2005

In Search of a Theory for Constitutional Comparativism

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IN SEARCH OF A THEORY FOR CONSTITUTIONAL COMPARATIVISM

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Constitutional comparativism—the notion that international and foreign material should be used to interpret the U.S. Constitution—is gaining currency. Yet proponents of this practice rarely offer a firm theoretical justification for the practice. This Article contends that constitutional comparativism should be examined from the perspective of constitutional theory. The use of comparative and international material must be deemed appropriate or inappropriate based on a particular judge's interpretive mode of constitutional analysis. The Article presents four classic constitutional theories—originalism, natural law, majoritarianism, and pragmatism—and addresses the propriety of constitutional comparativism under each theory. This theoretical approach goes far to explain why particular judges embrace comparativism, while others eschew it. In so doing, it grounds the debate in the larger framework of classic constitutional theory. It also anticipates the disquiet that constitutional comparativists will experience at the inadequacy of any existing constitutional theory to capture fully the comparative agenda. It therefore introduces the broad outlines of a comparative constitutional theory and judges such a theory based on established criteria for its saliency.

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INTRODUCTION

The notion of using comparative and international law to interpret the Constitution is gaining currency. All nine Justices have addressed the matter in recent years,[1] and they remain bitterly divided on the question. A few Justices argue that comparative material "emphatically is relevant" to resolving constitutional disputes,[2] while others contend that the Supreme Court should not consider "foreign moods, fads, or fashions" in resolving constitutional questions.[3] At least four of the current Justices advert to comparative law in their opinions, while three expressly criticize such references.[4] The debate crystallized with the recent decision of *Lawrence v. Texas*,[5] in which for the first time ever a majority of the Supreme Court relied on an international tribunal decision to interpret individual liberties embodied in the U.S. Constitution.[6]

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1. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 572–73, 576–77 (2003) (Kennedy, J.); *id.* at 598 (Scalia, J., dissenting); Atkins v. Virginia, 536 U.S. 304 (2002) (Stevens, J.); *id.* at 340–41, 347–48 (Scalia, J., dissenting); Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (mem.) (Thomas, J., concurring in denial of certiorari); Knight v. Florida, 528 U.S. 990, 990 n.1 (1999) (Thomas, J., concurring in denial of certiorari); Printz v. United States, 521 U.S. 898, 921 n.11 (1997) (Scalia, J., plurality opinion); *id.* at 977 (Breyer, J., dissenting); Washington v. Glucksberg, 521 U.S. 702, 710, 718 n.16 (1997) (Rehnquist, C.J.); *id.* at 785–87 (Souter, J., concurring). For extrajudicial speeches and writings, see Stephen Breyer, Keynote Address, 97 AM. SOC'Y INT'L L. PROC. ANN. MEETING 265 (2003) [hereinafter Breyer, Keynote Address]; Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329 (2004); Sandra Day O'Connor, Keynote Address, 96 AM. SOC'Y INT'L L. PROC. ANN. MEETING 348 (2002); William H. Rehnquist, Constitutional Courts—Comparative Remarks (1989), *reprinted in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993); Antonin Scalia, *Foreign Legal Authority in the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. ANN. MEETING 305 (2004); Stephen Breyer, *Réflexions Relatives Au Principe de Fraternité*, Speech to the 30th Congress of the Association of French-Speaking Constitutional Courts (June 20, 2003), *at* http://www.supremecourtus.gov/publicinfo/speeches/sp_06-20-03.html [hereinafter Breyer, *Réflexions*]; Justice Stephen Breyer & Justice Antonin Scalia, Debate on the Relevance of Foreign Law for American Constitutional Adjudication (Jan. 13, 2005) (transcript and recording available at http://www.wcl.american.edu/secle/founders/2005/050113.cfm) [hereinafter Breyer Scalia Debate]; Sandra Day O'Connor, Remarks at the Southern Center for International Studies (Oct. 28, 2003), *at* http://www.southerncenter.org/OConnor_transcript.pdf [hereinafter O'Connor, SCIS Remarks].

2. *See* Breyer, Keynote Address, *supra* note 1, at 282; Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 282 (1999).

3. *See Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (quoting *Foster*, 537 U.S. at 990 n.* (Thomas, J., concurring in denial of certiorari)).

4. *See* Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239, 245 (2003).

5. 539 U.S. 558.

6. *See id.* at 573 (discussing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981)). I discuss this case at some length in Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on* Lawrence v. Texas, 44 VA. J. INT'L L. 913 (2004).

While there has been a notable increase in scholarly literature on the subject of constitutional comparativism,[7] there is a remarkable absence of any serious attempt to square this methodology with classic constitutional theories. A number of justifications have been presented in support of the practice of using comparative material, but rarely are they grounded in constitutional theory. Often constitutional comparativists display little concern for constitutional theory, and far greater concern for parochialism, lack of U.S. leadership, and asymmetrical judicial dialogue.

The legitimacy of constitutional comparativism should be determined by constitutional theory. Comparativism is not a constitutional theory; it is a methodology that is employed depending on a judge's particular theory. If a judge interprets the Constitution based on a theory of original intent, then contemporary global practices will be of little service. If a judge espouses a theory that the Constitution embodies natural law principles, then evidence of universal norms may buttress that conception. If a judge grounds his or her decisionmaking on a theory of deference to the legislature, then comparative experiences that offer competing conceptions of "the good" will be of little relevance. If a judge is a constitutional pragmatist, real-world consequences at home and abroad may be deemed appropriate to cast an empirical light on proposed solutions to common problems. Rightly understood, one's willingness to engage in constitutional comparativism will depend on one's theory of constitutional decisionmaking.

It is remarkable that this elemental point is overlooked in arguments for constitutional comparativism.[8] Advocates of constitutional comparativism—principally international rather than constitutional scholars—have a different agenda. They commend constitutional comparativism not to promote a particular constitutional theory (or perhaps even result), but rather to advance a

7. *See generally* Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997); Paolo G. Carozza, *"My Friend is a Stranger": The Death Penalty and the Global* Ius Commune *of Human Rights*, 81 TEX. L. REV. 1031 (2003); William Ewald, *Comparative Jurisprudence: What Was it Like to Try a Rat?* (pt. 1), 143 U. PA. L. REV. 1889 (1995); David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001); Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1 (1993); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999); Sarah H. Cleveland, Our International Constitution (draft 2003) (unpublished manuscript, on file with author).

8. Mark Tushnet has come closest to providing a theoretical defense for constitutional comparativism. However, only one of his three explanations for comparativism (functionalism) even borders on a defense of the practice based on a classic constitutional theory (pragmatism). His approach appears to recognize that this new comparative approach requires new theoretical justifications. Tushnet, *supra* note 7, at 1238–39.

conception of transnational law in American courts.[9] They extol the internationalization of constitutional law as if it were an inherent good, used to cure the American legal system of its insularity.[10]

A few examples are illustrative. Harold Koh's "transnational legal process" theory posits the internalization of international norms into domestic law, with the judicial branch as a central channel for making international law part of U.S. law.[11] He justifies this approach to constitutional interpretation in part because failure to reference such material "invites charges of parochialism, and undermines U.S. influence over the global development of human rights."[12] In a similar vein, Anne-Marie Slaughter contends that a process of "constitutional cross-fertilization" is increasingly evident, resulting in an "emerging global jurisprudence" on issues such as the death penalty and privacy rights.[13] She asserts that although the Supreme Court thus far has been a "lender" rather than a "borrower" court in this "transjudicial debate,"[14] in the future it should make citation to foreign and international decisions a common practice. In so doing, the Court will broaden its "constitutional vision" and "fully join[ ] the global community of courts."[15] Bruce Ackerman has criticized the United States for its "astonishing indifference" to the spread of world constitutionalism and lamented the "emphatic provincialism" of the typical American judge, who would "hardly raise an eyebrow when told . . . that existing American law on capital punishment or welfare rights offends basic constitutional principles as the rest of the civilized world has come to understand them."[16] Paolo Carozza argues that failure to reference comparative material to interpret our Constitution "poses the danger of isolating the United States from full participation in the family of nations" and that "[i]nsularity on the issue of the death penalty . . . has helped to ostracize the United States from meaningful

9. As discussed at text accompanying notes 400–413, it is possible that such commendations represent an inchoate comparative constitutional theory, although not articulated as such.

10. *See* Tony Mauro, *Not So At-Home Abroad: Visiting Justices Get an Earful in London*, LEGAL TIMES, July 31, 2000, at 10 (describing Justice Kennedy's encounter in London with a "leading London barrister" who "accused the Supreme Court of 'turning its back on the Continent,'" and reporting that this barrister noted to an unrepentant Justice Kennedy that while British courts often invoke European and American court precedents, "[y]our system is quite certain it is has nothing much to learn from us").

11. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 44 (2004).

12. *Id.* at 56.

13. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 193 (2003).

14. *Id.* at 198–99, 204.

15. *Id.* at 204.

16. Ackerman, *supra* note 7, at 772–73.

and constructive engagement with much of the rest of the world."[17] Even Justice O'Connor in a recent speech went so far as to argue that we should use comparative material to interpret our Constitution in order to make a "good impression."[18] She suggested that the Supreme Court should be cognizant of other judicial systems so as to enhance its ability to act as a rule-of-law model for other nations.[19]

But in advocating a particular process, these and similar commentators offer little serious discussion of classic constitutional theories to support their comparative positions. They fall into the trap of many a comparativist, who envisions a limited role for theory in comparative legal studies. As one scholar noted:

> The marginal role of theory . . . in comparative legal studies has to be taken quite literally . . . . It is assumed that for comparative law proper theoretical guidance is either not needed or not heeded . . . . Comparatists often imply or suggest that there is no reason not to compare; that in the field of comparative law almost any approach and method may enhance a better or at least a more learned understanding . . . . Whoever questions the value of comparison is directed to its evident purpose and unquestionable necessity . . . . At the margin of the discourse, comparatists admit that deficiencies in theory and method account for the discipline's marginal role and rather blatant defects. Within the discourse however, the obvious utility of comparison remains aggressively asserted.[20]

This marginalization of theory in constitutional comparativism is in stark contrast to the typical emphasis found in constitutional scholarship. In the general academic discourse on constitutional law it is theory that reigns supreme. "For most judges, the basic unit of the Constitution is The Clause; for most law professors, the basic unit is The Theory, the one that lurks behind the Clauses and the cases, and puts them in their best light."[21] Constitutional theory is the meta-discourse that adumbrates most constitutional scholarship, and particular theories have been its central obsession.[22]

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17. Carozza, *supra* note 7, at 1087.
18. O'Connor, SCIS Remarks, *supra* note 1, at 2.
19. *Id.*
20. Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 416–18 (1985).
21. Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519, 1519 (1997).
22. *See* Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1290 (2004); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998).

While the community of constitutional law scholars is obsessed with the latest nuance of a grand constitutional theory, the community of international law scholars is obsessed with the latest application of international norms. The constitutional project focuses on questions such as how to choose a constitutional theory,[23] while the international project focuses on questions such as how to secure broader and greater international compliance.[24] One finds then a band of comparative commentators who simply assume the utility of international and foreign material in interpreting the Constitution, without offering a rigorous theoretical case for this particular mode of constitutional analysis. This assumption impoverishes the constitutional discourse, as international law scholars speak at cross-purposes with their constitutional law counterparts, marginalizing their debate from the larger discussion on constitutional theories.

Constitutional comparativism should turn to first principles. The central question that should animate any discussion of constitutional comparativism is one of constitutional theory. Why should the Court resort to comparative material as a device to resolve whether a particular measure violates a particular provision of the U.S. Constitution? If the central function of the Court is to resolve cases and controversies, it surely cannot be because we wish to enhance the global rule of law, or promote international judicial dialogue, or encourage our system to be less insular. Those concerns might be delightful unintended consequences in an adjudicative process that views comparativism as justified. But they cannot be *why* we adjudge a discrete measure as falling within or afoul of a particular constitutional line. Rather, the use of comparative material must be deemed appropriate or inappropriate based on whether recourse to it comports with a particular judge's interpretive mode for resolving constitutional cases and controversies.

This Article presents four classic constitutional theories—originalism, natural law, majoritarianism, and pragmatism—and addresses the propriety of constitutional comparativism under each theory. This theoretical approach goes far to explain why particular judges embrace comparativism, while others eschew it. In so doing, it grounds the debate in the larger framework of classic constitutional theory. It also underscores the irrelevance of many current justifications for constitutional comparativism, because none of the classic

23. *See* Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535 (1999); Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 GEO. L.J. 1837 (1997).

24. *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 476 (2003).

constitutional theories reflects concern for ancillary objectives regarding the larger role of our jurisprudence or judiciary in the global context.

Part I addresses originalism and argues that a historical comparative approach to constitutional law is fully consistent with this theory, provided that the correct comparative sources are utilized. This part suggests a more rigorous historical comparativist approach for those who espouse this theory and outlines illustrative instances in which historical comparative materials have been used to understand original intent. Part II addresses natural law as a constitutional theory and suggests that it continues to find application in certain types of constitutional adjudication. In the realm of substantive due process, the concept of "implicit ordered liberty" continues the natural law tradition. Claims of universality offer renewed opportunities to utilize comparative material to buttress the argument that certain rights are implicit in ordered liberty. Although natural law theory is discredited in constitutional discourse, this part argues that natural law is perhaps the most coherent rationale for recognizing the validity of comparative analysis in constitutional adjudication. Part III presents two versions of majoritarianism: structural and interpretive majoritarianism. The former emphasizes deference to the political branches, while the latter focuses on a "living Constitution" reflective of contemporary norms. A common feature of both structural and interpretive majoritarianism is their mutual skepticism of comparative material. Under the former, deference to the political branches belies the need for comparative experiences; under the latter, the contemporary values that underlie malleable interpretations of the Constitution are based on our own national experience. Part IV describes the pragmatic approach to constitutional law and suggests that this approach offers perhaps the most fertile opportunity for constitutional comparativism. Assuming that one accepts an antiformalist theory of constitutional decisionmaking that focuses on real-world consequences to constitutional adjudication, then pragmatism offers a sound theory for constitutional comparativism. Part V anticipates the disquiet that constitutional comparativists will experience at the inadequacy of existing constitutional theories to capture the comparative agenda fully. It introduces the broad outlines of a comparative constitutional theory. It then judges such a theory based on established criteria for its saliency.

I. ORIGINALISM

Originalism is a constitutional theory that judges the propriety of constitutional comparativism based on its ability to facilitate an understanding of original intent. As such, originalism makes a sharp distinction between

different types of comparative material. Originalism heartily welcomes historical comparativism that fosters a contextual understanding of linguistically indeterminate text, while flatly rejecting contemporary comparativism as an aberrant excrescence. The former is a legitimate exercise in discerning the Founders' intent, the latter an inappropriate attempt to accommodate contemporary fads and fashions.

"Originalism has been the dominant interpretative paradigm for most of American constitutional history."[25] It is a theory that is "deeply rooted in our history and in our shared principles of political legitimacy."[26] Characteristic of this approach is the pronouncement of a century ago: "The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted it means now."[27] It is only in the past century that originalism has come under sustained attack.[28] Today scholars and jurists of the originalist position are in full retreat, arguing for its application only to curtail further advances of jurisprudence that depart from original understandings.[29] While the appointments of Justices Scalia and Thomas to the Court have given the theory continued vitality for the present, the politicalization of the nomination process since the failed nomination of Robert Bork decreases the likelihood that orginalism will garner significant support among future Justices of the Court.[30]

In its modern variety, that is, the version adopted by members of the Rehnquist Court, originalism is the notion that the Constitution embodies

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25. Morton J. Horwitz, *The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 44 (1993).

26. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975).

27. South Carolina v. United States, 199 U.S. 437, 448 (1905).

28. *See* Horwitz, *supra* note 25, at 51–52.

29. *E.g.*, Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 129, 139 (Amy Gutmann et al. eds., 1997) (originalism is useful "not in the rolling back of accepted old . . . principles but in the rejection of usurpatious new ones"); Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 883–84 (2002). Bork and Troy state:

> [T]he reality is that the New Deal is not going to be undone, certainly not by the stroke of a judicial pen. That does not mean, however, that courts should not approach new problems (that is, legislation), as in *Lopez* and *Morrison*, by examining the original understanding and using it as a touchstone in deciding the case. It may be possible for courts to begin moving back in the direction of the original understanding, without necessarily upending decades of case law on which expectations have settled.

Id.

30. *See, e.g.*, STEPHEN L. CARTER, THE CONFIRMATION MESS (1994); MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT (1992); David A.J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. REV. 1373 (1990) (reviewing ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990)).

guarantees that are rooted in the Framers' moral perceptions and that protect society against the standards of future, more brutal generations.[31] It rejects arguments that the Constitution may evolve, for to make this concession is to permit it to devolve.[32] Originalism does not assume a static text incapable of modern application. But it does assume enduring principles. Thus, originalism does not trouble itself with wondering whether technology will render the Free Speech Clause meaningless to modern modes of media. Originalism troubles itself with wondering why the Court protects nonpolitical speech, or pondering the constitutionality of capital punishment, or discovering novel unenumerated rights.

In essence, originalism inverts Jefferson's famous maxim that "the earth belongs in usufruct to the living."[33] For an originalist, today's constitutional rights are solely those a past generation thought we should enjoy. The great fear of originalism is the tyranny of the future. The bulwark against this threat is a Constitution that "retain[s] that share of prejudice in its favor which is a salutary aid to the most rational Government."[34] Future generations give their assent to this established order, and that assent is assumed, absent positive dissent by the populace manifesting itself in the form of amendment or repeal.[35]

Thus, originalism rejects the Jeffersonian notion of generational sovereignty. Jefferson's version of generational sovereignty espoused the notion that each new generation should have the right to invalidate every act of society, including the fundamental constitution of government.[36] Modern proponents of generational sovereignty invoke constitutional hermeneutics to achieve the same result. As the Supreme Court recently put it, "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. As the Constitution

31. *See* Scalia, *supra* note 29, at 145.

32. As Justice Scalia recently remarked, he detests the phrase "evolving standards of decency that mark the progress of a maturing society" because "I'm afraid that societies don't always mature. Sometimes they rot." Breyer Scalia Debate, *supra* note 1. Justice Scalia offers examples of the devolution of rights, such as property rights, the right to bear arms, and the right to confront one's accuser. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System*, *in* A MATTER OF INTERPRETATION, *supra* note 29, at 3, 42–47.

33. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 392, 392 (Julian P. Boyd ed., 1958) [hereinafter Sept. 6, 1789 Letter from Jefferson] ("I set out on this ground, which I suppose to be self evident, '*that the earth belongs in usufruct to the living*': that the dead have neither powers nor rights over it. The portion occupied by any individual ceases to be his when himself ceases to be, and reverts to the society.").

34. Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), *in* 5 THE WRITINGS OF JAMES MADISON 437 n.1 (Gaillard Hunt ed., 1904).

35. *Id.*

36. *See* JOHN P. DAWSON, ORACLES OF THE LAW 93–94 (1968).

endures, persons in every generation can invoke its principles in their own search for greater freedom."[37] Originalism flatly denies the position that the Constitution "anticipate[s] posterity's independent appraisal of its own best interests."[38]

An originalist approach makes certain questions exceedingly easy. For example, one of the most common debates in constitutional comparativism relates to abolition of the death penalty. Scholars and jurists who embrace other constitutional paradigms struggle with the constitutional legitimacy of capital punishment and cite its repugnancy in other societies as evidence that it is cruel and unusual.[39] But an originalist would resolve the matter simply. There is firm textual support for the death penalty[40] and "it is perfectly clear" from the historical record that "the framers did not believe that the Eighth Amendment prohibited all forms of capital punishment."[41] Because the originalist methodology focuses on what the text was intended to mean, the illegitimacy of the death penalty from the perspective of contemporary norms is irrelevant. The death penalty was not constitutionally cruel and unusual then, therefore it cannot be cruel and unusual today.

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37. Lawrence v. Texas, 539 U.S. 558, 579 (2003); *see also* Sept. 6, 1789 Letter from Jefferson, *supra* note 33, at 392, 395–96. Jefferson wrote:

> [N]o society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct. They are masters too of their own persons, and consequently may govern them as they please. But persons and property make the sum of the objects of government. The constitution and the laws of their predecessors extinguished then in their natural course with those who gave them being.

Id.

38. *See* JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 113 (1997).

39. *See, e.g.*, Carozza, *supra* note 7, at 1086–88 (comparing "bizarre and sterile" positivism and historicism in U.S. legal discourse to the ideal of human dignity present in an "ius commune" and suggesting that blindness to death penalty practices abroad blinds us to our own humanity); Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1129 (2002) ("The evidence strongly suggests that we do not currently pay decent respect to the opinions of humankind in our administration of the death penalty. *For that reason*, the death penalty should, in time, be declared in violation of the Eighth Amendment." (emphasis added)); William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 817 (1998) ("Death penalty jurisprudence provides one of the most dramatic examples of this synergy between international and domestic human rights law.").

40. U.S. CONST. amend. V ("No person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person . . . be deprived of life . . . without due process of law . . . ."); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life . . . without due process of law . . . .").

41. GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 54 (1992) (citing RAOUL BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE 1–76 (1982)); *see also* WALTER BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 31 (1979).

