

## Essay: Why Justice Scalia should be a Constitutional Comparativist . . . Sometimes

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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>1</sup>

The proper role of international law in domestic constitutional adjudication is a hot issue in legal circles and beyond,<sup>2</sup> particularly in light of attacks on an “activist” judiciary presently the fad

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<sup>1</sup> *Roper v. Simmons*, 125 S. Ct. 1183, 1217, 1225-26 (2005) (Scalia, J., dissenting) (internal citations omitted). Justice Thomas has expressed similar sentiments. *See, e.g., Foster v. Florida*, 537 U.S. 990, 991 (2002) (Thomas, J., concurring in denial of *certiorari*). A full discussion of Justice Thomas’s views is reserved for later contributions to this series.

<sup>2</sup> *Id.* at 1206 (O’Connor, J., dissenting) and 1217, 1225-26 (2005) (Scalia, J., dissenting); *Foster v. Florida*, 537 U.S. 990, 991 (2002) (Thomas, J., concurring in denial of *certiorari*); *Atkins v. Virginia*, 536 U.S. 304, 347-48 (2002) (Scalia, J., dissenting); *Knight v. Florida*, 528 U.S. 990, 997-98 (1999) (Breyer, J., dissenting from denial of *certiorari*); *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting); *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring); American Justice for Americans Citizens Act, H.R. 1658, 109<sup>th</sup> Cong. § 3 (2005); Constitution Restoration Act of 2004, S. 2323, 108<sup>th</sup> Cong. (2004); Hearings of Nomination of John G. Roberts as Chief Justice of the Supreme Court: Hearing Before the Senate Judiciary Comm., 109<sup>th</sup> Cong. (Sept. 12, 2005) (exchange between then Judge Roberts and Senator Dewine) & (Sept. 13, 2005) (exchange between then Judge Roberts and Senator Kyl); Judith Resnik, *Law’s Migration, American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L. REV. 1564, 1567-74 (2006); Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 Va. J. Int’l L. 357 (2005); Ruth Bader-Ginsburg, Keynote Address: *A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication*, 99 Am. Soc’y Int’l L. Proc. 351 (2005) (“Ginsburg ASIL Address”); Vincent J. Samar, *Justifying the Use of International Human Rights Principles in American Constitutional Law*, 37 Colum. Hum. Rts. L. Rev. 1 (2005); Diarmuid F. O’Scannlain, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?*, 80 Notre Dame L. Rev. 1893, 1907-08 (2005); Roger Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. Rev. 639 (2005); Antonin Scalia, Keynote Address: *Foreign Legal Authority in the Federal Courts*, 98 Am. Soc’y Int’l L. Proc. 305 (2004) (“Scalia ASIL Address”); Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, 27 Harv. J. L. & Pub. Pol’y 431, 441-42 (2004); Harold Koh, *International Law as Part of Our Law*, 98 Am. J. Int’l L. 43, 54 (2004); Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 Ga. J. Int’l & Comp. L. 421 (2004); Stephen Breyer, Keynote Address, 97 Am. Soc’y Int’l L. Proc. 265 (2003) (“Breyer ASIL Address”); Roger Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 Va. J. of Int’l L. 675, 793 (2003); 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); Sandra Day O’Connor, Keynote Address, 96 Am. Soc’y Int’l L. Proc. 348, 349-50 (2002) (“O’Connor ASIL Address”), David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. Rev. 539, 551 (2001); Antonin Scalia, Keynote Address, American Enterprise Institute Feb. 21, 2006 (complete video available at [www.cspan.org](http://www.cspan.org), incomplete transcript available at <http://www.aei.org/events/filter.all,eventID.1256/transcript.asp>) (“Scalia AEI Address”); Association of

among pundits, politicians,<sup>3</sup> and pulpitarrians.<sup>4</sup> While the debate has been slow-roasting for decades in judicial and academic circles, the top blew off the pot during the 2003 and 2004 Supreme Court terms “[w]hen [Justice] Kennedy, who is hardly liberal, started citing these international sources [and] the subject exploded in the broader political world.”<sup>5</sup>

It is no surprise to his fans or critics that Justice Antonin Scalia has been at the front of the contest over use of foreign sources. In written decisions,<sup>6</sup> public speeches,<sup>7</sup> and an unprecedented debate on the topic with Justice Breyer,<sup>8</sup> Justice Scalia has drummed a regular beat against the use of contemporary foreign law materials when interpreting the United States Constitution.<sup>9</sup> This essay provides a critical exegesis of his position and argues that in a narrow field of constitutional cases,

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Constitutional Law, *The Constitutional Relevance of Foreign Court Decisions: A Conversation Between Justice Breyer and Justice Scalia*, January 13, 2005 (complete video available at [www.cspan.org](http://www.cspan.org), complete transcript available at <http://domino.american.edu/AU/media/mediaref.nsf/0/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>) (“Scalia-Breyer Debate”); Jeffrey Toobin, *Swing Shift*, THE NEW YORKER, Sept. 12, 2005, at 42.

<sup>3</sup> See, e.g., H.R. 4118, 108<sup>th</sup> Cong. § 3 (2004) (“Neither the Supreme Court of the United States nor any lower Federal court shall, in the purported exercise of judicial power to interpret and apply the Constitution of the United States, employ the Constitution, laws, administrative rules, executive orders, directives, policies, or judicial decisions of any international organization or foreign state, except for the English constitutional and common law or other sources of law relied upon by the Framers of the Constitution of the United States.”); H.R. 568, 108<sup>th</sup> Cong. (2004) (“[I]t is the sense of the House of Representatives that judicial 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 are incorporated into the legislative history of laws passed by the elected legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United States.”); Constitution Restoration Act of 2004, S. 2323, 108<sup>th</sup> Cong. (2004).

