Notes

USING COMPARATIVE CONSTITUTIONAL LAW TO RESOLVE DOMESTIC FEDERAL QUESTIONS

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> "We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution."[1]

> Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem . . . .[2]

INTRODUCTION

Something startling happened at the United States Supreme Court in June 2003. In *Lawrence v. Texas*, a 6-3 decision invalidating a Texas statute[3] that made it a crime for two persons of the same sex to engage in certain intimate sexual conduct,[4] the Supreme Court did what it had never done before in the main body of text in such a momentous case.[5] Justice Kennedy, writing for the Court, cited

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1. Atkins v. Virginia, 122 S. Ct. 2242, 2264–65 (2002) (Scalia, J., dissenting) (quoting Thompson v. Oklahoma, 487 U.S. 815, 868–69 n.4 (1988) (Scalia, J., dissenting)).

2. Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (citations omitted).

3. TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2002).

4. Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003).

5. Joan Biskupic, *Supreme Court Citing More Foreign Cases*, USA TODAY, July 8, 2003, at 9A; *see also* David Keene, *Justices: When in Rome, Do as the Romans Do*, THE HILL, July 15, 2003, at 17 (noting that this "was the first time that the U.S. Supreme Court had ever cited foreign decisions and opinions in this way as major determining factors in a major case").

foreign legal precedent—specifically, a decision of the European Court of Human Rights, as well as examples of the legal culture of other nations—in support of the Court's ultimate holding. As Justice Kennedy noted: "[A]lmost five years before *Bowers* [*v. Hardwick*, 478 U.S. 186 (1986),] was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. . . . The [European] court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights,"[6] and that "[o]ther nations have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct."[7] Given this citation, it now appears that some form of comparative constitutional analysis may be used in the future to resolve domestic federal questions.[8] This use of comparativism, however, may portend a shift of tectonic plates[9]—a shift that has been occurring for some time without sufficient rationalization.

Like *Lawrence*, the Supreme Court's 2002 decision in *Atkins v. Virginia*[10] illustrates well this major fault line in contemporary constitutional adjudication concerning whether and when comparative constitutional analysis is appropriate authority to resolve domestic federal constitutional questions. In *Atkins*, the Supreme Court concluded that the execution of mentally retarded criminals is a cruel and unusual punishment prohibited by the Eighth Amendment.[11] As momentous as this holding is for Eighth Amendment jurisprudence generally, the majority opinion is noteworthy for another reason: it, like *Lawrence*, appeals to comparative law as persuasive authority to help resolve the constitutional question. While *Atkins* was not the first time that the

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6. *Lawrence*, 123 S. Ct. at 2481 (citation omitted).

7. *Id.* at 2483.

8. *See* Charles Lane, *Thinking Outside the U.S.*, WASH. POST, Aug. 4, 2003, at A13:

> The Supreme Court is going global—and not just in the sense that several of the justices have embarked on their annual summer voyages to European destinations.
>
> Rather, the court's own decision-making is beginning to reflect the influence of international legal norms, as well as rulings by courts in foreign countries.

9. *Cf. Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting) ("The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans.'") (citations omitted).

10. 122 S. Ct. 2242 (2002).

11. *Id.* at 2246–52.

Supreme Court employed comparative constitutional analysis,[12] the *Atkins* decision is salient because it exposes acutely the debate among the Justices concerning the relevance of comparative constitutional law.

Writing for a majority that included Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer, Justice Stevens dropped a curious footnote to bolster the claim that the execution of mentally retarded criminals "has become truly unusual, and it is fair to say that a *national* consensus has developed against it."[13] Among other authorities, the Court cited a brief filed on behalf of the European Union as *amicus curiae* in the different case of *McCarver v. North Carolina*,[14] in support of the proposition that "within the *world community*, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[15] While the majority noted that the practices of other countries were by no means dispositive, the consistency of such practices with legislative evidence provided "further support to our conclusion that there is a consensus among those who have addressed the issue."[16]

This citation set off a flurry of criticism in the dissenting opinions. To the dissenters, comparative constitutional law was inappropriate for determining the constitutional question in the case at bar. In Chief Justice Rehnquist's words:

> I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination. While it is true that some of our prior opinions have looked to "the climate of international opinion" to reinforce a conclusion regarding evolving standards of decency, we have since explicitly rejected the idea that the sentencing practices of other countries could "serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people."[17]

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12. *See infra* note 54 and accompanying text.

