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Originalism at Home and Abroad

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Originalism at Home and Abroad

YVONNE TEW*

Originalism is typically thought to be a uniquely American preoccupation. This Article challenges the conventional view that originalism enjoys little support outside the United States by showing that the story of originalism—both at home and abroad—is more nuanced than has been appreciated. This Article examines how originalism has developed in two unexplored contexts—Malaysia and Singapore—to show that originalism not only thrives outside the United States but that it takes on distinct variations reflecting the cultural, historical, and political conditions of individual nations. The Article argues that whether originalism thrives, and the form that it takes, is context driven and culturally contingent.

The account that this Article provides of how originalism is practiced in the world beyond the United States tests familiar assumptions in the mainstream debates over originalism. First, it shows that existing accounts of the origins of originalism are incomplete.

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and questions the claim that originalism inevitably follows from judicial interpretation of a written constitution. Second, the experiences of countries elsewhere demonstrate that originalism is not necessarily—or even typically—associated with constraining judges. Originalists frequently claim that originalism is uniquely capable of limiting judicial discretion. Yet judges in various contexts employ originalism in support of expansive constitutional interpretation and to empower courts against the political branches. Third, this analysis sheds light on why certain nations—the United States included—are attracted to particular originalist approaches, such as original intent or original meaning.

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Americans obsess about originalism. Originalism’s proponents claim that its ability to accord fixed and determinate meaning to a written constitution makes it the legitimate method of constitutional interpretation and essential to constrain judges. Discussion about originalism continues to rage in American academic scholarship, and in the news. The debate over originalism, however, has chiefly been confined to the experience of originalism in the United States. This preoccupation with originalism—according to popular belief—is a distinctly American phenomenon. So goes the conven-


tional view. But the experiences of countries elsewhere tell a different story.

Beyond American borders, originalist arguments thrive inside and around the courts suggesting that fascination with originalism is not, after all, uniquely American. Australia’s judges openly consider original understanding in constitutional interpretation and are “self-consciously ‘originalist’ to a degree unknown in the United States.” The Turkish Constitutional Court employed an originalist interpretation of the Turkish Constitution’s secularism provisions to strike down legislative attempts allowing Islamic headscarves in educational institutions. Turning to Southeast Asia, the original meaning of the Malaysian Constitution’s Islamic establishment clause is the fault line of heated debates over religion and the state. Across the border, Singapore’s national court employed originalist reasoning to decide the constitutionality of the mandatory death penalty.

This Article challenges the conventional view that originalism enjoys little support outside the United States and shows that the story of originalism—both at home and abroad—is more nuanced than has been appreciated. The Article argues that whether originalism thrives, and the form that it takes, is context driven and culturally contingent. Originalism emerges out of the particular cultural, historical, and political conditions of individual states to take distinct variations in practice. The comparative perspective that this Article provides adds nuance to how we think about originalism. First, it complicates existing accounts about the origins of originalism and questions the claim that originalism is necessarily or conceptually re-
quired by a written constitution. Second, it shows that the experiences of countries elsewhere demonstrate that originalism is not necessarily—or even typically—associated with judicial restraint both in terms of deference to legislative outputs and constraining judges from imposing their subjective values into constitutional adjudication. Third, this analysis helps us understand why certain nations—the United States included—favor particular versions of originalism, such as original intent or original meaning.

This Article offers an account of how originalism is practiced in the world beyond the United States. It shows how originalism is employed in two contexts in Southeast Asia that have been unexplored in comparative scholarship. Malaysia and Singapore present a unique dual case study on originalism: both post-colonial states share a common founding as an independent nation, but have since separated and developed as two sovereign nations. Both have common law legal systems derived from British legal traditions, independent judiciaries with the power of judicial review, and written constitutions of similar age. Yet the originalist rhetoric that has popular appeal in Malaysia has distinct features and functions from the originalist interpretive methods employed by Singapore’s national court to limit judicial rights expansion. These examples map onto broader trends that emerge from the practice of originalism in Australia, Turkey, and the United States. I use the terms “popular” originalism and “prudential” originalism to capture the distinctive

8. See infra Part II.A.1, II.B.2. Existing scholarship on originalism in comparative contexts has been confined to a limited number of countries: Australia, Canada, and Turkey. See, e.g., Greene, supra note 4; Jeffrey Goldsworthy, The Case for Originalism, in CHALLENGE OF ORIGINALISM, supra note 3, at 42; Bradley W. Miller, Origin Myth: The Persons Case, the Living Tree, and the New Originalism, in CHALLENGE OF ORIGINALISM, supra note 3, at 120; Varol, supra note 5.

9. See infra notes 114–16.

10. I focus primarily on countries that employ common law adjudication, which seem more likely to share similarities in constitutional interpretation approaches compared to civil law countries. See Scalia, supra note 1, at 39–40 (asserting that an evolutionary, non-originalist approach to constitutional interpretation is “preeminently a common-law way of making law”); cf. Michel Rosenfeld, Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts, 2 INT’L J. CONST. L. 633, 656 (2004) (“In Europe . . . recourse to originalism is virtually nonexistent . . . .”).

11. The term “popular originalism” has been used by Jared Goldstein and Rachel Zeitlow to describe a popular movement that advances originalist interpretations outside the courts. See Jared A. Goldstein, Can Popular Constitutionalism Survive the Tea Party
features of how originalism operates in these different contexts.

The story this Article tells adds complexity to the dominant conventional accounts in the comparative literature about whether and why originalism thrives outside the United States. Emerging comparative originalism scholarship has either concluded that American-style originalism is rejected elsewhere, or offered various generalized hypotheses—such as a nation’s revolutionary constitutional traditions or a political leader’s cult of personality—to explain the origins of originalism. But current accounts fail to explain why originalist arguments arise in countries outside of the limited cases of each study. Existing accounts are incomplete, I argue, because a country’s attraction to originalist argument stems from cultural and historical traditions—and it is often also connected to temporal, political, or social elements—making it difficult to find a generalized explanation for why originalism thrives across diverse constitutional cultures.

The comparative perspective tests some of the familiar claims in mainstream debates over originalism at home and abroad. First, by decentralizing the United States from the originalism discourse, I question the claim that originalism inevitably follows from judicial interpretation of a written constitution. {\textsuperscript{12}} Comparativism shows us

\begin{itemize}
  \item \textsuperscript{12} See Greene, \textit{supra} note 4, at 3 (noting the “global rejection of American-style originalism”); Scheppele, \textit{supra} note 3, at 23 (noting that inquiry into a constitution’s original meaning “is done almost nowhere else in the world”); Balkin (2015 forthcoming), \textit{supra} note 3, at 2 (arguing that “the idea of fidelity to the founders . . . is a powerful trope in American constitutional argument, although not in most other constitutional democracies”).
  \item \textsuperscript{13} See David Fontana, \textit{Comparative Originalism}, 88 TEX. L. REV. 189, 197 (2010) (arguing that “countries whose courts and commentators make originalist arguments tend to come from revolutionary constitutional traditions or are acting in revolutionary constitutional moments”).
  \item \textsuperscript{14} See Varol, \textit{supra} note 5, at 1246 (arguing that “originalism blossoms when a political leader associated with the creation or revision of the nation’s constitution develops a cult of personality within that nation”).
  \item \textsuperscript{15} See \textit{infra} Part III.A. See, e.g., Whitington, \textit{supra} note 1, at 15, 50 (concluding that “a written constitution requires an originalist interpretation” because the Constitution’s
\end{itemize}
that some countries are originalist, some—including many with written constitutions—are non-originalist, and some are partially originalist. Countries that use originalist arguments may become more or less originalist across different times, and are attracted to different forms of originalism.\textsuperscript{16} In light of the geographical and temporal diversity of interpretive approaches across constitutional cultures, the claim that originalism is necessarily required by a written constitution seems difficult to defend.\textsuperscript{17}

Second, the story this Article tells about originalism abroad also challenges the claim that originalism is necessary as a means of constraining judges.\textsuperscript{18} Some proponents of originalism initially defended its capacity to restrain judges from interfering with the outputs of the democratic process,\textsuperscript{19} and many continue to claim that originalism constrains judges from imposing their own subjective views in constitutional decision-making.\textsuperscript{20} But the experiences of

\begin{flushleft}
\textsuperscript{16} See infra Part II.A–B (comparing the practice of popular originalism in Malaysia with prudential originalism in Singapore).

\textsuperscript{17} Some argue that the claim that originalism follows naturally from treating the constitution as a form of written law may be a more plausible fit for constitutional systems like Australia, where the Constitution is regarded formalistically as a basic legal document making it more conceivably viewed as reducible to its written text. See Lael K. Weis, \textit{What Comparativism Tells us About Originalism}, INT’L J. CONST. L., 8 (forthcoming) (U. of Melb. Legal Stud. Res. Paper No. 659), available at http://papers.ssrn.com/abstract=2297158.

\textsuperscript{18} See infra Part III.B.

\textsuperscript{19} See, e.g., Robert H. Bork, \textit{Neutral Principles and Some First Amendment Problems}, 47 IND. L.J. 1, 11 (1971) (asserting that “where the Constitution does not speak,” the “correct answer” to the question “[A]re we all . . . at the mercy of legislative majorities?” . . . must be ‘yes’”); see also RAOUl BERGER, \textit{GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT} 314–15 (1977) (arguing that non-originalist constitutional interpretation “reduces the Constitution to an empty shell into which each shifting judicial majority pours its own preferences”).

\textsuperscript{20} See, e.g., Antonin Scalia, \textit{Originalism the Lesser Evil}, U. CIN. L. REV. 849, 863–64
\end{flushleft}
countries elsewhere show the inverse phenomenon: historicist originalism has been deployed to judicially expand constitutional provisions and to invalidate the outputs of legislative majorities. Secularists and Islamists in Malaysia mobilize originalist arguments to support judicial expansion of constitutional religious liberty rights or the scope of Islam’s constitutional position. And the Turkish Constitutional Court has been criticized as judicially activist for its pro-secularism and originalist decisions to invalidate democratically enacted legislation allowing headscarves in higher educational institutions.21

In neither of these countries is the language of originalism associated with judicial deference to legislative majorities or constraining judicial discretion. The public appeal of originalist rhetoric in these contexts often makes it an attractive tool to deploy for strategic and ideological purposes. The comparative examples strengthen the observation that originalism does not necessarily—or even typically—constrain judges in practice. Courts in other countries creatively deploy originalism in a context-dependent manner. Originalism’s ability to constrain judicial discretion or the scope of judicial power is necessarily contingent on the particular cultural and political context of individual states. It is a deeply contextual tool—sometimes expansive and sometimes constraining—shaped by the constitutional culture in which it thrives.

Finally, this Article offers an analytical perspective on why particular versions of originalist methodology take hold in different countries.22 In nations where originalism has popular appeal—such

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21. See Varol, supra note 5, at 1245 (noting that the literature on the Turkish Constitutional Court “largely criticizes the Court as an activist institution that has wrongfully injected itself into the Turkish political process through unprincipled opinions”).

22. See infra Part III.C.
as Malaysia, Turkey, and the United States—original intent and historicist-focused original meaning tend to thrive. By contrast, courts in countries less sensitized to historicist appeals—like Singapore and Australia—favor original textual meaning in line with their prevailing legalistic interpretive jurisprudence.

This Article proceeds in three parts. Part I provides a brief overview of the contemporary originalist debates in America and examines the gap in the scholarship on originalism abroad. Part II offers an account of how originalism emerges out of the cultural, historical, and political conditions of individual states to take on distinct variations in practice. This Article adds two unexplored examples—Malaysia and Singapore—to an emerging body of literature on originalism in comparative contexts and shows how the distinctive features of originalism in each country illustrate popular and prudential forms of originalism. Part III evaluates the implications of these comparative observations for mainstream debates over originalism.

I. ORIGINALISM AT HOME

A. A Brief Overview of the Contemporary Debates in America

Originalism is a moving target: it has had multiple meanings at various times to different people. This section briefly describes the contemporary landscape of originalist theory and practice in the United States. It is not intended as a comprehensive overview of the vast literature on originalism. Rather, the aim is to provide a basic backdrop of the evolution of multiple forms of originalism and its operation in contemporary America to set the stage for comparing how originalism has developed elsewhere.

Originalism refers to the view that the original understanding of a constitutional provision is fixed at the time it was framed and enacted. Some argue that the original understanding is associated

23. See Berman, supra note 1, at 6 (observing that the literature on originalism is “vast, and a thorough survey would fill books”).

24. See Lawrence B. Solum, What Is Originalism? The Evolution of Contemporary Originalist Theory, in CHALLENGE OF ORIGINALISM, supra note 3, at 12, 33 (“Most or almost all originalists agree that original meaning was fixed or determined at the time each provision of the constitution was framed and ratified. We might call this idea the fixation thesis.”).
with the intent of the constitutional framers or ratifiers; others regard it as the original semantic meaning of the constitutional provision’s text. Originalists agree that this original understanding should play a significant and substantial role in constitutional interpretation. Originalism also encompasses various dimensions in academic, judicial, and popular culture. Originalist theory is debated in the legal academy; originalist argument is used in constitutional practice by judges and lawyers; and originalist rhetoric has popular appeal in public discourse. This paper is concerned not only with originalism as an interpretive theory, but also with the practice and rhetoric of originalist argument in legal and political culture.

Originalist theory has evolved dramatically in American academic scholarship over the past thirty years to encompass a variety of approaches. Frustration with the perceived activism of the Warren (and Burger) Court following several rights-expansive decisions led conservatives in the 1970s and 1980s to promote a “jurisprudence of original intentions” to restrain judges from inserting their own policy preferences into the Constitution. Scholars like Robert Bork and Raoul Berger pioneered the first wave of the modern originalist movement by insisting that courts interpret the Constitution according to the original intent of the Framers. Original intent theory was met with intense criticism. Critics like Paul Brest exposed the difficulties of determining the collective intent of the individuals involved

25. Id. at 36 (“Almost all originalists agree that the original meaning ought to make a substantial and important contribution to constitutional doctrine, and most originalists make the stronger claim that this contribution ought to constrain constitutional doctrine . . .”).

26. See Balkin (2015 forthcoming), supra note 3, at 17 (distinguishing between “judicial originalism,” “academic originalism,” and “popular originalism” in America’s constitutional culture).

27. See supra note 1.


29. See Post & Siegel, supra note 1.

30. See Colby & Smith, supra note 1, at 247–62.


in the framing. Jefferson Powell argued that historical evidence demonstrated that the Framers had not in fact expected future interpreters to follow their original subjective intent in interpreting the Constitution.

Widespread criticism of original intent’s theoretical and practical defects eventually led originalists to give up looking for the actual intent of the Framers in favor of the original meaning of the Constitution. Justice Scalia played a key role in the “campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning,” exhorting originalists to seek “the original meaning of the text, not what the original draftsmen intended.”

Original meaning became the cornerstone of originalist thought. Originalists focused on the idea that the Constitution should be interpreted according to the public meaning of the constitutional text when adopted. Original public meaning represented a shift from the subjective meaning tied to the intentions of the individual founders to the objective meaning of the text. As Justice Scalia explained, the originalist should seek the “meaning of the words of the Constitution to the society that adopted it—regardless of what the Framers might secretly have intended.”

“New” originalists like Randy Barnett and Keith Whittington have played a prominent role in distinguishing between constitutional

35. See Colby, supra note 1, at 720–22; Solum, supra note 24, at 16–27.
37. Scalia, supra note 1, at 38.
38. See Barnett, supra note 1, at 620 (“[O]riginalism has itself changed—from original intention to original meaning. No longer do originalists claim to be seeking the subjective intentions of the framers.”).
40. Scalia, supra note 36, at 106.
interpretation and constitutional construction. The former refers to the exercise to discern the semantic content of the text; the latter is an adjudicative and political exercise to specify constitutional rules when the meaning of the text is vague. This move acknowledges that constitutional interpretation must be supplemented by constitutional construction when the original public meaning of the text cannot be determined.

Contemporary originalism has continued to encompass increasing varieties of original understanding, and “the originalist tent keeps getting bigger.” Jack Balkin’s “living originalism” approach, for instance, attempts to reconcile original meaning with a living constitutionalist view that the Constitution should adapt to changing circumstances. According to this “method of text and principle,” faithfulness to the Constitution requires fidelity to the Constitution’s text and also to its principles and purposes. Balkin argues that Justice Scalia’s version of “original meaning” is actually a more limited original expected applications approach that “asks how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense.” Balkin’s original meaning approach, on the other hand, claims to be consistent with a Constitution “whose reach and application evolve over time” as future generations engage in constitutional construction to implement its text and principles. On this view, originalism and living constitutionalism are “two sides of the same coin.”

Compare this to the “original methods” originalism developed

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42. See WHITTINGTON, supra note 1, at 7–11 (viewing constitutional interpretation as “essentially legalistic” and constitutional construction as “essentially political”); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 4, 99 (2004) (distinguishing interpretation, which determines the meaning of words, from construction, which “fills the inevitable gaps created by the vagueness of these words when applied to particular circumstances”).
43. Colby & Smith, supra note 1, at 257.
44. Balkin, supra note 1, at 3.
45. Id. at 14.
46. Id. at 7.
47. Id. at 3.
48. Id. at 21.
by John McGinnis and Michael Rappaport. They argue that “the Constitution should be interpreted according to the interpretative rules that the enactors expected would be employed to understand their words.”

McGinnis and Rappaport defend original methods originalism as normatively desirable on pragmatic grounds: constitutional rules created through the supermajoritarian constitution-making process are likely to have good consequences.

Despite the contemporary academic debates that rage over these theoretical distinctions, it is “difficult to recall a case in which any self-proclaimed originalist judge has perceived daylight between original meaning, original expected application, and original intent.” Scholars often point out that for all Justice Scalia’s “strident claims to follow a consistent constitutional jurisprudence,” he “has in fact drifted among various versions of originalism.” As an example, while Justice Scalia outspokenly claims to be committed to the authority of original public meaning, he nevertheless believes that capital punishment does not violate the “cruel and unusual” punishment prohibition because its wide use at the time of framing indicates that the Framers did not originally expect the Eighth Amendment to prohibit it.

In practice, originalist arguments used in the courts do not turn on theoretical distinctions, but they are nevertheless frequently employed by judges and lawyers in constitutional argument. As Scalia observes, in America “the Great Divide with regard to constitutional interpretation, is not that between Framers’ intent and objective meaning, but rather that between original meaning . . . and current meaning.” What seems clear is that originalism—regardless of whether from intent or meaning—is alive and well in modern Amer-

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49. McGinnis & Rappaport, supra note 1, at 751.
51. Greene, supra note 4, at 10.
53. See Antonin Scalia, Response, in A MATTER OF INTERPRETATION, supra note 1, at 145–46 (“[I]t is entirely clear that capital punishment, which was widely in use in 1791, does not violate the abstract moral principle of the Eighth Amendment.”); see also Greene, supra note 4, at 10; Colby & Smith, supra note 1, at 296–97.
54. Scalia, supra note 1, at 38.
can constitutional practice. Consider the landmark case of District of Columbia v. Heller, in which the Supreme Court struck down a handgun ban as unconstitutional based on “the original understanding of the Second Amendment.”

Another feature of originalism in American constitutional practice is its uneasy relationship with precedent that conflicts with original meaning. The role of precedent in originalist theory is by no means uncontested among originalist scholars. Some originalists—like Robert Bork and Steven Calabresi—concede some form of stare decisis to be consistent with originalism. Several others—including John Harrison, John McGinnis and Michael Rappaport, and Lee Strang—argue that originalism allows for precedent on principled grounds.

Some originalists, however, view precedent as “completely irreconcilable with originalism,” scathingly dismissing those willing to sometimes qualify originalism with stare decisis as “would-be originalists.” Gary Lawson, for instance, insists that “the practice of

56. Id. at 625.
57. See Colby & Smith, supra note 1, at 260–62.
58. See, e.g., Bork, supra note 1, at 155–59 (arguing that “at the time of ratification, judicial power was known to be to some degree confined by an obligation to respect precedent”).
59. Steven G. Calabresi, Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMMENT. 311, 340 (2005) (concluding that “practice has settled the matter such that the Court does have an autonomous, implied power to sometimes follow precedent”).
63. See also Polly J. Price, A Constitutional Significance for Precedent: Originalism, Stare Decisis, and Property Rights, 5 AVE MARIA L. REV. 113, 114 (2007) (arguing that “as a matter of original understanding,” due to the original meaning of the “judicial power” in Article III, “an originalist owes some obligation to a nonoriginalist precedent.”).
64. Michael Stokes Paulsen, The Intrinsically Corrupting Influence of Precedent, 22
following precedent is not merely nonobligatory or a bad idea; it is affirmatively inconsistent with the federal Constitution.footnote{65} And Randy Barnett argues that a true “originalist simply could not accept that the Supreme Court could change the meaning of the text from what it meant as enacted and still remain an originalist.”footnote{66} Critics like Henry Monaghan argue that originalists who deny the authoritative nature of precedent in the American constitutional system “cannot account for a good deal of the contemporary constitutional order,” which already “embodies massive departures from any original understanding of the text.”footnote{67}

Judges who invoke originalism in constitutional decision-making have not typically shown deference for longstanding precedent.footnote{68} Justice Thomas’s originalism is not qualified by considerations of precedent; he has often expressed willingness to overrule settled precedent in the interest of returning to the original understanding.footnote{69} Justice Scalia has supported abandoning precedent in favor of original meaning in several cases—footnote{70}and recently recanted

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footnote{66} Randy E. Barnett, Trumping Precedent with Original Meaning: Not as Radical as It Sounds, 22 CONST. COMMENT. 257, 263 (2005); see also Barnett, supra note 52, at 13 (arguing that because Justice Scalia would sometimes allow precedent to trump original meaning, “Justice Scalia is simply not an originalist”).


footnote{68} Greene, supra note 4, at 16 (observing that one of the “distinguishing characteristics of the latest originalism movement [in the United States] is its hostility to precedent”).

footnote{69} See, e.g., United States v. Lopez, 514 U.S. 549, 601 n.8 (1995) (Thomas, J., concurring) (“Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years...”); see also Balkin (2015 forthcoming), supra note 3, at 21 (noting that Justice Thomas has shown himself “interested in bringing modern doctrine close to original meanings, often leading him to argue for overturning wide swaths of settled doctrine in the interest of constitutional fidelity”).

his famous declaration of being a “faint-hearted originalist.”  

Previously, Justice Scalia had acknowledged that he would “adulterate” his originalist philosophy with the doctrine of stare decisis on the grounds that originalism without allowance for precedent would be “medicine . . . too strong to swallow.”  

No longer, it seems. In a recent interview, Justice Scalia asserts that he will now “try to be an honest originalist;” in other words, one who “will take the bitter with the sweet.”  

The Supreme Court’s decision in District of Columbia v. Heller represents the high watermark of originalism’s ascendance in constitutional decision-making.  

Relying on the proposition that the original understanding of the Second Amendment “right of the people to keep and bear Arms” is not limited to a militia-related purpose, the Court invalidated the District of Columbia’s ban on the possession of handguns. The majority opinion dismissed the sixty-nine year-old Supreme Court precedent on the Second Amendment in United States v. Miller on the basis that Miller’s cursory treatment had failed to consider the history of the Second Amendment sufficiently. Justice Stevens, in his dissent, criticized the majority’s “feeble attempt to distinguish Miller” for placing “more emphasis on the Court’s decisional process than on the reasoning in the opinion itself.”

The clear disregard for precedent in Heller has prompted scholars to observe that “[w]hen stare decisis becomes stare original-
ist, we have reached a high and unprecedented plane of historicism indeed.

Finally, and significantly, a striking feature of originalist argument in the United States is its prominent place in the public discourse. Originalism has a popular appeal that extends well beyond the courts. It is discussed in bestselling books, blogs, radio talk shows, newspaper columns, magazine articles, at judicial confirmation hearings, and even on Saturday Night Live. Empirical analysis conducted by Jamal Greene, Nathaniel Persily, and Stephen Ansolabehere, shows that “most respondents believe judges ought to factor original intent into their interpretations of the Constitution.” Indeed, polls show that nearly half of Americans believe that the Supreme Court should only consider the original intentions of the Constitution’s authors in constitutional interpretation.

