

# AN AMERICAN AMENDMENT

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In two of the most controversial cases of the past decade, *Roper v. Simmons*<sup>1</sup> and *Lawrence v. Texas*,<sup>2</sup> the Supreme Court relied on foreign law to help determine the meaning of the United States Constitution.<sup>3</sup> This short Essay will explain why such citations violate important constitutional principles and will suggest a possible constitutional remedy.

## I. FOREIGN LAW AS A MECHANISM OF CONSTITUTIONAL CHANGE

The basic problem with these foreign citations is simple: the current state of foreign law generally does not tell us anything relevant to the project of constitutional interpretation, properly understood. For textualists and originalists, the project of constitutional law is to discern what the text of the document would have meant to an educated reader at the time of ratification.<sup>4</sup> For this project, the proper referents are constitutional

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1. 543 U.S. 551 (2005).

2. 539 U.S. 558 (2003).

3. See *Roper*, 543 U.S. at 575–77; *Lawrence*, 539 U.S. at 572–73.

4. See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 621 (1999) (“In constitutional interpretation, the shift is from the original intentions or will of the lawmakers, to the objective original meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.”); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 359 (1992) (“Thus the question becomes the level of generality the ratifiers and other sophisticated political actors at the time would have imputed to the text.”); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO.

text, history, and structure. The current trend is inconsistent with textualism and originalism not merely because the sources cited are *foreign*, but also because they are *contemporary*.<sup>5</sup> As a general matter, it is simply unfathomable how the law of, say, France in 2009 could be relevant to the public meaning of the United States Constitution in 1789.

But of course, those who would cite foreign law do not accept these premises. The current predilection for using *contemporary* foreign law to interpret the United States Constitution necessarily entails a rejection of the quest for its *original* meaning. Those who would cite contemporary foreign law necessarily embrace the notion of an “evolving” Constitution.

Or, to put the point more starkly, the current predilection for use of current foreign law is *as a mechanism of constitutional change*. Foreign law changes all the time. If foreign law is relevant to constitutional interpretation, it follows that a change in foreign law can alter the meaning of the United States Constitution.

And that is why the stakes are so high. The notion of the Court “updating” the Constitution to reflect its own evolving view of good government is troubling enough. But the notion that this evolution may be brought about by changes in foreign law violates basic premises of democratic self-governance.<sup>6</sup> When the Supreme Court declares that the Constitution

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WASH. L. REV. 1127, 1136 (1998) (“Originalism is the idea that the words of the Constitution must be understood as they were understood by the ratifying public at the time of enactment.”). See generally RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY ch. 4 (2004); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann ed., 1997); Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law and Legal Theory Research Papers, Series No. 07-24, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244).

5. John O. McGinnis, *Contemporary Foreign and International Law in Constitutional Construction*, 69 ALB. L. REV. 801, 803 (2006) (“From the perspective of originalism, the problem thus with contemporary international or foreign law is the fact that it is contemporary, not the fact that it is foreign or international. Originalists would be pleased to consider Blackstone, or other foreign and international sources from the time of framing that shed light on what a reasonable person at that time would have thought the Constitution meant.”).

6. See Frank H. Easterbrook, *Foreign Sources and the American Constitution*, 30 HARV. J.L. & PUB. POL’Y 223, 228 (2006) (“Foreign law post-dating the Constitution’s adoption is relevant only to those who suppose that judges can change the Constitution or make new political decisions in its name, which I think just knocks out the basis of judicial review.”).

evolves—and that foreign law effects its evolution<sup>7</sup>—it is declaring nothing less than *the power of foreign governments to change the meaning of the United States Constitution*.

And even if the Court purports to seek a foreign “consensus,”<sup>8</sup> a single foreign country might make the difference at the margin.<sup>9</sup> Indeed, foreign countries might even attempt this deliberately.<sup>10</sup> France, for example, has declared that one of its priorities is the abolition of capital punishment in the United States.<sup>11</sup> Yet surely the American people would rebel at the thought of the French Parliament deciding whether to abolish the death penalty—not just in France, but also, thereby, in the United States.<sup>12</sup>

After all, foreign control over American law was a primary grievance of the Declaration of Independence. The Declaration’s most resonant protest was that King George III had “subject[ed]

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7. If the Court cites foreign sources, presumably it is relying upon them at least in part. The Court has no business spending government money to print its thoughts in the United States Reports unless those thoughts are in service of an exercise of the judicial power. See *Roper*, 543 U.S. at 628 (Scalia, J., dissenting) (“Acknowledgment of foreign approval has no place in the legal opinion of this Court unless it is part of the basis for the Court’s judgment—which is surely what it parades as today.”).

8. See *id.* at 577 (majority opinion) (“In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.”); *id.* at 604 (O’Connor, J., dissenting) (criticizing the Court’s search for an “international consensus”).