<sup>4</sup> Jeffrey Toobin, *Swing Shift*, *supra* note 2 at 42.

<sup>5</sup> Toobin, *Swing Shift*, *supra* at note 2 at 43 (quoting Norman Dorsen).

<sup>6</sup> See, e.g., *Roper v. Simmons*, *supra* note 1 at 1225-26 (2005) (Scalia, J., dissenting); *Atkins v. Virginia*, 536 U.S. 304, 347-48 (2002) (Scalia, J., dissenting).

<sup>7</sup> Scalia, ASIL Address, *supra* note 2; Scalia, AEI Address, *supra* note 2.

<sup>8</sup> Scalia-Breyer Debate, *supra* note 2.

<sup>9</sup> Justice Scalia is neither the only opponent to the use of contemporary international law in constitutional cases on the Court nor the only originalist among the nine. Justice Thomas in particular has expressed his opposition on originalist grounds. See, e.g., *Knight v. Florida*, *supra* note 2 at 990. Cf. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2844 (2006) (Thomas, J., dissenting). Justice Thomas’s views will be addressed at greater lengths in later essays in this series. While they have yet to address the issue head on, one suspects that Chief Justice Roberts and Justice Alito will also fall closer to Justice Scalia and Justice Thomas than to other members of the Court on this question. The author waits with the crowd for further word.

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 two sections of the essay outline positions adopted by other members of the Court in favor of constitutional comparativism. With this frame drawn, the next section elaborates Justice Scalia's commitment to originalism as a theory of constitutional interpretation and explains his opposition to the use of contemporary foreign materials when interpreting the United States Constitution. The section also responds to some of Justice Scalia's more prominent critics, arguing that their attacks misunderstand the fundamentals of Justice Scalia's view and, therefore, fail to provide argumentative clash. The third section of the essay adopts a novel approach, taking a position within originalism and arguing that, on pains of contradiction, originalists must take into account contemporary views, foreign and domestic, in a limited set of constitutional cases where the meaning of the document's universalist language is at stake. The fourth section 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 section provides a schematic solution to this epistemic challenge and indicates the proper role for international law in a complete theory of constitutional interpretation.<sup>10</sup>

### 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 active proponents of what David Fontana calls "positive" "ahistorical

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<sup>10</sup> Because the goals of this essay 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," August 15, 2006, (unpublished manuscript on file with author).

comparativism.”<sup>11</sup> Their views spring from the premise that interpreting the Constitution is not an exclusively historical enterprise. 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 21<sup>st</sup> century, not as fixed forever by 18<sup>th</sup> century understandings.<sup>12</sup>

The contest that Justice Ginsburg identifies is at the core of debates between originalists and advocates of a “living Constitution.”<sup>13</sup>

The contemporary stink over the use of foreign sources in constitutional adjudication is most directly attributable to Justice Kennedy<sup>14</sup> and his opinions in *Lawrence v. Texas*<sup>15</sup> and *Roper v. Simmons*.<sup>16</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 in the absence of contemporary events and circumstances. Given this view, Justice Kennedy is committed to considering foreign sources where doing so enhances the capacity of the Court to determine the

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<sup>11</sup> David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 551 (2001).

<sup>12</sup> Ginsburg ASIL Address, *supra* note 2 at 355; *see also* *Roper v. Simmons*, *supra* note 1 at 1205 (2005) (Stevens, J., concurring with Ginsburg, J.) (rejecting the view that “the meaning of the Eighth Amendment had been frozen in when it was originally drafted”); *id.* at 1206-07 (O’Connor, J., concurring) (“It is by now beyond serious dispute that the Eighth Amendment’s prohibition of ‘cruel and unusual punishments’ is not a static command. Its mandate would be little more than a dead letter today if it barred only those sanctions—like the execution of children under the age of seven—that civilized society had already repudiated in 1791.”).

<sup>13</sup> Etymologically and historically the idea that the Constitution is a living entity traces directly to Justice Holmes’s opinion in *Missouri v. Holland*, 252 U.S. 416, 433 (U.S. 1920) (“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.”).

<sup>14</sup> *Swing Shift*, *supra* note 2.

<sup>15</sup> 539 U.S. 558, 562-579 (2003).

<sup>16</sup> 125 S.Ct. 1183, 1187-1204 (2005).

scope of objective constitutional standards or to put into perspective normative commitments held by our forbears, ancient and recent.

While neither *Lawrence* nor *Roper* express any concern for what foreign nations may think of United States courts, Justice Kennedy has elsewhere indicated that international reputation may provide a reason for domestic courts to refer to foreign materials in domestic constitutional litigation.<sup>17</sup> Decisions of United States courts, and particularly the Supreme Court, frequently are cited by foreign courts.<sup>18</sup> If domestic courts fail to reciprocate when it is relevant, then the United States risks losing its voice on issues of international concern and suffers a diminishment in international standing for its diffidence. In light of this, Justice Kennedy has voiced the view that domestic courts ought to cite foreign courts when relevant, both in order to preserve our position in the international community on questions of international significance and as a matter of reciprocity.<sup>19</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>20</sup> There he emphasized that the potential relevance of foreign materials in domestic cases is derived from two phenomena. The first is globalization.<sup>21</sup> The second is the spread of democracy and human rights.<sup>22</sup> The intersection of these two has internationalized interest in many of the “ancient and unchanging ideals” embedded in the United

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<sup>17</sup> See Toobin, *Swing Shift*, *supra* note 2 at 50 (quoting Justice Kennedy).

<sup>18</sup> O'Connor ASIL Address, *supra* note 2 at 350.

<sup>19</sup> Toobin, *Swing Shift*, *supra* note 2 at 50.

<sup>20</sup> Scalia-Breyer Debate, *supra* note 2.