80. Greene, supra note 1, at 686.


83. See, e.g., The Rush Limbaugh Show, Appoint an Originalist, Not an Activist (July 5, 2005), transcript available at http://www.rushlimbaugh.com/daily/2005/07/05/appoint_an_originalist_not_an_activist.


85. See, e.g., Lepore, supra note 3.


87. See, e.g., Saturday Night Live, supra note 2.


89. See Greene, supra note 1, at 659 (citing Press Release, Quinnipiac University Polling Institute, American Voters Oppose Same-Sex Marriage Quinnipiac University National Poll Finds, But They Don’t Want Government To Ban It, (July 17, 2008), http://www.quinnipiac.edu/institutes-and-centers/polling-institute/search-releases/search-results/release-detail?ReleaseID=1194&What=&strArea=&strTime=28; see also Balkin (2015 forthcoming), supra note 3 at 17 (observing that “[a]lthough originalism presents itself as a theory of how judges should decide cases, originalism appears most prominently in legal and political rhetoric outside of courts”).
Originalism gained its cultural prominence in America today largely as a result of political and social mobilization.\(^9\) By promoting originalism as a reaction to the perceived excesses of the Warren Court, the Reagan administration mobilized the originalist movement as a conservative judicial philosophy.\(^9\) In public rhetoric, originalism continues to feature in the national conversation about the proper role of the United States judiciary. Outside the academy, Rush Limbaugh’s call to “[a]ppoint an originalist not an activist” reflects a populist perception.\(^9\)

Elena Kagan declared at her confirmation hearing in 2010, “[w]e are all originalists.”\(^9\) Not everyone would agree, nor would they agree on what being an originalist means. But that such statements resonate not only within the courts but also in the larger political culture is testament to the significance and influence of originalism in America’s public dialogue.

B. Comparative Originalism: An Oxymoron?

The conventional view is that originalism is distinctly an American phenomenon. It is widely thought that “[o]riginalist theory has little purchase outside of the United States.”\(^9\) According to Jack Balkin, “is mostly unknown outside of the United States.”\(^9\) Kim Scheppele similarly observes that “[i]nquiring this closely into a constitution’s original meaning is done almost nowhere else in the world.”\(^9\) And Michel Rosenfeld explains that “[i]n Eu-

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90. See Greene, supra note 4, at 17; Post & Siegel, supra note 1, at 548.
91. See Greene, supra note 1, at 680–81; see also Johnathan O’Neill, Originalism in American Law and Politics: A Constitutional History 154 (2005); Post & Siegel, supra note 1, at 554 (“Since the 1980s, originalism has primarily served as an ideology that inspires political mobilization and engagement. Its success and influence is due chiefly to its uncanny capacity to facilitate passionate political participation.”).
92. See The Rush Limbaugh Show, supra note 83, at 12; Greene, supra note 4, at 11.
93. See Adler, supra note 87.
94. Huscroft & Miller, supra note 3, at 10; see also Lepore, supra note 3.
95. Balkin (2015 forthcoming), supra note 3, at 2; see also Balkin, supra note 3, at 838 (observing that “American ideas of originalism are not widely adopted outside the United States”).
96. Scheppele, supra note 3, at 23.
rope . . . recourse to originalism is virtually nonexistent.’

Unsurprisingly, originalism scholarship has been dominated by American debates over originalism.

Comparative originalism, as a result, is typically thought of as an oxymoron. Jamal Greene has probed the United States’ preoccupation with originalism by examining constitutional interpretation in Canada and Australia, two foreign legal regimes that he views as comparable to the United States in many key respects. From his comparative analysis of these two countries, Greene concludes that originalism has an appeal in America that is missing in other nations. Greene observes that originalism is “an exceedingly unpopular view around the world,” and that American-style originalism is indeed globally rejected.

Not all scholars agree. David Fontana argues, in response to Greene’s article, that “countries whose courts and commentators make originalist arguments tend to come from revolutionary constitutional traditions.” According to Fontana, “the most relevant” factor explaining a country’s affinity for originalist arguments is “whether or not its constitution created the nation that lives under the constitution, or whether the constitution merely reorganized the institutions of the country but did not create the nation that lives under the constitution.” The problem with Fontana’s distinction, however, is that it fails to explain why originalist arguments have been employed

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97. Rosenfeld, supra note 10, at 656.
98. See supra note 1.
99. Greene, supra note 4, at 5 (observing that Canada and Australia are “stable, liberal, federal democracies with independent judiciaries, well-established traditions of judicial review, and written constitutions of long standing” and also “have common law legal regimes derived from British practice” like the United States).
100. Id. at 6 (arguing that “the historicist appeals that support American originalism have a potency here that is found in few foreign constitutional courts, not least the two most like our own”).
101. Id. at 19.
102. Id. at 3 (“The notion that the meaning of a political constitution is, in any practical sense, fixed at some point in the past and authoritative in present cases is pooh-poohed by most leading jurists in Canada, South Africa, India, Israel, and throughout most of Europe . . . ”).
103. Fontana, supra note 13, at 197.
104. Id. at 190.
in Turkey where “[t]he constitution that established Turkey—the revolutionary constitution—was scrapped and replaced with reorganizational constitutions following military coups in 1960 and 1980.”\textsuperscript{105}

Nor, as I will discuss, does it accommodate the example of Singapore, which also has a reorganizational, rather than revolutionary, constitution.\textsuperscript{106}

Ozan Varol, analyzing the Turkish Constitution and the legacy of the Turkish Republic’s founder, Mustafa Kemal Atatürk, offers an alternative hypothesis: “originalism blossoms when a political leader associated with the creation or revision of the nation’s constitution develops a cult of personality within that nation.”\textsuperscript{107} His cult of personality hypothesis, however, fails to explain why originalist arguments thrive in the post-colonial Southeast Asian countries of Malaysia and Singapore. The framers of Malaysia’s Federal Constitution did not consist of elected local representatives like India’s Constituent Assembly. Rather, they were foreign jurists drawn from other Commonwealth countries that are not venerated in the same manner as America’s Framers or the Turkish Republic’s founder.\textsuperscript{108} And Singapore, with a pragmatic constitution hastily cobbled together after its strained separation from Malaysia, does not have any obvious framers associated with the establishment of its Constitution to hold in especial regard.\textsuperscript{109}

Existing accounts in the comparative originalism scholarship have begun a significant discussion by asking whether—and why—the United States is so preoccupied with originalism. Each offer partial insights, but the story told so far in the comparative originalism scholarship is incomplete. None of the current accounts is able to fully accommodate countries outside the limited cases of each study.

Comparative constitutional law, in general, suffers from a fo-

\textsuperscript{105} See Varol, supra note 5, at 1281 (arguing that the revolutionary-constitution hypothesis fails in Turkey).

\textsuperscript{106} See infra Part II.B.1.

\textsuperscript{107} Varol, supra note 5, at 1246.

\textsuperscript{108} See infra notes 114–21 and accompanying text.

\textsuperscript{109} See infra notes 219–21 and accompanying text. Although Lee Kuan Yew, the first Prime Minister of Singapore, is widely regarded as the founding father of the modern Singapore republic, he is not associated with the framing of Singapore’s Constitution. In Singapore, Lee Kuan Yew is recognized as a political leader, not a constitutional founder.
cus on the same countries: Canada, New Zealand, Australia, the United Kingdom, South Africa, France, Germany, and India. But many of these commonly studied constitutions may not be the most relevant case studies for examining originalist arguments. As Fontana recognizes, this may explain “why much of the salience of originalism around the world has been missed to this point.” I seek to contribute to the emerging body of scholarship on comparative originalism by examining the emergence of originalism in two unexplored contexts.

II. ORIGINALISM ABROAD

Part II examines how originalism operates in two new contexts: the post-colonial Southeast Asian countries of Malaysia and Singapore. Part II.A discusses the example of Malaysia, where originalist arguments are frequently invoked in debates about secularism and the establishment of Islam in the Constitution. Originalist rhetoric has popular salience in Malaysia and appears prominently in its legal and political culture. Part II.B compares the neighboring country of Singapore, whose highest appellate court recently employed a textualist originalist interpretation of its national constitution to decide a case on the constitutionality of its mandatory death penalty.

Malaysia and Singapore offer a unique dual case study for testing hypotheses on when and why originalism thrives. These former British colonies share a common historical background and closely related constitutional beginnings, before separating and developing as separate nations. These neighboring states share a common birth as a new nation. Malaya emerged from the shadow of British colonialism to gain independence on August 31, 1957; six years later, Singapore—along with the Borneo states of Sabah and

110. Fontana, supra note 13, at 194.

111. David Fontana suggests the more relevant case studies for originalism are the revolutionary “post-colonial constitutions of African and Latin-America,” which “foster many originalist arguments.” Id. at 198–99. Fontana does not provide further explanation in support of this striking observation. But if this were so, the post-colonial constitutions of Malaysia and Singapore would be particularly useful comparative case studies to test his hypotheses.

112. Id. at 199.
Sarawak—joined the Federation to form the new nation of Malaysia.\textsuperscript{113} Two years later, political tensions led to Singapore’s separation from Malaysia to become its own sovereign state on August 9, 1965.\textsuperscript{114}

Both countries have common law legal regimes based on the British legal system and independent judiciaries with the power of judicial review. They both also possess written constitutions of similar age, with codified bills of rights.\textsuperscript{115} Yet originalist rhetoric has a popular appeal in the legal and political culture outside the courts in Malaysia that it does not in Singapore, where originalist interpretation has chiefly been employed prudentially by the courts in service of judicial constraint. In this Part, I examine how originalism has developed context-specifically in these two environments.

A. Popular Originalism in Malaysia

1. Secular and Islamic Originalist Rhetoric in Malaysia

The Constitution of Malaysia—then Malaya—was conceived in the post-colonial climate of a nation at the cusp of independence.\textsuperscript{116} The Independence Constitution came into force when the Federation of Malaya ceased to be a British colony and became an independent state on August 31, 1957, following negotiations between the newly elected local political leaders and the departing British colonial powers.

Five legal experts from the United Kingdom and the Com-

\begin{footnotesize}

\textsuperscript{114} See generally Kevin Y.L. Tan, Singapore: In and Out of the Federation, in Constitutional Landmarks, \textit{supra} note 113, at 55.

\textsuperscript{115} The similarities between these two countries allow a “most similar cases” comparative constitutional law approach to be employed. See Ran Hirschl, The Question of Case Selection in Comparative Constitutional Law, 53 Am. J. Comp. L. 125, 134 (2005) (describing the “most similar cases” approach, which involves comparing cases “that have similar characteristics . . . but vary in the values on the key independent and dependent variables”).

\textsuperscript{116} See generally Rais Yatim, The Road to Merdeka, in Constitutional Landmarks, \textit{supra} note 113, at 1.
\end{footnotesize}
monwealth were appointed to form a constitutional commission chaired by Lord Reid, a judge from the United Kingdom, to draft the constitution for the newly independent state. This was a deliberate decision by the locally elected Alliance party, and the Malayan leaders gave the Reid Constitutional Commission specific terms of reference that the local representatives had already negotiated and agreed on. The Commission’s task was essentially a technical one of translating into legal terms what had already been politically settled.

The Constitution that was drafted established a federal system of government with a legislative, executive, and judicial branch, and a constitutional monarch as the head of the federation. Malaysia’s constitutional structure is based on a parliamentary system modeled after Westminster, and also possesses a written constitution containing an explicit bill of rights. The power of judicial review over the constitutionality of legislation and executive action is implicitly assumed as a natural corollary of the Constitution’s supremacy clause.

Malaysia’s Federal Constitution was fashioned at the birth of a new nation attempting to accommodate the competing demands of a pluralistic society made up of a Malay-Muslim majority group and non-Muslim Chinese and Indian ethnic minorities. As the result of


118. See Joseph M. Fernando, *Federal Constitutions: A Comparative Study of Malaysia and the United States* 12–13 (2007) (explaining that “the choice of an independent body made up of legal experts from the Commonwealth was a conscious choice of the ruling Alliance party and was intended to avoid local prejudices in the framing of the Constitution”).


122. *Id.* pt. IV, arts. 32–37.

123. *Id.* pt. II, arts. 5–13.

124. *Id.* pt. I, art. 4(1) (“This Constitution is the supreme law of the Federation and any law . . . which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.”).
inter-ethnic negotiations and compromise, a declaration that “Islam is the religion of the Federation; but other religions may be practised in peace and harmony” was included in the Constitution. The scope of this declaration has been the focus of much of the debate on the place of Islam in Malaysia’s constitutional system.

Growing Islamist social and political discourse in Malaysia over the past three decades has made religion—and the original understanding of the clause declaring Islam as the state religion—the fault line of battles between competing political and social groups attempting to define the identity of the contemporary Malaysian state. Originalist rhetoric has been at the forefront of the legal and political battleground. Secularists and Islamists—judges, lawyers, scholars, politicians, and activists—strive to mobilize originalist arguments to support their competing positions on Malaysia’s status as a secular or Islamic state.

In this section, I trace the arc of how judges and other constitutional actors in Malaysia have used originalist arguments in legal and political practice. Initially, the courts relied on originalist evidence to affirm the Constitution’s historically secular basis. In the wake of growing Islamization, however, some judges and scholars began to employ originalist arguments to expand Islam’s constitutional scope of power. In response, secularists claimed that the framers’ true original intent had been for the constitutional rights to be interpreted purposively and expansively. Appeals to constitutional history and the founders characterize originalist arguments in Malaysia, but its constitutional historicism has not been linked to constraining judges. Originalism in Malaysia is associated with judicially expansive constitutional interpretation and mobilized by social movements aimed at motivating constitutional change.

* * *

Initial originalist interpretation in Malaysia focused on the original intent of the constitutional framers in a manner consistent with legalistic interpretive methods influenced by the British tradition of parliamentary supremacy. In the landmark 1988 decision of Che Omar bin Che Soh v. Public Prosecutor, the Supreme Court—


Malaysia’s apex court—declared that the Malaysian Constitution was founded as secular, relying on the framers’ original intent for support.\textsuperscript{127} The Lord President of the Supreme Court—the equivalent of the United States’ Chief Justice—delivered the majority opinion, which was based on interpreting the original understanding of the Article 3(1) declaration that “Islam is the religion of the Federation.”\textsuperscript{128} According to the chief judge, “[t]he question here is this: Was this the meaning intended by the framers of the Constitution? For this purpose, it is necessary to trace the history of Islam in this country after the British intervention in the affairs of the Malay States at the close of the last century.”\textsuperscript{129}

The appellants in this case faced the mandatory death penalty for drug trafficking and firearm offenses. The defense contended that the death penalty was unconstitutional as crimes involving drugs and firearms were not offences requiring imposition of the death penalty under Islamic law. Since Islam was constitutionally declared as the religion of the Federation,\textsuperscript{130} the counsel argued, this meant that Islamic precepts should be regarded as the source of all legal principles. On this basis, the death penalty could not be imposed for offences that were not in line with Islamic law.

The Supreme Court attempted to discern what the framers had intended through a distinctly historical lens, tracing the relegation of Islam to the private sphere following the British invasion of Malaya. Lord President Salleh Abas, delivering the majority opinion, concluded that the history of British colonialism and the drafting history of the Constitution showed that Islam’s role was confined only to “rituals and ceremonies.”\textsuperscript{131} According to the Lord President, it was in this limited sense that the framers of the Constitution understood the meaning of the word “Islam” in the Article 3(1) religious establishment clause.\textsuperscript{132} The Court unanimously rejected the idea that

\begin{itemize}
\item \textsuperscript{127} The Supreme Court (known as the Federal Court after 1994) is the highest appellate court in Malaysia. The appellate courts in Malaysia consist of the Federal Court, the Court of Appeal, and the High Court.
\item \textsuperscript{128} MALAY. CONST, pt. I, art. 3(1) (“Islam is the religion of the Federation; but other religions may be practised in peace and harmony.”).
\item \textsuperscript{129} (1988) 2 MALAYAN L.J. at 56.
\item \textsuperscript{130} Id. at 57.
\item \textsuperscript{131} Id. at 56–57.
\item \textsuperscript{132} Id. at 56.
\end{itemize}
laws passed by Parliament “must be imbued with Islamic and religious principles,” insisting that this was “contrary to the constitutional and legal history of the Federation.”\textsuperscript{133}

Two years later, the Supreme Court again employed an interpretive approach based on the framers’ intent to uphold a statute allowing a parent or guardian to decide the upbringing, education, and religion of a minor.\textsuperscript{134} Susie Teoh, a seventeen-year-old Malaysian-Chinese girl, ran away from home with a boyfriend and converted to Islam. Her Buddhist father sought a judicial declaration that he had the right to decide Susie’s upbringing and religion until she reached the age of majority at eighteen.\textsuperscript{135} According to the new Lord President, Abdul Hamid:

Although normally . . . we base our interpretative function on the printed letters of the legislation alone, in the instant case, we took the liberty . . . to ascertain for ourselves what purpose the founding fathers of our Constitution had in mind when our constitutional laws were drafted.\textsuperscript{136}

Historical documents written by the constitutional framers at the time they had drafted the Constitution stated that the recognition of Islam as the state religion “would not in any way affect the civil rights of non-Muslims.”\textsuperscript{137} Since “under normal circumstances” a non-Muslim parent had the right to decide various issues affecting a minor’s life, the Court held that “no infant shall have the automatic right to receive instruction relating to any other religion than his own without the permission of the parent or guardian.”\textsuperscript{138} The Supreme Court’s decision “defused a potentially very divisive issue” over religious conversion by using the authority of the framers to support up-

\begin{.itemize}
\item \textsuperscript{133} \textit{Id.} at 57.
\item \textsuperscript{134} Teoh Eng Huat v. Kadhi Pasir Mas (Susie Teoh), (1990) 2 MALAYAN L.J. 300.
\item \textsuperscript{135} \textit{Id.} at 300–01. The Guardianship of Infants Act, No. 351 (1961) (Malay.) governs the rights and powers of a parent or guardian of a non-Muslim child. There was no assertion of disagreement by Susie’s other parent over her father’s application. By the time the appeal was before the Supreme Court, Susie had reached the age of majority and the declarations were dismissed with no costs. The appeal, therefore, was of purely academic—and political—interest.
\item \textsuperscript{136} Susie Teoh, (1990) 2 MALAYAN L.J. at 301.
\item \textsuperscript{137} \textit{Id.} at 301–02 (citing the Reid Report, \textit{supra} note 119, ¶ 169).
\item \textsuperscript{138} \textit{Id.} at 302.
\end{itemize}
holding the civil family law statute while emphasizing that religious freedom would be maintained for adults over the age of majority.\footnote{139}

In these two early decisions, the Supreme Court affirmed the secular nature of the Malaysian state by employing original intent to uphold parliamentary statutes and restrain judicial expansion of Islam’s constitutional scope. Originalist interpretation was used to constrain judges from imposing their own personal views on matters of religion and the state, particularly when such an interpretation would go against existing democratically enacted legislation. Lord President Salleh Abas in \textit{Che Omar} emphasized his reluctance for the court to interfere in policy-oriented decision-making:

\begin{quote}
[W]e have to set aside our personal feelings because the law in this country is still what it is today, secular law, where morality not accepted by law is not enjoying the status of law. Perhaps that argument should be addressed at other forums or at seminars and, perhaps, to politicians and Parliament.\footnote{140}
\end{quote}

This would soon change. Politicization of Islam between the ruling United Malay National Organization (UMNO) party and the opposition Islamic party, the Pan-Malaysian Islamic Party (PAS), began to intensify. Growing Islamic consciousness in Malaysia became increasingly political when PAS took control of the state government of Kelantan in 1990, establishing itself as a significant opposition presence. PAS’s political platform has been to project itself as the authentic Islamic party and as more Islamic than the ruling party. This set the stage for an Islamization race between the two parties beginning in the 1980s and intensifying in the 1990s to secure the Muslim majority electorate.\footnote{141} Against this backdrop of UMNO and PAS competing to out-Islamize each other, then Prime Minister Mahathir Mohamad declared in 2001 that Malaysia was an Islamic state,\footnote{142} sparking public controversy in Malaysia.\footnote{143}

\footnotetext{139}{Andrew Harding, \textit{Islam and Public Law in Malaysia: Some Reflections in the Aftermath of Susie Teoh’s Case}, 1 MALAYAN L.J. xci, xcv (1991).}
\footnotetext{141}{Jaclyn Ling-Chien Neo, \textit{Malay Nationalism, Islamic Supremacy and the Constitutional Bargain in the Multi-Ethnic Composition of Malaysia}, 13 INT‘L J. ON MINORITY & GROUP RTS. 95, 104–05 (2006).}
\footnotetext{142}{Ramlan Said, \textit{Islamic State Issue Dominates}, NEW STRAITS TIMES (Malay.), Oct.}
Originalist rhetoric became increasingly salient in legal and public discourse, but with a change in tone. To fuel the movement toward greater Islamization, supporters of a more Islamic state mobilized historicist language to promote judicial expansion of Islam’s constitutional scope. Unlike before, originalist arguments were no longer employed in service of judicial restraint. Instead, advocates employed originalist appeals in support of shifting away from established precedent and to prioritize Islam’s constitutional position over individual constitutional rights, such as religious freedom.\textsuperscript{144}

Consider the case of \textit{Meor Atiquelahman} in 1999.\textsuperscript{145} Schools in Malaysia prohibit Muslim students from wearing religious headgear—like the \textit{serban}—according to education policy on school uniforms. The High Court held that school bans on wearing the \textit{serban} were unconstitutional because “Islam is the dominant religion amidst other religions which are practiced in the country.”\textsuperscript{146} To support this expanded interpretation of Islam’s constitutional position, Justice Noor used historical arguments about the Constitution’s founding to assert that the “Malay rulers demanded that the clause ‘[t]he Muslim or Islamic faith to be the established religion of the Federation’ be in-

\begin{footnotesize}
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\item 27, 2001, at 6; \textit{see also} \textit{Malaysia Recognised as Islamic Nation}, NEW STRAITS TIMES (Malay.), Aug. 11, 2001, at 4.
\item 143. \textit{See}, e.g., \textit{Said}, supra note 142; \textit{Tommy Thomas, The Social Contract: Malaysia’s Constitutional Covenant}, (2008) 1 MALAYAN L.J. cxxxii, clxxv–clxxvi; \textit{Li-ann Thio & Jaclyn Ling-Chien Neo, Religious Dress in Schools: The Serban Controversy in Malaysia}, 55 INT’L & COMP. L.Q. 671 (2006) (describing the Prime Minister’s declaration as “a populist attempt to gain political support in a country where Muslims are a majority comprising some 60.4% of the population”); \textit{Hassan Saeed, Apostasy Laws in Malaysia: Jurisdiction and Constitutionality, in FREEDOM OF RELIGION, APOSTASY, AND ISLAM 160 (Abdullah Saeed & Hassan Saeed eds., 2004) (calling Islamization “a convenient tool” to achieve UMNO’s objective of maintaining the political power it had enjoyed since independence).}
\item 144. Compare originalism in practice in the United States. Greene observes that “Heller, Crawford, and Apprendi exemplify a remarkable turn in constitutional law wherein originalist arguments are used not to restrain constitutional updating but to overrule longstanding precedential lines with substantial reliance interests at stake.” Greene, \textit{supra} note 1, at 689.
\item 145. \textit{Meor Atiquelahman bin Ishak v. Fatimah bte Sih}, (2000) 5 MALAYAN L.J. 375 (High Court, Seremban). The High Court occupies the lowest tier in Malaysia’s appellate court structure, which comprises of the High Court, the Court of Appeal, and the Federal Court (previously known as the Supreme Court).
\item 146. \textit{Id.} at 375, 377 (translated from Malay).
\end{itemize}
\end{footnotesize}
cluded to recognize the supremacy of Islam.”

