

**DISCOUNTING FOREIGN IMPORTS:  
FOREIGN AUTHORITY IN CONSTITUTIONAL  
INTERPRETATION  
& THE CURB OF POPULAR SOVEREIGNTY**

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I. INTRODUCTION

The U.S. Supreme Court's resort to foreign and international sources of authority, although not of recent vintage,<sup>1</sup> has been a cause of alarm for some in the American public and legal academia in recent years,<sup>2</sup> as decisions such as *Lawrence v. Texas*<sup>3</sup> and *Roper v. Simmons*<sup>4</sup> have invoked the value judgments of other nations to provide content to constitutional rights in exercising the Court's counter-majoritarian power. The contemporaneous declarations of Supreme Court Justices halting the dawn of a new "global legal enterprise"<sup>5</sup> ensures that the practice will not be short-lived but is instead quickly becoming firmly rooted in the Court's jurisprudence.<sup>6</sup>

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1. Historically, the Supreme Court has resorted to foreign and international law in certain circumstances. See Steven Calabresi and Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005).

2. Daniel A. Farber, *The Supreme Court, The Law of Nations, and Citations to Foreign Law*, 95 CALIF. L. REV. 1335 (2007) ("The Supreme Court's reliance on 'foreign' law has become the subject of heated controversy, particularly with regard to the relevance of foreign authority in constitutional cases.").

3. 539 U.S. 558 (2003).

4. 543 U.S. 551 (2005).

5. Stephen Breyer, *Keynote Address*, 97 AM. SOC'Y INT'L L. PROC. 265, 268 (2003).

6. Indeed, very recently Justice Breyer invoked foreign sources to elucidate his theory of the First Amendment in his opinion dissenting in part and concurring in part in *Ysursa v.*

Moreover, the heavy speculation that Yale Law School Dean Harold Hongju Koh, a renowned champion of the Supreme Court's resort to international and foreign authority,<sup>7</sup> is among President Barack Obama's top choices for the estimated three vacancies that are likely to arise on the Supreme Court during the course of President Obama's first term<sup>8</sup> evinces a reasonable likelihood that the practice will only continue to grow in frequency.

Both the Court's decisions and the pledges of individual Justices to continue exploring the interpretive value of foreign and international law in construing our Constitution have stirred up a robust debate about the propriety of using such sources to interpret, supplement, or discover the meaning of the constitutional text. Some scholars—notably, Professors Steven Calabresi<sup>9</sup> and Roger Alford,<sup>10</sup> as well as Judges Frank Easterbrook<sup>11</sup> and Richard Posner<sup>12</sup>—have objected to the use of foreign law in constitutional interpretation in most circumstances. Their objections voice concerns regarding the nature of the Constitution as law, the problem of picking and choosing values from dissimilar systems, the irrelevance of these sources to the proper constitutional inquiry, and the undermining of

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*Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1103 (2009) (citing opinions of courts in Canada, the European Union, South Africa, and Israel to assist his analysis by examining the approaches used by “[c]onstitutional courts in other nations . . . when facing *somewhat similar* problems”) (emphasis supplied) (Breyer, J., concurring in part and dissenting in part).

7. See Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004); Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT'L L. 1 (2004).

8. See Justin Jouvenal, *Ten Picks for Obama's Supreme Court*, SALON.COM, Nov. 19, 2008, [http://www.salon.com/news/feature/2008/11/19/supreme\\_court/index.html](http://www.salon.com/news/feature/2008/11/19/supreme_court/index.html); Deborah O'Malley, *Looking for Law in All the Wrong Places*, THE AMERICAN SPECTATOR, Oct. 8, 2008, <http://spectator.org/archives/2008/10/08/looking-for-law-in-all-the-wro>; Jess Bravin, *Barack Obama: The Present is Prologue*, THE WALL STREET JOURNAL, Oct. 7, 2008, at A22, available at [http://online.wsj.com/article/SB122333844642409819.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB122333844642409819.html?mod=googlenews_wsj).

9. Calabresi & Zimdahl, *supra* note 1; Steven Calabresi, *Lawrence, the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097 (2004); Steven Calabresi, "A Shining City on a Hill": *American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335 (2006).

10. Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004); Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675 (2003).

11. Frank Easterbrook, *Foreign Sources and the American Constitution*, 30 HARV. J.L. & PUB. POL'Y 223, 224 (2006).

12. Richard A. Posner, *The Supreme Court 2004 Term: Foreword: A Political Court*, 119 HARV. L. REV. 31, 84–90 (2005).

the sovereignty of the American people. The results of their objections vary, although the objections of all but Alford<sup>13</sup> rest on either originalist or positivist assumptions about the Constitution that scholars who subscribe to non-originalist theories of the Constitution can easily ignore.

This paper argues that reliance upon foreign and international law in construing constitutional provisions for purposes of judicial review should be rejected, building upon Professor Alford's objection that the "international counter-majoritarian difficulty"<sup>14</sup> undermines American sovereignty. Reasoning from the indisputable foundation that the structure of the Constitution requires a government that is responsible to the people,<sup>15</sup> this paper argues that the rising practice of reliance upon foreign sources in judicial review is antithetical to popular sovereignty and, on that basis alone, it must be rejected in constitutional interpretation, outside of the limited role of defining international legal terms that have been incorporated into the document. This objection—which I dub the "roaming hand"—is unlike most other objections that have been voiced as it does not rely upon an originalist or positivist approach to the Constitution; rather, it is one that can be appreciated equally by constitutional scholars from both non-originalist and originalist interpretive approaches, both of which acknowledge the aspect of popular sovereignty in the constitutional design.

The paper commences with a description of the nature of the controversy that has arisen by examining the recent key cases at the epicenter of the conflict. Next, the paper distinguishes the employment of foreign and international sources of authority in judicial review and the interpretation of constitutional provisions from other reasons for citing those sources. Third, the paper outlines the

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13. Professor Alford, as will be explained later, rests his primary objection on the undermining of sovereignty and democratic governance. See discussion *infra* Part III.D. While Professor Alford is the most vocal and prominent critic of the practice to develop his argument on the ground of popular sovereignty, others have voiced the argument as well. See, e.g., Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law*, 29 *FORDHAM INT'L L.J.* 507 (2006); John O. McGinnis, *Foreign to Our Constitution*, 100 *NW. U. L. REV.* 303, 319 (2006).

14. Alford, *supra* note 10, at 59.

15. Throughout this paper, I will refer to "the people" with a lowercase "p" in order to denote very simply the present living American people, as opposed to a more abstract or mystical notion of "the People" that encompasses both past and present generations and is used by some theorists.

arguments of several key objectors to the practice and demonstrates that all but one of the arguments rely upon originalist or positivist assumptions. Fourth, the paper explores the principle of popular sovereignty, extracting aspects of the constitutional design that support it, and proposing that this principle cuts across interpretive methods. Finally, the paper argues that, for the reason that it contravenes popular sovereignty, the practice of invoking foreign and international law in judicial review must be rejected, likening the “roaming hand” objection to the non-originalist argument of the “dead hand.”

## II. THE PROBLEM POSED BY *ATKINS*, *LAWRENCE*, AND *ROPER*

The contemporary practice of invoking foreign law in judicial review can be traced to the seminal Eighth Amendment decision in *Trop v. Dulles*.<sup>16</sup> Although it is true that invocation of foreign authority in judicial review had occurred prior to this time, such as in *Dred Scott v. Sanford*,<sup>17</sup> the practice was isolated at best until *Trop* conferred on the opinions of other nations a routine place in the Eighth Amendment inquiry.<sup>18</sup> Since *Trop*, a number of Eighth Amendment cases similarly referenced foreign and international authorities without attracting too much attention. However, the more recent Supreme Court decisions in *Atkins*, *Lawrence*, and *Roper*, which have continued to use and expand upon this practice, have stirred up substantial controversy.

The first of the three recent cases that have drawn criticism for their reliance upon foreign and international authority was *Atkins v. Virginia*,<sup>19</sup> an Eighth Amendment case that required the Court to decide upon the constitutionality of executing the mentally handicapped and revisit its precedent of *Penry v. Lynaugh*.<sup>20</sup> Two important amici curiae briefs had been submitted on behalf of the defendants in *Atkins*, one by the European Union and one by a group of former U.S. diplomats, both informing the Court that the U.S. was

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16. 356 U.S. 86 (1958); Calabresi & Zimdahl, *supra* note 1, at 846.

