ARTICLES

COMPARATIVE LAW IN THE MODALITIES OF CONSTITUTIONAL ARGUMENT

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INTRODUCTION

On January 13th, 2005, United States Supreme Court Justices Stephen Breyer and Antonin Scalia** held their now-famous "conversation" on "[t]he relevance of foreign legal materials in U.S. constitutional cases."[1] Predictably for anyone familiar with their respective Supreme Court juris-

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** This article, which is in large part concerned with the views of Justice Antonin Scalia, was written prior to his death. In light of the Justice's love of argument and good-natured disagreement, I feel the best way to honor his memory is to continue engaging wholeheartedly with his ideas. Thus, I have not in any way blunted my criticism of Justice Scalia in the wake of his passing.

1. Norman Dorsen, *A Conversation Between U.S. Supreme Court Justices*, 3 INT'L J. CONST. L. 519, 519 (2005).

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prudence,[2] Justice Breyer argued for and Justice Scalia against the relevance, and hence propriety, of using foreign materials in deciding constitutional cases. A reader could be forgiven, though, for feeling that the two Justices were not really in conversation with each other but were more often talking past one another. Scalia and Breyer have quite different views about how constitutional cases should be decided in general,[3] and those different overall approaches lead naturally to different views on the appropriate role of international comparisons.

This article will attempt to bridge the divide between these two Justices and the jurisprudential traditions which they represent using the framework outlined by Professor Philip Bobbitt in his landmark work *Constitutional Fate*.[4] Professor Bobbitt outlines what he refers to as the six modalities of constitutional argument: historical, textual, doctrinal, prudential, structural, and ethical.[5] This division of constitutional argument into separate modalities allows us to see that the question Justices Scalia and Breyer were debating is the wrong one. We cannot simply ask whether use of foreign law is appropriate "in deciding American constitutional issues,"[6] but must ask instead whether foreign comparisons are relevant for making arguments within each of the different modalities. This realization allows us to see that foreign law is more or less completely irrelevant for historical and doctrinal argument, that it is an entirely appropriate source of prudential arguments, and that its use in making textual, structural, or ethical arguments raises far more complex and intricate issues.

In Part I, I will describe Professor Bobbitt's system of the six modalities of constitutional argument. Part II will be divided into six Sections, each of which will consider one of the modalities in turn and whether comparative constitutional law has any place within that modality. Finally, in the Conclusion, I will return to Justices Breyer and Scalia, and ask whether this modal understanding of this issue helps us understand their respective positions on it.

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2. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting); Printz v. United States, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting).

3. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann, ed., 1998); STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW (2011).

4. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

5. *Id*. at 7, 93.

6. Dorsen, *supra* note 1, at 519.

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PART I: THE SIX MODALITIES OF CONSTITUTIONAL ARGUMENT

Constitutional Fate and its sequel *Constitutional Interpretation*[7] are remarkable books for many reasons. Among the most striking is the subtle and sophisticated theory of the legitimacy of judicial review and of the American constitutional system more broadly to which the books are largely devoted.[8] Entirely as a predicate for constructing this theory, however, Bobbitt first provides a masterful and in certain ways revolutionary typology of constitutional arguments. In essence, Bobbitt suggests, these modalities are conventions; that is to say, they arise from the general understanding and agreement within the American legal community, and to some extent the broader American public, that constitutional cases may legitimately be decided on certain grounds and not on others.[9] For instance, recourse to the text of the Constitution is considered legitimate, while recourse to the text of the Bible or the Koran generally is not.[10] Because the modalities are conventions, their identities are not set in stone or handed down from on high. As Bobbitt puts it, "they could be different, but . . . then we would be different,"[11] both because we would have to be different to have made different choices about which modalities to accept as legitimate[12] and because the different shape of constitutional argument would shape us differently going forward.[13]

Bobbitt identifies six modalities that he contends have been in routine and accepted use throughout American history: historical, textual, structural, prudential, doctrinal, and ethical.[14] The first five had been identified long before *Constitutional Fate* was written,[15] and are therefore rather familiar. Historical argument, as Bobbitt defines it, is "argument that marshals the intent of the draftsmen of the Constitution and the people who adopted the

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7. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).

8. *Id*. at 109–186.

9. BOBBITT, *supra* note 4, at 6.

10. *Id*. ("One does not see counsel argue, nor a judge purport to base his decision, on arguments of kinship; as for example, that a treaty should be held to be supreme with respect to a state's statute because the judge's brother has a land title that would be validated thereby. Nor does one hear overt religious arguments or appeals to let the matter be decided by chance or by reading entrails. These arguments and a great many others are not part of our legal grammar, although there have been societies and doubtless are still societies within whose legal cultures such arguments make sense.").

11. *Id*.

12. For example, a society could not accept, by convention, astrological argument as a legitimate source of constitutional decision without having a very different character from that of the modern American people.

13. This is part of the force of the word "constitutional." The Constitution itself and also the forms of argument under it help to *constitute* the American people on an ongoing, constructive basis.

14. BOBBITT, *supra* note 4, at 7, 93.

15. *See* BOBBITT, *supra* note 4, at 93 (describing the first five modalities as "constitutional arguments whose existence I should think few would deny.").

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Constitution."[16] Textual argument is "drawn from a consideration of the present sense of the words of the provision."[17] Structural arguments are "claims that a particular principle or practical result is implicit in the structures of government and the relationships that are created by the Constitution among citizens and governments."[18] Prudential argument comes in a wide variety of forms,[19] with one of the most notorious being concerned with "the practical wisdom of using the courts in a particular way,"[20] but all its forms are concerned with "the political and economic circumstances surrounding the decision,"[21] and with consequences. Doctrinal argument is typically concerned with "principles derived from precedent or from . . . commentary on precedent."[22] Finally there is ethical argument, which Professor Bobbitt had the honor of being the first to comprehensively identify and define (though as he asserts that it has been in use since the early Republic,[23] he can hardly claim to have invented it). The name is a confusing one: ethical argument is not argument from ethics or from moral philosophy, but rather from *ethos*, specifically the American constitutional *ethos*.[24] Certain things, this approach suggests, are simply inconsistent with the character of the American republic and its general commitment to limited government and individual freedom.[25]

Each of these modalities arises from a particular aspect of our Constitution. Textual and historical argument, for instance, emerge from subtly different views of the Constitution as a contract. Historical argument asserts that "the Constitution *bound* government and that the People had therefore devised a construction by which they could enforce its limits and rules."[26] Textual argument, on the other hand, sees the Constitution as "a sort of ongoing social contract, whose terms are given their contemporary meanings continually reaffirmed by the refusal of the People to amend the instrument."[27] Doctrinal and prudential argument are both, I think, essentially common-law modes of argument. The former draws on a certain view of

16. *Id*. at 7.
17. *Id*.
18. *Id*.
19. Judge Richard Posner, for example, is very much a prudentialist, but he subscribes not to the form of prudentialism mostly discussed by Prof. Bobbitt and associated with Professor Bickel and Justice Frankfurter, *see infra* page 6, but with the "law and economics" school. *See, e.g.*, RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1981).
20. *Id*.
21. *Id*. at 61.
22. *Id*. at 7.
23. *Id*. at 108–119 (demonstrating Chief Justice Marshall's use of ethical argument in the *Cherokee Cases*).
24. *Id*. at 94–95.
25. See *id*. at 142–56 for an exploration of the methods of ethical argument.
26. *Id*. at 10.
27. *Id*. at 26.

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"the rule of law" in the Anglo-American tradition.[28] For the doctrinalist, "judicial rule applying must be a reasoned process of deriving the appropriate rules and following them in deciding any practical controversy between adverse parties without regard to any fact not relevant to the rules, such as the status or ultimate purposes of the parties."[29] Prudential argument focuses on the fact that there are always competing interests at stake in a given case, even competing constitutional interests or competing pieces of constitutional text.[30] For the prudentialist, therefore, deciding which of the Constitution's many commands to follow in a given case becomes "a matter of prudence, a calculation of the necessity of the act [under review] against its costs."[31]

Structural and ethical argument, meanwhile, arise, I think, from the fact that, as Chief Justice John Marshall so famously put it, "it is a *constitution* we are expounding."[32] The provisions of Articles I through VII and the twenty-seven ratified Amendments are not merely part of some statutory code. They *constitute* the allocation of political authority within America, both between the various institutions of the federal government and the states and between government as a whole and the people themselves. Given certain inherent principles about the nature of political authority, the specific grants of power in our Constitution will have, must have, certain unspoken consequences and implications.[33] Divining these consequences is the task of structural argument. Ethical argument, meanwhile, focuses mainly on those powers *not* granted, on the limited nature of government power and on the countless rights retained by the individual.[34] On this view, the Bill of Rights merely reflects an underlying ethos of limited govern-