The judge focused heavily on constructing a historical account of the constitutional bargain to argue that the constitutional framers had intended to secure Islam’s dominant position as the result of a social contract between the Muslims and non-Muslims. The accuracy of the High Court’s historical account of the Malay rulers and original founding intent is highly questionable: critics have called it “revisionist,” “erroneous,” and wrought with “historical amnesia.” But what is striking is that the judge insists on using history and original intent in support of his expansive interpretation of the Islamic constitutional clause despite established Supreme Court precedent in Che Omar confining Islam’s scope in Article 3 to “rituals and ceremonies.”

Reactive originalism continued its ascendency and its expansion of Islam’s public law role. Apostasy cases, in particular, brought into sharp tension the Article 3 declaration of Islam as the state religion and the Article 11 religious freedom guarantee. In Lina Joy v. Majlis Agama Islam, the High Court held that the constitutional right “to profess and practice” one’s religion did not extend to Muslims who wished to leave Islam without the approval of the Sharia Courts. Interpreting religious freedom to mean that

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147. Id. at 385; see also id. at 384.
148. Id. at 384.
149. Thio & Neo, supra note 143, at 681–83.
151. MALAY. CONST. pt. I, art. 3(1) (“Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.”); id. pt. II, art. 11(1) (“Every person has the right to profess and practice his religion and, subject to Clause (4), to propagate it.”).
153. Id. at 144. In practice, obtaining an order of apostasy from the Sharia Courts for a Malay-Muslim appears virtually impossible. There are no official statistics or empirical evidence of persons who have applied for and been granted an apostasy order by the Sharia Courts. Benjamin Dawson & Steven Thiru, The Lina Joy Case and the Future of Religious Freedom in Malaysia, LAWASIA J. 151, 160 (2007). This is unsurprising as apostasy is regarded as an offence under the state legislation of several states in Malaysia punishable by fines, imprisonment, or even whipping. See, e.g., Administration of the Religion of Islam and the Malay Custom Enactment of 1982 (amended 1989), § 185 (Pahang) (specifying that apostasy is an offence punishable by a fine or imprisonment not exceeding three years, and whipping not exceeding six strokes); Perak Islamic Criminal Law Enactment of 1992, § 13
Muslims could freely convert out of Islam could not be reconciled with the constitutional declaration of Islam as the religion of the federation. The High Court judge insisted that such an interpretation “would result in absurdities not intended by the framers of the [Federal Constitution].”\(^\text{154}\) Instead, Justice Faiza Tamby Chik reasoned that “[f]reedom of religion under art 11(1) must be read with art 3(1) which places Islam in a special position as the main and dominant religion of the Federation . . . .”\(^\text{155}\) “[T]o give effect to the intention of the framers of our [C]onstitution,” the judge claimed, religious freedom must be qualified by the other constitutional provisions on Islam.\(^\text{156}\)

The High Court judge employed originalist rhetoric to reorient settled legal precedent on the secular nature of the Constitution to enforce a more Islamic interpretation of the Malaysian Constitution. The judge used the report prepared by the Reid Constitutional Commission, which had drafted the Constitution, as his “starting point” in discerning the intent of the constitutional framers.\(^\text{157}\) Referring to how the Islamic clause had been included in the Constitution “after negotiations, discussions, and consensus between the British Government, the Malay Rulers and the Alliance party,”\(^\text{158}\) he concluded that Islam was meant to be the “main and dominant religion” of the state “from the inception” of the Constitution.\(^\text{159}\)

Despite the same Reid Report explicitly stating that insertion of the clause would “in no way affect the present position of the Federation as a Secular state,” Justice Faiza concluded that Article 3 “has a far wider and meaningful purpose than a mere fixation of the official religion.”\(^\text{160}\) The majority opinion in the Court of Appeal\(^\text{161}\) and

\(^{154}\) Lina Joy, 2 MALAYAN L.J. at 129[18].

\(^{155}\) Id. at 144[60].

\(^{156}\) Id. at 129[19].

\(^{157}\) Id. at 127[13].

\(^{158}\) Id.

\(^{159}\) Id. at 128[16].

\(^{160}\) Id. at 127[14], 128[18].
the Federal Court\textsuperscript{162} affirmed the High Court’s decision. \textit{Lina Joy} could not be recognized officially as no longer a Muslim without obtaining approval from the Sharia Courts.

The historicist appeals to the framers’ intent exhibited by judges attempting to expand Islam’s constitutional role have little utility as typical interpretive guides. The originalist rhetoric on display is often ideological, rather than methodological. Precedent conflicting with original understanding is downplayed. The Supreme Court’s previous ruling in \textit{Che Omar} that Islam’s role in Article 3 is confined only to “rituals and ceremonies”\textsuperscript{163} was completely disregarded by the lower courts in \textit{Meor} and \textit{Lina Joy}. The High Court judge in \textit{Meor} claimed that the Supreme Court precedent raised issues “too different from the current case” although the Supreme Court’s opinion discussed the constitutional history and original meaning of Article 3 in detail.\textsuperscript{164} Likewise Justice Faiza in \textit{Lina Joy} asserted that the Supreme Court had not decided on the meaning of Islam as the religion of the federation,\textsuperscript{165} despite the Supreme Court’s clear indication to the contrary in its opinion.

Judges who viewed this expansion of Islam’s position with alarm fought back on originalist turf. In a powerful dissent against the Federal Court’s majority opinion in \textit{Lina Joy},\textsuperscript{166} Justice Richard Malanjum asserted that the civil courts had a duty to uphold an individual’s right to religious freedom of choice because constitutional supremacy required protection of the fundamental liberties guaranteed in the Constitution.\textsuperscript{167} Significantly, Justice Malanjum viewed his interpretation as faithful to the original intent of the constitutional framers: "Sworn to uphold the Federal Constitution, it is my task to ensure that it is upheld at all times by giving effects to what I think

\begin{itemize}
  \item \textsuperscript{161} Lina Joy v. Majlis Agama Islam Wilayah Persekutuan, (2005) 5 ALL MALAY. REP. 663, 690(27)-91(29), 690 (C.A.).
  \item \textsuperscript{164} Meor Atiqurahman bin Ishak v. Fatimah bte Sihi, (2000) 5 MALAYAN L.J. 375 384.
  \item \textsuperscript{166} \textit{Lina Joy}, 3 ALL MALAY. REP. at 623[53]–24[53].
  \item \textsuperscript{167} \textit{Id.}
\end{itemize}
the founding fathers of this great nation had in mind when they framed this sacred document.”

Justice Malanjum emphasized that Islam’s special position in Article 3(1) “was never intended to override any right, privilege or power explicitly conferred by the Constitution.” Since the Constitution is the supreme law, he found it “abundantly clear” that all laws must be “in conformity with the provisions of the Constitution including those dealing with fundamental liberties.” Strikingly, proponents on either side of these competing constitutional narratives over the nation’s identity claim that their position on the Constitution’s secular or Islamic basis is supported by the constitutional framers’ original intent.

The battle over the original understanding in Malaysia has also reached beyond the issue of religion and the state. Judges advocating a purposive and rights-expansive interpretation of the bill of rights in the Malaysian Constitution also use the language of originalism to support their constitutional interpretation approach. Instead of rejecting the constitutional historicism of the Islamist movement, political liberals promoting a rights-oriented approach to constitutional interpretation systematically refer to the original commitments of the framers. Judges who advocate this living constitutionalism approach exhort the courts to “adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution.”

According to this view, the framers themselves had contemplated the necessity of constitutional construction by future generations: “the terms in which these provisions of the Constitution...

168. Id. at 619[23].
169. Id. at 623[53]–24[53].
170. Id. at 624[54].
172. Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan, (1996) 1 MALAYAN L.J. 261, 288; see also Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia, (1999) 1 MALAYAN L.J. 266, 271 (“[T]he Federal Constitution, unlike any ordinary statute, does not merely declare law .... It also confers upon individuals certain fundamental and inalienable human rights, such as equality before the law. Its language must accordingly receive a broad and liberal construction in order to advance the intention of its framers.”) (emphasis added).
are expressed necessarily co-opts future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights.\footnote{Lee Kwan Woh v. Pub. Prosecutor, (2009) 5 MALAYAN L.J. 301, 312 (quoting Boyce v. The Queen [2004] UKPC 32).}

Proponents of this originalist approach support empowering Malaysian judges to protect individual rights from legislative infringement by expanding the scope of enforceable constitutional rights. Judges adopting this view have shown themselves willing to find implied fundamental rights and to expand the right to life,\footnote{Malaysian courts have found that the right to life protects the right to access to court (Sivarasa Rasiah, (2010) 2 MALAYAN L.J. 333); employment (Tan Tek Seng, (1996) 1 MALAYAN L.J. 261); livelihood under native customary land rights (Nor Anak Nyawai, (2005) 3 CURRENT L.J. 555); and the right to fair trial (Lee Kwan Woh, (2009) 5 MALAYAN L.J. at 316).} equality,\footnote{Sivarasa Rasiah, 2 MALAYAN L.J. 333.} and the freedom of expression and association.\footnote{Muhammad Hilman bin Idham v. Kerajaan Malaysia, (2011) 6 MALAYAN L.J. 507.} In some ways, this original understanding approach reflects the living originalism approach advocated by Jack Balkin,\footnote{BALKIN, supra note 1.} which views fidelity to the text and general principles of the Constitution as compatible with changing constitutional norms.\footnote{Id. at 3.}

Originalist arguments have not been confined to the courts. Scholars and commentators regularly invoke originalist rhetoric in debates over Malaysia’s secular or Islamic identity. Some scholars argue that “history and the essential character of the country” are the “most important” reasons supporting Islam’s supremacy.\footnote{Abdul Aziz Bari, Islam in the Federal Constitution: A Commentary on the Decision of Meor Atiqulrahman, 2 MALAYAN L.J. cxxix, cxxxv (2000).} According to this view, the framers had intended to resurrect Islamic law from British rule and entrench it in the Constitution.\footnote{See, e.g., Mohamed Ismail Shariff, The Legislative Jurisdiction of the Federal Parliament in Matters Involving Islamic Law, 3 MALAYAN L.J. cv, cxc (2005) (“There is nothing in Article 3 that restricts the natural meaning of the term ‘Islam.’ And there is no reason to circumscribe its meaning to rituals and ceremonies only . . . . It is suggested that what the framers of the Constitution have in fact done is to resurrect the lost or hidden power relating to Islamic law, that which was taken away by the British, and entrenched it in Article 3.”).} Writing ex-
tra-judicially, Faiza Chik forcefully employed historical arguments to reiterate his position in *Lina Joy*[^181] that the Malaysian Constitution cannot be read to afford Muslims freedom of conscience.[^182] On the other side of the debate, secularists vigorously defend the original commitments of the Malaysian Constitution as secular, arguing that historical evidence during the founding demonstrates that the framers had clearly intended the nation to be a secular state.[^183] Others have trenchantly criticized the judicial expansion of Islam’s position for promoting a “revisionist” view of the constitutional founding.[^184]

Outside the academy, reference to the framers’ intent occurs frequently and forcefully in political and social discourse. Public debate on the issue of Malaysia’s status as a secular or Islamic state has been highly charged over the last decade, particularly after the then Prime Minister Mahathir Mohamad’s controversial declaration that Malaysia was an Islamic state.[^185] Opposition leaders in speeches and interviews have called political attempts to move toward greater Islamization “an affront to the solemn will of the framers of the Constitution.”[^186] Supporters of an Islamic state, on the other hand, argue


[^183]: See Fernando, supra note 113; Thomas, supra note 143; Tommy Thomas, *Is Malaysia An Islamic State?*, 4 MALAYAN L.J. xv (2006); Dawson & Thiru, supra note 153.

[^184]: Li-ann Thio, *Apostasy and Religious Freedom: Constitutional Issues Arising from the Lina Joy Litigation*, 2 MALAYAN L.J. i, xi–xii (2006) (“The revisionist tenor of the interpretive approach Faiza J applied in proffering a contested reading of article 3 is controversial and warrants close analysis. He referred to the framers’ intention, including the report of the Reid Commission and the Federation of Malaya Constitutional Proposal 1957... However, he did not go beyond mentioning these documents which emphasise the secular basis of the Malaysian polity and which were accompanied by assurances that what became article 3 was an ‘innocuous’ clause not implying ‘that the State is not a secular State.’”).

[^185]: See supra notes 143–44.

[^186]: See, e.g., *DAP Defends Secular Malaysia*, NEW STRAITS TIMES (Malay.), Oct. 10, 2001, at 3 (Opposition Democratic Action Party Chairman Lim Kit Siang defended Malaysia’s secular basis emphasizing that the party was “consistent in [its] stand on the fundamental constitutional principle propounded by the framers on the Federal Constitution.”); *DAP Firmly Against the Idea of Islamic State*, NEW STRAITS TIMES (Malay.), July 12, 2001, at 8 (Opposition figure Karpal Singh called the issue of setting up an Islamic state “an affront to the solemn will of the framers of the Constitution, who, undoubtedly, had as their objective Islam as the religion of the country in the context of a secular state”).
that the religious provisions contained in the Malaysian Constitution “disqualify Malaysia from being a secular state.”

In the popular media, Malaysia’s constitutional framers and founding are frequently invoked. References to the “founding fathers” or “framers” in the same sentence as the “constitution” appeared in three major Malaysian publications 305 times from 2001 to 2004 and 285 times from 2005 to 2009. This attention to the framers’ intent has not diminished perceptibly: from 2009 to 2012, these terms appeared in the same publications 216 times. Appeals to the framers and the founding remain part of the national conversation over a variety of issues. Originalist rhetoric has public salience in Malaysia: it is a prominent subject of academic discourse on constitutional interpretation and occupies a significant space in political and popular discourse.

2. Features of Popular Originalism

Originalist arguments in Malaysia have salience not merely as an interpretive technique but also have popular appeal in the legal and political rhetoric outside the courts. In this section, I sketch the main distinctive features of what I call popular originalism in Malaysia. There are resonances of this phenomenon elsewhere—for instance, in Turkey and in the United States. I draw comparisons with these other countries where helpful to illustrate its elements.

First, originalist arguments in Malaysia are typically associated with expansive judicial interpretation and constitutional change. Islamists view the expansion of theocratic elements as a constitution-


189. These data are on file with the author. The newspaper publications used in the search are New Straits Times (Malaysia), Bernama (Malaysia General News), and The Edge.

al restoration in line with the founding of the Malaysian nation and Constitution as an independent break from its Western colonial past.⁹¹ Secularists in Malaysia—comprised primarily of political and social liberals—champion a secularist original understanding of the founding and view a generous and purposive interpretive approach to individual rights as in line with the framers’ intent.⁹² In both cases, arguments about the original understanding are not used to constrain constitutional expansion but to motivate constitutional updating—whether toward a more politically conservative or liberal constitutional vision from the status quo.

Consider also Turkey, whose constitutional provisions on secularism have also been the site of originalist debate.⁹³ The Turkish Constitutional Court employed methodology “solidly grounded in originalism” in two decisions to strike down legislation allowing students to wear headscarves in educational institutions for violating the Turkish Constitution’s secularism provisions.⁹⁴ Many critics have called the Turkish Constitutional Court judicially activist for interfering with the democratic outputs of the political process.⁹⁵ In Turkey, the use of originalist reasoning by the Court has been viewed as a tool to expand its power and jurisdiction against the legislative branch. It has its strongest support among secular elites in Turkey, who are a part of the Turkish left.⁹⁶ Originalist approaches in Malaysia and Turkey are not characterized by political or judicial conservatism; instead, their use in these contexts has typically been associated with activist judging.

Second, originalist arguments in Malaysia have a distinctly popular dimension. Discussion about originalism extends well beyond the courts and has rhetorical potency in Malaysia’s political and

⁹¹. See supra notes 146–66 and accompanying text.
⁹². See supra notes 127–41, 166–79 and accompanying text.
⁹³. See Varol, supra note 5.
⁹⁴. Id. at 1262.
⁹⁶. Varol, supra note 5, at 1278.
public discourse. Judges, lawyers, scholars, politicians, and activists mobilize originalist arguments to support their claims over Malaysia’s secular or Islamic status because of the public appeal of such arguments. Originalism’s popular appeal has been observed elsewhere—most prominently in the United States. In America, originalism not only occupies a prominent place in its public and political culture, but has also become a “site of popular mobilization.” In Turkey, too, originalism is “not confined to the judicial sphere”—as Varol observes, “[e]ven the Turkish politicians’ criticisms of the judiciary feature heated debates over originalism.”

What appears to be a common thread among these countries is that originalism’s salience does not depend primarily on its analytical utility as an interpretive method. Rather, the force of originalist arguments stems from its social and political salience. Originalism as an argumentative approach has particular appeal in these countries because it “provides its proponents a compelling language in which to seek constitutional change through adjudication and politics.”

Third, the practice of originalism in Malaysia is largely dismissive of precedent. The Malaysian Supreme Court’s decision in Che Omar established clear precedent for recognizing the legal system as secular and confining Islam’s role to rituals and ceremonies. Yet judges and commentators who support the Islamization movement downplay the Supreme Court’s precedent as incompatible with their originalist arguments supporting an expansion of Islam’s primacy in the Constitution. Precedent is not regarded as a constraint that qualifies the application of an originalist approach. The

197. See supra notes 180–190.
198. See supra notes 81–94.
199. See Post & Siegel, supra note 1, at 548.
200. Varol, supra note 5, at 1274.
201. See Post & Siegel, supra note 1, at 549 (arguing that “[t]he current ascendancy of originalism does not reflect the analytic force of its jurisprudence, but instead depends upon its capacity to fuse aroused citizens, government officials, and judges into a dynamic and broad-based political movement”).
202. Id.
203. See generally Greene, supra note 4, at 16 (observing that a “distinguishing characteristic of the latest originalism movement [in America] is its hostility to precedent”).
tension between originalism and precedent is also resonant in United States constitutional practice: as Greene observes, Supreme Court decisions like “Heller, Crawford, and Apprendi exemplify a remarkable turn in constitutional law wherein originalist arguments are used not to restrain constitutional updating but to overrule longstanding precedential lines with substantial reliance interests at stake.”

Fourth, the originalist appeals in Malaysia rely heavily on constitutional historicism. Originalist arguments in Malaysia have not centered on the objective public meaning of the text at the time of drafting. Rather, interpretation of the Constitution is strongly influenced by the constitutional history surrounding its drafting. Historical evidence is viewed favorably as an extrinsic interpretive aid to originalist understanding. Take, for instance, the Malaysian Court of Appeal’s treatment of an academic article in the Cambridge Law Journal written by Professor Jennings—one of the framers of the Constitution. The Court relied on this extrinsic evidence to decide how to interpret constitutional provisions about the head of state’s right to dismiss a chief minister. Justice Zainun Ali openly encouraged the Court to “have regard to extraneous matters such as [the Jennings’] article . . . in order to distill the original and true intent behind constitutional provisions.” This historicist-orientation has meant that originalism in Malaysia is focused predominantly on the original intent of the framers.

Moreover, historical constitutional argument in Malaysia is used to generate change from the constitutional status quo. Recall, for instance, the Malaysian High Court judge in Lina Joy, who argued that the historical negotiations which resulted in the insertion of the Islamic clause in Article 3(1) indicated that the clause was “not

206. Greene, supra note 1, at 689; see also supra notes 68–80 and accompanying discussion.


208. Id. at 534.

209. See infra Part III.C.

210. Cf. Greene, supra note 4, at 61 (noting that in Australia the recognition that “history can be generative rather than constraining” has led to a focus on text and precedent).

merely ‘to fix’ the official religion of the state.”\textsuperscript{212} Historicist appeals to the framers and the founding are employed to promote an expansive constitutional interpretation of Islam’s position\textsuperscript{213} or individual rights provisions.\textsuperscript{214} The Turkish Constitutional Court’s originalist approach is also heavily historicist: it is focused on interpreting the Turkish Constitution’s secularism provisions in line with the historical meaning of Mustafa Kemal Atatürk’s reforms and principles.\textsuperscript{215}

Greene observes from his study of Canada and Australia that “the historicist appeals that support American originalism have a potency here that is found in few foreign constitutional courts.”\textsuperscript{216} But, as the experiences of Malaysia and Turkey illustrate, historicist appeals do thrive in other constitutional cultures—although not in the two that Greene considers to be most like the United States.\textsuperscript{217}

\textbf{B. Prudential Originalism in Singapore}

1. Singapore’s Death Penalty and Originalist Reasoning

Unlike Malaya’s Independence Constitution, conceived amidst the political excitement on the road to independence, Singapore’s constitutional origins emerged from more pragmatic circumstances.\textsuperscript{218} The former British colony of Singapore gained independence through merging with Malaya and the Borneo states of Sabah and Sarawak to form the Federation of Malaysia in 1963. Singapore became a state within the Federation, which had a federal structure that divided legislative jurisdiction between the federal and state governments.

\textsuperscript{212} Id. at 128[18].
\textsuperscript{213} See supra notes 146–50, 162–69, and accompanying text.
\textsuperscript{214} See supra notes 171–176 and accompanying text.
\textsuperscript{215} Varol, supra note 5, at 1277 (noting that in Turkey the “carefully delineated distinctions between originalist methods are without a difference” as “[a]ll three originalist modes yield the same result, primarily because original meaning, intent, and expected application all focus on ascertaining the meaning of Atatürk’s reforms and principles”).
\textsuperscript{216} Greene, supra note 4, at 6.
\textsuperscript{217} Id.
\textsuperscript{218} See generally LI-ANN THIO, A TREATISE ON SINGAPORE LAW 02.070–02.086 (2012).
The union was unhappy and brief. Political and ethnic tensions between the Federal Government of Malaysia and Singapore’s state government led to Singapore separating from the Federation of Malaysia to become its own sovereign nation on August 9, 1965.\(^\text{219}\) The Singapore Constitution was not drafted as a new constitutional document. Before the separation, Singapore was governed by the Federal Constitution of Malaysia and its own individual state constitution. After separating from Malaysia, the new Constitution of Singapore was a composite of three documents: the State Constitution of Singapore, with amendments after becoming a separate state; the Republic of Singapore Independence Act (RSIA) 1965; and the provisions of the Federal Constitution of Malaysia that the RSIA made applicable.\(^\text{220}\)

These documents provided Singapore with a working constitution—although one with untidy origins. Despite its close ties with the Malaysian Constitution, the Singapore Constitution is distinct in several ways: it has no established religion;\(^\text{221}\) it does not grant any special privileges on the basis of race;\(^\text{222}\) and religion is not specified as a criterion of ethnicity.\(^\text{223}\) The Constitution of Singapore was not the product of a constituent assembly or negotiations between domestic leaders and colonial powers: it was essentially a pragmatic product of the new state’s legislature.

Although there were initial discussions about drafting a new constitution, the Singapore Government eventually abandoned these plans. Instead, it convened a constitutional commission in 1966 to re-examine the existing constitution and to address issues relating to ethnic and religious minorities.\(^\text{224}\) The 1966 Wee Constitutional

\(^{219}\) See generally Tan, supra note 114; Li-ann Thio, Setting the Constitutional Context, in TREATISE ON SINGAPORE LAW, supra note 218.


\(^{221}\) Cf MALAY. CONST. art. 3(1) (specifying Islam as the religion of the Federation of Malaysia).

\(^{222}\) Cf id. art. 153 (on the special position of the Malays and indigenous natives).

\(^{223}\) Cf id. art. 160(2) (specifying that the criteria for being “Malay” includes, among other things, “a person who professes the religion of Islam”).

\(^{224}\) See THIO, supra note 218, at 02.095 (Note: in contrast to Malaysia, where the Malay-Muslims are the largest ethnic and religious group, the Malays and Indians are minorities in the Chinese-dominated population of Singapore).
Commission Report articulated several broad framing principles of the modern Singapore Constitution and made specific recommendations on keeping and modifying specific constitutional provisions. Many regard the Wee Constitutional Commission as “the next best thing to convening a full-fledged constituent assembly to craft a constitution.”