<sup>21</sup> *Id.*; see also Breyer ASIL Address, *supra* note 2 at 265-66.

<sup>22</sup> Scalia-Breyer Debate, *supra* note 2; see also Breyer ASIL Address, *supra* note 2 at 266.

States Constitution.<sup>23</sup> As a result, “human beings, called judges” in many countries “have problems that often, more and more, are similar to our own.”<sup>24</sup> They deal with similar texts and, like domestic courts, “are trying to protect human rights . . . and democracy.” While these cases can never provide a perfect analogue to domestic cases, and certainly are not binding,<sup>25</sup> Justice Breyer maintains that references to foreign materials are frequently relevant as models and sources of data when domestic litigation implicates rights or issues of active liberty.<sup>26</sup>

Though she has left the Court, Justice O’Connor’s views in myriad issues have had broad influence and promise to remain significant in domestic constitutional jurisprudence. Her willingness to consider foreign materials is no exception. Like Justice Breyer’s, globalization also 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>27</sup> In light of these conditions, domestic decisions may have significant impact beyond country borders. Domestic judges may also “learn from other distinguished jurists who have given thought to the same difficult decisions that we face here.”

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<sup>23</sup> Scalia-Breyer Debate, *supra* note 2.

<sup>24</sup> *Id.* This idea of parallelism is common in defenses transnational jurisprudence. See, e.g., Ginsburg ASIL Address, *supra* note 2 at 353; O’Scannlain, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?*, *supra* note 2 at 1907-08; Wald, *The Use of International Law*, *supra* note 2 at 441-42 (2004); O’Connor, ASIL Address, *supra* note 2 at 349-50.

<sup>25</sup> Knight v. Florida, *supra* note 2 at 997-98 (Breyer, J., dissenting from denial of *certiorari*) (“I believe their views are useful even though not binding.”)

<sup>26</sup> I take this phrase from STEPHEN BREYER, ACTIVE LIBERTY (2005).

<sup>27</sup> O’Connor, ASIL Address, *supra* note 2.

Justice O'Connor restated her commitment to the use of foreign materials in *Roper v. Simmons*.<sup>28</sup> Though Justice O'Connor dissented she maintained her view that the use of foreign materials is particularly appropriate in Eighth Amendment cases where the Court has a "constitutional obligation" to exercise its independent moral judgment<sup>29</sup> in order to determine whether "the evolving standards of decency that mark the progress of a maturing society" place a particular punitive practice in the category of the "cruel and unusual."<sup>30</sup> While not compelling or determinative of evolving standards of decency, Justice O'Connor holds a place for foreign materials to confirm objective indications of domestic standards and the independent moral calculus of the Court.<sup>31</sup>

The Court's 2003 decision in *Grutter v. Bollinger* held constitutional the University of Michigan Law School's race-sensitive admissions system. Writing in concurrence, Justice Ginsburg pointed out that the Court's holding "accords with the international understanding of the office of affirmative action."<sup>32</sup> This was not a surprise. Four years earlier in the Fifty-First Cardozo Memorial Lecture,<sup>33</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, including the Universal Declaration on Human Rights,<sup>34</sup> the Convention on the Elimination of All Forms of Racial Discrimination,<sup>35</sup> and the Convention on the Elimination of

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<sup>28</sup> 125 S.Ct. 1183, 1206 (2005) (O'Connor, J., dissenting).

<sup>29</sup> 125 S.Ct at 1207, 1209.

<sup>30</sup> *Id.* at 1207 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

<sup>31</sup> *Id.* at 1215-17.

<sup>32</sup> *Grutter v. Bollinger*, 538 U.S. 306, 344 (Ginsburg, J., concurring).

<sup>33</sup> Ruth Bader Ginsburg and Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999).

<sup>34</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp. No. 1, U.N. Doc. A/810 (1948).

<sup>35</sup> International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, opened for signature Mar. 7, 1966 (entered into force Jan. 4, 1969).

All Forms of Discrimination Against Women.<sup>36</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, describing her view that the Constitution is a document with universal aspirations, designed to be sensitive to international and foreign laws that seek the same ends.<sup>37</sup> In keeping with this view, domestic judges ought to refer to international sources in order to 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>38</sup> Of course, “it’s important that these things not be binding.”<sup>39</sup>

### Justice Scalia’s Opposition to Constitutional Comparativism

From the opposing camp we proceed to the most contested ground, host to the bloodiest battles: the Eighth Amendment’s prohibition on cruel and unusual punishment. The Court’s recent Eighth Amendment jurisprudence has been guided by three principles announced in *Trop v. Dulles*: that “the words of the Amendment are not precise;” “that their scope is not static;” and that the “Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>40</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>41</sup> In *Atkins v. Virginia* and *Roper v. Simmons*, the Court

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<sup>36</sup> Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13, opened for signature Dec. 18, 1979 (entered into force Sept. 3, 1981).

<sup>37</sup> Justice Ginsburg sees particular significance in the Declaration of Independence’s stated “Respect to the Opinions of Mankind.” See Ginsburg ASIL Address, *supra* note 2 at 352.

<sup>38</sup> *Id.* quoting *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring).

<sup>39</sup> Justice Breyer in his 2005 debate with Justice Scalia. Scalia-Breyer Debate, *supra* note 2.

<sup>40</sup> *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

<sup>41</sup> See, e.g., *Sanford v. Kentucky*, 492 U.S. 361, 370-71 (1989) (failing to find a national consensus “sufficient to label . . . cruel and unusual” the death penalty for offenders between the ages of 16 and 18); *Penry v. Lynbaugh*, 492 U.S. 302, 334 (failing to find national consensus against executing mentally retarded offenders); *Atkins v. Virginia*, *supra* note 2 at 314-16 (finding national consensus against execution of mentally retarded offenders); *Roper v. Simmons*, *supra* note 1 at 564-68 (finding national consensus against execution of offenders under the age of eighteen).