13. *Atkins*, 122 S. Ct. at 2249 (emphasis added).

14. Brief for the European Union as Amicus Curiae at 4, McCarver v. North Carolina, O.T.2001 (No. 00-8727). While originally submitted to support Ernest McCarver, the European Union brief was later filed on behalf of Daryl Atkins when McCarver's sentence was commuted by the North Carolina legislature, thus mooting *McCarver*.

15. *Atkins*, 122 S. Ct. at 2249 n.21 (emphasis added).

16. *Id*.

17. *Id.* at 2254 (citations omitted).

And Justice Scalia opined:

> [T]he Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of . . . members of the so-called "world community" . . . . I agree with the Chief Justice . . . . Equally irrelevant are the practices of the "world community," whose notions of justice are (thankfully) not always those of our people.[18]

Both dissents were joined by Justice Thomas,[19] thus setting up a tentative division of 6-3 concerning the relevance of comparative constitutional law for resolving Eighth Amendment questions—the same split that decided *Lawrence* a year later.[20]

Using the *Atkins* decision as a foil for reflection, this Note explores this tension by inquiring whether comparative constitutional analysis, while rich in substance, is incongruous to the task of interpreting the United States Constitution.[21] In short, comparative constitutional analysis presupposes that there is a public good and right political order to be achieved through *judicial* reason. Yet, the United States Constitution might presuppose, in contrast, that there is never a right political order to be achieved through the judiciary alone. In so arguing, this Note seeks to remedy a defect in the scholarly literature by illustrating that the current debate about comparative constitutional law is not a debate about comparativism as such. Rather, the debate exemplified in *Atkins* and *Lawrence* is a debate about the role of the judiciary within American democracy.

In Part I, this Note briefly describes what comparative constitutional law has meant and currently means for American courts. Building upon Part I, Part II puts forward the claim that one's view of the appropriateness of comparative constitutional analysis is ultimately a reflection of the interpretive posture of the advocate—judge, lawyer, or scholar—regarding the role of the Supreme Court in American democracy. As this Note argues, comparative constitutional analysis may be appropriate as part of a view towards interpreting the Constitution that relies heavily on a common law

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18. *Id.* at 2264–65 (citations omitted).

19. *Id.* at 2252, 2259.

20. Lawrence v. Texas, 123 S. Ct. 2472, 2475 (2003).

21. *Cf.* Printz v. United States, 521 U.S. 898, 921 n.11 (1997) (Scalia, J.) ("[C]omparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.").

conception of constitutionalism that provides the Court with an expanded, quasi-legislative role.[22] In contrast, a textualist school of constitutionalism might resist the utilization of comparative law[23] in order to exercise judicial restraint so as not to "impose upon those people of the United States norms that those people themselves (through their democratic institutions) have not accepted."[24] The exchange in *Atkins* is illustrative of this current divide on the Court and ultimately reflects Justice Scalia's remark in *Lawrence* that the Court's discussion of "foreign views" is "meaningless" yet "[d]angerous" dicta.[25] Finally, in Part III this Note urges restraint as to the use of comparative constitutional law so as to ensure that the law is not usurped from its organic ground: the American people.

I. COMPARATIVE CONSTITUTIONAL LAW

As the classics of constitutional theory—from Aristotle's *Politics*[26] to *The Federalist*[27]—make plain, a comparative perspective can be "helpful in the quest for a theory of the public good and right political order."[28] Comparative constitutional law can "represent a disinterested quest for a public philosophy and a statement of the rights and duties that would be assigned in a more perfect constitutional polity."[29] For nearly a century and a half, however, the Supreme Court of the United States gave short shrift to this

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22. *See infra* Part II.A–B.

23. *See infra* Part II.C–D.

24. Antonin Scalia, *Commentary*, 40 ST. LOUIS U. L.J. 1119, 1119 (1996).

25. *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting).