9. See, e.g., *id.* at 577 (“The United Kingdom’s experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins.”). But see *id.* at 626–27 (Scalia, J., dissenting) (“The Court has . . . long rejected a purely originalist approach to our Eighth Amendment, and that is certainly not the approach the Court takes today. Instead, the Court undertakes the majestic task of determining (and thereby prescribing) our Nation’s current standards of decency. It is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War . . . a legal, political, and social culture quite different from our own.”).

10. See Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to The Law of Other States*, 59 STAN. L. REV. 1281, 1305 (2007) (explaining how the United States Supreme Court’s reliance on foreign law could skew the policy incentives of foreign governments in a suboptimal way).

11. See Ken I. Kersch, *Multilateralism Comes to the Courts*, PUB. INT., Winter 2004, at 3, 4–5.

12. See Easterbrook, *supra* note 6, at 228 (“When other nations abolish the death penalty . . . they do this by voting and can reverse the result by voting. How, then, can these deliberations and results possibly eliminate the role of the people of the United States in making decisions?”).

us to a jurisdiction foreign to our constitution.”<sup>13</sup> And this is exactly what is at stake here: foreign government control over the meaning of our Constitution. Any such control, even at the margin, is inconsistent with our basic founding principles of democracy and self-governance.<sup>14</sup>

Indeed, the Constitution itself has something to say about constitutional change. “We the People of the United States . . . ordain[ed] and establish[ed] th[e] Constitution,”<sup>15</sup> and have also included mechanisms by which *we* could change it if necessary. Article V sets forth a complex, carefully wrought mechanism—really four such mechanisms—for constitutional change.<sup>16</sup> These mechanisms require the concurrence of many different collective bodies, each with a different—and exclusively American—geographic perspective.<sup>17</sup> There is simply no reason to believe that, in addition to the four express mechanisms of constitutional change in Article V, there is also a fifth mechanism, unmentioned in the text, by which

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13. THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776). The Declaration also protests:

The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

*Id.* paras. 2–4.

14. See Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1911 (2005) (“Surely the Founders would have been surprised to learn that a United States statute—duly enacted by Congress and signed by the President—may, under some circumstances, be rendered unconstitutional at the discretion of, for example, the King of England.”).

15. U.S. CONST. pmb. (emphasis added).

16. The amendment process has two phases, proposal and ratification, and each phase has two options. At the proposal phase, Congress may propose amendments “whenever two thirds of both Houses shall deem it necessary.” U.S. CONST. art. V. Or alternatively, “on the Application of the Legislatures of two thirds of the several States, [Congress] shall call a Convention for proposing Amendments.” *Id.* Likewise, at the ratification stage, there are two options: an amendment may be “ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.” *Id.*

17. See *id.*

foreign governments may change the meaning of the United States Constitution.

## II. AN AMERICAN AMENDMENT TO FORECLOSE FOREIGN AMENDMENTS

So, if foreign and international law is generally irrelevant to the interpretation of the Constitution, what can be done about the Court's reliance on these sources? Scholars and lawyers might try to persuade judges one by one, but that is bound to be a slow and incremental process at best. There is, however, a more dramatic possibility. The People might take matters into their own hands, and instruct their judges in a way that courts could not ignore. We could, in theory, amend the Constitution.

Consider, if only as a thought experiment, an amendment that would forbid the use of contemporary foreign law as an aid to the interpretation of the Constitution. An amendment could accomplish this in one short sentence, perhaps echoing the Preamble to underscore the point. It might, for example, declare: "This Constitution was ordained and established by the People of the United States, and so it shall not be construed by reference to the contemporary laws of other nations."

This thought experiment has a great deal to teach about our constitutional commitment to democratic self-governance. And it may not be as far-fetched as it sounds. After all, reliance on foreign law in constitutional interpretation is an issue of great salience, both politically and theoretically. As a political matter, this issue has captured the attention of Congress<sup>18</sup> and the public<sup>19</sup> in a way that few issues of constitutional interpretive methodology ever could. More than any other such issue, this one could conceivably inspire a sufficiently broad and deep consensus

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18. *House Resolution on the Appropriate Role of Foreign Judgments in the Interpretation of the Constitution of the United States: Hearing on H. Res. 97 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 30 (2005).

19. See, e.g., Floyd Abrams, *Foreign Law and the First Amendment*, WALL ST. J., Apr. 30, 2008, at A15; Joan Biskupic, *High court justices hold rare public debate*, USA TODAY, Jan. 14, 2005, at 3A, available at [http://www.usatoday.com/news/washington/2005-01-14-justices-usat\\_x.htm](http://www.usatoday.com/news/washington/2005-01-14-justices-usat_x.htm); Adam Liptak, *U.S. Court Is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 18, 2008 at A1; Robert Weisberg, *Op-Ed., Cruel and Unusual Jurisprudence*, N.Y. TIMES, Mar. 4, 2005, at A21; Tim Wu, *Foreign Exchange: Should the Supreme Court care what other countries think?*, SLATE, Apr. 9, 2004, <http://www.slate.com/id/2098559/>.

for constitutional change. And as a theoretical matter, this issue implicates a fundamental issue of democratic self-governance<sup>20</sup>—an eminently appropriate matter to enshrine in the Constitution.