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>42</sup> and juveniles under the age of eighteen.<sup>43</sup> Justice Scalia dissented in each case, both from the result and to disclaim the majority's references to foreign materials.<sup>44</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 high profile, prolific, elegant, or influential defender of originalism than Justice Scalia.<sup>45</sup> In his view, originalism is a species of textualism. Textualists take the view 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 only to interpret and apply the Constitution and legislation as it is written.<sup>46</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>47</sup>

The more limited authority afforded to Article III judges is, in the Justice Scalia's view, a function of the United States' conversion to republican democracy and the accompanying distribution of authority between three distinct branches of government. In systems where judges are representatives of crown or legislature they have derivative authority to, in contemporary

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<sup>42</sup> *Atkins v. Virginia*, *supra* note 2 at 316 n. 21.

<sup>43</sup> *Roper v. Simmons*, *supra* note 1 at 1198-1200.

<sup>44</sup> *Id.* at 1217, 1225-26 (Scalia, J., dissenting); *Atkins v. Virginia*, *supra* note 2 at 347-48 (Scalia, J., dissenting).

<sup>45</sup> *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION 144 (1997). Justice Thomas is also a stalwart and academically rigorous originalist. While this essay focuses on Justice Scalia, one cannot ignore the contributions of Justice Thomas to the general influence of originalism in the courts and in public discourse. While many of the arguments made here have equal force with respect to Justice Thomas's views, a full accounting of his position is beyond the scope of the present essay and is reserved for later work.

<sup>46</sup> *Id.* at 23-25.

<sup>47</sup> *Id.*

parlance, “make law.” United States judges, elevated and sequestered as they are, have none. That task is explicitly left to Congress alone by Article I, Section 1 of the Constitution.

Few have substantial objections to the idea that, as a matter of institutional democratic theory, judges should limit themselves to the interpretation and application of the laws<sup>48</sup>—though more than a few argue that it is folly to think that judges can and naïve to think that they do.<sup>49</sup> The real drama starts when those who might at first regard themselves as textualists are asked what it means “to interpret” and “to apply” a text. Strict constructionists argue that statutes and the Constitution should be interpreted literally and without regard to extra-textual considerations. Others take a more liberal view, taking account of the purposes of law and the consequences of competing interpretations.<sup>50</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>51</sup> Some materials are relevant to this endeavor and some are not. Notable in Justice Scalia’s category of the irrelevant is legislative intent. Ours is a system of laws, not men. To pursue legislative intent rather than interpreting *the law* as written would be to elevate men over the law. Pursuit of legislative intent may also veil judicial legislation. As a matter of fact, the many legislators who join to pass a law seldom share a single, unified intent. Moreover, the sources most cited as evidence of legislative intent actually reflect the opinions of a very few legislators, or sometimes none at all.<sup>52</sup> Attempts to find legislative intent

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<sup>48</sup> See, e.g., BREYER, ACTIVE LIBERTY, *supra* note 26 at 17.

<sup>49</sup> See, e.g., STANLEY FISH, DOING WHAT COMES NATURALLY, 87-119 (1989); *but see* RICHARD POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988) (arguing that objective meaning of text limits interpretation) and Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982) (arguing that continuity of interpretive community binds limits interpretation).

<sup>50</sup> See, e.g., BREYER, ACTIVE LIBERTY, *supra* note 26 at 17-18.

<sup>51</sup> In his 2005 debate with Justice Breyer, Justice Scalia put the point thus: “my theory of what I do when I interpret the American Constitution is I try to understand what it meant, what was understood by the society to mean when it was adopted.” Scalia-Breyer Debate, *supra* note 2.

<sup>52</sup> Committee reports come under particularly heavy fire from Justice Scalia. See A Matter of Interpretation, *supra* note 45 at 34-35.

therefore impose little actual discipline on judges. A judge seeking to establish a rule will find ample evidence to support the claim that what congress really meant is what the judge thinks it ought to have meant. Of course, 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, it is not for judges 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, 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>53</sup> For example, most legislation, and much of the Constitution, addresses particular problems. Only by understanding these problems can the original import and, therefore, the original meaning of the language be fully understood.<sup>54</sup> Similarly, the reasonable meaning of words of art and technical language incorporated into legal texts may be obscure without reference to other sources or 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>55</sup> Foreign sources are also relevant, though not dispositive, when

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<sup>53</sup> 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, 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 United States Constitution. I am entirely in debt to Bill Van Alstyne for illuminating this point for me.

<sup>54</sup> SCALIA, MATTER OF INTERPRETATION *supra* note 45 at 144.

<sup>55</sup> Scalia AEI Address, *supra* note 2; Scalia ASIL Address, *supra* note 2 at 305-06.

domestic courts must interpret international treaties to which the United States is party.<sup>56</sup> In regard to interpretations of domestic legislation, courts are entitled to consider foreign sources when the law in question provides a specific foothold in international law, such as in the Foreign Sovereign Immunities Act.<sup>57</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>58</sup> Beyond these limited cases, Justice Scalia argues that “modern foreign legal materials can never be relevant to an interpretation of—to the [original] meaning of—the U.S. Constitution.”<sup>59</sup>

Emphasis must be placed on “modern,” of course. Consistent with his views on original meaning, Justice Scalia allows that consideration of foreign materials that informed then-contemporary understandings of constitutional language may aid modern courts to understand the original meaning of the text.<sup>60</sup> In this regard, Justice Scalia has represented that he “probably use[s] more foreign legal materials than anyone else on the Court, with the possible exception of Justice Thomas [though o]f course they are all fairly old foreign legal materials, and they are all English.”<sup>61</sup>

Consistent with the foregoing, Justice Scalia, writing for the Court, famously has 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>62</sup> This view has been subjected to various attacks. Harold Koh, for example, has argued that Justice Scalia’s “[founding-interpretation] distinction

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<sup>56</sup> *Olympic Airways v. Husain*, 540 U.S. 644, 660-661 (2004) (Scalia, J., dissenting).

