk production and regulation. In the late 1800s, milk was no longer consumed locally, on the farm or its surroundings, but began to travel to urban centers. Milk found in cities was often of poor quality—spoiled due to lack of refrigerated transportation and storage, contaminated with bacteria and viruses, and adulterated by intermediaries seeking to maximize their profit margins. Public health reformers mobilized as a result of mounting rates of milk-related infant mortality.²⁰ Starting in the 1860s and throughout the late nineteenth century municipal, state, and later federal legislation sought to prohibit milk adulteration and ensure quality milk supply in the cities.²¹ The judiciary was soon confronted with

Court when it no longer needed the concept to separate the public from private spheres of authority).

¹⁹ The post-World War I depression, followed by the Great Depression accelerated drop in milk prices.

²⁰ See RICHARD A. MECKEL, *SAVE THE BABIES: AMERICAN PUBLIC HEALTH REFORM AND THE PREVENTION OF INFANT MORTALITY, 1850–1929* 5 (1990) (recounting the American campaign against infant mortality in the period between 1850 and the Depression of 1929).

²¹ City ordinances appeared in Boston, New York, and other large cities, soon followed by state legislation. See MECKEL, *supra* note 20 at 68 (pointing out that between 1880-1895 twenty-three American municipalities passed or strengthened ordinances governing the sale of milk and recounting). The 1906

the enforcement of and challenges to the new regulations. From the late 1800s until the 1970s, state and federal courts had repeated occasions to review state and federal milk safety legislation pertaining to such issues as pasteurization,²² milk containers,²³ bovine illnesses,²⁴ inspection areas,²⁵ the state's role as a licenser of milk dealers,²⁶ and so on. The constitutional question raised was typically whether the new health and safety laws were valid exercises of police powers on the part of the states or legitimate uses of the commerce powers on the part of Congress.

Food and Drug Act was the first major federal law to address food safety, ending piecemeal legislation and inconsistent state standards. While the Act is often presented as a consumer-protection measure, in fact many food and drug manufacturers pushed for the passage of the statute in the hope of securing advantage over domestic competitors and expanding markets to interstate and foreign commerce. *See* Ilyse D. Barkan, *Industry invites regulation: the passage of the Pure Food and Drug Act of 1906*, 75 AM. J. PUBLIC HEALTH 18 (1985) (arguing that industrial support prompted congressional action).

²² For an overview of early state court decisions dealing with pasteurization, see James A Tobey, *Court Decisions on Pasteurization*, 42 PUBLIC HEALTH REPORTS (1896-1970) 1756 (1927).

²³ *Dean Milk Co. v. City of Madison, Wis.' et al.*, 340 U.S. 349 (1951) (holding a Madison, Wisconsin ordinance, which required that milk to be sold in the city had to be produced within a twenty-five mile radius to facilitate inspection unconstitutional as a violation of the dormant commerce clause and insufficiently restrictive way of meeting safety goals.); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (upholding a Minnesota statute prohibiting the sale of milk in plastic nonreturnable containers as an environmental and energy conservation measure.).

²⁴ *See, e.g.*, *Adams v. Milwaukee*, 228 U.S. 572 (1913) (upholding a City of Milwaukee ordinance requiring a tuberculin test for milk drawn from cows outside of the city because they cannot be inspected by the health officers); *Mintz v. Baldwin*, 289 U.S. 346 (1933) (upholding a New York order requiring that out-of-state cattle brought in the state for dairy or breeding purposes have a certificate certifying that the animals are free of Bang's disease.).

²⁵ *H.P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949) (striking down New York Commissioner of Agriculture's decision to deny a Massachusetts corporation's license application to operate a fourth milk plant in New York as a burden on interstate commerce); *Dean Milk Co.*, 340 U.S. 349 (1951).

²⁶ *See Milk Control Board of Pennsylvania v. Eisenberg Farm Products*, 306 U.S. 346 (1939) (upholding the Pennsylvania Milk Control Board's authority to require licensure for milk dealers so long as the effects of the requirements were local and thus not burdening interstate commerce.).

Though bovine jurisprudence came about as a by-product of the wave of health and safety legislation that emerged during the Progressive Era, it prospered because milk soon became the object of extensive economic regulation. Milk has long been a cornerstone of American agriculture—today it comprises a whooping 11% of the total value of agricultural production.²⁷ This economic importance is reflected in the vast number of cases and statutes pertaining to the commerce of milk.²⁸ In the face of the post-World War I depression, followed by the Great Depression and the accelerated drop in milk prices which ensued, both the state and federal governments began to intervene massively in milk production and marketing.²⁹ Their typical goal was to ensure that milk prices remained stable to protect the livelihood of dairy farmers and further Americans' growing milk-drinking ways.³⁰ Initially, the courts interpreted the federal government's authority to regulate milk markets with little latitude, leading to a proliferation of state legislation. With the jurisprudential

²⁷ See WILEY, *supra* note 1 at 14. See also Ronald F. Wright & Paul Huck, *Counting Cases About Milk, Our "Most Nearly Perfect" Food, 1860-1940*, 36 LAW & SOC'Y REV. 51, 60 (2002) ("The value of milk and milk products was 19% of gross farm revenue in 1939, or roughly double the value of wheat, corn, and the other grain crops combined").

²⁸ For a presentation of the case law see generally see Wright & Huck, *supra* note 27. For a relatively recent example of federal legislation, see The Fluid Milk Promotion Act of 1990 (stating "(3) the dairy industry plays a significant role in the economy of the United States, in that milk is produced by thousands of milk producers and dairy products (including fluid milk products) are consumed every day by millions of people in the United States; . . . (5) the maintenance and expansion of markets for fluid milk products are vital to the Nation's fluid milk processors and milk producers, as well as to the general economy of the United States;")

²⁹ See, e.g., James T. Cross, *Legal Aspects Leading to Milk Control Law*, 5 N.Y. ST. B.A. BULL. 211 (1933).

³⁰ At the federal level the solution was a program of federal milk orders authorized by the Agricultural Marketing Agreement Act of 1937. The goal was threefold: to provide producers a minimum return, to ensure equality among handlers (i.e., milk processors who are also sometimes milk distributors), and to guarantee consumers a steady supply of milk. Since then federal milk orders have proliferated.

shift of the Supreme Court toward a broader understanding of congressional powers in the late 1930s,³¹ milk cases became a major battlefield for the delimitation of federal-state relations. By then the dairy industry had become one of the nation's most potent political lobbies. Typically, the Court sided with those parties (be it the federal or state governments, local or out-of-state dairy producers, farmers or dealers and distributors) which, in its view, promoted the production of greater quantities of milk for Americans.

The quasi-constitutionalization of milk in the United States appears centered upon an economic view of animal-human relations. It is the economic prosperity of dairy farmers and, therefore, of the milk-drinking nation, which must be fostered. When it comes to India, it seems at first sight that the picture is reversed, cows' welfare being at the forefront of the constitutional framework.

B. The Indian Ban on Cow Slaughter

There is a long history of cattle regulation in India. For a Hindu, the killing of a cow is a sin, which renders the killer ritually impure. Cultural geographer Frederick Simoons reports that in the 1920s cow killing was punishable by a prison sentence, even in Muslim areas such as in Kashmir, where a Sikh ruler had established earlier on the death penalty for cow killing.³² The Constitution

³¹ In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) and in a number of decisions which followed, the Supreme Court famously reverted course from its previous, *Lochner* era jurisprudence, and began upholding state and federal economic legislation, in particular New Deal legislation, recognizing broader congressional powers to regulate the economy. The shift is often referred to as "The switch in time that saved nine."

³² Frederick J. Simoons et al., *Background to Understanding the Cattle Situation of India: The Sacred Cow Concept in Hindu Religion and Folk Culture*, ZEITSCHRIFT FÜR ETHNOLOGIE, Bd. 106, H. 1/2, 121, 132 (1981).

adopted in 1949 makes the protection of cows a national constitutional objective. Article 48 reads:

The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and other milch and draught cattle.

On its face, the provision is religiously neutral, attempting to erase the spiritual and cultural dimension of the cow in the history of India. The post-independence Indian constitutional order, under the leadership of then Prime Minister Nehru, aimed to keep law and religion separate. The Hindu lobby had pushed for a general prohibition on cow slaughter, but Nehru threatened resignation unless the constitutional ban was given a secular, and limited, character.³³ Yet, a full understanding of the condition of cattle and the legal protections afforded to cows in India cannot overlook the devout Hindu conception of the cow as it manifests itself both in religious and everyday behavior. Hinduism, the professed religion of over 80 percent of Indians today,³⁴ is often described as a “way of life,” highlighting the “profound tension that penetrates to the core of Indian constitutionalism, where ‘the State is secular ... but the people are not.’”³⁵

³³ T.N. Madan, *Whither Indian Secularism?* 27 MODERN ASIAN STUD. 667, 687 (1993) (emphasizing the role of Nehru in the secular character of Article 48.) See also Subrata Kumar Mitra, *Desecularising the State: Religion and Politics in India after Independence*, 33 COMP. STUD. SOC’Y & HIST. 755, 770-771 (1991) (reporting that a few later when the Indian Parliament considered a wide-ranging Cattle Preservation Bill in 1955, Nehru rejected it on procedural grounds and went as far as to offering his resignation if his position on the secular state was not accepted.)

³⁴ According to the religion census of 2011, Hindus comprised 78.35 per cent of the total population.

³⁵ GARY JEFFREY JACOBSON, *THE WHEEL OF LAW: INDIA’S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT* 35-6 (2003).

To summarize the history at the risk of oversimplifying, cattle played a major role in the economy of the Aryan people who settled in what is currently northwest India during the second millennium BCE.³⁶ They were a source of meat, milk, leather, plow traction, but also of sacrificial victims in Vedic rituals. Though there is some disagreement among historians, the emergence of *ahimsa* (non-violence) and the sacred cow concepts are situated around 400 BCE, during a time of profound social and religious upheaval. The sanctity of the cow had become a central tenet of the Hindu faith by the 6th century CE. Not only are cows worshipped in Hinduism, but their products are seen as protective and purificatory, from the dust found in their hoofs and skin, to their hair and bodily excrements, including milk, urine, and dung, which figure, along with curd and ghee as the “five products of the cow” used in ritual purification.³⁷ In cooking, the purity of the cow is communicated through milk products, explaining the ubiquitous use of ghee (clarified butter) as a cooking oil in Indian cuisine. As Frederick Simoons explains, “[t]he effectiveness of the ‘five products’ derives from the view that the cow is higher in ritual status than all humans, including Brahmans, and that even a cow’s excrement is purifying to men.”³⁸ Cooking foods in milk or ghee bestows them with purity even when prepared by non-dominant castes. One of the most striking expressions of the sacred cow doctrine is the *goshalas* (“places for cows”), that is, the shelters for the aged and infirm cattle.³⁹

Despite this long religious history, when discussing the language of what became Article 48, members of the Constituent Assembly

³⁶ See, e.g., Simoons et al., *supra* note 32.