The power of judicial review is not expressly provided in the Singapore Constitution, but has been recognized by the courts as an implicit part of its Article 4 supremacy clause. Singapore’s judicial power is vested in the Supreme Court and subordinate courts. The composition and jurisdiction of the Supreme Court of Singapore is specified by the Constitution; it is made up of a Court of Appeal and a High Court. The Singapore Court of Appeal became Singapore’s final court of appeal after the right of appeal to the Judicial Committee of the Privy Council was abolished in 1994.

The prevailing interpretive approach of Singapore’s courts has been characterized by strict legalism and literalism. Its judges are generally skeptical of rights-expansive constitutional interpretation, unwilling to recognize implied constitutional rights, and heavily...


227. CONST. OF THE REP. OF SING. art. 4 (“This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.”). Singapore courts have recognized the judiciary’s power to strike down unconstitutional legislation in Chan Hiang Leng Colin v. Public Prosecutor [1994] 3 SING. L. REP. 662, 681 (H.C.); Taw Cheng Kong v. Public Prosecutor [1998] 1 SING. L. REP. (R) 78, 88–89 (H.C.); Nguyen Tuong Van v. Public Prosecutor [2005] 1 SING. L. REP 103, 120 (C.A.).

228. CONST. OF THE REP. OF SING. art. 93 (“The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force.”).

229. Id. art. 94(1) (“The Supreme Court shall consist of the Court of Appeal and the High Court with such jurisdiction and powers as are conferred on those Courts by this Constitution or any written law.”). The Court of Appeal exercises appellate criminal and civil jurisdiction, while the High Court exercises both original and appellate criminal and civil jurisdiction. Supreme Court of Judicature Act, ch. 322, pt. II, s.3 (Sing.).
influenced by the British legal tradition of parliamentary supremacy. Originalism had not featured prominently in Singapore’s constitutional jurisprudence until a recent 2010 decision on the constitutionality of the mandatory death penalty. The Singapore Court of Appeal’s originalist methodology in this case is consistent with its legalism in constitutional interpretation. Its originalism is employed to curb judicial discretion; it is focused on text, deferential to precedent, and has little popular appeal outside the courts. This section examines the apex Singapore court’s prominent originalist decision in *Yong Vui Kong v. Public Prosecutor*.232

* * *

Nineteen-year-old Yong, a Malaysian national, was arrested in 2008 for carrying several packages of heroin. He was convicted of trafficking more than forty grams of heroin. Drug trafficking offences carry a mandatory death penalty under Singapore law and Yong was sentenced to death. He appealed, arguing that the mandatory death penalty was an unconstitutional violation of the right to life under the Singapore Constitution, which provides under Article 9(1) that: “No person shall be deprived of his life or personal liberty save in accordance with law.” Yong argued that the mandatory death penalty was an inhuman punishment that could not be considered “in accordance with law” under Article 9.

The Singapore Court of Appeal—the nation’s highest court—unanimously rejected the appeal and upheld the constitutionality of the mandatory death penalty. The Court’s opinion was heavily originalist, and focused on the text and the intent of the framers.


232. *Id.* I focus on this case in detail because it is the principal originalist decision to date by the Singapore Court of Appeal. In this respect, it provides a useful contrast to the more frequent and popular appeals to originalist understandings inside and outside the Malaysian courts.

233. *Id.*

234. See The Misuse of Drugs Act, 2008 Rev. Ed. ch. 185 (Sing.) (mandating the death penalty for trafficking fifteen grams or more of heroin).

235. CONST. OF THE REP. OF SING. art. 9(1).
Yong’s counsel pointed to Privy Council decisions in several Caribbean states with British post-colonial constitutions, all of which had overturned the mandatory death penalty legislation on the basis that it was an inhuman punishment. The Court considered this to be an unwarranted and expansive interpretation of the term “law” in Article 9 and dismissed the idea that judges should change legal norms to reflect the “civilised norms of humanity.” The Court refused to find an implied prohibition against inhuman punishment in the Singapore Constitution, reasoning that the lack of an explicit textual provision and constitutional history at the time of drafting indicated that the framers had deliberately omitted to incorporate such a prohibition.

The starting point of the Court’s originalist approach is text-focused. The Court rejected the relevance of foreign decisions because, unlike the post-colonial Caribbean constitutions, the Singapore Constitution did not contain an express prohibition against inhuman punishment. The Chief Justice emphasized that the other Commonwealth cases were decided “in a different textual context,” and reasoned that the lack of any explicit textual provision prohibiting inhuman punishment was evidence of the framers’ original understanding of Article 9.

The Singapore Constitution’s fundamental liberties provisions were based on the 1957 Malayan Constitution drafted by the Reid Constitutional Commission. The Court placed particular emphasis on the fact that the Reid Commission had not recommended a prohibition against inhuman treatment in the Malayan Constitution, even though such a provision already existed in the European Convention on Human Rights at the time of Malaya’s independence when its Constitution was drafted. The Court concluded that the omission was not due to ignorance or oversight on the part of Malaya’s constitu-

237. Yong Vui Kong v. Public Prosecutor (Yong), [2010] 3 SING. L. REP. 489, [52].
238. Id. at [60]–[75].
239. Id. at [61].
240. Id. at [50] (emphasis in original).
241. Id. at [61].
242. Id. at [62].
tional drafters.\textsuperscript{243} Since the Reid Constitutional Commission had not included an express textual prohibition against inhuman treatment, the Court’s opinion was that to find that Article 9 encompassed such a prohibition would be “to legislate new rights into the Singapore Constitution under the guise of interpreting existing constitutional provisions.”\textsuperscript{244}

The Chief Justice went on to support this originalist understanding of Article 9 by using constitutional history to discern the original intent of the framers. He explained that the Constitutional Commission convened to review the Constitution in 1966 had proposed to add an \textit{express} constitutional provision against inhuman punishment, “but that proposal was ultimately rejected by the Government.”\textsuperscript{245} According to the chief judge, the Government’s “unambiguous” rejection of this proposal meant that it was “not legitimate for [the] court to read into Art 9(1) a constitutional right which was decisively rejected by the Government in 1969, especially given the historical context in which that right was rejected.”\textsuperscript{246}

The Court of Appeal’s original understanding approach is problematic. The first problem concerns the practical difficulty of discerning \textit{who} the framers of the Singapore Constitution were and their actual \textit{intentions} in drafting Article 9(1). As most of the Singapore Constitution’s fundamental rights provisions were adopted from the Malaysian Constitution, it appears “very odd for judges in today’s Singapore to . . . be fettered by the original intent of another nation-state’s constitutional framers.”\textsuperscript{247} The Court attempted to buttress its original intent approach by relying on the Singapore Government’s decision to reject the Wee Constitutional Commission’s proposal for including a prohibition on torture and inhuman treatment as evidence of parliamentary intent.\textsuperscript{248} But the 1966 Commission made its recommendations four years after the Singapore Constitution came into effect and the members of the Wee Commission were not the original

\begin{itemize}
\item \textsuperscript{243} Id.
\item \textsuperscript{244} Id. at [59].
\item \textsuperscript{245} Id. at [64].
\item \textsuperscript{246} Id. at [72].
\item \textsuperscript{247} P.J. Yap, \textit{Constitutionalising Capital Crimes: Judicial Virtue or ‘Originalism’ Sin?}, SING. J. LEGAL STUD. 281, 284 (2011).
\item \textsuperscript{248} See Yong Vui Kong v. Public Prosecutor (Yong), [2010] 3 SING. L. REP. 489 [64].
\end{itemize}
drafters of the Constitutions. It seems strange in this context that Parliament’s decision to reject the Commission’s proposal should be considered legitimate evidence of an “original” intent not to prohibit inhuman treatment.\footnote{249}

Moreover, taking the Court’s reasoning to its logical conclusion, any recommendation made by the Constitutional Commission in 1966 that was not adopted by the Singapore Government cannot judicially be deemed a constitutional right.\footnote{250} The Wee Constitutional Commission had in fact recommended inserting three new provisions: a prohibition against torture and inhuman treatment, a provision on the right to vote, and another on the right to a judicial remedy.\footnote{251} The Singapore Government found these to be “acceptable in principle” and stated that they would be “incorporated in some form in the new Constitution to be drawn up.”\footnote{252} A new constitution never eventuated, however, and the three suggested provisions never became part of the Constitution.

Yet in the same judgment, the Chief Justice made clear that laws allowing torture could not be permitted\footnote{253}—even though the 1966 Commission’s recommendation to prohibit torture was also not incorporated into Singapore’s Constitution. The Court attempts to justify this distinction by noting that the Home Minister had explicitly stated that torture is wrong during parliamentary debates in 1987.\footnote{254} But a ministerial statement two decades after the Commission’s report has little to do with the original intent of the framers, whether one regards the framing to be at the time of Singapore’s independence in 1963 or associated with the 1966 Constitutional Commission.\footnote{255} The Court’s deviation from its original intent approach when it would produce implausible results illustrates its

\footnote{249}{Yap, supra note 247, at 284.}
\footnote{251}{WEI REPORT, supra note 225, at ¶ 14.}
\footnote{252}{THIO, supra note 218, at 16.}
\footnote{253}{Yong, [2010] 3 SING. L. REP. 489, at [75] (noting that “[t]his conclusion does not mean that, because the proposed Art 13 included a prohibition against torture, an Act of Parliament that permits torture can form part of ‘law’ for the purposes of Art 9(1)”).}
\footnote{254}{Id.}
\footnote{255}{See Yap, supra note 247, at 285.}
“faint-hearted” originalism.\textsuperscript{256}

Yong’s second argument that the phrase “law” in Article 9 included customary international law, which prohibits the mandatory death penalty as inhuman treatment, also failed. The Court of Appeal held that since the Singapore Government in 1969 had “deliberated on but consciously rejected” the suggestion of incorporating a prohibition against inhuman punishment, the customary international law rule could not be part of the “law” referred to in Article 9(1).\textsuperscript{257} Again, the Court emphasized that it would be “acting as legislators in the guise of interpreters of the Singapore Constitution” if it accepted Yong’s submission.\textsuperscript{258}

2. Features of Prudential Originalism

The originalist arguments employed by the Singapore Court of Appeal bear little resemblance to the originalist appeals displayed across the border in Malaysia. The Singapore Court’s prudential originalist approach is less reactionary and historicist than Malaysian originalism, with little salience in public discourse. It is marked by legalism, focused on text and precedent, and concerned with ensuring deference toward legislative majorities and constraining judicial discretion. In this section, I outline the features that distinguish Singapore’s \textit{prudential} form of originalism from Malaysia’s \textit{popular} originalism.

The first key distinguishing feature between popular originalism and prudential originalism is that the latter has little popular reception outside the courts. Despite the Singapore Court of Appeal’s use of originalism at the highest judicial decision-making level, originalist arguments have little popular resonance in political or public discourse. Politicians rarely invoke constitutional values or refer to the framers in political debate; instead, their views are predominantly characterized by political pragmatism.\textsuperscript{259} Scholarly dis-
course over originalism is virtually non-existent; the Court of Appeal’s originalist decision in Yong attracted a few academic commentaries, but has not ignited any further academic debate in Singapore. Critics of the Court’s decision dismiss originalism altogether as an unsatisfactory method of constitutional interpretation for Singapore, in contrast to the battle waged by secularists and Islamists in Malaysia to claim the authority of the framers on their side.

The Singapore Court of Appeal’s use of originalism reflects its deferential approach to the political branches: the court employs originalism as a prudential doctrine to avoid interfering with legislation enacted by the political process. The Court’s original intent analysis is strained largely because it is focused on legislative intent, rather than the framers’ intent. For instance, it gives great weight to the Parliament’s act of not implementing the Constitutional Commission’s recommendation to insert a prohibition against inhuman treatment four years after the Singapore Constitution came into effect.

This stands in stark contrast to the Turkish Constitutional Court’s use of originalism to strike down democratically enacted statutes in the headscarves cases. The Singapore Court of Appeal’s originalist reasoning is solidly focused on upholding legislation enacted by Parliament. The Court’s concern of preventing judges from “acting as legislators in the guise of interpreters of the Singapore Constitution” runs through its entire opinion. Supporters of the decision in Yong approve of originalism precisely because it is perceived to constrain the judiciary from acting improperly political vis-à-vis the legislature. Singapore scholar Li-ann Thio writes approvingly: “Originalism here acts to restrain judicial discretion. This avoids the spectre of juristocracy, where activist judges advance

well for Singaporeans.”) (emphasis added).


261. See, e.g., Yap, supra note 247, at 288 (criticizing “all the difficulties” with “the espousal of originalism as the preferred mode of constitutional interpretation in Singapore”).

262. See supra notes 127–35, 146–91 and accompanying text.

263. See supra notes 246–47 and accompanying text.

264. See supra notes 194–97 and accompanying text.

265. Yong Vui Kong v. Public Prosecutor (Yong), [2010] 3 SING. L. REP. 489, at [92].
a political agenda through applying their subjective values in interpretation.” 266

Second, the Singapore Court of Appeal’s prudential originalism is a subset of the Court’s legalistic and formalistic interpretive methodology. Singapore’s constitutional jurisprudence is heavily formalistic; judges are generally reluctant to recognize implied constitutional rights or constitutional evolution. 267 Its originalist jurisprudence is no different. In Yong, the Court of Appeal held that nothing in the constitutional text suggested that the mandatory death penalty would infringe the due process clause, especially since there was no explicit textual provision in the Constitution against inhuman punishment. 268 The Court confined its interpretation to a strict textualist interpretation of the original understanding and rejected any suggestion that the meaning of the constitutional text could adapt to accommodate modern circumstances. 269 Contrast this with the originalist arguments employed in Malaysia to expand constitutional provisions on Islam’s position or religious freedom. Popular originalism in Malaysia is employed to motivate constitutional change, while the Singapore Court of Appeal’s originalist interpretation serves to constrain the judiciary to maintain the constitutional status quo. 270

Third, precedent is a central constraining feature of this form of prudential originalism. The Singapore Court of Appeal’s dominant interpretive approach is closely attentive to stare decisis and its originalist reasoning in Yong bolsters, rather than competes with, precedential authority. 271 The Chief Justice placed great weight on previous Singapore appellate court decisions upholding the mandatory death penalty, 272 even though the precedent in Nguyen has been heavily criticized for its lack of adequate reasoning and its failure to

266. Thio, supra note 260, at 570.
267. See supra note 231.
269. Id. at [52].
270. Id. at [49] (reasoning that the mandatory death penalty is “par excellence a policy issue for the Legislature and/or the Executive, and not a judicial issue for the Judiciary”).
271. Id. at [13]–[32], [52]–[54].
take into account the Privy Council’s changed position on the mandatory death penalty. Unlike how originalist arguments were employed to fuel Malaysia’s Islamization movement despite clear Supreme Court precedent to the contrary affirming the Constitution’s secular basis, the Singapore Court of Appeal does not use originalism in a manner that creates tension with precedent. Quite the opposite: both are viewed as complementary elements of a conservative interpretive methodology.

The manner in which originalism is applied in Singapore is unsurprising in light of its specific constitutional conditions. Constitutionalism in Singapore, Thio explains, “reflects a predominant constitutional pragmatism or realism, which is focused on experience . . . rather than an idealistic focus on abstract values.”

Part of this can be traced to the Singapore Constitution’s pragmatic beginnings as a basic working plan for governance hastily cobbled together after its separation from Malaysia. Unlike Malaysia’s Constitution, which was inextricably connected to its nation’s birth and independence from its colonial past, Singapore’s Constitution “emerged out of the ashes of a failed inter-communal experiment that was the Federation of Malaysia.”

Singaporeans do not regard their Constitution in an idealized light, nor view it as a source of aspirational values or national identity. As Singapore’s first Prime Minister Lee Kuan Yew emphasized, the “main thing about the Constitution is that it must work.”

Political, rather than legal, constitutionalism is the dominant

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275. See Thio, supra note 218, at 02.060.

276. Id. at 02.102 (noting that the Singapore Constitution was not born of revolutionary zeal or a deliberate process of negotiation with a departing power like in Malaysia or through convening a constituent assembly like in India but out of its failed relationship with the Federation of Malaysia).

constitutional mode in Singapore. Singapore’s legal culture is “more accurately identified with the practice of political constitutionalism, where the focus is on political methods of accountability and the preeminent role of the political branches in saying what the Constitution is.”

In the absence of a historical nation, Singapore’s national ideology has been shaped by political values promoted by the Government. Public discourse during the 1990s was dominated by a focus on cultural “Asian” values, rather than on constitutional principles or historical origins. Deference to political authority and constitutional pragmatism remain defining features of Singapore’s public law culture.

* * *

The High Court of Australia provides another comparative example of a national court that applies a form of prudential originalism. Australia’s constitutional court is “self-consciously ‘originalist’ to a degree unknown in the United States.” Australia’s general interpretive approach is heavily textualist and formalistic, and the form of originalism that has developed is closely aligned with the predominantly legalistic interpretative approach of its apex court. According to Justice McHugh of the High Court, “most Australian judges have been in substance what Justice Scalia of the United States Supreme Court once called himself—a faint-hearted originalist.” Precedent is treated as authoritative and central to the court’s interpretative methodology, rather than as aberrational when not in line

278. See Thio, supra note 261, at 570.

279. Thio, supra note 219, at 02.059, 02.023; see also id. at 02.016 (explaining that “the Government has actively sought to promote a focus on a shared future and a sense of common commitment to core values”).

280. Li-ann Thio, Constitution of the Republic of Singapore: The Indigenisation of a Westminster Import, in CONSTITUTIONALISM IN SOUTHEAST ASIA 251, 263 (Clauspeter Hill & Jörg Mezel eds., 2008) (noting the “marginal place of the highest law of the land in political discourse, which has, on occasion been unfortunately replicated in the judicial arena”).

281. Greene, supra note 4, at 5.


283. See Eastman v The Queen (2000) 203 CLR 1, 44 (Austl.) (observing that “most Australian judges have been in substance what Justice Scalia of the United States Supreme Court once called himself—a faint-hearted originalist”).
Judicial restraint is promoted not through historicist appeals, but through “a focus on text and existing doctrine.” Originalist interpretation remains solely the province of its courts, and the public appeal that originalism possesses in America is missing from Australian originalism. As Greene observes, Australian originalism is “more broadly practiced but less reactionary and less historicist than American originalism.” Originalism in Australia—like in Singapore—looks different from its American counterpart.

That originalism thrives in Australia in this form makes sense in the context of Australian constitutional culture. The Australian High Court is acknowledged as one of the most legalist national courts and its originalism stems from this formalistic interpretive approach. Unlike the U.S. Constitution, the Australian Constitution is a “prosaic document expressed in lawyer’s language.” Enacted as a statute by the British Parliament in 1900, it consists of structural provisions setting up a framework for governance and does not contain a bill of rights or any aspirational principles. Australians regard the Constitution as a basic legal agreement that establishes a framework for political governance, not as an object of aspirational ideals. As Jeffrey Goldsworthy explains, Australians “seem perfectly able to identify themselves as a historically continuing people, characterized by some basic shared values and commitments, without their Constitution playing a larger part in the narrative, except as the essential legal device by which federation was attained.” Indeed, “[t]he whole idea of the Constitution as an object of quasi-religious veneration, inspiration, and redemption is alien to Australians.”

284. Id. at 5 (observing that “Australia’s judges, lawyers, and theorists are less likely than their American counterparts to marry constitutional historicism to judicial restraint”).
285. Greene, supra note 4, at 41.
286. See Weis, supra note 17, at 8 (noting that Australian originalism does not share the popular reception in Australia that originalism has in American constitutional culture).
287. Greene, supra note 4, at 41.
291. Id. at 687.
In Australia, rights protection is viewed as a matter belonging to the political realm, not the constitutional one. Consequently, the Australian Constitution does not feature prominently in the public or political discourse: it “remains largely in the background and only occasionally attracts a modicum of public attention.” Indeed, a 1992 poll reported that a third of the Australian population were unaware that Australia had a written constitution. The Constitution has much less cultural or popular significance in Australia than in the United States—or, Malaysia and Turkey. This difference in constitutional conditions makes it far more persuasive to think of the Australian Constitution as a formalistic legal document; its High Court’s legalistic interpretive approach—including its originalist methodology—is in line with this constitutional framework. As a result, “the conditions of constitutionalism in Australia have given rise to a distinct interpretative tradition, of which originalism is a natural outgrowth or component.”

* * *

Originalist interpretation in Singapore and Australia has developed distinct forms and functions from the popular originalism seen in Malaysia and Turkey. The constitutional context and culture of a country influence not only whether originalism thrives but also its function and character. Ultimately, originalism’s salience in popular constitutional culture and its use as a prudential method of constitutional interpretation highlight how each is a product of culture and orientation.

III. IMPLICATIONS

A. Complicating the Story

Originalism is context dependent and culturally contingent. The variations in the practice of originalism abroad show that the

292. Id.
293. Id. at 685.
295. See Weis, supra note 17, at 14–15.
296. Id. at 3.
way originalism looks and functions is shaped by its cultural, historical, and political landscape. This may seem an unsurprising conclusion, but recognizing that originalism is culturally dependent adds texture to debates over originalism in two ways. First, it contributes to emerging scholarship on comparative originalism by complicating the story told so far by current accounts. Second, it questions the claim that originalist interpretation necessarily follows from written constitutionalism.

Until recently, it was widely assumed that originalism has little purchase outside of the United States. Emerging scholarship on comparative originalism has begun to question this assumption. There have been, broadly speaking, two prevailing views. The first view affirms the conventional narrative that originalism is indeed rejected by nations outside the United States. But perspectives that focus on particular features of “American-style” originalism are often inevitably colored by implicit assumptions about how originalism looks from an American lens. They sometimes simply fail to accommodate the different forms of originalist discourse present in other countries.

Other scholars acknowledge the presence of originalist arguments elsewhere and attempt to attribute a country’s affinity to originalism to various general hypotheses, such as a country’s revolutionary constitutional traditions, or a political leader’s cult of personality. The trouble is that none of these explanations fully work. Originalist rhetoric thrives in countries that do not fit the accounts

297. See supra note 3.

298. See, e.g., Greene, supra note 4, at 3 (noting the “global rejection of American-style originalism”); see also Scheppele, supra note 3, at 101; Balkin, supra note 3, at 839.

299. See Weis, supra note 17, at 4 (arguing that “[t]he fact that the vast literature on originalism in the United States has overlooked the possibility that the American constitutional system is not the best fit for originalist interpretation indicates the degree to which assumptions grounded in American debates about judicial activism have come to define the aims of interpretive theory”); Adam A. Perlin, What Makes Originalism Original?: A Comparative Analysis of Originalism and Its Role in Commerce Clause Jurisprudence in the United States and Australia, 23 UCLA PAC. BASIN L.J. 94, 95 (2005) (noting that “[t]oo often, American scholars have viewed originalism through an American prism that inevitably leads to the conclusion that American originalism must be the only originalism”).

300. Fontana, supra note 13, at 197.

301. Varol, supra note 5, at 1246.
provided by these studies. Part of this may be because existing scholarship on originalism abroad has been confined to a limited number of countries so far: Australia, Canada, Germany, and Turkey. Existing accounts are also incomplete, I argue, because a country’s attraction to originalism is culturally contingent, making it difficult to find a generalized explanation for why originalism thrives across diverse constitutional cultures.

The roots of originalism are more complicated than previous theories suggest and its origins cannot be attributed easily to a single-source hypothesis. These observations suggest the importance of a context-attentive and cautious analysis of the use and practice of originalism in different constitutional cultures. Explanations associating originalism with revolutionary constitutional traditions or veneration of a political leader provide helpful partial insights that highlight specific cultural features that contribute to why a country finds originalism attractive.

These efforts, however, point to a broader explanation. The reason why a particular type of originalism thrives in a nation stems from its cultural and historical environment and is also often connected to a temporal political or social element. Originalism assumes popular or prudential dimensions in different contexts, and is deployed by courts and communities in a context-dependent manner. The popular originalist rhetoric used in public debates over religion and the state in Malaysia is distinct in character and function from the legalist originalist methods employed by Singapore’s national court.