<sup>57</sup> Scalia ASIL Address, *supra* note 2 at 306 (citing 28 U.S.C. § 1605(a)(3)) (“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 . . .”).

<sup>58</sup> Scalia AEI Address, *supra* note 2; Scalia ASIL Address, *supra* note 2 at 307.

<sup>59</sup> Scalia ASIL Address, *supra* note 2 at 307.

<sup>60</sup> *Id.*; Scalia-Breyer Debate, *supra* note 2. In his address to the ASIL, 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 framer’s in 1791 that bear on the original meaning of the Fifth Amendment Confrontation Clause.

<sup>61</sup> Scalia ASIL Address, *supra* note 2 at 306; Scalia-Breyer Debate, *supra* note 2.

<sup>62</sup> *Printz v. United States*, 521 U.S. 898, 921 n.11 (1999); *see also* Scalia-Breyer Debate, *supra* note 2.

makes no sense,” principally because many constitutions of foreign nations and contemporary human rights documents are based on and use language similar to the United States’ Constitution; and, therefore, comparative analysis is just as relevant in contemporary interpretation as it was for the original founding.<sup>63</sup>

Such responses ignore the fundamentals of the originalist position and appear to rely on an application of the anachronistic fallacy. 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 were not part of the mix. Therefore, if one accepts the originalist’s contention that the beginning and end of 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>64</sup> Further, given the diversity of foreign views on many critical issues, reference to contemporary materials, like appeals to legislative intent, threaten to expand without warrant the powers of the judiciary.<sup>65</sup>

This is not to say that others on and off the court have not advanced compelling reasons to doubt the merits of Justice Scalia’s rejection of 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 essay adopts a novel approach, advancing an argument for constitutional comparativism internal to Scalian originalism. Specifically, it argues that, on pain of contradiction, Justice Scalia and other devotees of originalism may not limit

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<sup>63</sup> Harold Koh, *International Law as Part of Our Law*, 98 Am. J. Int’l L. 43, 54 (2004). Koh and others also smugly suggest 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 Reggio, *History of the Death Penalty*, in SOCIETY’S FINAL SOLUTION: A HISTORY AND DISCUSSION OF THE DEATH PENALTY 1, 3 (Laura Randa ed., 1997)). As with most anachronistic critiques, such attacks risk missing the point.

<sup>64</sup> Alford, *In Search of a Theory for Constitutional Comparativism*, *supra* note 2 at 654-55.

<sup>65</sup> Scalia AEI Address, *supra* note 2; Scalia ASIL Address, *supra* note 2 at 308-10; Scalia-Breyer Debate, *supra* note 2.

their interpretive inquiry to ancient materials in cases that implicate the Constitution’s universalist language.

### An Originalist Argument for Constitutional Comparativism

The United States Constitution is a complicated document that performs multiple tasks. Some are historical and constitutive. It proposes establishment of a country<sup>66</sup> and describes the formal requirements for ratification of that proposal.<sup>67</sup> It is a set of written instructions, providing technical details relating to, *inter alia*, the composition of the legislature<sup>68</sup> and the age requirements for various offices.<sup>69</sup> It is a principled organizational guide, establishing the responsibilities of the three branches.<sup>70</sup> It is also aspirational, describing the politico-ethical contours of the nation and moral limitations on governmental authority and action.<sup>71</sup> The language directed to this last purpose is notably grand, touching on universal norms of decency and right.<sup>72</sup> The Constitution exists to “form a more perfect union,” to “establish justice,” ensure “tranquility,” to “promote the general welfare,” and “to secure the blessings of liberty.” No matter its will to the contrary, a legislature cannot dictate punishments that are “cruel and unusual.” Neither can the executive deprive persons “of life, liberty, or property, without due process of law.” These are big ideas; and the constitutional language of rights and justice simply cannot be understood apart from the moral valance of the

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<sup>66</sup> U.S. CONST., pmbl.

<sup>67</sup> *Id.*, art. VII.

<sup>68</sup> *Id.*, art. I, §§ 1-3.

<sup>69</sup> *Id.*, art. I, §§ 2 & 3, art. II, § 1.

<sup>70</sup> *Id.*, art. I-VI.

<sup>71</sup> *See, e.g., id.*, pmbl., amend. V, amend. VIII, amend. XIV, § 1.

<sup>72</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 133, 185-86 (1977) (pointing out that the drafters of the constitution elected in these sections of the text to inscribe expansive moral limitations on government rather than specific technical regulations).

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>73</sup>

There is little doubt that late eighteenth century Americans were moral realists.<sup>74</sup> That is, they read portions of the Constitution as picking out objective and timeless moral truths. In particular, building on Blackstone's Commentaries and the work of seventeenth and eighteenth century liberals, the dominant view of our forebears at our founding was that justice and right in the world 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>75</sup> Nevertheless, certain passages, such as the Eighth Amendment prohibition on cruel and unusual punishment, indisputably attach to objective right. As an example, and 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>76</sup>

Given that the framers and their audience were moral realists it must be admitted that "cruel" originally meant to pick out 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

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<sup>73</sup> I invoke the distinction between "state" and "nation" with a purpose. Nations, as a people, are variously described, *see* BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1983), but the American Nation is rather 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.

<sup>74</sup> *See, e.g.*, SCALIA, *MATTER OF INTERPRETATION* *supra* note 45 at 146; Phillip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *YALE L.J.* 907 (1993); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 *U. CHI. L. REV.* 1127 (1987); Scalia, AEI Address, *supra* note 2 (responding to questions from the audience).