But this is not to suggest that originalists are inherently inflexible to change. Originalists are often caricatured as espousing static rules that are incapable of addressing constitutional guarantees in the modern age. But originalism (at least the more plausible variety) recognizes that constitutional guarantees may embrace abstract principles that will admit application to new circumstances. Thus, Justice Scalia recognizes that the Eighth Amendment prohibition against cruel and unusual punishment is "no mere concrete and dated rule," but rather an abstract principle that can be applied to all sorts of tortures unknown at the time the Eighth Amendment was drafted.[42] But "[w]hat it abstracts," he would contend, "is not a moral principle of 'cruelty' that philosophers can play with in the future, but rather the [then] existing society's assessment of what is cruel."[43] The Eighth Amendment means not "whatever may be considered cruel from one generation to the next, but what [the Framers] consider[ed] cruel . . . ; otherwise, it would be no protection against the moral perceptions of a future, more brutal, generation. It is, in other words, rooted in the moral perceptions *of th[at] time*."[44] Thus, Justice Scalia's originalism expresses an abiding concern about a constitutional standard embracing evolving standards, recognizing that the Framers anticipated that society may devolve toward a brutality that the guarantees sought to protect against.

Originalists warmly embrace constitutional comparativism, provided it elucidates a better understanding of original intent.[45] Thus, originalism embraces the use of historical comparative material, but rejects the use of contemporary material. Contemporary comparativism is suspect because it constitutes a subset of a much larger body of material that originalists reject in their conception of constitutionalism. For an originalist, Supreme Court jurisprudence that embraces contemporary comparativism reflects an "insidious appeal [to] internationalism"[46] that interferes with the proper interpretive task of identifying original understandings. As Robert Bork put it, the interpretive question that should be asked is "not the current views of foreign nations" but "the understanding of the ratifiers of the Bill of Rights in 1791."[47]

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42. Scalia, *supra* note 29, at 145.
43. *Id.*
44. *Id.* (emphasis in original).
45. *See infra* notes 50–77 and accompanying text. As Justice Scalia succinctly put it, "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. . . . Now, obviously if you have that philosophy . . . foreign law is irrelevant with one exception: Old English law." Breyer Scalia Debate, *supra* note 1.
46. ROBERT BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 22 (2003).
47. *Id.* at 23.

But originalists are more than willing to reference comparative material if it will advance an understanding of original meaning. Originalism recognizes that the Supreme Court necessarily examines the historical context at the time of the founding to understand constitutional text. If constitutional text can only be understood contextually, then recourse to historical comparative material is essential in the interpretative process. As James Madison recognized in *The Federalist* No. 37, all laws are obscure and equivocal and their meaning can only be ascertained by understanding the medium through which their conceptions are conveyed:

> The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered.[48]

Thus, even under an originalist conception, linguistic indeterminacy requires reference to the meaning of terms as they were understood at the time of the founding.[49] That task of understanding original meaning frequently requires reference to historical comparative material.

So frequent is this comparativist practice in originalist understandings of the Constitution that it barely needs citation.[50] Because the Constitution does not specify how it is to be construed, for an originalist the principal determinant of meaning is historical context.[51] Particularly common for originalists is "genealogical comparativism,"[52] which examines the historical practices and legal heritage of England.

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48. THE FEDERALIST NO. 37 (James Madison); *see also* Horwitz, *supra* note 25, at 49–51 (discussing Madison and early American originalism).

49. Maryland v. Craig, 497 U.S. 836, 864–65 (1990) (Scalia, J., dissenting) (discussing original meaning of the Confrontation Clause); Horwitz, *supra* note 25, at 49–50; Scalia, *supra* note 32, at 37.

50. For example, Justice Scalia has cited Blackstone's *Commentaries on the Laws of England* in over seventy-five cases.

51. *See* Scalia, *supra* note 29, at 135.

52. Fontana, *supra* note 7, at 572. For a useful recent example of comparative analysis used to understand the original meaning of indeterminant text, see Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why* Hollingsworth v. Virginia *was Rightly Decided, and Why* INS v. Chadha *was Wrongly Reasoned*, 83 TEXAS L. REV. (forthcoming April 2005) (discussing comparative analysis to discern originalist understandings of the Orders, Resolutions, and Votes Clause).

For example, in *Kilbourn v. Thompson*,[53] the Court addressed the English origins of the constitutional authority of Congress to hold a witness in contempt. The Court detailed at some length the historic adjudicatory function of the House of Parliament and then noted that this history is meaningless for the American context: "[T]he powers and privileges of the House of Commons of England, on the subject of punishment for contempts, rest on principles which have no application to other legislative bodies, and certainly can have none to the House of Representatives of the United States."[54] Thus, genealogical comparativism was used to show the radical departure of our system of government from its ancestors, and the rights of those held in legislative contempt in light of this departure from our English roots.[55]

In another death penalty case, Justice Scalia and Chief Justice Rehnquist argued that the Eighth Amendment cannot be understood without reference to its "antecedent": the English Declaration of Rights of 1689.[56] Because early Americans claimed all the rights of English subjects, the Framers' use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection. Thus, "not only is the original meaning of the 1689 Declaration of Rights relevant, but also the circumstances of its enactment, insofar as they display the particular 'rights of English subjects' it was designed to vindicate."[57] While "direct transplant of the English meaning to the soil of American constitutionalism" is unrealistic, Justice Scalia and Chief Justice Rehnquist recognize that its meaning sheds

53. 103 U.S. 168 (1880). In another case involving the House Un-American Activities Committee, the Court noted the English roots of the privilege against self-incrimination and discussed the early nineteenth-century practices in English-speaking jurisdictions to illuminate the requirements for holding witnesses in contempt in legislative proceedings. Quinn v. United States, 349 U.S. 155, 161–62, 167 n.36 (1955).

54. *Kilbourn*, 103 U.S. at 189.

55. In a similar vein, in interpreting the Due Process Clauses, the Court in *Hurtado v. California* distinguished our Constitution from the Magna Carta, noting that as the "broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation." Hurtado v. California, 110 U.S. 516, 532 (1884); *see also* Culombe v. Connecticut, 367 U.S. 568, 582 (1961) (discussing accusatorial and inquisitorial systems of interrogation in common law and civil law traditions as historical context for the Fourteenth Amendment). In other instances, the Court has examined our English roots and found them inconclusive in facilitating an original understanding of our constitution. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 272–73 (1989) ("It is difficult to understand how [the] Magna Carta, or the English Bill of Rights as viewed through the lens of [the] Magna Carta, compels us to read our Eighth Amendment's Excessive Fines Clause as applying to punitive damages when those documents themselves were never so applied.").

56. Harmelin v. Michigan, 501 U.S. 957, 966 (1991).

57. *Id.* at 967.

light on what "cruel and unusual punishments" meant to the Americans who adopted the Eighth Amendment.[58]

More recently, in *Atkins v. Virginia*,[59] Justice Scalia ridiculed the Court for relying on the practices of the "world community" in assessing whether executing the mentally retarded violates the Eighth Amendment.[60] Yet he simultaneously referred to the eighteenth-century practices of England to establish that only the severely or profoundly retarded enjoyed special status under the law at that time.[61] In a similar vein, Justice Thomas has excoriated Justice Breyer for relying on contemporary European norms to define prolonged death row delays as cruel and unusual, while intimating that the eighteenth-century English practice of a forty-eight hour delay between sentencing and execution might be constitutionally permissible were it to occur today.[62]

But an originalist approach does not simply utilize historical comparative material to understand constitutional text. It also recognizes that reference to the historical matrix is necessary to comprehend original understandings of constitutional structure. In a military death penalty case, *Loving v. United States*,[63] the Court heavily relied upon the English experience to interpret the constitutional provision vesting power in Congress to "make Rules for the Government and Regulation of the land and naval Forces."[64] The Court noted that it has interpreted that provision by drawing upon English constitutional history regarding parliamentary control of military tribunals. The Court concluded that the Framers learned from this English experience "the necessity of balancing efficient military discipline, popular control of a standing army, and the rights of soldiers" as well as the "risks inherent in assigning the task to one part of the Government to the exclusion of another."[65] Thus, separation of powers principles in military justice were derived, in part, from our genealogical roots. From this experience, the early Republic recognized that civil court jurisdiction over military death penalty cases should be the rule if the offense was an ordinary capital crime.[66]

58. *Id.* at 975.
59. 536 U.S. 304 (2002).
60. *Id.*
61. *Id.* at 340–41, 347–48 (Scalia, J., dissenting).
62. Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (mem.) (Thomas, J., concurring in denial of certiorari); Knight v. Florida, 528 U.S. 990, 990 n.1 (1999) (Thomas, J., concurring in denial of certiorari).
63. 517 U.S. 748 (1996).
64. U.S. CONST. art. I, § 8, cl. 14.
65. *Loving*, 517 U.S. at 761.
66. *Id.* at 752. Significantly, Justice Scalia took issue with the comparative approach of the Court:

> [I]n drafting the Constitution, the Framers were not seeking to replicate in America the government of England; indeed, they set their plan of government out in writing in part to make clear the ways in which it was different from the one it replaced. The Court . . . treat[s]

Likewise, in *United States v. Johnson*,[67] the Court interpreted the Speech or Debate Clause in light of the English Bill of Rights of 1689, which developed out of the struggle for power between the House of Commons and the British monarchy and the attempts by the latter to intimidate the former by using criminal and civil law to suppress and intimidate critical legislators:

> Since the Glorious Revolution in Britain, and throughout the United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature. In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders.[68]

In addition to English experiences, it is well recognized that the Framers were transfixed with the comparative experience in continental Europe,[69] particularly the confederate systems in Switzerland, Germany, and the Netherlands.[70] They examined with great care "the events that have attended confederate governments" in Europe to establish the illegitimacy of a confederacy and the superiority of federalism.[71] *The Federalist* Nos. 19 and 20 are devoted exclusively to an examination of the confederate systems in Europe.[72] Recent Rehnquist Court pronouncements on federalism regularly reference the Framers' consideration of these competing systems of government.[73]

Justice Scalia's denunciation in *Printz v. United States*[74] of Justice Breyer's comparativism articulates the distinction between historical and contemporary structural comparativism. When Justice Scalia, speaking for the Court, said that "comparative analysis [is] inappropriate to the task of interpreting a

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> the form of English government as relevant to determining the limitations upon Clause 14's grant of power to Congress. I would leave this historical discussion aside. While it is true, as the Court demonstrates, that the scheme of assigned responsibility here conforms to English practices, that is so *not* because Clause 14 requires such conformity, but simply because what seemed like a good arrangement to Parliament has seemed like a good arrangement to Congress as well.

Id. at 776 (Scalia, J., concurring). In this instance, Justice Scalia found the historical context unnecessary because the text is sufficiently clear.

67. 383 U.S. 169 (1966).

68. *Id.* at 178.

69. *See* THE FEDERALIST NOS. 6, 11, 12, 21, 22, 29, 75, 80 (Alexander Hamilton), NOS. 14, 37, 42, 43, 54 (James Madison), NOS. 19, 20 (James Madison and Alexander Hamilton).

70. *See* THE FEDERALIST NOS. 19, 20.

71. THE FEDERALIST NO. 17 (Alexander Hamilton).

72. THE FEDERALIST NOS. 19, 20.

73. New York v. United States, 505 U.S. 144, 180 (1992) (quoting THE FEDERALIST NO. 20); *see also* Alden v. Maine, 527 U.S. 706, 714 (1999) (citing THE FEDERALIST NO. 20); Printz v. United States, 521 U.S. 898, 921 n.11 (1997) (quoting THE FEDERALIST NO. 20).

74. 521 U.S. 898.

constitution, though it was of course quite relevant to the task of writing one,"[75] he was not arguing against structural comparativism per se. He was arguing against contemporary comparisons to understand historical structures. The Court in *Printz* noted that James Madison and Alexander Hamilton examined at great length the Dutch experience in support of a federal conception of government, while Patrick Henry examined the Swiss confederacy in support of an anti-federalist structure. From these comparisons the Framers derived our own form of federalism as "the unique contribution of the Framers to political science and political theory."[76] Thus, even while denouncing comparativism the Court conceded that an appreciation of the Framers' understanding of the merits and demerits of then-existing systems informs our understanding of our own federal system.

These and similar cases suggest that an originalist will draw a sharp distinction between contemporary comparativism that embraces international laws and practices and historical comparativism that seeks to understand the context from which the Constitution was born. The former is viewed as faddish and fashionable,[77] the latter a proper indicator of the founders' intent.

The originalist position on constitutional comparativism has been the source of significant criticism. Putting aside the general critiques of originalism that are well-worn, one may identify at least two specific criticisms of the originalist position on comparativism.

One common critique is that originalists are inconsistent in their insistence upon the irrelevance of contemporary foreign and international law.[78] This is without foundation. It is true that jurists of the originalist persuasion have occasionally referenced contemporary foreign and international practices. For example, proponents of comparativism have made much of Chief Justice Rehnquist's extrajudicial speech in which he stated that "it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process."[79] But the proponents

75. *Id.* at 921 n.11.

76. *Id.* (quoting United States v. Lopez, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring)).

77. *See* Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting); Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (mem.) (Thomas, J., concurring in denial of certiorari).

78. *See* Koh, *supra* note 11, at 47.

79. Rehnquist, *supra* note 1; *see, e.g.*, Ginsburg, *supra* note 1, at 330; Koh, *supra* note 11, at 48; Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1514 & n.113 (2003). It is worth noting that the full text of Justice Rehnquist's speech gives no indication that he believed that comparative law was appropriate in resolving individual rights. *See* Rehnquist, *supra* note 1, at 412. He stated:

> [N]ow that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process. The United States courts, and legal scholarship in our

often ignore the numerous instances—including one case rendered just four months before this speech—in which Justice Rehnquist rejected the use of contemporary comparative material in constitutional adjudication.[80] As for his judicial opinions, when Justice Rehnquist cites contemporary foreign practices (with one exception[81]), he either fails to indicate their relevance,[82] or expressly suggests their irrelevance.[83]

Likewise, Justice Scalia has consistently opposed references to contemporary comparative material in constitutional adjudication. The two instances cited to the contrary are either inapposite or support another theory of constitutionalism for which he is well known.[84] Moreover, his occasional reference to comparative material in other contexts supports rather than undermines his methodology. Whether interpreting a constitution, treaty or statute, Justice Scalia seeks to understand original meaning. Accordingly, in interpreting a modern treaty, Justice Scalia will not hesitate to examine contemporary judicial decisions in Britain and Australia because, in his view, "[f]oreign constructions are evidence of the original shared understanding of the contracting parties."[85] If one focuses on discernment of original meaning, Justice Scalia's antipathy for contemporary comparativism in one context and affinity for it in another is perfectly logical.

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country generally, have been somewhat laggard in relying on comparative law and decisions of other countries. But I predict that with so many thriving constitutional courts in the world today . . . that approach will be changed in the near future.

Id.

80. *Lawrence*, 539 U.S. at 572–73 (Scalia, J., dissenting); Atkins v. Virginia, 536 U.S. 304, 324–25 (2002) (Rehnquist, C.J., dissenting); Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989). *But see* Koh, *supra* note 11, at 52 n.62 (acknowledging a distinction between Chief Justice Rehnquist's extrajudicial and judicial pronouncements).

81. Washington v. Glucksberg, 521 U.S. 702, 710, 718 n.16 (1989). *Glucksberg* is discussed in this Article in the natural rights paradigm and the pragmatism paradigm. *See infra* notes 164–170, 378–390 and accompanying text.

82. *E.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (citing abortion decisions in West Germany and Canada).

83. *E.g.*, Raines v. Byrd, 521 U.S. 811, 828 (1997) ("There would be nothing irrational about a system that granted standing in these cases; some European constitutional courts operate under one or another variant of such a regime. But it is obviously not the regime that has obtained under our Constitution to date." (citations omitted)).

84. Harold Koh suggested that Justice Scalia "has been far from consistent in insisting upon the irrelevance of foreign and international law. Depending on the factual setting, he has not hesitated to take foreign practice into account or to argue in favor of construing U.S. law consistently with principles of international law." Koh, *supra* note 11, at 47 (citing McIntyre v. Ohio Election Comm'n, 514 U.S. 334, 381 (1995) (Scalia, J., dissenting) and Hartford Fire Ins. Co. v. California, 509 U.S. 764, 820 (1993) (Scalia, J., dissenting)). The reference in *McIntyre* reflects a majoritarian paradigm in which Justice Scalia argues for deferral to legislative prerogatives, and *Hartford Fire* is not a constitutional case and is wholly irrelevant to the question of constitutional comparativism.

85. Olympic Airways v. Husain, 124 S. Ct. 1221, 1232 (2004) (Scalia, J., dissenting).

A more convincing critique of originalism is its selectivity in considering the historical record. As one commentator put it, "the historical record is so inconclusive, so full of gaps and ambiguities, that originalist judges . . . must continuously make difficult and controversial historical and normative judgments."[86] This is no less true with respect to historical comparativism. Originalist understandings of historical comparativism as constitutional context raise the critical question of which context to choose in determining original meaning.

To take one example, it is curious to say the least that in interpreting the Bill of Rights, an originalist does not take into greater account the influence of the French Declaration of the Rights of Man. That Declaration—drafted in 1788 and 1789 and published on August, 27, 1789 (just one month before Congress formally proposed the Bill of Rights on September 25, 1789)—provides a useful prism to understand our own Bill of Rights. While Madison was drafting the Bill of Rights, the French Revolution was in full swing and was greeted in America with great enthusiasm. John Adams expressed the view that "most of the events in the annals of the world are but childish tales compared to it."[87] He hoped the French Revolution would "produce effects in favor of liberty, equity, and humanity as extensive as this whole globe and as lasting as all time."[88] Thomas Jefferson corresponded with Madison in January 1789 informing him that in France "[e]verybody here is trying their hands at forming declarations of rights."[89] Moreover, it is well known that Jefferson read and critiqued Lafayette's June 1789 drafts of the Declaration of the Rights of Man and offered his own version.[90] Jefferson also critiqued the Bill of Rights in light of his experience in France, suggesting that its language mirror provisions of the Declaration.[91]

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86. BASSHAM, *supra* note 41, at 55.

87. DAVID MCCULLOUGH, JOHN ADAMS 417 (2001).

88. *Id.*

89. Letter from Thomas Jefferson to James Madison (Jan. 12, 1789), *in* 14 THE PAPERS OF THOMAS JEFFERSON, *supra* note 33, at 436, 437, *cited in* Mark W. Janis, *The Declaration of Independence, the Declaration of the Rights of Man and Citizen, and the Bill of Rights*, 14 HUM. RTS. Q. 478, 480 (1992).

90. *See* ELLIS, *supra* note 38, at 109; Janis, *supra* note 89, at 480; Letter from Thomas Jefferson to Lafayette (June 3, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON, *supra* note 33, at 165. *See generally* Iain McLean, Thomas Jefferson, John Adams, and the Déclaration des Droits de l'Homme et du Citoyen (unpublished manuscript, Nov. 1, 2004), *available at* http://www.nuff.ox.ac.uk/Politics/papers/2002/w24/ddhc3.pdf.

91. One day after the publication of the Declaration, Jefferson wrote to Madison proposing modifications to the Bill of Rights that are similar to Article 11 of the Declaration of the Rights of Man. Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON, *supra* note 33, at 364, 367. Jefferson wrote:

> Their declaration of rights is finished. If printed in time I will inclose a copy with this. . . . I must now say a word on the declaration of rights you have been so good as to

One might think the perceived deficiencies of the Bill of Rights and Jefferson's proposals for improvement based on language from the French experience might inform our understanding of the original meaning of the Bill of Rights. One would also think that if Justice Scalia believes context is important because it reveals "the moral perceptions of the time"[92] then the historic developments in France would greatly impact those perceptions. Yet the Declaration of the Rights of Man and Citizen has never been referenced in a judicial opinion by an originalist member of the Court (or any other member, for that matter).[93] Justice Scalia is positively dismissive of the French Declaration, describing it merely as an aspirational document of philosophy that is of little use in understanding our own constitutional guarantees.[94] "There is no such philosophizing in our Constitution, which unlike the Declaration of Independence and the Declaration of the Rights of Man, is a practical and pragmatic charter of government."[95] But this fact in itself is of constitutional relevance. The French Declaration embodies the historical debate common in the late eighteenth century over whether a bill of rights should contain metaphysical principles of natural and civil liberty or enunciate a plain and positive declaration of the rights themselves.[96] At a minimum, the

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send me. I like it, as far as it goes; but I should have been for going further. For instance the following alterations and additions would have pleased me. Art. 4. "The people shall not be deprived of their right to speak to write or *otherwise* to publish anything but false facts affecting injuriously the life, liberty, property or reputation of others or affecting the peace of the confederacy with foreign nations."

Id. *Compare* DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 11 (1789) ("[E]very citizen may speak, write, and print freely, subject to responsibility for the abuse of such liberty in the cases determined by law."), *with* James Madison, Speech to the House of Representatives Presenting the Proposed Bill of Rights (June 8, 1789), *reprinted in* JACK RAKOVE, DECLARING RIGHTS 168, 173 (1998) ("The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments.").

92. Scalia, *supra* note 29, at 145.

93. Although, it should be noted that at least one state supreme court has had occasion to interpret its state constitution in light of the French experience. *See* Madison & Indianapolis R.R. Co. v. Whiteneck, 8 Ind. 217, 223–25 (1856).