³⁷ See Frederick J. Simoons, *The Purificatory Role of the Five Products of the Cow in Hinduism*, 3 *ECOLOGY OF FOOD & NUTRITION* 21 (1974)

³⁸ See, e.g., Simoons et al., *supra* note 32 at 121, 130.

³⁹ See Simoons et al., *supra* note 32 at 121, 133.

attempted to focus on the cow as an economic concept belonging to the debate on agriculture and development in general.⁴⁰ When the Hindu members of the Constituent Assembly mentioned the religious aspects of cows in Indian culture, it was typically to bolster economic arguments. For instance, representative Shibban Lal Saksena declared, “I personally feel that cow protection, if it has become a part of the religion of the Hindus, it is because of its economic and other aspects.”⁴¹ Pandit Thakur Dass Bhargava asserted that historically, even in the Muslim-ruled Mughal empire, “cows’ slaughter was not practised in India; not because Muslims regarded it to be bad but because, from the economic point of view, it was unprofitable.”

The economic argument for cow protection boiled down to the following: the cow does more good to the Indian nation alive than dead, supporting agriculture through its labor and manure, and benefiting the health of the populace with its milk. The contention was not totally novel, as a cow protection movement premised on remarkably similar economic justifications had existed since the 1880s.⁴² Since then, the slaughter of cattle had been periodically condemned as contributing to famines and the increasing poverty of the country. Yet, for the first time this utilitarian discourse came to

⁴⁰ Though the debates transpire religious motivations, e.g., Seth Govind Das declaring: “The Muslims should come forward to make it clear that their religion does not compulsorily enjoin on them the slaughter of the cow.” See 7 Constituent Assembly of India (Nov. 24, 1948).

⁴¹ 7 Constituent Assembly of India (Nov. 24, 1948).

⁴² See Cassie S. Adcock, *Sacred Cows and Secular History: Cow Protection Debates in Colonial North India*, 30 COMP. STUD. SOUTH ASIA, AFRICA & THE MIDDLE EAST 297, 301-2 (2010) (presenting the founding text of the cow protection movement, Dayanand Saraswati’s *Gokarunanidhi*, first published in 1881, which developed the argument that cows were essential to the prosperity and the health of the Indian people and that when cows are protected, milk is plentiful and inexpensive, which allows the poor to consume more dairy products and less grain, with benefits to their digestion).

the forefront of constitutional lawmaking on a national scale. At the Constituent Assembly, protecting “cattle wealth” was presented as key to the agricultural development and economic welfare of the newly independent, and still mostly agricultural nation—to this day, milk production comprises 17% of the total value of agricultural production.⁴³ Expanding the country’s cattle population, drafters argued, would provide much needed animal traction for agriculture, increase milk production, and maximize manure to fertilize lands. Milk was seen as essential to solving the hunger problem. The last major famine in India had occurred in 1943, preceding independence in 1947, but the challenge of feeding a growing nation was very much on the drafters’ minds.⁴⁴ During the debates, Seth Govind Das thus admonished that the campaign to grow more food “cannot succeed so long as we do not preserve the cows,”⁴⁵ unfavorably comparing India’s milk production per capita at the time (7 ounces) to countries such as New Zealand (56 ounces), Denmark (40), the United States (35), or France (30).

Though the final wording of Article 48 is not limited to protecting “useful cattle,” it is far from providing universal cattle protection. Only bovines appear covered, and among bovines, only those which have economic value, “cows and calves and other milch and draught cattle,” are to benefit from the slaughter ban. In other words, Article 48 does not protect cattle that neither produce milk

⁴³ See WILEY, *supra* note 1 at 14. See also CHRISTOPHER L. DELGADO & CLARE A. NARROD, IMPACT OF CHANGING MARKET FORCES AND POLICIES ON STRUCTURAL CHANGE IN THE LIVESTOCK INDUSTRIES OF SELECTED FAST-GROWING DEVELOPING COUNTRIES Annex I (2002), available at <http://www.fao.org/wairdocs/lead/x6115e/x6115e0b.htm#bm11.2.1> (last accessed, January 12, 2015)

⁴⁴ See JEAN DRÈZE & AMARTYA SEN, THE POLITICAL ECONOMY OF HUNGER: VOLUME 1: ENTITLEMENT AND WELL-BEING 16 (1991).

⁴⁵ 7 Constituent Assembly of India (Nov. 24, 1948).

nor can be bred nor used for agricultural work. Most strikingly, the Constitution does not protect buffaloes, which nonetheless generated 50% of India's milk supply in the 1940s, as drafter Pandit Thakur Dass Bhargava points out,⁴⁶ and currently produce 58% of the total milk supply.⁴⁷ As will be discussed below, this disparity suggests that religious motivations inspired drafters more than they were willing to admit—buffaloes do not share in cows' sacred status in Hinduism.⁴⁸

Called to interpret Article 48 in 1958 in *Hanif Quareshi*, the Supreme Court of India initially maintained the primarily economic vision of cow protection.⁴⁹ The case had been brought by Muslim butchers and dealers who claimed that a series of bans on cow slaughter (including buffaloes) enacted at the state level in furtherance of Article 48 violated their freedom of religion, their right to equal protection, and their right to carry on their occupation. The Court dismissed the first two claims, finding that the sacrifice of cows is not a mandatory practice in Islam and that butchers could be validly classified in separate groups depending on the type of animals they handled.⁵⁰ But it accepted a version of the trade argument,

⁴⁶ See 7 Constituent Assembly of India (Nov. 24, 1948).

⁴⁷ See WILEY, *supra* note 1 at 58.

⁴⁸ See Stanley A. Freed & Ruth S. Freed, *Sacred Cows and Water Buffalo in India: The Uses of Ethnography*, 22 CURRENT ANTHROPOLOGY 483 (1981) (presenting the religious and the techno-environmental positions on the composition of the Indian cattle population).

⁴⁹ Mohd. Hanif Quareshi & Others vs The State Of Bihar, [1959] 1 SCR 629 (upholding a total ban on the slaughter of cows of all ages but not on she-buffaloes, breeding bulls, and working bullocks after they had ceased to be capable of yielding milk or breeding or working as draught animals).

⁵⁰ In doing so, the Court was applying the “essential religious practices” doctrine it had begun to develop a few years earlier in cases such as Commissioner, Hindu Religious Endowments vs Lakshmindra, [1954] S.C.R. 1005 and Ratilal Panachand Gandhi vs State of Bombay, [1954] S.C.R. 1055. According to the doctrine, only practices considered “essential” to a religion are protected under Articles 25 and 26 of the Indian Constitution (which declare freedom of religion and the freedom to manage religious affairs to be fundamental rights). This

reasoning that the degree of interference with butchers' freedom should be tied to cattle's varying economic "utility." According to the Court, a total ban on the slaughter of all bovines would imperil butchers' occupation and source of livelihood. The high judges noted that male buffaloes, are "not half as useful as bullocks," and that sheep and goats, giving "very little milk compared to the cows and the female buffaloes" should not be protected from slaughter by the law.⁵¹ It concluded that these animals are not only deprived of economic value, but also create a burden on resources by draining the nation's cattle feed.

Some forty years later, in a series of case culminating in the 2005 *Gujarat v. Mirzapur* case, the Court reverted course, apparently relinquishing the constitutional doctrine according to which cow protection is an economic and public health-oriented endeavor. It announced that "[a] cattle which has served human beings is entitled to compassion in its old age when it has ceased to be milch or draught and becomes so-called 'useless.'"⁵² In the case at hand, the Court was called to examine the constitutionality of the Bombay Animal Preservation (Gujarat Amendment) Act of 1994, which mandated a broad ban on cow slaughter, including female buffaloes. The Court upheld the amendment, pointing out that food security was no longer an urgent national problem and that constitutional change, which improved the legal status of animals, had intervened since *Hanif Quareshi*.

jurisprudence raises the question whether courts have the authority and legitimacy to determine whether certain religious practices are "essential" or not, and accord protection only to those. The *Hanif Quareshi* decision is a particularly striking illustration of the concerns arising from the doctrine given that a bench of five judges, none of whom were Muslim, upheld a ban on cow slaughter.

⁵¹ Mohd. Hanif Quareshi & Others vs The State Of Bihar, [1959] 1 SCR 629.

⁵² State Of Gujarat vs Mirzapur Moti Kureshi Kassab, 2005 8 SCC 534.

In 1976 the Constitution had been amended with the addition of Article 51A(g) making it a “fundamental duty” for every citizen of India “to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.”⁵³ The new constitutional mandate of compassion extricated economically valueless, aged cattle from their subaltern status of farm animals, recognizing them as “living creatures.” The Court thus declared, “[i]t will be an act of reprehensible ingratitude to condemn cattle in its old age as useless.”⁵⁴ Despite this new constitutional outlook, however, the Court did not fully renounce its utilitarian or economic framework, carrying on the language of usefulness versus uselessness. For instance, it pointed out that “[a]fter the cattle cease to breed or are too old to do work, they still continue to give dung for fuel, manure and bio-gas, and therefore, they cannot be said to be useless.”⁵⁵ Though the Bombay cow slaughter ban was ultimately upheld, the conditions of living bovines there as well as in the rest of the country remained constitutionally unexamined.

Similar to the American quasi-constitutionalization of milk, the post-independence anti-cow slaughter provision in India was couched as an economic measure geared toward advancing public health, even though it also embodied a Hindu political and religious agenda. Having described each country’s constitutional approach to milk and cows, the next Part argues that the constitutional discourse in favor of milk drinking sanctioned, and even reinforced, the oppression of dairy animals on a scale previously unknown.

⁵³ IND. CONST. ART. 51A(g).

⁵⁴ *State Of Gujarat vs Mirzapur Moti Kureshi Kassab*, 2005 8 SCC 534.

⁵⁵ *State Of Gujarat vs Mirzapur Moti Kureshi Kassab*, 2005 8 SCC 534.

Part II. Drinking Milk, Oppressing Cows

This Part begins by tracing a brief history of milk production and consumption in the United States and in India, before arguing that the two nations share a similar reverence for dairy foods and disregard for the plight of cows and other milk-producing animals.

A. The Construction of Milk as an Essential Food

In both the United States and India, anthropologist Andrea Wiley has shown that milk became “the food associated with the modern body, due to its perceived abilities to make it bigger, stronger and more powerful and these qualities extended to the nation-state.”⁵⁶ In constitutional discourse, this translated into the depiction of milk as a superior source of nutrition, necessary to feed the people, thereby justifying the disregard of dairy animals’ welfare.

