

# WHY JUSTICE SCALIA SHOULD BE A CONSTITUTIONAL COMPARATIVIST . . . SOMETIMES

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|   |      |
|---|------|
| INTRODUCTION.....   | 1249 |
| I. THE “LIVING” ROOTS OF CONSTITUTIONAL COMPARATIVISM .....                                 | 1252 |
| II. JUSTICE SCALIA’S OPPOSITION TO CONSTITUTIONAL<br>COMPARATIVISM .....                    | 1256 |
| III. AN ORIGINALIST ARGUMENT FOR CONSTITUTIONAL<br>COMPARATIVISM .....                      | 1261 |
| IV. ORIGINALIST AS PRAGMATIST?.....   | 1265 |
| V. HOW TO BE AN ORIGINAL CONSTITUTIONAL COMPARATIVIST.....                                  | 1271 |
| CONCLUSION: FUTURE CHALLENGES FOR A UNIFIED THEORY OF<br>CONSTITUTIONAL COMPARATIVISM ..... | 1276 |

*Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.*

—Antonin Scalia, Associate Justice of the Supreme Court<sup>†</sup>

## INTRODUCTION

The proper role of international law in domestic constitutional adjudication is a hot issue in legal circles and beyond, particularly in light of attacks on an “activist” judiciary, presently the fad among pundits, politicians, and pulpitiarians. While the contest has been simmering for years in Congress,<sup>1</sup> on

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<sup>†</sup> *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting).

1. *See, e.g.*, American Justice for Americans Citizens Act, H.R. 1658, 109th Cong. § 3 (2005) (forbidding federal courts from interpreting the Constitution by employing contemporary foreign or international legal authorities not relied upon by the Framers); Constitution Restoration Act of 2004, S. 2323, 108th Cong. § 201 (2004) (“In interpreting

the Court,<sup>2</sup> and among academics,<sup>3</sup> the top blew off the pot during the 2003 and 2004 Supreme Court terms “[w]hen [Justice] Kennedy, who’s hardly a liberal, started citing these international sources . . . [and] the subject exploded in the broader political world.”<sup>4</sup>

It is no surprise to his fans or critics that Justice Scalia has been at the front of this contest. In written decisions,<sup>5</sup> public speeches,<sup>6</sup> and an unprecedented debate on the topic with Justice Breyer,<sup>7</sup> Justice Scalia has drummed a regular

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and applying the Constitution . . . a court . . . may not rely upon any . . . law . . . of any foreign state or international organization or agency, other than English constitutional and common law.”); H.R. Rcs. 568, 108th Cong. (2004) (“[J]udicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements . . . inform an understanding of the original meaning of the laws of the United States.”).

2. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 604-07 (2005) (O’Connor, J., dissenting) (maintaining relevance of international law sources in domestic constitutional cases); *id.* at 608, 622-29 (Scalia, J., dissenting) (rejecting the majority and Justice O’Connor’s appeals to international human rights law to interpret the Eighth Amendment); *Atkins v. Virginia*, 536 U.S. 304, 347-48 (2002) (Scalia, J., dissenting) (criticizing the majority’s referrals to international law sources); *Knight v. Florida*, 528 U.S. 990 (1999) (Thomas, J., concurring in denial of certiorari) (expressing skepticism about recourse to contemporary foreign sources); *id.* at 997-98 (Breyer, J., dissenting from denial of certiorari) (citing international law sources for the proposition that inordinate delay in administration of death sentence renders the sentence cruel).

3. See, e.g., Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1567-74 (2006); Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005); Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT’L L. 357 (2005); Vincent J. Samar, *Justifying the Use of International Human Rights Principles in American Constitutional Law*, 37 COLUM. HUM. RTS. L. REV. 1 (2005); Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT’L & COMP. L. 421 (2004); Mattias Kumm, *International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model*, 44 VA. J. INT’L L. 19 (2003).

4. Jeffrey Toobin, *Swing Shift: How Anthony Kennedy’s Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 42, 43 (quoting New York University Professor Norman Dorsen).

5. See, e.g., *Roper*, 543 U.S. at 622-29 (Scalia, J., dissenting) (rejecting the majority and Justice O’Connor’s appeal to international and foreign law to interpret the Eighth Amendment); *Atkins*, 536 U.S. at 347-48 (Scalia, J., dissenting) (arguing that the practices of the world community are “irrelevant” when interpreting the Constitution).

6. See Antonin Scalia, Assoc. Justice, U.S. Supreme Court, Foreign Legal Authority in the Federal Courts, Keynote Address at the Ninety-Eighth Annual Meeting of the American Society of International Law (Apr. 2, 2004), in 98 AM. SOC’Y INT’L L. PROC. 305 (2004) [hereinafter Scalia ASIL Address]; Antonin Scalia, Assoc. Justice, U.S. Supreme Court, Keynote Address at the American Enterprise Institute Conference on the Outsourcing of American Law (Feb. 21, 2006) [hereinafter Scalia AEI Address] (transcript available at <http://www.tmcnet.com/usubmit/2006/02/22/1397738.htm>).

7. See Antonin Scalia & Stephen Breyer, Assoc. Justices, U.S. Supreme Court, Debate at American University: Constitutional Relevance of Foreign Court Decisions (Jan. 13,

beat against the use of contemporary foreign law materials when interpreting the Constitution.<sup>8</sup> This Article provides a critical exegesis of his position and argues that, in a narrow set of constitutional cases, including those implicating the Eighth Amendment prohibition against cruel and unusual punishment, Justice Scalia, as an originalist, ought to refer to contemporary foreign sources.

The first Part of this Article outlines positions adopted by members of the Court in favor of constitutional comparativism. With this frame drawn, the second Part elaborates Justice Scalia's commitment to originalism as a theory of constitutional interpretation and explains his opposition to the use of contemporary foreign law materials when interpreting the Constitution. The second Part also responds to some of Justice Scalia's more prominent critics, arguing that their attacks misunderstand Justice Scalia's views, and therefore fail to provide argumentative clash. The third Part adopts a novel approach, taking a position within originalism and arguing that, on pain of contradiction, originalists must take into account contemporary views, foreign and domestic, in a limited set of cases where the meaning of the Constitution's universalist language is at stake. The fourth Part returns to the task of sympathetic exegesis, arguing that Justice Scalia's steadfast refusal to consider foreign sources is a practical response to an apparently insurmountable epistemic challenge. The final Part sketches a solution to this epistemic challenge and outlines a role for contemporary international law in originalist constitutional interpretation.<sup>9</sup>

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2005) [hereinafter Scalia-Breyer Debate] (transcript available at <http://www.freerepublic.com/focus/f-news/1352357/posts>).

8. Justice Scalia is neither the only member of the Court who opposes the use of contemporary international law in constitutional cases nor the only originalist among the nine. Most prominently, Justice Thomas has expressed significant skepticism about the authority of courts to apply international law absent a clear legislative mandate. *See, e.g., Foster v. Florida*, 537 U.S. 990, 991 n.\* (2002) (Thomas, J., concurring in denial of certiorari) ("While Congress, as a *legislature*, may wish to consider the actions of other nations on any issue it likes, this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans."). Justice Thomas's views on originalism and constitutional comparativism are not discussed at length here, and this Article does not presume that his views mirror those of Justice Scalia. Chief Justice Roberts and Justice Alito have not had occasion to weigh in on these issues since arriving on the Court, though both expressed reservations about comparativist practice during their confirmation hearings. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr., to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 201 (2005); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 370 (2005).

9. Because the goals of this Article are fundamentally critical, it provides only an outline of a positive theory of constitutional comparativism. The full picture is elaborated in David Gray, *The Proper Care and Feeding of International Law: An Epistemic Role for International Law in Constitutional Interpretation* (Aug. 15, 2006) (unpublished manuscript, on file with author).

## I. THE "LIVING" ROOTS OF CONSTITUTIONAL COMPARATIVISM

The best place to start is with a visit to the opposing camp. At least four present Justices of the Supreme Court, Stevens, Kennedy, Ginsburg, and Breyer, and the recently retired Justice O'Connor, are proponents of what David Fontana might call "positive," "ahistorical comparativism."<sup>10</sup> Their views spring from the premise that interpreting the Constitution is not merely an exercise in painstaking historical investigation, but requires reading constitutional language with the benefit of intervening events and experiences. In a recent speech before the American Society of International Law, Justice Ginsburg stated the point thus:

The notion that it is improper to look beyond the borders of the United States in grappling with hard questions has a close kinship to the view of the U.S. Constitution as a document essentially frozen in time as of the date of its ratification. I am not a partisan of that view. U.S. jurists honor the framers' intent "to create a more perfect Union," I believe, if they read our Constitution as belonging to a global twenty-first century, not as fixed forever by eighteenth-century understandings.<sup>11</sup>

The contest that Justice Ginsburg identifies is at the core of debates between originalists and advocates of a "living Constitution."<sup>12</sup>

10. David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 551 (2001). There is some risk of confusion in Professor Fontana's juxtaposition of two apparently contradictory terms, "ahistorical," which suggests a committed objectivism immune to events, with "comparativism," which suggests an interest in describing contingent circumstances and events. He has, of course, put his finger on precisely the source of bewilderment that textualists and originalists express when engaging living constitutionalists. After all, is not the entire procedure of comparativism essentially contemporary, and therefore historicist in the extreme? While troubling, these issues are beyond the scope of this Article, which focuses on the internal demands and external application of originalism.

11. Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication, Keynote Address at the Ninety-Ninth Annual Meeting of the American Society of International Law (Apr. 1, 2005), in 99 AM. SOC'Y INT'L L. PROC. 351, 355 (2005) [hereinafter Ginsburg ASIL Address]; see also *Roper v. Simmons*, 543 U.S. 551, 587 (2005) (Stevens, J., joined by Ginsburg, J., concurring) (arguing that the meaning of the Eighth Amendment did not freeze when it was originally drafted).

12. The idea that the Constitution is a living entity can be traced to Justice Holmes's opinion in *Missouri v. Holland*, 252 U.S. 416 (1920). There the Court stated that

when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

*Id.* at 433.

The contemporary stink over the use of foreign sources in constitutional adjudication is most directly attributable to Justice Kennedy and his opinions in *Lawrence v. Texas*<sup>13</sup> and *Roper v. Simmons*.<sup>14</sup> While Justice Kennedy has not separately published his views on the proper place of foreign materials in domestic constitutional jurisprudence, these two decisions paint a vivid picture of the Constitution as containing objective normative standards that cannot be understood without reference to contemporary events and circumstances. Assuming that this is his view, it follows that Justice Kennedy is committed to considering foreign sources when doing so enhances the capacity of the Court to determine the scope of objective constitutional standards or to put into perspective normative commitments held by our forebears, ancient and recent.

While neither *Lawrence* nor *Roper* expresses any concern for what foreign nations may think of U.S. courts, Justice Kennedy has suggested that international reputation may provide another reason for domestic courts to refer to foreign materials in domestic constitutional litigation.<sup>15</sup> Foreign courts frequently cite decisions of U.S. courts, particularly the Supreme Court.<sup>16</sup> If domestic courts fail to reciprocate, then the United States risks losing its voice on issues of international concern and a diminishment in international standing. In light of this, Justice Kennedy has suggested that domestic courts ought to cite foreign decisions, when relevant, as a matter of reciprocity, to preserve our authority on issues of international significance and to maintain our position in the international community.<sup>17</sup>

A signatory to the majority opinions in *Lawrence* and *Roper*, Justice Breyer is perhaps the most publicly vocal advocate on the Court for some form of constitutional comparativism. Justice Breyer described his position most recently in a 2005 debate with Justice Scalia hosted by the United States Association of Constitutional Law.<sup>18</sup> There, he emphasized that the increasing relevance of foreign materials to domestic cases is a function of two intersecting phenomena. The first is globalization. The second is the spread of democracy and human rights. With expanding transnational intercourse and broadening commitments to democratic and human rights principles has come an internationalized interest in many of the “ancient and unchanging ideals”

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13. 539 U.S. 558, 572-73 (2003).

14. 543 U.S. at 575-78.

15. Toobin, *supra* note 4, at 50.

16. See Sandra Day O'Connor, Assoc. Justice, U.S. Supreme Court, Keynote Address at the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002), in 96 AM. SOC'Y INT'L L. PROC. 348, 350 [hereinafter O'Connor ASIL Address].

17. Toobin, *supra* note 4, at 50.

18. Scalia-Breyer Debate, *supra* note 7; see also Stephen Breyer, Assoc. Justice, U.S. Supreme Court, Keynote Address at the Ninety-Seventh Annual Meeting of the American Society of International Law (Apr. 4, 2003), in 97 AM. SOC'Y INT'L L. PROC. 265, 265-66 [hereinafter Breyer ASIL Address].

embedded in the Constitution.<sup>19</sup> As a result, in many countries, “human beings, . . . called judges, . . . have problems that often . . . are similar to our own.”<sup>20</sup> They deal with similar texts and, like domestic courts, “are trying to protect human rights . . . and democracy.”<sup>21</sup> While foreign cases can never provide a perfect analogue to domestic cases, and certainly are not binding,<sup>22</sup> Justice Breyer maintains that foreign materials frequently are relevant as models and sources of data when domestic litigation implicates rights or issues of active liberty.<sup>23</sup>

Though she has left the Court, Justice O’Connor’s views on myriad issues have had broad influence and promise to remain significant in domestic constitutional jurisprudence. Her willingness to consider foreign materials is no exception. As it does in Justice Breyer’s, globalization plays a central role in Justice O’Connor’s views on the relevance of foreign materials to domestic constitutional litigation. In a 2002 address to the American Society of International Law, Justice O’Connor argued that the expansion of international law and international treaty regimes, combined with cross-border commerce and increased accessibility to information, has enhanced our “awareness of, and access to, peoples and places far different from our own.”<sup>24</sup> In light of these conditions, domestic decisions may have significant impact beyond state borders. Domestic judges may also “learn from other distinguished jurists who have given thought to the same difficult issues that we face here.”<sup>25</sup>

Justice O’Connor restated her commitment to the use of foreign materials in *Roper v. Simmons*.<sup>26</sup> Though Justice O’Connor dissented, she wrote separately to maintain her view that the use of foreign materials is particularly appropriate in Eighth Amendment cases, where the Court has a “constitutional

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19. STEPHEN BREYER, *ACTIVE LIBERTY* 132 (2005).

20. Scalia-Breyer Debate, *supra* note 7. The argument that foreign and domestic courts frequently confront similar problems is common in defenses of transnational jurisprudence. See, e.g., Ginsburg ASIL Address, *supra* note 11, at 353; O’Connor ASIL Address, *supra* note 16, at 350; Diarmuid F. O’Scannlain, What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?, Address Before the Institute of Advanced Legal Studies of the University of London (Oct. 11, 2004), in 80 *NOTRE DAME L. REV.* 1893, 1907-08 (2005); Patricia M. Wald, The Use of International Law in the American Adjudicative Process, Address at the Federalist Society National Lawyer’s Convention (Nov. 15, 2003), in 27 *HARV. J.L. & PUB. POL’Y* 431, 441-42 (2004).

21. Scalia-Breyer Debate, *supra* note 7.

22. See *Knight v. Florida*, 528 U.S. 990, 997-98 (1999) (Breyer, J., dissenting from denial of certiorari) (“I believe their views are useful even though not binding.”).

23. I take this phrase from Justice Breyer’s book *ACTIVE LIBERTY*, *supra* note 19. There he argues for an approach to constitutional jurisprudence designed to maximize the democratic potential of citizens, society, and government. *Id.* at 3-12.

24. O’Connor ASIL Address, *supra* note 16, at 349.

25. *Id.* at 350.

26. 543 U.S. 551, 587 (2005) (O’Connor, J., dissenting).

obligation”<sup>27</sup> to exercise its independent moral judgment in order to determine whether “the evolving standards of decency that mark the progress of a maturing society”<sup>28</sup> place a particular punitive practice in the category of the cruel and unusual. While not determinative of evolving standards of decency, Justice O’Connor holds a place for foreign materials to confirm the reasonableness of domestic consensus and the independent moral calculus of the Court.<sup>29</sup>

Justice Ginsburg also is not shy about referring to international law in her opinions, particularly where the issues address parallel contests in foreign countries and in the international community. In *Grutter v. Bollinger*, the Court upheld the constitutionality of the University of Michigan Law School’s race-sensitive admissions system.<sup>30</sup> Writing in concurrence, Justice Ginsburg pointed out that the Court’s holding “accords with the international understanding of the office of affirmative action.”<sup>31</sup> This was not a surprise. Four years earlier, in a lecture to the New York City Bar Association,<sup>32</sup> Justice Ginsburg argued that domestic jurisprudence touching on issues of affirmative action must be read as part of an international dialogue with sovereign states and transnational regimes, which includes the Universal Declaration of Human Rights,<sup>33</sup> the Convention on the Elimination of All Forms of Racial Discrimination,<sup>34</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>35</sup> In a 2005 address to the American Society of International Law, Justice Ginsburg put this dialogical approach to affirmative action litigation in a larger context, arguing that the Constitution is a document with universal aspirations, designed to be sensitive to international and foreign laws that seek the same ends.<sup>36</sup> In keeping with this view, she has argued that domestic judges ought to refer to international sources in order to

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27. *Id.* at 590 (quoting *Stanford v. Kentucky*, 492 U.S. 361, 382 (1989)).

28. *Id.* at 589 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

29. *Id.* at 605.

30. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

31. *Id.* at 344 (Ginsburg, J., concurring).

32. Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, *Affirmative Action: An International Human Rights Dialogue*, Fifty-First Cardozo Memorial Lecture Before the Association of the Bar of the City of New York (Feb. 11, 1999), in 21 *CARDOZO L. REV.* 253 (1999).

33. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d. Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

34. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. EXEC. DOC. C, 95-2 (1978), 660 U.N.T.S. 195.

35. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13.

36. See Ginsburg ASIL Address, *supra* note 11, at 352. Justice Ginsburg sees particular significance in the Declaration of Independence’s stated “Respect to the Opinions of Mankind.”

learn from the experiences of those on the same path toward justice because “[w]ise parents . . . do not hesitate to learn from their children.”<sup>37</sup>

## II. JUSTICE SCALIA’S OPPOSITION TO CONSTITUTIONAL COMPARATIVISM

From the opposing camp we proceed to the most contested ground: the Eighth Amendment’s prohibition on cruel and unusual punishment. The Court’s recent Eighth Amendment jurisprudence has been guided by the principle announced in *Trop v. Dulles*: that “the words of the Amendment are not precise”; “that their scope is not static”; and that “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>38</sup> In order to gauge this progress, the Court has traditionally surveyed the practices of the several states and federal authorities, declaring unconstitutional only those practices rejected by a clear domestic consensus.<sup>39</sup> In *Atkins v. Virginia* and *Roper v. Simmons*, the Court expanded the scope of its survey, consulting the practices of foreign states and transnational institutions to determine the objective decency of executing mentally retarded offenders<sup>40</sup> and juveniles under the age of eighteen.<sup>41</sup> Justice Scalia dissented in each case, both from the result and to disclaim the majority’s references to foreign materials.<sup>42</sup> In each case, and in subsequent public appearances, Justice Scalia has defended that view based on his commitment to originalism.