94. Scalia, *supra* note 29, at 134.

95. *Id.*

96. *See* THOMAS PAINE ON A BILL OF RIGHTS, 1777, *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 314, 315 (1971). Paine wrote:

> I conceive a Bill of Rights should be a plain positive declaration of the rights themselves: and, instead of saying it should "contain the great principles of natural and civil liberty," that it should retain such natural rights as are either consistent with, or absolutely necessary toward our happiness in a state of civil government; for were all the great natural rights . . . to be admitted, it would be impossible that any government could be formed thereon, and instead of being a Bill of Rights fitted to a state of civil government, it would be a Bill of Rights fitted to man in a state of nature without any government at all.

Id. As Jed Rubenfeld has noted, while the Declaration of the Rights of Man "spoke in the language of universal rights," the "American language of constitutional rights . . . does not claim

Declaration's metaphysical pronouncements—like general principles in Madison's earlier version of the Bill of Rights—could have been viewed as a cautionary warning to the ratifiers against pronouncements upon which it would be impossible for a government to be formed.[97] Originalists could thus use the French Declaration as evidence of the nonaspirational nature of our own Bill of Rights.[98] Moreover, if "context is everything,"[99] Justice Scalia never explains why the English Declaration of Rights of 1689 is somehow more indicative of the perceptions of the times than the French Declaration drafted in 1789 with Jefferson's help and Madison's knowledge.[100] As Jefferson noted, in the French Revolution we can see our own visage, for the French revolutionaries viewed the American proceedings "as a model for them on every occasion," with the American experience "treated like that of the bible, open to explanation but not to question."[101]

In sum, originalists are firmly committed to historical comparativism in constitutional adjudication. Justice Scalia recently joked that he uses comparative material more than any other Justice; it just happens to be old material.[102] Under this originalist conception, the meaning to be given ambiguous text can only be ascertained by an examination of historical context. That context includes not simply the American experience, but also the moral perceptions of other countries that influenced the standards of the times. But because current practices are irrelevant to understanding original meaning, originalists do not take cognizance of evolving standards or current developments, foreign or domestic.

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the authority of universal law. It claims . . . the authority of democracy." Jed Rubenfeld, *The Two World Orders*, WILSON Q., Autumn 2003, at 22, 29.

97. *See* PAINE, *supra* note 96, at 314 (commenting that a comparison of the Bill of Rights and the French Declaration reveals Thomas Paine's essential point that a bill of rights should be a plain positive declaration of rights rather than a statement of great principles of natural liberty); BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 200 (1992) ("Madison had also included some general principles in his proposed amendments, but they were eliminated during the congressional debates.").

98. This is how Justice Scalia uses it in his extrajudicial writing. *See, e.g.*, Scalia, *supra* note 29, at 134.

99. Scalia, *supra* note 32, at 37.

100. Indeed, Jefferson believed that French perceptions of liberty were more valuable than English perceptions, as the French "give a full scope to reason" and "strike out truths as yet unperceived and unacknowledged" by the English, while "[a]n Englishman, dozing under a kind of half reformation, is not excited to think by such gross absurdities as stare a Frenchman in the face wherever he looks, whether it be towards the throne or the altar." Letter from Thomas Jefferson to David Humphreys (Mar. 18, 1789), *in* 14 THE PAPERS OF THOMAS JEFFERSON, *supra* note 33, at 676–77.

101. Letter from Thomas Jefferson to James Madison, *supra* note 91, at 366.

102. Scalia, *supra* note 1, at 306; Breyer Scalia Debate, *supra* note 1 (Justice Scalia remarking that "the reality is I use foreign law more than anybody on the Court. But it's all old English law.").

II. NATURAL LAW

Natural law is perhaps the most coherent rationale for recognizing the validity of comparative analysis in constitutional adjudication. Although rarely framed in terms of natural law, appeals to universalism and fundamentality are often grounded in this theory. To contend that a right is inalienable or naturally endowed invites reference to comparative experiences to buttress or betray the universal appeal of the asserted right. The substantive due process doctrine of "implicit ordered liberty" is the modern vehicle that has been employed to incorporate comparative experiences in furtherance of natural law constitutionalism.

"Natural law" generally refers to a "higher" law accessible to human reason and not dependent on (though compatible with) divine revelation.[103] As Edward Corwin put it, natural law is predicated on the notion that

> there are certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community.... They are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws are ... merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration.[104]

Advocates of constitutional comparativism occasionally appeal to universal norms in language that echoes natural law principles.[105] The universality of our common experience, it is suggested, justifies

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103. Robert P. George, *Natural Law, The Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2269 (2001).

104. Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152 (1928).

105. *See, e.g.*, Carozza, *supra* note 7, at 1080. Carozza states:

> [T]he normative force of ... transnational jurisprudence ... is premised upon the recognition of the common humanity of all persons. The universality of this sentiment ... consistently provides a justification for courts to take foreign sources into account despite constraints of constitutional form, historical context, or political and social practice. The courts treat the idea of human dignity as the common thread to be followed across all those contingencies. In doing so, they never suggest that a dignified, human life means anything fundamentally different in the otherwise variable contexts of different cases.

Id.; *see also* Breyer, *Réflexions*, *supra* note 1. Breyer states:

> On trouve partout dans le monde le désir des peuples de construire des gouvernements démocratiques dotés de garanties en matière de libertés fondamentales; on trouve partout le désir d'établir un état de droit dont l'efficacité serait renforcée par un pouvoir judiciaire indépendant,—le tout étant nécessaire à la prospérité économique et à la dignité humaine.... En un mot on trouve partout des juges faisant face aux mêmes espèces de problèmes et armés des mêmes espèces d'instruments juridiques.

Id.

transnational borrowing of laws and practices that invoke higher laws or embrace meta-ethical abstractions. A similar approach was invoked in the early days of our national experience. Because the natural law tradition is generally discredited as a constitutional theory, it is worth highlighting its historical pedigree and outlining its current vitality.

As is well known, the early Court regularly relied on natural law concepts to restrict government action. What is particularly noteworthy about the Court's early natural law decisions is their indifference to reliance upon the written constitution or unwritten natural law as the fundamental law that justified review of legislative enactments.[106] With the exception of claims involving separation of powers, the Court "referred almost indiscriminately to the constitution . . . natural law, ancient custom, and inalienable rights . . . . Thus the written constitution . . . served as the sole source of fundamental law for determining the government's internal structure, but not for describing its relationship with the citizenry."[107] In relying on natural law, the Court frequently resorted to comparative experiences.

An early example of natural law constitutionalism is found in *Ware v. Hylton*,[108] in which the Jay Treaty was held to void a Virginia state law that confiscated British creditor's property.[109] *Hylton* is noteworthy because it is the first time that the Supreme Court determined that federal courts could review and invalidate state law.[110] But it is also noteworthy for the bases upon which the laws were interpreted and invalidated. Justice Paterson argued for an expansive reading of the Treaty, finding that it was incompatible with "principles of justice and policy that contracts entered into by individuals of different nations should be violated by their respective governments in consequence of national quarrels and hostilities."[111] Rather than rely on constitutional guarantees,[112] he appealed to the dictates of "moral sense," "right reason," and "natural equity" to argue

106. *See* Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1135–36 (1987); *see also* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 907–08 (1997) (citing other scholars who have argued this principle).

107. Sherry, *supra* note 106, at 1135.

108. 3 U.S. (3 Dall.) 199 (1796).

109. There are numerous other examples that could be cited. In the most celebrated natural law case of the period, *Calder v. Bull*, the Court generously relied upon comparative understandings and experiences in articulating the basis for prohibiting ex post facto laws and defining the constitutional prohibition against such laws. Calder v. Bull, 3 U.S. (3 Dall.) 386, 389–93 (1798) (Chase, J.).

110. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 39 (1985).

111. *Hylton*, 3 U.S. at 255 (Paterson, J.).

112. Justice Chase, by contrast, relied on the Supremacy Clause. *See id.* (Chase, J.) ("A treaty cannot be the *Supreme law* of the land . . . if any act of a State Legislature can stand in its way . . . . [L]aws of any of the States, contrary to a treaty, shall be disregarded."); CURRIE, *supra* note 110, at 39–40.

Virginia could not by statute confiscate British property.[113] Part of the appeal to natural justice included references to international practice. "Confiscation of debts is considered a disreputable thing among civilized nations" and "nothing is more strongly evincive of this truth, than that it has gone into general desuetude."[114]

Another example of extratextual reference to natural law is offered in the case of *Chisholm v. Georgia*,[115] which upheld the right of a citizen of one state to sue another state. Although the matter could have been easily resolved by simple reference to the Constitution,[116] Justice Wilson relied upon three "touchstones" to justify the asserted right: "general jurisprudence," the law of nations, and the Constitution of the United States.[117] In the first touchstone, Justice Wilson noted:

> [I]n the science of politics there has very frequently been a strong current against the natural order of things, and an inconsiderate or an interested disposition to sacrifice the *end* to the *means*. As the *State* has claimed precedence of the people; so, in the same inverted course of things, the *Government* has often claimed precedence of the State . . . .[118]

A proper recognition of state sovereignty, he reasoned, would find that "laws derived from the pure source of equality and justice must be founded on the consent of those, whose obedience they require."[119] The constitutional analysis likewise was replete with natural law references. Admitting that the state is the "noblest work of man," but calling "man . . . the noblest work of God,"[120] Justice Wilson reasoned that the people ordained and established the Constitution, and by that charter vested the judiciary with power over the state. The textual commitment of the judiciary with power over the state was consistent with the "natural order of things," for "[c]auses, and not parties to causes, are weighed by justice, in her equal scales: On the former solely, her

113. *See Hylton*, 3 U.S. at 255 (Paterson, J.).
114. *Id.*
115. 2 U.S. (2 Dall.) 419 (1793). There is extensive commentary on the natural law underpinnings of Justice Wilson's opinion in *Chisholm*. *See, e.g.*, WILLIAM R. CASTRO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 195 (1995); CURRIE, *supra* note 110, at 15–17; Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113, 176–184 (2003).
116. U.S. CONST. art. III, § 2 ("The judicial power shall extend to . . . controversies . . . between a State and citizens of another State.").
117. *Chisholm*, 2 U.S. at 466 (Wilson, J.).
118. *Id.* at 455.
119. *Id.* at 458.
120. *Id.* at 462–63.

attention is fixed: To the latter, she is . . . blind."[121] As for the law of nations, Justice Wilson reviewed the right to sue the sovereign from the practice of ancient Greece to his present day and found nothing to contradict his conclusion.[122] Quoting the King of Prussia, he considered state practice consistent with the dictates of justice, for "all men ought to obtain justice; since in the estimation of justice, all men are equal; whether the Prince complain of a peasant, or a peasant complain of the Prince."[123]

Justice Wilson's (and Chief Justice Jay's)[124] reliance on comparative and international material was pointedly criticized by other Justices, with Justice Blair contending that the likeness of "European confederations" to our own "is not sufficiently close to justify any analogical application" and that, in any event, European precedents "are utterly destitute of any binding authority here."[125] Justice Iredell likewise argued that "[n]o part of the Law of Nations can apply to this case" and that resolution of the case should be based on constitutional authority.[126] "If upon a fair construction of the Constitution" the power exists, it may be exercised; if constitutional authority was lacking however, then "ten thousand examples of similar powers would not warrant its assumption."[127]

Even if much of Justice Wilson's opinion might be dismissed as "persiflage" by modern standards, it underscores that at the time, prominent Justices believed "general jurisprudence, sound policy, and the experience of other nations were . . . immediately relevant to the interpretation of our written Constitution."[128]

The decline of natural law interpretations of the Constitution in the nineteenth century is well documented.[129] Suffice it to say that in the crucible of the abolitionist movement, natural law interpretations of the Constitution

121. *Id.* at 466.
122. *Id.* at 461.
123. *Id.* at 460.
124. Chief Justice Jay examined the differences between the concepts of sovereignty in Europe and the United States to elucidate the nature of sovereignty generally as well as to judge whether the prerogatives of sovereignty allowed in Europe are essential ingredients of sovereignty in the United States. He concluded that the nature of sovereignty in Europe, which is based on feudal powers of the Prince, differs sharply from sovereignty in the United States, which is based on compact. Therefore the respective prerogatives of sovereignty likewise must differ. *Id.* at 471–72 (Jay, C.J.).
125. *Id.* at 450 (Blair, J.).
126. *Id.* at 449 (Iredell, J.). Justice Iredell did concede that that treaty law may be applicable to furnish rules of interpretation. *Id.*
127. *Id.*
128. CURRIE, *supra* note 110, at 15.
129. *See, e.g.*, Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 65–68 (1988); William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974); Sherry, *supra* note 106, at 1175–76.

went into abeyance. As late as 1829 the Court could declare the natural law pronouncement that "[t]he fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred."[130] But the abolitionist movement placed in opposition the sacred rights of property and liberty, with natural law advocates arguing both sides of slavery question.[131] By the mid-1800s the Court rejected natural law appeals to abolish slavery, concluding that matters of justice are best left to the political branches. As the Court put it in *Dred Scott*,

> [i]t is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it.[132]

What is less often discussed is the revival of natural law interpretations of the Constitution in the twentieth century.[133] While the natural law concept has diminished in American intellectual discourse, it has shown continued vitality "in the field of constitutional law . . . woven into the fabric of due process" jurisprudence.[134] If the early Court recognized extratextual natural rights as a limit on legislative action, the modern Court finds in the interstices of the text rights that are inherent but not enumerated. That is to say, the trend toward collapsing fundamentality with constitutionalism has often been animated by a generosity of spirit regarding the meaning behind the text. As Justice Brennan put it, while the "text marks the metes and bounds of official authority and individual autonomy," that text represents a "sparkling vision of the supremacy of the human dignity of every individual."[135] Visionary constitutionalism approaches textual guarantees expansively based

130. Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829).

131. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 51 (1980).

132. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 405 (1856).

133. *See* George, *supra* note 103, at 2270–75, 2278–83 (discussing *Griswold* and natural law).

134. *See* BENJAMIN FLETCHER WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW 330–31 (1962); *see also* Meachum v. Fano, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting) (arguing that liberty interests do not have their source in the Constitution or state law: "I had thought it self-evident that all men were endowed by the Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects . . . ."). *But see* ELY, *supra* note 131, at 52 (arguing that natural law interpretations are no longer respectable in constitutional adjudication).

135. Speech of Justice William J. Brennan, Jr. to the Text and Teaching Symposium, at Georgetown University (Oct. 12, 1985), *reprinted in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 18 (The Federalist Soc'y 1986).

on overarching themes and grand designs that echo natural law principles, challenging "the capacity of our constitutional structure to foster and protect the freedom, the dignity, and the rights of all persons within our borders."[136] Similarly, Ronald Dworkin's "moral reading" of the Constitution pours natural law wine into the wineskin of originalism with the view that the Framers intended to enact general principles and that these principles should be construed maximally at the "most general possible level" of abstraction.[137] Abstract, moral readings of the Constitution thus permit the Court to fashion principles to reach "right" results contrary to original standards, historical experience, or modern majoritarian impulses.[138] The Supreme Court likewise embraces natural law approaches to constitutionalism when it pronounces that the constitutional demands for autonomy require recognition of the libertarian choice to "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[139] Thus, while not espousing natural law per se, the Court has embraced catch phrases that are sub silentio surrogates of the principle.[140]

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136. *Id.* at 20; *see also* MARTIN EDELMAN, DEMOCRATIC THEORIES AND THE CONSTITUTION 171–77 (1984) (discussing Justice Douglas' natural law approach and his conception of the Constitution's "grand design").

137. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7–9 (1996). For a critique of the maximalist approach of Dworkin' moral reading of the Constitution, see Gregory Bassham, *Freedom's Politics: A Review Essay of Ronald Dworkin's* Freedom's Law: The Moral Reading of the American Constitution, 72 NOTRE DAME L. REV. 1235, 1246–58 (1997).

138. Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1253 (1997) (discussing the choice between "abstract, principled, moral reading" and inconsistent, "concrete, dated readings" in constitutional interpretation); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1276–77 (1997). In so doing, Dworkin "liberate[s] judges to achieve their own vision of the 'best answers' to controversial questions without regard to the Framers' opinions, while simultaneously claiming to be faithfully carrying out the Framers' intentions." *Id.* at 1281.

139. Lawrence v. Texas, 539 U.S. 558, 574 (2003) (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)); *see also* DWORKIN, *supra* note 137, at 104–12 (discussing attempts to identify a "textual home" for an autonomy right); Jason S. Marks, *Beyond Penumbras and Emanations: Fundamental Rights, The Spirit of the Revolution, and the Ninth Amendment*, 5 SETON HALL CONST. L.J. 435, 486 (1995) (arguing that the notion that an individual is "entitled to a sphere of personal autonomy that prevents government imposition of morality when such a constraint affects personal issues related primarily to religion" is a "modern analogue of precepts of natural law" that are "explicit conditions of the social compact that guide constitutional interpretation without regard to the textual location of a particular right"); Stephen B. Presser, *Some Thoughts on Our Present Discontents and Duties: The Cardinal, Oliver Wendell Holmes, Jr., The Unborn, The Senate, and Us*, 1 AVE MARIA L. REV. 113, 114 (2003) (discussing theological underpinnings of the "mystery passage").

140. *See* Griswold v. Connecticut, 381 U.S. 479, 511 n.4 (1965) (Black, J., dissenting) (identifying various catchwords and catchphrases the Court has used that connote principles of natural justice); George, *supra* note 103, at 2274–75 ("'Natural law' jurisprudence by any other name remains natural law jurisprudence.").

The most obvious modern variation of a natural law theory of constitutionalism is found in the substantive due process jurisprudence of implicit ordered liberty.[141] The natural law roots behind this doctrine are underappreciated. As David Currie noted—citing parallels to the Chase-Iredell debate in *Calder v. Bull*[142]—"[i]n practice . . . some of the Court's more recent decisions under . . . 'substantive due process' raise the question whether it is paying lip service to Iredell for the sake of appearances while effectively following Chase."[143] While the "implicit ordered liberty" doctrine echoes eighteenth-century natural law jurisprudence, its modern origins are to be found in the early twentieth-century cases of *Twining v. New Jersey*[144] and *Palko v. Connecticut*.[145]

In *Twining*, the Court equated "due process of law" with provisions in the Magna Carta that prohibit the taking, imprisonment, or exile of any freeman without the lawful judgment of his peers or "the law of the land."[146] *Twining* thus affirmed the notion that due process might be defined by reference to fundamental principles that delimit governmental action from changing "ancient procedures." For the Court in *Twining*, due process of law reflects certain "immutable principles of justice which inhere in the very idea

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141. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 433 (6th ed. 2000). Nowak and Rotunda write:

> Today the Justices of the Supreme Court will apply strict forms of review under the due process clauses and the equal protection clause to any governmental actions which limit the exercise of "fundamental" constitutional rights. . . . Little more can be said to accurately describe the nature of a fundamental right, because fundamental rights analysis is simply no more than the modern recognition of the natural law concepts first espoused by Justice Chase in *Calder v. Bull*.

Id.; *see also* Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 STAN. L. REV. 140, 165 (1949) (arguing that the "true source" of substantive due process is found "in concepts of natural law," which, although "historically separate from the English concept of due process," has "by judicial fiat been grafted upon the venerable phrase").

142. 3 U.S. (3 Dall.) 386 (1798).

143. CURRIE, *supra* note 110, at 48.

144. 211 U.S. 78 (1908).

145. 302 U.S. 319 (1937).

146. *Twining*, 211 U.S. at 100 (citation omitted). From these historical origins, the Court drew the following conclusions regarding the Due Process Clause:

> First. What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors . . . . Second. It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law . . . . Third. But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government.

Id. at 100–01.

of free government."[147] Fundamental principles relating to the process of law and protection of private rights must be safeguarded from arbitrary government action, and the identification of those fundamental principles should be determined by settled usages and modes of procedure. What is particularly significant about *Twining* is the notion that due process rights are ancient, natural, preexisting rights that are part of the very order of free societies.

In *Palko*, the Court expanded on *Twining* and articulated a jurisprudence of "ordered liberty" as a basis for due process guarantees.[148] The Court reasoned that certain rights, in particular the right to trial by jury, may be of great value and importance, but "not of the very essence of a scheme of ordered liberty. To abolish [the right to trial by jury] is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without [it]."[149] Relying on *Twining*, the Court in *Palko* suggested that a "study and appreciation of the meaning . . . of liberty itself" could identify certain rights as so systemically essential that "justice would perish" if those rights were abridged.[150]

A decade later, Justice Black famously ridiculed the natural law underpinnings of *Twining* and *Palko* in arguing for full incorporation of the Bill of Rights upon the states. Rather than accepting *Twining*'s rule that would apply none of the Bill of Rights to the states, or *Palko*'s rule that would selectively incorporate them provided the right was implicit in ordered liberty, Justice Black argued in dissent in *Adamson v. California*[151] that relying on natural law principles "to hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution."[152]

147. *Id.* at 102.

148. The question addressed in *Palko* was whether the double jeopardy immunity was applicable to the states by virtue of the Fourteenth Amendment. The Court noted that the Due Process Clause may make it unlawful for a state to abridge liberties embodied in the Bill of Rights, recognizing that in "these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states." *Palko*, 302 U.S. at 324–25. The Court attempted to fashion a line that divided liberties as falling within or without this rationalizing principle.