26. *See, e.g.*, ARISTOTLE, THE POLITICS bk. 4, ch. 3, at 241 (T.A. Sinclair trans., Penguin Books 1962) ("The reason for the plurality of constitutions lies in the plurality of parts in every state . . . . We see this in Chalcis and Eretria and, on the Asiatic side, Magnesia on the Maeander, and other areas.").

27. *See, e.g.*, THE FEDERALIST NO. 45, at 289–90 (James Madison) (Clinton Rossiter ed., 1961):

> We have seen, in all the examples of ancient and modern confederacies, the strongest tendency continually betraying itself in the members to despoil the general government of its authorities . . . . In the Achaean league it is probable that the federal head had a degree and species of power which gave it a considerable likeness to the government framed by the convention.

28. Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 JOHN MARSHALL J. PRAC. & PROC. 685, 692 (1976); *see also* VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW v (1999) ("Centuries ago scholars and political activists ranging from Aristotle to James Madison compared and analyzed systems of government to determine how best to constitute polities.").

29. Kommers, *supra* note 28, at 692.

remonstrance.[30] Remarkably, with the Court's recent decisions in *Atkins* and *Lawrence*, the stage may be set for an increased utilization of comparative constitutional analysis.[31] After first providing an overview of comparative constitutional law, this Part examines the use of comparativism by American courts and evaluates the argument that comparative constitutional law should be used to interpret the Constitution.

A. Overview

Comparative constitutional law is a subfield of the larger discipline of comparative law. With roots going back to the time of Aristotle, the academic discipline of comparative law traces its origins to Paris in 1900, when the French scholars Édouard Lambert and Raymond Saleilles[32] founded the International Congress for Comparative Law.[33] The goals of Messrs. Lambert and Saleilles were not modest. Armed with an unshakeable belief in progress, the two scholars set about developing a common law of humankind (*droit commun de l'humanité*) and a system of world law.[34] Later, with the atrocities of two world wars and the threat of nuclear annihilation looming, the belief in progress dimmed, but the comparative enterprise still flourished.[35] Today, the blossoming of comparative law is particularly evidenced throughout the European countries, which

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30. *Cf.* Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 585 (1998) ("[C]ourts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority." (quoting William Rehnquist, Constitutional Courts—Comparative Remarks, Address in Commemoration of the Fortieth Anniversary of the German Basic Law (1989), *in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchoff & Donald P. Kommers eds., 1993)).

31. This is a trend that perhaps has been germinating for some time. *See* Alain A. Levasseur, *The Use of Comparative Law by Courts*, *in* THE USE OF COMPARATIVE LAW BY COURTS 315, 325–31 (Ulrich Drobnig & Sjef van Erp eds., 1997) (illustrating the various uses of comparative law by the U.S. Supreme Court and other federal courts from 1907 to 1995).

32. For an excellent overview on these scholars comparing and contrasting their comparative methodologies, see generally Christophe Jamin, *Saleilles' and Lambert's Old Dream Revisited*, 50 AM. J. COMP. L. 701, 701–18 (2002).

33. KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 2 (Tony Weir trans., 3d rev. ed. 1998).

34. *Id.* at 3.

35. *See id.* ("The belief in progress, so characteristic of 1900, has died. World wars have weakened, if not destroyed, faith in world law. Yet despite a more sceptical [*sic*] way of looking at the world, the development and enrichment of comparative law has been steady.").

enjoy rich cross-fertilization of legislative and judicial decisionmaking in the areas of both public and private law.[36]

Modern comparative law is seen by many as a science, the ultimate aim of which is knowledge.[37] As the leading textbook on comparative law notes, the basic rule of comparativism is that "different legal systems give the same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure, and style of operation."[38] Such an approach to comparative law has been termed functionalism.[39] Functionalists see political institutions as performing certain tasks that are common to all systems of governance.[40] While this approach to comparative law has been adopted in many countries, including Canada, Germany, and South Africa,[41] the American experience with comparative law has been more hesitant.[42]

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36. *See generally* JACKSON & TUSHNET, *supra* note 28 (compiling decisions of various European courts, as well as other foreign legal materials).