Such an amendment would not be constitutionally incongruous. In fact, it would fit nicely within our constitutional tradition, across at least two important dimensions. First, this would be a meta-constitutional provision, one that forbids a certain method of constitutional interpretation. There is nothing strange about a legal document prescribing rules for its own interpretation.<sup>21</sup> Indeed, two out of the twenty-seven constitutional amendments have taken precisely this form. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be *construed* to deny or disparage others retained by the people.”<sup>22</sup> And the Eleventh Amendment provides: “The Judicial power of the United States shall not be *construed*”<sup>23</sup> in a particular manner. These two amendments are rules of construction, rules of interpretation; here the Constitution is giving explicit instruction regarding the proper methods for its own interpretation. The hypothetical Twenty-Eighth Amendment would take this same form. Moreover, the rules of interpretation set forth in the Ninth and Eleventh Amendments are rules that their framers thought should have gone without saying: These amendments were intended to restore, or to preserve, the correct method of interpretation, by foreclosing an actual<sup>24</sup> or potential<sup>25</sup> interpretive error. Again, the hypothetical Twenty-

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20. See *supra* Part I.

21. See generally Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

22. U.S. CONST. amend. IX (emphasis added).

23. U.S. CONST. amend. XI (emphasis added).

24. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 420 (1793) (holding that a state could be sued in federal court by a citizen of another state); Mark Strasser, *Chisholm, the Eleventh Amendment, and Sovereign Immunity: On Alden's Return to Confederation Principles*, 28 FLA. ST. U. L. REV. 605, 606–07 (2001) (*Chisholm v. Georgia* was “so unpopular that it was quickly overruled by the Eleventh Amendment to the Constitution.”); *Alden v. Maine*, 527 U.S. 706, 726 (1999) (Eleventh Amendment restored and ratified an “original [constitutional] understanding”).

25. Some feared that a bill of rights would dangerously imply greater federal power because it “would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted.” THE FEDERALIST NO. 84, at 579 (Alexander Hamilton) (J. Cooke ed., 1961). The Ninth Amendment was intended, in part, to foreclose this

Eighth Amendment, forbidding recourse to foreign or international law, would fit squarely within this tradition.

And this amendment would fit within another constitutional tradition as well. The Constitution has been amended seventeen times since the Bill of Rights. Many of these seventeen amendments—and some of the most popular and successful ones—have been what John Hart Ely might have called “representation-reinforcing” amendments.<sup>26</sup> They have served to bind the *government* of the United States more closely to the *people* of the United States. One example is the Seventeenth Amendment, providing for the direct election of Senators.<sup>27</sup> But the most obvious such amendments are those that extended the franchise: the Fifteenth Amendment, extending the vote to all races;<sup>28</sup> the Nineteenth Amendment, extending the vote to women;<sup>29</sup> the Twenty-Fourth Amendment, extending the vote to those who could not afford to pay a poll tax;<sup>30</sup> and the Twenty-Sixth Amendment, extending the vote to all those at least eighteen years old.<sup>31</sup> By granting more Americans the vote, these amendments bind the government more closely to the people, and ensure that the *laws* of the United States more closely reflect the aggregated preferences of the *citizens* of the United States.

An amendment forbidding reliance on contemporary foreign law to interpret the Constitution would fit neatly within this constitutional tradition because it would do exactly the same thing. Just as *excluding* black Americans and female Americans and poor Americans and young Americans drove a wedge between American preferences and American law, likewise *ind-*

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erroneous interpretive inference. See Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty: A Response to A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 937, 945 (2008) (“As Madison explained to Congress, the Ninth Amendment was his solution to the Federalist objection to adding any bill of rights to the Constitution.”).

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

27. U.S. CONST. amend. XVII.

28. U.S. CONST. amend. XV.

29. U.S. CONST. amend. XIX.

30. U.S. CONST. amend. XXIV.

31. U.S. CONST. amend. XXVI.

cluding the British<sup>32</sup>, the French<sup>33</sup>, the Jamaicans, or the Zimbabweans<sup>34</sup> as a source of American constitutional interpretation drives a wedge between American preferences and American law. By ruling such sources out of bounds, this hypothetical Twenty-Eighth Amendment—like the Fifteenth, Seventeenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth—would pull the United States Constitution closer to those who ordained and established it: the People of the United States.<sup>35</sup>

So, once again, if only as a thought experiment, the Twenty-Eighth Amendment: “This Constitution was ordained and established by the People of the United States, and so it shall not be construed by reference to the contemporary laws of other nations.”

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32. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (citing contemporary practice in the United Kingdom among other foreign law).

33. *See, e.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988) (citing the banning of the death penalty in France and other westernized nations).

34. *See, e.g.*, *Knight v. Florida*, 528 U.S. 990, 995–96 (1999) (Breyer, J., dissenting) (citing court holdings from India, Jamaica, and Zimbabwe in analyzing the Eighth Amendment).

35. U.S. CONST. pmb. (“We the People of the United States . . . do ordain and establish this Constitution for the United States of America.”).