149. *Id.* at 325–26 (citation omitted).

150. *Id.* at 326.

151. 332 U.S. 46 (1947).

152. *Id.* at 89–90 (Black, J., dissenting). For Justice Black, a "natural law" formula is an incongruous excrescence on our Constitution that "subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power." *Id.* at 75.

Nonetheless, the concept of implicit ordered liberty continued to be cited with regularity and now is part of the fundamental canon of modern substantive due process. In many respects, Justice Harlan was the midwife in this rebirth through his dissent in *Poe v. Ullman*[153] and his concurrence in *Griswold*. In *Poe*, Justice Harlan recognized substantive due process "embrace[s] those rights 'which are . . . *fundamental*, which belong . . . to the citizens of all free governments.'"[154] Citing *Palko's* progeny, Harlan noted that the right to privacy "is part of the 'ordered liberty' assured against state action by the Fourteenth Amendment."[155] "[B]y common understanding throughout the English-speaking world," he continued, "the privacy of the home" must be "granted to be a most fundamental aspect of 'liberty.'"[156] Subsequently in *Griswold*, Justice Harlan grounded a right to privacy in the Due Process Clause, which embraces "basic values 'implicit in the concept of ordered liberty.'"[157] For Justice Harlan, penumbras and emanations from other constitutional provisions are unnecessary; the privacy right in the Due Process Clause stands on its own bottom.[158]

Following *Griswold*, the concept of implicit ordered liberty has been cited numerous times in substantive due process jurisprudence.[159] Thus, from *Twining* to the present, an evolution of the "natural law due process" has occurred by which the Court has freed

> itself from the limits of a written Constitution and set[ ] itself loose to declare any law unconstitutional that . . . violates the principles "implicit in the concept of ordered liberty." While this approach has been frequently used in deciding so-called "procedural" questions, it

153. 367 U.S. 497 (1961).

154. *Id.* at 541 (Harlan, J., dissenting) (citing Corfield v. Coryell, 6 Fed. Cas. 546 (E.D. Pa. 1823) (No. 3230)).

155. *Id.* at 549.

156. *Id.* at 548.

157. Griswold v. Connecticut, 381 U.S. 479, 500 (1961) (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

158. Not surprisingly, Justice Black strongly dissented in *Griswold* and specifically attacked Justice Harlan's invocation of "catch phrases" to strike down under the Fourteenth Amendment laws that offend notions of natural justice. In his view, such formulas based on natural justice require judges to determine what is or is not constitutional on the basis of their own appraisal of which laws are unwise or unnecessary. *Id.* at 511–12 (Black, J., dissenting). There is extensive modern commentary on the natural law arguments of Justice Black's dissent in *Griswold*. *See, e.g.*, James E. Fleming, *Fidelity to Natural Law and Natural Rights in Constitutional Interpretation*, 69 FORDHAM L. REV. 2285 (2001); Robert P. George, *The Natural Law Due Process Philosophy*, 69 FORDHAM L. REV. 2301 (2001); George, *supra* note 103, at 2270–75, 2278–83.

159. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 592–93 (2003) (Scalia, J., dissenting); Chavez v. Martinez, 538 U.S. 760, 775, 787, 788 (2003); Washington v. Glucksberg, 521 U.S. 702, 721, 727, 765 (1997); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 295, 341 (1990); Bowers v. Hardwick, 478 U.S. 186, 191, 194 (1986); Roe v. Wade, 410 U.S. 113, 152 (1973).

> has evolved into a device as easily invoked to declare invalid "substantive" laws that sufficiently shock the consciences of at least five members of this Court.[160]

The great ghosts that haunt natural law understandings of substantive due process are indeterminacy and judicial hegemony. As Justice Black feared, "[s]uperimposing the natural justice concepts on the Constitution's specific prohibitions could operate as a drastic abridgement of democratic safeguards they embody."[161] In so doing, the application of a natural law concept "makes judges the supreme arbiters of the country's laws and practices."[162] For a majority of the justices, unenumerated constitutional rights are deemed appropriate as constitutional guarantees because they are experienced rights fundamental to the natural political order of free societies. And as experienced rights, one can safeguard against judicial overreaching by examining asserted due process rights through the prism of our history, traditions, and values. As Justice Harlan put it, judicial self-restraint is achieved "by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."[163]

The fear of indeterminacy has only intensified since *Griswold*. Doctrines of judicial self-restraint have been proposed and finally adopted in the substantive due process test of *Washington v. Glucksberg*.[164] *Glucksberg* cabins substantive due process into the conjunctive obligation of finding fundamental rights only if they are "implicit in the concept of ordered liberty" and "deeply rooted in this Nation's history and tradition."[165] If the liberty interest is not fundamental, it may be abridged pursuant to a validly enacted law if that law is rationally related to a legitimate state interest.[166] This approach, the Court emphasized, "tends to rein in the subjective elements that are necessarily present in due process judicial review."[167] In addition, by establishing a threshold requirement of fundamental rights, the Court has resisted expansion of the concept of substantive due process, recognizing that "guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."[168] Thus,

160. *In re* Winship, 397 U.S. 358, 381–82 (1970) (Black, J., dissenting) (citations omitted).
161. Int'l Shoe Co. v. Washington, 326 U.S. 310, 325 (1945) (Black, J., separate opinion).
162. *Id.* at 326.
163. *Griswold*, 381 U.S. at 501 (Harlan, J., concurring).
164. 521 U.S. 702.
165. *Id.* at 721 (quotations omitted).
166. *Id.* at 722.
167. *Id.*
168. *Id.* at 720 (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).

in *Glucksberg*, the Court examined our history and tradition "to conclude that the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."[169] It also looked at the practice elsewhere to conclude "almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide."[170]

Occasionally, the Court has referenced the practices of other nations in attempting to understand implicit ordered liberty.[171] "If neither liberty nor justice would exist if the right were sacrificed, then comparative examples [may be] offered to buttress or betray the argument that the right is fundamental."[172] For example, the Court in *Rochin v. California*[173] defined due process protections as encompassing immunities rooted in the traditions of our people or implicit in the concept of ordered liberty. Such canons of decency express notions of "justice of English-speaking peoples even toward those charged with the most heinous offenses."[174] The Court adverted similar construction in *Wolf v. Colorado*[175] when it indicated that due process exacts all that is "implicit in the concept of ordered liberty."[176] It is a "compendious expression for all those rights which the courts must enforce because they are basic to our free society."[177] Such basic rights are "eternal verities" consistent with the "human rights enshrined in the history and the basic constitutional documents of English-speaking peoples."[178]

More recently in *Bowers v. Hardwick*,[179] the Court refused to locate a fundamental right in implicit ordered liberty, concluding that "[p]roscriptions against that conduct have ancient roots" and that in light of these proscriptions, "to claim that a right to engage in such conduct is . . . 'implicit in the concept of ordered liberty' is, at best, facetious."[180] Justice Burger in his concurrence was even more explicit in his comparative analysis. After

169. *Id.* at 728.
170. *Id.* at 710.
171. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 576 (2003); *Glucksberg*, 521 U.S. at 710–21, 730–34; Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989); Bowers v. Hardwick, 478 U.S. 186, 192–94 (1986); *id.* at 197 (Burger, J., concurring); Ingraham v. Wright, 430 U.S. 651, 673 n.42 (1977); Rochin v. California, 342 U.S. 165, 169 (1952); Wolf v. Colorado, 338 U.S. 25, 27–28 (1949); Palko v. Connecticut, 302 U.S. 319, 326 n.3 (1937).
172. Alford, *supra* note 6, at 921.
173. 342 U.S. 165 (1952).
174. Malinski v. New York, 324 U.S. 401, 417 (1945) (Frankfurter, J., separate opinion); *see also* Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968); *Rochin*, 342 U.S. at 169.
175. 338 U.S. 25.
176. *Id.* at 27.
177. *Id.*
178. *Id.* at 27–28; *see also Ingraham*, 430 U.S. at 673 n.42; *Duncan*, 391 U.S. at 149 n.14.
179. 478 U.S. 186 (1986).
180. *Id.* at 192, 194.

reviewing Roman law, English law, and early American law, Chief Justice Burger reasoned that "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[181]

The most noteworthy reference to comparative material in recent decades is found in *Lawrence v. Texas*. In *Lawrence*, the Court cited a decision of the European Court of Human Rights, *Dudgeon v. United Kingdom*,[182] to show that "[t]he sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction."[183] It also referenced *Dudgeon*'s progeny as evidence that "[t]o the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere."[184]

As I have suggested elsewhere, *Lawrence*'s appeal to comparative material is comprehensible only when considered from the perspective of natural law understandings of implicit ordered liberty.[185] The right is implicit in ordered liberty as suggested by *Lawrence*'s reference to Western civilization. The Court critiqued *Bowers*' reliance on the history of Western civilization for its failure to account for opposing authorities.[186] Most important among these was the European Court of Human Rights' decision in *Dudgeon v. United Kingdom*, binding in forty-five countries. Thus, the Court noted that *Bowers* "relied on values we share with a wider civilization" to establish that the right is not implicit in ordered liberty.[187] In addition, *Lawrence* implied that other indicators from that wider civilization establish this element of substantive due process.[188] This right, the Court stated, is "an integral part of human freedom in many other countries"[189]—an approximation of the notion that this interest is of the "very essence of a scheme of ordered liberty."[190]

It is curious that the Court's reliance on implicit ordered liberty was so opaque. The Court never identified the test that it was using, leading some to question whether the Court was basing its decision on rational basis review

181. *Id.* at 197.
182. 45 Eur. Ct. H.R. (ser. A) (1981).
183. Lawrence v. Texas, 539 U.S. 558, 572 (2003).
184. *Id.* at 576.
185. Alford, *supra* note 6, at 927. That argument assumes that the Court viewed the asserted right as fundamental and that it engaged in a *Glucksberg* substantive due process analysis. Both of these propositions are controversial. *Id.* at 922 n.59.
186. *Lawrence*, 539 U.S. at 572–73.
187. *Id.* at 576.
188. *Id.* at 576–77.
189. *Id.* at 577.
190. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

or strict scrutiny.[191] A careful reading of the opinion, however, underscores that much of the decision attempts to ground the reasoning in our history and tradition,[192] and that references to foreign laws and practices were offered to rebut *Bowers*' finding that the right was not part of ordered liberty given that for millennia Western civilization has opposed the practice.[193] *Lawrence* locates the autonomy right in our national experience, and extends that right to persons in homosexual relationships.[194] The Court confirms the correctness of this step by looking to foreign laws and practices, which support the substantial nature of the asserted right. Under this conception, the Court affirms that "international decisions occasionally may be used to help understand implicit ordered liberty, but that jurisprudence will simply reflect principles that are embodied in the laws of all civilized nations, including our own."[195]

But the natural law assertions that undergird the decision are not opaque. Indeed, *Lawrence* suggests that natural law theory has continued currency in constitutional jurisprudence. Liberty is defined in its broadest "transcendent dimensions" to include "freedom of thought, belief, expression, and certain intimate conduct."[196] *Lawrence* offers a theory of constitutional anthropology that endows personhood with the freedom to define "one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[197]

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191. Justice Scalia argues that the Court is engaging in "an unheard-of form of rational-basis review that will have far-reaching implications beyond this case." *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting); *see also* Laurence H. Tribe, Lawrence v. Texas, *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1916–17 (2004) (arguing the Court adopted a fundamental rights analysis); *Leading Cases: Constitutional Law*, 117 HARV. L. REV. 226, 306 (2003) ("If . . . government has no legitimate interest, then its interest cannot be compelling. . . . Absent a compelling interest, the direct infringement of a fundamental right is unconstitutional, no matter how narrowly tailored.").

192. *See* Eric L. Muller, *Constitutional Conscience*, 83 B.U. L. REV. 1017, 1065 n.341 (2003). Muller writes:

> Beneath the open-textured and aspirational tone of *Lawrence* . . . lies a continued intense interest in the historical pedigree of claimed fundamental freedoms . . . . [While] important areas of disagreement remain about how to go about the historical inquiry . . . *Lawrence* does not purport to renounce an interest in history and tradition in the process of determining the scope of Due Process Clause's substantive coverage.

Id.

193. *See* Alford, *supra* note 6, at 916–17; Breyer Scalia Debate, supra note 1 (Justice Breyer remarking that the reason Lawrence cited the European Court of Human Rights was because in *Bowers* "the Court had made the claim that homosexual sodomy is almost universally forbidden").

194. *Lawrence*, 539 U.S. at 573–74.

195. Alford, *supra* note 6, at 928. "[T]his is not to imply that *Lawrence* is without problems from the perspectives of classical substantive due process jurisprudence." *Id.* at 923–24.

196. *Lawrence*, 539 U.S. at 562.

197. *Id.* at 514 (citations omitted). One critic described *Casey*'s "mystery passage," cited by *Lawrence*, as "fl[ying] in the face of all that the Founders meant by 'ordered liberty'" including the "truths of what the Declaration of Independence calls the 'Laws of Nature and of Nature's God.'" Richard J. Neuhaus, *Rebuilding the Civil Public Square*, 44 LOY. L. REV. 119, 125 (1998). Neuhaus argued that such passages "deserve the closest attention, for they reveal the underlying

"[M]ore than any other decision in the Supreme Court's history" *Lawrence* also "presuppose[s] and advance[s] an explicitly equality-based . . . theory of substantive liberty."[198] It all but embraces a Millean libertarianism that counsels against state attempts to impose relational boundaries absent injury to persons or protected institutions.[199]

But like all decisions grounded on natural law concepts, the "singular vagueness" that permits invocation of metaphysical principles to support constitutional propositions also has the distinct disadvantage of its transparent indeterminacy.[200] Thus, what historically was recognized as a crime against nature is now constitutionally protected as a component of "universal dignity."[201] A hundred years ago, the economic theory that "[e]very man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man"[202] was famously ridiculed as having no location in our Constitution,[203] but now that same Constitution has enshrined the ethical

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assumptions of the Court—or at least of some on the Court—about the relationship between law and moral judgment." *Id.*

198. Tribe, *supra* note 191, at 1898.

199. *Lawrence*, 539 U.S. at 567; *see id.* at 599 (Scalia, J., dissenting); Tribe, *supra* note 191, at 1938 & n.174 (denying that the Fourteenth Amendment has ever been confused by any Court majority with a charter of pure liberal individualism, but conceding that libertarians will "claim *Lawrence* as a victory for their camp"); text accompanying *infra* note 204.

200. ELY, *supra* note 131, at 50 (quoting CHARLES HANES, THE REVIVIAL OF NATURAL LAW CONCEPTS, at vii–viii (1930)).

201. Tribe, *supra* note 191, at 1898. Even as *Lawrence* embraces an indeterminate constitutional theory of personal autonomy, it does not begin to answer critics of Millean libertarianism, such as Lord Devlin's well known query:

> If the statement that "there must remain a realm of private morality and immorality, which is, in brief and crude terms, not the law's business" . . . is really meant as a statement of principle to include other immoralities besides the homosexual, every practical reformer before he makes use of it will want to be told what else it embraces. . . . What those interested in reform will want to know is whether, if the principle is conceded in the case of homosexuality, some other and what parts of the existing criminal law will be carried away as well.

PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 139 (1965). Those sympathetic with the decision, however, have made halting attempts at discernible distinctions. For example, Laurence Tribe distinguishes between sodomy, on the one hand, and incest, adultery and bigamy on the other, based on the insignificant number of persons implicated, which he contends "cut no wide swath through the population to limit the options open to any particular oppressed minority." Tribe, *supra* note 191, at 1944. Tribe offers no basis for distinguishing the size of the affected group as having constitutional relevance, as if minority groups that are more discrete and insular somehow deserved lesser protection. Nor does he provide any data to support the proposition that those who, say, commit adultery are larger or smaller in number than those who practice homosexual sodomy. In any event, Tribe argues that such questions should be saved for a later day, ignoring the theoretical difficulties that for decades have bedeviled attempts to draw principled distinctions between different types of moral legislation.

202. HERBERT SPENCER, SOCIAL STATICS; OR, THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED 121 (1872).

203. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("[T]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.").

principle that "the only purpose for which power can be rightfully exercised over any member of a civilized community against his will is to prevent harm to others."[204] Why is one ethic an unprotected liberty interest but the other of its very essence? Certainly one could appeal to natural law principles to justify invocation of either as a fundamental interest. Both Spencer and Mill are legitimate, indeed parallel, conceptions of the good. Deprivation of property interests, like liberty interests, requires due process. One cannot explain the disconnect without conceding the transparent indeterminacy of the constitutional due process interest.

While *Lawrence* is most comprehensible when viewed through the lens of implicit ordered liberty, the Court's broader natural law ruminations include language that advances comparativism far beyond its traditional analogical bounds.[205] The Court reasoned that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."[206] Under this conception it is of little moment that in this country the state has always asserted the right to circumscribe such choice. This approach of "unexperienced rights" would suggest that implicit ordered liberty may be identified in other systems of justice, and that it is incumbent upon our political branches to justify a departure from liberty rights guaranteed elsewhere but not experienced here. Concerns about institutional legitimacy would counsel that such an expansive role for comparativism will not hold sway in future due process cases.[207]

With substantive due process, implicit ordered liberty offers an undeniable link to the disfavored natural law constitutional tradition. That tradition affords ample opportunity for constitutional comparativism. International law is replete with claims of universality, and ordered societies structure themselves consistent with general notions of fairness and justice. As such, a natural law approach to constitutionalism is perhaps the most coherent theory to advance comparativist conceptions. The great obstacle of this approach is the obstacle of history, which (with limited exception) has long relegated it to a disfavored status in our constitutional system. That disfavor reflects a profound historical skepticism about judicial overreaching and substantive indeterminacy.

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204. JOHN STUART MILL, ON LIBERTY 22 (Longman, Roberts & Green 1864) (1859); *see also Lawrence*, 539 U.S. at 567 (stating that liberty "counsel[s] against attempts by the State to . . . set [relational] boundaries absent injury to a person or abuse of an institution the law protects").

205. *See supra* notes 185–190 and accompanying text.

206. *Lawrence*, 539 U.S. at 577.

207. *See* Alford, *supra* note 6, at 929.

III. MAJORITARIANISM

Majoritarianism is a constitutional theory that embraces sovereign expressions of ordered society. The conservative version of majoritarianism seeks a limited role for the Constitution, recognizing that any declaration of unconstitutionality thwarts the will of the majority reflected in legislative and executive action. The activist version of majoritarianism seeks to embody in the text of the Constitution current contemporary standards, on the view that the founding document is a living instrument embracing the broadest ideals of our evolving national experience.

Although rarely recognized as such, these competing versions of constitutional interpretation are both variations of majoritarianism. The most common variety of majoritarianism concerns deference to the political branches and limitations on judicial review. Structural majoritarianism recognizes that the political branches are the embodiment of our democratic system of governance. "For most judges, most of the time, the principal constraint on constitutional authority is not text, history, or even precedent, but deference to the decisions of representative institutions in close cases."[208] Majoritarian rule is the core of the American governmental system. One of the central tasks of constitutionalism has been to devise mechanisms for promoting democratic rule while also "protecting minorities from majority tyranny" consistent with those demands.[209]

Interpretive majoritarism is another variation of majoritarianism, albeit one that concerns the infusion of politics into law through malleable interpretations of the Constitution that bring the text in line with the times. When one speaks of a "living Constitution," one generally is embracing an interpretative device that seeks to ensure consistency with contemporary standards. The "living Constitution" is an organism that rarely swims upstream. As one noted commentator put it,

> [w]hat prevents the judicial recognition of additional individual rights is usually not the text. Instead, it is the same thing that prevents their explicit incorporation into the Constitution: the lack of any strong national consensus in their favor . . . . In the end, society gets its way; if we dislike the results, we must put most of the blame on our contemporaries rather than the Framers.[210]

208. McConnell, *supra* note 138, at 1289.
209. ELY, *supra* note 131, at 7–8.
210. Daniel A. Farber, *Our (Almost) Perfect Constitution*, 12 CONST. COMMENT. 163, 163–65 (1995).

A common feature of both structural majoritarianism and interpretive majoritarianism is skepticism toward comparative material. Under the former, deference to the political branches belies the need for comparative empirical experiences; under the latter, the contemporary values that infuse malleable interpretations of the Constitution are based on our own national experience, not the community standards of some real or imagined global village.

A. Structural Majoritarianism

The moral argument for majoritarianism is political liberty in the democratic order: the notion that our laws are not simply for the people, but also of and by the people.[211] Rather than accepting the premise that we are wards under the benevolent trusteeship of the Court, majoritarianism understands that each citizen's ideas about justice and the public good are entitled to an equal hearing. "[T]he only way to show equal concern and respect is to govern democratically, subject to constraints to which the people themselves have agreed."[212]

If the moral argument for majoritarianism is democracy, the legal argument for majoritarianism is structuralism—separation of powers and federalism. As John Hart Ely put it, the structural design of the Constitution assumes that

> an effective majority will not inordinately threaten its own rights . . . by structuring decision processes . . . to try to ensure, first, that everyone's interest will be . . . represented . . . at the point of substantive decision, and second, that the processes of individual application will not be manipulated so as to reintroduce in practice the sort of discrimination that is impermissible in theory.[213]

Thus, the process of constitutional decisionmaking ensures due regard for majoritarian concerns, and appropriate protection of minority interests, particularly interests that reinforce and protect representation in the democratic process. Judicial review that is consistent with the majoritarian premise generally defers to the political branches, and imposes more exacting review of political measures if they undermine participation in the process by representative parties.