<sup>75</sup> Scalia, AEI Address, *supra* note 2 (responding to questions from the audience); *see also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849, 862-63 (1989).

<sup>76</sup> SCALIA, *MATTER OF INTERPRETATION* *supra* note 45 at 146. Justice Scalia goes on to suggest that "[the framers] were embedding in the Bill of Rights *their* moral values." This conclusion does not follow. The framers used the objective language of "cruelty." Each participant in the process of drafting and ratification may have had strong views on the content of "cruelty." However, from an originalist point of view their particular beliefs are of no consequence. Then, as now, "cruel" meant cruel. Full faith to originalism requires reading the Eighth Amendment for what it actually meant rather than for the subjective beliefs its various contributors and readers might have intended to capture in the text.

framers and other residents of late eighteenth century America thought was cruel. While they 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” meant then, as it does now, to pick out an objective moral category, then it is the court’s duty to discover the content of that category. Forgoing this search in favor of an inquiry into what the framers intended to capture with “cruel and unusual” either involves a category mistake<sup>77</sup> or requires 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 engage in moral inquiry when deciding Eighth Amendment cases.<sup>78</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, given democratic commitments to legitimacy and collective will formation, it seems improper for judges to usurp the elected branches, which have the political authority to resolve normative contests that arise in diverse societies.<sup>79</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 would be brought to

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<sup>77</sup> 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.”

<sup>78</sup> Scalia, AEI Address, *supra* note 2 (responding to questions from audience addressing moral and natural law foundations of the Constitution).

<sup>79</sup> SCALIA, MATTER OF INTERPRETATION *supra* note 45 at 9-14. This is a version of the counter-majoritarian dilemma, elaborated in Barry Friedman’s work, which stands as a principal challenge to constitutional comparativism. *See, e.g.,* Alford, *In Search of a Theory for Constitutional Comparativism*, *supra* note 2 at 641-45.

naught.”<sup>80</sup> According to this view, the moral text of the Constitution can only be read to refer to the moral opinions of 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 rides on fallacious equivocation, 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 a moral category that is “out there.” Yet when asked to interpret and apply the moral language of the Constitution, Justice Scalia takes the position that it means only what some of those living in 1791 America believed was right or, less powerfully, what they had not rejected as cruel.<sup>81</sup> On this view, “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 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>82</sup>

To see the point more clearly, it is worth considering a brief thought experiment. Imagine for a moment that, out on her habitual constitutional, Mary Mothes, mother, grandmother, wife, and

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<sup>80</sup> *Id.*

<sup>81</sup> SCALIA, MATTER OF INTERPRETATION *supra* note 45 at 146; Scalia, *Lesser Evil*, *supra* note 75 at 862-63. It is worth noting that on the matter of lashing, Scalia has acknowledged that “in a crunch[he] may prove to be a faint hearted originalist.” *See id.* at 864.

<sup>82</sup> Lawrence Lessig makes a similar point in his criticism of “one-step originalism.” 85 GEO. L. REV. 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 to fidelity to what was meant at the original writing (again, this raises troubling epistemic problems that cannot fully be attended to here). Originalists have an easy response, of course, which is that the Constitution includes terms of amendment. If we want to convert from the original meaning of the language, we know how.

D.A.R., stumbles across the moral truth poking out of the ground. Surprisingly light and compact, she quickly excavates it 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 actively engage the practice as a punishment. This is not to say that bastinado and other forms of corporal punishment are 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 various grounds, religious, deontological, and social. 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 its costs and benefits. Each of these groups has taken the day at different points 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 syllogism. They argue that if a punishment is cruel,<sup>83</sup> it is prohibited by the Eighth Amendment; that bastinado is cruel; and, by an application of modus ponens, the Eighth Amendment prohibits bastinado. Defenders of bastinado admit that there is now no contest as to 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

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<sup>83</sup> The rather more nuanced issue of what punishments are "unusual" is left aside for purposes of elegance with a notation that in Eighth Amendment terms is more than a statistical or demographic issue.

regarded as cruel by a significant group of Americans in 1791. They point out that bastinado was widespread in 1791; therefore, by application of a historical version of *expressio unius est exclusio alterius*, bastinado is not “cruel” in Eighth Amendment terms because a significant group of those who read “cruel” in 1791 would not have thought excluded lashing and other corporal punishment.

Faced with one of these new cases, what is an originalist to do? It is clear that, on pain of contradiction, 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 or 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 judicial task of interpretation from an originalist’s point of view.

### 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 means and recognizes that moral language in the Constitution has objective meaning, would interpret the Constitution by attempting to divine the subjective moral dispositions of 1791 Americans. The answer is that Justice Scalia is Odysseus.<sup>84</sup>

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<sup>84</sup> I am in debt to Travis LeBlanc for his lively riff on this theme.

In a now famous contribution to the canon, Jon Elster analogizes the Constitution to a ship's mast in Odysseus's escape from the sirens.<sup>85</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. To save them, 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. Odysseus was made weak by the chorus and begged his men to untie him. As ordered, however, they left him bound until they made safe passage.<sup>86</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. 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>87</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 would be brought to naught"<sup>88</sup> becomes clear.

As a matter of fact, there is broad disagreement on moral matters.<sup>89</sup> Some 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

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<sup>85</sup> JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 36-47 (1979).

<sup>86</sup> HOMER, ODYSSEY XII, 39.

<sup>87</sup> SCALIA, MATTER OF INTERPRETATION *supra* note 45 at 40.

<sup>88</sup> *Id.* at 146.

<sup>89</sup> *But see*, JAMES RACHELS, THE ELEMENTS OF MORAL PHILOSOPHY, 23-29 (2d. Ed. 1993) (arguing that there is broad agreement on core moral commitments and disagreements occur only at the margins).