17. 60 U.S. (19 How.) 393, 407–08 (1857) (relying in part on the “the public history of every European nation” to reach its conclusion that blacks were an inferior race).

18. To support its holding that denationalization was cruel and unusual punishment, the Court relied upon international documents stating that it was “offensive to cardinal principles for which the Constitution stands,” while citing a United Nations survey of 84 nations and a study from the United Nations on statelessness. *Trop*, 356 U.S. at 102.

19. 536 U.S. 304 (2002).

20. 492 U.S. 302, 340 (1989).

alone in the world in permitting the execution of mentally handicapped persons and urging the Court to abolish the practice.<sup>21</sup> The briefs appeared as part of an intentional strategy by death penalty abolitionists to introduce foreign law as material that was more sympathetic to their position than the available domestic authority.<sup>22</sup> The strategy proved successful as the Court ultimately agreed with their position. After ostensibly engaging in the routine Eighth Amendment inquiry, the Court speciously concluded that the execution of mentally handicapped “has become truly unusual, and it is fair to say that a national consensus has developed against it.”<sup>23</sup> Consistent with this conclusion, the Court held that the state laws that permitted it, like the one at issue, were “cruel and unusual” and unconstitutional.

There were several reasons to believe that the Court’s conclusion was dubious and that the Justices’ real reasons for revisiting the issue were not those that they acknowledged, including that little had changed in the state of domestic law since *Penry*. In a supportive footnote, the Court enumerated several reasons for concluding that a “national consensus” had developed against the practice, including among them that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”<sup>24</sup> Such factors were supposedly confirmatory of the Court’s holding yet lacked a firm foundation for the Court to confirm. Although the Court alleged that the foreign authority and other evidence noted in the footnote were “by no means dispositive,”<sup>25</sup> it was nonetheless difficult to pinpoint many significant changes between *Penry* and *Atkins* beyond those cited in the footnote. Because of this unusual deference to external authority, *Atkins* drew immediate criticism.<sup>26</sup>

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21. See Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT’L L. 69, 70 (2004) (citing to Brief of the European Union as Amicus Curiae, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (No. 00-8727), 2001 WL 648604 (resubmitted in *Atkins*); and Brief for Diplomats Morton Abramowitz et al. as Amici Curiae, *McCarver* (No. 00-8727), 2001 WL 648607 (resubmitted in *Atkins*)).

22. *Id.*

23. *Atkins*, 536 U.S. at 316 (emphasis supplied).

24. *Id.* at 316 n.21.

25. *Id.*

26. Jeremy Rabkin, *A Multilateralist Supreme Court*, THE AMERICAN SPECTATOR, Sept.–Oct. 2002, at 24; Editorial, *Judges Making Bad Law*, NEW YORK POST, June 22, 2002; *Globalizing the Supreme Court*, THE NEW AMERICAN, Nov 4, 2002.

During the next term, in *Lawrence v. Texas*,<sup>27</sup> the Court further expanded its reliance on foreign and international sources in judicial review. The *Lawrence* decision concerned whether a fundamental right to engage in homosexual sodomy existed under the doctrine of Substantive Due Process,<sup>28</sup> a question that again required the Court to revisit one of its precedents—this time, *Bowers v. Hardwick*.<sup>29</sup> The Court held that a fundamental right did in fact exist, invoking foreign and international materials to criticize *Bowers*, stating that “[t]o the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere.”<sup>30</sup> The Court cited three decisions of the European Court of Human Rights and an amicus brief noting the rights of homosexuals in other nations in order to support its argument.<sup>31</sup> The Court then summarily concluded that “the right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries [and] [t]here has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.”<sup>32</sup> In so stating, the Court made it appear as though the foreign authority created a presumption against the enforcement of the law, thereby placing a high burden on Texas despite applying the ordinarily benign rational basis test.

The most recent case invoking foreign and international law in judicial review has been *Roper v. Simmons*,<sup>33</sup> where the Court decided the constitutionality of the juvenile death penalty, revisiting precedent from the case of *Stanford v. Kentucky*.<sup>34</sup> In abolishing the juvenile death penalty in *Roper*, the Court pronounced that “[o]ur determination . . . finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”<sup>35</sup> The Court recognized that Article 37 of the United Nations Convention on the Rights of the Child prohibited the juvenile death penalty and had been

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27. 539 U.S. 558 (2003).

28. *Id.* at 564.

29. 478 U.S. 186 (1986).

30. *Lawrence*, 539 U.S. at 576.

31. *Id.*

32. *Id.*

33. 543 U.S. 551 (2005).

34. 492 U.S. 361, 379–80 (1989).

35. *Roper*, 543 U.S. at 575.

ratified everywhere but in the United States and Somalia.<sup>36</sup> The Court also took notice of several “[p]arallel prohibitions . . . contained in other significant international covenants,” concluding that “the United States now stands alone in a world that has turned its face against the juvenile death penalty.”<sup>37</sup> As it did in *Atkins*, the Court admitted that such international opinions were not controlling, but the Court nevertheless affirmed the role of “the laws of other countries [and] international authorities as instructive for . . . interpretation” of the Eighth Amendment.<sup>38</sup> Similar to the decision in *Atkins*, the discussion in *Roper* was veiled. The foreign authority was perhaps the greatest change between *Stanford* and *Roper*, during which period only a minor shift in state legislation had occurred—certainly not enough to justify overturning the precedent.<sup>39</sup> Even Justice O’Connor, who had herself been a proponent of utilizing foreign and international law in construing the Constitution, objected to the Court’s categorization of a national consensus by stating that “[b]ecause I do not believe that a genuine *national* consensus against the juvenile death penalty has yet developed . . . I can assign no such *confirmatory* role to the international consensus described by the Court.”<sup>40</sup>

In the aftermath of *Atkins*, *Lawrence*, and *Roper*, there has been a rigorous debate over the relevance of foreign and international law to the U.S. Constitution. It is unclear why the practice has come under scrutiny at this particular time when it was so quietly and tacitly accepted in years prior as the Court decided *Trop*,<sup>41</sup> *Coker*,<sup>42</sup> *Thompson*<sup>43</sup> and other cases utilizing similar methods. Perhaps this is due in part to the Court’s expansion of the practice beyond the Eighth Amendment context in *Lawrence*.<sup>44</sup> Nonetheless, it is clear that all

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36. *Id.* at 576.

37. *Id.* at 577.

38. *Id.* at 575.

39. Corrina Barrett Lain, *Deciding Death*, 57 Duke L.J. 1, 54 (2007) (commenting that “[a]lthough the numbers did not add up in *Atkins* and *Roper* (at least as the Court had previously counted them), the Justices still managed to ‘get it right’”).

40. *Id.* at 604–05 (O’Connor, J., dissenting).

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

42. *Coker v. Georgia*, 433 U.S. 584, 593 (1977).

43. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (noting that “[t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community”).

44. It must be noted also that the Court previously referenced international authority that same term in a concurring opinion in *Grutter v. Bollinger*, an Equal Protection Clause case.

three cases presented a problem of legitimacy because of their reliance upon foreign standards in utilizing the counter-majoritarian power of striking down statutes via judicial review, a problem that is evident from the flurry of law review articles written in the years since *Atkins* either denouncing or attempting to justify the Court's decisions in these cases. The reason why this practice is problematic is taken up in further detail below.

### III. THE RELATIVE RECENCY OF THE COURT'S RESORT TO FOREIGN LAW IN JUDICIAL REVIEW

Although some scholars have admonished against reactionary claims that the Supreme Court's resort to foreign law is entirely new,<sup>45</sup> there is little doubt that the Court's employment of foreign law as a reason for exercising judicial review, or as an interpretive guide to the meaning of a constitutional clause, is a relatively recent practice—having taken root in the Court's jurisprudence with *Trop*.<sup>46</sup> Many scholars assert that the Supreme Court has always engaged in the practice that has made *Atkins*, *Lawrence*, and *Roper* notorious,<sup>47</sup> but discerning the truth of this claim requires distinguishing among the ways in which foreign and international law has been invoked. Generally speaking, three categories of use can be delineated: (1) where the Court engages in a determination of international law, or the *law of nations*, as an independent or competing source of authority; (2) where the Court refers to norms of international or foreign law to inform concepts of international politics and diplomacy that are written into the Constitution; (3) where the Court invokes foreign or international sources as a basis for norms of individual rights against government, relevant to the judicial review of a

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*Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring). This reference was distinct, however, as it did not provide the holding for the Court. Subsequent to *Lawrence*, this expansion has continued to include the First Amendment, although again confined to a dissenting opinion. See *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1103 (2009) (Breyer, J., concurring in part and dissenting in part).