There are a number of constitutional doctrines that support majoritarianism. The fundamental constitutional doctrine that promotes a structural majoritarian conception is the presumption of constitutionality. To use the

211. *See* McConnell, *supra* note 138, at 1290.
212. *Id.* at 1290–91.
213. ELY, *supra* note 131, at 100–01.

language of *Carolene Products*,[214] under this conception, one presumes that facts support legislative judgments, one assumes that the legislature has a rational basis for its actions, and one imposes more searching judicial scrutiny only in narrow circumstances in which participational values are undermined, such as laws that infringe fundamental rights relating to political process or laws that impose suspect classifications on discrete and insular minorities.[215]

The presumption of constitutionality rests on a "decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt."[216] Since the earliest pronouncements of this presumption, deference to Congress has been so commonly referenced by the Court as to become almost formulaic.[217] Justice Holmes described the practice of declaring congressional acts unconstitutional the Court's "gravest and most delicate duty," such that if the statute can be found to be constitutional the Court is duty-bound to so find.[218] Today the Court often begins its analysis with expressions of deference "customarily [given] to the duly enacted and carefully considered decision[s] of a coequal and representative branch of our Government."[219]

As Chief Justice Rehnquist has put it, the presumption of constitutionality "makes eminent good sense" because

> if the Supreme Court wrongly decides that a law enacted by Congress is constitutional, it has made a mistake, but the result of its mistake is only to leave the nation with a law duly enacted by the popularly chosen members of [Congress] . . . and signed into law by the popularly chosen president. But if the Supreme Court wrongly decides that a law enacted by Congress is not constitutional, it has made a mistake of considerably greater consequence; it has struck down a law duly enacted by the popularly elected branches of government, not because of any principle in the Constitution but because of the individual views of desirable policy held by a majority of the nine justices at that time.[220]

214. 304 U.S. 144 (1938).

215. *Id.* at 152 n.4.

216. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827).

217. *See* Morrison v. Olson, 487 U.S. 654, 704 (1988) (Scalia, J., dissenting) (discussing the recitation of presumption of constitutionality as "almost formulary caution").

218. Blodgett v. Holden, 275 U.S. 142, 148 (1927).

219. Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 319 (1985); *accord* Bd. of Educ. v. Mergens, 496 U.S. 226, 251 (1990); U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 721 (1990).

220. WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 318 (1987). *But see* David M. Burke, *The "Presumption of Constitutionality" Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty*, 18 HARV. J.L. & PUB. POL'Y 73, 81–82 (1994) (objecting to Rehnquist's

He might also have added that a mistake of the former is easily corrected by the demands of popular will to rescind an unjust law, but a mistake of the latter is compounded by the inability to alter that mistake except through the extraordinary procedure of overruling the erroneous decision. As the Court put it, "[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."[221] The mistake of judicial deference lasts for a political season; the mistake of judicial usurpation is fixed in the constitutional firmament.

The presumption of constitutionality finds concrete manifestation in rational basis review. Under rational basis review, legislation is presumed valid and will be sustained if the statute is rationally related to a legitimate state interest.[222] Thus, in the due process context, if a liberty interest is not of fundamental importance, the state and federal legislatures will be given "wide latitude" to regulate such conduct.[223] While accepting that legislative action is not unfettered,[224] in most contexts the Constitution "grants legislatures, not courts, broad authority (within the bounds of rationality) to decide whom they wish to help with their . . . laws and how much help those laws ought to provide."[225] As the Court put it recently, rational basis review—with its presumption favoring constitutionality—is "a paradigm of judicial restraint."[226]

Even the Court's newfound willingness to invalidate legislative determinations based on federalism concerns arguably signals not "a retreat from [a] commitment to majority rule but rather an attempt to perfect it."[227] Not only is the Rehnquist Court arguably "invalidat[ing] purely symbolic legislation,

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view that mistakenly declaring a Congressional act unconsequential is of greater consequence than declaring the act constitutional).

221. FCC v. Beach Communications, Inc., 508 U.S. 307, 314 (1993) (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).

222. *See* Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

223. For example, if a city ordinance requires a police officer to be clean shaven, the Court will uphold that requirement, recognizing that similarity in appearance of police officers is a desirable and rationale objective. *See* Kelley v. Johnson, 425 U.S. 238, 246–49 (1976).

224. Courts will examine government infringements of nonfundamental liberties to ensure that they have some rational basis. Moreover, in the case of criminal laws, courts will seek to ensure that some notice has been provided to individuals concerning the proscribed conduct and that some limitations have been imposed on police discretion. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41 (1999) (striking down loitering statute).

225. Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 108 (2003).

226. *Beach Communications*, 508 U.S. at 314; *see also* Eldred v. Ashcroft, 537 U.S. 186, 205 n.10 (2003) (quoting Bd. of Trs. v. Garrett, 531 U.S. 356, 383 (2001) (Breyer, J., dissenting)).

227. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 481 n.99 (2003).

intended more to induce public support than to honor public preferences,"[228] it is doing so sensitive to the fact that state legislatures are more attuned to majority preferences than the federal legislature. As one commentator put it, the modern federalism cases recognize that with the "transfer [of] power . . . from the state . . . to the nation, political incentives shift."[229] A decisionmaker in an aggregated, national system representing more people is less likely to be sensitive to localized, majority preferences than a decisionmaker in a disaggregated, state system. "[I]f we are worried about predicting structural risk, then it seems uncontroversial to begin . . . with a presumption that a relatively more disaggregated set of citizens is more likely, on average, to reflect more sensitive accounts of majoritarian preference."[230] Under this conception, *United States v. Lopez*[231] was an easy case because concerns about federalism reflect concerns about majoritarianism.[232]

Structural majoritarianism is equally common in the solicitude granted by the Court to actions of the executive branch. Various doctrines support this deference. For example, under the presumption of regularity, "in the absence of clear evidence to the contrary, courts presume that [public officials] have properly discharged their official duties."[233] This doctrine rests on an assessment of the relative competence of the executive branch and also concerns to avoid unnecessary impairment of core executive functions.[234] The Court went further in the recent case of *Cheney v. United States District Court*,[235] granting extraordinary protections to the executive branch from civil litigation, arguing it was not incumbent on the president to claim executive privilege to avoid civil discovery because "the public interest requires that [the Court] give recognition to the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties."[236]

228. *Id.*; *see also* Lisa Schultz Bressman, *Disciplining Delegation After* Whitman v. American Trucking Ass'ns, 87 CORNELL L. REV. 452, 479 (2002) (discussing *United States v. Lopez* as an instance of "symbolic response[] to public problems"); V.F. Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835, 878, 880 n.171 (2004) (discussing federal statute that criminalizes violence against women as not indicative of a truly majoritarian remedy and as "simply a way to gain political favor in an election year without consideration of constitutional questions").

229. Nourse, *supra* note 228, at 875.

230. *Id.*

231. 514 U.S. 549 (1995).

232. Nourse, *supra* note 228, at 876.

233. United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting United States v. Chemical Found. Inc., 272 U.S. 1, 14–15 (1926)).

234. *Id.* at 465.

235. Cheney v. Dist. Ct., 124 S. Ct. 2576 (2004).

236. *Id.* at 2588.

Likewise, extreme deference to executive agency action supports the majoritarian premise. All of the modern conceptions of the administrative state support majoritarianism. The "interest group" approach reinforces majoritarianism by promoting participation through notice-and-comment rulemaking. "Agency decisions made after adequate consideration of all affected interests . . . have . . . legitimacy based on the same principle as legislation."[237] The "presidential model" seeks to ensure that administrative policy decisions are accountable to the public through transparency and presidential leadership that links the electorate with the bureaucrats.[238] Under the presidential model, "[w]hatever administration holds office and whatever regulatory vision that administration implements, the result represents the majority will."[239] Rules for judicial review of agency decisionmaking likewise support majoritarianism. At the heart of *Chevron* deference[240] is a concern about majoritarianism and political accountability.

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . . In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.[241]

Moreover, the reason that the Court in *United States v. Mead Corp.*[242] cabined *Chevron* deference was out of concern that not all agency action reflected a congressional intent to delegate authority to issue interpretations that carry the force of law.[243] Congress contemplated that administrative action will have the force of law only if procedures are in place that afford fairness and deliberation, such as notice-and-comment rulemaking.[244] Thus, the same concerns about democratic participation that animate judicial deference to

237. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1712 (1975).

238. Bressman, *supra* note 227, at 485–86 (discussing presidential model); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32 (2001) (discussing political accountability of the presidential model through transparency and an "electoral link").

239. Bressman, *supra* note 227, at 491.

240. Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984). Under *Chevron*, a federal court must undertake a two-step process in which it first asks "whether Congress has directly spoken to the precise question at issue." If so, the court "must give effect to the unambiguously expressed intent of Congress." Second, if Congress expressed no intent on the matter, or Congress' purpose and intent is unclear, the court must defer to the agency's interpretation of the statute if it falls within the range of permissible construction. *Id.* at 842–43.

241. *Id.* at 865–66.

242. 533 U.S. 218 (2001).

243. *Id.* at 230–31; *see also* Bressman, *supra* note 227, at 536.

244. *Mead*, 533 U.S. at 230.

legislative action likewise animate *Chevron* deference to administrative action if formal procedures are in place to ensure democratic participation.

Structural majoritarianism is highly skeptical of the relevance of comparative law in constitutional adjudication. In a number of recent cases that reflect a structural majoritarian approach, the Supreme Court has been invited to consider comparative material to resolve constitutional questions. With remarkable frequency, the Court declines.

In the most recent case involving campaign finance reform, *McConnell v. FEC*,[245] the Court was invited in an amicus brief by international experts to consider the practices of "peer nations" that have addressed inappropriate financial influence in electoral politics. That comparative analysis revealed that "the United States occupies an extreme end of the spectrum in regulating the flow of money in electoral politics."[246] The brief argued that campaign finance reforms would "incrementally nudge the American system . . . away from the fringe of international practice."[247] In a decision that was extraordinarily deferential to congressional findings,[248] the Court's majority recognized that "proper deference" was required given "Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise."[249] As a result, the majority gave no recognition whatsoever to the experiences in other countries.[250] Thus, while the decision in *McConnell* was in many respects remarkable,[251] it was commonplace in its refusal to view the U.S. position as an intentional outlier in free speech protections as relevant. If majoritarian interpretations such as *McConnell*

245. 540 U.S. 93 (2003).

246. Brief of Amici Curiae International Experts et al. at 4, *McConnell* (02-1674).

247. *Id.* at 5.

248. *See* Bradley A. Smith, *McConnell v. Federal Election Commission, Ideology Trumps Reality, Pragmatism*, 3 ELECTION L.J. 345, 350 (2004) ("[T]he extreme deference of the Court to judgments by an obviously self-interested legislature effectively abdicates its policing responsibility."); *see also* Lillian R. BeVier, *McConnell v. FEC: Not Senator Buckley's First Amendment*, 3 ELECTION L.J. 127, 130 (2004) ("The argument for deference, which Justice Stevens seems to have found persuasive, reflects the opposite attitude. It is based on the conviction that systematic considerations cut against strict scrutiny because the 'political arena is one in which the expertise of legislators is at its peak and that of judges is at its very lowest.'").

249. *McConnell*, 540 U.S. at 137.

250. The only nod to comparativism was by Justice Scalia, who addressed the eighteenth-century historical practice in Britain as evidence of the Framers' original understanding that regulation of money used to fund speech constituted regulation of speech as such. *Id.* at 722–23 (Scalia, J., dissenting in part and concurring in part). Other justices were clearly cognizant of the comparative arguments in *McConnell*. *See* Breyer Scalia Debate, *supra* note 1 (Justice Breyer discussing amicus brief citations to comparative experiences involving campaign contributions and the freedom of expression).

251. *See* Daniel R. Ortiz, *The Unbearable Lightness of Being McConnell*, 3 ELECTION L.J. 299, 299 (2004); Smith, *supra* note 248, at 350.

presume extreme deference to congressional factfinding and expertise,[252] it follows that comparative experiences will be of limited utility in the Court's interpretive approach.

Naturalization and immigration is another area in which the Court has shown extreme deference to majoritarian concerns. In *Demore v. Kim*,[253] the Court upheld detention of deportable criminal aliens as a valid exercise of Congress' broad authority over naturalization and immigration,[254] notwithstanding arguments that the practice violated international law.[255] The Court deferred to Congress' approach, recognizing that while other approaches (such as posting bail) might be less burdensome, the Court is not a legislature charged with formulating public policy.[256] "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[257] Significantly, no Justice accepted the invitation to rely on international or comparative law as relevant to the inquiry.[258]

Even *Eldred v. Ashcroft*,[259] which proponents cite in support of constitutional comparativism,[260] actually has little to do with judicial comparativism

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252. *See* Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 ELECTION L.J. 147, 149 (2004). Briffault states:

> *McConnell* appears to have placed the democracy-promoting features of campaign finance law at the heart of the Court's analysis. The *McConnell* majority clearly viewed many of BCRA's restrictions and requirements not as burdens on speech but as desirable efforts to promote democracy. . . . This democracy-centered perspective on . . . campaign finance law was joined by a striking degree of judicial deference to Congress. The Court repeatedly recognized Congress's 'particular expertise' concerning the impact of particular campaign finance practices and their effects on both elections and government decision-making. The Court expressed its willingness to give Congress "sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the electoral process." Indeed, the Court deferred to Congress not just with respect to political facts and electoral predictions but also concerning the weight to be given to those facts and predictions in balancing democracy-promoting regulatory interests against the speech and associational rights of parties and interest groups.

Id. at 148–49 (citations omitted).

253. 538 U.S. 510 (2003).

254. *Id.* at 521–31.

255. Brief for Respondent at 40 n.39, *Demore* (No. 01-1491); Brief of Amici Curiae International Human Rights Organizations, *Demore* (No. 01-1491).

256. *Demore*, 538 U.S. at 528 (citing City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002)).

257. *Id.* at 521 (citing Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)).

258. This is particularly noteworthy given that the statute was ambiguous, *see id.* at 578 (Breyer, J., concurring in part and dissenting in part) (noting ambiguity in statutory language), and the *Charming Betsy* doctrine might counsel an interpretation that is consistent with international law, *see* Brief of Amici Curiae International Human Rights Organizations at 15–22, Demore (No. 01-1491). For a discussion of *Charming Betsy*, see *infra* note 404 and accompanying text.

259. 537 U.S. 186 (2003).

and far more to do with deference to legislative attempts to secure international uniformity. In *Eldred*, the Court upheld the Copyright Term Extension Act of 1998 as a "rational exercise of the legislative authority conferred by the Copyright Clause."[261] Recognizing that the Copyright Clause requires substantial deference to Congress, the Court concluded that the copyright extension reflects judgments of a kind Congress typically makes and that are well within its legislative domain.[262] A key factor Congress considered in extending the copyright term was to "ensure that American authors would receive the same copyright protection in Europe as their European counterparts."[263] The Court concluded that the congressional attempt to match the European Union's "life plus 70 years" provided a rational basis for the conclusion that the extension promotes the primary objective of the Copyright Clause, which is to promote the progress of science.[264] Thus, the Court did not sua sponte engage in comparativism to uphold the statute, but it did recognize the legitimacy of Congress' own review of the comparative landscape.

But consistent with structural deference, to say that Congress acted rationally in matching foreign practices is not to say that it would have been irrational for it to fail to match a foreign standard or to achieve international uniformity. Even if such an approach were "very bad policy . . . [t]he wisdom of Congress' action . . . is not within [the Court's] province to second guess."[265] Significantly, it is structural deference that led the Court to reject Justice Breyer's heightened judicial review of copyright term extensions. Justice Breyer reasoned that a copyright extension statute seriously restricts the dissemination of speech and therefore more careful review of congressional action was required.[266] He examined the purported benefits of the copyright extension—including the degree of international uniformity created—and found these benefits illusory.[267] In his view, it does not intrude upon congressional authority "to find the statute unconstitutional on the basis of . . . the statute's apparent failure to provide significant international

260. *See, e.g.*, Breyer, Keynote Address, *supra* note 1, at 265 n.4 (citing *Eldred* as an example of instances in which the Court faces "an increasing number of domestic legal questions that directly implicate foreign or international law").

261. *Eldred*, 537 U.S. at 204.

262. *Id.* at 205.

263. *Id.* at 205–06.

264. *Id.* at 205–06, 213.

265. *Id.* at 222.

266. *Id.* at 244 (Breyer, J., dissenting).

267. *Id.* at 257–260.

uniformity."[268] The Court refused to examine whether Congress' attempt at international uniformity was achieved, denying that it could subject this particular congressional action to heightened judicial scrutiny or that it had a role of "alter[ing] the delicate balance Congress has labored to achieve."[269] Far from imposing rational choices through comparative experiences, the Court simply deferred to a congressional approach that imperfectly sought to achieve international uniformity.

B. Interpretive Majoritarianism

As introduced above, another variation of majoritarianism concerns living constitutionalism that attempts to infuse constitutional text with contemporary values. The sweep of contemporary experience will influence the interpretive direction of the Court, such that the Court embraces—some would say discovers—constitutional principles that are consistent with a modern ethic,[270] and repudiates decisions widely perceived as implausible or illegitimate through new choices of constitutional principle.[271] As Erwin Chemerinsky noted: "Criticism of the Court throughout American history has shaped beliefs about the proper role of the judiciary and in turn shaped its jurisprudence."[272]

In moments of unusual candor, the Court has conceded the weight of public opinion on its decisionmaking power.

> The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands. . . . [T]he Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.[273]

While its decisions must be perceived as legitimate, much of that legitimacy derives from a confidence that its decisions are principled.[274] The Court must remain discretely attuned to the public square, but not overtly submissive to it.

Barry Friedman outlined the New Deal Court's "switch in time" as a quintessential example of the Court's adaptation to majoritarian demands.[275]

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268. *Id.* at 264.
269. *Id.* at 205 n.10 (quoting Stewart v. Abend, 495 U.S. 207, 230 (1990)).
270. *See* text accompanying *infra* notes 287–301.
271. *See* Planned Parenthood v. Casey, 505 U.S. 833, 861–64 (1992).
272. Chemerinsky, *supra* note 129, at 62.
273. *Casey*, 505 U.S. at 865–66.
274. *Id.* at 865.

In the Roosevelt era, "[s]cholars and citizens favored judicial activism to interpret the Constitution consistent with the needs of the times . . . . The notion of a flexible Constitution became official administration policy during the New Deal and strongly influenced popular understandings."[276] So susceptible were the Justices to political pressure to approve economic legislation that they were lampooned for doing mid-air somersaults and amending the Constitution by the hour.[277] If Congress wished to regulate in the economic arena, the Court would no longer stand as an impediment.[278] Friedman concludes: "It is difficult after 1937 to insist that there is a strict separation of law and politics . . . . The public in 1937 was ready for a change in constitutional meaning . . . [and] seems to . . . have accepted it happily when it came."[279] Likewise, today "public comfort or discomfort will, ultimately, have some impact on Supreme Court review and constitutional change."[280]

The Court's understanding of the machinations of New Deal economic jurisprudence illuminates another example of interpretative majoritarianism relating to stare decisis. One of the considerations the Court entertains in determining whether to overrule a prior decision is whether the "facts have so changed, or come to be seen so differently, as to have robbed the old rule of . . . justification."[281] The discussion in *Casey* of *Lochner*'s demise illustrates this consideration. *Lochner* embraced laissez-faire capitalism as a substantive constitutional limitation, such that human welfare legislation was seen as an infringement of the constitutionally protected liberty of contract. The lesson of the Great Depression was that *Lochner* and its progeny "rested on fundamentally false . . . assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare."[282] Laissez-faire capitalism was "recognized everywhere outside the Court to be dead."[283] Therefore liberty of contract must die. "Premised [on] a constitutional resolution of social

275. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 1011–18 (2000).

276. *Id.* at 1016–17.

277. *Id.* at 1048, 1052.

278. Explaining the Court's rulings on the Commerce Clause, Justice Jackson wrote in 1942:

> If we were to be brutally frank, I suspect what we would say is that in any case where Congress thinks there is an effect on interstate commerce, the Court will accept that judgment. . . . When we admit that it is an economic matter, we pretty nearly admit that it is not a matter which courts may judge.

Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1146 (2000) (quoting Letter from Robert H. Jackson to Sherman Minton (Dec. 21, 1942)).

279. Friedman, *supra* note 276, at 1063.

280. *Id.* at 1064.

281. Planned Parenthood v. Casey, 505 U.S. 833, 855 (1992).

282. *Id.* at 861–62.