1. The Milk Drinking American Nation

One of the central twentieth century American nutritional dogmas is epitomized in public health reformers Samuel Crumbine and James Tobey’s affirmation that milk is “the modern elixir of life. Without dealing in superlatives, it can indeed be said that milk is the most nearly perfect of human foods for it is the only single article of diet which contains practically all of the elements necessary to sustain and nourish the human system.”⁵⁷ As sociologist Melanie DuPuis has shown, in the past couple of centuries, this milk ideology has shaped the United States into a “milk-drinking nation” and milk, into

⁵⁶ WILEY, *supra* note 1 at 5.

⁵⁷ SAMUEL CRUMBINE & JAMES TOBEY, THE MOST NEARLY PERFECT FOOD: THE STORY OF MILK 17 (1930).

“nature’s perfect food.”⁵⁸ Though drinking fluid milk is a recent phenomenon, it became a staple food near the end of the 19th century and into the 20th century primarily as a substitute for breast milk for infants. Under the conjoined forces of the agriculture community, the new science of nutrition, and the federal and state governments, milk was now produced, marketed, and promoted on an unprecedented scale. During the twentieth century, dairying shifted toward large-scale output through a series of innovations such as herd size increases, highly selective artificial breeding, new feeding techniques tracking every rations, and the mechanization of the milking process. Interstate highways facilitated transport and with access to refrigeration, market demand surged. Mass-produced and mass distributed, it became the patriotic beverage par excellence, providing dairy farmers with a livelihood and sustaining American bodies, making the United States a “tall” nation.⁵⁹

As fluid milk consumption soared, the successive Justices sitting on the Supreme Court treated milk as a core food and a defining element of the American diet. As early as 1906, the Court upheld state legislation discriminating between different classes of milk producers so long as “the purpose of the law [was] to *secure to the population*, adult and infant, milk attaining a certain standard of purity and strength.”⁶⁰ A few decades later, in *Nebbia*, the 1934 landmark case which upheld New York’s milk price regulation, the majority cited a New York senate legislative report approvingly, concluding

⁵⁸ See E. MELANIE DUPUIS, *NATURE’S PERFECT FOOD: HOW MILK BECAME AMERICA’S FAVORITE DRINK* 4 (2002).

⁵⁹ See ANDREA S WILEY, *RE-IMAGINING MILK. CULTURAL AND BIOLOGICAL PERSPECTIVES* 64-80 (2011) (showing that drinking more milk in childhood makes people taller but means they are proner to cancer, hit menarche earlier, and are at risk of other health problems).

⁶⁰ *St. John v. New York*, 201 U.S. 633, 637 (1906) (emphasis added).

that “[m]ilk is an essential element of diet,” that “[t]he production and distribution of milk is a paramount industry of the state, and largely affects the health and prosperity of its people,” and that “milk, an essential food, must be available as demanded by consumers every day in the year.”⁶¹ In 1937, the Court upheld the states’ power to fix a minimum price for milk despite its impact on interstate commerce.⁶² Justice Cardozo, writing for the Court, justified this decision by pointing that it would “save producers, and with them the consuming public, from price-cutting so destructive as to endanger the supply”⁶³ of milk. In 1939, the Court described milk as “an essential item of diet.”⁶⁴ In the late 1960s, the Court’s milk rhetoric remained unchanged, portraying milk as “a fluid staple of daily consumer diet.”⁶⁵

2. The White Revolution in India

In South Asia, dairying goes back at least 400 BCE, with the territory now known as India one of the oldest homes of milking populations and agro-pastoralism.⁶⁶ In India, domestic animals played an important role in providing not only labor and meat, but also milk for humans. Hinduism and Mahayana Buddhism required dairy products as ceremonial offerings, encouraging dairying and milk use. While fermented milk and curds (yogurt) have long figured in Indian

⁶¹ *Nebbia v. People of New York*, 291 U.S. 502, 515-16 (1934).

⁶² *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608 (1937).

⁶³ *Id.*, at 609.

⁶⁴ *United States v. Rock Royal Co-op.*, 307 U.S. 533, 549 (1939).

⁶⁵ *Zuber v. Allen*, 396 U.S. 168, 173 (1969).

⁶⁶ Frederick J. Simoons, *The Determinants of Dairying and Milk Use in the Old World: Ecological, Physiological, and Cultural*, 2 *ECOLOGY OF FOOD & NUTRITION* 83 (1973). *But see* Dorian Q. Fuller, *Agricultural Origins and Frontiers in South Asia: A Working Synthesis*, 20 *J. WORLD PREHIST.* 1, 14-15 (2006) (arguing that archaeological evidence indicates that zebu cattle was being used for milk as early as the Indus Valley civilization, ca 3300-1300 BCE).

diets, fluid milk consumption remained limited in scale due to milk's extreme perishability and the traditional system of producing and marketing milk, which made it difficult to obtain it beyond the rural areas where the cattle was kept.⁶⁷ Until the 1970s milk consumption was thus limited to rural communities and rich urbanites that could afford to obtain it.⁶⁸ Today, India produces and consumes more milk than any other country, though per capita production and consumption remain low due to its large population and income disparities.⁶⁹

Milk consumption has risen dramatically in India since 1970, while U.S. consumption, which had surged dramatically until World War II, stabilized before declining during the second half of the twentieth century. In India, the consumption increase is not only due to the constitutional protection of cows, but also to a series of governmental operations leading up to the establishment of the National Dairy Development Board in 1965, which was tasked with setting up cooperatives and providing technical support to farmers. A few years later, the launch of "Operation Flood," a program designed to flood India with milk with the assistance of European dairy

⁶⁷ Marie-Claude Mahias, *Milk and its Transmutations in Indian Society*, 2 FOOD AND FOODWAYS 265, 272 (1987) (explaining that the large-scale consumption of fluid is very recent because first, milk used to be fermented, turning into yoghurt from which butter was made and second, the milk market which existed focused on provisioning cities).

⁶⁸ See Jacques Dupuis, *Coutumes alimentaires, sociétés et économies. Le cas de la répartition de la consommation du lait en Asie tropicale*, 79/435 ANNALES DE GÉOGRAPHIE 529, 541 (1970) (writing in 1970 that "the poorer classes, as well as a very great number of children, are generally deprived of milk. It often happens that the children of the poor waste away when they are weaned because of a lack of milk in their diet").

⁶⁹ See WILEY, *supra* note 1, at 7.

surplus,⁷⁰ accelerated the development of the dairy economy. The program had several goals, including improving productivity, making milk more easily available and affordable to urban consumers, bringing technological advances to the rural milk sector, and orienting dairy production toward markets.⁷¹ Certain aspects of Operation Flood resembled the American government's milk policy, in particular the use of price control regulation to off-set seasonal fluctuations in the supply and pricing of milk.⁷² Unlike the U.S. dairy industry, which is characterized by consolidation and concentration, Indian milk production remains dominated by smallholder farmers—in 2009, 80% of milk still came from farms with one to five cows.⁷³

Despite the relative scarcity of fluid milk around the time the Constitution was enacted, the presumed importance of milk in the Indian diet, especially for infants, was a central topic for discussion among constitutional drafters. At the Constitutional Convention,

⁷⁰ The program has been strongly criticized by development cholars Barat Dogra and Shanti George, but praised by Bruce Sholten. *See* BRUCE A SCHOLTEN, *INDIA'S WHITE REVOLUTION* (2010).

⁷¹ To do so, the program purported to replicate the successful cooperative dairying which had developed in Anand across rural India. *See* Pratyusha Basu & Bruce A. Scholten, *Crop-livestock systems in rural development: linking India's Green and White Revolutions*, 10 INT'L J. AGRICULTURAL SUSTAINABILITY 175 (2012) (recounting the history and development of the program). This required funding and led the National Dairy Development Board to seek foreign aid. The program was supported by international organizations. It began by using milk surplus built up in Europe in the form of milk powder and butter which built stock to stabilize Indian milk prices. The World Bank also intervened by injective millions of dollars in the program in the form of loans and promoting high-yielding cows, a cross between European dairy breeds and the original zebu breed. *See* WILFRED CANDLER & NALINI KUMAR, *THE IMPACT OF DAIRY DEVELOPMENT IN INDIA AND THE WORLD BANK'S CONTRIBUTION* ix-x (1998).

⁷² Dairy cows do not produce milk evenly year-round, leading farmers to overproduce in the spring so as to have enough milk in the fall. This results in large surpluses in the spring which destabilize milk markets.

⁷³ KENDA CUNNINGHAM, *RURAL AND URBAN LINKAGES: OPERATION FLOOD'S ROLE IN INDIA'S DAIRY DEVELOPMENT* (2009).

Seth Govind Das asked, “There is a huge infantile mortality in this country. Children are dying like dogs and cats. How can they be saved without milk?” Shibban Lal Saxena affirmed that two of the “evils in our country are infant mortality and tuberculosis which have their origin in deficient milk diet.” Pandit Thakur Dass Bhargava added, “the average age in our country is 23 years, and . . . many children die under one year of age! The real cause of all this is shortage of milk and deficiency in diet.” The Supreme Court joined the chorus, repeatedly reaffirming the centrality of milk in the Indian diet. In its 1958 landmark case *Hanif Quareshi*, the Court declared that cows are “the back-bone of Indian agriculture,” citing approvingly the preamble of the Bombay Animal Preservation Act of 1954, which stated, “cow and her progeny sustain the health of the nation by giving them the life giving milk which is so essential an item in a scientifically balanced diet.”⁷⁴ As recently as 2013, the Court reiterated the exceptionalism of milk, admonishing state governments to tighten their food safety legislation, specifically making the adulteration in milk and milk products an offense punishable with life imprisonment.⁷⁵

3. A Common Anti Dairy Substitutes Stance

In both the American and the Indian legal discourses, milk is presented as an essential food, which must be protected against counterfeits. There is a striking similitude between the two countries, for example, when it comes to constructing dairy products in opposition to non-dairy substitutes such as margarine and filled milk

⁷⁴ Mohd. Hanif Quareshi & Others vs The State Of Bihar, AIR 1958 SC 629, at 748.