There is no more influential defender of originalism than Justice Scalia.<sup>43</sup> In his view, originalism is a species of textualism. Textualists contend that Article III judges have no authority to pursue abstract principles of right or the advancement of social justice. Neither do they have authority to add or detract from the law as it is written. Rather, textualists argue that judges have authority

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37. *Id.* (quoting *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring)).

38. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

39. See *Roper v. Simmons*, 543 U.S. 551, 567 (2005) (finding a national consensus against the execution of offenders under the age of eighteen); *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (finding a national consensus against the execution of mentally retarded offenders); *Stanford v. Kentucky*, 492 U.S. 361, 370-71 (1989) (failing to find the degree of national consensus “sufficient to label . . . cruel and unusual” the death penalty for offenders between the ages of sixteen and eighteen); *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (failing to find a national consensus against the execution of mentally retarded offenders).

40. *Atkins*, 536 U.S. at 316 n.21.

41. *Roper*, 543 U.S. at 575-78.

42. *Id.* at 608, 622-28 (Scalia, J., dissenting); *Atkins*, 536 U.S. at 347-48 (Scalia, J., dissenting).

43. See generally Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997).

only to interpret and apply the Constitution and legislation as written.<sup>44</sup> As Justice Scalia has pointed out, these limitations are a relative novelty in the common law tradition, in which judges traditionally enjoyed a prominent role in defining the law.<sup>45</sup>

The more limited authority of Article III judges in our system is, according to Justice Scalia, a function of the United States's conversion to republican democracy and the accompanying distribution of authority between three distinct branches of government. In systems where judges are representatives of the Crown or legislature, they have derivative authority to, in contemporary parlance, "make law." U.S. judges, elevated and sequestered as they are, have none. That task explicitly is left to Congress alone.<sup>46</sup>

Few have substantial objections to the idea that, as a matter of democratic institutional theory, judges should limit themselves to the interpretation and application of the laws<sup>47</sup>—though more than a few argue that it is folly to think that judges can and naïve to think they do.<sup>48</sup> The real drama starts when those who regard themselves as textualists are asked what it means to interpret and apply a text. Strict constructionists argue that statutes and the Constitution should be interpreted literally and without regard to extratextual considerations. Others take a more liberal view, taking account of the purposes of law and the consequences of competing interpretations.<sup>49</sup> Originalists fall somewhere between these points on the spectrum.

The hallmark of the originalist is that she seeks, as best she can, to understand what the reasonable meaning of the text was at the time it was written.<sup>50</sup> Some materials are relevant to this endeavor and some are not. Notable in Justice Scalia's category of the irrelevant is evidence of legislative intent. According to Scalia, ours is a system of laws, not men; pursuing legislative intent rather than interpreting the law as written would elevate men above the law.<sup>51</sup> Pursuit of legislative intent may also veil judicial legislation.<sup>52</sup>

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44. *See id.* at 23-25.

45. *See id.*

46. U.S. CONST. art. I, § 1.

47. *See, e.g.,* BREYER, *supra* note 19, at 17.

48. *Cf.* STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 87-119 (1989) (arguing that the meaning of any text is always and necessarily determined by the intellectual commitments, cognitive limitations, and experiential background of the reader). *But cf.* RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988) (arguing that objective meaning of a text limits interpretation); Ronald Dworkin, *Law as Interpretation*, 60 *TEX. L. REV.* 527, 540-46 (1982) (arguing that continuity of interpretive community binds interpretation).

49. *See, e.g.,* BREYER, *supra* note 19, at 17-18.

50. Justice Scalia put the point thus: "[M]y theory of what I do when I interpret the American Constitution is I try to understand what it meant, what [it] was understood by the society to mean when it was adopted." Scalia-Breyer Debate, *supra* note 7.

51. Scalia, *supra* note 43, at 17.

As a matter of fact, the many legislators who join to pass a law seldom share a single, unified intent.<sup>53</sup> Moreover, the sources most cited as evidence of legislative intent sometimes reflect the opinions of very few legislators, or even none at all.<sup>54</sup> Originalists worry that attempts to find legislative intent therefore impose little actual discipline on judges. A judge will almost always find ample evidence to support the claim that what Congress really meant is what the judge thinks it ought to have meant. If a law, read for what it reasonably means, does not reflect the intentions of the legislature, then Congress is well-positioned to remedy the situation. At any rate, originalists do not think judges have the authority or competency to diagnose and cure disparities between legislative intent and the objective meaning of the text.

While Justice Scalia does not regard evidence of legislative intent as relevant to the task of interpreting the law, he does not limit himself to the text alone. As a hermeneutical matter, he and other originalists will consider evidence exogenous to the text if it clarifies what the words in a statute reasonably meant when the law was passed.<sup>55</sup> For example, most legislation, and much of the Constitution, addresses particular problems, by, for example, establishing traffic rules, regulating pharmaceuticals, and allocating legislative seats. Only by understanding these problems can the original meaning of the language be fully understood.<sup>56</sup> Similarly, the reasonable meaning of terms of art incorporated into legal texts may be obscure in the absence of an

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52. *Id.* at 35, 132.

53. *Id.* at 36 (pointing out that there is “something for everyone” in the history of most legislation, converting references to legislative history into a practice of “pick[ing] out your friends” from the crowd).

54. Committee reports come under particularly heavy fire from Justice Scalia. See Scalia, *supra* note 43, at 34.

55. *Id.* at 37-38. While perhaps not Scalia’s view, by an application of *lex posterior derogat legi priori*, an originalist may consider evidence that post-dates a statute or section of the Constitution if that evidence is contemporaneous with legislation or a constitutional amendment that bears on the meaning of language that appears in the earlier statute or section. For example, in considering the meaning of “due process of law” in the Fifth Amendment the originalist need not, and perhaps ought not, seek to discover the reasonable meaning of that phrase in 1791, but may expand her search to include its meaning in 1868, when the Fourteenth Amendment was ratified with identical language. Of course, this presents some difficulty in understanding the proper date referent for some laws and amendments. Consider, as an extreme example, the Twenty-Seventh Amendment to the U.S. Constitution, which limits the authority of Congress to raise the wages of its members. The Amendment was meant to be included in the original Bill of Rights, but its ratification dragged on for almost two hundred years. I am entirely in debt to Professor Bill Van Alstyne for illuminating these issues for me during a conversation at Duke University School of Law.

56. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989) (pointing out that for Justice Taft, writing for the Court in *Meyers v. United States*, 272 U.S. 52 (1926), to understand the meaning of provisions in Article II, it was necessary to describe the specific problems of removal authority confronting the drafters).

understanding of sources and events contemporary with the drafting and adoption of the text.

With this background in mind, there are few surprises in Justice Scalia's views on the use of foreign materials by domestic courts. Foreign sources are critical when domestic courts are called upon to apply foreign law.<sup>57</sup> Foreign sources are also relevant, though not dispositive, when domestic courts must interpret international treaties to which the United States is party.<sup>58</sup> When interpreting domestic legislation, courts are entitled to consider foreign sources if the law in question provides a specific foothold in international law.<sup>59</sup> He also recognizes that the experiences of other states may be used in narrow circumstances to refute predictions of disaster advanced against a textually accurate holding.<sup>60</sup> Beyond these limited cases, Justice Scalia argues that "modern . . . foreign legal materials can never be relevant to an interpretation of—to the meaning of—the U.S. Constitution."<sup>61</sup>

Emphasis must be placed on "modern," of course. Justice Scalia allows that consideration of foreign materials that informed then-contemporary understandings of constitutional language may aid modern courts in understanding the original meaning of the text.<sup>62</sup> As he put the point during his keynote address at the American Society of International Law's annual conference in 2004: "I probably use more foreign legal materials than anyone else on the Court, with the possible exception of Justice Thomas. Of course they are all fairly old foreign legal materials, and they are all English."<sup>63</sup>

Applying these principles, Justice Scalia, writing for the Court, has famously opined that "comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one."<sup>64</sup> Scholars have attacked this view. Harold Koh, for example, has argued that Justice Scalia's distinction between drafting and interpretation

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57. See Scalia ASIL Address, *supra* note 6, at 305-06; Scalia AEI Address, *supra* note 6.

58. See *Olympic Airways v. Husain*, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting) ("One would have thought that foreign courts' interpretations of a treaty that their governments adopted jointly with ours, and that they have an actual role in applying, would be (to put it mildly) . . . relevant.").

59. See Scalia ASIL Address, *supra* note 6, at 306 (citing Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3) (2007) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which rights in property taken in violation of international law are in issue . . .")).

60. See Scalia ASIL Address, *supra* note 6, at 307; Scalia AEI Address, *supra* note 6.

61. Scalia ASIL Address, *supra* note 6, at 307.

62. Justice Scalia highlights as an example of this view the Court's opinion in *Crawford v. Washington*, 541 U.S. 36 (2004), where he relies on English sources of law known to the Framers in 1791 that bear on the original meaning of the Confrontation Clause. Scalia ASIL Address, *supra* note 6, at 306.

63. Scalia ASIL Address, *supra* note 6, at 306.

64. *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997).