283. *Id.* at 862.

controversy [that] had proven to be untrue," a new choice of constitutional principle was "not only justified but required."[284] Thus, majoritarian interpretations prevailed and, precedents notwithstanding, liberty of contract succumbed to political and social "facts."[285]

One can cite numerous other examples of interpretive majoritarianism.[286] Indeed, the very notion that "community standards" should have constitutional import is a concession to majoritarianism. In the context of the First Amendment, obscenity is determined based on "contemporary community standards."[287] Accepting that an abstract definition would not suffice, nor would a standard based on the peccadilloes of the faint (or stout) of heart,[288] the word "obscene" was permitted to indicate, in the words of Learned Hand,

> the present critical point in the compromise between candor and shame at which the community may have arrived here and now. . . .
>
> . . . Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent.[289]

As such it is the "community" that determines whether certain categories of speech are deserving of constitutional protection or subject to criminal prosecution. Of course, since its adoption in *Roth v. United States*,[290] this standard has always been controversial. The dissent in *Roth* argued that "[t]he standard of what offends 'the common conscience of the community' conflicts . . . with

284. *Id.*

285. *Id.* at 855.

286. *E.g.*, Atkins v. Virginia, 536 U.S. 304, 311–317 (2002) (determining whether execution of mentally retarded is cruel and unusual by reference to a national consensus against the practice); BMW v. Gore, 517 U.S. 559, 595 (1996) (Breyer, J., concurring) ("[A]s the majority opinion makes clear, the record contains nothing to suggest that the extraordinary size of the [punitive damage] award in this case is explained by the extraordinary wrongfulness of the defendant's behavior, measured by historical or community standards, rather than arbitrariness or caprice."); Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 264 n.4 (1989) ("The same basic mode of inquiry should be applied in considering the scope of the Excessive Fines Clause as is proper in other Eighth Amendment contexts, [which look to evolving standards of decency]"); Miller v. California, 413 U.S. 15, 24 (1973) (holding that in determining obscenity, courts must consider, inter alia, "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest" (citation omitted)); Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

287. *Miller*, 413 U.S. at 24; Roth v. United States, 354 U.S. 476 (1957).

288. *Miller*, 413 U.S. at 33 ("The primary concern . . . is to be certain that . . . [material] will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one.").

289. United States v. Kennerley, 209 F. 119, 121 (S.D.N.Y. 1913).

290. *Roth*, 354 U.S. at 489.

the command of the First Amendment . . . . Certainly that standard would not be an acceptable one if religion, economics, politics, or philosophy were involved. How does it become a constitutional standard when . . . sex is concerned?"[291] Even though conceding community standards might be appropriate, leading scholars have recognized that localized standards may be unduly censorious, while national standards are illusory.[292] In truth, obscenity is a riddle whose legs are wrapped around a mystery deep inside an enigma.[293] One cannot "define what may be indefinable."[294] But the message behind the method is not mysterious: First Amendment obscenity jurisprudence is acutely sensitive to majoritarian concerns about common understandings and general notions of sexual decency.

Interpretive majoritarianism has proven unsympathetic to the use of comparative material to illuminate community standards. The Court has never accepted the notion that "community" as a constitutional construct should be defined so broadly as to encompass communities beyond our borders. For example, in the First Amendment obscenity context, the Court's original embrace of "contemporary community standards" in 1957 left the concept of "community" undefined. Leading scholars of the day recognized the geographic ambiguity in such a concept and queried whether the standard would be the "local community . . . [or] the national community or even the larger international community commonly called the western world?"[295] Finding it unimaginable that local standards should prevail, for "their application would emasculate independent judicial review . . . [b]alkanize . . . literature in the United States, and reduce art . . . to the levels of the most Philistine communities in the country," it was assumed that national standards would prevail.[296] No serious attempts were made to advocate for a global or western standard. Subsequent cases clarified that obscenity prosecutions could proceed based on offense to local rather than national sensibilities. "There is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others."[297]

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291. *Id.* at 511–12 (Douglas, J., dissenting).

292. *See, e.g.*, William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 108–14 (1960) [hereinafter Lockhart & McClure, *Censorship of Obscenity*]; William B. Lockhart & Robert C. McClure, *Literature, The Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295, 387–90 (1954).

293. Obscenity on the Internet has only increased the difficulty of identifying an appropriate "community standard." *See* text accompanying *infra* notes 298–302.

294. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

295. Lockhart & McClure, *Censorship of Obscenity*, *supra* note 292, at 50.

296. *Id.* at 112–14.

297. Sable Communications, Inc. v. FCC, 492 U.S. 115, 125–26 (1989). That is, the Court anticipates that a juror will apply common understandings of the average person in the community,

The birth of the Internet generated renewed debate as to whether a community standard was appropriate, and if so, whether that standard should be localized or broader in scope. The great concern of regulating online pornography was that "the 'community standard' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message."[298] In *Ashcroft v. ACLU*,[299] opponents of federal regulation of indecent, nonobscene speech argued that local and national standards raised significant problems, and that the Court should repudiate a community standard altogether as a basis for regulating online pornography.[300] Nonetheless, the Court disagreed, accepting that "contemporary community standards" was an appropriate test for regulating online pornography.[301] While the decision as to what constituted the appropriate geographic community was fragmented, no Justice argued that the standard should refer to, or be based upon, a wider community beyond our national borders.[302] Thus, in this most global of media,

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drawing upon their own knowledge of the views of persons in that community or vicinage. *See* Hamling v. United States, 418 U.S. 87, 104 (1974).

298. Reno v. ACLU, 521 U.S. 844, 877–78 (1997).

299. 535 U.S. 564 (2002).

300. *See, e.g.*, Brief of Volunteer Lawyers for the Arts et al. at 14, *Ashcroft v. ACLU* (No. 00-1293). The brief states:

> [T]here is no basis for requiring local business owners to comply with widely divergent community standards throughout the country, particularly where they would have who have little or no knowledge of such standards. In addition, as discussed above, unlike sending mail to a zip code or a telephone message to an area code, it is not possible or feasible for the vast majority of Internet speakers to control where their speech can be received or to "tailor" their communications on a "selective basis." As a result, unlike the other federal statutes cited by the petitioner, COPA would impermissibly impose a national, lowest common denominator standard on a vast range of speakers, and on communication and content that would be deemed "acceptable" in many communities and was specifically protected under Miller.

Id. at 14. "Because present day technology does not permit a speaker [using the World Wide Web to publish his works only to] specific geographic locales, reliance on a community standard element to define proscribed content would necessarily lead to the most puritan view of what constitutes prohibited speech." *Id.* at 12.

301. *Ashcroft v. ACLU*, 535 U.S. at 585 (holding federal law's "reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment"). The Court had previously accepted that regulation of obscene material may be subject to a community standard. *Id.* at 574–75.

302. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, expressed the view that local community standards were constitutionally permissible, *id.* at 584–85 (Thomas, J., joined by Rehnquist, C.J., Scalia, J.) ("Congress has narrowed the range of content restricted by COPA in a manner analogous to *Miller's* definition of obscenity . . . [and] any variance caused by the statute's reliance on community standards is not substantial enough to violate the First Amendment."), while Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer advocated national standards, *id.* at 586 (O'Connor, J., concurring) (writing separately on constitutionality and desirability of adopting a national standard); *id.* at 591 (Breyer, J., concurring) ("[A]

not a single Justice expressed the view that foreign standards were somehow relevant to regulate sex on the Internet. As a constitutional matter, the contemporary community is anything but a global village.

C. The Synthesis of Structural and Interpretive Majoritarianism

If there is a subject that is at the vanguard in the debate on constitutional comparativism, it is the death penalty. Proponents maintain that comparative experiences are decidedly relevant to the question of whether capital punishment is constitutionality suspect.[303] As one commentator put it, "[d]eath penalty jurisprudence provides one of the most dramatic examples of th[e] synergy between international and domestic human rights law."[304]

The critical constitutional inquiry in recent decades has been what information the Court should consider in deciding whether the death penalty is cruel and unusual. In making this determination, fierce disagreements have ensued within the Court as to the relevance, if any, of contemporary standards of decency reflected in the practice in the United States and, more controversially, world opinion as expressed by the practice of foreign states and evolving international norms.

Death penalty jurisprudence reflects a synthesis of interpretive and structural majoritarianism. Modern death penalty jurisprudence began in 1958 with the recognition in *Trop v. Dulles*[305] that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[306] In many respects, *Trop* displayed originalist and natural law tendencies, citing the Eighth Amendment as firmly established in the Anglo-American tradition dating back to the Magna Carta and noting "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[307] This approach makes room for historical comparativism and broad conceptions of modern standards of decency, including reference to comparative material. Recognizing such evolving standards, the Court found that the punishment of denationalization—rendering a person stateless—is "a

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nationally uniform adult-based standard . . . significantly alleviates any special need for First Amendment protection"); *id.* at 591–602 (Kennedy, J., joined by Souter, J., Ginsburg, J.) (advocating uniform national standard that addresses variations in community standard). Justice Stevens dissented, finding that a community standard was inappropriate for regulating pornography on the Internet. *Id.* at 602–12 (Stevens, J., dissenting).

303. *See, e.g.*, Koh, *supra* note 11, at 46–48; Koh, *supra* note 39, at 1109–29.

304. Schabas, *supra* note 39, at 817.

305. 356 U.S. 86 (1958).

306. *Id.* at 101 (plurality opinion).

307. *Id.* at 100.

condition deplored in the international community of democracies."[308] In support of this conclusion, it noted that "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime" and that a "United Nations' survey of the nationality laws of eighty-four nations of the world reveals that only two countries . . . impose denationalization as a penalty for desertion."[309]

But following *Trop* there has been a long line of death penalty cases that adopt an interpretive and structural majoritarian paradigm with only passing references to comparativism. In *Coker v. Georgia*,[310] a plurality looked to the "objective evidence of the country's present judgment concerning the acceptability of death as a penalty."[311] Because Georgia was the sole state in the union that imposed capital punishment for rape, the Court concluded that near unanimity among state legislatures "weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman."[312] Citing *Trop*, the Court noted that the practices of other nations are "not irrelevant,"[313] although it did not clarify how they were relevant. *Enmund v. Florida*[314] was in accord, addressing at length the practices of state legislatures and concluded that their legislative judgments weigh on the side of rejecting capital punishment.[315] Citing *Coker*, the Court added that international opinion is an "additional consideration which is 'not irrelevant.'"[316]

In *Thompson v. Oklahoma*,[317] a four-justice plurality approached the "evolving standards of decency" test by principal reference to "legislative enactments . . . [and] jury determinations" as "indicators of contemporary standards of decency."[318] It also noted that state legislative judgments are consistent with the views of others who have considered the matter, including professional organizations, as well as other nations that share our Anglo-American heritage and leading members of the Western European

308. *Id.* at 102.
309. *Id.* at 102–03.
310. 433 U.S. 584 (1977).
311. *Id.* at 593.
312. *Id.* at 596.
313. *Id.* at 596 n.10. Justice Powell, concurring in part and dissenting in part, emphasized the need to focus on "objective indicators of society's 'evolving standards of decency,' particularly legislative enactments and the responses of juries in capital cases." *Id.* at 603 (Powell, J., concurring in part and dissenting in part). He made no mention to the relevance of international opinion.
314. 458 U.S. 782 (1982).
315. *Id.* at 793.
316. *Id.* at 796 n.22.
317. 487 U.S. 815 (1988).
318. *Id.* at 822–23 (citations omitted).

community.[319] The remaining four Justices strongly emphasized that it was a national consensus that was critical to an understanding of an evolving standard of decency.[320] Three Justices went further and found that the consensus in this society is "assuredly all that is relevant."[321]

The following year in *Stanford v. Kentucky*,[322] the Court held in determining evolving standards of decency: "[W]e have looked . . . to those of modern American society as a whole."[323] It emphasized:

> [I]t is *American* conceptions of decency that are dispositive. . . . While the "practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well," they cannot serve to establish the . . . Eighth Amendment prerequisite that the practice is accepted among our people.[324]

This approach is required, the Court indicated, both by the language of the Eighth Amendment and by federalism concerns respecting the "deference we

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319. *Id.* at 830.

320. Justice O'Connor stated that she agreed with the three Justices in dissent that the decisions of American legislatures "provide the most reliable signs of a society-wide consensus on this issue." *Id.* at 849 (O'Connor, J., concurring); *see also id.* at 865 (Scalia, J., dissenting) ("The most reliable objective signs consist of the legislation that the society has enacted.").

321. *Id.* at 868 (Scalia, J., dissenting). Justice Scalia wrote:

> The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so "implicit in the concept of ordered liberty" that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. But where there is not first a settled consensus among our own people, the views of other nations . . . cannot be imposed upon Americans through the Constitution. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.

Id. (citations omitted).

322. 492 U.S. 361 (1989).

323. *Id.* at 369. In her concurring opinion, Justice O'Connor again emphasized that evolving standards must be measured based on a national consensus. *Id.* at 381 (O'Connor, J., concurring). Four Justices disagreed. The dissent observed that "[t]he views of organizations with expertise in relevant fields and the choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society." *Id.* at 384 (Brennan, J., dissenting). In addition, the dissent argued that "objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis." *Id.* at 389.

324. *Id.* at 369 n.1 (quoting *Thompson*, 487 U.S. at 868–69 n.4 (Scalia, J., dissenting)) (citations omitted).

owe to the decisions of the state legislatures under our federal system."[325] In a separate opinion rendered the same day, the Court reiterated that position, finding that in discerning evolving standards, what is critical is "objective evidence of how our society views a particular punishment today."[326]

Finally, in *Atkins v. Virginia*, the Court repeated its conclusions that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[327] After a careful examination of state legislative practices, the Court concluded that the practice of imposing the death sentence on the mentally regarded "has become truly unusual" and that a "national consensus has developed against it."[328] The Court also noted this national consensus was consistent with a much broader consensus shared by others who have considered the matter, including the opinions of the "world community."[329]

Thus, the Court has indicated the Eighth Amendment is to be construed with due regard for interpretive and structural majoritarian concerns. In a nod to interpretive majoritarianism, the Court accepts the notion that the Eighth Amendment should be read in light of evolving standards of decency. But in recognition of structural majoritarianism, it cabins that broad notion within a majoritarian paradigm that it dubs the national consensus. This approach permits the Court to adopt an evolving understanding of decency while remaining deferential to the decisions of state legislatures, recognizing that specific punishments for specific crimes remain a matter of peculiar question of state legislative policy.[330] The cases reflect a synthesis of these two strands of majoritarianism in that they accept the use of a national consensus as a test for contemporary standards, define that consensus based on legislative pronouncements, and caution against finding any punishment as offending the Eighth Amendment out of deference to state legislative prerogatives.

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325. *Id.* at 369–70 (quoting Gregg v. Georgia, 428 U.S. 153, 176 (1976)).

326. Penry v. Lynaugh, 492 U.S. 302, 331 (1989); *accord* Atkins v. Virginia, 536 U.S. 304 (2002).

327. *Atkins*, 536 U.S. at 312.

328. *Id.* at 316.

329. *Id.* at 316 n.21.

330. Federalism concerns have led the Court to exercise great caution in finding an Eighth Amendment violation. *See, e.g.*, *Gregg*, 428 U.S. at 176. *Gregg* stated:

> The deference we owe to the decisions of the state legislatures under our federal system is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy'. . . . A decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment. The ability of the people to express their preference through the normal democratic processes, as well as through ballot referenda, is shut off.

Id.

To the extent the Court does refer to comparative material in Eighth Amendment jurisprudence, it is only after the majoritarian concerns have been satisfied, and only to confirm that our standards are consistent with the natural law themes inherent in the notions of implicit ordered liberty. In no case has the Court relied on comparative material in the absence of a national consensus, and in no case has the Court suggested that natural law principles can serve as a proxy for what is cruel and unusual, divorced of majoritarian concerns. Claims of universality are unappealing to the Justices, unless those claims are consistent with the measured decision making of politically accountable legislative actors. Countermajoritarian international standards grounded in natural law theories have no location in our Eighth Amendment jurisprudence.[331]

A majoritarian constitutional theory finds comparative material of little value. Conservative versions such as structural majoritarianism emphasize that deference is due to legislative enactments as an expression of political democracy. Activist versions such as interpretive majoritarianism locate contemporary standards in community norms that find expression in our national experience. To the extent comparative material is cited, it generally has a subsidiary role and is borrowed from other constitutional theories such as originalism or natural law.

IV. PRAGMATISM

Pragmatism is the leading candidate for a constitutional theory that can credibly justify recourse to comparative material. Firm in the belief that constitutional decisionmaking should employ empirical means to reach consequentialist ends, a pragmatist may examine experiences from abroad to shed light on possible solutions to similar problems at home. This approach manifests itself in the admonition to avoid possible solutions that reached adverse results elsewhere, as well as the endorsement of salutary approaches that could be applied in our own constitutional context. The limits of pragmatism, however, suggest that this approach is incapable of wholly sustaining a comparativist rationale.

Pragmatism is a philosophical concept that finds all truth to be experiential. As Williams James put it, "[t]rue ideas are those that we can assimilate, validate, corroborate, and verify. . . . The truth of an idea is not a

331. *See* Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 59–60 (2004) ("If the national consensus is that a certain punishment is cruel and unusual, then this American conception of decency will be dispositive. The legitimating function of this national consensus in defining what is cruel and unusual serves as a checking function on international . . . norms.").

stagnant property inherent in it. Truth happens to an idea. It becomes true, is made true by events."[332] In this sense, pragmatism is inherently unprincipled and undogmatic.[333] Pragmatism does not deny the existence of truth; it posits that truth is discovered through experience. For a pragmatist, the ought is the is. Description is prescription.

Lacking unshakable priors, a pragmatic decisionmaker is concerned principally with factual consequences.[334] Such an approach looks at the law as one "who cares only for the material consequences which such knowledge enables him to predict, not as a good [person], who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."[335] Legal pragmatism takes this Jamesian conception of reality and applies it to resolve concrete cases. When Holmes said "[t]he life of the law has not been logic: it has been experience"[336] he was espousing a pragmatic philosophy that resolves cases based on the "interaction of the human organism with its environment: his beliefs, sentiments, customs, values, policies, [and] prejudices."[337] As Holmes put it, "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed . . . . The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient."[338] Experience thus embraces the totality of the cultural encounters that an objective and fair-minded judge brings to the decisionmaking process. Not simply personal experience, but also the experience "embodie[d in] the story of a nation's development through many

332. William James, *Pragmatism's Conception of Truth*, *in* PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING 92 (Bruce Kuklick ed., 1981) (1907).

333. *See id.* ("[Pragmatism] stands for no particular results. It has no dogmas, and no doctrines save its method."); Brian Z. Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction*, 41 AM. J. JURIS. 315, 328 (1996). *But see* Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687, 698–99, 734–37 (2003) (disputing the absence of what they describe as "pragmatic valence").

334. *See* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 76, 85 (2003) (defining pragmatic adjudication as a "disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities"). It is irrelevant for present purposes to distinguish between the different categories of pragmatism, or to differentiate between pragmatism and consequentialism. For a discussion of these topics, see *id.* at 35–41, 49–56, 65–71.

335. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

336. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Little, Brown & Co. 1948) (1881).

337. LOUIS MENAND, THE METAPHYSICAL CLUB 342 (2001).

338. HOLMES, *supra* note 336, at 1–2.

centuries."[339] And it is from this experience—personal and corporate, contemporary and historical—that a judge derives his or her answers to resolve concrete cases. Constitutional truth, for the pragmatic judge, is a juridical understanding of our national experience.

The embodiment of the pragmatic ethic is the "reasonable man." In tort law one is deemed blameworthy not based on some sense of one's personal moral shortcomings, but rather based on an external standard based on a certain average of conduct.[340] In contract law, the external standard of blameworthiness is simply whether a breach is inefficient. In constitutional law, a pragmatist would say that a law is constitutional unless a "rational and fair man . . . would admit that the statute . . . would infringe fundamental principles as . . . understood by the traditions of our people and our law."[341] In other words, for Holmesian pragmatism at least, if a reasonable man *might* think the law is proper, then it is constitutional.[342] Thus, pragmatism embraces healthy experimentalism, permitting the political branches to explore novel solutions to complex problems.

Such constitutional pragmatism embraces democratic experimentation in deference to legislative solutions. Thus, for Richard Posner, a decision like *Roe v. Wade*[343] is problematic because, although the decision "may well have been based on a weighing of the consequences of the alternative outcomes . . . the Court ignored an important consequence—the stifling effect on democratic experimentation of establishing a constitutional right to abortion."[344] Posner

339. *Id.* at 1.

340. *Id.* at 107–08.

341. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

342. *See id.*; Otis v. Parker, 187 U.S. 606, 608–09 (1903). In *Otis*, Holmes wrote:

> Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus*.

Id.; *see also* Rast v. Van Deman & Lewis Co., 240 U.S. 342, 366 (1916) (same). This reasonable man approach is analogous to what Judge Posner calls the test of "outraging" the judge or what substantive due process jurisprudence describes as "shocking the conscience." *See* POSNER, *supra* note 334, at 122; *see also* County of Sacramento v. Lewis, 523 U.S. 833, 848 n.8 (1998). *Lewis* states:

> [I]n a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience. That judgment may be informed by a history of liberty protection, but it necessarily reflects an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them.

Id.

343. 410 U.S. 113 (1973).