37. ZWEIGERT & KÖTZ, *supra* note 33, at 15.

38. *Id.* at 39.

39. *See id.* at 34 ("The basic methodological principle of all comparative law is that of *functionality*."). Professor Mark Tushnet notes that Justice Breyer has perhaps adopted this functionalist approach. Mark Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 325, 326 (1998).

40. *See* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1238 (1999):

> A functionalist might claim, for example, that such systems must have some institutions to resolve conflicts among their components, or mechanisms for ensuring some stability in a changing extra-political environment. Functionalists naturally think in comparative terms, for only by examining different political systems can they identify the functions common to all and the institutions they think serve those functions. Functionalism faces challenges from two directions. It must avoid specifying functions so generally that its purported insights become banal. But it must also avoid specifying functions so precisely that every institution performs a complex set of functions unique to it as an institution.

(citations omitted).

41. *Cf.* JACKSON & TUSHNET, *supra* note 28, at 455–607 (illustrating the approach to judicial review taken by various constitutional courts). The basis for this utilization perhaps points to a particular role of judicial authority in these countries. For instance, the Supreme Court of Israel might engage in comparative analysis. But, such utilization foreshadows a view as to the role of the court in that society. *Cf.* Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 27–28 (2002) ("The primary concern of the supreme court in a democracy is not to correct individual mistakes in lower court judgments. . . . The supreme court's primary concern is broader, systemwide corrective action. This corrective action should focus on two main issues: bridging the gap between law and society, and protecting democracy.") (citations omitted).

42. *See generally* Jackson, *supra* note 30, at 585. (detailing the "ambivalent resistance of U.S. constitutional law to explicit learning and borrowing from other nations' constitutional decisions and traditions").

B. The American Experience with Comparative Constitutional Law

In America's courts, "[t]here is an increasing use of foreign law . . . associated with the internationalization of civil procedure and criminal procedure."[43] Such utilization is "tied to the growth in trade and investment across national borders and the ease of long distance travel and communication," and it "manifests itself when a domestic court must deal with a foreign law issue, collect evidence abroad, extradite a fugitive, or obtain jurisdiction over a foreign country defendant."[44] Outside these fields, there is "scant legal literature on the use of foreign and comparative law in United States courts because courts rarely cite foreign law."[45] This development is quite curious because before the American Civil War, courts regularly referred to Roman law, civil law (that is, the law of continental Europe), and English common law.[46]

The memorable case of *Pierson v. Post*[47] is instructive. In that case, the Supreme Court of New York held that wild animals become the property of a person when mortally wounded or entrapped, so as to be deprived of their natural liberty by that person.[48] In order to reach this result, the majority opinion delivered by Justice Thompkins carefully canvassed the writings of Puffendorf, Barbeyrac, and Grotius.[49] Yet, in the twentieth century, such appeals were few and far between, except for the occasional reference to the writings of Blackstone.[50] Various reasons may account for this shift, but it is possible that the influence of the historical school of jurisprudence, coupled with "the adequacy of the West Publishing Company's national reporter and digest system in accumulating a corpus of

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43. David S. Clark, *The Use of Comparative Law by American Courts*, *in* THE USE OF COMPARATIVE LAW BY COURTS, *supra* note 31, at 297.

44. *Id*.

45. *Id*.

46. *See generally* Levasseur, *supra* note 31, at 316–24. While beyond the scope of this Note, more work remains to be done exploring these early efforts at comparativism and applying them to the modern resurgence.

47. 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

48. *Id.* at 176–79.

49. *Id.* at 176–78.

50. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 715 (1999) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *234–35); Stanford v. Kentucky, 492 U.S. 361, 368 (1989) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *23–24). A Westlaw search of the U.S. Supreme Court database ("SCT") within the period January 1900 to June 2003 with the query "William Blackstone," or "W. Blackstone," or "Blackstone," yielded 309 cases in which Blackstone and/or his *Commentaries* were cited.

American law, and the general social force of nationalism" contributed to the ending of the brief American experiment with comparative law.[51]

In short, the American experiment with comparative law was limited to a time in American history when there was little or no indigenous precedent to draw upon to reach conclusions of law. Thus, American judges freely canvassed the law of other nations to extend the common law to American situations.[52] Once an indigenous common law developed, the perceived need for comparative analysis was not as great and courts became less inclined to look outside of American borders.