“makes no sense” because many foreign constitutions and contemporary human rights documents are based on and use language similar to that in the U.S. Constitution. According to Koh, “Construing U.S. constitutional law by referring to other nations’ constitutional drafters, but not their constitutional interpreters, would be akin to operating a building by examining the blueprints of others on which it was modeled, while ignoring all subsequent progress reports on how well those other buildings actually functioned over time.”<sup>65</sup>

Such responses ignore the fundamentals of the originalist position. Foreign practice was part of the milieu at the Founding and informed the reasonable meaning of constitutional language at that time. By definition, contemporary comparative materials, including intervening developments in foreign interpretations of those sources, were not part of the mix. Therefore, if one accepts the originalist’s contention that the contemporary interpretive challenge is to divine what the words meant to those who wrote them, then reference to contemporary materials is of no moment.<sup>66</sup> Further, an originalist would not endorse the view that changes in views on “liberty, equality, and privacy”<sup>67</sup> over time, domestically or abroad, mark evolutionary progress.<sup>68</sup> Finally, for the originalist, the diversity of foreign views on many critical issues raises the same specter as appeals to legislative intent, opening the gates to judicial activism by providing a diverse crowd from which judges can choose their friends.<sup>69</sup>

This is not to say that others both on and off the Court have not advanced compelling reasons to consider modern foreign sources. Most are external to the originalist position, however, attacking the claim that interpretation is limited to divining the meaning of the text at the time it was written and ratified. This Article adopts a different approach, advancing an argument for

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65. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 54 (2004). Koh also suggests that the moral views of our progenitors are quaint, at best. *See id.* (“Early American law punished not just consensual sodomy, but also idolatry, blasphemy, adultery, and witchcraft, all of which were treated as capital crimes.” (citing Michael H. Reggio, *History of the Death Penalty*, in SOCIETY’S FINAL SOLUTION: A HISTORY AND DISCUSSION OF THE DEATH PENALTY I, 3 (Laura E. Randa ed., 1997))).

66. *See* Alford, *supra* note 3, at 654 (providing an exegesis of the distinction between “contemporary comparativism” and “historical comparativism”).

67. Koh, *supra* note 65, at 54.

68. Scalia, *supra* note 43, at 40–41.

69. *See* Scalia AEI Address, *supra* note 6 (pointing out that references to contemporary international law invite new opportunities for judicial selectivity in the service of intentional or unintentional judicial legislation); *see also* Scalia ASIL Address, *supra* note 6, at 308–10 (same). The suggestion that citing legislative history is “akin to ‘looking over a crowd and picking out your friends’” is credited to the late Judge Harold Leventhal, *see* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983), but was applied to the use of foreign materials by then-Judge Roberts during his confirmation hearing, *see Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States*, *supra* note 8, at 201.

constitutional comparativism internal to originalism. Specifically, it argues that, on pain of contradiction, Justice Scalia and other devotees of originalism may not limit their interpretive inquiry to ancient materials in cases implicating the Constitution's universalist language.

### III. AN ORIGINALIST ARGUMENT FOR CONSTITUTIONAL COMPARATIVISM

The U.S. Constitution is a complicated document that performs multiple tasks. Some are historical and constitutive. It proposes a new country<sup>70</sup> and describes the formal requirements for ratification of that proposal.<sup>71</sup> It is a set of written instructions, providing technical details relating to, *inter alia*, the composition of the legislature<sup>72</sup> and the age requirements for various offices.<sup>73</sup> It is a principled organizational guide, establishing the responsibilities of the three branches.<sup>74</sup> It is also aspirational, describing the politico-ethical contours of the nation and moral limitations on governmental authority and action.<sup>75</sup> The language directed to this last purpose is notably grand, touching on universal norms of decency and right.<sup>76</sup> The Constitution exists to “form a more perfect Union,” to “establish Justice,” to ensure “Tranquility,” to “promote the general Welfare,” and “to secure the blessings of Liberty.”<sup>77</sup> No matter its will to the contrary, a legislature cannot dictate punishments that are “cruel and unusual.”<sup>78</sup> Neither can the Executive deprive persons “of life, liberty, or property, without due process of law.”<sup>79</sup> These are big ideas, and the constitutional language of rights and justice simply cannot be understood apart from the moral valance of the words themselves, confirmed by the soaring declarations of the Preamble and concretized in the historical events that gave rise to the Constitution, the state, and the nation.<sup>80</sup>

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70. U.S. CONST. pmb.

71. *Id.* art. VII.

72. *Id.* art. I, §§ 1-3.

73. *Id.* art. I, §§ 2-3, art. II, § 1.

74. *Id.* art. I-VI.

75. *See, e.g., id.* pmb., amend. V, amend. VIII, amend. XIV, § 1.

76. *See* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 133, 185-86 (1977) (noting that the drafters of the Constitution elected in these “moral” sections to impose “vague standards” on government rather than “precise rules”).

77. U.S. CONST. pmb.

78. *Id.* amend. VIII.

79. *Id.* amend. V, amend. XIV, § 1.

80. I invoke the distinction between “state” and “nation” with a purpose, to distinguish between political unions and “peoples.” Nations, as a people, are variously described, *see* BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1991) (arguing that nationalism is a function of intersecting cultural and historical constructs), but the American Nation is unique in that it is identified not by ethnicity, religion, or historical geography, but by association with a set of normative commitments that provide the narrative structure of our creation myth and are set forth in a handful of founding documents.

Late eighteenth-century Americans were moral realists.<sup>81</sup> That is, they read portions of the Constitution as referring to objective and timeless moral truths. The dominant view of our forebearers at the Founding, consistent with that of Blackstone and seventeenth- and eighteenth-century liberals, was that justice was a function of faith to natural law. As Justice Scalia has pointed out, there is no textual ground on which one can conclude that the Constitution incorporates the whole of natural law.<sup>82</sup> Nevertheless, certain passages, such as the Eighth Amendment's prohibition on cruel and unusual punishment, indisputably attach to objective right. In Justice Scalia's words, "Americans of 1791 surely thought that what was cruel was cruel, regardless of what a more brutal future generation might think about it."<sup>83</sup>

If the Framers and their audience were moral realists, it must be admitted that they originally intended "cruel" to refer to practices that are, and always will be, cruel. If this is so, then it follows that judges charged with enforcing the Eighth Amendment must determine whether state conduct falls within the natural category of "cruelty." This is not the same as determining what the Framers and other residents of late eighteenth-century America thought was cruel. While Americans in 1791 likely had strong views on the subject, for a court to limit its inquiry to their views would give unwarranted privilege to eighteenth-century moral beliefs. If the goal is to discover original meaning, and "cruel" referred then, as it does now, to an objective moral category, then it is the Court's duty to discover the content of that category. Abandoning this search in favor of an inquiry into what the Framers understood to be "cruel and unusual" is either a category mistake<sup>84</sup> or a move from originalism to intentionalism.

A contemporary devotee of moral realism might recognize that the Framers were kindred spirits, but challenge the view that unelected judges ought to

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81. See, e.g., Phillip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993) (elaborating a refined description of our Founders' commitments to natural law); Scalia, *supra* note 43, at 146; Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987) (arguing that our Founders' commitment to constitutionalism was not meant to displace their commitment to "fundamental law" as a source of law for courts).

82. Scalia AEI Address, *supra* note 6 (agreeing that in 1791 Americans believed in natural law, but arguing that they failed to incorporate it into the text of the Constitution); see also Scalia, *supra* note 56, at 862-63 (stating that the Constitution guards only a limited set of "original values," leaving resolution of questions regarding other values to the political branches).

83. Scalia, *supra* note 43, at 146. Justice Scalia goes on to suggest that the Framers "were embedding in the Bill of Rights *their* moral values." *Id.* As this Article argues, that conclusion does not follow.

84. As is discussed below, the mistake is to confuse the actual content of, for example, "cruelty," with late-eighteenth-century views on the content of "cruel."

engage in moral inquiry when deciding Eighth Amendment cases.<sup>85</sup> Disagreements among committed moral realists define our times, as they have most of modern history. One might believe that well-ordered societies have a duty to resolve correctly these disputes in order to conform their practices to natural law. It does not follow, however, that unelected judges have the authority to make the call. Rather, Justice Scalia argues, given democratic commitments to legitimacy and collective will formation, it is improper for judges to usurp the political authority of the elected branches to resolve normative contests.<sup>86</sup>

Whether Platonists or endorsers of natural law, then, Americans in 1791 were objectivists who meant to embed in the text of the Constitution a defined set of timeless and objective norms. Nevertheless, Justice Scalia claims that these same Americans “were embedding in the Bill of Rights *their* moral values, for otherwise all its general and abstract guarantees could be brought to naught.”<sup>87</sup> According to this view, the moral text of the Constitution can only be read to refer to the moral opinions current in late eighteenth-century America; the job of judges is to discover those views from the text and the record as best they can. Of course, this conclusion depends on fallacious equivocation between the moral truth and our Founders’ beliefs about the content of the moral truth, presenting originalists with a difficult contradiction.

Originalists are committed to the view that the text of the Constitution must be interpreted to mean what it meant at the time it was written and ratified. In 1791 the moral language of the Constitution meant to refer to objective right. “Cruel” picked out an objective moral category. Yet when asked to interpret and apply the moral language of the Constitution, Justice Scalia takes the position that it means only what those living in 1791 America believed was right or, less powerfully, what they had not rejected as cruel.<sup>88</sup> On this view,

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85. See Scalia AEI Address, *supra* note 6 (“I believe in natural law . . . I think the people have a responsibility to adhere to the natural law in the laws they enact. The issue is whether it was supposed to be left up to nine lawyers to figure out for the whole country what the natural law is. And I don’t think there’s anything in the mind of the framers that would suggest that.”).