⁷⁵ Swami Achyutanand Tirth & ORS vs. Union of India & ORS (December 5, 2013) (when the matter came up for a new hearing in 2014 the Supreme Court called the national government to intervene by updating the Food Safety and Standards Act 2006). See Max Bearak, *Upscale Dairies Grow in India, Promising Safer Milk*, N.Y. TIMES (June 3, 2014).

in the United States, and Vanaspati ghee in India. In the famous *Carolene Products* case, the Supreme Court upheld the 1923 federal Filled Milk Act, which prohibited “filled milk” (milk reconstituted with non-dairy fats, usually vegetable oils) from being shipped in interstate commerce.⁷⁶ The Act was arguably the result of years of successful lobbying on the part of the dairy industry, which was motivated by the desire to get rid of the competition represented by cheaper non-dairy products.⁷⁷ To substantiate its decision to uphold the statute, the Court accepted the nutritional ideology of the day, according to which “[b]utter fat, which constitutes an important part of the food value of pure milk, is rich in vitamins, . . . [is] essential to proper nutrition and . . . wanting in vegetable oils.”⁷⁸ Similarly in India, at the Constituent Assembly, Shibban Lal Saksena lamented the common use of “Vanaspati ghee,” a hydrogenated vegetable cooking oil, which he argued was caused by shortage in the more expensive, “pure,” dairy ghee.⁷⁹ This anti-non-dairy product stance is reflected in the 1954 Prevention of Food Adulteration Act, which prohibits the sale of ghee containing “any added not exclusively derived from milk fat.”⁸⁰

⁷⁶ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

⁷⁷ See Geoffrey P. Miller, *The True Story of Carolene Products*, SUP. CT. REV., 397, 404 (1987) (recounting the background economic and political history behind the *Carolene Products* case). See also Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83 (1989) (claiming that for close to a century, between the 1870s and the 1950s, margarine was “the victim of a sustained and concerted pattern of discrimination by the national government and almost every state in the union.”)

⁷⁸ *Carolene Products*, 304 U.S. at 149 n.2 (1938) (summarizing the congressional report which served as the factual basis for Congress enactment of the 1923 Filled Milk Act).

⁷⁹ It is striking to note that the same exact language “injurious to health” was used in both countries to belittle non-dairy substitutes.

⁸⁰ 1954 Prevention of Food Adulteration Act. Part VIII, §44(c) (and vice versa, vanaspati cannot be sold if ghee or any other substance has been added to it.)

In both countries, the apology of milk thus relies on a rhetoric of purity and exclusion of non-dairy substitutes. As the next section argues, the United States and India's juridical glorification of milk also goes hand in hand with the subordination of cows as milk-producing machines whose working and living conditions, especially in intensive dairy systems, is often a form of abuse.

B. The Disregard for the Plight of Cows

Though the American and Indian constitutional treatment of cows and milk differ, most obviously in that there are no federal constitutional restrictions on the killing of animals in the United States, the two share important similarities. Both legal systems are based on a hierarchical ontology, which rests upon the assumption of the superiority of humans over non-human animals, which are not independent bearers of rights. When it comes to the specific case of cows and milk, both constitutional orders ignore the enormous scale of abuse and exploitation that dairy cows endure from birth until they get sent to the slaughterhouse, which has been documented by animal rights' activists as well as scholars.⁸¹ In the United States, the Supreme Court is preoccupied with the quality of milk for *human* consumption. In India, constitutional drafters and high judges are absorbed by the legality of slaughtering, sidestepping the quality of life of living cows.

⁸¹ On the U.S., see Cheryl L. Leahy, *Large-Scale Farmed Animal Abuse and Neglect: Law and its Enforcement*, 4 J. ANIMAL L. & ETHICS 63 (2011) (describing the cruelty and neglect inherent in industrialized animal agriculture). On India, see Michael W. Fox, *India's Scared Cow: Her Plight and Future* in THE ANIMAL ETHICS READER 238 (Susan Jean Armstrong, ed., 2003) (explaining the plight of Indian cows who are chronically malnourished and arguing that the situation is sometimes worsened by the taboo against cow slaughter).

Female cows naturally produce milk as a result of pregnancy to nourish their young. The very concept of dairy farming is premised on a speciesist assumption that humans are superior to animals: the milk that would have fed the cows' offspring is taken for human consumption. Frederick Simoons reports that in Eastern Asia there have been times when the practice of milking was rejected as stealing primal food from the young nursing animal, a violation of the *ahimsa* concept (which can be translated as doing no harm or a commitment to non-violence).⁸² But mainstream vegetarianism in India, like *ahimsa*, developed primarily as expressions of one's personal degree of purity and place in society rather than concern for animal welfare.⁸³ There is no opposition within the major Indian religions to the consumption of milk and milk products, hence, the widespread consumption of dairy products.⁸⁴ Even Jains, who extend non-violence to all living creatures capable of suffering and abstain not only from meat, but also from animal source foods such as eggs and honey, consume dairy products.⁸⁵

What do American and Indian constitutional law have to say about dairy animals' welfare? While milk drinking has acquired a privileged cultural and constitutional status in the United States, the

⁸² See Simoons, *supra* note 66.

⁸³ See Catherine Robinson & Denise Cush, *The Sacred Cow: Hinduism and Ecology*, 18 J. BELIEFS & VALUES 25, 30-31 (1997) (pointing out that the motivation behind vegetarianism in Hindu cultures is connected with notions of purity rather than protecting the natural world from humans).

⁸⁴ See Frederick J. Simoons, *The Traditional Limits of Milking and Milk Use in Southern Asia*, 65 ANTHROPOS, 547, 557-61 (1970) (arguing that with the exception of the Muslim Shins who refuse to use cow's milk, milking and milk use are accepted in Indian religions).

⁸⁵ See Colleen Taylor Sen, *Jainism and Food*, ENCYCLOPEDIA OF FOOD & AGRICULTURAL ETHICS (2014).

animals producing milk, mostly cows,⁸⁶ remain in the shadow of the law. All but one of the Supreme Court's decisions relating to cattle and milk fail to exhibit concern for the welfare or working conditions of cows.⁸⁷ Nor has the Court ever taken on animal welfare generally. A few milk cases address bovine illnesses and inspection,⁸⁸ but it is always for the benefit of human dairy producers and consumers that cows' health is regulated. This reflects American law's general lack of interest in the treatment of farm animals. The handful of cases in which the Court has addressed animal cruelty stemmed not from examining farming practices, which could have implicated cows, but from contexts such as the use of animals in research,⁸⁹ the ritual slaughter of animals,⁹⁰ and the depiction of animal cruelty.⁹¹ In

⁸⁶ Traditionally, the overwhelming majority of the milk consumed in the U.S. has been cow's milk, rather than milk originating from other lactating animals (sheep, goats, mares, donkeys).

⁸⁷ *Baltimore & OSWR v. U.S.*, 220 U.S. 94 (1911) (finding that a railroad violated a federal law meant to prevent cruelty to livestock during transfer.)

⁸⁸ *Kimmish v. Ball*, 129 U.S. 217 (1889) (upholding an Iowa statute making anyone in possession of Texas cattle that had not wintered north of the southern boundary of Missouri or Kansas liable for damages resulting from the spread of Texas fever); *Grayson v. Lynch*, 163 U.S. 468 (1896) (appeal from a case where defendants were held liable for damages resulting from spreading Texas fever to the cattle of the plaintiffs); *Reid v. Colorado*, 187 U.S. 137 (1902) (upholding a Colorado statute which prohibited bringing cattle with certain diseases into the state); *Adams v. Milwaukee*, 228 U.S. 572 (1913) (upholding a City of Milwaukee ordinance requiring a tuberculin test for milk drawn from cows outside of the city because they cannot be inspected by the health officers); *Thorton v. U.S.*, 271 U.S. 414 (1926) (holding that the Department of Agriculture has the authority to regulate the transport of livestock from state to state and send agents to dip livestock in order to prevent disease); *Mintz v. Baldwin*, 289 U.S. 346 (1933) (upholding a New York order requiring that out-of-state cattle brought in the state for dairy or breeding purposes have a certificate certifying that the animals are free of Bang's disease.).

⁸⁹ *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991) (dealing with the euthanization of monkeys used in research and avoiding the issue of animal welfare by only deciding a narrow jurisdictional question of federal court removal).

⁹⁰ *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (holding that city ordinances prohibiting religious animal sacrifice violated a church's rights under the Free Exercise clause of the First Amendment).

neither of these cases did animals' interests prevail, suggesting that animals' experience of cruelty remains invisible to law.

The Indian case is more complex. Compared to the United States, one would expect Indian constitutional law to be more attuned to the plight of dairy cows. Yet a few features of Article 48 conspire to make it a weak form of cow protection.

First, the provision figures among the "Directive Principles of State Policy," rather than the Fundamental Rights section of the Constitution. The Directive Principles occupy an ambiguous place in the Indian constitutional scheme. Framed as a set of important governmental goals incumbent upon the States, they are not judicially enforceable, as opposed to "fundamental rights," which create justiciable rights.

Second, the welfare of non-human animals is conspicuously absent from Article 48 and much of the litigation arising from it. The Constitution adopts a hierarchical vision of animals, mirroring the hierarchy inherent in the Indian social system.⁹² (The United States is

Though animal rights advocates were furious, this decision did not lead to a wider movement for the constitutionalization of animals rights, unlike what happened in Germany, where following a similar decision by the German Federal Constitutional Court in 2002, the Constitution was amended to include an animal protection provision. GRUNDGESETZ R [GG] [Constitution] art. 20a (F.R.G.). On the German story see generally Claudia Haupt, *Free Exercise of Religion and Animal Protection: A Comparative Perspective on Ritual Slaughter*, 39 GEO. WASH. INT'L L. REV. 839, 857-72 (2007).

⁹¹ *United States v. Stevens*, 559 U.S. 460 (2010) (finding that a federal statute criminalizing creation or possession of depictions of animal cruelty was substantially overbroad, and therefore invalid under the First Amendment).

⁹² Though the Constitution abolished untouchability. *See* IND. CONST. ART. 17. At the Constituent Assembly, Seth Govind Das explicitly made the link between the plight of dairy cows and the oppressed lower castes, declaring "just as the practice of untouchability was going to be declared an offence so also we should declare the slaughter of cows to be an offence." *See* 7 Constituent Assembly of India (Nov. 24, 1948).

also a hierarchical society, of course, animal hierarchies being reflected in the law through farm animals' exclusion from the definition of the word "animal" as it is employed in the U.S. Animal Welfare Act⁹³ and human hierarchies, though milk's favored status despite its disparate impact on human consumers.) In India, it is clear that it is the life of *certain cows* that matters, not that of other animals. The supreme position is held by "cow and calves and other milch and draught cattle"—an imprecise group, though as noted earlier generally understood as excluding buffaloes who have a lower cultural and religious status.⁹⁴ Buffaloes nonetheless produce the majority of India's milk and are still commonly used as draught animals, especially in the South. If animal welfare were constitutionally valued in and of itself, discrimination among bovines on the one hand and among bovines and other animals on the other hand would not be justifiable.⁹⁵

Third, the beneficiaries of Article 48 are only spared from an early death, not from abuse during their lifetime, the irony being that cows are both worshiped and routinely neglected and poorly nourished. At the Constituent Assembly, the consensus was that the *slaughter* of cows should be banned, or at least restricted, but not a word was uttered on the treatment and welfare of *living* cows, in particular of dairy cows.