45. Farber, *supra* note 2, at 1336; David J. Seipp, *Our Law, Their Law, History and the Citation of Foreign Law*, 86 B.U. L. REV. 1417 (2006).

46. Roger P. Alford, *Four Mistakes in the Debate on "Outsourcing Authority,"* 69 ALB. L. REV. 653, 664–70 (2006) (refuting the argument that the practice is firmly rooted in the Supreme Court's history and stating that "[w]hat the Court has not done until very recently is rely on foreign sources where the decision of the Court depends primarily on the interpretation of the meaning of the Constitution").

47. See Seipp, *supra* note 45, at 1431–35.



statute.<sup>48</sup>

The first category is widely misconstrued to be equivalent to the practice involved in *Atkins*, *Lawrence* or *Roper*, as foreign or international law is invoked authoritatively. In reality, this method shares very little with the contemporary employment of foreign and international sources in interpreting clauses of the Constitution during judicial review, despite what some scholars may claim. For instance, while alleging that “[e]arly opinions of the Supreme Court . . . reflected this broad acceptance of the law of nations,”<sup>49</sup> Professor Daniel Farber cites to the cases of *Murray v. The Schooner Charming Betsy*<sup>50</sup> and *The Paquete Habana*<sup>51</sup> for support. Both of these decisions are important and influential; however, neither has much in common with the practice engaged in by the Justices in *Atkins*, *Lawrence*, and *Roper*. Instead, each case expounds rules on conflict of law questions about the relative authority of international law domestically.

For instance, in *Charming Betsy*, Chief Justice Marshall held that federal laws “ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>52</sup> While certainly giving deference to international law in the domestic context, *Charming Betsy* did not address its relationship to the Constitution. Similarly, *Paquete Habana* famously held:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . . . For this reason, *where there is no treaty, and no controlling executive or legislative act or judicial decision*, resort must be had to the customs and usages of civilized nations . . . .<sup>53</sup>

*Paquete Habana* thus recognized the authority of what is known as customary international law in cases where no other relevant domestic authority existed on the subject. In no respect did it foreshadow the invocation in the recent cases of international law as an authority on level with the text of the Constitution. In addressing

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48. See, e.g., Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006). For an alternative analysis that addresses *why* courts utilize foreign sources rather than the ways in which they do so, see Comment, *Foreign Law and the U.S. Constitution: Delimiting the Range of Persuasive Authority*, 54 UCLA L. REV. 1413, 1421–32 (2007).

49. Farber, *supra* note 2, at 1350.

50. 6 U.S. (2 Cranch) 64 (1804).

51. 175 U.S. 677 (1900).

52. *Charming Betsy*, 6 U.S. at 118.

53. *Paquete Habana*, 175 U.S. at 700 (emphasis added).

the misuse of *The Paquete Habana*, Professor Alford has remarked that the case affirmed that international law may be part of our law “[b]ut it is not our protean law. The status of international law remains subconstitutional and cannot be changed to ignore the hierarchy that renders all of our laws subject to constitutional constraints.”<sup>54</sup> Similarly, one “militant moderate” in the foreign authority debate acknowledges that the *Roper* decision is not “on all fours with” the *Paquete Habana* decision as some scholars assert.<sup>55</sup> Thus, to the extent that scholars attempt to justify *Atkins*, *Lawrence* or *Roper* as being consistent with this historical practice, the scope of these cases have been exaggerated.

The second category of use is more closely akin to the practice of more recent cases as it involves the determination of the meaning of a constitutional word or phrase by reference to international or foreign law. Professor Sarah Cleveland marks a few examples of this method, stating that the Constitution “addresses concepts of international law through terms that, while they do not themselves constitute international law, are substantially defined by international rules.”<sup>56</sup> Examples include cases concerning the use of international law to help define the scope of the Constitution’s reference to war powers, admiralty, and citizenship, among others.<sup>57</sup>

At first glance, the method has similarities to *Lawrence* and *Roper*. This practice is nonetheless distinguishable as the words used by the Constitution in this context, as Cleveland observes,<sup>58</sup> are terms of art stemming from the vernacular of international law. In construing those phrases, it is not any more unreasonable to resort to international law for help defining the words than it would be to refer to Black’s Law Dictionary to gather an understanding of a legal phrase written into a statute, such as *res judicata* or *res ipsa loquitor*—a kind of use that is unlikely to cause contention and to which not even originalists object. One scholar even recently advocated from an originalist point of view that international law would be extremely helpful in determining the meaning of the

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54. Alford, *supra* note 10, at 63.

55. Melissa A. Waters, *Getting Beyond the Crossfire Phenomenon: A Militant Moderate’s Take on the Role of Foreign Authority in Constitutional Interpretation*, 77 *FORDHAM L. REV.* 635, 640 (2008).

56. Cleveland, *supra* note 48, at 13.

57. *Id.* at 19–33.

58. *Id.* at 13.

Commander In Chief Clause to define presidential powers.<sup>59</sup> Accordingly, this method is incongruous with the one that has been the subject of recent controversy.

The last category involves the contemporary practice of interpreting provisions of the Constitution using international and foreign law to provide substantive content for constitutional rights while engaging in judicial review. This practice is distinct from mere “citation” to foreign authority as it invokes foreign law for guidance regarding the meaning or content of constitutional values while applying those values during judicial review. As has been discussed, this practice first became prevalent with *Trop v. Dulles*,<sup>60</sup> the rationale for which included consideration of both foreign and international law. Moreover, this tradition includes the more recent *Atkins* and *Roper* decisions, which construed the Eighth Amendment in a way that would be consistent with an “international consensus” on particular questions, as well as *Lawrence*, which invoked foreign law norms for the creation of a constitutional right (or, in another sense, defined the scope of a previously created right). This practice has increased substantially in its frequency and popularity in recent years, and it is unlikely to slow down, as many Justices have publicly spoken out in support of it, including Stephen Breyer,<sup>61</sup> Ruth Bader Ginsburg,<sup>62</sup> and retired Justice Sandra Day O’Connor.<sup>63</sup> For instance, referencing the *Atkins* and *Lawrence* decisions and anticipated future occasions inviting analysis of foreign and international law, Justice Breyer exclaimed to a group of international lawyers and scholars, “What could be more exciting for an academic, practitioner, or judge

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59. Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61 (2007).

60. See, e.g., Calabresi & Zimdahl, *Two Hundred Years of Practice*, *supra* note 1, at 846 (“Much of the modern Court’s citation of foreign law in its Eighth Amendment jurisprudence traces its roots to the plurality opinion in *Trop* . . .”).

61. Breyer, *supra* note 5.

62. Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 282 (1999); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL’Y REV. 329 (2004); Ruth Bader Ginsburg, “A Decent Respect to the Opinions of [Human]kind”: *The Value of a Comparative Perspective in Constitutional Adjudication*, 26 ST. LOUIS U. PUB. L. REV. 187 (2006).

63. See Sandra Day O’Connor, *Keynote Address*, 96 AM. SOC’Y INT’L L. PROC. 348 (2002); Sandra Day O’Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, INT’L JUD. OBSERVER (Fed. Judicial Ctr., Wash. D.C.), June 1997, at 2.

than the global legal enterprise that is now upon us?”<sup>64</sup> Despite the enthusiasm of Breyer and others, the legitimacy of this last category of use is hotly debated.

#### IV. SOME CONSERVATIVE SKEPTICISM: EASTERBROOK, POSNER, CALABRESI, AND ALFORD

The practice of interpreting the Constitution using foreign law has drawn a lot of criticism, including prompting legislative attempts aimed at restricting its use.<sup>65</sup> Skeptics come primarily from the same end of the interpretive spectrum, arguing from an originalist point of view or otherwise reflecting positivist assumptions on the nature of an unchangeable constitution. A few of the most articulate objectors<sup>66</sup> will be discussed to determine the strengths and inadequacies of the arguments that have been raised.