344. POSNER, *supra* note 334, at 125.

also finds deference to legislative prerogatives in times of looming national crisis. He argues that *Bush v. Gore*[345] represents a missed opportunity for constitutional pragmatism. The Court could and should have resolved the case on legislative deference, grounding its decision on the constitutional limitations that prevent judicial usurpation of legislative authority.[346]

With the notable exception of Richard Posner, the most forceful advocate for legal pragmatism is Justice Stephen Breyer. Justice Breyer's pragmatism is skeptical of judicial control of legislative experimentation. In dissenting to the invalidation of the line-item veto, Justice Breyer wrote that he would have upheld the law as an innovative experiment that might improve democratic governance. "I recognize that the Act before us is novel. In a sense, it skirts a constitutional edge. But that edge has to do with means, not ends. The means chosen . . . represent an experiment that may, or may not, help representative government work better. The Constitution, in my view, authorizes Congress and the President to try novel methods in this way."[347] Likewise, in *Lopez*, Justice Breyer would have deferred to the legislative branch's factual findings regarding affectation of interstate commerce:

> Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce—both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy . . . . Thus, the specific question before us . . . is not whether the "regulated activity sufficiently affected interstate commerce," but, rather, whether Congress could have had "*a rational basis*" for so concluding.[348]

To put it in Holmesian terms, if a reasonable man *might* think the law affects interstate commerce, then it is constitutional.[349]

But what is distinctive about Justice Breyer's pragmatism is its transnational emphasis. For Breyer's pragmatism, constitutional truth depends

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345. 531 U.S. 98 (2000).

346. POSNER, *supra* note 334, at 343–47. Article II provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. CONST. art. II, § 1, cl. 2.

347. Clinton v. City of New York, 524 U.S. 417, 496–97 (1998) (Breyer, J., dissenting); *see also* Ken I. Kersch, *The Synthetic Progressivism of Stephen G. Breyer*, *in* REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 241, 249 (Earl M. Maltz ed., 2003).

348. United States v. Lopez, 514 U.S. 549, 616–17 (1995) (Breyer, J., dissenting).

349. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 660–61 (Breyer, J., dissenting) ("[W]ithin the bounds of the rational, Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance.").

not just on our national experience, but also on global realities. Breyer's pragmatism has boldly invigorated transnational empiricism as a constitutional method.[350] In *Printz*, he argued that reference to foreign experiences is justified because it may "cast an empirical light on the consequences of different solutions to a common legal problem."[351] Justice Breyer reasons that comparativism is appropriate as a mode of argument by analogy, in which developments abroad may be capable of producing similar results in the United States.[352]

For Breyer, the federal/state balance struck in *Lopez* is constitutional in part because Congress could have recognized that "[i]ncreasing global competition . . . has made primary and secondary education economically more important."[353] Noting that the United States lags behind other industrialized nations in worker productivity, he argued that education is a commercial problem that affects interstate and foreign commerce.[354] Lower worker productivity in the United States is attributable in part "to students who emerge from classrooms without the reading or mathematical skills necessary to compete with their European or Asian counterparts."[355] In a similar vein, in *United States v. Morrison*,[356] Breyer relied on the European experience for guidance in our Commerce Clause jurisprudence on the question of judicial deference to congressional fact-finding.[357]

But Justice Breyer has also used transnational pragmatism to curtail what he perceives as irrational expressions of congressional intent. As he put it in *Eldred v. Ashcroft*, "[a]lthough it can be helpful to look to international norms and legal experience in understanding American law, in this case the [congressional] justification based upon foreign rules is surprisingly weak."[358] Comparative analysis led Justice Breyer to conclude that the Copyright Term Extension Act was unconstitutional, in part because of its "apparent failure to provide significant international uniformity."[359]

Thus, Justice Breyer's pragmatism is distinctly transnational. In his view, most people in most places share common aspirations in the face of

350. *Cf.* Muller v. Oregon, 208 U.S. 412 (1908).

351. Printz v. United States, 521 U.S. 898, 977 (Breyer, J., dissenting).

352. Breyer, Keynote Address, *supra* note 1, at 268; Breyer Scalia Debate, *supra* note 1 (Justice Breyer remarking that "If here I have a human being called a judge in a different country dealing with a similar problem, why don't I read what he says if it's similar enough? Maybe I'll learn something.").

353. *Lopez*, 514 U.S. at 621 (Breyer, J., dissenting) (citation omitted).

354. *Id.* at 620–21.

355. *Id.* at 621; *see also* Kersch, *supra* note 347, at 251.

356. 529 U.S. 598 (2000).

357. *Id.* at 663 (Breyer, J., dissenting).

358. Eldred v. Ashcroft, 537 U.S. 186, 257 (2003) (Breyer, J., dissenting).

359. *Id.* at 264.

common problems.[360] Likewise, constitutional courts throughout the world share a common enterprise, facing "the same kinds of problems . . . armed with the same kinds of legal instruments."[361] Accordingly, it is incumbent upon constitutional courts to learn from their shared experiences, which he contends are more similar than different.[362] He is convinced constitutional comparativism will carry the day because, like any other discipline, constitutional law can benefit enormously from the similar experiences of others.[363]

Pragmatic comparativism is not without its difficulties. First, in searching for commonalities among and between constitutional courts, the Court patently risks ignoring the distinctions. For example, in *Lawrence*, although the Court appealed to European jurisprudence to establish that sodomy laws were unconstitutional, the actual legal questions presented in each case were radically different. In *Dudgeon*, the European Court of Human Rights was addressing whether a sodomy law was "necessary . . . to protect health and morals" so as to sanction interference with an expressly guaranteed right to privacy.[364] In *Lawrence*, the Court addressed whether the practice of sodomy was subsumed within an unenumerated fundamental right to privacy, and if not, whether a proscription against it had a rational basis.[365] Justice Breyer's finding of broad commonalities among constitutional courts is justified only if, as one commentator has put it, "one thinks that the courts are not really interpreting texts but deciding whether sodomy laws are justifiable as a matter of moral and social policy."[366]

Another key problem with pragmatic comparativism is its inherently countermajoritarian tendency. In looking abroad for solutions to common problems, Justice Breyer risks eschewing the distinctive choices that have been made at home. As Ken Kersch put it:

> Justice Breyer, in pioneering the introduction of foreign and international precedent and sources into his Supreme Court opinions, represents . . . the jurisprudential adjunct to . . . elite progressive

360. Breyer, *Réflexions*, *supra* note 1.

361. *Id.* ("En un mot on trouve partout des juges faisant face aux mêmes espèces de problèmes et armés des mêmes espèces d'instruments juridiques.").

362. *Id.*

363. Breyer, Keynote Address, *supra* note 1, at 266.

364. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) paras. 48–52 (1981).

365. Lawrence v. Texas, 539 U.S. 558, 562–79 (2003).

366. Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on* Atkins *and* Lawrence, 98 AM. J. INT'L L. 69, 74 (2004). Justice Breyer recently remarked that comparativism is appropriate because other constitutions, although using "different words . . . come to roughly the same thing . . . . [T]he fact that this has gone on all over the world and people have come to roughly similar conclusions . . . was the reason for thinking it [comparative material] at least is the kind of issue that maybe we ought to hear in our court . . . ." Breyer Scalia Debate, *supra* note 1.

> globalism. Through the novel use of these foreign and international . . . sources into his Supreme Court opinions, he is beginning to lay the basis for a postsovereign constitutionalism in which the wisdom of policies, including our substantive commitments regarding rights and liberties, is assessed by global rather than American standards.[367]

"Postsovereign constitutionalism" is a remarkable position to espouse for a Supreme Court Justice, but it is not wholly unsurprising for a judicial pragmatist. If pragmatic adjudication evinces an unrelenting focus on real-world consequences, it is consistent with that position to examine the common experiences of peer nations. As Justice Breyer put it, "this Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances . . . . Willingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a 'decent respect to the opinions of mankind.'"[368]

In fairness, other notable pragmatists have recognized the perils of constitutional comparativism on precisely these grounds. Richard Posner categorically rejects the notion the world is a single legal community, and has expressed caution regarding the undemocratic character of citing foreign decisions. "[D]ecisions rendered by judges in democratic countries, or by judges from those countries who sit on international courts, are outside the U.S. democratic orbit."[369] While our judges have a certain democratic legitimacy, foreign and international judges have none. Thus, Judge Posner would embrace the notion that judges should understand the factual consequences of real-world experiences elsewhere,[370] but he would not go so far as to treat foreign judicial decisions as authoritative in U.S. courts.[371] "To cite foreign law as authority is to . . . suppose fantastically that the world's judges constitute a single, elite community of wisdom and conscience."[372]

While Justice Breyer is at the vanguard of pragmatic empiricism, it is far more difficult to find instances in which the Supreme Court has rendered pragmatic decisions regarding constitutional liberties that rely on comparative experiences. There are, of course, a handful of cases in which the Court has used comparative empiricism negatively to warn against extreme responses of

367. Kersch, *supra* note 347, at 266.
368. Knight v. Florida, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting in denial of certiorari).
369. Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF., July–Aug. 2004, at 40, 42.
370. POSNER, *supra* note 334, at 76.
371. Posner, *supra* note 369, at 42.
372. *Id.*

totalitarian regimes to curtail civil liberties.[373] These cases offer a parade of horribles of state infringements on basic civil liberties. For example, in *Shaughnessy v. United States*[374] the Court stated: "No society is free where government makes one person's liberty depend upon the arbitrary will of another. Dictatorships have done this since time immemorial. They do now [in Russia, China and Nazi Germany] . . . . Our Bill of Rights was written to prevent such oppressive practices."[375] Such negative pragmatism highlights competing systems of government that offer extreme representations of oppressive violations of civil liberties. Uncivilized systems are presented for derision, not emulation. This is hardly the sort of pragmatism to which Justice Breyer aspires.

A lesser variant of negative pragmatism is found when the Court examines comparative experiences only for the purpose of rejecting the foreign approach as inappropriate. In *Raines v. Byrd*[376], the Court noted that "[t]here would be nothing irrational about a system that granted standing [to legislatures, as] . . . some European constitutional courts operate under one or another variant of such a regime. . . . But it is obviously not the regime that has obtained under our Constitution."[377] In *Washington v. Glucksberg* the Court noted evidence in the Netherlands supports the legislative concern that opening the door to physician-assisted suicide could affect a broader license to practice euthanasia that would be difficult to police and contain.[378] "Euthanasia in the Netherlands has not been limited to competent, terminally ill adults who are enduring physical suffering, and . . . regulation of the practice may not have prevented abuses in cases involving vulnerable persons."[379] The Court thus utilized the Dutch experience as evidence of the potential evils that might result from regulation as compared with prohibition, intimating that

373. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 647 (1993) ("A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid."); Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) ("Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state."); Elrod v. Burns, 427 U.S. 347, 353 (1976) ("[Patronage] has been used in many European countries, and in darker times, it played a significant role in the Nazi rise to power in Germany and other totalitarian states."); Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) ("The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.").

374. 345 U.S. 206 (1953).

375. *Id.* at 217–18.

376. 521 U.S. 811 (1997).

377. *Id.* at 828.

378. Washington v. Glucksberg, 521 U.S. 702, 734 (1997).

379. *Id.*

the problems in the Dutch experiment supported the state's argument for a rational basis in banning the practice.

Thus, negative pragmatism has occasionally been used to highlight aberrant foreign practices or advance American distinctions. With negative pragmatism, foreign experiences are offered as object lessons of what not to do. But positive experiences from abroad are less frequently invoked to support pragmatic empiricism.[380] Perhaps the best example is *Muller v. Oregon*,[381] a case in which the Court relied heavily upon a brief by future Justice Louis Brandeis—the famous Brandeis Brief—to defend state restrictions on the working of hours of women. Brandeis surveyed national and European practices to establish empirically the negative effects of long working hours on a woman's familial station and physical constitution. Brandeis argued "[t]he leading countries in Europe . . . have found it necessary to take action for the protection of [women's] health and safety and the public welfare, and have enacted laws limiting the hours of labor for adult women . . . . In no country in which the legal limitation upon the hours of labor of adult women was introduced has the law been repealed."[382] Remarkably, at the height of *Lochner*,[383] the Court upheld the measure. The Court found that evidence at home and abroad established valid reasons that are "so important and so far reaching that the need for such reduction [in the working hours of women] need hardly be discussed."[384]

Two more recent examples may be found in the cases of *Miranda v. Arizona*[385] and *Burson v. Freeman*.[386] In *Miranda*, the Court addressed the question of whether the danger to law enforcement in curbs on interrogation was overplayed. Examining the practices in four commonwealth countries,[387] the Court cited their experiences to establish that "lawlessness will not result from warning an individual of his rights or allowing him to exercise them."[388] The Court took pains to note the similarity of criminal law enforcement in

380. *See, e.g.*, Freeman v. Hewit, 329 U.S. 249, 251 n.1 (1946) (comparing experiences in Canada and Australia to support the need for judicial adjustment in the taxing authority in federal systems).

381. 208 U.S. 412 (1908).

382. Brief for the State of Oregon at 11, *Muller* (No. 107), *available at* http://library.louisville.edu/law/brandeis/muller.html.

383. The Court distinguished *Lochner* by finding that the case was not "decisive of the question before [it]" because the difference between the sexes justifies a different rule respecting a restriction on the hours of labor. *Muller*, 208 U.S. at 419.

384. *Id.* at 420 n.1.

385. 384 U.S. 436 (1966).

386. 504 U.S. 191 (1992).

387. *Miranda*, 384 U.S. at 486–90 (discussing practices in England, Scotland, Ceylon, and India).

388. *Id.* at 489.

these jurisdictions.[389] *Miranda* thus discounted claims that particular evils would ensue if the right to remain silent was granted based on the absence of such evils in comparable countries. Significantly, the dissent found these countries' experiences to be not truly comparative.[390] The dissent echoes a familiar critique of transnational pragmatism; there are variables that cannot be ignored if one wishes to capture fully the constitutional experience of other nations.[391]

In *Burson*, the Court addressed the constitutionality of a campaign-free zone at polling places.[392] In determining whether the law served a compelling state interest, the Court examined the evolution of election reform both in this country and abroad to demonstrate the necessity of restricted voting areas. Voter intimidation and election fraud were common problems in numerous countries in the nineteenth century, and by the end of that century several countries and numerous U.S. states had adopted the so-called "Australian system" of voting, which included the use of official ballots, voting booths, and polling places that were off-limits to electioneering. The Court concluded its summation of the historical experience with a decidedly pragmatic justification for the measure under review:

> [A]n examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments. We find that this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud.[393]

Burson exemplifies a modest instance of reference to a uniform solution to address a common problem. Moreover, because the solution proposed was uniformly employed throughout the United States and other Western democracies, traditional pitfalls of pragmatic comparativism were absent.[394] But it is

389. *Id.*

390. *Id.* at 521–23 (Harlan, J., dissenting) (discussing counterbalancing factors in other jurisdictions not available in the United States and concluding that these other data reflect a more moderate conception of the rights of the accused in these countries).

391. *See* Tushnet, *supra* note 7, at 1266–67.

392. Burson v. Freeman, 504 U.S. 191 (1992).

393. *Id.* at 206.

394. *See supra* notes 364–372 and accompanying text. Advocates relied on *Burson* in the recent case of *McConnell v. FEC* to encourage the Court to examine the comparative experiences of other countries. *See* Brief of Amici Curiae International Experts at 9, McConnell v. FEC, 540 U.S. 93 (2003) (No. 02-1674) ("*Burson* confirms Justice Breyer's observation that the experiences of other countries may 'cast an empirical light on the consequences of different solutions to a common legal

worth noting that *Burson* is not a quintessential case of pragmatic comparativism. One could just as easily describe *Burson* as a case that reflects an historical analysis of domestic adoption by state legislatures of proposals suggested from abroad. Foreign seeds took root at home and an American solution germinated over the course of a century.

Two aspects of the Court's limited use of empirical data from abroad to resolve constitutional questions pragmatically are worth noting. First, the paucity of pragmatic jurisprudence that relies on comparative experiences is striking. For every instance in which the Court referenced global experience, one could cite dozens of examples in which the Court resolved common problems pragmatically without reference to comparative solutions. The pregnant negative in the Court's jurisprudence speaks far louder than the occasional affirmations of comparativism. To the extent the Court is a pragmatic one, with rare exception it continues to view constitutional truth through the lens of national experience. As David Strauss put it, as a matter of judicial convention, it is accepted wisdom that "[t]he potential gain from drawing on the accumulated wisdom of many societies would be outweighed by the unmanageability of the task."[395] It should not be surprising, for example, that the Court recently refused the invitation to consider foreign experiences with campaign finance reform.[396] Whatever pragmatic value may be brought to bear with references to foreign experiences, those references do not compete with the developed body of domestic law that is at hand, and they do not resolve in any meaningful way the question of whether our First Amendment jurisprudence sanctions the campaign finance reform measure in question.

Second, and perhaps more momentous, when comparative pragmatism is used in constitutional jurisprudence, it often is for the benefit of the government seeking to limit a right rather than the individual asserting the right. Pragmatic decisionmaking, with its focus on real-world consequences, may be used by the state to justify curtailments of a purported constitutional right. Notably, the majority opinions in *Muller*, *Burson*, *Eldred*, and *Glucksberg* all used comparative experiences to assert the legitimacy of the government measure.[397] If pragmatic comparativism is employed, it may be to justify a diminishment rather than an enhancement of constitutional liberties.

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problem,' and represents persuasive authority for looking to the international community in evaluating [the statute]."). As noted above, the Court's decision was a model of majoritarianism and made no references to comparative experiences in campaign finance reform. *See supra* notes 248–252 and accompanying text.

395. David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1738 (2003).

396. *See supra* notes 246–252 and accompanying text.

397. *See supra* notes 164–170, 259–264, 378–384, 392–394 and accompanying text.

Governments may view constitutional comparativism as a new vehicle to establish that a measure is necessary, or that an interest is rational or compelling. Even where rights abroad are greater than at home, as with *Glucksberg*, the experiences associated with such greater freedoms have been highlighted to warn against the proposed alternative.[398] *Miranda* is the notable exception. Although the Court has suggested that comparative experiences may enhance individual rights,[399] transnational empiricism has actually been invoked to curtail individual liberties and uphold the propriety of government action.

V. A COMPARATIVE THEORY?

Thus far constitutional comparativism has been analyzed through the lens of traditional constitutional theories. But the notion that comparative material is to be utilized only to the extent it facilitates one or more classic constitutional theories no doubt will prove unsatisfying to many comparative constitutional scholars. Those who advocate a more prominent role for comparative material in our constitutional system, or a more prominent role for the American judiciary in the international system will chafe at such an ancillary role for international and foreign law. The agenda for constitutional comparativists is far grander, as though comparativism should have a more searching, if not central role in constitutional adjudication. One senses the yearning for a constitutional theory that at its core is comparative.

Part of this yearning reflects disquiet at the inadequacy of any current theory to capture fully the aims of the comparativist agenda. Originalism and majoritarianism offer little hope of advancing constitutional comparativism given the central role that text and democratic preferences, respectively, play in these theories. Pragmatism is unsatisfying because it denies the existence of universal truths or unshakable priors and remains relentlessly focused on consequentialist ends. It also may prove too deferential to healthy experimentation by the political branches. Modern varieties of the natural law tradition offer limited hope, as this theory is discredited, and to the extent it has continued currency, it plays a subsidiary role to buttress more venerable theories, such as majoritarianism. Moreover, in a positivist era, international and comparative scholars are ill at ease with a constitutional theory that embraces a bygone era of natural law internationalism.

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398. *See supra* notes 378–380 and accompanying text.

399. Lawrence v. Texas, 539 U.S. 558, 577 (2003) ("The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.").

From the various writings advocating the use of international and foreign material in constitutional adjudication one may identify an emerging inchoate comparative constitutional theory.[400] This theory is both process-oriented and substantive. The process that comparativists invoke is a transnational one that encourages dialogue and "transjudicial debate."[401] When comparativists deride our judiciary for its provincialism,[402] they are contending that reference to foreign law and practice is somehow a privileged methodology that will enhance constitutional adjudication. Why this methodology should be preferred is far from clear given the *lex specialis* that is our Constitution. But comparative scholars offer a few suggestions.

One explanation is that a parochial methodology places the United States at odds with international norms and creates diplomatic tensions with foreign allies.[403] In this sense, comparativists advocate adoption on the constitutional plane of a *Charming Betsy* method of construction: to the extent a constitutional provision may admit of more than one interpretation, one should interpret the provision consistent with international norms, and do so out of a decent respect for the opinions of humankind.[404] Failure to do

400. *See supra* notes 7–24 and accompanying text.

401. Slaughter, *supra* note 13, at 198; *see also* Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271, 271–72, 286 (2003).

402. *See* Ackerman, *supra* note 7, at 773; Koh, *supra* note 11, at 56–57.

403. *See* Koh, *supra* note 39, at 1123–29.

404. *See* Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMP. L. 421, 427 (2004) ("The policy interest in avoiding friction with the rest of the world is reflected in the Charming Betsy doctrine, which states that, wherever possible, statutes, and presumably the Constitution as well, should be construed so as to be consistent with international norms."); Koh, *supra* note 39, at 1128–29. Koh states:

> The Court should further find that allowing the practice [of executing persons with mental retardation] to continue will strain diplomatic relations with close American allies, provide diplomatic ammunition to countries with demonstrably worse human rights records, increase U.S. diplomatic isolation, and impair other U.S. foreign policy interests. For that reason, the Court should . . . hold that the practice of executing people with mental retardation offends the broad universal "concepts of dignity, civilized standards, humanity and decency" that lie at the core of the Eighth and Fourteenth Amendments.