⁹³ Animal Welfare Act, Title 7, s. 2132. See also David J. Wolfson & Mariann Sullivan, Foxes in the Henhouse: Animals, Agribusiness, and the Law: A Modern American Fable, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS, 205, 206-207 (Cass R. Sunstein & Martha C. Nussbaum, eds., 2004) (noting the absence of federal laws regulating the treatment of farm animals prior to transport or slaughter and that state cruelty laws typically exempt farmed animals altogether or exclude "customary farming practices").

⁹⁴ See Robert Hoffpauir, *The Water Buffalo: India's Other Bovine*, 77 ANTHROPOS 215, 227 (1982).

⁹⁵ The Supreme Court upheld the differential treatment of cows on the one hand and goats and sheep on the other hand in *State Of Gujarat v. Mirzapur Moti Kureshi Kassab*, AIR 2006 SC 212.

Yet, milking is constitutive of the cruelty inherent in factory farming. The milking process itself can be painful for cows, and may cause infections.⁹⁶ Modern dairying is based on the manipulation and exploitation of the reproductive labor of cows. Breeding has become a cornerstone of animal husbandry, artificial insemination being a standard practice to improve meat and milk yield through genetic selection.⁹⁷ Assisted reproductive technologies are an integral part of intensive dairying, as consumers expect milk to be available all year round, which means that cows are impregnated and give birth every year. While reproductive control over dairy animals is erased from the American constitutional discourse on milk, it has not escaped Indian jurisconsults. Much of the constitutional debates leading up to the adoption of Article 48 focused on the importance of “breeding” to build “cattle wealth.”⁹⁸ More to the point, in its 1958 *Hanif Quareshi* decision, the Supreme Court lamented that “notwithstanding the artificial insemination methods, we are in “short supply” of the ordinary breeding bulls.”⁹⁹

Assisted reproduction technologies (such as artificial insemination and, since the 1970s, embryo transfers) to increase “genetic gains” (i.e., meat and milk output) constitute a form of

⁹⁶ Certain milking practices are more cruel than others. Gandhi, who supported dairying, opposed the practice known as *phooka* or blowing, which consists in inserting a bamboo stick to blow air into the cow’s uterus, allowing for more milk to be retrieved. See Florence Burgat, *Non-Violence Toward Animals in the Thinking of Gandhi: The Problem of Animal Husbandry*, 14 J. AGR. & ENVIRON. ETHICS 223, 237 (2004).

⁹⁷ On the imported breed in India and their deleterious effects on the ecosystem and human welfare, see Greta Gaard, *Toward a Feminist Postcolonial Milk Studies*, 65 AM. Q. 595, 606 (2013).

⁹⁸ Pandit Thakur Dass Bhargava, for example, pointed to the importance of “cow-breeding” for the improvement of milk supply, draught, and transport.

⁹⁹ *State Of Gujarat vs Mirzapur Moti Kureshi Kassab*, AIR 2006 SC 212.

animal cruelty.¹⁰⁰ The practice deprives cows of any control over their sexual and reproductive lives and being nearly continually pregnant decreases their life span compared with their natural longevity. A cow's natural lifespan is about 20 years, but cows used by the dairy industry are typically killed in the United States after about five years because their bodies wear out from constantly being pregnant and lactating. The use of assisted reproduction technologies is typically accompanied by the premature separation of newborn calves from their mothers so that humans may consume their milk, a process known to be brutal and distressing, leading cows to mourn their loss for days.¹⁰¹ India's productivity remains low by world standards, a reflection of the small-scale nature of the dairy industry, the continuing use of traditional breeds, and the less widespread use of assisted reproductive technologies.¹⁰² India's lower productivity is often associated with greater welfare for cows, minimizing interferences in their reproduction as well as diseases such as mastitis and lameness, which are associated with intensive milking. Yet Indian cows suffer from ailments of their own, such as malnourishment.¹⁰³ In Indian states where anti-cow slaughter statutes prohibit the practice, old cows are sent to cow shelters (*goshalas*) or animal shelters (*pinjrapoles*). Though the *goshalas* are religious institutions in nature,

¹⁰⁰ On the use of assisted reproduction technologies in the U.S., see Reuben J. Mapletoft & John F. Hasler, *Assisted Reproductive Technologies in Cattle: A Review*, 24 REV. SCI. TECH. OFF. INT. EPIZ. 393 (2005). On India, see K Misra, Shiv Pragsad, V K Taneja, *Embryo Transfer Technology (ETT) in Cattle and Buffalo in India: A Review*, 75 INDIAN J. ANIMAL SCI. (2005).

¹⁰¹ See, e.g., Sherry F. Colb, "Never Having Loved at All": An Overlooked Interest That Grounds the Abortion Right 48 CONN. L. REV. 933 (2016) (discussing dairy cows' forced pregnancies and their grieving from their separation from their calves).

¹⁰² UNITED STATES INTERNATIONAL TRADE COMMISSION, CONDITIONS OF COMPETITION FOR MILK PROTEIN PRODUCTS IN THE U.S. MARKET 2-3 (2004).

¹⁰³ See Fox, *supra* note 81 at 238 (explaining the plight of Indian cows who are chronically malnourished and arguing that the situation is sometimes worsened by the taboo against cow slaughter).

they also have an economic mission, which has been strengthened since independence. They are supported by government agencies to act as breeding centers for cattle improvement and some of their bovine boarders are held and milked for human use.¹⁰⁴

Another ramification of dairy farming is its link to the meat industry. India is the largest beef exporter in the world, and the United States is the fourth.¹⁰⁵ In both countries, dairy cows sometimes end up as meat and their male calves are typically used for veal. In conventional dairy farming, calves are separated from their mother shortly after birth so as to preserve milk yield for human consumption.¹⁰⁶ Male calves are seen as “byproducts” of milk. Confined in crates, they are fed an iron-deprived diet until being slaughtered for veal or fattened for beef. Female calves, too, are separated from their mothers, but they are usually kept on the farm to become dairy cows.

In sum, in both India and the United States, bovine life is typically short and torturous. The harmful effects of dairying are not limited to non-human animals. As the next Part argues, the constitutional status of cows and milk leads to oppressing humans too.

¹⁰⁴ See Simoons et al., *supra* note 32 at 121, 133.

¹⁰⁵ See UNITED STATES DEPARTMENT OF AGRICULTURE, FOREIGN AGRICULTURAL SERVICE, LIVESTOCK AND POULTRY: WORLD MARKETS AND TRADE (October 2015).

¹⁰⁶ See, e.g., Pamela Vesilind, *Animal Husbandry Redux: Redefining “Accepted Agricultural Practices” for Locally Sourced Foods*, 28 NATURAL RESOURCES & ENVIRON. 1, 3 (2013) (describing the connection between the dairy and the veal industry).

Part III. The Exclusionary Politics of Milk and Cows

In the United States and India, the constitutionalization of milk and cows has been part of a political agenda both implicitly and explicitly aimed at oppressing part of the population—racial and ethnic minorities in the United States and non-dominant-caste groups and religious minorities in India.

A. Milk and Racial Subordination in the United States

The ability to digest lactose, the predominant sugar in milk, is a recent human evolution dating back to the last ten thousand years and closely associated with dairy animal domestication.¹⁰⁷ “Lactase persistent” individuals continue to produce the enzyme lactase, necessary to digest lactose, beyond their toddler years, while “lactase impersistent” individuals do not. For the lactase impersistent, consuming lactose may not only cause a cluster of uncomfortable gastrointestinal symptoms, such as nausea, stomach cramps, bloating, gas, diarrhea, but also cause a range of systemic symptoms, “including headaches and light headedness, loss of concentration, difficulty with short term memory, severe tiredness, muscle and joint pain, various allergies, heart arrhythmia, mouth ulcers, sore throat, and increased frequency of micturition.”¹⁰⁸ It may also interfere with the absorption of other nutrients, which can lead to a host of medical conditions.¹⁰⁹

¹⁰⁷ See Nissim Silanikove et al., *The Interrelationships between Lactose Intolerance and the Modern Dairy Industry: Global Perspectives in Evolutional and Historical Backgrounds*, 7 NUTRIENTS 7312, 7315 (2015).

¹⁰⁸ Stephanie B. Matthews et al., *Systemic Lactose Intolerance: A New Perspective on an Old Problem*, 81 POSTGRAD MED. J. 167, 168 (2005). See also Piero Vernia et al., *Lactose Malabsorption and Irritable Bowel Syndrome. Effect of a Long-Term Lactose-Free Diet*, 27 ITALIAN J. GASTROENTEROLOGY 117 (1995) (suggesting a correlation between lactose malabsorption and irritable bowel syndrome).

¹⁰⁹ See R. Honkanen, et al., *Lactose Intolerance Associated with Fractures of Weight-Bearing*

Only a minority of humans has developed lactase persistence, a trait now known to be genetically controlled and closely tied with ancestry.¹¹⁰ As Andrea Wiley has demonstrated, in the United States, “the overall rate of lactase persistence is estimated to be somewhere around 75 percent.”¹¹¹ The capacity to digest milk in adulthood is highly correlated with racial and ethnic origin. As Wiley has pointed out, “[c]ross-culturally, persistence of lactase activity into adulthood correlates with (1) fresh milk consumption; (2) a central role for milk production in the domestic economy; (3) positive evaluation of milk and other dairy products; and (4) physiological capacity to digest and, hence, tolerate lactose.”¹¹² In practice, the highest rates of lactase persistence “are found only among northern Europeans; South Asians; herding populations of the Middle East, Arabian Peninsula, and sub-Saharan Africa; and descendants of these populations.”¹¹³ This means that millions of Americans are lactase impersistent, including close to 100 percent of Native Americans, 90 percent of Asian Americans, and 75 percent of African-Americans, Mexican-Americans, and Jews.

The U.S. Supreme Court’s quasi-constitutionalization of milk, conjoined with the government’s promotion of milk and dairy products through various forms of subsidization, including food and

Bones in Finnish Women Aged 38–57 Years, 21 BONE 473 (1997) (indicating that lactose intolerant women have a higher risk of fracture due to calcium deficiency); J. Ji, J. Sundquist, & K. Sundquist, *Lactose Intolerance and Risk of Lung, Breast and Ovarian Cancers: Aetiological Clues From a Population-Based Study in Sweden*, 112 BRITISH J. CANCER 149 (2015) (showing that individuals with lactose intolerance with *low intake of milk and dairy products* have decreased risks of lung, breast, and ovarian cancers).