##### A. Judge Easterbrook: Constitution as Law

Judge Frank Easterbrook’s opinion on citations to foreign and international law is poignantly simple. Judge Easterbrook contends that “these references are just window dressings” without any authoritative role for decisions, just as “[m]ost citations are just filler, added by law clerks or by the Justices themselves when engaged in belt-and-suspenders reasoning.”<sup>67</sup> This does not make Judge Easterbrook particularly comfortable with such references. But according to him, the issue is not foreign law. Instead, the “disease lies in the claim of power; foreign citations are just a symptom.”<sup>68</sup> Referencing the British study known as the “Wolfenden Report” that was cited in *Lawrence v. Texas*,<sup>69</sup> Easterbrook notes that “what really

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64. Breyer, *supra* note 5, at 268.

65. Resolutions were introduced after *Lawrence* and *Atkins* and again after *Roper*. See H.R. Res. 568, 108th Cong. (2004) (proposed bill that would have made citation to foreign authority an impeachable offense and stating that “it is the appropriate judicial role to faithfully interpret the expression of the popular will through laws enacted by duly elected representatives of the American people”); S. Res. 2323, 108th Cong. (2004) (providing that “[i]n interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law”); S. Res. 92, 109th Cong. (2005); H.R. Res. 97, 109th Cong. (2005).

66. Justice Antonin Scalia’s own objections in the relevant decisions aside.

67. Easterbrook, *supra* note 11, at 224 (2006).

68. *Id.* at 228.

69. 539 U.S. 558, 573 (2003).

swayed the Justices in *Lawrence*” was not foreign law but “John Stuart Mill’s *On Liberty* (1859): Government should not interfere with acts that do not harm third parties.”<sup>70</sup> He argues that the disease of which foreign citations are symptomatic is the larger evil of not viewing the Constitution as law, and instructs that “the reason why judges are entitled to make constitutional decisions is that the Constitution is *real law*[;] that’s *Marbury*’s central point.”<sup>71</sup> For Easterbrook, it is *because* the Constitution is “higher law” that it “constrains the democratic process.”<sup>72</sup> This core of our constitutional heritage, Easterbrook argues, “has implications for what counts as an admissible source.”<sup>73</sup>

The logic of Easterbrook’s argument is compelling, but it remains married to the underlying premise that judicial review must be based strictly on a method that first examines the text of the statute measured solely against the text of the Constitution, then strikes down a statute where any conflict exists because the Constitution is law of a superior order. Easterbrook’s understanding is indeed the traditional and historical approach.<sup>74</sup> However, for many, this understanding of judicial review is too constricting. To any contemporary subscriber to a non-originalist view of the Constitution, including a current majority of the Supreme Court and a vast majority of law professors, Easterbrook’s argument is unpersuasive for a number of reasons.<sup>75</sup> Not the least of those reasons is that some non-originalists take issue with the premise that the Constitution is binding law.<sup>76</sup> Further, even

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70. Easterbrook, *supra* note 11, at 225.

71. *Id.* at 226.

72. *Id.* at 227.

73. *Id.*

74. See THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two . . . the Constitution ought to be preferred to the statute . . .”).

75. Judge Easterbrook admits that a reader must believe we can be bound by the “dead hand” in order to buy his argument. Easterbrook, *supra* note 11, at 227–28.

76. See Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism? The People Themselves: Popular Constitutionalism and Judicial Review*, 118 HARV. L. REV. 1594, 1620 (2005) (discussing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004), Alexander and Solum state that “[n]oninterpretive popular constitutionalism,” the method to which Kramer subscribes, “amounts to the view that the written Constitution is not binding law and that the executive and legislative branches are not only free, but actually compelled, to disregard the written Constitution if they sincerely believe that the people have authorized such violations”).

the many non-originalist scholars who believe the Constitution is legal will nonetheless question whether its legal status automatically forecloses the judicial power to expand upon or revise its content as Easterbrook contends.<sup>77</sup> To convince a broader audience, therefore, a different reasoning must be proffered.

*B. Judge Posner: Unprecedented Opportunity*

Like Judge Easterbrook, Judge Richard Posner objects to what he views as the “limited efforts” by the Supreme Court in decisions like *Lawrence* and *Roper* to “ground decisions in conventional legal materials.”<sup>78</sup> Among the offenses, Judge Posner expresses that the “most egregious departure from conventionality” is the citation and reliance on foreign decisions.<sup>79</sup> Judge Posner views such methods as a means of implementing a type of natural law by “counting foreign judicial noses in an effort to determine the existence of a global consensus on a legal issue,” the method of which “suppose[s] fantastically that the world’s judges constitute a single, elite community of wisdom and conscience.”<sup>80</sup> The open-endedness of such an inquiry is what Posner finds particularly troubling, commenting that “[i]f foreign decisions are freely citable, any judge wanting a supporting citation has only to troll deeply enough in the world’s *corpora juris* to find it.”<sup>81</sup> This trolling for support, Posner asserts, is “opportunistic” and constitutes “an effort to mystify the adjudicative process and disguise the political decisions that are the core of the Supreme Court’s constitutional output.”<sup>82</sup>

The criticisms Posner affords are well-placed and pour considerable contempt upon the practice. Yet, again, if put to the scrutiny of a scholar who approaches constitutional interpretation from a non-originalist and non-positivist outlook, the arguments fail.

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77. RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 3-4 (2001) (advocating that the Court create content for the principles of the Constitution “through a highly moralized, philosophic inquiry”); RONALD DWORKIN, FREEDOM’S LAW 7, 11-12 (1996) (proposing that many of the rights granted in the Constitution “refer to abstract moral principles” that make the judge’s task “find[ing] the best conception of constitutional moral principles . . . .” Although Dworkin states that such readings have to “fit[] the broad story of America’s historical record,” he admits that the inquiry leaves plenty of room for different and even contradictory accounts).

78. Posner, *supra* note 12, at 84.

79. *Id.*

80. *Id.* at 85, 87.

81. *Id.* at 86.

82. *Id.* at 88.

Posner makes assumptions that he does not make explicit. For instance, no judge or academic who accepts the idea of a living Constitution<sup>83</sup> would turn up their nose at the idea of making decisions on the basis of authority that they find persuasive simply because the authority is not seen as “conventional legal material,” as most evolutive theorists do not attempt to confine the list of available material for interpretation.<sup>84</sup> Again, to come to a common understanding on the inappropriateness of the practice, a broader reason must be given.

*C. Professor Calabresi: By Invitation Only*

Having written extensively on the history and possible applications of invoking foreign and international law in adjudication and politics, Professor Steven Calabresi has identified four purposes to which such invocations might possibly be put to use.<sup>85</sup> One of those purposes—using foreign and international law as persuasive wisdom during the law-making process—does not concern the propriety of judicial reliance upon foreign law.<sup>86</sup> Another purpose, using foreign law for “assessing questions of the judicial role,” except insofar as it touches upon revising or construing the structural provisions of Article III, is similarly irrelevant to this discussion.<sup>87</sup> The other two, employing foreign and international law in matters of interpretation and in “constitutionally prescribed” determinations of reasonableness, address the core issue.

As to matters of interpretation of most provisions of the Constitution, Calabresi claims to take the “hard line position . . . in saying that foreign constitutional law tells us very little about how to interpret the original meaning of concrete clauses in the American

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83. By the term “living Constitution” I mean what is ordinarily understood by that term, i.e., a document subject to interpretations that permit or encourage the judicial infusion of contemporary values.

84. Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 13 (2001) (arguing that it is the Justices’ duty to “articulat[e] and defen[d] . . . what they regard as the appropriate content of the Constitution’s language” based upon “all available sources”); MICHAEL PERRY, *MORALITY, POLITICS AND LAW*, 150 (1988) (proposing that a judge should consider “original beliefs” but nonetheless “should not ignore [the beliefs of past judges]—including ‘precedent’—or, indeed, any other source that may shed light on the problem before the court . . .”) (emphasis supplied).

85. Calabresi, *An Originalist Reappraisal*, *supra* note 9.

86. *Id.* at 1103–04.

87. *Id.* at 1105–06.