Scalia's solution is to bind himself and these "abstract guarantees" to the moral views of the founders. While this is obviously a derogation 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*. In view of moral disagreements and 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.

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 the 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. Moreover, they are not elected and they enjoy life tenure, isolating them from the democratic process. Given this, if the moral content of abstract rights is left to judges, constitutional guarantees are likely to be both idiosyncratic and unstable. While the elected branches of the federal government and the legislatures of the many states 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.

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 content, 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' intent is a practical solution to an epistemic problem.<sup>90</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.

There is good reason to doubt the utility of historicism as a solution to the problem of predictability and stability. 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>91</sup> Some of the key players were even at odds with themselves.<sup>92</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, trading one epistemic problem for another. Second, even if the historicist move is not strictly an appeal to framers' intent, the fact of diversity 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.

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<sup>90</sup> 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, "The Care and Feeding of International Law," *supra* note 10.

<sup>91</sup> See generally The Federalist No. 54 (James Madison); PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON (1996), Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 424 ff. (1999).

<sup>92</sup> Mr. Jefferson famously wrestled with his own conscience in these matters. See Thomas Jefferson, *Notes on Virginia*, in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 173, 210 (Koch, et al., eds., 1944).

By contrast, diversity of opinion in 1791 bolsters the claim that the moral language of the Constitution should be read for its objective meaning. The Constitution is a product of committee work. 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 to the office of the President without having “attained to the Age of thirty five years,” the Third Amendment prohibition on the quartering of troops during peacetime “without the consent of the Owner.” 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 might serve to mask disagreements also demonstrates real agreement. While there was surely some disagreement as to what constitutes cruel punishment, all agreed that the Constitution prohibits 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 prohibition on cruel and unusual punishment. Justice Scalia has argued that no punishment is cruel or unusual in constitutional terms unless it was so for late Eighteenth Century residents of the colonies.<sup>93</sup> Since 1791, views on what is and is not cruel have shifted and many of these shifts have gained sufficient footing to achieve the status of moral truth. On the originalist’s

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<sup>93</sup> SCALIA, MATTER OF INTERPRETATION *supra* note 45 at 145-47; *Roper v. Simmons*, *supra* note 1 at 1218 (Scalia, J., dissenting). Justice Scalia cannot be accused of putting his intellectual commitments above his professional duties, however. Despite his belief that it is a “mistaken . . . jurisprudence,” *Roper v. Simmons*, 125 S.Ct. 1183, 1217 (Scalia, J., dissenting), when writing for the majority Justice Scalia has applied the metric of “evolving standards of decency” announced in *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). See *Stanford v. Kentucky*, 492 U.S. 361, 368 ff. (1989). Faith to theory aside, Justice Scalia has elsewhere admitted that, if faced with a particularly nauseating punitive practice, he might be inclined to a more “faint-hearted” originalism, though he doubts that the political branches would ever put him in such a position. See Scalia, *Lesser Evil*, *supra* note 75 at 862-64.

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 engaging contemporary semantic referents. Returning to the mind experiment, whether relying on Mary Mothes's incredible discovery or the "evolving standards of decency that mark the progress of a maturing society"<sup>94</sup> a proposed amendment that would allow the judiciary to read the Eighth Amendment as prohibiting punishments that are actually cruel would change the language of the Eighth Amendment not a wit. 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: those temptations of power, greed, that are fundamental to the human condition.

Interpreting the Constitution through the lens of historical relativism limits its moral content to the happenstance dispositions of those present when last it was ratified. For those more inclined to read the Constitution as a "living" document or as bound to objective norms, amendments are necessary only to change the language or substance of the Constitution. To conform constitutional language to actual rather than historical right, the originalist requires regular and almost constant amendment, even if only to re-ratify the same old language. Building in this structural requirement for frequent constitutional legislation has obvious impact on the Constitution's capacity to serve as a mast in the storm. Constant exposure to the political process provides a wealth of opportunity to change the content, of course, but it also reduces the sacred to the profane. Much of the authority

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<sup>94</sup> *Trop v. Dulles*, *supra* note 40 at 100-01.

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 and necessarily 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 was to incorporate objective moral content into the text. His historicism and attendant reliance on the amendment process reflects an underlying epistemic problem and a determination that, from a democratic point of view, the moral content of the Constitution should be determined by the elected branches of government 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 the Articles I and II.

The judiciary's critical constitutional function is to limit the actions of the elected branches according to limits set forth in the Constitution. If authority to determine the content of existing constitutional language is exclusively assigned to the elected branches through legislation or constant amendment 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 as 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, improperly, because 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.<sup>95</sup>

### How to be an Original Constitutional Comparativist

From the point of view of democratic theory there is little to dispute 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>96</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>97</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 the natural law presents serious epistemic problems. Judges are not oracles and any attempt by a court to reach an earnest view on "cruelty," for example, risks deteriorating into rank subjectivity.

Courts that take up this gauntlet must confront their epistemic limitations. However, if the foregoing is right then courts deciding cases that implicate the objective moral content of the Constitution must embrace the challenge rather than abdicating 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>98</sup> This view takes seriously the Constitution's intention to

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<sup>95</sup> By this I do not imply that the elected branches are necessarily vicious predators, though they sometimes are. In fact, each of the three branches has the potential to be wolf and lamb.

<sup>96</sup> JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS*, 168-93 (1996).

<sup>97</sup> *Id.*

<sup>98</sup> *See, e.g.,* *Lawrence v. Texas*, *supra* note 2 at 578-79 ("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.")

create a “more perfect union” and acknowledges that there is room for improvement.<sup>99</sup> Further pursuit is left for future generations within the objective boundaries of right described in the text and resolution of any particular case relies on “the evolving standards of decency that mark the progress of a maturing society.”