28. *Id*. at 41.
29. *Id*.
30. *Id*. at 60–61.
31. *Id*. at 61.
32. McCulloch v. Maryland, 17 U.S. 316, 407 (1819).
33. For instance, consider Chief Justice Marshall's observation in *McCulloch*, *supra* note 32, that a state cannot be allowed the power to destroy, or even meaningfully burden, an instrument of the national government. *Id*. at 436. Nothing in the text of the Constitution mandates this result, but based on the distribution of political authority between the state and federal governments this *must* be true, for reasons sketched out by Professor Bobbitt. *See* BOBBITT, *supra* note 4, at 79.
34. *See* BOBBITT, *supra* note 4, at 144. Of course, it is only the federal government which the Constitution confines to its enumerated powers. Much of the work Bobbitt sees ethical argument performing is extending this ethos of limited government to the states through the Fourteenth Amendment. *Id*. at 100. A frequent refrain of his is that those means which are denied to the federal government, even when it is acting in pursuit of its enumerated powers, are also denied to the states. *Id*. at 152. Bobbitt also suggests that much of the confusion of the Court's substantive due process doctrine early in the twentieth century, exemplified by the decision in Lochner v. New York, 198 U.S. 45 (1905), arose because of a conceptual confusion in applying the ethos of limited government to the states. The *Lochner*-era Court tried to treat the states as having only limited rather than plenary authority. *See* BOBBITT, *supra* note 4, at 147–49. A focus on means rather than ends, Bobbitt suggests, allows us to translate the ethos of limited government to the states without committing this fundamental mistake.

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ment. Since these limits on government do not originate in the Bill of Rights, but rather from more fundamental understandings of the nature of power in America, they cannot be confined to the explicit provisions of the first eight amendments.[35]

Each modality also comes with certain inherent weaknesses or limitations. Historical argument, for instance, cannot provide the kind of "authoritative reading"[36] which is so often sought from it without sacrificing historical accuracy, and is far more effective in disproving a given interpretation (say, by showing that a proposal to enact a provision which would generate the same result as that interpretation had been rejected) than at providing the true meaning of a successful enactment.[37] Textual argument, meanwhile, has a tendency toward "stultifying rigidity,"[38] and also cannot overcome the basic fact that all language, and particularly the language of the Constitution, is ambiguous. Worse, the meaning of words is often shaped by our choices about how we wish to use law, making any recourse to those meanings to shape the law circular.[39] Doctrinal argument can easily degenerate into "mere formalism" when "the doctrine is severed from the animating text,"[40] and is moreover limited by the fact that its rules of neutrality and logical coherence have no ability to "provide purpose."[41] Prudentialists often suffer from an inability to believe that textualists or doctrinalists, for instance, actually mean what they say about the limits binding on their decisions,[42] as well as from a willingness to disregard specific constitutional provisions in pursuit of what they deem "prudent" outcomes.[43] Meanwhile, structural reasoning is indispensable when thinking about federalism or separation of powers issues, but, Bobbitt suggests, not as powerful in dealing with issues of individual rights.[44] Ethical argument, conversely, is tailor-made for those issues, but suffers — particularly as Bobbitt applies it to the states — from the inherent difficulty in discerning "means" from "ends."[45] The competing strengths and weaknesses of each modality help explain why we have used all six of them: we need to, in order to satis-

35. Bobbitt gives as one example of this effect the Pentagon Papers case, *New York Times Co. v. U.S.*, 403 U.S. 713 (1971), in which the Court "applied conventional First Amendment analysis [to an action by the President] despite the clear terms of that Amendment limiting the powers of *Congress*." BOBBITT, *supra* note 4, at 101.

36. BOBBITT, *supra* note 4, at 13.

37. *Id*. at 12–13.

38. *Id*. at 36.

39. *Id*. at 37.

40. *Id*. at 54.

41. *Id*. at 55.

42. *Id*. at 67–68.

43. *Id*. at 67.

44. *Id*. at 89–90.

45. *Id*. at 154.

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factorily handle all the constitutional problems with which we are faced. The ability to choose between different modalities allows us to use the tool best suited to a particular situation, and to mitigate the pitfalls of any one approach.

Each of these modalities is also associated with one or more chief practitioners. Bobbitt gives, as his exemplar of historical argument, William Winslow Crosskey; his forgotten landmark work *Politics and the Constitution* argued that the Constitution had been originally understood to "establish[] a government fully empowered to accomplish the broad charter of the Preamble and not, as has been generally thought, a government of limited enumerated powers."[46] Justice Hugo Black is given as textualism's chief champion,[47] and Justice Oliver Wendell Holmes as the greatest doctrinalist.[48] Alexander Bickel is offered as the greatest recent academic champion of a particular form of prudential argument, and Justice Felix Frankfurter as one of the greatest prudential Justices.[49] Structural argument was, for modern purposes and for Bobbitt's, first identified and defined by Charles Black,[50] and Chief Justice John Marshall is given as an example of a Justice famously adept with the form.[51] Bobbitt himself stands to ethical argument much as Black does to structural argument, and he educes Chief Justice Earl Warren as a practicing jurist most known for his ethical approach.[52]

It is worth noting, however, that not all of these paragons of the modalities have the same relationship to the overall system of constitutional argument. For some of them, their preferred modality is just that, a preference, and they will use other modalities where appropriate.[53] For instance, in his masterful analysis of Justice Holmes's equally masterful opinion for the Court in *Missouri v. Holland*,[54] Bobbitt identifies the use of all six modalities in what is ultimately a doctrinal opinion.[55] Others, however, were what we might call constitutional ideologues,[56] who did not accept the legitimacy of modalities other than their own. This is, in Bobbitt's view, a mistake. For one thing, it limits a jurist to a particular, perhaps limited set of tools. More importantly for Bobbitt, such an ideology undermines the work that he sees

46. *Id*. at 14–15.
47. *Id*. at 26–27.
48. *Id*. at 63.
49. *Id*. at 61.
50. *Id*. at 77.
51. *Id*. at 78–79. Of course, Chief Justice Marshall was rather proficient at all the forms of constitutional argument, and is later used as high authority for the existence of ethical argument. *Id*. at 106–119.
52. *Id*. at 133–36.
53. *Id.* at 234.
54. 252 U.S. 416 (1920).
55. BOBBITT, *supra* note 7, at 51–61.
56. *Cf. id*. at xiii.

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the modalities as doing to legitimate the constitutional system as a whole.[57] Of course, the constitutional ideologues would presumably disagree with Bobbitt about this, and it is not the purpose of this article to argue one way or the other. Instead, I will simply look at each of the modalities in turn, assuming (with, I think, good reason) that they exist and are in frequent use, and consider whether the enterprise of comparative constitutional law is relevant within that modality. This will help answer the question of whether such comparative inquiries have a legitimate place in constitutional law as a whole. A constitutional ideologue who denies the validity of one or more of the modalities may, therefore, naturally disagree with my overall conclusions as to this question without disagreeing with any other step in my analysis. Indeed, I will use my analysis of each modality to argue that the debate about foreign law is only contentious in the first place because of constitutional ideologies, like that of Justice Scalia.

However, I cannot get to those conclusions without first analyzing each individual modality in isolation, and it is to that analysis that I now turn.

PART II - FOREIGN LAW WITHIN THE MODALITIES

I will consider, in order, the historical, prudential, doctrinal, textual, structural, and ethical modalities. This order is meant to be, roughly speaking, in order from the modalities for which foreign law comparisons are most clearly relevant or irrelevant to those where things are the least clear. However, the order should not be taken too literally. The major divide is between the first three, where I believe there is a fairly clear answer, and the last three, where the considerations are far more mixed.

It is also important at this point to be very clear about the distinction between an argument *from* considerations of foreign law and an argument *for* consideration of foreign law. Each of the six modalities can be characterized as a form of argument that uses some particular kind of premise as the basis for its conclusions.[58] Historical argument is argument from original intent and understanding.[59] Textual argument is argument from constitutional text as commonly understood today.[60] Prudential argument is argument from consequences.[61] Structural argument is argument from the overall structure of the American government,[62] and ethical argument is argument from the limited nature of that government.[63] Doctrinal argument,

57. *Id*.
58. *See* BOBBITT, *supra* note 4, at 7, 94.
59. *Id.* at 7.
60. *Id.*
61. *Id.* at 61.
62. *Id*. at 7.
63. *Id*. at 94.

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finally, is argument from a certain vision of the "rule of law" and its principles of neutrality and generality.[64] I am interested in whether consideration of foreign law can usefully and legitimately form the premise of an argument within each of these modalities; that is, an argument that some proposition about American constitutional law is true[65] *because of* something about foreign law.