Constitution.”<sup>88</sup> The reasoning is, as can be guessed from Calabresi’s choice of language, that “the decision of cases and controversies usually involves the interpretation of text and not the making of policy. . . .”<sup>89</sup> Additionally, “[f]iguring out the original meaning of the [text] requires asking what certain words meant in their ordinary public usage in the United States some 200 years ago.”<sup>90</sup> Separating reasonableness determinations from the broader category of interpretation, Calabresi believes that international and foreign sources are relevant in interpreting provisions of the Constitution that “provide open-ended considerations of ‘reasonableness.’”<sup>91</sup> Justifying their relevance, he argues that clauses such as the Fourth Amendment’s “unreasonable searches and seizures” provision and the Eighth Amendment’s bar on “cruel and unusual punishments” are written “at a high level of abstraction and were arguably intended, *as an original matter*, to have some evolving content.”<sup>92</sup>

Consistent with the arguments of Easterbrook and Posner, Calabresi’s reasoning relies upon assumptions as to the nature of the Constitution that justices and scholars from a non-originalist viewpoint are unlikely to accept. Indeed, at many points, Calabresi invokes originalism explicitly. For instance, Calabresi expressly acknowledges that the purpose of the judge is to “figur[e] out what the original meaning of the [text] requires”<sup>93</sup>—a manifestly originalist teleology—and bases his objections on the irrelevance of foreign sources to the task of discerning the original meaning of the text. Also problematic, Calabresi dilutes this position by permitting the disputed practice on selected provisions of the Constitution, which he deems more “open-ended” than others. There appears to be no real test as to *why* these provisions are more indeterminate than, say, attempting to define the “freedom of speech” or what constitutes a “taking” for a “public purpose without just compensation,” which he specifically mentions among the provisions that he would not permit foreign or international law to permeate.<sup>94</sup> While the Fourth Amendment clearly

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88. *Id.* at 1106.

89. *Id.*

90. *Id.*

91. *Id.* at 1104.

92. *Id.* (emphasis supplied).

93. *Id.* at 1106.

94. *Id.* (commenting that “in interpreting key clauses of the U.S. Constitution such as, say, the First Amendment’s protection of freedom of speech or the Fifth Amendment’s protection against uncompensated ‘takings’ of private property . . . I would take a hard line



requires a “reasonableness” determination, Calabresi does not satisfactorily answer why it is that defining the “cruel and unusual punishment” provision in the Eighth Amendment or the Due Process provision of the Fourteenth Amendment is more of a reasonableness determination than defining a “public purpose” in the Fifth Amendment or “speech” in the First Amendment. In response to Calabresi, a more consistent and non-originalist rationale for why foreign and international law ought to be rejected in constitutional interpretation needs articulation.

*D. Professor Alford: The International Counter-Majoritarian Difficulty*

The opinions of Professor Alford are of particular relevance to this paper as he locates his concern with the practice of relying on foreign and international judgments at the heart of the issue of judicial review. Delineating misuses of international law in constitutional interpretation, Alford first criticizes the infusion of international opinion into the Constitution’s provisions by stating that “in the hierarchical ranking of relative values domestic majoritarian judgments should hold sway over international majoritarian values.”<sup>95</sup> The reason is simple: using foreign sources “dramatically undermines sovereignty by utilizing the one vehicle—constitutional supremacy—that can trump the democratic will reflected in state and federal legislative and executive pronouncements.”<sup>96</sup> Alford further expounds that “to the extent that constitutional guarantees *are* responsive to democratic popular will, those guarantees are not to be interpreted to give expression to international majoritarian values to protect the individual from democratic governance.”<sup>97</sup> In other words, whereas striking down a statute via judicial review ordinarily has some trace of democratic legitimacy, using foreign and international law in the process causes it to lose that legitimacy altogether.

While at first glance Professor Alford’s criticism may be brushed aside as being, like the previous objections, draped in an ideology that is inaccessible to those who do not subscribe to a particular constitutional interpretive method, on a closer examination his point is fundamentally sound regardless of ideology. It is difficult for

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approach . . .”).

95. Alford, *Misusing International Sources*, *supra* note 10, at 58.

96. *Id.*

97. *Id.* at 59.

anyone to deny that the American sovereign is neither King George nor the European Court of Human Rights but the people themselves, and that the Constitution clearly establishes this role. Popular sovereignty is the value invoked by originalist theorists and non-originalist theorists alike.<sup>98</sup> As both sides agree on a common value, a detailed look at what popular sovereignty is and what it means for the foreign authority debate demonstrates the necessity for the Court to abstain from employing foreign authority in constitutional interpretation.

#### V. POPULAR SOVEREIGNTY: BRIDGING INTERPRETIVE THEORIES

Although many of the objections to invoking foreign law in judicial review come from the constitutional interpretive method of originalism,<sup>99</sup> such grounding is unnecessary to conclude that resort to foreign law is an inappropriate practice. Rather, a compelling reason to reject the use of international and foreign law in the construction of provisions of the Constitution not explicitly or implicitly<sup>100</sup> invoking it, apart from any particular theory of interpretation, is that using foreign law as persuasive (and ultimately decisive) authority delegates the power to rule away from those to whom that power rightly belongs—those most affected by governmental action—the American people. This consequence is inconsistent with the constitutional design, as the government established by the Constitution is “founded upon natural law theories of equality of persons and states, social contract theory, and the idea that the primary purpose of the government is the protection and betterment of the people, all of which are part of the modern concept of sovereignty.”<sup>101</sup> Therefore,

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98. Lee Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism and the Aristotelian Tradition*, 2 GEO. J.L. & PUB. POL'Y 523, 524 (2004) (“Both originalists and non-originalists often seek to justify their mode of constitutional interpretation through appeals to democracy . . .”). I do not intend to conflate the terms democracy and popular sovereignty here, which are certainly related but distinct concepts. Nonetheless, the discussion will, I hope, demonstrate that the appeals to democracy in much of constitutional theory are actually appeals to popular sovereignty, or the rule by the people. See, e.g., DWORKIN, *FREEDOM'S LAW*, *supra* note 77, at 15 (“Democracy means government by the people.”).

99. See, e.g., Cindy G. Buys, *Burying Our Constitution in the Sand?: Evaluating the Ostrich Response to the Use of Foreign Law in U.S. Constitutional Interpretation*, 21 B.Y.U. J. PUB. L. 1, 2 (2007) (“The debate regarding the use of foreign and international law is really a sub-set of the debate about the proper method of interpreting the U.S. Constitution.”).

100. See discussion *infra* Part V.

101. Buys, *supra* note 99, at 22.

regardless of one's approach to questions of interpretation, all who acknowledge the essential role of the American people as the American sovereign can agree that the invocation of foreign authority in judicial review is improper.

A. *Describing Popular Sovereignty*

The idea of popular sovereignty is so basic that it needs little description or definition; nonetheless, I will describe it here only to make it abundantly clear that the use of foreign authority in judicial review offends popular sovereignty, and also that, as an argument against invoking foreign authority, popular sovereignty transcends interpretive approaches to the Constitution. Popular sovereignty is the concept of government by the people governed.<sup>102</sup> There is little doubt that the Constitution embodies the purpose of establishing popular sovereignty and has increasingly done so with the passage of multiple amendments either broadening the right to vote or tying the representative government more closely to the popular will.<sup>103</sup> The Constitution prescribed that the government was to be established as one responsive to its constituents from the moment of its inception, forming the government with the words "We the People . . . ."<sup>104</sup> Additionally, historical evidence demonstrates that popular sovereignty was a core concern to the framers, as the Declaration of Independence listed among the grievances against King George that he had "subject[ed] us to a jurisdiction foreign to our constitution."<sup>105</sup> As the Supreme Court has commented, in America "sovereignty itself

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102. Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CALIF. L. REV. 429, 437 (1998) ("We can define popular sovereignty as the subordination of the state to the popular will, as that will is recognized by such procedural criteria as majoritarianism or the amendment mechanism of Article V."); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) ("The central pillar of Republican Government, I claim, is popular sovereignty. In a Republican Government, the people rule.").

103. These are primarily the 15th, 17th, 19th, 24th, and 26th Amendments. For a discussion on the role of the Seventeenth Amendment in securing a more responsive government, see C.H. HOEBEKE, *THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT* (1995).