Id. Koh states elsewhere:

> Justice Marshall ruled in *The Charming Betsy* that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.' Eleven years later, he clarified that absent a contrary statute, 'the Court is bound by the law of nations which is a part of the law of the land.' In *McCulloch v. Maryland*, Chief Justice Marshall suggested that mankind's views are also relevant to the task of constitutional interpretation . . . .

Koh, *supra* note 11, at 44–45; *see also* Jackson, *supra* note 401, at 335. Jackson states:

> [R]ule-of-law values should not preclude resort to the decisions of non-U.S. tribunals as an effort at genuine interpretation of existing U.S. legal texts, including the Constitution . . . [and] may even favor interpretive rules that assume a national preference to be in

so will embroil the executive branch in political controversy, and create undo friction as a result of discretionary judicial interpretation. Just as we presume that the legislature would not pass a measure that would embroil us in international conflict through violations of international norms, so too should we presume the judiciary will not seek to embroil us into such conflict through interpretations that clash with international obligations. In other words, there may be separation of powers reasons for interpreting constitutional guarantees to be consistent with international values. Of course, such an approach must remain faithful to other recognized interpretive devices, including text, history, structure and national experience. But if these interpretive guidelines are not conclusive, then a comparative theory may serve as a supplementary interpretive aid in the choice of competing conceptions of aspirational constitutional provisions. A comparative theory would argue "[i]nternational law can and should inform the interpretation of various clauses of the Constitution."[405]

A halting example of this approach is found in *Boos v. Barry*.[406] In *Boos*, the Court was invited to limit speech near embassy properties to further the government interest in complying with international law obligations regarding the protection of diplomatic and consular personnel. Although the Court rejected the claim, much of the opinion addressed the importance of interpreting the Constitution with due regard to the government interest in complying with international law. It noted that the "United States has a vital national interest in complying with international law" and strongly hinted that such an interest could be compelling.[407] At a minimum, *Boos* suggests that compliance with international law is an important factor to be considered in interpreting constitutional guarantees. If international law could serve as a compelling government interest in curtailing speech, could it also have a role in defining it?

A second methodological reason for a comparative theory is to enhance transnational dialogue and the global rule of law. As one noted commentator recently put it, there are plenty of good ideas in the "global jurisprudence," and the impulse to look at these ideas "reflects a spirit of genuine transjudicial

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conformity with international human rights law, as *The Schooner Charming Betsy* presumes with respect to statutes.

Id.; *see also* Cleveland, *supra* note 7 (discussing *Charming Betsy* and judicial deference to political branch acceptance or rejection of international norms).

405. Koh, *supra* note 39, at 1103 (quoting Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 46 (1994)).

406. 485 U.S. 312 (1988).

407. *Id.* at 323–24.

deliberation within a newly self-conscious transnational community."[408] The United States has long served as a role model for other constitutional courts. Constitutional comparativism should be invoked in our constitutional processes because it will make a "good impression" on other constitutional courts. As the Supreme Court serves as a role model for other constitutional courts, reciprocal reference to the decisions of other courts will further the transjudicial dialogue.

This is what Justice O'Connor means when she says reliance on foreign and international law "may not only enrich our own country's decisions; it will create that all-important good impression. When U.S. courts are seen to be cognizant of other judicial systems, our ability to act as a rule-of-law model for other nations will be enhanced."[409] This process seeks to enhance the exportation of our ideals through a method that shows due respect to the ideas of others. More broadly, it seeks to promote the global rule of law. The movement toward constitutional convergence will converge on understandings of human decency so as to construct a fledgling global rule of law.[410]

As courts increasingly engage in a process of cross-fertilization, proponents contend that respect for the rule of law as a worldwide mechanism for ordering societies will result. Moreover, to the degree that first-tier constitutional courts such as the U.S. Supreme Court reference international tribunals or other constitutional courts, the stature of that law and the bodies that promulgate it will be enhanced, as will the likelihood of compliance.[411] By capturing and crystallizing the work of constitutional judges around the world, a constitutional court can have disproportionate influence as it is seen as "reflecting an emerging international consensus rather than existing as an outlier."[412] The result of such an approach is nothing less than a "'global legal system" in which there are loosely composed... horizontal and vertical

408. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 78 (2004).

409. O'Connor, SCIS Remarks, *supra* note 1, at 2; *see also* Jackson, *supra* note 401, at 358–59 ("[C]onstitutions do not function solely as a charter of self-government, or an expression of unique national identity.... Constitutions are thus adopted, and interpreted, not only with an eye to the internal demands of the polity but also with an eye on the stature and position of the nation state in the international arena ....").

410. *See* Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570, 2593–95 (2004).

411. *See* Breyer Scalia Debate, *supra* note 1 (discussing how reference by U.S. Supreme Court to other fledgling constitutional courts will give such courts a "leg up"); Jackson, *supra* note 401, at 313–14 (discussing "relational authority" of constitutional courts to consider decisions on similar human rights issues by other tribunals).

412. Slaughter, *supra* note 13, at 198 (quoting Frederick Shauer, *The Politics and Incentives of Legal Transplanting*, *in* GOVERNANCE IN A GLOBALIZING WORLD 253, 258 (Joseph S. Nye & John D. Donahue, 2000).

networks of national and supranational judges."[413] A comparative constitutional theory is thus profoundly procedural in seeking a particular comparativist methodology that promotes the global rule of law and the establishment of a global community of courts.

But a comparative constitutional theory is also substantive in that it maintains the existence of universal norms[414] and advocates the internalization of those norms as primary obligations to protect against state infringement. Transnational legal process advocates internalization of international norms into our constitutional jurisprudence.[415] It presumes there is a certain category of basic human rights to which the United States should adhere notwithstanding contrary democratic preferences. And to secure such adherence, those rights should be reflected in our constitutional architecture. As Vicki Jackson has put it, the "new normativity of human rights law is reflected in the way references to other constitutional courts' decisions are often accompanied by references to international legal norms as well. The sense of distinctive sovereignties is diminished, as is the strong distinction between domestic constitutional law and international legal norms."[416] The substantive theory would collapse constitutional liberties and international human rights into a cornucopia of suprapositive norms that are binding as a matter of constitutional law.

In some cases this substantive approach requires a broadly aspirational reading of textual guarantees. It is occasionally asserted, for example, that if the great majority of civilized nations prohibit juvenile death penalty, then we should interpret the Eighth Amendment consistent with that universal ethic.[417] In other cases this approach espouses internalization of human rights

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413. SLAUGHTER, *supra* note 408, at 100.

414. *See* Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1868–69 (2003) (discussing the "suprapositive" aspect of human rights that transcends positivist commitments); Jackson, *supra* note 401, at 307; Teitel, *supra* note 410, at 2593 ("Comparative Constitutionalism points us in the direction of heightened convergence in the law in distinct areas, perhaps the most robust being transnational human rights law.").

415. Carozza, *supra* note 7, at 1042, 1080 (discussing transnational "constitutional space" as dependent "on the fundamental universality of the underlying principles of law expressed through human rights;" the universality of the common humanity of all persons "complements and supports the transnational character of the discourse . . . and . . . provides a justification for courts to take foreign sources into account"); Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 643 (1998); Koh, *supra* note 11, at 55–56 ("Virtually all legal systems identify one or more mechanisms through which executive, legislative, and judicial institutions may domesticate international norms, with judicial interpretation of domestic constitutions representing only one such channel.").

416. Jackson, *supra* note 401, at 309.

417. *See* Oral Argument, Roper v. Simmons (U.S. Oct. 13, 2004) (No. 03-633), 2004 WL 2387647, at *11–*14, *20–*21, *38; State *ex rel.* Simmons v. Roper, 112 S.W.3d 397, 410–11

as unenumerated constitutional rights. If the overwhelming majority of our peer nations have eschewed sodomy laws to criminalize the private conduct of consenting adults, then this ethic should form part of an unenumerated constitutional right to privacy.[418] Thus, in some respects, a comparative theory is more substantive than formal, advocating judicial decisionmaking pursuant to criteria that aim to promote transparent substantive goals.[419] Just as certain constitutional theories espouse a libertarian ethic[420] or Rawlsian liberalism,[421] a comparative theory espouses a discrete substantive content: universal standards reflected in prevailing international norms accepted by civilized nations.

The legitimacy of a comparative constitutional theory must necessarily be subject to traditional evaluative criteria. As Richard Fallon noted, there are widely accepted standards by which different kinds of constitutional theories can be tested and compared.[422] "Almost without exception, theorists claim that their preferred approaches optimally realize sometimes competing values associated with (i) upholding the rule of law, (ii) promoting political democracy, and (iii) advancing substantive justice by respecting a morally defensible set of individual rights."[423] Examining a comparative constitutional theory in light of the standards Fallon presents offers some preliminary conclusions about its saliency as a constitutional method.

A constitutional theory that advances the rule of law promotes legal certainty, efficacy, stability, supremacy, and impartiality.[424] A comparative theory, like other substantive theories, likely would contend that a rule of law "implies the intelligibility of law as a morally authoritative guide to human conduct," and that law is "unintelligible . . . in the absence of rationally cognizable purposes."[425] A comparative theory promotes the rule of law to the extent it offers a morally persuasive guide to constitutionalism based on a universal ethic. It advances the requirement of efficacy in that it "holds out

(2003), *cert. granted*, 124 S. Ct. 1171 (2004); Brief of Nobel Peace Prize Laureates, *Roper* (No. 03-633), 2004 WL 1636446; Brief of Amici Curiae Former U.S. Diplomats, *Roper* (No. 03-633), 2004 WL 1636448; *see also* Carozza, *supra* note 7, at 1086–88; Koh, *supra* note 39, at 1129; Schabas, *supra* note 39, at 845–46.

418. *See* Lawrence v. Texas, 539 U.S. 558, 572–77 (2003); Brief of Amici Curiae Mary Robinson, Amnesty International U.S.A., Human Rights Watch, Interights, the Lawyers Committee for Human Rights, and Minnesota Advocates for Human Rights, *Lawrence* (No. 02-102), 2003 WL 164151.

419. *See* Fallon, *supra* note 23, 562–63. For a discussion of the distinction between formal and substantive theories and the problems inherent in substantive theories, see *id.* at 563.

420. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

421. *See* DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION (1986).

422. Fallon, *supra* note 23, at 549.

423. *Id.* at 549–550.

424. *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8–9 (1997) (discussing the five elements that constitute the rule of law).

425. *Id.* at 21.

the prospect of moral reasons for obedience even for those who believe there is no general, content-independent reason to obey the law."[426] A comparative theory also resembles other legal process theories, which satisfy the rule of law requirement by imputing morally attractive purposes to constitutional language.[427]

But certain aspects of the rule of law element are not advanced by the relatively novel comparative theory, including respect for precedent, history, and tradition, the primacy of rules over substance, the importance of legal certainty, and the certainty of decisionmaking. One prominent scholar pointedly rejected a comparative approach out of such concerns, suggesting that it invites judges to "troll deeply . . . in the world's *corpus juris*" to find a supporting citation in order to disguise a politically preferred outcome.[428] A constitutional theory does not advance the rule of law to the extent it licenses a judge's preferred outcomes under false pretenses.

The second benchmark for any constitutional theory is its ability to promote political democracy. All constitutional theories aspire to promote political democracy, although they may differ as to what that entails. Political democracy imputes the notion that "majorities should be able to determine public policy without being frustrated by judicial decisions that reflect the judges' moral values."[429] Even under certain countermajoritarian theories, judicial review of majoritarian preferences may nonetheless enhance political democracy if it is representation-reinforcing or if it reflects a historic understanding of a sound approximation of the balance of the rights of majorities and minorities that is, the balance of political democracy and individual rights.[430] A comparative theory is most problematic when viewed from the perspective of whether it advances political democracy.

Comparativism is inconsistent with political democracy in at least four fundamental ways. First, international norms cannot serve as contemporary reference points without being either superfluous or countermajoritarian. To the extent that international norms reflect contemporary majoritarian preferences within the national experience, the added value of their consistency with international norms is limited. To the extent the norms are inconsistent with

426. *Id.* at 37.
427. *Id.* at 31.
428. Posner, *supra* note 369, at 42; *see also* Breyer Scalia Debate, *supra* note 1 (Justice Scalia discussing how constitutional comparativism "invites manipulation," allowing judges to cite foreign material in order to reach a desired result, and Justice Breyer concurring that "really what's worrying people" is, as Justice Scalia put it, the use of comparative material will be used as a reflection of the "moral perceptions of the justices").
429. Fallon, *supra* note 23, at 552.
430. *Id.* at 553–54.

domestic values, they cannot serve as a constitutional standard without being countermajoritarian. Second, while all domestic judicial decisions have a certain degree of democratic legitimacy, foreign judges have no democratic legitimacy.[431] Immune to the democratically corrective forces of judicial election or executive nomination, there is no democratic check that the United States can impose upon the rulemaking power of foreign courts. Third, if a comparative theory advocates recourse to decisionmakers in an aggregated, international judicial system, this deference will prove less sensitive to majoritarian preferences than a judicial decisionmaker in a disaggregated, local system.[432] A comparative theory that relies on decisions of an international judiciary is even less sensitive to local preferences than are national judges in a federal system, much less state or local judges. In European parlance, a comparative theory is at odds with subsidiarity, the notion that governments should seek to locate governance at the lowest possible level. Fourth, relative to other substantive theories, a comparative theory is unsympathetic to political democracy. Even a countermajoritarian substantive theory of political democracy such as Ronald Dworkin's approach of "constitutional democracy," admits of the requirement of recourse to the same structures of government as a majoritarian premise, including politically accountable elected officials.[433] A comparative theory of constitutionalism has yet to advance a compelling case for its consistency with political democracy. As I have indicated elsewhere,[434] comparativists must overcome a profound international countermajoritarian difficulty.[435]

The third element that a comparative constitutional theory must include is advancing substantive justice by respecting a morally defensible set of individual rights.[436] In most respects, a comparative theory offers quite rational arguments for the validity of international norms as an appropriate ethic for substantive justice. There is a morally defensible appeal to a theory that seeks to bring our fundamental individuals rights into sync with universal norms. If it is true the U.S. practice of imposing the death penalty on juveniles or the mentally retarded is aberrant and exceptional, then there are sound moral arguments for seeking consistency with the common agreement of appropriate practices in civilized nations. Having said that, if there is

431. Martinez, *supra* note 24, at 461; Posner, *supra* note 369, at 42.
432. *See* Nourse, *supra* note 228, at 875.
433. DWORKIN, *supra* note 137, at 17.
434. Alford, *supra* note 331, at 58–61.
435. *See* Martinez, *supra* note 24, at 461 ("If the so-called counter-majoritarian difficulty is a central dilemma in defining the judicial role in the United States, the prospect of an international judicial system presents this difficulty multiplied by ten.").
436. *See* Fallon, *supra* note 23, at 539.

a problem with a comparative theory in regards to individual rights it is the choice it privileges to international norms over peculiarly American norms. That is, while this theory does not fall short in upholding the centrality of individual rights, it does exacerbate the debate about exactly which rights ought to be recognized.

There are numerous examples in which the United States is an international outlier, in some cases granting greater rights to individuals, while in others cases granting less. A comparative theory must be able to make the case as to why its preferred set of rights are superior to other sets of rights, and the theory must do so consonant with political democracy and the rule of law. Moreover, to the extent a comparative theory is more process-oriented than substantive, it may actually result in a curtailment of individual rights. If the force of this methodology is an unrelenting focus on a transjudicial debate and transnational legal process, then a number of jurisprudentially settled rights may yet again be up for grabs. As I have discussed elsewhere, incorporation of international and comparative material into the constitutional dialogue may require a renewed discussion on the diminishment of constitutional rights relating to speech, abortion, establishment of religion, and procedural due process, to name but a few.[437] In each of these cases, the United States grants individual rights that are greater than those rights enjoyed on the international and comparative plane. This suggests that a comparative theory, like other process-oriented theories, is presented with a conundrum: "[I]f an important test of [a] constitutional theor[y] involves [its] capacity to define and protect individual rights, how could it be desirable to adopt a theory with a predominant thrust that is methodological . . . ?"[438]

Finally, this last criterion underscores the schizophrenic nature of comparative theories in their current iterations. If at its bottom it is a process-oriented approach, it will sacrifice core individual rights for the sake of thoroughgoing comparative methodology. Given that comparative experiences are both more and less sensitive to individual rights, "[i]f international and foreign sources are arrows in the quiver of constitutional interpretation, those arrows should pierce our constitutional jurisprudence to produce results that we celebrate and that we abhor."[439] If on the other hand, a comparative theory is at its essence a substantive ideal, it must illuminate the selective nature of that ideal. That is, it must explain why certain universally recognized norms are constitutionally cognizable, while

437. Alford, *supra* note 331, at 67–68.
438. Fallon, *supra* note 23, at 562.
439. Alford, *supra* note 331, at 69.

other foreign practices that are less solicitous to individual rights are not. If international norms are the substantive ideal without such distinctions, then a convincing case must be made not only for internalizing those norms to enhance individual rights, but also for internalizing those norms to diminish certain rights that are currently enjoyed at an enhanced level in the American ethic. This is especially important to comparative constitutionality's appeal as a substantive theory because consensus on normative judgments may prove difficult to secure, particularly when it is not clear in advance how far particular substantive ends will be pursued and what attendant costs must be accepted "in varied and frequently unknown factual contexts."[440]

CONCLUSION

Constitutional comparativism is a methodology in search of a theory. Proponents of this approach must either explain how their approach fits within one or more of the traditional theories, or fully detail a constitutional theory that at its core is comparative. This Article has suggested that the use of contemporary foreign and international laws and practices to interpret constitutional guarantees is ill-suited under most modern constitutional theories.

Originalism will not embrace contemporary comparativism because it does not advance the fundamental objective of interpreting constitutional text based on the Framers' moral perceptions. Contemporary practices at home and abroad are useless in servicing that objective. That said, originalism has always embraced historical comparativism, particularly experiences rooted in English practices, to secure a greater understanding of the constitutional context. But such an approach offers little comfort for most constitutional comparativists who are looking to a future new world order, not a past enlightened age.

Appeals to comparative experiences are quite logical if one espouses a natural law theory of constitutionalism. Early experience in constitutional interpretation often relied upon natural law to limit legislative action. Modern variations of this theory find in the interstices of the text rights that are inherent but not enumerated. This tradition also finds expression in abstract, moral readings of constitutional text to embrace natural law shibboleths such as fairness, justice, liberty and dignity. If the Constitution simply advances such abstractions, then appeals to foreign experiences to establish fundamentality or universality are to be anticipated. For reasons of judicial hegemony and substantive indeterminacy, the natural law tradition, however,

440. Fallon, *supra* note 23, at 565.

is discredited as a constitutional theory. Comparativists are unlikely to carry the full weight of their comparative agenda on such a thin reed.

Majoritarianism, in its structural and interpretive varieties, is a constitutional theory that is ill-suited to justify recourse to comparative material. An approach of judicial deference to the political branches offers few opportunities for courts to rely upon foreign experiences. Interpretive majoritarianism is a better candidate assuming one could invoke the broadest possible conception of community. But the longstanding tradition of the Court has been to cabin community standards to values reflected in our own national experience. Even if a persuasive argument could be made for a broader notion of a community standard in certain contexts, such as regulation of obscene speech on the Internet, the Court has refused to expand communitarianism beyond our borders. Euphemisms such as the "global village" or the "world community" have yet to find meaningful constitutional expression.

As far as classic constitutional theories go, pragmatism is the leading candidate for a theory that can sustain constitutional comparativism. Proponents of this approach are at the vanguard of the comparativist movement, and transnational empiricism will continue to grow in importance. When resolving constitutional questions depends upon consequentialist ends, then proposed solutions to shared problems could benefit from transnational recognition. But pragmatism is hardly capable of sustaining the full freight of the comparativist agenda. Pragmatic decisions that enhance civil liberties are rare, and they frequently offer a rationale for curtailing rather than advancing constitutional rights. Moreover, the human rights movement espouses notions of universality and fundamentality that are inconsistent with an empirical, pragmatic theory that denies the existence of teleological truth. Devoid of a *summum bonum*, pragmatism is not prescriptive to the degree that most comparativists would like it to be.

Because all of the classic constitutional theories outlined above do not capture a rigorous theory for constitutional comparativism, this Article outlines what proponents might advance as an inchoate comparative constitutional theory. Such a theory, however, struggles for legitimacy based on established criteria, including promotion of the rule of law, protection of political democracy, and advancement of a morally defensible set of individual rights. Moreover, comparativists differ as to whether a comparative theory should be process-oriented or substantive, recognizing that either approach creates unique problems of authenticity.

Until such time as advocates can cogently offer a raison d'etre, the search for a theory to legitimate constitutional comparativism continues.

After all, constitutional theory is just a vehicle to make sense of a constitutional practice. "Cases get decided, and behind them is a theory of constitutional law."[441] Comparative cases are occasionally part of constitutional practice, but those cases are senseless without theories to reveal what lies behind them. Comparativists do themselves no favors when they advocate a practice, but offer no compelling theory to justify it. Without such a theory, comparativism will remain just a fashionable constitutional accessory.

441. Lessig, *supra* note 23, at 1838.