I am not interested, on the other hand, in whether any of the modalities provide an argument *for* considering foreign law; that is, whether any of these modalities might direct us to consider foreign law. The South African Constitution, for example, famously provides that, in interpreting the Constitution's Bill of Rights, courts *must* consider international law,[66] and may consider foreign law.[67] Under such a constitution, there is an obvious textual argument *for* considering foreign law, and it is possible that similar textual arguments could be made from the American Constitution.[68] There could similarly be arguments from within historical, doctrinal, prudential, structural, or ethical argument whose conclusions direct us to consider foreign law, or which conversely direct us to ignore it.[69] The concern of this article is not whether such arguments can be made, but only whether foreign law comparisons can be useful in formulating arguments within each modal tradition. I turn now, rather briefly as will be seen, to that question as it concerns historical argument.

A) Historical Argument

The answer to the question of whether comparative constitutional law can ever provide the basis for historical argument is quite simple: no, it cannot, not ever. As we have seen, historical argument is argument from the

64. This point is easily misunderstood. Doctrinal arguments often appear as arguments from precedent, but, I think, it is closer to the truth to characterize them as arguments *from* this view of the rule of law *to* the conclusion that we should follow precedent. *See id*. at 41–44.

65. It should be mentioned that the word "true" is being used in a somewhat unusual way here. Bobbitt is very explicit in his view that constitutional propositions are not, and cannot be considered, "true" in the same way as, say, statements about the physical world. *See* BOBBITT, *supra* note 7, at xii. Rather, they are "true" only *within* a modality. Thus, for example, a constitutional proposition is "true" within the textual modality if it can be derived from some feature of the text of the Constitution, as commonly understood today; it is false if it cannot be.

66. S. AFR. CONST., 1996, § 39(1)(b).

67. S. AFR. CONST., 1996, § 39(1)(c).

68. Most plausibly, the Eighth Amendment's prohibition of "cruel and unusual punishments," U.S. CONST. amend. VIII, as commonly understood in contemporary society, could be argued as making a punishment's frequency within the international community, or the community of liberal democracies relevant to its constitutionality.

69. For a consideration of arguments within each modality favoring or opposing the use of foreign law in constitutional decision-making, see Bradley G. Silverman, *The Legitimacy of Comparative Constitutional Law: A Modal Evaluation*, 34 Mich. St. Intl. L. Rev. __ (forthcoming 2016).

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original intentions and understandings of the Founders.[70] In order to form the basis of a historical argument, therefore, a foreign law comparison would need to tell us something about what those intentions and understandings were. But this is impossible. The Founders did not know what the law of Germany or England or Israel or India would be in 2015, any more than they knew what the law of the United States would be or which Major League Baseball team would win the World Series. They could not know because it had not happened yet. Comparative law is irrelevant for historical argument for the same reason that *anything* from after the Constitution's ratification is irrelevant for historical argument. Anyone who tries to use modern-day comparative law in making historical argument is essentially trying to violate causality.

Now, there are a few more things to say about the nexus between historical argument and international comparison. First, all of the above observations apply only to comparisons with *modern* foreign law. As Scalia himself notes in his Conversation with Breyer, the Founders were quite aware of foreign law as it existed in their own time. Indeed, as he observes, the *Federalist Papers* were "full of discussions of the Swiss system, the German system, etc."[71] Historical arguments can, therefore, take note of foreign law as it existed in 1789 without violating causality in the slightest. If, for example, the *Federalist Papers* had mentioned, in discussing some feature of the proposed Constitution, some feature of the Swiss system or the German system and all of the problems which that feature had caused, we may properly infer that the relevant feature of the U.S. Constitution was understood as being different from—and better than—its European counterpart, and vice versa if some feature of Germany or Switzerland were praised as a comparison. But in drawing this inference, we are not really using comparative constitutional law so much as we are reading the *Federalist Papers*. True, it may in some cases be helpful to know more about the country used as a comparison than is stated explicitly in the *Papers*, but, importantly, this can only be helpful if that additional knowledge was common knowledge in America at that time. Otherwise it cannot have contributed to forming the Founders' intentions and understandings. Scalia also notes that one particular kind of foreign law, English common law at the time of the Founding, is *highly* relevant to understanding what the Founders meant by phrases such

70. *See* BOBBITT, *supra* note 7, at 13.

71. Dorsen, *supra* note 1, at 525. Scalia also notes that most of these comparisons were negative ones, which "make very clear that the framers didn't have a whole lot of respect for many of the rules in European countries." *Id*. at 521. This is in essence a historical argument against using comparative European law in interpreting the U.S. Constitution; that is to say, the Founders most emphatically did not intent to create a government similar to those of Europe, so we should not use European law as a reference in interpreting the Constitution.

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as "due process" and the "right of confrontation," and is frequently used for that purpose,[72] but this, too, is not really what we mean when we talk about using foreign law.

The second major caveat is that this causality problem applies to less and less of the potential materials for a comparative inquiry as we move to each successive amendment. Each amendment, after all, is a new constitutional enactment and brings with it a new set of original intentions and understandings. The original understanding of the Twenty-Sixth Amendment, for instance, is the understanding of 1970, not 1790. The original understanding of each amendment can therefore be informed by considerations about the state of the world up to the date of its proposal and/or ratification,[73] including consideration of foreign law. Moreover, these new understandings might transform the way we must understand other provisions of the Constitution. For instance, Professor Akhil Amar has argued that the adoption of the Reconstruction Amendments, and the Fourteenth Amendment in particular, radically altered the correct understanding of the Bill of Rights, both as it is applied against the states through incorporation into the Fourteenth Amendment and as it is applied directly against the federal government.[74] For Amar, the way the Reconstruction generation understood freedom of speech, the right to bear arms, or the prohibition on cruel and unusual punishment is at least as important as the Founding generation's understandings of these concepts.[75] Amar has also suggested that certain amendments which broadened the scope of American democracy, notably the Nineteenth, might properly be viewed as having modified the correct historical understanding of other constitutional provisions insofar as the original understanding was hostile to the interests or views of the newly included group.[76]

On such an approach, the same reasoning by which a comparison with the Swiss government of 1789 might be relevant to understanding the original Constitution might make comparisons with other countries' systems from as late as 1971 or potentially even 1992 relevant, within historical argument, to understanding not just recent amendments but potentially the entire document. However, these comparisons would only be relevant to the extent they could be shown to have influenced the framers of each new

72. *Id*. at 525.

73. Which date one focuses on will depend on whether one views the intentions of the framers or of the American people who ratified the Constitution as most important. Usually there will not be a big difference between the two, but in the case of the Twenty-Seventh Amendment, proposed along with the rest of the Bill of Rights in 1789 but not ratified until 1992, figuring out whose understanding was the original one is quite a puzzle.

74. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (2000).

75. *Id.*

76. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 277–306 (2012).

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amendment, and in the end it is the views of the framers, not the comparative inquiry itself, doing all the work. Our use of such comparative evidence should really be confined to what we can document as having gone into the framers' thinking, and we, the modern constitutional interpreters, certainly have no business rendering our own judgments about whether those other systems were worthy of emulation or not. The question is only whether they were deliberately emulated, and this is a historical inquiry much like any other.

Ultimately, therefore, the original conclusion stands: comparative constitutional law, properly speaking, has no place within historical argument.

B) Prudential Argument

As easily as the comparative inquiry can be rejected for historical argument, it can that easily be accepted as a valid part of prudential argument. The logic is similarly simple, though with nothing so powerful as the rules of causality as its foundation. Prudential argument is concerned above all else with the consequences of a decision.[77] A conscientious prudentialist should, therefore, want to know as much as possible about what the consequences of the decision are *actually likely to be*, not merely to conjecture about what they might be, and that is an empirical question like any other. Therefore, the conscientious prudentialist should take a scientific mindset toward answering it, which means considering any possible source of reliable evidence. Foreign law is therefore relevant insofar as it has any possibility to help us evaluate what the likely consequences of a decision will be, and there is no reason whatsoever to think this will not happen fairly regularly. Especially valuable, one would imagine, would be the stories of other countries' legal experiences, stories linking legal changes to their consequences. If we can see that decisions of a certain kind had what we would consider good consequences in a number of other countries which make for an apt comparison to present-day America, that should rationally make us more likely to expect good consequences from a similar decision rendered here, and hence more favorably disposed toward such a decision — at least as far as prudential argument is concerned. Conversely, if certain kinds of decisions have had disastrous consequences elsewhere, we might suspect that a similar decision would not turn out well here. This is what Justice Breyer is alluding to when he says, as a reason for considering foreign decisions, "maybe I'll learn something."[78]

77. *See* BOBBITT, *supra* note 4, at 59–61. (Professor Bobbitt does not use the word "consequences," but it serves as a useful shorthand for both the "costs" and the "benefits" of a decision.)