104. Some have cautioned against using the Preamble as an interpretive tool. *See, e.g.*, ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW*, 34-36 (1990). I would agree with Robert Bork that to read constitutional provisions in light of the Preamble presents problems. My argument does not attempt to read substance into the Preamble, however, but merely to understand the *general purpose* of the Constitution, a use for which preambles are designed and particularly well-suited.

105. THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776).

remains with the people, by whom and for whom all government exists and acts.”<sup>106</sup> At least four pillars of the constitutional structure evince that the Constitution created a government where the people are sovereign: general suffrage, federalism, ordinary majoritarian rule, and the power of constitutional revision.<sup>107</sup> Each of these principles will be discussed in turn.

### *B. General Suffrage: Broad Participation*

Perhaps most important to the maintenance of popular sovereignty is the right of all adults, regardless of race, sex, age or economic status, to vote. Although the Constitution did not originally positively protect this right, the nation’s history and experience have led to this general suffrage through the passage of the 15th,<sup>108</sup> 19th,<sup>109</sup> 24th,<sup>110</sup> and 26th<sup>111</sup> Amendments, which granted that voting rights could not be denied on the basis of race, sex, economic status, or age (after the age of eighteen), respectively. The right to vote granted by these amendments ensures popular sovereignty by securing to the people the ability to keep their representatives responsive to their will. Thus, the right to vote “is regarded as a fundamental political right, because [it is] preservative of all rights.”<sup>112</sup> General suffrage gives every person an equal voice in government and an equal right to participate in the democratic process. Moreover, general suffrage embodies a value that, aside from the few specified instances where a super-majority has bound America, Americans should not be subjected to decisions that they have not had even an opportunity to exercise the least indirect influence over.

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106. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

107. Although I have not borrowed this list of principles from another source, these principles are all identified as supporting popular sovereignty in various other sources. *See, e.g., Post, Democracy, Popular Sovereignty, and Judicial Review, supra* note 100; Amar, *The Central Meaning of Republican Government, supra* note 102, at 749 (noting constitutional revision as a “corollary” to popular sovereignty).

108. U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

109. U.S. Const. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.”).

110. U.S. Const. amend. XXIV, § 1 (“The right of citizens of the United States to vote . . . shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax.”).

111. U.S. Const. amend. XXVI, § 1 (“The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age.”).

112. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

*C. Ordinary Majoritarian Rule: The People Themselves*

As a further protection of popular sovereignty, the Constitution permits<sup>113</sup> an almost exclusive right of political majorities to govern. As to the rights of majorities, “[t]he United States was founded,” as Robert Bork has said, “as a Madisonian system, which means that it contains two opposing principles . . . .”<sup>114</sup> The first principle is self-government, meaning that “in wide areas of life, majorities are entitled to rule, if they wish, simply because they are majorities.” The second is “that there are nonetheless some things majorities must not to do minorities.”<sup>115</sup> The latter restriction is spelled out primarily in the Bill of Rights.<sup>116</sup> The former principle, however, is that of ordinary majoritarian rule: political majorities are allowed to have their way in all areas that are not specifically removed from the authority of ordinary majorities by the Constitution. In an obvious way, permitting the representatives of the people to rule by a mere majority in nearly all circumstances supports a government that is responsive to the will of the people.

*D. Federalism: Keeping Decisions Local*

Federalism also acts as an additional protection of popular sovereignty by delegating power to the institutions most directly responsible to the people and by drawing the power of majority rule even closer to the people, giving not just majorities but *local* majorities the right to govern. The Constitution is designed as a federal government by designating the powers of the national Congress and granting all remaining power to the state governments. Article I, Section 8, grants the federal Congress enumerated powers, subsequently interpreted to also consist of implied powers that were reasonably necessary<sup>117</sup> to the enforcement of those listed.<sup>118</sup> Article X of the Bill of Rights withheld all other power to the states,<sup>119</sup>

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113. While no specific provision concerns majority rule, the rule is implied by contrast to the several circumstances where the Constitution mentions a need for something greater or other than a majority, including stating that two-thirds are needed for overriding a veto, U.S. CONST. art. I, § 7, as well as by the provision that the Senate's president shall vote when the house is equally divided U.S. CONST., art. I, § 3.

114. ROBERT H. BORK, *THE TEMPTING OF AMERICA*, *supra* note 104, at 139.

115. *Id.*

116. *Id.*

117. Or “necessary and proper.” U.S. CONST. art. I, § 8, cl. 18.

118. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

119. U.S. CONST. amend. X (“The powers not delegated to the United States by the

causing government to remain closely accountable to the people. Although there has certainly been a wide expansion of the federal government's powers since the time of the founding through constitutional amendment and the Supreme Court's various Commerce Clause decisions,<sup>120</sup> the principle of federalism is nonetheless innate in the constitutional design. Moreover, that principle today still protects, supports, and fosters popular sovereignty.<sup>121</sup>

*E. Constitutional Revision: The Right to Change Our Minds*

Finally, the Constitution grants the people the power to redefine the existing structure of government or the presently protected realm from which government intrusion is barred by the Constitution.<sup>122</sup> Under Article V, the Constitution may be amended by a two-thirds vote of both houses of Congress together with ratification by three-fourths of all state legislatures. As Professor Nicholas Quinn Rosenkranz has observed, "an entire article of the Constitution, one of *only* seven, is dedicated to creating an elaborate mechanism for constitutional change."<sup>123</sup> Though critics may discredit the Article V system of constitutional reform as untenable,<sup>124</sup> the passage of

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Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

120. Important decisions along these lines include: *U.S. v. Darby*, 312 U.S. 100, 124 (1941) (claiming that "[t]he [tenth] amendment states *but a truism* that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.") (emphasis supplied); and *Wickard v. Filburn*, 317 U.S. 111 (1942) (allowing for the federal government's control over non-commercial activities which, in the aggregate, substantially effect commerce).

121. See *Printz v. United States*, 521 U.S. 898, 918–19 (1997) ("It is incontestable that the Constitution established a system of 'dual sovereignty.' Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty' . . . . The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens."). For a further discussion of the relationship between the Tenth Amendment and popular sovereignty, see Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and "Expressly" Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1922–1927 (2008).

122. U.S. CONST. art. V.

123. Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to the Law of Other States*, 59 Stan. L. Rev. 1281, 1306 (2007) (emphasis supplied).

124. See, e.g., Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1021–23 (1984) (justifying "constitutional moments" where necessity permits the Justices to alter the structure of the Constitution); Akhil Reed Amar, *The Consent of the*

seventeen amendments since the Bill of Rights demonstrates the wisdom of the mechanism that was designed to “guard equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.”<sup>125</sup>

This mechanism supports popular sovereignty in a way that is complementary to ordinary majoritarian rule by acknowledging that, while mere majorities may be denied their preference, the will of the people may not be denied. If the popular will is so strong as to be able to muster a two-thirds majority vote in both houses and ratification by three-fourths of the states, then the people may add or detract from either the powers possessed by the government or their rights as individuals against the government as they desire, thereby revising their charter of government and redefining their nation’s character. The scope of this power is so large as to even include the potential for the people to “abdicate” rule by establishing a monarchy or revising the qualifications for voting in elections or holding office.<sup>126</sup> Since no one but a sovereign could possibly act so authoritatively as to be capable of restructuring the government, overturning the present order and even abdicating power,<sup>127</sup> constitutional revision affirms that the power of sovereignty lies with the people.

*F. Agreement on Popular Sovereignty in Justifying Decisions Amongst Both Originalist and Non-Originalist Theorists*

In denying the permissibility of invoking foreign and international law in judicial review, the argument of popular sovereignty stands apart from other justifications that necessitate an

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*Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 458 (1994) (implying the inadequacy of Article V as the sole mechanism for constitutional change in arguing that the people “retain an unenumerated, constitutional right to alter our Government and revise our Constitution in a way not explicitly set out in Article V”).

125. THE FEDERALIST No. 43, at 275 (James Madison) (Clinton Rossiter ed., 2003).

126. Article V of the U.S. Constitution implies and in no manner limits the people’s power, through their representatives, to make amendments that are inconsistent with or that even necessitate the abolition of the existing governmental structure.