Originalism has popular appeal in a nation conditioned by particular cultural and political influences to identify with its constitutional history. Jamal Greene has suggested that the appeal of originalism in the United States can be associated with certain fea-

302. See supra Parts II.A, II.B.
303. See, e.g., Greene, supra note 4; Goldsworthy, supra note 8; Goldsworthy, supra note 290; Weis, supra note 17.
304. See, e.g., Greene, supra note 4.; cf. Miller, supra note 8 (arguing that a proper understanding of the Persons Case is consistent with an originalist interpretation rather than the “living tree” approach to constitutional interpretation that has become associated with Canadian constitutional jurisprudence).
305. See, e.g., Scheppele, supra note 3.
306. See, e.g., Varol, supra note 5.
tured of America culture: lionization of the Framers; the revolutionary character of American sovereignty; backlash against the rights revolution of the Warren and Burger Courts; the politicization of the judicial-nomination process; a culturally and politically assimilative ethos; and a relatively religious culture. Jack Balkin, too, agrees that “American originalism has been produced by a combination of historical and cultural factors.” Likewise, originalist arguments have popular salience in Malaysia and Turkey because of cultural features and political traditions associated with the nation’s founding or constitutional framing. Originalism’s success requires “an audience sensitized by culture and by history.”

In these societies, popular originalism functions as more than an interpretive method. Originalist argument of this kind, as Greene suggests, is best understood as an argument about constitutional ethos. Drawing on Philip Bobbitt’s typology of constitutional argument, it is a form of ethical argument: a “constitutional argument whose force relies on a characterization of American institutions and the role within them of the American people.” As Richard Primus recognizes, “the deeper power of originalist argument sounds in the romance of national identity.”

Secularists and Islamists in Malaysia and Turkey battle so deeply over the original understanding of the constitutional provi-
sions on religion because it is, in essence, a struggle over the nation’s identity. Originalist argumentation provides a way for a society to articulate and cement constitutional narratives about itself.\textsuperscript{314} The Malaysian constitutional narrative is “caught between competing stories: the anti-colonial story of a largely Muslim people’s movement that overthrew colonial rule and the evolutionary story of an orderly transition of power from British to Malay rulers.”\textsuperscript{315} Judges, lawyers, and scholars use originalist arguments in debates over Islam’s position in Malaysia’s Constitution because of their authority in a society where the Constitution has central political and cultural significance.\textsuperscript{316}

Popular originalism provides a powerful means for political and legal actors to articulate their narrative of the nation’s constitutional identity because of how it connects the past to the future. As Balkin explains, “[p]opular (or populist) originalism is primarily an appeal to national ethos and to an imagined tradition.”\textsuperscript{317} But the popular appeal of originalism in these societies also highlights its potential to be used for ideological purposes. Originalist arguments are rhetorically potent because they help construct a constitutional narrative about a nation’s identity. In these contexts “the very public appeal of originalism makes it an attractive device to manipulate.”\textsuperscript{318} Some view this as consistent with a skeptical view of originalism as a deeply strategic tool conveniently deployed to support particular objectives.\textsuperscript{319} But we need not take such a cynical position to recognize

\begin{itemize}
\item \textsuperscript{314} See Carolyn Evans, \textit{Constitutional Narratives: Constitutional Adjudication on the Religion Clauses in Australia and Malaysia}, 23 EMORY INT’L L. REV. 437, 438 (2009) (“Constitutional narrative in this context is a culturally and legally created story about the role, purpose, history, and relevance of the constitution in a particular society.”).
\item \textsuperscript{315} Id. at 454.
\item \textsuperscript{316} Jamal Greene also points to religion as one of the features that sensitizes the American audience to originalism. According to Greene, “the originalism movement that so glorifies the Constitution’s original understanding is conspicuously commingled with an evangelical movement that tends to disfavor departures from the original meaning of God’s word.” Greene, supra note 4, at 7; see also, id. at 78–81.
\item \textsuperscript{317} See Balkin (2015 forthcoming), supra note 3, at 18.
\item \textsuperscript{318} See Cross, supra note 28, at 14.
\item \textsuperscript{319} Id. at 16 (“[O]riginalism may be used as a tool for other ends . . . . The theoretical attractiveness of originalism to the public makes it a particularly desirable tool to pursue other ends and may even embolden the justices to go farther than they otherwise might.”); see also Berman, supra note 1, at 8 (“[O]riginalism . . . is not merely false but pernicious . . . because of its tendency to be deployed in the public square—on the campaign trail, on talk
that originalism can be employed—not necessarily insincerely—to support vastly different constitutional visions.

Consider the various versions of originalist theory in the United States. Take, for instance, Randy Barnett’s “presumption of liberty” originalism, which would expand the scope of enforceable constitutional rights, or Jack Balkin’s living originalism, which views Roe v. Wade as correctly decided. Both are the antitheses of the originalism of Justice Scalia and Robert Bork, which was born out of a conservative movement that sought to limit judicial expansion of unenumerated rights. And in District of Columbia v. Heller, Justice Scalia and Justice Stevens each relied on different originalist interpretations to reach contrasting positions over whether the Second Amendment protects the right of an individual to carry a gun for confrontation. Similarly, secularist and Islamist factions in Malaysia both employ originalist arguments to support opposite conclusions on the scope of Islam’s constitutional power. Yet other Malaysian judges argue that the framers’ truly intended an individual rights-oriented approach to constitutional interpretation that would empower judges to protect constitutional rights against legislative infringement.

Originalism’s cultural contingency raises questions about some of the familiar claims defended in American debates over originalism. Some originalists defend originalism based on conceptual claims about the right way to read written texts. On this view,

radio, in Senate confirmation hearings, even in Supreme Court opinions—to bolster the popular fable that constitutional adjudication can be practiced in something close to an objective and mechanical fashion”.


322. See Bork, supra note 1, at 114, 118–19, 125 (viewing judicial protection of unenumerated rights as an illegitimate attempt to circumvent the legislative process).

323. See Colby & Smith, supra note 1, at 260, 286–87 (observing that disparate versions of originalism have been used to reach diametrically different conclusions on significant issues of constitutional law).


325. See supra notes 127–71 and accompanying text.

326. See supra notes 172–77 and accompanying text.
originalism is the inevitable approach to interpreting a written constitution. Justice Scalia, for instance, insists that only originalism treats the Constitution as having “a fixed meaning ascertainable through the usual devices familiar to those learned in the law.”\textsuperscript{327} Keith Whittington asserts that “originalism is required by the nature of a written constitution” and that there not only is “a right answer to the construction of an interpretive standard but that that answer is fixed in the essential forms of the Constitution and does not change.”\textsuperscript{328} The Constitution’s status as supreme law “can emerge from the text as intended . . . only if the text has the fixed meaning it is capable of carrying.”\textsuperscript{329} In other words, written constitutionalism “entails originalism.”\textsuperscript{330}

But once we take the geographical and temporal diversity of interpretive and argumentative approaches across constitutional cultures into account, the claim that originalism is necessarily or conceptually required by a written constitution seems difficult to defend. The comparative perspective shows us that some countries are originalist, some are not, and some are partially originalist. Many legal systems with written constitutions use non-originalist methods of interpretation.\textsuperscript{331} Countries in which originalism thrives can become more or less originalist over time, and they are not all originalist in the same way—originalism takes on more popular or prudential dimensions in different contexts. Recognizing that the practice of originalism is culturally contingent is in tension with the view that originalism necessarily follows judicial interpretation of written constitutions.\textsuperscript{332}

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\item \textsuperscript{327} Scalia, supra note 20, at 854.
\item \textsuperscript{328} WHITTINGTON, supra note 1, at 15.
\item \textsuperscript{329} Id. at 56; see also Calabresi & Prakash, supra note 15, 551–52 (1994).
\item \textsuperscript{330} WHITTINGTON, supra note 1, at 49. See also Gary Lawson, The Rise and Rise of the Administrative State, 107 HARV. L. REV. 1231, 1250 (1994) (“[O]riginalist interpretivism is not simply one method of interpretation among many—it is the only method that is suited to discovering the actual meaning of the relevant text”); Kesavan & Paulsen, supra note 15, at 1142 (“[O]riginal meaning textualism is the only method of interpreting the Constitution”); Saikrishna B. Prakash, Unoriginalism’s Law Without Meaning, 15 CONST. COMMENT. 529, 544 (1998) (“When we accept some text as law, we also commit to the law’s original meanings . . . . Indeed, to embrace the legitimacy of words as law without their original, ordinary meanings is to embrace nothing.”).
\item \textsuperscript{331} See generally, Scheppel, supra note 3.
\item \textsuperscript{332} See Greene, supra note 4, at 88.
\end{itemize}
\end{footnotesize}
The variations in the practice of originalism across the world reinforces the idea that whether—and when—originalism takes hold in a country is influenced by cultural and historical traditions, rather than conceptual arguments. If originalism is an argument about constitutional ethos, its authority and appeal are ultimately connected to how closely a society identifies with the particular constitutional narrative on offer— not because of an inherent link to written constitutionalism. Nor does it appear necessarily linked to a capacity to provide fixed and objective criteria for constitutional interpretation. Indeed, the opposite phenomenon appears on display in Malaysia and Turkey: because the language of originalism has popular appeal in these countries, constitutional actors seize on originalist arguments to support opposing positions on significant constitutional issues.

The claim that originalist interpretation follows from treating the Constitution as a form of written law may be a more plausible justification for constitutional systems where the Constitution is regarded formally as a statute or basic legal document for governance. For instance, the Australian Constitution was initially conceived as a British statute; it does not contain a bill of rights or any aspirational formulations and is not an object of veneration. Singapore’s Constitution originated as a hasty reorganization of its governance following its separation from Malaysia; as a result, it is viewed pragmatically and not in an idealized light. The form of originalism that thrives in both countries is strikingly similar: their national courts employ textualist originalist methods in a legalistic manner consistent with a formalistic view of the Constitution. Lael Weis argues that the “Australian constitutional system is a better fit for an originalist theory of interpretation” because it is “more plausible to treat Australian constitutionalism as reducible to the written

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333. See id. at 85 (“For some originalists, the recognition [that originalist argument in the United States is ultimately ethical] is self-defeating. Originalism is valuable to many originalists precisely because its source of legal authority is not inherently contested . . . . Ethical argument is an ideological approach to interpretation . . . . originalists generally reject ideological approaches in either sense . . . . But if the choice of a historical modality is culturally dependent, conventional legal analysis cannot be authoritative on its own; it must always be connected to a story about what kind of people we are”).

334. See, e.g., Scalia supra note 20, at 854 (arguing that originalist interpretation treats the Constitution as “an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law”).

335. See Weis, supra note 17.
constitution,” compared to the central founding role that the U.S. Constitution has in American constitutionalism.\(^{336}\)

As Mark Tushnet has observed, “seeing how things are done in other constitutional systems may raise the question of the Constitution’s connection to American national character more dramatically than reflection on domestic constitutional issues could.”\(^{337}\) Recognizing that the popularity of originalist rhetoric is linked to its role in expressing cultural values and defining national character helps in understanding why originalism has such a hold on American constitutional culture.

Comparative analysis helps us see that conceptual defenses about originalism being required by a written constitution may not work across all constitutional cultures. And it also shows us that interpretive claims about how to interpret a constitution’s text do not tell us why some countries are attracted to originalism and some are not. This suggests that, quite apart from conceptual or normative justifications for originalism, there is something culturally contingent about what a country accepts as authoritative in constitutional argument that makes it more or less sensitized to originalism.

B. Originalism and Judicial Restraint

Originalism’s necessity as a means of constraining judges has been central to its justification and appeal as an interpretive approach in America. As Thomas Colby observes: “Originalism was born of a desire to constrain judges.”\(^{338}\) The originalist movement in the United States emerged as a response to the rights-expansive decisions of the Warren Court.\(^{339}\) Early originalists advocated using originalist

\(^{336}\) \(\text{Id. at 3.}\)


\(^{338}\) See Colby, supra note 1 at 714 (“Judicial constraint was its heart and soul—its raison d’etre.”).

\(^{339}\) See Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 601 (2004) (noting that “originalism was a reactive theory motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger Courts”); Colby, supra note 1, at 716 (explaining that originalism “arose as a by-product of the conservative frustration with the broad, rights-expansive decisions of the Warren and Burger Courts”).
interpretation to curb judicial expansion of constitutional rights that interfered with the output of democratically enacted bodies. Its supporters portrayed originalism as a tool of judicial restraint because it promoted deference to the decisions of those with political authority.340

Originalists claim that originalism also offers the power to constrain judges from imposing their own views in constitutional interpretation.341 Many new originalists no longer emphasize judicial restraint in the sense of restraining judges from using the power of judicial review to strike down legislation or executive action.342 But many originalists continue to promote originalism’s capacity to constrain judicial discretion. Justice Scalia, for instance, adamantly insists that originalism’s reliance on fixed and determinate criteria makes it uniquely capable of limiting judges’ ability to decide cases based on their personal preferences and subjective values.343 And even new originalists who acknowledge that originalism is “less determinate as its most vocal proponents would suggest” defend the more modest claim that “originalism is defensible not because it restrains judges completely, or even well, but because it restrains judges better than alternative methods of judging.”344

340. See, e.g., Bork, supra note 19, at 11 (asserting that “where the Constitution does not speak,” the “correct answer” to the question “‘[A]re we all . . . at the mercy of legislative majorities?’ . . . must be ‘yes’”).

341. See, e.g., Robert H. Bork, Styles in Constitutional Theory, 26 S. TEX. L.J. 383, 387 (1985) (arguing that the nature of other non-originalist theories “must end in constitutional nihilism and the imposition of the judge’s merely personal values on the rest of us”); BERGER, supra note 19 (noting that employment of non-originalist interpretations “reduces the Constitution to an empty shell into which each shifting judicial majority pours its own preferences”).

342. See, e.g., Whittington, supra note 339, at 609 (“The new originalism does not require judges to get out of the way of legislatures. It requires judges to uphold the original Constitution—nothing more, but also nothing less.”).

343. See, e.g., Scalia, supra note 20, at 863–64 (“[T]he main danger in judicial interpretation . . . is that the judges will mistake their own predilections for the law . . . . Nonoriginalism . . . plays precisely to this weakness . . . . Originalism does not . . . for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself”); see also BORK, supra note 1, at 155 (“No other method of constitutional adjudication [besides ‘the approach of original understanding’] can confine courts to a defined sphere of authority. . . .”)

The shift in focus from judicial restraint in the sense of refraining from invalidating outputs of the democratic process to judicial constraint in the sense of constraining judicial discretion in the academic discourse, however, has not affected its appeal in practice. As a matter of political and popular appeal, the language of judicial restraint—and constraint—has been crucial to originalism’s success. Among the general public, originalism is routinely associated with judicially conservative values. “In popular discourse,” Balkin observes, originalist “advice is primarily directed at judges, who, it is feared, are tempted repeatedly to stray from the framers’ vision and substitute their personal political predilections from the country’s basic law.”

Originalism continues to be portrayed in American popular constitutional culture as necessary for curbing activist judges. As an example, take Rush Limbaugh’s declaration:

The court is out of control. The court is made up now of nine people, some of whom are simply substituting their own personal policy preferences or foreign law or whatever to find in legal cases that come before them If you’re going to have members of the Supreme Court look at the document and find something in it that isn’t there, then the Constitution is meaningless! . . . This whole thing is about reorienting the court for constitutionalism. Another word for that is originalism. You go back and you check the originalists, the Founders. It’s there, and if the Constitution doesn’t provide for it, you don’t make it up.

firm criteria makes it easier to check up on originalist interpretations for the soundness of their reasoning and their adherence to correct principles whereas “[n]onoriginalism, on the other hand, means never having to say you’re sorry”).

345. See Colby, supra note 1, at 751 (observing that “although originalism in its New incarnation no longer emphasizes judicial restraint—in the sense of deference to legislative majorities—it continues to a substantial degree to emphasize judicial constraint—in the sense of promoting to narrow the discretion of judges”) (emphasis in original).

346. See Greene, supra note 1, at 678 (noting that “the mantle of judicial restraint is essential to originalism’s present political success”); see also Post & Siegel, supra note 1.


348. See, e.g., LEVIN, supra note 81, at 12–22.

349. The Rush Limbaugh Show, It’s Not All About Roe v. Wade (Oct. 11, 2005),
To be sure, critics of originalism have sought to undermine originalism’s claim of constraining judges by pointing to its selective and inconsistent use by judges in practice;\textsuperscript{350} the indeterminacy of historical evidence;\textsuperscript{351} and the substantial discretion afforded to judges to pick from different versions of originalist theory to reach a desired conclusion.\textsuperscript{352} Other scholars have argued that non-originalist methods, such as common law constitutionalism or precedent-based approaches, offer more effective means of constraining judicial discretion.\textsuperscript{353} These critiques offer important insights made from within the American discourse over originalism. I provide a comparative perspective to these debates by providing an account of how courts elsewhere creatively deploy originalist arguments in a context-dependent manner.

The story of originalism abroad is not typically associated in practice with judicial restraint—both in terms of deference to legislative majorities and constraining judicial discretion. Judges in various contexts deploy historicist originalism with substantial judicial dis-

\textsuperscript{350} See, e.g., Greene, supra note 1, at 711 (“Originalism is not inherently a doctrine of judicial restraint. Originalists emphasize restraint in cases such as Casey but not in cases such as District of Columbia v. Heller, Parents Involved in Community Schools v. Seattle School District No. 1, and Kelo v. City of New London, creating the impression that it is they who leave constitutional decisionmaking in the hands of the people”); Erwin Chemerinsky, The Jurisprudence of Justice Scalia: A Critical Appraisal, 22 U. HAW. L. REV. 385, 385 (2000) (arguing that Justice Scalia’s jurisprudence of original meaning is “one that Justice Scalia uses selectively when it leads to the conservative results he wants, but ignores when it does not generate the outcomes he desires”); Rosenthal, supra note 28 (arguing that originalism has a limited role in actual constitutional practice).


\textsuperscript{352} See, e.g., Colby & Smith, supra note 1, at 292 (observing that “a judge who seeks to answer difficult questions of constitutional meaning by invoking originalism in fact has significant discretion to choose (consciously or subconsciously) the version of originalism that is most likely to produce results consistent with his own preferences”); Colby, supra note 1, at 776 (“Whereas the Old Originalism promised constraint but lacked respectability, the New Originalism has achieved respectability, but only by sacrificing constraint. It is not possible for an originalist theory to have both at the same time.”).

\textsuperscript{353} See, e.g., David Strauss, Originalism, Conservatism, and Judicial Restraint, 34 HARV. J.L. & PUB. POL’Y 137 (2011); Thomas W. Merrill, Originalism, Stare Decisis and the Promotion of Judicial Restraint, 22 CONST. COMMENT. 271 (2005).
cretion both to promote expansive constitutional interpretation and to invalidate democratically enacted legislation. Originalist arguments have been employed in practice to achieve judicially expansive constitutional interpretation in Malaysia, and also to empower the Turkish judiciary vis-à-vis the legislature. The features of American-style originalism—with its focus on constitutional historicism and its popular appeal in the public arena—are associated in these contexts with assertive or reactive judging against the existing constitutional order.

Secularists and Islamists in Malaysia on both sides of the debate over religious establishment and the state strive to mobilize originalist arguments to support either judicial expansion of religious liberty rights or Islam’s constitutional scope of power. Islamists assert that an originalist interpretation supports a broader reading of the Islamic establishment clause that would expand theocratic elements of the Malaysian Constitution. Secularists, on the other hand, argue that a constitutional interpretation approach that would limit Islam’s role and judicially protect individual rights against legislative infringement would be in line with the framers’ original intent. The fact that both sides of the divide can claim different originalist understandings of Islam’s constitutional position highlights the substantial discretion available to judges employing originalist arguments in constitutional practice.

In Turkey, the judiciary has employed originalism to assert its power and jurisdiction against the elected branches. The Turkish Constitutional Court thwarted the legislature’s attempt to allow Islamic headscarves in higher educational institutions using originalist reasoning in two decisions to return the Turkish Constitution to its secular roots. The Court’s controversial pro-secularism decisions striking down democratically enacted legislation have led to the Court being called “an activist institution that has wrongfully injected itself into the Turkish political process through unprincipled opin-

354. See supra Part II.A.1.
355. See MALAY. CONST., art. 3(1) (“Islam is the religion of the Federation; but other religions may be practised in peace and harmony.”).
356. See supra Part II.A.2.
In Turkey—as is often also the case in Malaysia—it is "primarily secular elites who support originalist interpretations of the Constitution." In neither of these countries is the language of originalism associated with the cabining of judicial discretion or deference to the legislative process.

To Americans, judicial restraint and the early originalist movement are usually associated with political conservatism, particularly in the shadow of the Warren Court’s perceived judicial activism. The opposite phenomenon is apparent in Malaysia and Turkey: originalism is frequently the domain of political liberals seeking to increase the courts’ oversight of the legislative process or judicial expansion of individual rights. Originalism in these contexts is not intrinsically linked to constraining judicial discretion nor does it serve politically conservative values. These examples demonstrate originalism’s potential to be appropriated for judicially liberal or conservative ends in countries where ideas about the founding or framing have popular appeal. Popular originalism has salience in these contexts not merely as an interpretive tool, but as a rhetorical means of appealing to a particular constitutional vision. The features of popular originalism have at least as much—if not greater—affinity to what is viewed as activist or expansive judging than judicial constraint of any kind.

The form of originalism practiced in Singapore and Australia arguably offers a better claim to cabining judicial discretion. But this prudential originalism is largely a function of the interpretive traditions and constitutional culture of these countries, which bear little resemblance to those of the United States. Originalist methods in these countries are employed as part of the courts’ dominant legalistic interpretive methodology. It is focused on text, heavily con-

358. Varol, supra note 5, at 1245; see also supra note 195.
359. Varol, supra note 5, at 1239.
360. See id. at 1278 (noting that originalism “has its following primarily with secular elites in Turkey, who form a part of the social democrats—i.e., the Turkish left”).
361. Indeed, Balkin acknowledges that despite the immense preoccupation with originalism in United States discourse, “it is not even the dominant form of argument among American judges” and that cases decided primarily through originalist methods, like Heller and McDonald, are rare. Jack Balkin, The American Constitution as “Our Law,” 25 YALE J.L. & HUMAN. 113, 124 (2013).
362. See Greene, supra note 4, at 84–85.
strained by precedent, and has no popular appeal in political or public discourse. In short, the prudential originalism employed in these countries has little in common with the originalism in practice in the United States.

The comparative analysis strengthens the observation that originalism is not necessarily—or even typically—a doctrine of judicial constraint. Originalism’s capability to constrain judicial restraint is contingent on the particular cultural and political context of individual states. It is a deeply contextual—sometimes expansive and sometimes constraining—tool shaped by the constitutional culture in which it thrives.

C. Original Understanding (or Intent or Meaning)

Originalism is itself a contested concept; originalists disagree vehemently over whether the framers’ intention or the original public meaning of the text should determine the interpretation. The development of originalism abroad helps shed some analytical insight into which form of originalist methodology—original intent, original meaning, or original expected applications—takes hold in certain nations.

The reasons why a country finds a particular originalist method attractive has little to do with the theoretical distinctions so hotly debated in the academic literature. Instead, it is profoundly influenced by the orientation of its constitutional culture toward the authority of the past. Original intent or historicist-focused original meaning methods thrive in countries where originalism has popular resonance; by contrast, countries less sensitized to historicist appeals tend to favor textualist originalist approaches.