78. Dorsen, *supra* note 1, at 523.

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Consider the strand of prudential argument on which Professor Bobbitt primarily focuses, the tradition of Brandeis, Frankfurter, and Bickel.[79] These men were largely concerned with "safeguard[ing] the Court's own position" by avoiding issuing divisive rulings on contentious political issues.[80] Alexander Bickel, for instance, "thought that by prudently avoiding some controversies and by handling others in subtle, indirect ways the Court could preserve its independence and authority for those few cases that should be decided on the merits."[81] It was for these reasons that Justice Frankfurter wrote that the Court should not enter the "political thicket" of attempting to police malapportionment of legislative districts.[82] Except, Frankfurter's predictions of doom proved to be, as John Hart Ely noted,[83] spectacularly wrong. Ely even quotes a critic of *Baker v. Carr*,[84] in which the Court first signaled a willingness to enter Frankfurter's thicket, as admitting that "it has not impaired, indeed ... it has enhanced the prestige of the Court."[85] Presumably, a prudentialist circa 1960 considering whether or not the Court should get into the malapportionment game would have been very interested to know that, ten years later, the one person, one vote rule would be completely uncontroversial (in the general political culture, at least, if not in the legal academy), and that adopting that rule would have "enhanced the prestige of the Court."[86] And while they obviously could not have known that (another casualty of causality), they probably could have gotten much of the same utility out of a comparison with any other countries which had judicially adopted the one person, one vote rule. Such a comparison might have alerted the prudentialist skeptics to a dynamic they overlooked, namely that a legislature once reapportioned according to one person, one vote would no longer have any quarrel with that rule.[87]

Of course, since the inquiry here is an empirical, quasi-scientific one, the standards of empiricism and proper scientific method need to be observed. There are difficulties in drawing comparisons across national boundaries because different countries are different in so many ways. This can make it difficult to be sure that what happened in another country would happen

79. *See* BOBBITT, *supra* note 4, at 61.
80. *Id.* at 65.
81. *Id*. at 68.
82. Colegrove v. Green, 328 U.S. 549, 556 (1946).
83. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 121 (1981).
84. 369 U.S. 186 (1962).
85. *Id.* (quoting Louis Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 991 (1967)).
86. *See id.*
87. ELY, *supra* note 83, at 121. ("What the critics missed is that the incentive of elected representatives is not necessarily toward malapportionment but rather toward maintaining whatever apportionment, good or bad, it is that got and keeps them where they are.")

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again in this one. There is also the danger of cherry-picking: with nearly 200 other countries to choose from, the temptation to focus on those few whose experience supports one's preferred position and ignore those examples which cut against it will be a constant threat. However, neither of these difficulties is unique to using foreign law for prudential purposes. The routine application of a court's own precedent requires skill at determining which cases are similar to the present one and which are properly distinguished, and presents the same opportunity to emphasize precedents favorable to one's side while ignoring unfavorable ones. These difficulties do not mean we shouldn't use precedent, just that we must go about it carefully, making sure to do it the right way rather than the wrong way. The same is true for the prudentialist looking at foreign legal experiences.

There may even be reason to think that foreign law will provide an especially powerful source of knowledge for prudentialists to use. As Professor Steve Calabresi and Bradley Silverman note,[88] Friedrich Hayek famously argued for the power of what he called "systems of spontaneous order".[89] Such systems, he proposed, can "secure the utilization of widely dispersed knowledge,"[90] and allow for "adaptation to a large number of particular facts which will not be known in their totality to anyone."[91] Hayek used the common law as one example of such a system,[92] and Calabresi and Silverman argue that a kind of international common law (which we will meet in greater detail in the next section) could serve a similar purpose. This line of thinking will be of particular interest to the prudentialist. If many, many judges across many different countries have faced a given problem and have wrestled with it over time, sometimes trying one approach and then rejecting it when it fails to produce acceptable results, and those judges seem to have converged on one particular approach, that is strong evidence that this is truly the best approach to that problem. Looking to the work of foreign courts allows American courts to take advantage of all the work those other courts have done in processing the information available to them that is not available to us. As noted above, and as Professor Calabresi and Mr. Silverman make painstakingly clear, there are a number of methodological precautions which must be taken when conducting this inquiry.[93] So long as these precautions are observed, however, this Hayekian argu-

88. Steven G. Calabresi & Bradley G. Silverman, *Hayek and the Citation of Foreign Law: A Response to Professor Jeremy Waldron*, 2015 MICH. ST. L. REV. 1 (2015).

89. *Id.* at 18; *see* 2 FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 117 (1976).

90. Calabresi & Silverman, *supra* note 88, at 18.

91. *Id*. at 17; *see* 1 FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 40 (1973).

92. Hayek, *supra note 91,* at 85.

93. *See, e.g.*, Calabresi & Silverman, *supra* note 88, at 155–173.

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ment provides a strong positive reason for thinking that prudential jurists not only can consider foreign law, but should do so.

C) Doctrinal Argument

The story with doctrinal argument is more complicated than that with historical and prudential arguments, but only slightly so: on anything like a conventional account, there is no place whatsoever for foreign law to serve as the basis for a doctrinal argument. However, here it is at least possible to challenge the conventional account, and such a challenge has been eloquently made at least once. I shall consider that unconventional argument for the doctrinal use of foreign law at the end of this section, but first, the conventional account. Doctrinalism is, as Bobbitt notes, rooted in a certain vision of the rule of law,[94] the central concern of which is that like cases be treated alike.[95] Thus, for the doctrinalist, the strongest reason which can be given for why we should decide one case a certain way is that we have in the past decided very similar cases that same way. In its strongest form, doctrinal argument may not even care whether those prior cases were decided correctly. Consider the following doctrinal argument:

> In *Hammer v. Dagenhart*,[96] the Court struck down a federal ban on the interstate shipment of goods produced using child labor. It did so on the grounds that, though the law was plainly a regulation of interstate commerce,[97] it was an impermissible intrusion into an area of exclusive state authority.[98] A prohibitive federal tax on child labor likewise seems to fall within an enumerated power of Congress[99] but features precisely the same intrusion into state authority, and should therefore likewise be struck down.

This is in essence the reasoning of *Bailey v. Drexel Furniture Co.*,[100] and the remarkable thing is that Justice Holmes, the preeminent doctrinalist who wrote the dissent in *Dagenhart*, joined the majority opinion in *Drexel*![101] That is to say, he voted for a result that, as a matter of first impression, he

94. BOBBITT, *supra* note 4, at 41.

95. Of course, this comes with a set of rules about which characteristics of a case are or are not relevant for drawing comparisons between cases. Certain features, such as the "status or ultimate purposes of the parties," are explicitly defined as irrelevant; doctrinal rules must be *neutral* as to these features, and should consider only the nature of each side's specific legal claims. *Id*. at 42–43.

96. 247 U.S. 251 (1918).

97. U.S. CONST. art. I, § 8, cl. 3.

98. *Cf.* U.S. CONST. amend. X.

99. U.S. CONST. art. I, § 8, cl. 1.

100. 259 U.S. 20 (1922).

101. *Id*. at 27.

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would clearly have believed incorrect, because to do otherwise would be to favor arbitrarily inconsistent results across indistinguishable cases.[102]

Let us consider, therefore, what it would mean to use foreign law as the input to a doctrinal argument. Here is an argument superficially analogous to the one given above:

> In 1977, the German Constitutional Court declared unconstitutional the punishment of life imprisonment without the possibility of parole.[103] Therefore, the U.S. Supreme Court should declare that life imprisonment without the possibility of parole is unconstitutional; to do otherwise would be for two identical cases to be decided differently, a violation of the rule of law.

This is patently ridiculous. The reasons why this logic does not hold are almost too numerous to name, but they all boil down to the basic fact that the United States and Germany are separate jurisdictions. If that means anything, it means that they can treat similar cases differently without violating the rule of law; arguably that characteristic is what defines separate jurisdictions. Doctrinal argument harmonizes the law by erasing logical inconsistencies and making sure that all similarly situated parties *within a given jurisdiction* are effectively governed by the same law, but there is simply no requirement that law be harmonious across jurisdictional lines. This is nearly as categorical as the rejection of foreign law for historical argument's purposes, though it rests not on the laws of physics but on the most fundamental principles of legal and political theory. This is what both Justice Breyer and Justice Scalia mean when they say, respectively, that foreign law should not be "binding"[104] or "authoritative."[105]

However, as noted above, that is just the conventional account. Professor Jeremy Waldron offers a provocative argument to the contrary in his com-

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102. This is not to say that a doctrinalist could never properly overrule a prior decision. As Bobbitt notes, Justice Owen Roberts, another doctrinal Justice, defended his seemingly inconsistent votes in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), where he joined the Court in reaffirming the rule of *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) against state minimum wage laws, and in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), where he provided the crucial fifth vote for overruling *Adkins*. *See* BOBBITT, *supra* note 4, at 40–41. Roberts's claim, made in a memorandum given to Felix Frankfurter to be published on his death, was that he would have voted to overrule *Adkins* in *Tipaldo* had the issue been properly presented, i.e. had counsel asked the Court to do so instead of merely trying vainly to distinguish *Adkins*. *Id.* This illustrates the role of *stare decisis* for the doctrinalist: it is not an unbreakable commandment that precedent must never be overruled, but rather a principle that precedent must be followed until it is squarely overruled in a proper case — and also, of course, that there should be a certain reluctance to do so.

103. Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] June 21, 1977, 45 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 187 (Ger.).

104. Dorsen, *supra* note 1, at 524, 530.

105. *Id*. at 522.

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ment *Foreign Law and the Modern* Ius Gentium.[106] Waldron relies upon the old concept of *ius gentium*, or the law of nations, which, he notes:

> [Is] often used [today] as a synonym for international law . . . [b]ut it once had a broader meaning, comprising something like the common law of mankind, not just on issues between sovereigns but on legal issues generally—on contract, property, crime, and tort. It was a set of principles that had established itself as a sort of consensus among judges, jurists, and lawmakers around the world.[107]

This emerged, as Waldron describes, from "the coming together of two ancient ideas."[108] One of these was a technical feature of the Roman legal system, which reserved Roman law itself, *ius civile*, for Roman citizens, as opposed to foreigners resident within Rome.[109] This raised the question of what law exactly it was that governed those foreigners, and the "Romans resorted to the expedient of applying certain rules held to be common to Roman law and the laws of the surrounding non-Roman Italian communities."[110] These rules, they figured, were "common to all nations," and thus came to be known as *ius gentium*.[111] The other was natural law, the idea that there exists in some abstract sense an ideal legal system which ought to be the law everywhere. After all, "just as fire burns in Persia as well as in Greece, so murder is wrong in Carthage and in Rome."[112] Naturally enough (so to speak), it became natural to view the *ius gentium* as "a great though as yet imperfectly developed model" of natural law, "to which all law ought as far as possible to conform"[113] — even though there were certain undeniable features of the *ius gentium*, such as slavery, which were obviously incompatible with natural law.[114] *Ius gentium* eventually came to be used to "correct and supplement the *ius civile*"[115] within Rome itself.

Ius gentium was never viewed as supplanting or replacing local law, *ius civile*, but rather as supplementing it. The principle, expressed in the Institutes of Justinian, was that "[e]very community governed by laws and customs uses partly its own law, [and] partly laws common to all mankind."[116] Waldron finds this kind of hybrid thinking in action in the New York Court

106. Jeremy Waldron, *Foreign Law and the Modern* Ius Gentium, 119 HARV. L. REV. 129 (2005).
107. *Id*. at 132.
108. *Id*. at 133.
109. *See id.*
110. *Id*.
111. *Id*.
112. *Id*. at 134.
113. *Id*. at 133 (quoting HENRY SUMNER MAINE, ANCIENT LAW 49 (London, J. Murray, 3d ed. 1866)).
114. *See* Waldron, *supra* note 106, at 134.
115. *Id.*
116. *Id*. (quoting J. INST. 1.2.1, at 80 (photo. reprint 1997) (Thomas Collett Sanders trans., London, John W. Parker & Son, 2d ed. 1859)).

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of Appeals' famous decision in *Riggs v. Palmer*,[117] which held that a man who had murdered his father could not claim an inheritance under his grandfather's will.[118] That court observed that "[a]ll laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law," for instance that "[n]o one shall be permitted to profit by his own fraud, . . . or to acquire property by his own crime."[119] "These maxims," it declared, "are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes."[120] A few things are interesting about this quote: first, the identification of "fundamental maxims of the common law" with "maxims . . . dictated by public policy [which] have their foundation in universal law administered in all civilized country," and, second, the court's reliance on the fact that these maxims have not been "superseded by statutes." The model of *ius gentium* suggested by these remarks, and endorsed by Waldron, is that *ius gentium* serves as sort of the default law on all questions in all nations, but that it may be superseded in any given nation by legislative or constitutional enactment. This may be viewed as similar to the rule of *Somerset's Case*,[121] which famously declared that slavery was "so odious, that nothing can be suffered to support it, but positive law."[122]

Applying these principles to American constitutional law, we might say something like the following. Our written Constitution exists against a backdrop of *ius gentium*. Granted, the Constitution has the authority to displace the *ius gentium*, but where it is silent *ius gentium* still prevails, and where it is ambiguous it should in general be interpreted so as to cohere with the *ius gentium*. The *ius gentium*, meanwhile, is known by examining the laws of many nations, and finding the areas of commonality. This immediately makes foreign law relevant for interpreting the Constitution, and note that it does so for genuinely doctrinal reasons. The point here is not simply that we may learn something from seeing how other countries have approached a given problem (though Waldron does use this prudential logic to support his central claim[123]). The point is that *ius gentium* **is law**, binding except where we have deliberately diverged from it by an act of sovereign will. Another way to put this is that, on the view Waldron defends, like cases *should* be treated alike in America and in Germany, and in Britain and

117. 22 N.E.188 (N.Y. 1889).
118. *Id.* at 191.
119. *Id*. at 190.
120. *Id*..
121. Somerset v. Stewart, 98 Eng. Rep. 499 (1772).
122. *Id*. at 510.
123. Waldron, *supra* note 106, at 143–46.

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Italy and Greece and indeed in every nation, *unless* something in the municipal law of a given nation says otherwise. True, discerning the content of the *ius gentium* will often be difficult,[124] but — if we accept the rest of Waldron's theory — this is not a reason to shirk from the task. As when making prudential arguments, we would simply have to do comparative constitutional law well rather than poorly.

Waldron's theory is innovative and interesting, and provides what would otherwise be unthinkable: a viable theoretical basis for the use of foreign law in making doctrinal arguments. However, his theory is, as noted above, deeply unconventional, vulnerable to attack on a number of grounds or even to just being rejected outright,[125] and is highly, highly unlikely to be adopted by the Supreme Court or the broader American legal community any time soon. Thus, we are back at the original conclusion that foreign law is categorically irrelevant for doctrinal argument.

D) Textual Argument

The appropriate role of foreign law in textual argument is considerably more complex. At first glance we might think that it can and should play a meaningful role. After all, textual argument is about the ordinary contemporary meaning of the constitutional language. It is not about original intentions, or even really about contemporary intentions. Thus, for a textualist like Justice Hugo Black, when the First Amendment says that "Congress shall make no law . . . abridging the freedom of speech," it really means ***no law***, *even* if the American people who "continually reaffirm"[126] the Constitution think that maybe laws against obscenity are not so bad.[127] Accordingly, the correct textual answer to a given constitutional problem depends

124. Waldron describes the process thusly: "It was not enough for ius gentium to serve only as a basis for philosophical discussion of natural law or only as a barometer of legal consensus. If consensus was to function normatively, it had to be less than complete (so that it guided someone's choices). But incomplete consensus required choices to be made, and those choices would necessarily be guided by a sense of justice. That sense of justice would not be idiosyncratic but would itself be informed by the extent, depth, and character of the consensus on the question at hand. This process of back-and-forth, which is well understood in moral philosophy, accounts for the dual nature of ius gentium." *Id*. at 136 (citations omitted).

125. Waldron describes the *ius gentium* and gives several reasons why we should not rule out its use. He also gives more-or-less prudential reasons for why taking account of the *ius gentium* would be a good idea, reasons broadly similar to those made in greater detail by Calabresi and Silverman, *supra* note 88. His article is, however, a bit short on any compelling theoretical reasons for viewing the *ius gentium* as binding law. Therefore, it seems to me at least that a reader would be within their rights simply to deny that the *ius gentium* has or should have any doctrinal force over domestic constitutional law.

126. BOBBITT, *supra* note 4, at 26.

127. *Cf.* Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring); Quantity of Copies of Books v. Kansas, 378 U.S. 205, 214 (1964) (Black, J., concurring); Jacobelis v. Ohio, 378 U.S. 184, 196 (1964) (Black, J., concurring).

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only on the relevant text, or rather, on the semantic meanings to which that text corresponds in ordinary contemporary usage. Therefore, this answer should be the same in any two jurisdictions governed by the same constitutional text. Justice Breyer alluded to this idea when he observed that the legal problems faced by foreign judges often "involve[] the application of a legal text, often similar to the text of our own Constitution . . . ."[128]

There are, however, a number of problems with this happy story, and unlike the ordinary challenges of using foreign comparisons for prudential argument they are enough to cast significant doubt on the utility of comparative law in textual argument. The first is so simple that it is easy to overlook it: most countries' constitutional texts are not written in English. Worse still, most of the countries whose constitutions are in English are the Commonwealth countries, which are the countries least likely to have "embodied that protection [of human rights] in legal documents enforced through judicial decision making."[129] If we wish to make a textualist comparison with, say, Germany, we face the fact that the German Court is working with a German text. This is not necessarily a major theoretical problem for textual use of foreign comparisons. After all, textualism is not about the ink on a parchment but about the meaning of words in the general culture, and it is easy enough to say that we can translate a foreign constitution, e.g. Germany's, into English words and phrases which would have the same contemporary meaning in America as the original German words have in Germany. Of course, this requires judges to have proficiency, even fluency, in other languages before even beginning to make those comparisons, or to have the assistance of someone who does.