Like American courts generally, the United States Supreme Court has been wary of using comparative constitutional analysis.[53] Although comparative law has been used by various Justices at isolated times,[54] on multiple occasions, the present Court has rejected

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51. Clark, *supra* note 43, at 298.

52. *See* DARGU DAS BASU, COMPARATIVE CONSTITUTIONAL LAW 10 (1984) ("[I]t is natural that while interpreting those provisions of the American Constitution which embody common law principles, the American judges would seek light from English precedents where the common law concept had been explained. This broad principle . . . has been emphasized by the Supreme Court ever since its inception." (footnote omitted) (citing Calder v. Bull, (1798) 3 Dall. 386; Cummings v. Missouri, (1867) 4 Wall. 277)).

53. It is important to note the distinction between using the law of another country (e.g., the common law of England) for determining the meaning of specific words when the Constitution was written (e.g., using the common law as of 1791 to determine the distinction between law and equity) and using comparative analysis to interpret the Constitution in the present (e.g., to understand "evolving standards of decency"). The former is done frequently to give context and meaning to American constitutional history and tradition. The latter, and the use of comparative analysis which this Note discusses, is perhaps more questionable. For further discussion, see *infra* note 131 and accompanying text, and Part III.

54. *See, e.g.*, Printz v. United States, 521 U.S. 898, 921 n.11, 976 (1997) (Breyer, J., dissenting) (noting that other nations with federal systems "have found that local control is better maintained" by allowing the national government to use local governments to administer national law); Roe v. Wade, 410 U.S. 113, 129–33 (1973) (Blackmun, J.) (citing to Persian, Greek, Roman, and English laws to show that abortion before quickening was not an indictable offense); New York v. United States, 326 U.S. 572, 580, 583 (1946) (Frankfurter, J.) (appealing in two footnotes to the laws of Argentina, Canada, and Australia to uphold the right of Congress to tax the state of New York on sales of mineral waters); Muller v. Oregon, 208 U.S. 412, 419–20 (1907) (Brewer, J.) (adopting as persuasive authority the various foreign statutes initially presented by the soon-to-be Justice Louis Brandeis in the famous "Brandeis Brief"); *see also* David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 544–49 (2001) (illustrating a history of the uses of comparative law by individual Supreme Court Justices).

outright the use of comparative constitutional analysis.[55] But, given the use of comparative constitutional analysis in *Atkins* and *Lawrence*, the tide may indeed be turning.

C. The Aims of Comparative Constitutional Law

Comparativists have set forth various aims of comparative constitutional law.[56] To many scholars, the use of comparative constitutional law by U.S. courts is a logical extension of the process of globalization.[57] Some judges, such as Judge Guido Calabresi of the United States Court of Appeals for the Second Circuit, have acknowledged this argument, especially in the context of comparing judicial systems which were put in place after World War II under Allied occupation.[58] An analogous sentiment was expressed recently by Chief Justice Rehnquist, who urged American courts to look to

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55. *See, e.g.*, *Printz*, 521 U.S. at 921 n.11 (Scalia, J.) ("[C]omparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one."); Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989) (Scalia, J.):

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

(citations omitted). *But see* Atkins v. Virginia, 122 S. Ct. 2242, 2249–50 n.21 (2002) (Stevens, J.) ("[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.").

56. *See, e.g.*, Vicki C. Jackson, *Narratives of Federalism*, 51 DUKE L.J. 223, 254–63 (2001) (emphasizing that comparative constitutional law may help one understand what the law is, may help one understand one's own constitutional tradition better, may help elucidate different functional concerns to similar questions, and may strengthen the quality of judicial decisions by providing a benchmark against which they can be judged). For a thoughtful critique of using comparative law, see generally Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411 (1985) (criticizing the continuing "endless search for a neutral stance and objective status" within comparative law).

57. *E.g.*, Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1103–04 (2000); Tushnet, *supra* note 40, at 1230–38.