In Malaysia and Turkey, originalism is characterized by a focus on constitutional history and intentionalism, rather than text. Original intent and historicist-oriented originalist approaches are particularly salient in these contexts. Focusing on the intent of the fram-

363. See supra Part II.B.2; see also Weis, supra note 17, at 9 (noting the differences between Australian originalism and American originalism, and arguing that “it would be a mistake to assume that a robust popular constitutional culture and central founding moment or a socially profound rights jurisprudence are necessary components of originalism simply because they are necessary to understand the reception of originalism in the United States”).
ers is an obvious manifestation of this affinity toward constitutional historicism. Original intent dominates the courts’ originalist jurisprudence in Malaysia. Extrinsic historical evidence is used not merely to provide an understanding of the context, but as a tool to determine the actual intentions of individual framers. Original meaning is referred to occasionally but it is not focused on discovering the objective public meaning of the text. Rather, judges and lawyers in practice rely on historical sources as subjective evidence of the text’s original meaning.

This emphasis on historical meaning is also reflected in the Turkish Constitutional Court’s originalist approach to the headscarves cases. Varol observes that “original intent continues to form a part of the Turkish Constitutional Court’s originalist methodology” and the Court looks to readily available evidence of “Ataturk’s writings, video and audio recordings of his speeches, as well as second-hand accounts of his statements” to ascertain his intent.

Scholarly distinctions between the different methods of originalism have little practical significance to the constitutional practice of Malaysia or Turkey. Secularists and Islamists in Malaysia do not battle over whether to focus on the framers’ intent or the original meaning of the text, but over whether the historical arguments support their originalist interpretation. Varol observes that the Turkish Constitutional Court’s use of originalist methods “yield the same result primarily because original meaning, intent, and expected application all focus on ascertaining the meaning of Ataturk’s reforms and principles.” The overriding theme that emerges from originalism in practice in Malaysia—as well as in Turkey—is a focus


365. See supra notes 208–09 and accompanying text.

366. See Varol, supra note 5, at 1278.

367. Id.

368. See supra notes 127–40, 146–191, and accompanying text.

369. Varol, supra note 5, at 1277.
on historical understandings and the intentions of the constitutional framers.

To Americans, originalism—whether focused on intent or meaning—is also characterized by constitutional historicism. As Greene notes, “American scholars, not to mention the lay public, tend to lump together original intent and original meaning as two different ways of practicing a methodology whose essential features they share: attention to a fixed historical meaning.” The original intent of the Framers dominated the first wave of American originalist jurisprudence, and the United States’ “constitutional practice continues to privilege intentionalism.” Although academic originalist theory has shifted away from original intent toward original public meaning, American lawyers and judges continue to quote from historical texts from the Founders like The Federalist, suggesting that the intent of the Framers “remain a vital source of American constitutional wisdom.” Indeed, citation to statements of the Framers or ratifiers increased during the period that original-meaning originalism gained prominence.

As Balkin points out, “[d]espite the dominance of original public meaning originalism in academic theory, lawyers . . . continue to treat particular members of the founding generation differently than a dictionary or concordance.” Historicist original understanding—particularly, original intent—continues to matter in practice and in popular discourse because the Framers carry authority in Ameri-

370. Greene, supra note 4, at 61.
372. See id. at 1686.
373. Greene, supra note 4, at 34–35.
374. See Greene, supra note 371 at 1691 (“From 1986 to 2002, according to Professor Melvyn Durchslag, the Supreme Court referenced The Federalist in forty-two percent more cases (ninety-eight cases) than during the preceding sixteen years, with Justice Scalia writing nearly one-fifth of those opinions.”) (citing Melvyn R. Durchslag, The Supreme Court and the Federalist Papers: Is There Less Here Than Meets the Eye?, 14 WM. & MARY BILL RTS. J. 243, 295, 297 (2005)); see also Greene, supra note 371, at 1691 (“The Federalist was cited more often in the nineteen years from 1980 to 1998 than in the eighty previous years combined.”) (citing Ira C. Lupu, Time, the Supreme Court, and The Federalist, 66 GEO. WASH. L. REV. 1324, 1328 (1998)).
In stark contrast, originalist methodology in Singapore and Australia is focused on textual meaning, rather than on intent or historical evidence. The Singapore Court of Appeal’s originalism in *Yong* is heavily text-oriented; the Court found that the lack of an explicit textual prohibition against inhuman treatment indicated that the mandatory death penalty did not infringe upon the constitutional due process guarantee. The Court’s occasional reference to original “intent” is misleading: the Court is concerned with the intent of Parliament—a reflection of the influence of British legal traditions—not the constitutional framers. Put another way, its application of original “intent” is in service of legislative deference; the Singapore Court employs originalism as a tool that is part of its prevailing legalistic interpretative approach.

Australian originalism is also decidedly focused on original textual meaning, rejecting the search for the subjective intent of its framers in favor of the objective public meaning of the text. Even when the High Court of Australia reversed its previous stance on extrinsic evidence to permit consultation of convention debates, it emphasized:

Reference to [legislative history] may be made not for the purpose of substituting for the meaning of the words used the scope and effect . . . which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of the language used [and] the subject to which that language was directed.

Supporters of originalist interpretation in the High Court of Australia have insisted that constitutional interpretation is based on

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376. Greene, *supra* note 371, at 1696–97 (arguing that “original understandings are authoritative . . . because they reflect a set of values that are offered by proponents as uniquely or especially constitutive of American identity”).
378. *Id.* at 61–63.
379. *Id.* at 64–74.
original objective meaning, not subjective intent.\textsuperscript{382} Justice Heydon, one of the chief proponents of originalism presently on the bench, dismissed the search for original intent as “both delusive and lacking in utility.”\textsuperscript{383}

That original textual meaning is favored in Singapore and Australia is unsurprising in light of their interpretive tendency toward strict legalism stemming from their political and cultural traditions. Courts with a legalistic outlook prefer original textual meaning to original intent because they recognize that “history can be generative rather than constraining.”\textsuperscript{384} But for countries where the founding or framing have a central part in their constitutional narrative—like Malaysia, Turkey, and the United States—originalist arguments have authority precisely because of their role in linking constitutional history and national identity.

CONCLUSION

Examining the practice of originalism in the world beyond the United States is long overdue. This Article begins to reveal this world. The reality is more complex than has been thought. Not only does originalism occur around the world, and not merely in the United States, it operates in distinct forms and for different functions depending on its context. Originalism’s public appeal elsewhere has not typically been associated with constraining judges; instead, it has been employed in practice in support of judicial expansion of constitutional provisions and to generate constitutional change.

This comparative perspective matters for several reasons. First, it tests familiar claims in mainstream American debates over originalism, particularly that originalism follows inevitably from the interpretation of a written constitution and that it is uniquely suited to constrain judicial discretion. Second, it contributes to an emerging body of comparative originalism literature by showing that the roots of originalism are more complicated than previous accounts suggest.

\textsuperscript{382} See Brownlee v The Queen (2001) 207 CLR 278, 285 (Austl.).
\textsuperscript{383} Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252, 277 (Austl.).
\textsuperscript{384} Greene, supra note 4, at 61.
Finally, it brings a fresh analytical lens to long-running debates over originalist methodology by providing a broader understanding of why some countries, including the United States, are attracted to historicist or textualist versions of originalism.

Originalism’s variations in different contexts illustrate how certain distinctive features—popular and prudential—emerge from a country’s constitutional culture and political context. The reasons why a particular form of originalism has salience in a country stem from social and cultural facts. Originalist arguments have popular appeal in Malaysia—as they do in the United States and Turkey—because they have been tied successfully to a constitutional narrative that resonates with the people. In Singapore and Australia, originalist interpretation has taken a more prudential form because of the more pragmatic role their constitutions occupy as a result of different constitutional histories and political traditions.

Recognizing the diversity in the use of originalist arguments elsewhere not only illuminates our understanding of originalism abroad, but also changes how we think about some of the assumptions that inform the debates over originalism at home.
The Admissibility of Foreign Coerced Confessions in United States Courts: A Comparative Analysis

American lower courts are presently conflicted over whether foreign coerced confessions are admissible under the Due Process Clause. The confusion can be traced largely to the Supreme Court’s opinion in Colorado v. Connelly which justified the exclusion of involuntary confessions only in the deterrence of wrongful police action. This Note offers a solution to the current circuit split by examining the justifications foreign jurisdictions and international courts offer to explain the exclusion of coerced confessions.

A review of international reasoning indicates that a strong majority of courts exclude coerced confessions out of a protest against admitting coerced evidence into judicial proceedings. This Note argues that this approach would more fully protect the values codified in the Due Process Clause.

INTRODUCTION

The global war on terror has increased the tension between two principles: the rule of law on the one hand, and the effective prosecution of heinous acts on the other.¹ The rule of law reflects a

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principle that certain rights receive absolute protection.² However, the global demand for effective prosecution of terrorism has often placed pressure on these absolute prohibitions.³ This struggle has plagued international legal fora.⁴ Courts around the globe have been called on to play a major role in adjudicating the proper balance of these ideals.⁵ The Israeli Supreme Court noted the inherent tension involved in these types of decisions:

We are aware that this decision does not ease dealing with [terrorism]. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.⁶

The extraterritorial nature of terrorism has exacerbated these difficulties.⁷ Because terrorism is a global issue, it has forced cross-jurisdictional legal responses,⁸ leading to significant cooperation be-

⁴. See, e.g., Antonio Cassese, Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law, 12 EUR. J. INT'L L. 993 (2001); Reuven Young, Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation, 29 B.C. INT'L & COMP. L. REV. 23 (2006).
tween states in the investigation and prosecution of crimes. The United Nations Security Council has codified this need for cooperation, noting that, “terrorism can only be defeated . . . by a sustained comprehensive approach involving . . . collaboration of all states.” The United States Congress, the Council of Europe, and the African Union have also explicitly articulated the need for international cooperation in prosecuting terrorism. Increased international cooperation to combat terrorism has vastly expanded the reach of American law enforcement and the capacity of foreign-obtained evidence to enter American courtrooms. Presently, American courts are conflicted regarding whether the Due Process Clause of the United States Constitution protects defendants from admission of confessions coerced by foreign officers. The debate centers on the values which underlie the exclusion of involuntary confessions. This Note offers a solution to that conflict by examining these values both in American courts and abroad.

As a preliminary matter, it is important to understand the conditions that suspected terrorists may face in foreign interrogations. In recent years, when suspected terrorists have been interrogated, the means used for questioning have often exceeded accepta-

16. See infra Part II.
ble limits. For example, in *Agiza v. Sweden*, the Committee Against Torture documented the interrogation methods used against a suspected terrorist in Egypt. Mr. Agiza alleged that during his flight to Egypt, he was “bound by hands and foot.” Upon arrival he was subjected to advanced interrogation methods including electrical shocks, solitary confinement, and restriction from toilet facilities. These methods were employed to secure his confession. Similarly, the European Court of Human Rights has noted the risk of torture that suspected terrorists face in Tunisia including “electric shock,” “beatings and cigarette burns,” and “hanging from the cell bars until loss of consciousness.” If a suspected terrorist makes a confession under these circumstances to foreign interrogators and then is brought to trial in the United States, should that confession be admissible in American courts? This Note attempts to answer that question.

Part II of this Note examines the traditional American jurisprudence on the admissibility of coerced confessions. It begins by explaining how traditional standards governing the admissibility of coerced confessions have become blurred in the context of extraterritorially coerced confessions. It then examines cases from the Sec-

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18. The Committee Against Torture is the monitoring body of the Convention Against Torture. Its duties include monitoring compliance, adjudicating individual complaints, issuing interpretations of the Convention, and conducting investigations into country compliance. *See Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* art. 17, *entered into force* June 26, 1987, 1465 U.N.T.S. 85.


20. *Id.* ¶ 2.6.

21. *Id.*

22. *Id.* ¶ 2.8.

23. *Id.*

24. *Id.*


26. *Id.* ¶ 143.

27. *Id.*

28. *Id.* ¶ 84.
ond, Fourth, and Ninth Circuits that have addressed the issue of the admissibility of foreign coerced confessions and highlights the doctrinal lines on which they disagree.

Part III introduces the international comparative framework as a mechanism for solving difficult constitutional questions. It outlines both the benefits and the drawbacks of a comparative methodology. It then suggests some of the parameters under which comparative study may be fruitful.

Part IV applies a comparative methodology to the law on coerced confessions. It examines the justifications for exclusion that are given by domestic courts in Canada, Australia, the United Kingdom, the Republic of Ireland, South Africa, Japan, and Germany, as well as international tribunals, all of whom have excluded coerced confessions.

Part V seeks to synthesize these values as a mechanism for solving the circuit split in the United States. It suggests that the exclusion of coerced confessions should extend to cases where the United States government did nothing illegal or wrong in interrogation simply because courts themselves should protest against coerced confessions by excluding them. That is, courts should not condone the practice of coercing confessions, even if no consequentialist reason can be given for exclusion.

I. THE VOLUNTARINESS REQUIREMENT: FROM THE TRADITIONAL APPROACH TO MODERN CONFUSION

A. Bram, Brown, and the Traditional American Exclusionary Approach to Foreign Coerced Confessions

On July 13, 1896, the crew aboard the merchant vessel *Herbert Fuller* awoke to screaming and a gurgling sound. The first mate, Bram, investigated the noises and discovered that the captain, his wife, and the second mate had all been murdered. The crew’s sus-

29. These tribunals include, *inter alia*, the European Court of Human Rights, the Inter-American Commission of Human Rights, the Committee Against Torture, the Human Rights Committee, and various international criminal tribunals.
31. *Id.* at 535.
PICION FELL ON TWO MEN: BRAM AND A SEAMAN NAMED BROWN. THE CREW HANDED THEM OVER TO LOCAL AUTHORITIES IN HALIFAX, NOVA SCOTIA.

UPON ARRIVAL IN NOVA SCOTIA, A DETECTIVE WITH THE HALIFAX POLICE DEPARTMENT ORDERED BRAM TO HIS OFFICE. THERE, BRAM WAS STRIPPED, SEARCHED, AND TOLD THAT THE DEPARTMENT WAS CONVINCED THAT BRAM HAD COMMITTED THE MURDERS. HE WAS THEN TOLD THAT IF HE HAD AN ACCOMPlice, HE SHOULD SAY SO IN ORDER TO AVOID THE TOTALITY OF THE CRIME BEING PLACED ON HIS SHOULDERS.32 THE DETECTIVE TOLD BRAM THAT BROWN HAD SEEN HIM COMMIT THE MURDERS WHILE WORKING THE WHEEL; BRAM REPLIED THAT BROWN COULD NOT HAVE SEEN HIM.33


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32. Id. at 539.
33. Id.
34. Id. at 537.
35. Id. at 540.
36. Id. at 569.
37. Id. at 558–59.
38. Id. at 563.
39. Id.
40. Id. at 564.
41. Id.
Bram was not a radical decision at the time it was announced. In fact, the "compulsion" language the Court used in Bram had been announced twenty months earlier in Wilson v. United States. In Wilson, a magistrate questioned the defendant in the presence of a large mob which had apparently talked about lynching the defendant; the magistrate did not offer inducements or threaten the defendant. The Court allowed the use of Wilson’s statements:

[W]e are not prepared to hold that there was error in its admission in view of its nature and the evidence of its voluntary character, the absence of any threat, compulsion, or inducement, or assertion or indication of fear, or even of such influence as the administration of an oath has been supposed to exert.

The Wilson Court appears to have decided that the use of the evidence was permissible because there had been no overt threats against Wilson by the magistrate and because he had not directly confessed. However, the Court noted the general rule that "the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort."

It is important to note that the Court’s reasoning never mentioned that Bram’s interrogators were foreign. The Court seemed to view Bram as a similar case to Wilson. Therefore, from its inception, the Due Process Clause was thought to protect against both foreign and domestically induced confessions.

This conception of the voluntariness requirement remained dominant, although seldom used, for much of the next half century. In Brown v. Mississippi, the Court found the voluntariness requirement applicable to confessions at the state court level. This decision launched a period where the Court would apply and refine the

43. Id. at 615.
44. Id. at 624.
45. Id.
46. Id. at 623.
voluntariness requirement much more frequently. The test that emerged examined the totality of the circumstances in order to determine whether the defendant's will was overcome. Although this jurisprudence has never been explicitly overruled, the Warren Court, in the mid-twentieth century, shifted its inquiry towards the procedural requirements of custodial interrogations rather than the substantive degree of coercion. But even as the Court turned away from the voluntariness test articulated in Bram and Wilson, it did not indicate that foreign coerced confessions were admissible or to be treated distinctly from domestically coerced confessions.

B. The Connelly Turn, Emphasis on Deterrence, and Confusion in the Lower Courts

The stability of lower court consensus was thrown into flux by the truly bizarre factual situation presented to the Supreme Court in Colorado v. Connelly. In 1983, Officer Patrick Anderson of the Denver Police Department was approached by Francis Connelly who, without prompting, stated that he had “murdered someone and wanted to talk about it.” Connelly proceeded to confess to the unsolved murder of a young female and then brought the detective to the exact scene of the alleged crime. The next morning, Connelly was interviewed by the public defender's office where he became “visibly disoriented” and stated that “voices” had told him to come to Denver and he “had followed the directions coming from these voices in

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52. Dickerson, 530 U.S. at 433.
54. United States v. Mundt, 508 F.2d 904 (10th Cir. 1974); Kilday v. United States, 481 F.2d 655, 656 (5th Cir. 1973); United States v. Welch, 455 F.2d 211, 213 (2d Cir. 1972).
56. Id. at 160.
57. Id.
At a preliminary hearing, Connelly moved to suppress all of his statements. Psychiatrists testified that he was suffering from chronic schizophrenia and that Connelly’s interviews revealed that he indeed believed that he was “following the ‘voice of God’” when he confessed. In fact, at the time of his confession, Connelly believed that God was requiring him either to confess or commit suicide. In sum, a psychiatrist testified that Connelly, although not significantly impaired in his cognitive abilities, had suffered from “command hallucinations” that interfered with his ability to make free choices at the time of confessions.

The Colorado trial court suppressed Connelly’s statements because they were involuntary, even though they found that the police had done nothing wrong. The Colorado Supreme Court affirmed. In reversing, the U.S. Supreme Court recast the voluntariness inquiry as a question of police overreach, noting that:

While each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct. Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law. Respondent correctly notes that, as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the “voluntariness” calculus. But this fact does not justify a conclusion that a defendant’s mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional
"voluntariness." 65

The Court buttressed its requirement of state action by examining the values which underlie the voluntariness requirement. It argued that exclusion of involuntary confessions was almost entirely premised on deterring future wrongful police action: "[t]he purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution." 66 Although the Court noted other potential values served by the voluntariness requirement, such as evidentiary reliability, it did not find them controlling, noting that "[w]e hold that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." 67 Rather, the Court argued that the Due Process Clause left evidentiary reliability "to be resolved by state laws governing the admission of evidence." 68

The Connelly Court fundamentally altered the traditional due process voluntariness protections by collapsing the entire basis of the voluntariness requirement into limiting police overreach, stating "we hold that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." 69 Lower courts have subsequently struggled to determine how to apply the state action requirement in the context of foreign interrogations. 70

C. The Circuit Split: The Cases of Wolf, Sameleh, and Abu Ali

Almost immediately following Connelly, the Ninth Circuit, in

65. Id. at 163–64 (citations omitted).
66. Id. at 166.
67. Id. at 167.
68. Id.
69. Id.; Darmer, supra note 15, at 364.
70. It should be noted that Connelly as a factual matter does not mandate a fundamental reconceptualization of the Due Process Clause’s voluntariness requirements. A compulsion from God’s voice is very different from other situations of purported compulsion, particularly the foreign officer coercion examined here. Therefore, it would not be inconsistent to hold that Connelly was correctly decided and still exclude foreign coerced confessions.
United States v. Wolf,\textsuperscript{71} confronted a case where the defendant argued that his confession was involuntary because it had been procured through threats by a Mexican police officer.\textsuperscript{72} Like most circuits, the Ninth Circuit had held in \textit{Brulay—prior to Connelly—}that foreign coerced confessions must be excluded under the Due Process Clause.\textsuperscript{73} In \textit{Wolf,} the court rejected the defendant’s argument that he had been coerced as a factual matter,\textsuperscript{74} but also noted that \textit{Connelly} had thrown its previous due process jurisprudence into doubt:

The continuing vitality of this holding in \textit{Brulay} was cast into serious doubt by \textit{Colorado v. Connelly,} where the Supreme Court considered a defendant’s claim that his confession was “involuntary” because it was the product of mental delusion. While admittedly no state action was responsible for eliciting the confession, the defendant argued that the introduction of the confession as evidence in a criminal proceeding constituted a state action depriving him of his right not to be convicted based upon an involuntary confession. The Court rejected this argument, holding that the introduction of evidence into a judicial proceeding does not by itself satisfy the “state action” requirement for triggering the constitutional protection against involuntary confessions. According to the Court, such an understanding “fails to recognize the essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other.”\textsuperscript{75}

The court did not resolve the continuing vitality of the \textit{Brulay} doctrine, preferring to decide \textit{Wolf} more narrowly on its facts.\textsuperscript{76} The Ninth Circuit has yet to revisit the issue, although lower courts within the Circuit continue to apply the \textit{Brulay} rule by assuming without deciding that \textit{Connelly}’s police action requirement applies to all po-

\textsuperscript{71.} United States v. Wolf, 813 F.2d 970 (9th Cir. 1987).
\textsuperscript{72.} \textit{Id.} at 972.
\textsuperscript{73.} Brulay v. United States, 383 F.2d 345, 348 (9th Cir. 1967).
\textsuperscript{74.} \textit{Wolf,} 813 F.2d at 975.
\textsuperscript{75.} \textit{Id.} at n.3 (internal citations omitted).
\textsuperscript{76.} \textit{Id.}
Over ten years later, the Second Circuit encountered a similar legal question in *United States v. Salameh*. There, the defendant argued that his incriminating statements should be excluded because they were made following ten days of incarceration and torture in an Egyptian jail. The court rejected the argument. Citing *Connelly*, it held:

[W]hile it is reasonable that Egyptian incarceration and torture, if true, would likely weaken one's mental state, one's mental state does not become part of the calculus for the suppression of evidence unless there is an allegation that agents of the United States engaged in some type of coercion. Because Abouhalima does not contend that federal agents either mentally or physically coerced his remarks during that interrogation, there is no basis for inquiry into a possible constitutional violation. Only if we were to establish a brand new constitutional right—the right of a criminal defendant to confess to his crime only when totally rational and properly motivated—could respondent's present claim be sustained.

The Second Circuit has yet to fully revisit the issue. However, two district courts, although outside the context of foreign confessions, have used the *Salameh* precedent to find that unless government malfeasance is alleged, courts need not inquire into the context of a confession.

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77. See, e.g., United States v. Navarro-Montes, 2011 WL 317718, at *5 (S.D. Cal. Jan. 27, 2011) (noting that “The Ninth Circuit has stated that ‘we assume without deciding that the constitutional protection against involuntary confessions applies to confessions coerced by foreign police.’ Thus, if a court finds that a defendant made an inculpatory statement to foreign officials of his own free will, without duress or coercion, the statement may be used against him in later proceedings.”) (internal citations omitted).


79. Id.

80. Id. (internal citations and quotations omitted).

81. *But see In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 177, 203 (2d Cir. 2008) (noting that in the context of a *Miranda* warning, issued during a joint venture, statements made to a foreign officer must be voluntary).

82. United States v. Sanderson, 2011 WL 87298 at *2 n.1 (D. Conn. Jan. 11, 2011);
Ten years later, in *United States v. Abu Ali*, the Fourth Circuit considered the same issue.\(^{83}\) Mr. Abu Ali was arrested in Saudi Arabia on suspicion of terrorism and confessed to Mabahith, the Saudi secret police.\(^{84}\) The FBI was notified of Abu Ali’s arrest, but was denied access to the prisoner.\(^{85}\) The United States did not gain custody over the defendant until he was indicted and extradited for trial.\(^{86}\) At trial, Abu Ali claimed that his confession to Saudi police should have been suppressed as involuntary as it had been coerced.\(^{87}\) Relying on pre-*Connelly* opinions in its brief discussion of law, the court found that foreign coerced confessions would be excludable under the Due Process Clause\(^{88}\) but nonetheless affirmed the district court’s finding that there was in fact no coercion.\(^{89}\)

Demonstrably, *Connelly* has divided circuit courts, with the Fourth and Ninth Circuits holding in dicta that it does not preclude the exclusion of foreign coerced confessions and the Second Circuit concluding in dicta that it does.