¹¹⁰ See Timo Sahi, *Genetics and Epidemiology of Adult-type Hypolactasia*, 29 sup. 202 SCANDINAVIAN J. GASTROENTEROLOGY 7 (1994) (providing an overview of the genetic basis of lactase impersistence).

¹¹¹ WILEY, *supra* note 1 at 11.

¹¹² See Wiley, *supra* note 111 at 506.

¹¹³ *Id.* at 507.

nutrition policies and federally funded nutrition programs, reflect a form of “nutritional racism”¹¹⁴ which may arise out of unconscious biases, structural forces, a total lack of appreciation for population diversity in physiological responses to lactose, or all of the above. For the first 180 years of the Court’s existence, Justices have almost always been white Protestants,¹¹⁵ i.e., likely to be lactase persistent considering that the highest rates of lactase persistence are found among descendants of northern European populations. Federal and state legislators have been and remain disproportionately (non-Hispanic) white when compared with the U.S. population.¹¹⁶ This lack of diversity may explain in part lawmakers and judges’ zealous embrace of milk as an essential element in the diet, revealing an “ethno- or biocentric bias” insofar as they have promoted milk consumption and neglected the “significance of other biologies.”¹¹⁷ Though the scientific documentation of lactase impersistence is relatively recent, the racial and cultural biases behind milk’s privileged legal position are not.

Though the formative studies demonstrating population variation in milk digestion were not conducted and published until the 1960s,¹¹⁸ Hippocrates described lactase impersistence around 400

¹¹⁴ I borrow the expression from Andrea Freeman. See Andrea Freeman, *The Unbearable Whiteness of Milk: Food Oppression and the USDA*, 3 UC IRVINE L. REV. 1251, 1268-9 (2013). See also Cohen, *supra* note 2.

¹¹⁵ Louis Brandeis was the first Jewish Justice to be appointed in 1916, Thurgood Marshall the first African-American in 1967, Sonia Sotomayor the first Hispanic Justice in 2009 and we are still waiting for the first Native American and Asian American.

¹¹⁶ See ROGER H DAVIDSON, ET AL., CONGRESS AND ITS MEMBERS 106-7 (14th ed. 2013).

¹¹⁷ See Wiley, *supra* note 111 at 506.

¹¹⁸ See ANDREA S. WILEY, RE-IMAGINING MILK: CULTURAL AND BIOLOGICAL PERSPECTIVES 21-22 (2010) (presenting and citing the pioneering studies on “lactase deficiency” in African Americans)

BCE.¹¹⁹ The scientific community has long emphasized a connection between whiteness and milk—not only metaphorically. At the turn of the century, the new discipline of nutrition was in part an enterprise aimed at countering racial degeneracy. Viewing diet not simply as a matter of personal and cultural taste, but a set of practices governed by inherited biological needs, nutrition experts pushed the notion that certain foods were more adapted than others to white Americans. Elmer McCollum, the famed biochemist known for his role in the discovery of vitamins and whom the Supreme Court cites in one of the *Carolene Products* footnotes, was an overt racist. Since the early 1920s, he had become akin a professional expert witness on behalf of the dairy lobby, testifying before legislative committees and courts. His “scientific” apology of milk was premised on the supposed superiority of (white) milk-drinking cultures. McCollum “asserted that milk drinkers had always enjoyed cultural and physical superiority over their leaf-chewing cousins.”¹²⁰

This racialized conception of milk was not only widespread among researchers, but it also motivated some of the state and national legislators at the forefront of milk regulation. Representative Edward Voigt of Wisconsin, “America’s Dairyland,” authored the 1923 Filled Milk Act, which banned milk products compounded with any fat or oil other than milk fat. Voigt was an admirer of McCollum and shared his racism.¹²¹ During the floor debates, Voigt declared:

¹¹⁹ See Sahi, *supra* note 110, at 17.

¹²⁰ See Miller, *supra* note 111 at 421.

¹²¹ See, e.g., 62 Cong. Rec. 7581 (remarks of Rep. Voigt: “Doctor McCollum . . . who is probably the greatest expert on nutrition in the world . . . [has shown that t]he vitamins which have been so necessary for the growth of infants and children and for the grown body as well are absent from this filled milk.”)

*The superiority of the white race is due at least to some extent to the fact that it is a milk-consuming race. Natives of the tropical countries who use the products of the coconut are stunted in body and mind. I believe one reason why they are inferior is that they do not use the milk of cows or other animals. We owe a great deal to the dairy cow, a great deal more than the general public gives her credit for. We can not afford to injure the dairy industry: if we do we injure the Nation.*¹²²

Other representatives subscribed to this opinion. Representative Haugen of Iowa, a Wisconsin native who served as the chairman to the Agriculture Committee, made a point of reading to the House floor excerpts from the transcript of McCollum's committee hearings. According to McCollum's testimony, the "finest people" are found in "those places where milk and dairy products form one of the prominent, the most prominent constituent of the diet," such as "in Europe, in America, and on the plains of Asia."¹²³ In contrast, McCollum proclaimed, "[l]ook at the Chinaman who does your laundry and see what he is. Almost without exception he is an undersized individual. He is poorly developed physically."¹²⁴

¹²² 62 Cong. Rec. 7583.

¹²³ 62 Cong. Rec. 7587.

¹²⁴ 62 Cong. Rec. 7587. These racist milk discourses found a practical translation in East and South East Asia, especially in China and Japan, where the American influence was key in establishing a dairy industry and transforming nonmilking cultures into some of the biggest dairy consumers. On China, see Françoise Sabban, *The Taste for Milk in Modern China (1865-1937)*, in *FOOD CONSUMPTION IN GLOBAL PERSPECTIVE* 182 (Jakob A. Klein & Anne Murcott, eds, 2014) (highlighting the role of American nutritional science and American Christian and missionary circles in developing dairy farming in China in the 1920s). On Japan, see Moen Darrell Gene, *The Postwar Japanese Agricultural Debacle*, 31 *HITOTSUBASHI J. SOCIAL STUD.* 29(1999); Paul Hansen, *Hokkaido's Frontiers: Blurred Embodiments, Shared Affects and the Evolution of Dairy Farming's Animal-Human-Machine*, 34 *CRITIQUE OF ANTHROPOLOGY* 48 (2014) (describing the pressure applied by the U.S. during the its military occupation

Long before the discovery of lactase's unequal distribution in humans' small intestine, the Court's reliance on this legislative history indicates that milk had been a substance of choice to govern the biology of a population as a scientific racist project. In spite of, or perhaps in part because of, its racialized construction and its aura of constitutional legitimacy, throughout the twentieth century, milk acquired a prominent place in official dietary recommendations. More than any other organization or entity, the U.S. Department of Agriculture (U.S.D.A.) shaped the way Americans think about a healthy diet. Its guidelines, which are widely used in nutrition, health, and education settings, in the media, and in the food industry, have continuously afforded milk products a prominent position. They have constituted their own food group since the 1940s.¹²⁵ The food pyramid included a separate category for dairy products, prescribing two to three servings per day. The new design, MyPlate devotes a circle to dairy products, symbolizing the glass of milk accompanying the American meal, with recommended daily amounts varying from two to three cups depending on people's age. A welcome evolution of the MyPlate guidelines is to suggest that "[f]or those who are lactose intolerant" soy milk counts as a "dairy" product. At the same time, the guidelines still recommend that people who do not digest milk nonetheless consume milk products, albeit in "smaller portions" or in "[l]actose-free and lower-lactose" form.¹²⁶

The constitutional and governmental promotion of milk has negative disparate effects upon certain segments of the American

for Japan to purchase its food surpluses and its role in initiating a nationwide milk program in schools).

¹²⁵ See Susan Welsh, *Atwater to the Present: Evolution of Nutrition Education*, 124 J. NUTRITION 1799S, 1800S (1994).

¹²⁶ See the U.S.D.A. document titled "What Foods Are Included in the Dairy Group?", available at <http://www.choosemyplate.gov/food-groups/dairy.html>.

population, in particular racial and ethnic minorities more likely to be lactase impersistent. Not only do these groups not benefit from the legal framework and public monies fostering milk promotion, but also their health and well-being are adversely affected. Some of the most commonly produced foods in the fast food industry are laden with dairy products,¹²⁷ children are typically given milk at public schools, and underprivileged families are often given milk products as part of their food aid package. As a result, low income African Americans and Latinx who live in urban centers dominated by fast food restaurants and who rely in part on government-funded program to meet their nutritional needs are disproportionately harmed by milk's favored position. As Andrea Freeman has shown, the omnipresence of dairy products in American society is constitutive of "food oppression," which she defines as "institutional, systemic, food-related action or policy that physically debilitates a socially subordinated group."¹²⁸ Individuals who already experience multiple levels of structural subordination are also those most negatively affected by more than a century of bovine jurisprudence.¹²⁹

In India, it is the protected status of cows, rather than milk, which has had adverse consequences on already marginalized groups.

¹²⁷ See Mathew, *supra* note 108, at 170 (pointing out that lactose is "hidden" in many processes foods and drinks such as bread, cake mixes, processed meats, breakfast drinks, sauces, as well as slimming products, given that it is used as a sweetener and browning agent)

¹²⁸ See Freeman, *supra* note 114 at 1253.

¹²⁹ Historically, the dairy industry has also relied on the exploitation of minority farm workers, with an ethnic shift from black (including African American and Caribbean) to Latino workers in the late the twentieth century. See MARGARET GRAY, *LABOR AND THE LOCAVORE. THE MAKING OF A COMPREHENSIVE FOOD ETHIC* (20014) (exposing the exploitative labor practices of Hudson Valley's small dairy farms which typically employ undocumented Latino immigrants.)

B. The Ambivalent Politics of the Sacred Cow in India

In India, the cultural and legal status of cows has had more ambivalent effects than that of milk in the United States, alternatively used to contest or reinforce existing social hierarchies. The battle for cow protection was waged as an effort to assert a pan-Hindu identity and political agenda against the British colonizer, but also against minority religious groups and non-dominant castes.

1. The Anti-Colonial Cow

In the mid- to late nineteenth century, the cow was a symbol for “Mother India” as a “life giving nation.”¹³⁰ Cow worship became a rallying-cry against the British colonists who were portrayed as the enemy of the cow and hence the Indian people. The great mutiny of 1857, which nationalists see as their first war of independence, started because of a rumor according to which British soldiers were greasing their new rifles’ cartridges in a compound of pig and cow’s fat.¹³¹ The *sepoys*, the Indian soldiers serving the British, were commonly tasked to bite off the ends of the cartridges. This would have meant oral contact with a mixture of animal fats—an abomination to both the Muslims and the Hindus.¹³²

The so-called cow protection movement, which aimed at curbing or even eliminating the slaughter of cows, developed in the

¹³⁰ WILLIAM GOULD, HINDU NATIONALISM AND THE LANGUAGE OF POLITICS IN LATE COLONIAL INDIA 78 (2004).