86. See Scalia, *supra* note 43, at 9-14. This is a version of the countermajoritarian dilemma, elaborated in Barry Friedman’s work, which stands as a principal challenge to constitutional comparativism. See Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002); see, e.g., Alford, *supra* note 3, at 641-45 (elaborating the countermajoritarian challenge to comparativism).

87. Scalia, *supra* note 43, at 146.

88. See *id.*; see also Scalia, *supra* note 56, at 862 (arguing that even if the Constitution was intended to expound evolving values, there is no basis for believing supervision of that evolution would have been committed to the courts). It is worth noting that on the matter of lashing, Scalia has acknowledged that “in a crunch [he] may prove a faint-hearted originalist,” though he doubts that the political branches would ever put him in such a position. *Id.* at 864.

“cruel” means the category of punishments that were regarded as cruel in 1791 and excludes punishments that were then in use. These are two different meanings of “cruel.” One refers to an objective moral category, the other to subjective beliefs regarding the content of that category. To interpret the moral language of the Constitution as referring to subjective beliefs about content is to accuse the Framers of embracing Rortian irony<sup>89</sup> two hundred years before its time. Doing so also imposes on the document a brand of moral relativism that is not consistent with the fact that some constitutional language had objective moral meaning for the Framers and their contemporaries.<sup>90</sup>

To see the point more clearly, it is worth conducting a brief thought experiment. Imagine for a moment that, out on her habitual constitutional, Mary Mothes, wife, grandmother, and Daughter of the American Revolution, stumbles across the moral truth poking out of the ground. She quickly excavates it—it is surprisingly light and compact—and presents it to the proper authorities. Upon inspection it is discovered that, as a matter of moral fact, bastinado is cruel. Unfortunately, a small but committed group of states still impose the punishment. This is not to say that bastinado is not controversial. To the contrary, it is, and has been, a source of public debate since well before 1791. In these contests some have argued that bastinado is cruel on religious, deontological, and social grounds. Others have maintained that it is not, finding religious, philosophical, and sociological support for their views. A third group, split within itself, has remained agnostic on the hard moral question, focusing instead on the punishment’s costs and benefits. Each of these groups has taken the day at different times and in different states, but the practice has persisted, and no clear national consensus has ever been reached.

Prior to Mary’s discovery, there were periodic Eighth Amendment challenges to the practice as well. None were successful, principally because originalists were able to demonstrate that bastinado was widely used in the colonies and England during the late eighteenth century, though even then some thought it cruel. Soon after Mary’s discovery, a new round of challenges arrive at federal courthouses across the country. The plaintiffs advance a simple

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89. See RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 73-74 (1989). Rorty uses the term “ironist” to refer to those who, while committed to their normative views, recognize that they are without foundation, and therefore are contingent and always subject to change.

90. Lawrence Lessig makes a similar point in his criticism of “one-step originalism.” Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 *GEO. L.J.* 1837, 1840 (1997). Lessig rightly criticizes this view for preventing fidelity to constitutional meaning by requiring an antiquarian reading of the language that has no footing in contemporary society. As he points out, originalists charge judges not with fidelity to the language of the Constitution but with fidelity to what was meant at the original writing.

sylllogism. They argue that if a punishment is cruel,<sup>91</sup> it is prohibited by the Eighth Amendment; bastinado is cruel; and therefore, the Eighth Amendment prohibits bastinado. Defenders of bastinado admit that there is now no doubt of the actual cruelty of bastinado, but maintain that bastinado does not violate the Eighth Amendment. They do so by attacking the major premise of their opponents' argument. Specifically, they claim that the Eighth Amendment does not prohibit punishment that is actually cruel; rather, it prohibits punishment that would reasonably have been regarded as cruel by a significant group of Americans in 1791. They point out that bastinado was widespread in 1791. By applying a historical version of *expressio unius est exclusio alterius*, they conclude that bastinado is not "cruel" in Eighth Amendment terms because a significant group of those who read "cruel" in 1791 would not have thought it referred to bastinado, lashing, and other corporal punishment. They recognize that many moderns, including Justice Scalia, cannot stomach the practice,<sup>92</sup> but maintain that it is constitutional.

Faced with one of these new cases, what is an originalist to do? It seems clear that an originalist must hold that the Eighth Amendment prohibits bastinado. The guiding principle of originalism is that texts should be read for what they meant at drafting and adoption. On its face, and read for its original meaning, the Eighth Amendment prohibits punishment that *is* cruel and unusual. While Americans in 1791 may have had some ideas about what sorts of punishments fill that category, the mind experiment shows that any inquiry into their views is not determinative of what actually *is* cruel and unusual. Discovering their views does not end an Eighth Amendment inquiry. Put another way, inquiring into then-contemporary beliefs about the cruelty of various forms of punishment may reveal what the Framers and ratifiers *intended* to prohibit; but that, as Justice Scalia has argued, is not relevant to the task of originalist interpretation.<sup>93</sup>

#### IV. ORIGINALIST AS PRAGMATIST?

While many disagree with Justice Scalia, nobody can accuse him of being soft-headed. One wonders, then, how and why Justice Scalia, who reads the Constitution for what it meant when drafted and recognizes that moral language

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91. The more nuanced issue of what punishments are "unusual" is left aside for purposes of elegance, with a notation that determining what punishments are "unusual" in the Eighth Amendment context is, in part, a normative inquiry requiring more than simply counting heads.

92. See, e.g., Scalia, *supra* note 56, at 864.

93. See Scalia, *supra* note 43, at 38 (explaining that he consults the writings of the Framers when interpreting the Constitution "not because . . . their intent is authoritative . . . but rather because their writings . . . display how the text of the Constitution was originally understood").

in the Constitution had objective meaning to those who originally read and drafted it, would interpret the Constitution by attempting to divine the subjective moral dispositions of 1791 Americans. The answer is that Justice Scalia is Odysseus.

In a now famous contribution to the canon, Jon Elster analogizes the Constitution to the ship's mast during Odysseus's escape from the sirens.<sup>94</sup> As his ships approached the Sirenum scopuli, Odysseus feared that he and his men would be lured to their destruction by the seductive melodies of the sirens' song. He ordered his men to stuff their ears with wax and had himself lashed to the mast of his ship so that he could hear their song without placing himself and his ship at risk. Weakened by the chorus, Odysseus begged his men to untie him. As ordered, however, they left him bound until they made safe passage.<sup>95</sup>

Elster suggests that the Constitution plays a similar role in our democracy. It sets forth "precommitments" that bind us and keep us safe from the temptations that would otherwise cast us against the cliffs of history.<sup>96</sup> Justice Scalia has a similar view, noting that the Constitution's "whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away. A society that adopts a bill of rights is skeptical that 'evolving standards of decency' always 'mark progress,' and that societies always 'mature,' as opposed to rot."<sup>97</sup> With this in mind, the impact of Justice Scalia's claim that "Americans of 1791 . . . were embedding in the Bill of Rights *their* moral values, for otherwise all its general and abstract guarantees could be brought to naught"<sup>98</sup> becomes clear.

Some moral disagreements reflect individual differences; others derive from cultural, national, or historical views. Absent some objective referent, these disagreements threaten the stabilizing function of the Constitution by subjecting critical constitutional language and content to the whims of fashion and history. Justice Scalia's solution is to bind himself, and these "abstract guarantees," to the moral views of the Founders. While this historicism is obviously a departure from the originalist's commitment to read the Constitution for what it means, and may even fail to secure the actual guarantees embedded in the moral language of the Constitution, it at least guarantees *something*. Given changes in moral views over time, attempts to read the Constitution for its objective content may guarantee nothing. Of course, if future discoveries should prove the Founders' views wrong, dysfunctional, or otherwise unworthy, then the content of constitutional guarantees can always be changed through the amendment process.

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94. JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 36-47 (1979).

95. HOMER, *ODYSSEY* 214-16 (Robert Fitzgerald trans., Anchor Books 1963).

96. ELSTER, *supra* note 94.

97. Scalia, *supra* note 43, at 40-41.

98. *Id.* at 146.

This last point deserves brief attention. The same epistemic difficulties that motivate the move to historicism also buttress Justice Scalia's reliance on the elected branches and the amendment process. While those in robes might think differently, it is Justice Scalia's view that judges are no better situated than others to divine the moral truth behind constitutional language.<sup>99</sup> Moreover, judges are not elected and they enjoy life tenure, isolating them from the democratic process. If determining the moral content of abstract rights is left to judges, constitutional guarantees are likely to be idiosyncratic and unstable. While the elected branches of the federal government and state legislatures may not be more enlightened, the amendment process is sufficiently cumbersome to ensure stability. Perhaps more importantly, the elected branches are democratically accountable, providing hope for legitimacy if not truth.<sup>100</sup>

Cast in this light, attempts to divine the Founders' views may seem attractive when the moral language of the Constitution is implicated. There are a number of reasons why this may not be so. Before getting to that discussion, however, it is worth clarifying two points. First, Justice Scalia's attempt to interpret the objective moral language of the Constitution by reference to the moral views of 1791 Americans is a move away from originalist orthodoxy. The moral language of the Constitution, read in context and for what it meant in 1791, limits government actions according to the demands of objective right. While this begs the question of what is objectively right, no honest reading of the text can bind the moral language to the moral ideas of any person or group without an added premise connecting their views to the good. Second, as the mind experiment demonstrates, the move from objective right to Founders' beliefs is a practical solution to an epistemic problem.<sup>101</sup> If the undisputed truth about cruelty, liberty, justice, and due process were discovered tomorrow, then there would be no reason to indulge in historicism, or to be a pollster of either contemporary or past beliefs about cruelty, liberty, justice, or due process.