A second problem is that textualism is not the only modality, in America or in other countries. This means that if we find some other country with a similar constitutional text which faced a similar constitutional problem, we cannot necessarily assume that it approached that problem using textualism. And those other considerations which influenced its decision will likely have been peculiar to that country and inapplicable in ours. What if, for instance, the foreign court's decision was largely a historical one, drawing on the original intentions of *that* country's founders? Since they were not proceeding solely from their constitutional text, their reasoning will be utterly inappropriate for interpreting our constitutional text, even if the two texts truly are similar. Now, perhaps we could say that this will only limit the set of foreign cases which will be useful for textualists to those that were themselves textual decisions. However, constitutional decisions are

128. Dorsen, *supra* note 1, at 523.
129. *Id*.

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rarely made using only one modality.[130] In particular, few if any interesting constitutional cases can be resolved purely through the textual modality, because language simply is not that precise.[131] We should expect, therefore, that any important foreign decision will be at least somewhat contaminated by non-textual modalities, and that therefore the neat textual equivalence of this Section's first paragraph will just not work.

A final problem, and perhaps the most fundamental, is that, of course, no two countries actually do have the same constitutional text. (This is another decent definition of what it means to be different countries.) Two constitutions may be broadly similar, and they may even be identical in certain places. For instance, the South African Constitution (one of the few true written Constitutions written in English) declares that "[t]his Constitution is the supreme law of the Republic,"[132] in language distinctly reminiscent of our Supremacy Clause.[133] However, any given similar provision in two constitutions will be situated in the middle of a very different overall constitutional text. This matters because it is fairly well-recognized that the best form of textualism is not a "clause-bound" one,[134] but one which situates each individual provision within the broader framework of the entire text as a coherent whole. In its most refined form this becomes what Professor Amar has called "intratextualism,"[135] a holistic approach which "read[s] a word or phrase in a given clause by self-consciously comparing and contrasting it to identical or similar words or phrases elsewhere in the Constitution."[136] And as soon as one admits that a given provision's proper application is influenced, even as a purely textual matter, by the provisions around it, whether by intratextualism or by some other clause-liberated textualist technique, it becomes clear that even a purely textual decision from another country using an apparently identical textual provision (plus or minus a bit of translation) is not a close enough match to serve as a valid comparison in a textual argument. Textualists who are not clause-bound never really apply individual provisions, they apply the entire constitutional text as a whole, even though most of it will be irrelevant in any given case. Accordingly,

130. *Cf.* BOBBITT, *supra* note 7, at 51–61 (discussing Justice Holmes's opinion in *Missouri v. Holland*, 252 U.S. 416 (1920)).

131. There is also a certain degree of self-selection here: interesting constitutional cases are precisely those which cannot be resolved solely by recourse to the text. The question of whether a thirty-year-old may be elected President, for instance, is not an interesting or contested constitutional question precisely because it is unambiguously settled by the text. U.S. CONST. art. II, § 1, cl. 5.

132. S. AFR. CONST., 1996, § 2.

133. U.S. CONST. art. VI, cl. 2. It is worth noting that I had to use the Supremacy Clauses as my example because there are not many provisions of the South African Constitution which closely resemble provisions of our own.

134. *Cf.* ELY, *supra* note 83, at 12–13.

135. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

136. *Id*. at 748.

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using a result from a foreign court would mean applying the *entirety* of that other country's constitution, which will of course differ from our Constitution in almost every detail.

Therefore, while it is tempting to think that there could be some room for international comparisons in textual argument, the problems inherent in drawing those comparisons suggest that the whole enterprise is probably best avoided.

E) Structural Argument

One might think, given this discussion of textualism and foreign law, that the situation would be even worse when it came to structural argument. After all, the biggest problem in using foreign decisions for textual purposes is that we cannot properly consider individual provisions in isolation, but rather must situate them within what you might call the structure of the entire constitutional text. You might, therefore, think that foreign comparisons would be just as inappropriate in making structural arguments as such, which by their very nature proceed not from any particular provision but from the entire constitutional structure. But, I would argue, this is not the case. The difference is that structural argument, at least in its purest forms, is *even more macroscopic* even than the most sophisticated and intratextual textual argument. At that rarefied level of generality, the differences between countries often fade away, or at least are reduced to sufficiently simple, large-scale distinctions that they can be easily discussed and accounted for. An example will demonstrate this point.

Consider *Carrington v. Rash*,[137] the case with which Charles Black began his seminal exposition of structural argument.[138] In that case, the Court struck down a Texas law prohibiting members of the military who moved into the state during their service from voting, ostensibly because it violated the Equal Protection Clause[139]. Black suggests, however, that this is not the real or the best grounds for the decision.[140] Under standard equal protection doctrine, he points out, the standard was whether the Texas law was "reasonable," and that "[t]he state of Texas put forward justifications which I for one find it impossible to classify as wholly capricious and arbitrary, or as 'unreasonable' in this constitutional sense."[141] However, he suggested, the decision was correct on alternate grounds:

137. 380 U.S. 89 (1965).

138. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 8 (Ox Bow Press, 1985) (1969).

139. *Carrington*, 380 U.S. at 96–97.

140. BLACK, *supra* note 138, at 10.

141. *Id*.

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> Carrington, I should rather have said, was a federal soldier, recruited by the national government to perform a crucial national function. Conceding that in every other way he qualified to vote, Texas said that, solely upon the showing that he was in performance of that function, he was not to vote . . . . My thought would be that it ought to be held that no state may annex any disadvantage simply and solely to the performance of a federal duty.[142]

Note that all I need to know about the American constitutional system in order to appreciate this argument is its federal nature. Indeed, assuming we think this logic is basically sound, it ought to be equally sound in every federal country around the world. The exact same reasons which lead Black to say that an American state cannot disenfranchise a member of the American military should also lead him to conclude that Australian states cannot disenfranchise members of the Australian military, that German Länder cannot disenfranchise members of the German military, and that Swiss cantons cannot disenfranchise members of the Swiss military.[143] The converse should hold: if something is truly intrinsic in the very nature of federalism, we should expect to see it present in every country that could fairly be called federal, or at least in every federal country where some very specific and compelling local circumstance did not dictate a different result.

The role of international comparisons in structural argument should at this point be obvious. If it is suggested that a case be decided one way because of some essential feature of one of the deep structures of American government, it will make for a powerful rebuttal to show that many other countries with that same feature do not do things that way. This, for instance, is the purpose for which Justice Breyer used an international comparison in *Printz v. United States*.[144] In that case, the Court (speaking through Justice Scalia) struck down a provision of the Brady Handgun Act which would have required local law enforcement officers to participate in its enforcement as being inconsistent with federalism.[145] This principle, the so-called "anti-commandeering" rule,[146] is essentially a structural one, and the *Printz* Court was explicit in its use of structural logic (though, characteristically, Scalia emphasized historical considerations as well).[147] Justice

142. *Id*. at 10–11.

143. Some of these countries may have specific constitutional right-to-vote provisions which would negate such laws more directly. This is unimportant; one of the structuralist's favorite games is to pretend a certain constitutional provision which quickly and easily provides some result were not there, and ask whether the result would still hold. *See id*. at 33-35.

144. 521 U.S. 898 (1997).

145. *Id*. at 935.

146. *Cf.* JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION 16 (2014).

147. *Printz*, 521 U.S. at 905 ("the answer . . . must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court"). Unsurprisingly, Justice

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Breyer's brief dissenting opinion (he joined Justice Stevens's principle dissent) consists almost entirely of the observation that many other federal systems, for instance those of Germany, Switzerland, and the European Union, *routinely* used local rather than federal officials to implement federal laws.[148] This, Breyer suggests, puts the lie to any claim that such "commandeering" is inconsistent with federalism. This is exactly the right structural use of international comparison, and Breyer's point is strengthened, not weakened, by noting that Germany, Switzerland, and the European Union are all, if anything, more solicitous of state independence than we are in the United States.[149] Now, this argument does not necessarily win the case; Scalia can, for instance, respond that *American* federalism is different for some important, perhaps historical reason. Alternately he might try to argue that Breyer's three examples are aberrations from the general rule among federal nations, and that circumstances peculiar to each caused those aberrations, or that the commandeering in these other nations was not really like the commandeering at issue in *Printz*. But Breyer has at least made a point that Scalia needs to answer; that is, he made a valid argument.