¹³¹ See, e.g., GEORGE FORREST, 3 A HISTORY OF THE INDIAN MUTINY, 1857-58 xxxii (1912).

¹³² During those years, these two groups, labeled as such by the colonial administration, were far from constituting homogenous units. Due the British administration’s desire to identify the constituent peoples in Indian society, a new process of forging group identities began, relying in part on religious symbols.

1880s in urban northern India, later spreading to rural surroundings.¹³³ Through the sacred cow, “mobilizing and ideological connections were forged between the city and the countryside.”¹³⁴ The sacred cow became a unifying idiom among Hindus to overcome fragmentation and raise the new consciousness that they were members of an identifiable community.¹³⁵ Similar to the eugenic discourse surrounding milk in the United States, Indian cow protection integrated a nutritional ideology. The reasoning was that protecting cows would result in more milk, which in turn would increase dairy consumption, promoting bigger and stronger Hindu men.¹³⁶

The targets of cow protection action included the beef-eating British, but cow protectionists also used the unifying symbol to exclude autochthonous groups. Muslims in particular were targets of sectarian violence, with propagandists claiming that cows were mistreated in their hands. In 1893, the first of a long series of “cow protection riots” arose in the Azamgarh District in the eastern United Provinces, when groups of Hindus attempted to prevent Muslims from sacrificing animals in celebration of Bakr-id.¹³⁷ Concerned with the threat to their authority represented by the campaign and the social unrest it generated, the British suppressed much of the movement’s organizational and communications

¹³³ See Adcock, *supra* note 42 at 298 (situating the birth of the movement in the foundation of Arya Samaj in 1881).

¹³⁴ Sandria B. Freitag, *Sacred Symbol as Mobilizing Ideology: The North Indian Search for a “Hindu” community*, 22 COMP. STUD. IN SOC’Y & HIST. 597, 599 (1980).

¹³⁵ On this process, see Freitag, *supra* note 134 at 599.

¹³⁶ Charu Gupta, *The Icon of Mother in Late Colonial North India: “Bharat Mata,” “Matri Bhasha” and “Gau Mata,”* 36 ECON. & POL. WEEKLY 4291, 4296 (2001) (arguing that cows and their milk were connected to building and providing “physical power” a strong nation).

¹³⁷ See Freitag, *supra* note 134 at 617-8.

network.¹³⁸ The colonial rule was temporarily preserved, but the cow protection movement left an enduring legacy in Hindu nationalism.

A few decades later, Gandhi recognized the sanctity of the cow as central to Hindu faith and used it as a political tool, emphasizing both the economic and spiritual benefits of the cow.¹³⁹ Gandhi is remembered as passionately committed to the philosophy of *ahimsa* (non-violence) and what he saw as its dietary translation, vegetarianism. He expressed a lifelong interest in diet and dietary reform, frequently experimenting upon himself.¹⁴⁰ The young Gandhi had consumed meat, a concession to the dominant carnophilic and carnivorous ideology according to which Indian men were effeminate compared to the British because they abstained from meat.¹⁴¹ The articulation of meat, especially beef, as a masculine food necessary to sustain virile and healthy bodies was a common trope not only of

¹³⁸ See Sandria B. Freitag, "Natural Leaders," *Administrators and Social Control: Communal Riots in the United Provinces, 1870-1925*, 1 SOUTH ASIA: J. SOUTH ASIAN STUD. 27 (1978).

¹³⁹ See Subrata Kumar Mitra, *Desecularising the State: Religion and Politics in India after Independence*, COMP. STUD. IN SOC'Y & HIST. 755, 771 (1991) (reporting that Gandhi supported the national commitment to cattle preservation and had declared that "cow protection is more important than swaraj [self-rule].") At the same time, Gandhi condemned the use of sacred cow as an anti-Muslim prop. See, e.g., Mahatma K. Gandhi, *Presidential Address at the Cow-protection Conference*, YOUNG INDIA 29-1- 1925.

¹⁴⁰ See Parama Roy, *Meat-Eating, Masculinity and Renunciation in India: A Gandhian Grammar of Diet*, 14 GENDER & HIST. 62 (2002) (describing Gandhi's meat eating period, his turn to vegetarianism, his fasting, his insistence on eating few, cheap foods, and nothing after nightfall, his removal of certain foods from his diet such as spices, salt, cow's milk, or lentils).

¹⁴¹ See John Rosselli, *The Self-Image of Effeteness: Physical Education and Nationalism in Nineteenth-Century Bengal*, 86 PAST & PRESENT 124-4 (1980). There is a long history in the Global North of associating vegetarianism with inferior bodies and civilizations. German philosopher Ludwig Feuerbach's famous phrase "Man is what he eats" was in its original context immediately followed by a denunciation of plant-based diets, the next sentence stating "A man who enjoys only a vegetable diet is only a vegetating being, incapable of action." See Melvin Cherno, *Feuerbach's "Man Is What He Eats": A Rectification*, 24 J. HIST. OF IDEAS 397, 401 (1963).

British colonial discourse but also of mainstream American politics.¹⁴² Meat, red meat in particular, has long been associated with power, status, and patriarchy in the United States and elsewhere.¹⁴³

The vegetarian movement as it emerged in nineteenth-century Europe and North America was a form of social critique. As Leela Gandhi has shown, since the mid-nineteenth century, the movement was associated with dissident politics.¹⁴⁴ This subversive force may have had to do with the fact that reconceptualizing the human-animal divide and noticing the similar forms of oppression of animals and humans opened up new anticolonial possibilities. During his student years in London, Gandhi encountered *fin de siècle* animal welfare groups, arguably prompting his conversion to vegetarianism and marking the beginning of his political involvement.¹⁴⁵ Becoming vegetarian was in and of itself a political act with profound anti-colonialist implications. Gandhi saw meat avoidance as a mode of resistance against Western imperialism, when he had earlier advocated in favor of meat eating as a means of strengthening Indians in their fight against the British colonizer.

¹⁴² See, e.g., Samuel Gompers & Herman Gutstadt, *Some Reasons for Chinese Exclusion: Meat Versus Rice; American Manhood Versus Asiatic Coolieism—Which Shall Survive?* at 24 (The American Federation of Labor Washington DC, GPO (1902) Submitted to the U.S. Senate as document No. 137 (an American Federation of Labor pamphlet written to support the renewal of the 1882 Chinese Exclusion Act)).

¹⁴³ See generally CAROL ADAMS, *THE SEXUAL POLITICS OF MEAT: A FEMINIST-VEGETARIAN CRITICAL THEORY* (1990).

¹⁴⁴ See LEELA GANDHI, *AFFECTIVE COMMUNITIES. ANTICOLONIAL THOUGHT, FIN-DE-SIÈCLE RADICALISM, AND THE POLITICS OF FRIENDSHIP* 67-114 (2006).

¹⁴⁵ See TRISTAM STUART, *THE BLOODLESS REVOLUTION: RADICAL VEGETARIANS AND THE DISCOVERY OF INDIA* 424 (2006) (arguing that “Western vegetarianism had been heavily influenced by Indian culture for more than 300 years; in Gandhi’s hands it was re-exported to India as a core element in the great national freedom struggle.”).

The political significance of the cow endured after Gandhi's death. In independent India, the dominant political party, Congress, made use of a bovine iconography. Under Nehru's leadership, the party adopted the symbol of a pair of bullocks carrying a yoke. When Nehru's daughter, Indira Gandhi, was expelled from the party in 1969 and set out to form her own party, the New Congress, she chose the image of a cow and suckling calf as a new emblem.¹⁴⁶ As a political tool, the cow may have served to end the British Raj and to structure post-independence politics. But as the following section argues, in contributing to the formation of a dominant-caste pan-Hindu identity, the cow also functioned as an exclusionary mechanism against those of non-dominant castes and religious minorities.

2. The Dominant Caste Pan-Hindu Cow

Legal scholar and activist Shraddha Chigateri has demonstrated that the constitutional elision of the religious dimension of cows "masks the prioritizing of dominant-caste Hindu identity."¹⁴⁷ The groups that contravene the taboo on beef-eating in India are minorities which historically have been the victims of discrimination: Dalits¹⁴⁸ and "Other Backward Castes,"¹⁴⁹ Christians, Adivasi communities,¹⁵⁰ and Muslims, who all continue to be held as

¹⁴⁶ VIJAY SANGHVI, *THE CONGRESS, INDIRA TO SONIA GANDHI* 77 (2006).

¹⁴⁷ Chigateri, *supra* note 7 at 138.

¹⁴⁸ Gaining currency in the 1990s, the term "Dalit" (meaning "crushed underfoot," "broken into pieces") is the contemporary version of the word "untouchable," used as form of identity assertion. See Sagarika Ghose, *The Dalit in India*, 70 *SOCIAL RESEARCH* 83, 85-6 (2003).

¹⁴⁹ "Other Backward Castes" (OCBs) is a collective expression used by the Indian government to classify disadvantaged classes for the purposes of affirmative action policies.

¹⁵⁰ "Adivasi" is an umbrella term for several aboriginal South Asian groups making up 8.6% of India's population according to the 2011 census.

low standing groups and to suffer various forms of violence. In every culture, “food is a focus of much taxonomic and moral thought.”¹⁵¹ This is particularly true in India, where eating practices are explicitly interwoven with caste and sect affiliations. Social hierarchies intersect with food in complex ways, but vegetarianism remains a sign of superiority and privilege.¹⁵² As Chigateri points out, there is “an order of superiority of food conception—which goes down from vegetarianism, meat-eating (no beef) to beef-eating.”¹⁵³

The caste system maintained its hold over the prevailing social structure in part through food and eating practices, particularly those pertaining to beef. The structural distance between castes is defined in terms of pollution and purity, with dominant castes refraining from certain contact with the oppressed, including abstaining from eating food cooked by them. Though beef eating was part of Hindus’ food habits in the Vedic times,¹⁵⁴ it has long signaled low status and pollution. The “purity” of dominant-caste Hindu is intimately connected to the “purity” of their vegetarian foodways, in a positive feedback loop. According to Ambedkar (1891-1956), the framer of the Indian Constitution who launched the modern Dalit movement, the principal origin of “untouchability,”¹⁵⁵ the practice of humiliating and ostracizing from generation to generation, is food hierarchy. In his famed book-manifesto *The Untouchables*, he dedicated an entire chapter to the question, titled “Beef Eating as the Root of

¹⁵¹ Arjun Appadurai, *Gastro-Politics in Hindu South Asia*, 8 AM. ETHNOLOGIST 494, 195 (1981).

¹⁵² Caroline Osella, *Introduction*, 31 SOUTH ASIA J. SOUTH ASIAN STUD. 1, 4, 7 (2008).