58. *See* United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995):

> At one time, America had a virtual monopoly on constitutional judicial review, and if a doctrine or approach was not tried out here, there was no place else to look. That situation no longer holds. Since World War II, many countries have adopted forms of judicial review, which—though different from ours in many particulars—unmistakably draw their origin and inspiration from American constitutional theory and practice. These countries are our "constitutional offspring" and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children.

(citations omitted).

"the decisions of other constitutional courts to aid in their own deliberative process."[59] Further, as Justice O'Connor has articulated: "I think that I, and the other Justices of the U.S. Supreme Court, will find ourselves looking more frequently to the decisions of other constitutional courts. . . . All of these courts have something to teach us about the civilizing functions of constitutional law."[60] And Justice Breyer opined in the wake of *Lawrence*:

> We see all the time, Justice O'Connor and I, and the others, how the world really—it's trite but it's true—is growing together . . . . Through commerce, through globalization, through the spread of democratic institutions, through immigration to America, it's becoming more and more one world of many different kinds of people . . . . And how they're going to live together across the world will be the challenge, and whether our Constitution and how it fits into the governing documents of other nations, I think will be a challenge for the next generations.[61]

The above examples would seem to confirm that comparative law should be used by judges to inform their decisions, and is being used to do the same.

Yet all is not well in the land of comparative constitutionalism. Some of the current Justices have expressed antagonism to the consideration of foreign law in constitutional interpretation.[62] When confronted with petitioners who argued that twenty-plus years on

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59. William Rehnquist, Constitutional Courts—Comparative Remarks, Address in Commemoration of the Fortieth Anniversary of the German Basic Law (1989), *in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchoff & Donald P. Kommers eds., 1993). Notice, however, that this sentiment is not in accord with the Chief Justice's pronouncements in *Atkins*. *See, e.g.*, Atkins v. Virginia, 122 S. Ct. 2242, 2254 (2002) ("I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination."). Or is it? The Chief Justice's use of the words "deliberative process" might imply that through transnational judicial conferences, for instance, judges might benefit from the comparative enterprise, even though such comparativism would never manifest itself explicitly in the jurisprudence of the Court.

60. Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, INT'L JUD. OBSERVER, June 1997, at 2.

61. John H. Cushman, Jr., *O'Connor Indicates She Will Remain on Court*, N.Y. TIMES, July 7, 2003, at A1.

62. *See, e.g.*, Atkins v. Virginia, 122 S. Ct. 2242, 2254 (2002) (Rehnquist, C.J., dissenting); Knight v. Florida, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari); Printz v. United States, 521 U.S. 898, 921 n.11 (1997) (Scalia, J.).

death row was cruel and unusual punishment,[63] Justice Thomas recently put his view of comparative analysis this way:

> I write only to point out that I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed. Indeed, were there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.[64]

Comparative constitutional analysis, to be sure, did not help these petitioners. Nevertheless, the majority decisions in *Atkins* and *Lawrence* point to a purposeful use of comparison in reaching the final decision.

The primary aim of comparativism from the judge's perspective is that it serves as an aid in interpretation.[65] Recourse to such an aid would not be needed should there be unequivocal national rules which could be applied to the case at hand.[66] However, even the most committed textualist encounters times where it is necessary to plug holes in the process of interpretation.

There are a variety of ways in which the legal propositions used to plug holes can be characterized from a constitutional point of view. According to Professor Phillip Bobbit, legal propositions may be differentiated along six modes of constitutional argument:

> historical (relying on the intentions of the framers and ratifiers of the Constitution); textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary "man on the street"); structural (inferring rules from

63. Petition for Writ of Certiorari at 9, Knight v. Florida, 528 U.S. 990 (1999) (No. 98-9741).

64. *Knight*, 528 U.S. at 990 (Thomas, J., concurring in denial of certiorari). The reference to "proponents" above refers in part to Justice Breyer's dissent from the denial of certiorari which cites the mentioned foreign legal precedent. *See id.* at 995–96.

65. *Cf.* Kommers, *supra* note 28, at 695 ("German and American constitutional principles and theories could be blended fruitfully and seasonably to produce more equitable balances between rights and duties within the American political order.").