For a number of reasons, though, it is probably true that we must be more careful in using foreign law for structural purposes than for purely prudential ones. For one thing, not every aspect of the constitutional structure lends itself to such broad, essentialist reasoning. Federalism may in fact be unique among constitutional structures in the rich diversity of inferences which may be drawn from the very fact of its existence. For instance, structural separation of powers analysis is much more dependent on the particular way that our Constitution allocates power among the three branches. Note that Professor Black's *Carrington* argument does not depend at all on the way the Constitution allocates power between Congress and the states; a structural argument Professor Bobbitt offers concerning the legislative veto, however, is all about the details of the Article I legislative process.[150] Other countries, even ones which have a separation of powers regime broadly similar to ours, will get the details a bit different, making them less viable points of comparison. Moreover, with structural as with textual argument, one must be careful not to consider one aspect of a constitution in isolation. All cohere to form a working whole (this is, indeed, the entire point of

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Scalia's meditations on constitutional structure were less general than Professor Black's, and featured more assistance from historical arguments (e.g., using the Federalist Papers to demonstrate the original understanding of the constitutional structure). *Id*. at 918–24. However, they are labeled as structural arguments and I will therefore discuss them as such.

148. *Id*. at 976 (Breyer, J., dissenting).

149. After all, we do not normally strike down federal laws as being inconsistent with the nature of federalism because they give the states too much authority.

150. BOBBITT, *supra* note 4, at 83.

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structural argument). For instance, the way a country handles separation of powers at the federal level may say quite a bit about the nature of federalism in that country.[151] Therefore, even when making comparisons based on structural features such as federalism that are most susceptible to the kind of deep, essentialist reasoning Professor Black uses to explain *Carrington*, one must be wary about interference from features less amenable to such reasoning.

Thus, while structural argument is broadly speaking open to the use of international comparisons, such usage should be far more limited than in prudential argument, and is probably best suited to rebuttal.

F) Ethical Argument

In this as in so many things, ethical argument is perhaps the most inscrutable of the six modalities. The first thing to say, though, is that ethical argument proceeds from the *American* constitutional ethos.[152] It concerns the character of the *American* people, not of the British people or the German people or of any other people. Bobbitt is explicit in noting that the bases of ethical arguments may not be "shared by all cultures."[153] Now, this does not rule out that there may be an ethical argument *for* the use of foreign law; for instance, perhaps it is in the nature of the American people to follow international human rights law.[154] But that is not my concern. I want to see if ethical arguments may be made *from* foreign law, and to make such an argument there must be some way that foreign law tells us something about the character of the American people and of the American republic. This is not a ridiculous concept; one may often know oneself best by comparison with others. That, however, suggests that international comparisons are mostly relevant to ethical argument for *contrast*; that is to say, for identifying those ways in which America's ethos is distinctive. Here, the fact that other countries do things a certain way would be used as evidence that we should *not* do things that way. Can we find a more positive use for foreign law in ethical argument?

I believe we can. Ethical argument, as Bobbitt defines it, is chiefly concerned with placing certain *means* off-limits for both state and federal government.[155] Even when individuals fall under the legitimate authority of either level of government, they have the right not to be treated in certain

151. Indeed, Justice Scalia's opinion in *Printz* argues that the commandeering scheme at issue in that case would violate not only the principles of federalism but also those of separation of powers. *See Printz*, 521 at 922–23.

152. BOBBITT, *supra* note 4, at 94.

153. *Id*. at 96.

154. Or perhaps again it is not.

155. BOBBITT, *supra* note 4, at 150–53.

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ways[156]. A few such ethical principles Bobbitt offers are that "government may not mutilate persons save in self-defense, which means the defense of itself, its communities, and their inhabitants,"[157] and that "[g]overnment may not coerce intimate acts."[158] These are taken to be among the countless principles of the broader ethos of limited government of which the Bill of Rights was but a manifestation and which was applied to the states through the Reconstruction Amendments. But where do these principles come from? How do we know they are part of the American ethos of limited government? Bobbitt suggests that we should "try out our constitutional sense of the matter by testing the rule in various situations that might implicate it."[159] For instance, of the rule against coerced intimate acts he observes:

> For example, it would seem clear that a teacher in the public schools may not order students to perform sex acts as part of a sex education class. To take another case, does anyone think that a state might be able to order marriages as a remedy in paternity suits? Or, from another angle, could a state order conception between individuals thought to have desirable characteristics or among classes—say state workers—thought to be reproducing too little? Does anyone reading this page even entertain the possibility that the state might be able to order errant husbands or wives to rejoin the families they have abandoned?[160]

Because no one would doubt that all of these are impermissible, Bobbitt concludes that the rule against coerced intimate acts is a part of the American ethos, a conclusion which forms the basis for his alternate justification for the Court's holding in *Roe v. Wade*[161] that the abortion is a constitutional right.[162]

I suggest that for the purpose of determining whether a given principle is a genuine part of the American constitutional ethos, it cannot but help to see that a principle is commonly observed throughout the civilized world. After all, the character of the American people is distinctively their own, but there are many other countries whose character is broadly similar, to greater or lesser degree. If all of these other countries consider certain practices beyond the pale that strongly suggests that such practices violate the American ethos of limited government as well. This inference might be even stronger if we observe that those countries whose character we Americans basically respect uniformly observe the rule, but that countries or regimes with notoriously vicious character have violated it, and that these violations

156. *Id*.
157 *Id.* at 156.
158. *Id*. at 159.
159. *Id.* at 160.
160. *Id*.
161. 410 U.S. 113, 166 (1973).
162. BOBBITT, *supra* note 4, at 160–65.

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are part of why we revile them.[163] Better yet, perhaps even those countries we revile have followed the rule. Suppose, for instance, that even Nazi Germany did not force specific couples to reproduce as part of its eugenics program.[164] Would not this be utterly conclusive evidence of the truly universal force of Bobbitt's anti-coercion of intimate acts principle? Or, to put it another way: surely the American people and the American republic are not more depraved in this regard than the Nazis were.[165]

This, I think, is what is really going on in cases like *Roper v. Simmons*,[166] in which the Court held unconstitutional the execution of those who committed their crimes before the age of 18.[167] The *Roper* Court famously concluded its opinion with a survey of foreign law, finding "confirmation" for its holding 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."[168] This set off a flurry of (mostly unsuccessful) legislation against the use of foreign law in American courts.[169] But what role did this passage serve in the opinion? If we were to highlight each sentence of the *Roper* opinion with colors corresponding to the modality being used,[170] what color would this passage be? For the reasons given above, it cannot be the historical or doctrinal modalities, as foreign law has no place there. It could theoretically be prudential, but nothing in the passage suggests that it is.[171] No

163. This effect was likely behind the shift between Buck v. Bell, 274 U.S. 200 (1927), in which the Court upheld a forced sterilization program, and Skinner v. Oklahoma, 316 U.S. 535 (1942), in which it struck down a sterilization law on tenuous equal protection grounds. What happened between 1927 and 1942? The rise of Nazi Germany, a regime built on eugenics. Indeed, it is probably not a coincidence that the Court first really started enforcing constitutional rights around the time of the Second World War. *Cf*. W. Va. State Bd. of Educ. v. Barnett, 319 U.S. 624 (1943) (finding a First Amendment right against forced recitation of the Pledge of Allegiance).

164. I neither know nor care whether this was true; it is presented purely for hypothetical purposes.

165. This sounds like, but is not, an argument *for* consideration of foreign law. The point is not that being better than the Nazis is part of the American character (though it surely is), but that we just know the American character to be better than the Nazi character, and therefore may assume that any way in which the Nazis were not depraved, so too the American people must not be depraved.

166. 543 U.S. 551 (2005).

167. *Id*. at 578–79.

168. *Id*. at 575.

169. *E.g.*, Constitution Restoration Act of 2005, S. 520, 109th Cong. (2005). As an aside, this piece of legislation is one of the most flagrantly unconstitutional I have ever seen. Perhaps if its proponents understood the relationship between foreign law and the modalities of constitutional argument, they would not have supported such an absurd law.

170. *Cf*. BOBBITT, *supra* note 4, at 93–94.

171. Justice Kennedy does note that one of the prudential reasons underlying his decision, that "the instability and emotional imbalance of young people may often be a factor in the crime," *Roper*, 543 U.S. at 578, seems to be shared by other countries as a reason for not executing young offenders. He is not, however, using international experience to demonstrate that his decision will have good consequences, as we would expect in a prudential passage.

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mention is made of constitutional structure, and the Eighth Amendment is mentioned only briefly, for its connection with English history.[172]

Clearly, then, this is either an ethical argument or it is nothing which Professor Bobbitt would consider legitimate law. I believe it is the former. Even if it doesn't quite know it (as it often doesn't when it relies upon ethical arguments[173]), the Court is using the overwhelming international consensus against the execution of child offenders to show that the American ethos similarly prohibits such executions. For instance, surely the American republic is of a better character, and has greater respect for human dignity,[174] than the governments in Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of the Congo, and China, the only other nations to execute juvenile offenders since 1990, but as the Court notes, even *these* nations have repudiated the practice.[175] The argument flows in a similar pattern to Waldron's *ius gentium* model, but its underlying thrust is, I think, quite different. Executing juvenile offenders is not unconstitutional *because* every other nation has repudiated it; the Court is very, very explicit on this point.[176] Rather, it is unconstitutional because it is inconsistent with the character, the *ethos*, of the American republic and the people who inhabit it, *and we know this* in part by observing the universal condemnation of the practice. Now, it is always possible that this inference about the American ethos will in any given case be inaccurate. Perhaps there is some special reason why the American ethos is uniquely friendly to the execution of juvenile offenders. (Certainly America seems uniquely enthusiastic about capital punishment in general; whether this forms a part of our constitutional ethos is debatable.) But the fact that the inference may be rebutted does not mean that it cannot be a valid one.