In addition to these theoretical issues, there is good reason to doubt the utility of historicism as a solution to the problem of predictability and stability.

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99. Scalia AEI Address, *supra* note 6 ("I think the people have a responsibility to adhere to the natural law in the laws that they enact. The issue is whether it was supposed to be left up to nine lawyers to figure out for the whole country what the natural law is. And I don't think there's anything in the mind of the framers that would suggest that. So it isn't a fight of natural law people versus non-natural law people; it's a question of who it is in a democratic society that is supposed to mirror the natural law in the statutes of the country.").

100. *Id.* (pointing out that in democratic societies, legislatures have sole authority to resolve contests over competing social norms).

101. It may be argued that Scalia's reliance on the elected branches to fill the moral language of the Constitution with content via legislation and amendment is epistemological as much as practical. While such an argument may be made convincingly in non-constitutional cases (and, in fact, reflects our assessment of epistemic capacity and assignments of decisional responsibilities among the three branches), it has no footing in constitutional cases where the assignments shift. This is a point elaborated at greater length in Gray, *supra* note 9.

To start, the claim that there was a unified view on moral matters in late eighteenth-century America is dubious at best. Framers, commentators, citizens, and members of ratifying legislatures notoriously were of different minds on many core issues of right.<sup>102</sup> Some of the key players were even at odds with themselves.<sup>103</sup> This diversity of opinion presents obvious problems for the historicist. First, it renders the archaeological goal of uncovering what was regarded as cruel in 1791 difficult, if not impossible. Second, even if historicism is not strictly an appeal to Framers' intent, the diversity of opinion in 1791 suggests that hopes for stability and predictability may be misplaced. Originalists oppose appeals to legislative intent because the legislative record is sufficiently ambiguous to provide support for diverse views and space for judicial legislation. If the historical record is also ambiguous, then to bind judges to moral opinions circulating in 1791 is to bind them to nothing at all, opening the door to much-feared judicial legislation.

To push the point a bit further, diversity of opinion in 1791 actually bolsters the claim that the moral language of the Constitution should be read for its objective meaning. The Constitution is the work of a committee. As with most committees, the authors and the ratifying states agreed on some matters and disagreed on others. Where the language in the document is definite and concrete there is good reason to conclude that the committee agreed. Consider the Article II, section 1 requirement that no person is eligible for the office of the President without having "attained to the Age of thirty five years,"<sup>104</sup> and the Third Amendment prohibition on the quartering of troops during peacetime "without the consent of the Owner."<sup>105</sup> Where the language is more general and abstract, however, one suspects persistent disagreement on the details. Expansive language effects a compromise without actually achieving a meeting of the minds by encompassing diverse, and sometimes conflicting, views. In the case of the Constitution, however, grand language that masks disagreements about the precise extension of universalist commitments also demonstrates real agreement about the necessity of fencing government action within normative

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102. See generally THE FEDERALIST No. 54 (James Madison) (defending the three-fifths compromise as an accommodation of diverse views on the nature and role of slaves in America); PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON (1996) (documenting the debate on slavery among those who drafted and signed the Constitution); Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423 (1999) (describing how portions of the Constitution were drafted to secure institutional protections for slaveholders).

103. Jefferson famously wrestled with his own conscience in these matters. See THOMAS JEFFERSON, NOTES ON VIRGINIA (1782), reprinted in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 187, 210 (Adrienne Koch & William Peden eds., 1944) (Jefferson recognized, as an intellectual matter, that owning slaves was immoral, but could not bring himself to free his own slaves).

104. U.S. CONST. art. II, § 1.

105. U.S. CONST. amend. III.

borders. While there was surely some disagreement as to what constitutes cruel punishment, all agreed that the Constitution should prohibit punishment that *is* cruel and unusual.

Reliance on the amendment process as a solution to epistemic challenges also raises concerns for the stabilizing function of the Constitution. Take, for example, the Eighth Amendment's prohibition on cruel and unusual punishment. Justice Scalia has argued that no punishment is cruel or unusual in constitutional terms if it was not so for late eighteenth-century residents of the colonies.<sup>106</sup> Since 1791, many shifts in views on what is and is not cruel have achieved the status of moral truth for most modern Americans. On Scalia's view, for courts to take notice of these shifts in social conscience requires a constitutional convention that would formally do nothing more than restate existing language but, as a hermeneutical matter, would change the content of those protections by formally endorsing contemporary semantic referents. Whether relying on Mary Mothes's incredible discovery or the "evolving standards of decency that mark the progress of a maturing society,"<sup>107</sup> a proposed amendment that would allow the judiciary to read the Eighth Amendment as prohibiting punishments practiced in 1791 that are actually cruel would not change the language of the Eighth Amendment. Put another way, in order to make the moral language of the Constitution mean what it means, the originalist requires constant constitutional conventions that function as recommitment ceremonies. The goal of these conventions would not be to change the text. Rather, the purpose would be to reaffirm commitment to the same old language. This is not only odd but also threatens the function of the Constitution as a set of precommitments meant to offer security against the sirens' song: the temptations of power and greed that are fundamental to the human condition.

Converting originalism to historical relativism, committed to the prevailing moral beliefs of a specific time, by definition limits the meaning of the Constitution's moral content to the happenstance dispositions of those present when it was last ratified. For those inclined to read the Constitution as a "living" document or as bound to objective norms, amendments are necessary

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106. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 609 n.1 (2005) (Scalia, J., dissenting) ("[T]he threshold inquiry in determining whether a particular punishment complies with the Eighth Amendment [is] whether it is one of the 'modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.'" (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986))); Scalia, *supra* note 43, at 145-46 (claiming that 1791 Americans were embedding "their moral values" in the Bill of Rights). Justice Scalia cannot be accused of putting his intellectual commitments above his professional duties, however. Despite his belief that it is "mistaken[] jurisprudence," *Roper*, 543 U.S. at 608 (Scalia, J., dissenting), when writing for the majority Justice Scalia has applied the metric of "evolving standards of decency" announced in *Trop v. Dulles*, see *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

107. *Trop*, 356 U.S. at 101.

only to change the language or substance of the Constitution. However, for an originalist, achieving this same interpretive goal requires subjecting the document to almost constant amendment, even if only to re-ratify the same language. Resort to such a baroque procedural structure suggests the theoretical equivalent of a software patch and, more importantly, has disturbing consequences for the Constitution's capacity to serve as a mast in the storm. Constant exposure to the political process provides a wealth of opportunities to change the content of the Constitution, but it also reduces the sacred to the profane. Much of the authority of the Constitution as a principled limitation of governmental action depends on its remaining immune from the whims of history and the political process. If its content is limited to momentary disposition and is constantly subjected to the political process, then that authority, and its capacity to save us from the shoals, is lost.

The originalist's reliance on historical views of right and the amendment process also has unattractive consequences for the balance of power between the three branches of government. Justice Scalia does not contest the claim that the Constitution has moral content or that in 1791 the meaning of the language incorporated objective moral content into the text. His historicism and attendant reliance on the amendment process is a response to an underlying epistemic problem and a determination that, from a democratic point of view, the elected branches should determine the moral content of the Constitution through legislation and amendment. While there may be good epistemological and democratic reasons to rely on electoral and legislative processes to determine the objective moral content of the Constitution, to do so would require a dramatic shift of constitutional authority from Article III to Articles I and II.

The judiciary's critical constitutional function is to constrain the actions of the elected branches according to limits set forth in the Constitution. If authority to determine the content of existing constitutional language, either through legislation or constant amendment, is exclusively assigned to the elected branches then the judiciary will have abdicated its constitutional role. Exercise of this Article III authority is not without structural limitation, of course. The amendment process remains an important check on the judiciary's execution of this duty, and properly so. However, to rely on the amendment process as a source of meaning for the existing text unduly limits the constitutional authority of the judiciary. The reliance is improper because it constantly subjects constitutional protections to the vicissitudes of the political process and puts the judiciary's capacity to enforce the Constitution at the mercy of the elected branches and the states. In short, it leaves the wolves to tend the flock.

## V. HOW TO BE AN ORIGINAL CONSTITUTIONAL COMPARATIVIST

There is little to question in the claim that the elected branches have authority to resolve contests over policy and collective conceptions of the good life and that courts must generally limit themselves to resolving disputes.<sup>108</sup> Constitutional courts have a unique role, however. In constitutional democracies these bodies are charged with enforcing objective limitations on law and policy according to foundational boundaries enshrined in a constitution.<sup>109</sup> Objectivity and stability are critical to the exercise of this authority and, as Justice Scalia and other originalists have pointed out, resolving constitutional disputes by reference to natural law presents serious epistemic problems.<sup>110</sup> Judges are not oracles and any attempt by a court to reach an earnest view on “cruelty,” for example, risks deteriorating into rank subjectivity. The immediate retort—that legislatures show no promise of faring any better—is easily quashed by pointing out that legislators are at least accountable directly to the electorate, and therefore that their activities in these fields enjoy a sheen of legitimacy, if not the benefit of superior institutional competency.

Courts taking up the gauntlet of full-blooded originalism cannot ignore these challenges. However, if the foregoing is right, then, when deciding cases that implicate the objective moral content of the Constitution, constitutional courts must embrace the challenges inherent in an originalist program, not abdicate to eighteenth-century views. The question that remains is how. One possibility might be to adopt an onto-teleological view of constitutional commitments to right.<sup>111</sup> This view takes seriously the Constitution’s intention to create a “more perfect union” and acknowledges that there is room for improvement.<sup>112</sup> Contemporary judges presume that modern views mark advances over those held by previous generations and set out to resolve

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108. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 168-93 (William Rehg trans., MIT Press 1996) (1992) (describing the unique distribution of authority between courts, legislatures, and the executive in constitutional democracies).