While some may take solace in the implied teleology, there is no warrant for a court to find the practices of contemporary institutions more humane than those of their predecessors based solely on fear of anachronism.<sup>100</sup> Further, 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 the Constitution to act as stable check on government action.

Another path might be for judges to exercise their independent judgment.<sup>101</sup> While faithful to originalism, such a strategy begs 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 both *Atkins* and *Roper* the Court considered scientific studies relating to the decisional capacities of the profoundly retarded and the profoundly young, and in *Brown* the Court famously considered studies demonstrating the deleterious and disparate impact of segregated educational institutions. While laudable as efforts by the Court to embrace its assigned constitutional duty,<sup>102</sup> reliance on scientific evidence presents its own epistemic challenges, particularly in regard to the selection and interpretation of evidence.

This essay 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

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<sup>99</sup> Ginsburg ASIL Address, *supra* note 2 at 355.

<sup>100</sup> SCALIA, MATTER OF INTERPRETATION *supra* note 45 at 44-47, 146.

<sup>101</sup> *Roper v. Simmons*, *supra* note 1 at 1192, 1194-98; *Roper v. Simmons*, *supra* note 1 at 1207 (O’Connor, J., dissenting); *Atkins v. Virginia*, *supra* note 2 at 321.

<sup>102</sup> *Roper v. Simmons*, *supra* note 1 at 1194-98; *Atkins v. Virginia*, *supra* note 2 at 317-21.

in objective morality. They give up too soon. The epistemic challenges that confront judges in these constitutional cases are similar in character to challenges that confront all others who pursue the truth. For example, philosophers of science have long recognized the inherent epistemic challenges to objectivity in the sciences that derive from the phenomenal limitations imposed by our sensorial nature and our essential subjectivity. Justice Scalia and others 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 substitute intersubjectivity for objectivity.<sup>103</sup> While a full argument for this position is beyond the scope of this essay,<sup>104</sup> the insight is straightforward. In the absence of Platonic capacities, the best path to truth is through substantive and open exchange with others who have an interest in the answer. The disciplinary effects of the community governed by appropriate rules of exchange result in the best approximation of objectivity we can ever achieve.

Embracing intersubjectivity as objectivity may appear shocking, but it 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>105</sup> It is frequently applied in the overarching structures of legal procedure<sup>106</sup> and appears frequently as a response to more fine-grained problems of evidence.<sup>107</sup> It is, then, no surprise that a judge confronted with her

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<sup>103</sup> See, e.g., DAVID L. HULL, *SCIENCE AS PROCESS* (1988); JÜRGEN HABERMAS, *SCIENCE AND HUMAN INTERESTS* 1-64, 113-139 (1972).

<sup>104</sup> This position is developed more fully in David Gray, “The Proper Care and Feeding of International Law: An Epistemic Role for International Law in Constitutional Interpretation,” *supra* note 10.

<sup>105</sup> See generally JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 96 at 82-193; Jürgen Habermas, *On the Internal Relation Between the Rule of Law and Democracy*, 3 *EUR. J. OF PHIL.* 12 (1995); Jürgen Habermas, *Three Normative Models of Democracy*, 1 *CONSTELLATIONS* 1 (1994).

<sup>106</sup> For example, this is the fundamental structure of jury deliberations and verdicts.

<sup>107</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 570, 592-93 (1993) (noting the importance of “peer review,” “the scrutiny of the scientific community,” and “general acceptance” in the scientific community as standards for evaluating the admissibility of expert scientific evidence).

constitutional duty to apply the objective moral language of the Eighth Amendment, say, would consider the learned views and opinions of others who have engaged the same questions, without regard to national borders. They are, after all “human beings” confronting problems “similar to our own.”<sup>108</sup>

This, then, is the fundamental core of the originalist’s case for comparativism in cases 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 picking out 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 these questions are reserved to the courts by the incorporation of moral language into the text, judges cannot revert to historicism or hide behind broad claims of democratic theory. Rather, they must embrace the challenge and enforce those moral limitations on the elected branches that are 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 those foreign courts which 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. Further, the weight of foreign voices, like those heard from our founders, must be

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<sup>108</sup> Scalia-Breyer Debate, *supra* note 2; *see also* Ginsburg ASIL Address, *supra* note 2 at 353; O’Scannlain, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?*, *supra* note 2 at 1907-08; Wald, *The Use of International Law*, *supra* note 2 at 441-42 (2004); O’Connor, ASIL Address, *supra* note 2 at 349-50.

measured according to considerations of interest and relevance,<sup>109</sup> which are well within the wheelhouse of judges and lawyers who make a living from such analyses.

This essay has argued that the fundamental tenets of originalism commit its adherents to refer to foreign law, among other contemporary sources, 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 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 essay has certainly raised more questions than it has answered. Judges remain to confront the epistemic challenges inherent in attempts to divine the truths that surround concepts like “cruelty” and “liberty.” In addition, allowing unelected judges to engage such questions presents significant concerns from a democratic point of view, such as those that arise from counter-majoritarian debates. Engaging foreign sources also raises nettlesome technical, but normatively significant questions, relating to, *inter alia*, weight and relevance that have not been adequately elaborated here.<sup>110</sup> Finally, by confining itself to originalism, this essay has not had occasion to address the diversity of alternative theories of constitutional interpretation that have a presence in the judiciary and the halls of academe, each of which present the question of transjudicialism in a unique light. These are all issues left for another day. The purpose of this essay

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<sup>109</sup> See Glensy, *Which Countries Count?*, *supra* at note 2.

<sup>110</sup> Justice Scalia made just this challenge to Justice Breyer in their 2005 debate on this topic. See Scalia-Breyer Debate, *supra* note 2.

is only to cast the present debate over constitutional comparativism in a new light and to set the stage for future debate and discussion.