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172. *Id.* at 577. Note that Kennedy is not making a true historical argument, for the present-day practices of the United Kingdom cannot have informed the original understanding of the Eighth Amendment (though contemporary British practices obviously might have). In truth his reasons for giving special weight to Britain seem somewhat confused; it is true that Britain is probably the country with the most similar character to the United States, but that has nothing to do with its connections to the Eighth Amendment's origins. (Note that, while Britain has never had a robust American-style system of judicially-enforced rights against government, it may still have an ethos of limited government in which Parliament simply refrains from passing laws considered repugnant to that ethos. Bobbitt expressly notes that the failure to pass laws which violate a certain principle cannot be taken as evidence against that principle's bona fides as part of the constitutional ethos. BOBBITT, *supra* note 4, at 159.).

173. *See* BOBBITT, *supra* note 4, at 103.

174. *Cf. Roper*, 543 U.S. at 578.

175. *Id.* at 577. The Court simply names the seven countries, but I think the implication is strongly that these are not the countries whose ethical (in both senses of the word) company America should be keeping.

176. *E.g., id.* at 575 ("This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility.").

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CONCLUSION

We have seen that foreign law finds a welcome home in some modalities and not in others. It seems categorically inconsistent with historical or doctrinal argument, Professor Waldron's heroic efforts to fit it into the latter notwithstanding. While it may theoretically fit within textual argument, the dangers of using it for such purposes are so great as to probably be prohibitive. On the other hand, comparisons with other countries are a perfectly natural and perhaps even an integral part of prudential analysis. Such comparisons may also be useful in structural reasoning, particularly to rebut a proffered structural argument, and may also be helpful in illustrating the admittedly distinctive character of the American people which forms the basis for ethical argument. The answer to the question of whether foreign law is relevant to deciding American constitutional cases is, therefore, yes, it is—but only for certain purposes. At least, this is the answer if we follow Bobbitt in deeming all six modalities legitimate parts of constitutional decision. A constitutional ideologue who denied the validity of prudential, ethical, and structural argument would be entitled, within their own ideology at least, to say that foreign law should not play any role in constitutional decision.[177]

With this understanding in hand, let us return to Justice Breyer and Justice Scalia, and consider whether their modal preferences can help explain their respective views on the foreign law question. Justice Breyer is not a constitutional ideologue; he will happily use any of the six modalities where appropriate.[178] However, Breyer displays a strong tendency toward the prudential modality.[179] For example, he recently wrote a book outlining his judicial philosophy called *Making Our Democracy Work*.[180] Justice Breyer is also notorious for his disdain for hard-and-fast doctrinal rules and his love of more flexible balancing tests; in one recent case, he wrote a one-paragraph concurring opinion whose sole purpose is to point out that the other Justices were, if only implicitly, using balancing tests.[181] It is not surprisingly, therefore, that he should be among the preeminent defenders of a role for foreign law in Supreme Court decisions: prudentialism is the mo-

177. The first two of these, prudential and ethical argument, are quite controversial indeed. I am not aware, however, of any major theory which denies the validity of structural reasoning.

178. For instance, Justice Breyer's opinion for the Court in NLRB v. Noel Canning, 573 U.S. ___, 134 S. Ct. 2550 (2014), made ample use of historical argument.

179. Justice Breyer is to be distinguished from ideological prudentialists like Professor Mark Tushnet or Judge Richard Posner, whose recent book *Overcoming Law* can be read as saying that all modalities other than prudentialism are a façade to mask ultimately prudential decision-making. *See* BOBBITT, *supra* note 7, at 126, 138–39; RICHARD A. POSNER, OVERCOMING LAW (1996).

180. BREYER, *supra* note 3.

181. Doe v. Reed, 561 U.S. 186, 202 (2010) (Breyer, J., concurring).

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dality most friendly to such a role. His "I may learn something" approach to the whole question[182] is characteristic of how a prudentialist would think about it. This is not surprising.

What of Justice Scalia? He is, of course, most notorious for his love of historical argument, but unlike Justice Breyer, Scalia *is* an ideologue. His originalist philosophy leads him to reject any role for the textual, prudential, or ethical modalities as Bobbitt describes them.[183] True, he does not avowedly reject structural argument; as we saw earlier, his opinion for the Court in *Printz* devoted a whole section to constitutional structure.[184] However, that very passage features no fewer than eight citations to the *Federalist Papers*.[185] It seems, therefore, that Scalia was concerned less with the essential nature of federalism, the stuff of which Charles Black-style structural arguments are made, but with the Founders' understanding of the constitutional structure. This is not really structural argument, but rather just another species of historical argument; indeed, conflating the two reeks of an attempt to subsume the former within the latter. There is one other modality Scalia does avowedly embrace, namely doctrinal argument. Though he is generally critical of the tendency of Court precedent to wander away from the original understanding, he does admit that he is a "faint-hearted originalist" and would not revert to the original understanding on every issue.[186] Unlike his colleague Justice Clarence Thomas, Scalia does not want to overrule the last eighty years of doctrine regarding Congressional authority to regulate the economy.[187]

Should we, then, be surprised that Scalia rejects a role for foreign law in interpreting the Constitution, when the only modalities he accepts as legitimate are the two in which such a role is the least appropriate? Foreign law is utterly irrelevant for discerning the Founders' original intentions, and while Scalia will sometimes diverge from the original understanding when a well-settled body of precedent requires him to do so, he can hardly be expected to give similar treatment to foreign precedent. Interestingly, though, I believe that Scalia is so vehement in his rejection of foreign law not merely because his preferred modalities are those in which it can have

182. Dorsen, *supra* note 1, at 523.

183. *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). Like most originalists, Scalia is often described as a textualist, but at least within the Bobbitt framework this is wrong. Unlike Justice Black, Scalia never asks what a constitutional provision would mean to the average American today, but rather what it meant to the average (well-educated and politically active) American when it was ratified.

184. *Printz*, 521 U.S. at., 918–25.

185. *Id.* at 919–22, 924.

186. Scalia, *supra* note 183, at 864.

187. *Compare* Gonzales v. Raich, 545 U.S. 1, 33 (2005) (Scalia, J., concurring), *with* U.S. v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

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no place. Something deeper is at work. Consider the way Bobbitt describes the modalogic signature of Judge Robert Bork, perhaps Scalia's closest jurisprudential cousin.[188] Like Scalia, Bork purported to follow the original understanding of the Constitution, but would leave undisturbed most existing precedent, including those he believed incorrect. What Bobbitt points out, though, is that Bork's choices whether to follow the historical modality or the doctrinal one were entirely driven by prudential concerns — and, Bobbitt realized, if prudential concerns are driving the question of which modality will govern a judge's decisions, that judge is at root a prudentialist.[189] Scalia's judicial philosophy is not so different. In fact, it is almost avowedly the same: what does it mean to be a "faint-hearted" originalist if not that you will follow the dictates of originalism unless the consequences would be too horrible to bear?

Now, this might seem like a contradiction; after all, if Scalia is just a prudentialist, then he is not so different from Breyer, and he should be similarly willing to use international comparisons to inform his prudential calculus. And for all I know he does. But the big difference between Breyer's prudentialism and Scalia's is that the latter goes unstated. It must do so, for it is essential for Scalia to maintain without exception that he is not a prudentialist, that his originalist philosophy gives his opinions an authority which the consequentialist nonsense of the nonoriginalists can never hope to attain.[190] This is certainly vital to maintaining his public image; perhaps it is also vital for his own self-conception.[191] And this is why it is so essential to Scalia not only not to use foreign law but to shout from the rooftops that he rejects its usage: any use or tolerance of foreign law would give away the game. It would show that really, what he is doing is not so different from what Justice Breyer or any of the other nonoriginalists are doing.

In the end, therefore, not only does understanding the modalities of constitutional argument help us understand why these two Justices take the positions they do on the propriety of citing foreign law, but their positions on that question helps us understand how they use the modalities themselves.

188. BOBBITT, *supra* note 7, at 99–101.

189. *Id.*

190. *Cf.*, Scalia, *supra* note 183, at 853–54 (disparaging various non-originalists for their use of what seem to be prudential considerations, among other things).

191. *Cf.* BOBBITT, *supra* note 7, at 99 ("perhaps the judge, in his desire for firm ground, has even concealed it from himself. . . .").

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