109. See *id.*

110. Scalia AEI Address, *supra* note 6 (pointing out the difficulty of objectively determining the content of the natural law).

111. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003) (“Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”).

112. See, e.g., Ginsburg ASIL Address, *supra* note 11, at 355 (“U.S. jurists honor the framers’ intent ‘to create a more perfect Union,’ I believe, if they read our Constitution as belonging to a global twenty-first century, not as fixed forever by eighteenth-century understandings.”).

particular cases by reference to “the evolving standards of decency that mark the progress of a maturing society.”<sup>113</sup>

While some may take solace in the implied teleology of evolving standards, there is no warrant for a court to endorse the general view that the practices of contemporary institutions are more humane than those of their predecessors based solely on fear of anachronism.<sup>114</sup> To do so would be not only to indulge in the anachronistic fallacy, but would require a nihilistic irony that flatly contradicts the fundamental sincerity required of those who pursue the truth.<sup>115</sup> After all, we are no more immune to the inevitable moldering of flesh than those who came before us; and our views on cruelty and justice are just as vulnerable to extinction as those we would now extinguish.

Privileging contemporary views—because they are contemporary—also has practical consequences for the stabilizing function provided by a constitution. Just as opinions on what constitutes cruelty vary between individuals (including judges), they vary over time. Thus, interpreting “cruelty” through the lens of contemporary opinion eliminates the capacity of a constitution to act as a stable check on government action through the generations. Constitutional practice under the faith of cultural teleology thus seems an unattractive course unless we can identify clearly the ultimate goal to which we are plodding, ever so slowly. But, of course, success in this endeavor would eliminate the need to settle for interim steps.<sup>116</sup>

Another path might be for judges to exercise their independent judgment.<sup>117</sup> While faithful to originalism, such a strategy begs the

113. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

114. *See* Scalia, *supra* note 43, at 44-47 (arguing that contemporary views do not necessarily mark progress or evolution).

115. While much abused by his critics and supporters alike, Jedediah Purdy’s social criticism has much to contribute to our avoiding this cultural cul-de-sac. *See* JEDEDIAH PURDY, *FOR COMMON THINGS: IRONY, TRUST, AND COMMITMENT IN AMERICA TODAY* (1999) (making a plea for sincerity in a culture increasingly marked by irony bordering on nihilism).

116. This is highly idealized, of course. As Immanuel Kant has pointed out, there are two paths to paradise, one which leads to the kingdom of ends, where we each do what is right because it is right, and another which traverses the bloodbath of history to reach an approximation of the kingdom of ends, where we do what is right because awed by the state and memories of the past. *See* Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Purpose*, in *KANT: POLITICAL WRITINGS* 41 (Hans Reiss ed., H. B. Nisbet trans., Cambridge Univ. Press, 2d ed. 1991); Burleigh Taylor Wilkins, *Teleology in Kant’s Philosophy of History*, 5 *HIST. & THEORY* 172 (1966). Even if we could draw in detail the end of history, by virtue of situational contingency, as a function of humility, or simply as a matter of necessity born of our imperfect nature, we may not be able to skip the blood bath.

117. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 563 (2005) (“[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty . . . .” (quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002))); *id.* at 590 (O’Connor, J., dissenting) (quoting the same line); *Atkins*, 536 U.S. at 321 (“Our independent evaluation of the issue reveals no reason to disagree with the

fundamental question of how a mortal judge can avoid substituting idiosyncratic opinion for objective moral fact. In the recent past, a majority of the Court has sought safe harbor in science. As examples, in *Atkins* and *Roper* the Court considered scientific studies of the decisional capacities of the profoundly retarded and the profoundly young, respectively. In *Brown v. Board of Education*, the Court famously considered studies demonstrating the deleterious and disparate impact of segregated educational institutions.<sup>118</sup> While laudable as efforts by the Court to embrace its assigned constitutional duty,<sup>119</sup> reliance on scientific evidence frequently begs the questions of the normative significance of data. Appeals to science in the midst of moral debates also present their own epistemic challenges, ranging from the basic assumption that normative phenomena are susceptible to scientific description<sup>120</sup> to issues regarding the selection and interpretation of evidence. This is not to imply that such appeals are without merit; rather, the point is that they are undertheorized, and therefore open to conscious or unconscious abuse.

This Article has argued that similar concerns drive Justice Scalia and other originalists to indulge in historicism in cases where, from an originalist point of view, the question presented deals with objective morality, not historical contingency. As it has been reconstructed here, that move is not purely originalist, but at least holds promise of stability and institutional humility. These historicists give up too soon. The epistemic challenges that confront judges in these constitutional cases are similar in character to those confronted by all who pursue the truth. For example, philosophers have long recognized the inherent epistemic challenges to objectivity in the sciences, a result of our sensorial nature and essential subjectivity.<sup>121</sup> Justice Scalia and others

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judgment of 'the legislatures that have recently addressed the matter' and concluded that death is not a suitable punishment for a mentally retarded criminal.".)

118. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954).

119. See, e.g., *Roper*, 543 U.S. at 569 (reviewing scientific literature on the cognitive capacities of adolescents); *Atkins*, 536 U.S. at 317-21 (discussing scientific literature on the decisional consequences of limited mental development).

120. Long a distraction for philosophers of language and mind, this is a hot issue in current debates about the "Universal Moral Grammar," a parallel to Noam Chomsky's Universal Grammar, which some argue reflects a ubiquitous cognitive structure for the comprehension and processing of moral and ethical questions. See, e.g., MARC D. HAUSER, *MORAL MINDS: HOW NATURE DESIGNED OUR UNIVERSAL SENSE OF RIGHT AND WRONG* (2006); John Mikhail et al., *Toward a Universal Moral Grammar*, in *PROCEEDINGS OF THE TWENTIETH ANNUAL CONFERENCE OF THE COGNITIVE SCIENCE SOCIETY 1250* (Morton Ann Gernsbacher & Sharon J. Derry, eds., 1998).

121. This form of skepticism has its roots in Plato's parable of the cave. See PLATO, *REPUBLIC*, 514a-18a. Descartes rehabilitated it as a direct epistemic critique of the sciences. See RENÉ DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY* 12, 17-23, reprinted in *DISCOURSE ON METHOD AND MEDITATIONS ON FIRST PHILOSOPHY* 59 (Donald A. Kress trans., 4th ed. 1998). Subjectivist concerns reappeared with new force in the Twentieth Century with cultural critiques of scientific process. See, e.g., THOMAS S. KUHN, *THE STRUCTURE OF*

committed to finding the true answers to such questions as “What is cruel?” may find some guidance from the work done by their fellow travelers in other fields.

The most persuasive solutions to epistemic challenges in the sciences conclude that what we mean by “objectivity” is “intersubjectivity.”<sup>122</sup> While a full argument for this position is beyond the scope of this Article,<sup>123</sup> the insight is straightforward. In the absence of Platonic capacities that would allow us direct access to the true nature of the physical world, the best path to truth is through substantive and open exchange with others who have an interest in the answer. The disciplinary effects of a community governed by appropriate rules of exchange result in the best approximation of Platonic objectivity we can ever achieve in the sciences. Applying these insights to normative problems leads to the conclusion that intersubjectivity *is* objectivity when the questions posed concern the world of human intercourse.

Embracing intersubjectivity as objectivity is hardly revolutionary. The same intuition underlies democratic politics, justifying truth claims by reference to a discursive process that starts in civil society and ends in law and official policy.<sup>124</sup> It is commonplace in the overarching structures of legal procedure<sup>125</sup> and appears frequently as a response to more fine-grained problems of evidence.<sup>126</sup> It is, then, no surprise that a judge confronted with her constitutional duty to apply the objective moral language of the Eighth Amendment, would consider the learned views and opinions of others who have engaged the same questions, without regard to national borders. They are, after all, as Justice Breyer has said, human beings confronting problems similar to our own.<sup>127</sup> That is sufficient qualification to provide them a voice in any

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SCIENTIFIC REVOLUTIONS (3d ed. 1996) (arguing that scientific knowledge is a function of community endorsed “received beliefs”).

122. See, e.g., JÜRGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 1-64, 113-39 (Jeremy J. Shapiro trans., Beacon Press 1971) (1968); DAVID L. HULL, SCIENCE AS A PROCESS: AN EVOLUTIONARY ACCOUNT OF THE SOCIAL AND CONCEPTUAL DEVELOPMENT OF SCIENCE (1988).

123. This position is developed more fully in Gray, *supra* note 9.

124. See generally HABERMAS, *supra* note 108, at 82-193; Jürgen Habermas, *On the Internal Relation Between the Rule of Law and Democracy*, 3 EUR. J. PHIL. 12 (1995); Jürgen Habermas, *Three Normative Models of Democracy*, 1 CONSTELLATIONS 1 (1994) (describing the coherent forms of discursive rationality that pervade democratic societies).

125. For example, this is the fundamental structure of jury deliberations and verdicts.

126. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593-94 (1993) (establishing the legal importance of peer review and general acceptance in the scientific community as factors in evaluating the admissibility of expert scientific evidence).