¹⁵³ Shraddha Chigateri, ‘Glory to the Cow’: Cultural Difference and Social Justice in the Food Hierarchy in India, 31 SOUTH ASIA: J. SOUTH ASIAN STUD. 10, 11 (2008).

¹⁵⁴ Mahadev Chakravarti, *Beef-Eating in Ancient India*, 7 SOCIAL SCIENTIST 51 (1979).

¹⁵⁵ See Simon Charsley, “Untouchable”: What is in a Name?, 2 J. ROYAL ANTHROPOLOGICAL INSTITUTE 1 (2001).

Untouchability,”¹⁵⁶ noting that there is no community that is really an untouchable community which has not something to do with the dead cow.

Historically, marginalized groups have tended to be flesh-eaters in part because of their occupational and social segregation. The caste hierarchy assigns them perennially “dirty” occupations, including tasks involving contact with dead cattle such as butchering and skinning cattle, removing carcasses and waste, itinerant packing, working leather, bones, and tanning.¹⁵⁷ Condemned to dirtying their hands in the dead cattle business for upper castes, beef is often one of the most easily accessible foods. In part because it is taboo, it is also cheap and an easy source of nutrition for the underprivileged.¹⁵⁸ In a vicious circle, those at the bottom rungs of society are ostracized partly because they consume foods, which they are socially programmed to eat.

Despite the 1949 Constitution’s commitment a casteless, secular, and egalitarian nation state,¹⁵⁹ the sacred cow principle has been used as a political tool to oppress two communities in particular: Muslims and Dalits. The political association of vegetarianism and non-violence often goes hand in hand with the

¹⁵⁶ BHIMRAO RAMJI AMBEDKAR, *THE UNTOUCHABLES: WHO WERE THEY AND WHY THEY BECAME UNTOUCHABLES?*, Part IV, Chapter X.

¹⁵⁷ See OLIVER MENDELSON & MARIKA VICZIANY, *THE UNTOUCHABLES: SUBORDINATION, POVERTY AND THE STATE IN MODERN INDIA* 7 (2000).

¹⁵⁸ See Ian Copland, *What to do about Cows? Princely versus British Approaches to a South Asian Dilemma*, 68 BULL. SOAS 59 (2005) (noting that beef has traditionally been cheaper than mutton or goat).

¹⁵⁹ The Constitution’s commitment to secularism has been discussed above. The Constitution also contains an anti-discrimination in its Article 15, which broadly prohibits “discrimination on grounds of religion, race, caste, sex or place of birth.” Article 17 attempts to attack the root of the caste system by abolishing untouchability (“Untouchability is abolished and its practice in any form is forbidden.”)

claim that minority groups, in particular Muslims, are violent because they eat beef.¹⁶⁰ This is ironic given the fact that communal violence has long been associated with instances, real or imaginary, of cow slaughter and beef consumption in violation of Hindu principles.¹⁶¹ By the start of the nineteenth century, and perhaps even before, communal violence between Hindus and Muslims in particular had become commonplace, with cow-related riots breaking out in multiple northern Indian districts in the late 1880s.¹⁶² The most recent illustration was the killing of a Muslim man in September of 2015 over rumors that he had consumed beef.¹⁶³ Similar episodes have been reported concerning Dalits, including the 2002 infamous lynching of five Dalit men who were found skinning a dead cow on the roadside.¹⁶⁴

A longstanding strategy for vilified castes and minority groups to upgrade their social standing has been to adopt dominant-caste mores, such as abjuring beef and other anathematic diets by, for example, converting to vegetarianism or joining cow protection movements.¹⁶⁵ At the same time, a subaltern perspective giving voice

¹⁶⁰ See Osella, *supra* note 152.

¹⁶¹ See, e.g., Gyanendra Pandey, *Rallying Around the Cow: Sectarian Strife in the Bhojpur Region, c.1888–1917*, in 2 SUBALTERN STUDIES 60 (Ranjit Guha, ed., 1983); Anand Yang, *Sacred Symbol and Sacred Space in Rural India: Community Mobilization in the “Anti-Cow Killing” Riot of 1893*, 22 COMP. STUD. SOC’Y & HIST. 576 (1980).

¹⁶² See Copland, *supra* note 158 at 60.

¹⁶³ See Eugene Volokh, *Man murdered by mob in India for allegedly eating forbidden meat*, WASH. POST (Sept. 30, 2015), available at <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/30/a-mob-in-india-just-dragged-a-man-from-his-home-and-beat-him-to-death-for-eating-beef/>.

¹⁶⁴ See Surinder S. Jodhka & Murlidhar, *Cow, Caste and Communal Politics: Dalit Killings in Jhajar*, 38 ECON. & POL. WEEKLY 174 (Jan. 18–24, 2003) (pointing out the islamophobic bias in the incident as some of the perpetrators joined the killing on the mistaken assumption that the victims were Muslim).

¹⁶⁵ See Adcock, *supra* note 42 at 298 (pointing out that as early as the 1880s

to oppressed groups themselves reveals the importance of meat eating or meat avoidance in forging positive identities, rather than simply reactive choices dictated by elites. Thus some Adivasi people in southern Gujarat may turn to vegetarianism, not out of a desire to enhance their social standing, but as “powerful subaltern way of being,” to become full members of a Hindu religious sect.¹⁶⁶ Conversely, in other groups, such as Christians, beef eating can be understood as a form of resistance to Hindu oppression.¹⁶⁷ For them, the goal is not to associate with the dominant-caste Hindu way of life, but with what is perceived as a Western and modern practice.

The religious and cultural dimensions inherent in constitutional cow protection, therefore, have contributed to reinforce social and religious hierarchies to the detriment of the most vulnerable segments of the population. Has the increased availability of milk resulting from the constitutionalization of cows compensated, at least in part, for these inequities? Andrea Wiley has shown that the boom in dairy production benefits urban middle classes, not the poor and the rural.¹⁶⁸ Though the “white revolution” was aimed at improving the economic livelihood of the rural poor as much as expanding milk production for the benefit of all consumers, some farmers reportedly deprived their own malnourished children of cow’s milk to sell it to dairy cooperatives.¹⁶⁹ Yet the cooperatives

proponents of cow protection included groups such as the Jats of eastern Punjab and the Ahirs of the United Provinces).

¹⁶⁶ See Amit Desai, *Subaltern Vegetarianism: Witchcraft, Embodiment and Sociality in Central India*, 31 SOUTH ASIA: J. SOUTH ASIAN STUD. 96, 100 (2008) (critiquing from a subaltern perspective the assumption that non-dominant castes and Adivasis turn to vegetarianism out of a desire to enhance their social standing).

¹⁶⁷ See James Staples, “Go on, just try some!”: *Meat and Meaning-Making among South Indian Christians*, 31 SOUTH ASIA: J. SOUTH ASIAN STUD. 36 (2008).

¹⁶⁸ WILEY, *supra* note 1 at 77.

¹⁶⁹ See Gaard, *supra* note 97 at 606.

received more milk than they could sell, leading them to convert surplus milk into marketable products such as infant formula.¹⁷⁰ Amul, the Gujarat-based dairy cooperative, became the largest baby-food producer in India, disrupting traditional breastfeeding practices and lobbying extensively against bans on infant food advertisement recommended by the World Health Organization's Code against advertising baby foods. There is ample research today documenting the superiority of human milk over animal-milk based formula to feed infants, particularly in areas where access to clean water is difficult.¹⁷¹ But government-sponsored, industrial animal milk production and marketing goes hand in hand with infant formula production and marketing. Much like in the United States, the supposed beneficiaries of milk's prominent status, humans, in particular baby humans, are actually harmed by it.

It appears that the constitutionalization of the prohibition on cow slaughter not only failed to significantly advance the cause of cows or animal welfare generally, but it also encouraged a culture of subordination and stigmatization of marginalized human groups.

Conclusion

This Article has outlined the various elements, which contributed to the development of a constitutional law of cows and milk in the United States and in India. While each case study is

¹⁷⁰ See generally CLAUDE ALVARES, ED., *ANOTHER REVOLUTION FAILS: AN INVESTIGATION INTO HOW AND WHY INDIA'S OPERATION FLOOD PROJECT, TOUTED AS THE WORLD'S LARGEST DAIRY DEVELOPMENT PROGRAMME, FUNDED BY EEC, WENT OFF THE RAILS* (1985) (critiquing the various outcomes of Operation Flood).

¹⁷¹ See, e.g., Patrice L. Engle, *Infant Feeding Styles: Barriers and Opportunities for Good Nutrition in India*, 60 *NUTRITION REV.* S109 (2002); Arun Gupta, et al., *Breastfeeding and complementary feeding as a public health intervention for child survival in India*, 77 *INDIAN J. PEDIATRICS* 413 (2010).

rooted in its culture and history, taken together, the two constitutional frameworks reveal surprisingly similar attitudes toward milk and cows. Both legal histories show how deeply a political issue milk drinking and beef eating are and have been in past societies. They also expose constitutional law's instrumental conception of non-human animals as assets with positive economic values, justifying their legal status as objects of rights vested in humans. Cows are particularly illustrative of this subordination as they represent a major economic resource, being a source of labor, land fertilization, milk, meat, and leather.

In 1954 Gandhi wrote,

The cow protection ideal set up by Hinduism is essentially different from and transcends the dairy ideal of the West. The latter is based on economic values, the former while duly recognizing the economic aspect of the case, lays stress on the spiritual aspect viz. the idea of penance and self-sacrifice for the relief of martyred innocence which it embodies.¹⁷²

This Article has demonstrated that this distinction is overstated as economic considerations have been at the forefront of cow protectionism in India as well as milk's legal status in the United States. While religion clearly underlies the Indian constitutional discourse with respect to cows and other "living creatures," it is absent from the legal and policy debate surrounding milk in the United States. Yet the cow has been afforded some "spiritual" symbolism, to use Gandhi's language, in American culture too. As Andrea Wiley reminds us, in contemporary U.S. culture images of "cow care and devotion" are ubiquitous—from milk cartons

¹⁷² MAHATMA K. GANDHI, HOW TO SERVE THE COW 85 (1954).

depicting happy cows grazing in idyllic pastures to children's books where cows are represented as loving moms nursing their own.¹⁷³ India and the United States, therefore, may be even more analogous than expected in their approach to the constitutional status of cows and milk.

¹⁷³ WILEY, *supra* note 1 at 103. *See also* William J. Moore, *The Milk Mystery*, 56 A.B.A. J. 357 (1970) (comparing the Hindu and American enshrinement of the cow and pointing out that “[m]ilk has been described in our country as “nature’s most perfect food” and as such has been treated more as a holy oil than a food commodity.”).