127. THOMAS HOBBS, LEVIATHAN 173 (Michael Joseph Oakeshott ed., 1946) (1651) (speaking of the capability of the sovereign to bind and loose himself from laws, Hobbes notes that “having power to make and repeal laws, [the sovereign] may when he pleases free himself from that subjection by repealing those laws that trouble him and making of new; and consequently he was free before. For he is free that can be free when he will; nor is it possible for any person to be bound to himself, because he that can bind can release, and therefore he that is bound to himself only is not bound”).

agreed-upon method of constitutional interpretation, namely, the theory of originalism. The reason for this distinction is the consensus among theorists of constitutional interpretation as to the value of popular sovereignty in interpretation. Although the dynamics of how this value plays out varies among interpretive methodologies,<sup>128</sup> popular sovereignty nonetheless functions as a central—and often the justifying—element of all (or nearly all) interpretive approaches.<sup>129</sup>

In originalism, many of the most ardent defenders of the theory rely upon the need for democratic legitimacy in judicial review as the theory's primary justification.<sup>130</sup> Originalist scholar Keith Whittington observes generally that “[t]raditional defenses of originalism often employ some version of a popular sovereignty argument.”<sup>131</sup> A good example is the writing of Robert Bork, which typifies Whittington's rule. Bork, a leading defender of originalism, maintains that “only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy.”<sup>132</sup> Bork's adherence to originalism is annexed to his conception of the democratic legitimacy of judicial review and emphasizes ordinary majoritarian rule to the maximum extent possible,<sup>133</sup> while also stressing the need for an effective separation of powers and local control in government—in essence, federalism.<sup>134</sup> Similarly, originalist Justice Antonin Scalia claims that judges must follow originalist principles because doing otherwise

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128. Strang, *supra* note 98, at 523 (noting that “a central dispute between originalism and non-originalism, driven by divergent philosophical traditions, revolves around the nature of ‘democracy’”) (emphasis supplied).

129. For a related commentary on the use of popular sovereignty as a justification for interpretive methods, see Zachary C. Larsen, *The Egalitarian First Amendment: Its History and a Critique on the Grounds of Text, Rights, Negative Liberty and Our Republican Constitutional Structure*, 31 N.C. CENT. L. REV. (forthcoming 2009).

130. Strang, *supra* note 98, at 523. (“Originalists appeal to ‘democracy’ and government by ‘the People.’”); Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. J. JURIS. 255, 261 n.19 (2002) (“The argument from democracy is a recurrent theme in originalist writing.”).

131. KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW, 111 (1999).

132. BORK, *supra* note 104, at 143.

133. For Bork, ordinary majoritarian rule to the “maximum extent possible” means in all arenas not explicitly trumped by a constitutional command of abstinence for the sake of protecting the minority. *Id.* at 139 (explaining that “in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities” but that nonetheless the Constitution commands “some things” that majorities must not to do minorities). See *supra* text accompanying notes 111–114.

134. BORK, *supra* note 102, at 52–53.



would be to “render democratically adopted texts mere springboards for judicial lawmaking,”<sup>135</sup> thereby undermining the democratic objectives of the Constitution.<sup>136</sup> Scalia’s complaint is that the judicial practices which concern him trump ordinary majorities without a legitimate reason<sup>137</sup> and usurp the appropriate means of affecting change through constitutional revision.<sup>138</sup>

Non-originalist interpretive theorists also make democracy an equally central appeal in attempting to legitimate their method. In *Democracy and Distrust*,<sup>139</sup> John Hart Ely appeals to what he calls “representation reinforcement,” whereby judges in making decisions must ensure the participation of minority interest groups.<sup>140</sup> Ely’s appeal is to the same principle that underlies general suffrage—that the nature of our government requires participation by all citizens, who are the ultimate decision makers.<sup>141</sup> This approach, according to Ely, is required by popular sovereignty because his “representation-reinforcing approach to judicial review, unlike its rival . . . is not inconsistent with, but on the contrary (and quite by design) entirely supportive of, the underlying premises of the American system of representative democracy.”<sup>142</sup>

Cass Sunstein’s theory of judicial minimalism, expounded in his book *One Case at a Time*,<sup>143</sup> is similarly justified by reference to popular sovereignty, as Sunstein concludes that minimalism is mandated by the ideal of “democracy promotion.”<sup>144</sup> He notes that minimalist judges are often encouraged to make decisions which are intentionally vague for the sake of permitting democracy to run its

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135. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 25 (1997).

136. *Id.* at 10.

137. *Id.* at 41 (detailing various issues that have been removed from the democratic arena via judicial review).

138. Scalia implicitly makes this point in lamenting the lack of guidance in the direction or process of an evolving Constitution. *Id.* at 44–45 (criticizing an evolutive view of the Constitution on the grounds that “the most glaring defect . . . is that there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution”).

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

140. *Id.* at 101.

141. *Id.* at 77–78.

142. *Id.* at 88.

143. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

144. *Id.* at 24.

course.<sup>145</sup> Sunstein argues that minimalist judging is democracy-promoting and “tr[ies] to trigger or improve the processes of democratic deliberation” by “provid[ing] spurs and prods to promote democratic deliberation.”<sup>146</sup> Similar to Ely, Sunstein also emphasizes participation that gives a voice to all, a value that resounds with general suffrage and underlies popular sovereignty.

While Ely and Sunstein do not by any means comprehensively represent non-originalist theory, the appeal to democracy and representation, which is synonymous with popular sovereignty—although particular outcomes may change based upon how that value is described—is widely shared among non-originalist theorists.<sup>147</sup> The democratic rule of the people is also often invoked as a central justification for originalism. It is proper to conclude, therefore, that the value, demonstrably held by originalists and non-originalists alike, cuts across interpretive methodology.

#### VI. POPULAR SOVEREIGNTY AND THE PROBLEM OF THE ROAMING HAND: THE DEAD HAND REVISITED

For the reason just proffered—popular sovereignty—the practice of using foreign authority in constitutional interpretation ought to be rejected. Although it may at first seem harsh to propose that popular sovereignty does not tolerate foreign authority in judicial review, the explanation for why this must be is one that is remarkably familiar to constitutional theorists. A frequent evolutive or non-originalist argument advanced against the originalist theory of interpretation also invokes the principle of popular sovereignty. The argument, known as the “dead hand,” is one that appeals to the power of present majorities to make decisions, often specifically moral decisions, and criticizes the power of past generations to bind the present. The argument of the dead hand may be applied with equal force to the issue of invoking foreign and international laws and decisions in construing the Constitution. For the reasons advanced in the dead hand argument, the problem that I have identified as the “roaming hand”—allowing the

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145. *Id.* at 40.

146. *Id.* at 27.

147. Another prominent example is Justice Stephen Breyer's theory of “active liberty,” which Breyer describes as the “people's right to ‘an active and constant participation in collective power.’” STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 5 (2005). Additionally, Bruce Ackerman justifies judicial review on the basis of enforcing the people's will. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

writings of foreign lawmakers and jurists to be taken into consideration during judicial review—is as repugnant to popular sovereignty as the idea of holding the present majority to past standards. In fact, it is even more repugnant, as will be seen. Consequently, the roaming hand, which violates the same principle as the dead hand, should be despised by evolutive scholars for the same reason that the dead hand is despised by them: it subjects present majorities to *someone else's* standards.

A. *Originalism's Toughest Critique: The Dead Hand*

As the Supreme Court throughout the mid-twentieth century took further steps away from reasoning from the text of constitutional provisions while exercising judicial review,<sup>148</sup> some concerned scholars articulated an interpretive method that they may have previously assumed to be innate in judicial review and that was certainly supported by a strict kind of judicial review expounded in Federalist No. 78 and *Marbury v. Madison*. The interpretive theory that they articulated was at first called interpretivism and later became more precisely articulated as originalism<sup>149</sup>—the idea that constitutional provisions should be applied consistently with either how the text was intended to be understood by its framers and ratifiers<sup>150</sup> or how the text was popularly understood at the time of its adoption.<sup>151</sup>

For twenty years, the strongest objection to originalism has been the “dead hand” argument.<sup>152</sup> How can our modern society be bound

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148. The culmination of this movement might be located in the decision of *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating a state law that prohibited the sale of contraceptives). The Court's decision referred to the “penumbras” of various texts as creating an independent right, located in no single provision. *Id.* at 483–84, 487, 499.

149. Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 910 n.1 (1998) (noting that the phrase originalism was probably coined by Paul Brest and the methodology had previously been called interpretivism).

150. James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1, 3 (1991). This form of originalism is also known as “original intent.” See Kavanagh, *supra* note 130, at 280.

151. This alternative form of originalism is known as “original meaning.” See Kavanagh, *supra* note 130, at 280. See also SCALIA, A MATTER OF INTERPRETATION, *supra* note 135, at 38.

152. See, e.g., Daniel A. Farber, *The Dead Hand of the Architect*, 19 HARV. J. L. & PUB. POL'Y 245, 245–49 (1996); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225 (1980); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 789 (1983).

by a writing from authors long dead who have little in common with those now living?<sup>153</sup> In other words, “the question of why, to put it bluntly, we ought to care what a bunch of dead people thought about how we ought to live our lives today . . . .”<sup>154</sup> For many non-originalist scholars, the dead hand argument offered a valid justification for departing from the original understanding in favor of embracing evolving standards on the grounds that they more fully comported with the will of the living—the ones who have to “live with”<sup>155</sup> the Constitution. The dead hand argument has raised serious questions that require satisfactory answers. While it is not the purview of this article to answer those questions, the same principles underlying the dead hand raise serious questions in the context of citing foreign authority in judicial review.

*B. The Roaming Hand: The Dead Hand’s Unjustifiable Companion*

When the Supreme Court injects foreign and international authority into its constitutional interpretation, as it has done in *Roper*, *Atkins*, and *Lawrence*, it subjects Americans to a “roaming hand” by permitting the writings of foreign jurists and law makers to “roam” outside of their respective jurisdictions and lay claim to influence that usurps the power of the people to rule. Like the problem of the dead hand, this raises serious questions as to why a majority—in the case of the dead hand argument, *today’s majority*; or in the case of the roaming hand, *an American majority*—should not get to have their way. Also like the problem of the dead hand, the problem of the roaming hand begs an answer. Unlike the responses to the dead hand argument, no satisfactory answer can be given as to why an American majoritarian decision should be subjugated to the will of a foreign majority or, worse yet, a foreign judicial pronouncement. Instead, the roaming hand undermines popular sovereignty on all accounts, including rejecting majoritarian rule without justification, offending federalism, denying citizens the opportunity to participate in government, and circumventing the prescribed method of constitutional revision.

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153. Some non-originalist theorists refer to Thomas Jefferson as the first proponent of the “dead hand” argument. Jefferson stated that “the earth belongs in usufruct to the living; that the dead have neither power nor rights over it.” Letter to James Madison (Sept. 6, 1789), in *THE PORTABLE THOMAS JEFFERSON* 445 (Merrill D. Peterson ed., 1975).

154. Gardner, *supra* note 150, at 14.

155. The author begs the reader’s pardon for a bad pun.

Ordinarily, when the Supreme Court exercises judicial review, it does so on the basis that a law is inconsistent with—or violates a promise or value of—the Constitution, often a provision of the Bill of Rights.<sup>156</sup> It is arguably justified in doing so because a super-majority has at one time made a decision that bound future generations to that promise or value.<sup>157</sup> At least this is the conventional wisdom, and from any perspective, when the Court engages in judicial review, it enforces a promise or value out of duty to the American people to look out for their overarching interest, whatever their momentary decisions may be. Moreover, even when the Supreme Court looks to opinion polls,<sup>158</sup> its own sense of what America is “ready for,”<sup>159</sup> or other non-originalist sources in judicial review, its ostensible goal is to promote democracy.<sup>160</sup> To the contrary, when the Court infuses foreign or international sources into the process of exercising judicial review, it also trumps majority rule; however, it does so not on the basis of some long-gone super majority that agreed to bind the American people, or even on what it thinks will best support American democracy,<sup>161</sup> but, instead, it does so on the basis of an alien majority or alien judicial pronouncement.

The roaming hand lacks even the merit that non-originalist scholars cannot deny to originalism: that at least with originalism, the society as a whole once bound itself, and in that respect “the People” in a broader, metaphysical sense made a decision.<sup>162</sup> Whereas reading the constitutional text as originally understood holds the present society to a compact that living Americans may not have assented to but that was agreed to by a previous generation of Americans, reading the text in light of foreign or international law holds the present

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156. *Trop v. Dulles*, 356 U.S. 86, 103–04 (1958) (“We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution . . . . If we do not, the words of the Constitution become little more than good advice.”); THE FEDERALIST No. 78, *supra* note 73.

157. Strang, *supra* note 96, at 527 (“Our society made a prudential social ordering decision when it ratified the Constitution. . . . Thus, individuals today are bound by . . . the Constitution.”).

158. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

159. See generally BREYER, *supra* note 147.

160. *Id.* See also SUNSTEIN, *supra* note 143.

161. See BREYER, *supra* note 147.

162. Strang, *supra* note 96, at 563–64 (“Originalists view the Constitution as a binding decision by Society—by the People—that future generations (and individuals) must respect and act in accord with until such time that society should decide to legitimately alter the constraints.”).

society to a compact to which no American electorate ever assented. Ordinary majoritarian rule is forsaken and no adequate answer can be given for why this is acceptable.

The practice of deference to the roaming hand also invites great offenses against federalism.<sup>163</sup> Not only is a debatable issue removed from the realm of the states' powers to regulate and, hence, the people's power to decide, but it is removed on some supposed need for consistency among, or agreement with, the international community. It is as though the Court has invoked a super-national, super-federal governmental authority, thus relegating the power of the states to an even less significant position and taking the power to decide issues even further away from the American people. The roles assigned for participatory self-government and constitutional revision are usurped. The American people are "subject[ed] . . . to a jurisdiction foreign to [their] constitution," a repetition of one of the instigating offenses of the revolution.<sup>164</sup> In sum, the rule of the people is denied.

The remarkable congruity between the dead hand problem and the roaming hand demonstrates that the popular sovereignty argument cuts across interpretive approaches. Since the reliance upon foreign sources of law in constitutional interpretation presents a problem so closely related to the issue of the dead hand, it is surprising that many of the same scholars who eschew originalism for the reason that it holds those now living to the standards of those long dead are comfortable with the practice.<sup>165</sup> While there is room for debate over the merits of the approaches to constitutional interpretation, there is no room for debate over the proposition that the American Constitution establishes a government "of the People, by the People, and for the People,"<sup>166</sup> and, consequently, one where subjecting an ordinary American majority to standards that they have never adopted

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163. See *Atkins*, 536 U.S. at 322 (stating that "[t]he Court's suggestion that these sources are relevant to the constitutional question finds little support in our precedents and . . . is antithetical to considerations of federalism, which instruct that any 'permanent prohibition upon all units of democratic government must [be apparent] in the operative acts (laws and the application of laws) that the people have approved'" (Rehnquist, C.J., dissenting)).

164. DECLARATION OF INDEPENDENCE, *supra* note 105, at para. 15; see also John O. McGinnis, *Contemporary Foreign and International Law in Constitutional Construction*, 69 ALB. L. REV. 801 (2006).

165. See, e.g., Eric A. Posner and Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006).

166. Abraham Lincoln, Address at Gettysburg (Nov. 19, 1863), in 2 William E. Barton, *THE LIFE OF ABRAHAM LINCOLN* 486 (1925).

is impermissible. Recognizing that the American people have the final say is necessarily to renounce the kind of counter-majoritarian action taken in *Lawrence*, *Atkins*, and *Roper*, which relies upon foreign norms and values to deny the majority its prerogative.

## VI. CONCLUSION

Popular sovereignty is the answer for why American standards should rule in the interpretation of *all* provisions of the Constitution,<sup>167</sup> to the exclusion of foreign or international sources of norms. The answer is distinct from originalist assumptions about the Constitution—it is found in the broad layout of the document, not the specific construction of a phrase or in the method of construing that phrase, and is the Constitution's most basic principle. It does not answer the question of what any word or phrase means, ought to mean, or how to interpret it, but rather what sources are permissible in giving that phrase meaning. Upon this basis alone, the source list may yet be broad, but it is a narrower gate than some would have it, and it is a gate that is marked with the words “no trespassers; here the people rule.”

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167. As discussed previously, this does not include defining those phrases which, by their nature, are terms of international law by resort to international legal norms.