127. Scalia-Breyer Debate, *supra* note 7; see also Ginsburg ASIL Address, *supra* note 11, at 353 (“[J]ust as lawyers can learn from each other in multinational transactions and bar associations, judges, too, can profit from exchanges and associations with jurists elsewhere.”); O’Connor ASIL Address, *supra* note 16, at 350 (“[T]here is much to learn from other distinguished jurists who have given thought to the same difficult issues we face

circumstance where similar issues arise, though, obviously, relevance does not determine weight.<sup>128</sup>

This, then, is the fundamental core of the originalist case for comparativism where the question presented implicates objective moral language embedded in the Constitution. Our Founders and their audience would, as moral realists, have read these portions of the text as referring to objective moral truths. An originalist who is committed to reading the Constitution for what it meant when written must, then, accept the fact that the borders imposed by these portions of the document are objective, not historical. In most cases, issues of ethics and morality are left to the elected branches under the Constitution. However, in the few cases where ultimate authority over these questions are reserved to the courts by the incorporation of moral language into the text of the Constitution, judges cannot revert to historicism or hide behind broad claims of institutional humility. Rather, they must embrace their assigned role and enforce moral limitations on the elected branches imposed by the Constitution itself. In the absence of oracular insight, this is a task that can only be approached in an intersubjective mode by consulting a diversity of opinions and sources. The opinions of foreign courts that have engaged the same issues have obvious relevance in such a pursuit. This conclusion must not be overstated. Listening does not entail deference. Foreign views on cruelty and liberty, like those of our Founders, should be heard when relevant, but they are only one voice in the conversation. Furthermore, the weight of foreign voices, like those of our Founders, must be measured according to considerations of interest and relevance.<sup>129</sup> While Herculean in aspect,<sup>130</sup> these tasks are well within the wheelhouse of judges and lawyers, who make a living from such practices.

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here.”); O’Scannlain, *supra* note 20, at 1907 (acknowledging that in limited cases judges may gain valuable insight from foreign practice and precedent).

128. As with most of what appears in the final Part of this Article, this requires more elaboration in response to challenges from Justice Scalia and others who rightly demand a coherent explanation for how a judge can determine how much persuasive or precedential force various international sources should carry. *See* Scalia-Breyer Debate, *supra* note 7.

129. *See* Glensy, *supra* note 3, at 401-40 (describing criteria for selecting, evaluating, and applying foreign legal sources).

130. I invoke Ronald Dworkin’s Judge Hercules intentionally, *see* DWORKIN, *supra* note 76, at 105-30, both to acknowledge the practical challenges inherent in the theory of constitutional interpretation suggested here and to point out a significant distinction between his aspirational approach, which requires positing an autonomous cultural omniscience, and discourse theory, which, though aspirational, does not require an appeal to superhuman capacities and provides clear regulative ideals, which can be deployed for both diagnostic and practical purposes.

CONCLUSION: FUTURE CHALLENGES FOR A UNIFIED THEORY OF  
CONSTITUTIONAL COMPARATIVISM

This Article has argued that the fundamental tenets of originalism commit its adherents to refer to foreign law when engaging a narrow band of constitutional questions. The Constitution contains universalist language that, read for its original meaning, refers to objective moral truths. Without substituting meaning for intention, the originalist is bound to read these sections of the document for their objective content. Accepting that burden raises many more questions than it answers, of course. In particular, the pursuit of moral truth presents significant epistemic challenges that have pushed Justice Scalia and others to substitute democratic theory for originalist orthodoxy. While this move may have some appeal, it is nevertheless a sleight of hand. In exposing the trick this Article has revealed common ground for originalists and those inclined to view the Constitution as a living document. What they share, or must share, is a commitment to read the moral language of the Constitution for what it actually means. This is a daunting enterprise, but, as this Article has argued, partisans of both views should agree that the task requires understanding the actual content of “cruelty” and “liberty.” This imperative is not met by equivocating to the opinions of modern scholars or to those of our predecessors.

By using contemporary debates about constitutional comparativism to suggest an internal connection between orthodox originalism and approaches to constitutional interpretation more frequently associated with living constitutionalists, this Article has aspired to show an internal connection between apparently opposing approaches to constitutional theory endorsed by originalists and living constitutionalists. In so doing, however, it has done relatively little to chart and occupy this common ground, and certainly falls well short of presenting a complete theory of constitutional comparativism. While elaboration of such a theory is well beyond the modest goals of this work, it is worth a few moments to describe in broad strokes some of the major challenges that a more complete theory must address, including concerns about the institutional competence of courts to engage in—or to approximate—discursive processes usually reserved for the political branches and civil society.

First, all theories of constitutional interpretation must provide a coherent and workable solution to the epistemic challenges inherent in attempts to divine the truths that fill abstract moral concepts contained in the text. Comparativist approaches are no different. Ronald Dworkin has met this challenge by appeal to an über-anthropologist/nomologist, Judge Hercules, who is capable of reaching a determinate outcome in any case by applying his powers of lawyerly thinking to a complete knowledge of relevant moral norms, social practices,

and precedents.<sup>131</sup> Justice Scalia posits a similar figure, who might appropriately be dubbed “Judge Historices,” endowed with the same capacities as Judge Hercules, but whose focus of inquiry is limited to a particular period.<sup>132</sup> While the success of these efforts is subject to debate on theoretical and practical grounds, they at least attempt to meet epistemological demands.

To earn a place at bench and bar the program of constitutional comparativism outlined here also must meet these demands. It does so by appeal not to an ideal practitioner, but to an ideal community practice. While in need of considerable elaboration and defense, the core insight is that objectivity is a function of intersubjectivity. Linking knowledge about normative truths to intersubjectivity prescribes a practice of judges’ approximating, as best they can, the results of idealized intersubjective events rather than the insights of an intellectual demigod. It also provides a box of analytic tools that judges may deploy to critique the products of legislatures and executives, looking skeptically at results reached by exclusion.<sup>133</sup> There is, of course, tremendous potential for such a program to go wrong, as a result of abuse or misguided goodwill. Properly regulated, however, those dangers are far fewer than those posed by the approaches endorsed by originalists and many contemporary comparativists precisely because they are subject to a greater range of public appeals. However, because those appeals are made to judges insulated from the political process, the theory outlined here hopes to avoid the institutional hysteria that frequently prevails in Article I and Article II institutions.

As Justice Scalia has rightly pointed out, any program of constitutional comparativism must also provide a coherent and workable theory for determining what foreign views to consider and how much weight to give them.<sup>134</sup> Justice Breyer has met this challenge by drawing a distinction between sources he considers and sources he must rely upon as precedent.<sup>135</sup> Without further elaboration and justification, this distinction is deeply dissatisfying. The program outlined here provides some hope to do better by appeal to interest as a way to measure the spectrum of potential weight that foreign views might have in domestic constitutional litigation.

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131. See DWORKIN, *supra* note 76, at 105-30.

132. Justice Scalia humbly admits that he may not be adequate to the task. See Scalia, *supra* note 56, at 860-61. While few others would question the capacity of Justice Scalia and his brethren to accomplish “Historiclesian” tasks, there is no doubt that heavy caseloads and ever-shrinking periods of deliberation impose practical limits on the ability of judges to pursue the complete view of history necessary to decide the hard cases. *Id.*

133. Application of these tools may sometimes favor the modern over the ancient, but only insofar as our national history is one of expansion of opportunities to participate in public life and meaningful extension of those opportunities to broader swaths of Americans. See JÜRGEN HABERMAS, *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* 203 (Ciaran Cronin & Pablo De Greiff eds., 1998).

134. See Scalia-Breyer Debate, *supra* note 7.

135. See *id.*

Like all constitutional theories, a theory of constitutional comparativism that steps away from historicist anchors must provide some assurances of stability over time. While further elaboration is necessary, the intersubjective approach outlined here meets this demand by clarifying a distinction between stability and ossification. With this distinction in place, commitments to practice, in combination with the inherent inertia and conservatism of societies engaging fundamental moral and ethical issues, provide some assurance of stability without excluding the possibility that we can overcome illusions and injustices of both historical and contemporary vintage.

Finally, allowing unelected judges to engage fundamental normative questions presents significant concerns about institutional competence. Some of these worries have been captured in the literature on countermajoritarian debates.<sup>136</sup> Others have provided the fuel for less esoteric contests over judicial activism and term limits. To be persuasive in and out of the academy, any theory of constitutional comparativism, including the one proposed here, must provide some justification for judges' engaging in practices that look legislative, yet are not subject to the electoral checks that control the power of the legislature and the executive. Part of the response to these concerns is banal: as a matter of fact our Constitution commits these issues to constitutional courts; it simply would be a derogation of institutional duty to refuse that burden. Part of the response poaches on the weaknesses of the political branches and their vulnerability to the pressures and influences for which life tenure provides some inoculation. Much of the rest is accomplished by elaborating the role of constitutional judges as moderators and referees, charged with evaluating and regulating the products of legislative and executive action.

All of the foregoing requires significant development, of course, but in closing it is imperative to recognize that the requirements set forth above do not combine into a demand for perfection. Justice Scalia himself recognizes that his appeal to historicism is the lesser of competing evils.<sup>137</sup> This Article has elaborated his departure from originalist orthodoxy and, in so doing, indicated a purer approach to difficult constitutional cases. The proof that this approach is also a lesser evil is left for another day. By confining itself to originalism, this Article also has not had occasion to address the diversity of alternative theories of constitutional interpretation, each of which present the question of

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136. See, e.g., ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-18 (2d ed. 1986); Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 *GEO. WASH. L. REV.* 1373 (1998); Friedman, *supra* note 86; Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 *IOWA L. REV.* 1287 (2004); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 *MICH. L. REV.* 245 (1995).

137. Scalia, *supra* note 56, at 862-65.

transjudicialism in a unique light. These too are issues left for another day. For today, it will be enough if this Article has succeeded in casting the present debate over constitutional comparativism in a new light while setting the stage for future discussion.