**II. Justifications for the Voluntariness Requirement: A Comparative Approach**

Resolution of the circuit split will depend on the values that courts emphasize to justify the voluntariness requirement. Scholarship has suggested that the major move by the *Connelly* Court was to justify the voluntariness requirement only in terms of deterrence of American police rather than in its traditional, more multi-faceted, justifications.\(^{90}\) Consequently, the values that underlie the voluntariness requirement will, in many ways, determine how extensive its reach should be. This Note will seek to determine those values by examin-

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\(^{84}\) United States v. Abu Ali, 528 F.3d 210, 231 (4th Cir. 2008).
\(^{85}\) *Id.* at 224.
\(^{86}\) *Id.* at 225.
\(^{87}\) *Id.* at 225.
\(^{88}\) *Id.* at 231.
\(^{89}\) *Id.* at 232–33.
ing how other jurisdictions have justified the exclusion of coerced confessions. However, before turning to an analysis of what values American and global courts have emphasized to justify the voluntariness standard, it is first necessary to examine the benefits and limitations of comparative constitutionalism as a framework, in order to generate an appropriate methodology for a comparison of the values underlying the exclusion of coerced evidence internationally.

A. Comparison as a Means of Constitutional Interpretation: The Benefits and the Costs

1. The Benefits of Comparison as a Means of Interpretation

Proponents of comparative constitutionalism highlight a number of benefits to the methodology. The foremost justification is also the simplest: different legal systems often encounter similar problems, and foreign jurisprudence often offers reasoning that is persuasive and applicable to the American context. Justice Sandra Day O'Connor defended this justification before the American Society of International Law, before which she noted that distinguished jurists abroad had often devoted significant judicial resources to solving issues novel to American law and should therefore be considered persuasive authority at times. Chief Justice William Rehnquist also articulated this justification for a comparative methodology, arguing that as more countries' constitutional legal systems thrive, judges should look internationally to see how other courts have reasoned. Justice Ruth Bader Ginsburg has praised this justification of comparative law because it allows beneficial and novel legal tools to quickly spread between jurisdictions. The fact that "[o]ther legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems" suggests a need for comparative frameworks in


order to efficiently reach optimal judicial solutions.\textsuperscript{94} This pragmatic justification has found significant support in scholarship; for example, a noted comparative law casebook argues "different legal systems give the same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure, and style of operation."\textsuperscript{95} Bruce Ackerman has argued, therefore, that comparative constitutional analysis should focus on finding "common problem[s] confronting different 'constitutional courts'"\textsuperscript{96} and then comparing their "coping strategies" in order to illuminate the best judicial solutions. Judge Patricia Wald perhaps most succinctly describes this justification:

[C]itizens of most countries have common aspirations, a sense of dignity and worth, and intuitions and feelings about justice. Why then would we consciously shut the door to American judges on looking at the law of these countries as it affects the basic human needs and dilemmas of their people?\textsuperscript{97}

The second justification proffered is a recognition that American law shares common values with other legal systems. This appears to be the justification underlying Justice Anthony Kennedy's citation of the European Court of Human Rights in \textit{Lawrence v. Texas}, where he argued "to 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."\textsuperscript{98} This desire for shared international values has been echoed throughout American jurisprudence.\textsuperscript{99} Anne-Marie Slaughter has maintained that interna-


\textsuperscript{95} \textit{Konrad Zweigert \& Hein Kötz, An Introduction to Comparative Law} 15 (Tony Weir trans., 3d ed. 1998).


tional comity may act as an interpretive presumption of an integrated legal system, where reasons to diverge from foreign courts must be articulated.\footnote{100}

A third justification offered for comparative constitutional reasoning is that many nations, particularly common law nations, share a legal history with the United States; consequently, their judicial decisions may be "relevant and informative" to answering domestic questions.\footnote{101} This is perhaps the least controversial rationale for the use of comparative reasoning. Courts routinely look to U.K. precedents in order to understand the historical development of a constitutional guarantee.\footnote{102} Judge Diarmuid O'Scannlain has summarized this rationale by noting that "[t]ruly, we are all part of the same common-law family."\footnote{103} Moreover, the legal traditions of many countries have been deeply influenced by that of the United States.\footnote{104} Judge Guido Calabresi has therefore argued that we should look to their practice in dealing with analogous legal problems; he explained "[w]ise parents do not hesitate to learn from their children."\footnote{105}

2. Risks of a Comparative Legal Framework as a Means of Constitutional Interpretation

The principal objection to a comparative methodology is one of selection bias. When jurists and scholars avail themselves of the breadth of nonbinding foreign jurisprudence, they can, and often do, cherry-pick the best cases to make their argument with very limited

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\begin{itemize}
\item \footnote{100}{Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1115 (2000).}
\item \footnote{101}{Knight v. Florida, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting).}
\item \footnote{102}{Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, in *The Migration of Constitutional Ideas* 1, 6 (2006); Slaughter, *supra* note 100, at 1116.}
\item \footnote{103}{Diarmuid O'Scannlain, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law*, 80 NOTRE DAME L. REV. 1893, 1894 (2005).}
\item \footnote{104}{Mads Andenas & Duncan Fairgrieve, *Intent on Making Mischief: Seven Ways of Using Comparative Law*, in *Methods of Comparative Law* 25, 40 (Pier Giuseppe Monateri ed., 2012).}
\item \footnote{105}{United States v. Manuel, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring).}
\end{itemize}
negative implication, little contextual analysis, and little consideration of countervailing examples. This argument was made by Justice Antonin Scalia in his dissent in *Roper v. Simmons*, where he maintained that “[t]o invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry.” Academics have asserted that the Supreme Court’s almost exclusive use of European law may be inappropriate as a source of comparison, exacerbating the selection bias problem. This criticism has not been limited to those that oppose comparative constitutionalism as a methodological framework. Bruce Ackerman, for example, has called for caution in choosing countries to compare and for analytic rigor in noting the differences between the points of comparison. Likewise, Vicki Jackson has argued that controlling for “false necessities” is a major difficulty of and a major cause of the ambivalence towards comparative frameworks. That is, comparison may allow for fruitful borrowing of ideas and reasoning between legal systems, but only if those ideas are truly comparable rather than incidentally so. Jackson emphasizes that many hard-to-measure variables, such as culture, may make it difficult to draw true comparisons between different legal systems or even when analyzing seemingly similar problems.

Additionally, comparative constitutionalism has been criticized as being irrelevant given the exceptional nature of the American political and legal systems. For example, Justices Scalia and Thomas have argued that foreign law is simply irrelevant because the U.S. Constitution is unique and foreign law involves interpretation of other documents. Likewise, Chief Justice Rehnquist has contend-

111. *Id.*
112. *Id.* at 618–19.
ed that, in the context of the cruel and unusual punishment clause of the Eighth Amendment, the inquiry that matters is the one into the national, rather than the international, consensus.114 Scholars have attempted to limit the "irrelevance" argument to certain legal questions the very nature of which requires exceptionalism, rather than apply it to comparative methodology as a whole.115

Finally, scholars have argued that the use of comparative sources may undermine democratic values, particularly in situations where judicial resolution depends on complicated value judgments.116 These scholars point to the methodological debate in Atkins v. Virginia as a harbinger of the difficulties of comparative methodologies. There, the Court found a national consensus prohibiting the execution of the mentally disabled and concluded that it was in conformity with an international consensus.117 However, it is easily imaginable that there are cases where national and international attitudes diverge, and, in those cases, some have argued that reliance on international sources may undermine democratic values.118 Judge J. Harvie Wilkinson III has stressed this position, arguing that "[t]he use of international law to resolve social issues of domestic import runs counter to the democratic accountability and federal structure envisioned by our Constitution."119

3. The Parameters of a Fruitful Comparative Framework: Building a Comparison that Avoids the Risks

Given the benefits and challenges of a comparative methodology, a salient comparative analysis must seek the most relevant comparisons while limiting false, irrelevant, or misleading comparisons. It must use relevant foreign and international materials even-handedly, rather than cherry-picking only the most useful exam-

116. See, e.g., Alford, supra note 106, at 58.
118. Alford, supra note 106, at 61.
This approach implies an examination of multiple foreign sources. Moreover, justifications must be given for which foreign sources are employed in line with the three bases for resort to foreign sources identified above. Additionally, those sources must be vetted to avoid false comparison. One mechanism for limiting false comparison is to use foreign law to illuminate principles that have already been articulated by American courts—this mechanism controls for variables such as cultural or political exceptionalism.

This Note will compare the values underlying the voluntariness requirement in the United States with those in Australia, Canada, the United Kingdom, the Republic of Ireland, South Africa, Japan, and Germany. In addition, it will examine the jurisprudence of international tribunals such as the European Court of Human Rights, the Inter-American Commission on Human Rights, the United Nations Committee Against Torture, the United Nations Human Rights Committee, and international criminal tribunals.

The jurisdictions of comparison chosen serve four purposes. First, Australia, Canada, South Africa, the Republic of Ireland, and the United Kingdom are all common law countries which share a similar constitutional and legal tradition with the United States. Their encounters with the question of foreign coerced confessions therefore shed light on the American jurisprudential landscape. Second, the Japanese Constitution serves as a useful historical comparison because it was drafted with considerable influence from American lawyers before the voluntariness requirement faded into relative obscurity in American jurisprudence. Third, the German inquisitorial system employs a different structural methodology to attain the same goals as the adversarial system and therefore serves as a


121. *Id.* at 73.

122. *Id.* at 70.


useful counterpoint in the analysis.\textsuperscript{127} Finally, the examination of international tribunals offers a unique perspective from newer courts whose constitutive documents often include specific provisions excluding coercion of confessions. Moreover, their interpretations are authoritative, although not always binding,\textsuperscript{128} interpretations of legally binding obligations\textsuperscript{129} that states have established as common minimum standards of human rights.\textsuperscript{130}

III. THE JUSTIFICATIONS FOR A DUE PROCESS VOLUNTARINESS REQUIREMENT

Prior to Connelly, there were rich and multifaceted justifications proffered in support of the voluntariness requirement by American courts.\textsuperscript{131} These justifications included the following: deterrence of wrongful police conduct;\textsuperscript{132} concern about the reliability of the evidence obtained through confession;\textsuperscript{133} and protest against a court’s participation in the use of coerced evidence.\textsuperscript{134} This diversity of justifications reflected that the admission of coerced evidence has diverse and significant costs, including risks of violence,\textsuperscript{135} degradation of the courts,\textsuperscript{136} and fundamental unfairness.\textsuperscript{137} To a large extent, the

\begin{itemize}
\item \textsuperscript{128} Jones v. Saudi Arabia [2006] UKHL 26, [2007] 1 A.C. 270 (H.L.) [23, 56] (appeal taken from Eng.) (noting that the CAT did not have binding authority).
\item \textsuperscript{131} See, e.g., \textit{Wayne R. LaFave & Jerold H. Israel, Criminal Procedure} 266 (1985); Darmer, supra note 15, at 365.
\item \textsuperscript{132} See, e.g., United States v. Leon, 468 U.S. 897 (1984).
\item \textsuperscript{133} See, e.g., Brown v. Mississippi, 297 U.S. 278 (1936).
\item \textsuperscript{134} See, e.g., Townsend v. Sain, 372 U.S. 293 (1963); Rogers v. Richmond, 365 U.S. 534 (1961).
\item \textsuperscript{135} Brown, 297 U.S. at 287.
\item \textsuperscript{136} Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944).
\end{itemize}
applicability of the voluntariness requirement to actions of foreign law enforcement officials could depend on which justifications, or blend of justifications, American courts choose to emphasize.138

Choosing any of the justifications has consequences; for example, adopting solely a deterrence justification could allow for the admission of coerced confessions into evidence in situations where there are reasons to believe there will be no deterrent effect served by exclusion.139 Indeed, in other areas of law where the American courts have emphasized deterrence, evidence has been admitted where the courts believe there will be no meaningful deterrent effect. For instance, circuit courts have articulated a foreign exception to the Miranda rule—accepting into evidence un-Mirandized statements given to foreign officials.140 In United States v. Welch, the Second Circuit considered whether to admit un-Mirandized statements made to a Bahaman police officer.141 The court allowed the statements into evidence reasoning that “since the Miranda requirements were primarily designed to prevent United States police officers from relying upon improper interrogation techniques and as the requirements have little, if any, deterrent effect upon foreign officers,” Miranda need not apply to foreign interrogations.142 Similarly, in United States v. Chavarria, the Ninth Circuit noted that because American courts have little deterrent effect on foreign actors, Miranda does not apply to foreign interrogations.143

Emphasizing the reliability justification may have a similar impact on the admissibility of coerced confessions, potentially lowering the bar for their admission.144 For example, judges and jurors may not be able to identify in an individual case whether the purported coercion actually suggests unreliability.145 This may allow in-

139. Benner, supra note 137, at 136.
140. Darmer, supra note 15, at 351.
141. United States v. Welch, 455 F.2d 211, 212 (2d Cir. 1972).
142. Id. at 213.
143. United States v. Chavarria, 443 F.2d 904, 905 (9th Cir. 1971).
144. However, it could be possible to craft prophylactic evidence rules that seek to exclude ex ante unreliable coerced confessions. In other areas of the law where evidence is thought to be inherently unreliable, broad prophylactic rules seek to exclude evidence. See FED. R. EVID. 404(b).
145. Stephen A. Saltzburg, Standards of Proof and Preliminary Questions of Fact, 27
stances of coerced confessions to slip into courtrooms. Moreover, even when courts do identify certain circumstances that suggest unreliability, the circumstances are often difficult to generalize into clear rules.\textsuperscript{146} The inability to create clear, enforceable rules about what behaviors make evidence unreliable increases the likelihood that coerced confessions will be occasionally admitted. This process can be demonstrated by examining the parallel question of the admission of evidence proffered by jailhouse informants. Courts routinely note that there are significant reliability concerns with jailhouse informants.\textsuperscript{147} Nonetheless, because it is difficult to identify which informants are unreliable, the general rule has been to admit the evidence to the jury and allow juror weighing.\textsuperscript{148}

Finally, although emphasizing the protest justification—which excludes coerced evidence as inherently harmful to courts—would create a clear rule against the admission of coerced evidence, it would also require courts to articulate a theory of a just judiciary.\textsuperscript{149} This injects significant subjectivity into the question of what evidence to exclude, which risks unpredictability.\textsuperscript{150} Additionally, it has been argued that legal rules premised on judicial value judgments are unmoored from binding law, risking roll-back at judicial whim.\textsuperscript{151}

Although each of these justifications has at times appeared prominent in American jurisprudence,\textsuperscript{152} comparison with foreign courts attempting to grapple with the costs and benefits of adopting any justification may serve to elucidate the rationales for applying the voluntariness requirement to foreign induced confessions. This inquiry seeks to identify the proper balance of justifications. By examining the justifications proffered in other jurisdictions,\textsuperscript{153} this Note

\textsuperscript{146} Scott A. McCreight, Colorado v. Connelly: Due Process Challenges to Confessions and Evidentiary Reliability Interests, 73 IOWA L. REV. 207, 212 (1987).
\textsuperscript{147} See, e.g., Northern Mariana Islands v. Bowie, 243 F.3d 1109, 1124 (9th Cir. 2001).
\textsuperscript{148} Jack Call, Judicial Control of Jailhouse Snitches, 22 JUST. SYS. J. 73, 75 (2001).
\textsuperscript{149} Benner, supra note 137, at 137.
\textsuperscript{150} For example, there has been significant discussion of the unpredictability of having judges determine a theory of what rights are fundamental. See Laurence H. Tribe, American Constitutional Law 777–78 (2d ed. 1988).
\textsuperscript{152} Benner, supra note 137.
\textsuperscript{153} A number of the cases examined in this Note arise from allegations of torture. The
concludes that American courts should adopt a more nuanced understanding of the rationale for exclusion of coerced confessions, particularly one that also emphasizes the protest justification.

A. Deterrence Justification

The American criminal justice system has a long history of seeking mechanisms to prevent the deplorable use of coerced confessions and has therefore required that "police must obey the law while enforcing the law."\textsuperscript{154} Therefore, when a court finds that a confession has been coerced by police misconduct it will refuse to sanction such police tactics and therefore exclude the coerced testimony.\textsuperscript{155} In \textit{Watts v. Indiana}, Justice William Douglas described the intended deterrent effect of the exclusion of forced confessions as a method of condemning incorrect police procedures.\textsuperscript{156} In cases where only the deterrence justification is used, American courts have noted that they are "not tasked with supervising the behavior of foreign actors because the penalty for misconduct—suppression—will have no deterrent effect on foreign actors abroad."\textsuperscript{157}

Although this logic has generally been applied to un-Mirandized statements,\textsuperscript{158} a similar logic would apply to the voluntariness standard. In fact, scholarship has indicated that grounding the due process voluntariness requirement in deterrence alone could open American courts to coerced confessions from abroad.\textsuperscript{159} One could certainly argue that in an era of globalized policing,\textsuperscript{160} Ameri-

\begin{itemize}
  \item \textsuperscript{154} Spano v. New York, 360 U.S. 315, 320 (1959).
  \item \textsuperscript{155} Brown v. Mississippi, 297 U.S. 278, 287 (1936).
  \item \textsuperscript{156} Watts v. Indiana, 338 U.S. 49, 57 (1949) (Douglas, J., concurring).
  \item \textsuperscript{157} Condon, \textit{supra} note 15, at 673.
  \item \textsuperscript{158} See, e.g., United States v. Chavarria, 443 F.2d 904, 905 (9th Cir. 1971).
  \item \textsuperscript{160} See, e.g., Mathieu Deflem, \textit{Global Rule of Law or Global Rule of Law}
can courts could indeed deter foreign police activities. However, this argument has not yet been successful in American courts. Connelly grounded the entire justification for the exclusion of coerced confessions in the deterrence justification.

B. Evidentiary Reliability Justification

Traditional American jurisprudence grounded the exclusion of involuntary confessions on their inherent unreliability. The Court in Bram, for instance, explained that coerced confessions must be excluded because "the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner . . . ." The Court therefore concluded that the law of nature "commands every man to endeavor his own preservation; and therefore pain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on." However, following Bram, American courts quickly abandoned reliability as a justification for exclusion of forced confessions. In 1941, the Court noted that the "aim of the requirement of due process is not to exclude presumptively false evidence . . . ." By 1961, the Supreme Court had abandoned this justification in its entirety:

To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little
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doubt of the truth of what the defendant had confessed.\textsuperscript{166}

Conversely, courts in the United Kingdom have predominantly grounded the exclusion of coerced confessions in their unreliability. English common law for centuries emphasized the inherent unreliability of coerced confessions as the reason justifying exclusion.\textsuperscript{167} For example, in the 1783 case of \textit{R. v. Warickshall}, English courts pointed to the inherent unreliability of coerced confessions as one of the main reasons for their exclusion.\textsuperscript{168} Later cases stated that unreliability was one of the major reasons, along with strands of deterrence and protest, justifying the exclusion of coerced confessions.\textsuperscript{169} In \textit{Lam Chi-Ming v. The Queen},\textsuperscript{170} the Privy Council summarized the traditional exclusionary rule, noting that it had expanded to include multiple justifications:

Their Lordships are of the view that the more recent English cases established that the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilised society to proper behaviour by the police towards those in their custody.\textsuperscript{171}

Therefore, absent any statutory expansion, the common law also excluded evidence procured from third-party coercion.\textsuperscript{172}

The law of confessions in England is now governed by the Police and Criminal Evidence Act, which provides:

If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused, it is represented to the court that the confession was or may have been obtained:

\textsuperscript{166} Rogers v. Richmond, 365 U.S. 534, 541 (1961).
\textsuperscript{168} R. v. Warickshall (1783) 168 Eng. Rep. 234 (K.B.) 1 Leach 263.
\textsuperscript{169} A & Ors v. Secretary of State for the Home Department, [2005] UKHL 71, [17].
\textsuperscript{170} Lam Chi-Ming v. The Queen [1991] 2 A.C. 212 (P.C.) (appeal taken from H.K.).
\textsuperscript{171} \textit{Id.} at 220.
\textsuperscript{172} A & Ors v. Secretary of State for the Home Department, [2005] UKHL 71, [52].
(a) by oppression of the person who made it; or
(b) in consequences of anything said or done which
was likely, in the circumstances existing at the time, to
render unreliable any confession which might be made
by him in consequences thereof, the court shall not al-
low the confession to be given in evidence against him
except in so far as the prosecution proves to the court
beyond reasonable doubt that the confession (notwith-
standing that it may be true) was not obtained as
foresaid.173

The United Kingdom’s emphasis on unreliability, both under
the common law and under the Police and Criminal Evidence Act, is
evidenced in the 2005 case before the House of Lords, *A v. Secretary
of State for the Home Department*.174 In that case, the applicants
contended that evidence procured through torture by foreign
agents175 was used against them before the Special Immigration Ap-
peals Commission (SIAC), a special court with expertise concerning
deporation of national security threats.176 SIAC had held that the
evidence was admissible and that the risk of torture went to the weight
of the evidence.177 On appeal, a split court upheld the SIAC deci-
sion.178 The House of Lords overturned this ruling,179 noting that the
exclusionary rule was grounded primarily by a desire to exclude the
inherently unreliable evidence obtained through torture.180 Lord Car-
swell, although acknowledging the protest justification, addressed the
reliability justification:181

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173. Police and Criminal Evidence Act, 1984, c. 60, § 76(2) available at


175. *Id.* [9].

176. *Id.* [6].

177. *Id.* [9].

178. *Id.*

179. *Id.*; see also Eileen Skinnider, *The Art of Confessions: A Comparative Look
at the Law of Confessions—Canada, England, The United States and Australia*,
International Centre for Criminal Law Reform and Criminal Justice Policy 29
20PAPER%20CONFESSIONS%20REVISED.pdf.


181. However, this description does also seem to include a protest justification.
The objections to the admission of evidence obtained by the use of torture are twofold, based, first, on its inherent unreliability and, secondly, on the morality of giving any countenance to the practice. The unreliability of such evidence is notorious: in most cases one cannot tell whether correct information has been wrung out of the victim of torture—which undoubtedly occurred distressingly often in Gestapo interrogations in occupied territories in the Second World War—or whether, as is frequently suspected, the victim has told the torturers what they want to hear in the hope of relieving his suffering. Reliable testimony of the latter comes from Senator John McCain of Arizona, who when tortured in Vietnam to provide the names of the members of his flight squadron, listed to his interrogators the offensive line of the Green Bay Packers football team, in his own words, "knowing that providing them false information was sufficient to suspend the abuse." 182

Therefore, the Lords declined to accept the evidence even though British agents had not ordered or participated in the torture. 183

C. Protest Justification

American courts have occasionally couched the voluntariness requirement in a desire to preserve the sanctity of the court system. That is, evidence was excluded as a protest against the methods used being brought before the court. For example, in *Ashcraft v. Tennessee*, the Court noted that coerced confessions must be excluded because "[s]o long as the Constitution remains the basic law of our Republic, America will not have that kind of government." 184 The protest justification therefore excludes coerced testimony not because of its effects but because of the means itself. 185 However, this conception of the voluntariness requirement appears to have fallen out of

182. A & Ors v. Secretary of State for the Home Department, [2005] UKHL 71, [147].
183. Id. [45].
favor in American law.  

Interestingly, the protest justification appears to underlie how American military courts explain the exclusion of involuntary confessions given to foreign interrogators. For example, in United States v. Murphy, a Marine was apprehended by Naval Investigative Services (now known as the Naval Criminal Investigative Services) on drug charges; under the Status of Forces agreement, Japan asserted jurisdiction. Murphy confessed to the Japanese authorities and was subsequently charged by the U.S. military. On appeal, the accused argued that his statements to the Japanese investigators were involuntary because he had been led to believe that if he confessed to the Japanese that he would be given leniency both in Japanese courts and by the American military. Although the court found that, as a factual matter, Murphy had not been coerced into confessing, it did note that Japanese coercion could have been grounds to exclude his confession even though there was no deterrent impact of American military courts over Japanese prosecutors. Post-Connelly opinions have employed a similar decision calculus. Consequently, in United States v. Kofford, the court excluded a confession made to Japanese interrogators because the confession was likely not voluntary. The 2009 Military Commissions Act codifies the protest justification, excluding evidence obtained by torture or cruel, inhuman, or degrading treatment, whether or not obtained by color of law.

Although these decisions were decided under military proce-

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187. It should be noted that many of these cases do not arise under the Due Process Clause but rather under Status of Forces Agreements or military regulation. Nonetheless, their reasoning may serve to elucidate the values underlying the exclusion of coerced evidence.
190. Id.
191. Id. at 224.
192. Id. at 227.
dure rather than constitutionally mandated procedure, they are significant insofar as they demonstrate that the protest justification is not anathema to American jurisprudence or values.

Similarly, Canadian conceptions of the voluntariness requirement seem to be grounded in the protest justification. The exclusionary rule in Canada is governed by Section 24(2) of the Canadian Charter of Rights and Freedoms, which is part of the 1982 Constitution Act. It provides:

Where . . . a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

In *R. v. Hodgson*, the Canadian Supreme Court noted that the voluntariness requirement is partially grounded in “the need to ensure fairness by guarding against improper coercion by the state.” The court went on to admit Hodgson’s confession because, although it was made under threat of force, it was made to a private citizen. This “person-in-authority test” appears to draw on some deterrent principles. However, it would probably not preclude the exclusion of foreign induced confession; the court noted that “person-in-authority” means those formally engaged in arrest, detention, examination, or prosecution of the accused. A foreign law enforcement officer would likely fit into this category.

Additionally, Canadian common law voluntariness requirements may justify exclusion even when the Charter does not. For example, Judge Frank Iacobucci has noted that:

These various differences illustrate that the Charter is not an exhaustive catalogue of rights. Instead, it represents a bare minimum below which the law must not

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197. *Id.* § 24(2).
199. *Id.* at 449–50.
200. *Id.* at 450.
fall. A necessary corollary of this statement is that the law, whether by statute or common law, can offer protections beyond those guaranteed by the Charter. The common law confessions rule is one such doctrine, and it would be a mistake to confuse it with the protections given by the Charter.201

Therefore, even if the Charter would not preclude foreign induced confessions, common law voluntariness rules might.202 Canadian common law voluntariness rules are quite robust:

Voluntariness is the touchstone of the confessions rule. Whether the concern is threats or promises, the lack of an operating mind, or police trickery that unfairly denies the accused's right to silence, this Court's jurisprudence has consistently protected the accused from having involuntary confessions introduced into evidence. If a confession is involuntary for any of these reasons, it is inadmissible.203

Australian courts also emphasize the protest justification. In R v. Swaffield, the High Court of Australia described a three-part test for the admissibility of confessions: (1) was the statement voluntary; (2) if so, is it reliable; (3) if so, should it be excluded in the exercise of discretion?204 This final criterion of admissibility seeks to exclude confessions where admission would be unfair.205 The High Court of Australia has defined the inquiry into the fairness concerns: "[A]ll that seems to be intended is that [the judge] should form a judgment upon the propriety of the means by which the statement was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused."206 That is, courts will exclude even reliable, voluntary confessions in

204. SKINNIDER, supra note 179, at 26.
206. McDermott v The King [1948] 76 CLR 501, 513 (Austl.).
order to protect the integrity of the courts. For example, in *R v Ireland*, the High Court of Australia noted, in excluding coerced evidence, that "[c]onvictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price." The protest justification also underlies Japanese law on confessions. During the post-World War II occupation, American lawyers noted that the problem of forced confessions had plagued prewar Japan. The subsequent Constitution responded to this concern. Article 36 of the Constitution contains an absolute ban on the infliction of torture. Article 38 provides significant protections against coerced confessions:

No person shall be compelled to testify against himself. Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence. No person shall be convicted or punished in cases where the only proof against him is his own confession.

The criminal code was written to enforce this provision: Article 319(1) of the Japanese Code of Criminal Procedure requires the exclusion of any confession that is suspected not to have been made voluntarily. The occupation officials argued that this provision was intended to "exclud[e] from evidence confessions... whose voluntary character [is] in any way suspect." Although Japanese courts have subsequently limited the scope of the constitutional protections by narrowly reading the scope of the term "voluntary,"
the American drafters' understanding of the voluntariness require-
ment at the time of the framing was clearly quite robust.\textsuperscript{216} Moreover, there appears to be a turn towards the protest justification in Jap-
inese case law, with some courts beginning to exclude evidence obtained through coercion.\textsuperscript{217}

South African courts have recently adopted the protest justifi-
cation as well. In \textit{Mthembu v. State}, the Supreme Court of Appeal
excluded evidence of a robbery obtained through torture.\textsuperscript{218} The Court justified this exclusion by noting:

To admit [the evidence] would require us to shut our
eyes to the manner in which the police obtained this
information . . . . More seriously, it is tantamount to
involving the judicial process in "moral defilement." This "would compromise the integrity of the judicial
process (and) dishonour the administration of justice."
In the long term, the admission of torture-induced evi-
dence can only have a corrosive effect on the criminal
justice system. The public interest, in my view, de-
mands its exclusion, irrespective of whether such evi-
dence has an impact on the fairness of the trial.\textsuperscript{219}

British law has also voiced the protest justification. As early
as 1846, British courts noted that the use of coercive means to dis-
cover evidence was anathema to the idea of a fair judiciary.\textsuperscript{220} In \textit{Pearse v. Pearse},\textsuperscript{221} the court stressed that:

The discovery and vindication and establishment of
truth are main purposes certainly of the existence of
Courts of Justice; still, for the obtaining of these ob-
jects, which, however valuable and important, cannot
be usefully pursued without moderation, cannot be ei-
ther usefully or creditably pursued unfairly or gained
by unfair means, not every channel is or ought to be

\begin{footnotes}
\item[216] See id. at 425.
\item[217] Foote, \textit{supra} note 210, at n.226 (citing Tokyo Chiho Saibansho [Tokyo Dist. Ct.]
Dec. 16, 1987, 1275 \textsc{HANJI} 35).
\item[219] \textit{Id.} ¶ 36.
\item[220] A & Ors v. Secretary of State for the Home Department, [2005] UKHL 71, [13].
\end{footnotes}
open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination . . . . Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much . . . .

In a more recent decision, *A & Ors v. Secretary of State for the Home Department*, a majority of the Lords discussed unreliability. Nonetheless, Lord Hope of Craighead argued that:

The use of such evidence is excluded not on grounds of its unreliability—if that was the only objection to it, it would go to its weight, not to its admissibility—but on grounds of its barbarism, its illegality and its inhumanity. The law will not lend its support to the use of torture for any purpose whatever. It has no place in the defence of freedom and democracy, whose very existence depends on the denial of the use of such methods to the executive.

Lord Brown of Eaton-Under-Heywood decided on similar grounds, arguing that admission of any evidence obtained from torture:

[w]ould . . . bring British justice into disrepute. And this is so notwithstanding that the appellant was properly certified and detained by the Secretary of State in the interests of national security, notwithstanding that the legislation (now, of course, repealed) allowed the appellant’s continuing detention solely on the ground of suspicion and belief, notwithstanding that the incriminating coerced statement was made not by the appellant himself but by some third party, and notwithstanding that it was made abroad and without the complicity of any British official.

Similarly, the Republic of Ireland appears to apply a protest justification. In *People v. O’Brien*, the Supreme Court of Ireland noted that “to countenance the use of evidence extracted or discov-

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222. *Id.* at 28–29.
224. *Id.* [165].
tered by gross personal violence would, in my opinion, involve the State in moral defilement.”

German law does not generally have mandatory constitutional or statutory exclusions of evidence nor is there a general exclusionary rule, which would render illegally obtained evidence inadmissible. However, German law makes clear that coerced confessions must be excluded.

Therefore, section 136a of the Strafprozessordnung provides:

(1) The freedom of the accused to make decisions and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, the administration of drugs, torment, deception or hypnosis. Coercion may be used only in so far as it is permitted by the law on criminal procedure. Threatening the accused with measures that are not permitted under the law on criminal procedure or holding out the prospect of an advantage that is not contemplated by statute shall be prohibited.

(2) Measures which impair the accused’s memory or ability to understand and accept a given situation (Einsichtsfähigkeit) shall not be permitted.

(3) The prohibition under subsections (1) and (2) shall apply irrespective of the accused’s consent. Statements which were obtained in breach of this prohibition shall not be used, even if the accused consents to their use.

Germany therefore categorically prohibits the use of coerced confessions in courts as a fundamental notion of the judiciary.

226. Sabine Gless, Truth or Due Process? The Use of Illegally Gathered Evidence in the Criminal Trial—Germany, in GERMAN NATIONAL REPORTS TO THE 18TH INTERNATIONAL CONGRESS OF COMPARATIVE LAW (Jurgen Basedow, Uwe Kischel & Ulrich Sieber eds. 2010).
228. Strafprozessordnung [StPO] [Code of Criminal Procedure], Apr. 7, 1987, Bundesgesetzblatt [BGBl. I] 1074, as amended, §136(a) (Ger.).
229. Fahl, supra note 227, at 1062.
should be noted, however, that as a practical matter this categorical prohibition is rarely ever required because German courts require a high degree of substantiation for claims of torture.\(^{230}\)

**D. The Perspective of International Courts**

International fora have increasingly taken a major role in protection from coerced confession.\(^{231}\) This transition has occurred for two reasons. First, international human rights conventions have codified protections against coerced evidence,\(^{232}\) allowing for easier challenges to coercive behavior.\(^{233}\) Second, the number and jurisdictional reach of international tribunals has drastically expanded.\(^{234}\) Therefore, the perspective of international tribunals may serve as an important basis of comparison.\(^{235}\)

1. The European Court of Human Rights

In the last decade, the European Court of Human Rights has considered the admissibility of coerced confessions in *Jalloh v. Germany*,\(^ {236}\) *Harutyunyan v. Armenia*,\(^ {237}\) *Gafgen v. Germany*,\(^ {238}\) and *Othman v. United Kingdom*.\(^ {239}\) The case law of the European Court of Human Rights demonstrates an evolution of the rationale underly-

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\(^{232}\) See, e.g., ICCPR art. 14, entered into force Mar. 23, 1976, 999 U.N.T.S. 171; Convention Against Torture, supra note 18, art. 15.


ing exclusion from a purely deterrence-based approach to a multifaceted approach. This may serve as a useful case study for a potentially similar evolution in the United States.

As a preliminary matter, it is important to give a brief sketch of the European Convention on Human Rights' protections against coerced confessions. The European Convention does not derive the voluntariness requirement from a protection of due process—rather, the protection comes from the blending of two explicit articles. Article 3 provides an absolute prohibition on torture. Article 6 provides the right to a fair trial. The jurisprudence on the voluntariness requirement comes from an interpretation of these two articles.

In Jalloh, the defendant was convicted in German courts of drug trafficking. The principal evidence adduced against Mr. Jalloh at trial was a “bubble containing 0.2182 grams of cocaine” which had been forcibly removed from Mr. Jalloh’s body with an emetic. Before the European Court, Jalloh argued that the use of an emetic was either torture or cruel, inhuman, or other degrading treatment and therefore the trial had been unfair.

The European Court began its discussion by noting that the prohibition against torture “enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the European Convention on Human Rights prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim’s conduct.” The European Court therefore excluded the evidence because it extinguished the fairness of Jalloh’s trial. Importantly, though the European Court’s reason for exclusion was primarily one of deterrence, it noted that admission of torture evidence would “serve to legitimate indirectly the sort of moral-

241. Id. art. 6.
243. Id. ¶ 13.
244. Id. ¶ 89.
245. Id. ¶ 99.
246. Id. ¶ 108.
ly reprehensible conduct" which the prohibition on torture sought to proscribe.247

The European Court went further in Harutyunyan.248 There, the defendant was convicted before an Armenian court of premeditated murder.249 The primary evidence brought against the defendant was the testimony of two servicemen, A and T.250 The defendant brought claims before the European Court of Human Rights alleging violations of the European Convention on Human Rights.251 Specifically, Harutyunyan argued that his conviction was unfair because the testimony of A and T had been coerced.252

The European Court found that A and T had been coerced to give evidence.253 It then noted:

Incriminating evidence—whether in the form of a confession or real evidence—obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, in other words, to "afford brutality the cloak of law."254

The European Court went on to reject the state's argument that the coercion was not relevant because A and T gave their testimony to officers who did not engage in any coercive activities.255 The European Court noted that even when a third party engages in coercion, that bad act may forever taint the testimony.256 Although,

247. Id. ¶ 105.
249. Id. ¶ 19.
250. Id. ¶ 26.
251. Id. ¶ 55.
252. Id.
253. Id. ¶ 59.
254. Id. ¶ 63.
255. Id. ¶ 65.
256. Id.
the European Court did not explicitly repudiate the Jalloh deterrence justification in Harutyunyan, the decision cast the deterrence rationale into some doubt because the party to the confession could not control third-party coercion. Although no deterrence justification applied, the European Court still found the evidence to be inadmissible.\textsuperscript{257}

In Gafgen, the European Court was forced to consider the admissibility of coerced evidence obtained in an emergency situation. Mr. Gafgen had kidnapped and killed a young child;\textsuperscript{258} he then deposited a ransom note with the child’s parents asking for one million euros in exchange for their living son.\textsuperscript{259} After he picked up the ransom, Gafgen was arrested.\textsuperscript{260} The police believed throughout the interrogation that the child was still alive.\textsuperscript{261} In order to try to ascertain the child’s whereabouts, German police threatened and beat Gafgen.\textsuperscript{262} He subsequently disclosed the location of the child’s body.\textsuperscript{263} Germany then brought criminal proceedings against Gafgen using his confession as evidence.\textsuperscript{264} Gafgen argued that his confession was coerced and therefore should be excluded.\textsuperscript{265} The European Court held that the evidence must be excluded because, citing Jalloh, “any other conclusion would only serve to legitimise, indirectly, the sort of morally reprehensible conduct which the authors of Article 3 of the convention [prohibiting torture] sought to proscribe or, in other words, to afford brutality the cloak of law.”\textsuperscript{266} Therefore, the European Court appears to have adopted a blend of the deterrence and protest justification.

The Jalloh case grounded the exclusion of torture evidence primarily in deterrence, excluding evidence in order to prevent future

\textsuperscript{257} Id. ¶ 66.
\textsuperscript{259} Id. ¶ 12.
\textsuperscript{260} Id. ¶ 13.
\textsuperscript{261} Id. ¶ 20.
\textsuperscript{262} Id. ¶ 15.
\textsuperscript{263} Id. ¶ 16.
\textsuperscript{264} Id. ¶ 24.
\textsuperscript{265} Id. ¶¶ 24, 37, 40.
\textsuperscript{266} Id. ¶ 167 (internal quotations and citations omitted).
torture. In Gäfgen, the European Court applied this deterrent justification but blended with a protest justification, even in situations of extreme emergency.

In Othman, the European Court greatly expanded the rationale for excluded torture evidence. There, the European Court considered a number of human rights claims relating to the proposed transfer of a terrorist suspect from the United Kingdom to Jordan. In particular, the European Court considered the claim that the transfer would violate human rights because there was a real risk that, at Othman’s trial in Jordan, evidence obtained through torture would be introduced. The European Court began this discussion by noting that “international law, like the common law before it, has declared its unequivocal opposition to the admission of torture evidence. There are powerful legal and moral reasons why it has done so.” The European Court then noted a number of reasons underlying the exclusion of tortured evidence. First, citing Jalloh, the European Court identified that admission of torture evidence legitimated the practice of torture. Second, the court noted that tortured evidence was unreliable and unfair. Finally, the European Court stated its fundamental reason for exclusion:

[N]o legal system based upon the rule of law can countenance the admission of evidence—however reliable—which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence damages irrevocably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law

269. Id. ¶ 8.
270. Id. ¶ 263.
271. Id. ¶ 264.
272. Id.
273. Id.
itself.\textsuperscript{274}

Therefore, the European Court found the transfer of Othman would violate the Convention\textsuperscript{275} because the risk of torture at a Jordanian trial was "not only immoral and illegal, but also entirely unreliable."\textsuperscript{276}

The expansion of the rationales underlying the exclusion of torture evidence at work in \textit{Othman} demonstrates the importance of understanding the rationale of exclusion. Deterrence alone would not have precluded the evidence. Jordan is not a party to the European Court and may not be deterred by its decisions. Nonetheless, the European Court's expanded understanding of the exclusionary rule justified exclusion on protest and reliability grounds.

2. The American Human Rights Regime: The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights

The American Convention on Human Rights\textsuperscript{277} includes explicit protection against coerced confessions. Article 8(3) provides that "[a] confession of guilt by the accused shall be valid only if it is made without coercion of any kind."\textsuperscript{278}

The Inter-American Commission of Human Rights has emphasized deterrence in its jurisprudence on Article 8(3). In \textit{Manriquez v. Mexico},\textsuperscript{279} the Commission was confronted with a case of torture leading to a confession.\textsuperscript{280} It rejected the confession, noting that "historical experience has clearly shown that giving evidentiary effect to extrajudicial statements, or statements made during the

\begin{itemize}
\item \textsuperscript{274} Id.
\item \textsuperscript{275} Id. \textsuperscript{287}
\item \textsuperscript{276} Id. \textsuperscript{267}.
\item \textsuperscript{277} The United States has signed but not ratified the convention. See List of Signatory Parties to the American Convention on Human Rights, \textit{available at} http://www.oas.org/en/iachr/mandate/Basics/4.RATIFICATIONS%20AMERICAN%20CONVENTION.pdf.
\item \textsuperscript{278} American Convention on Human Rights art. 8(3), Nov. 22, 1969, 1144 U.N.T.S. 143.
\item \textsuperscript{280} Id. \textsuperscript{25}.
\end{itemize}
investigative stage of the proceedings, is an incentive to use torture when the police prefer to save on investigative effort, extracting a confession from the accused.” 281 The Commission has found that mistreatment short of torture must also be excluded. 282 The American Court of Human Rights has also found that Article 8(3) requires the exclusion of coerced evidence, 283 although its basis for doing so was not stated. 284

3. International Criminal Tribunals

International criminal tribunals have adopted a blend of the protest and reliability justifications. For example, in 1994, the International Criminal Tribunal for the Former Yugoslavia (ICTY) adopted an exclusionary rule for coerced evidence. 285 It provided that “no evidence shall be admitted if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.” 286 In applying this rule, the ICTY noted that its goal was ensuring the “surest way to protect the integrity of the proceedings.” 287 The International Criminal Tribunal for Rwanda (ICTR) adopted an identical rule. 288 The Statute of the Special Court for Sierra Leone (SCSL) includes a similar rationale for exclusion providing for the exclusion of evidence “if its admission would bring the administration of jus-

281. Id. 78–79.
286. Id.
tice into serious disrepute." 289  The Rome Statute of the International Criminal Court also includes provisions that exclude evidence that would damage the integrity of the court. 290  The International Criminal Court therefore appears to have adopted the protest justification as grounds to exclude coerced testimony.

4. The Committee Against Torture and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Article 15 of the CAT, 291 provides that "[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings." 292

The Committee Against Torture has held that the obligations of Article 15 extend to situations where the use of tortured evidence in a third state is alleged. 293  In P.E. v. France, 294 the Committee considered the claim of a German national who was arrested in France. 295  Spain requested extradition. 296  The appellant protested that the reasons underlying the extradition request were based on evidence obtained by torture. 297  The Committee noted that the requirements of Article 15 extend to all national courts regardless of where the alleged torture takes place because of the "absolute nature of the prohibition of torture." 298  This reasoning forms the basis of later

292. See Convention Against Torture, supra note 18, art. 15.
295. Id. ¶ 2.1.
296. Id. ¶ 2.2.
297. Id. ¶ 2.4.
298. Id. ¶ 6.3.
Committee decisions.\textsuperscript{299} In fact, the Committee has called upon states to amend their national laws to exclude tortured evidence, even when state actors are not complicit.\textsuperscript{300}

The Committee Against Torture therefore derives the inadmissibility of coerced confessions in part from the absolute prohibition on torture contained in Article 2 of the Convention.\textsuperscript{301} In turn, Article 2 seemingly incorporates the protest justification. The Committee Against Torture has, for example, noted that the obligations to prevent torture are absolute\textsuperscript{302} and \textit{jus cogens}.\textsuperscript{303} Labeling the obligation to prevent torture as a \textit{jus cogens} norm indicates that it is a fundamentally important norm from which no derogation is permitted.\textsuperscript{304} That is to say, torture and other cruel, inhuman, or degrading treatment constitute conduct which states, regardless of circumstances, are not permitted to condone. The conception of the exclusionary rule found in Article 15 therefore most closely aligns with the protest justification.

5. The International Covenant on Civil and Political Rights and the Human Rights Committee

Article 14(g) of the ICCPR\textsuperscript{305} enshrines the right of an individual not to "be compelled . . . to confess guilt."\textsuperscript{306} The Human Rights Committee, the ICCPR's treaty body, has argued that Article 14 requires that "[d]omestic law must ensure that statements or confessions are not obtained in violation of article 7 [prohibiting cruel,
inhuman, or degrading treatment] of the Covenant in order to extract a confession." 307 Consequently, in Bakhridin v. Tajikistan, the Human Rights Committee found that Tajikistan violated its human rights obligation by admitting evidence that had been coerced from a defendant’s son. 308

The Human Rights Committee has grounded this exclusion in the absolute prohibition of cruel, inhuman, or degrading treatment. 309 Subsequently, the Committee’s jurisprudence on Article 14 mirrors its statements on Article 7. 310 This jurisprudence, much like the jurisprudence of the Committee Against Torture, seems to implicitly endorse a protest justification for the exclusion of coerced confessions. Consequently, the Human Rights Committee has argued that in order to introduce a confession, the state must always bear the burden to demonstrate voluntariness. 311

CONCLUSION

A review of the practice of foreign jurisdictions indicates that most courts justifies the exclusion of at least some coerced evidence based in part on a protest justification—that is, a view that coerced evidence taints the legitimacy of the judicial process and consequently is simply beyond the province of what courts should sanction. The courts of Canada, the United Kingdom, Japan, South Africa, Germany, the Republic of Ireland, and Australia all employ this justification to exclude evidence. Similarly, the European Court of Human Rights, the Committee Against Torture, the Human Rights Committee, and international criminal tribunals decline to admit coerced confessions based in part on the protest justification. The European

Court of Human Rights appears to have given the issue the most thought in its recent *Othman* decision, where it observed that the exclusion of coerced evidence is based on many values, including deterrence, evidentiary reliability, and the protest justification.

The discussion above does not indicate that the United States has misconstrued or misstated the rationales underlying the voluntariness rule. Each of the principles discussed in this Note have at one time or another been identified and applied by United States courts. Rather, courts around the world have currently identified and applied a significantly more diverse set of values that protect defendants against the admission of coerced confession than have some of their American counterparts. In fact, the majority of courts sampled now justify the exclusion of coerced confessions by arguing that courts should not admit these confessions—in other words, these courts protest their role in the use of these confessions.

That is not to say that *Connelly* was wrongly decided. In fact, deciding *Connelly* under the protest justification may very well have resulted in the same outcome—hearing confessions compelled by the voice of God is very different than admitting confessions coerced by foreign authorities. Rather, extending *Connelly* to the question of foreign coerced confessions severely oversimplifies the reasons and benefits obtained from the exclusion of coerced confessions. It risks both the admission of unreliable evidence and a corruption of the judicial process. If American courts do not expand their rationale for excluding coerced evidence, then important values, which have been identified both domestically and internationally, would be ignored.

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