66. *See* ZWEIGERT & KÖTZ, *supra* note 33, at 18 ("It is clear that such foreign material cannot be used in order to bypass unequivocal national rules . . . . But the question may be raised when the construction of the rule is doubtful, or where there is a lacuna in the system which the judge must fill.").

> the relationships that the Constitution mandates among the structures it sets up); doctrinal (applying rules generated by precedent); ethical (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and prudential (seeking to balance the costs and benefits of a particular rule).[67]

Some scholars have argued that comparative constitutional law should be added to this typology to help expound the Constitution.[68] As Professor Vicki Jackson has noted, judges might regard "legal sources, including the decisions of other constitutional courts, as being binding, or as nonbinding but relevant authority that must be considered, or as of only possible relevance and persuasive value that may be considered."[69] David Fontana has argued that judges should consider using comparative constitutional law when American sources do not provide clear answers to the question the judge must answer.[70] At least one Justice has accepted this reasoning, noting that the experience of other countries may indeed "cast an empirical light on the consequences of different solutions to a common legal problem."[71] Such arguments, however, presuppose a certain way of

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67. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991). This typology is too simplistic to cover the rich and varied literature on constitutional interpretation. Yet, for the purposes of this Note, it provides a common hermeneutical lens without requiring that a position be taken regarding the "deeper" discussion of constitutional interpretation. A word of thanks goes to Professor Ralf Michaels for challenging my use of this typology and for helpful comments, both here and elsewhere.

68. *E.g.*, Slaughter, *supra* note 57, at 1103; Tushnet, *supra* note 40, at 1225.

69. Jackson, *supra* note 56, at 258 n.164 (emphasis removed).

70. *See* Fontana, supra note 54, at 556–57:

> The judge should use the comparative legal materials only if the contextual differences are relatively minimal—if the problems faced by importing a solution or fact from another country are relatively insignificant. The judge should then consider whether the comparative materials have any comparative advantages, the paradigmatic case of when comparativism would be appropriate, or simply provide another "data point" (factual or legal). Within the framework of a trial or appeal, a judge should encourage litigants to argue comparative constitutional law to courts (when appropriate), sometimes even using expert witnesses on foreign law who can help the judge determine the relevant comparative constitutional law and its transferability. Judges who use comparative constitutional law and solicit expert witnesses to help them do so will encourage litigants to argue and brief foreign law, thereby making the judicial use of comparative constitutional law more accurate because it will be based on a number of different sources.

(footnote omitted).

71. Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting); *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) ("The approach taken [in some federal] cases is consistent with that of other constitutional courts facing similar complex constitutional problems.").

viewing the method of interpretation undertaken by the judge. For those willing to accept comparison as an appropriate interpretive tool, the Constitution is presumably seen as part of the common law tradition, as opposed to a text that is to be interpreted in light of the context of the words.[72] But, should the courts be in the business of displacing the "messiness of politics with the ostensible reasonability and order of judicial decision-making?"[73] In the next Part, this Note puts forward the claim that the arguments in favor of comparative constitutional analysis are pended to a certain conception of constitutional interpretation grounded in the common law and, more generally, to the role of the judiciary in a democracy.

II. THE JUDICIAL FUNCTION

What is the role of the judge in interpreting the American Constitution? Providing an answer to this question offers a glimpse into the role of comparative constitutional analysis emphasized by the majority and minority in *Atkins*, and into the greater debate concerning comparative constitutionalism. As the following Section makes clear, one's view of the appropriateness of using comparative constitutional analysis correlates closely with one's view of the role of the judiciary within the United States' constitutional framework, as well as one's view of the Constitution itself.

A. The Constitution and the Common Law

Like other countries descended from the English legal system, the United States is part of the common law tradition.[74] Yet,

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72. *Cf.* ANTONIN SCALIA, A MATTER OF INTERPRETATION 13 (1997):

> But though I have no quarrel with the common law and its process, I do question whether the *attitude* of the common-law judge—the mind-set that asks, "What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?"—is appropriate for most of the work that I do, and much of the work that state judges do.

73. Paul D. Carrington & H. Jefferson Powell, *The Right to Self-Government After* Bush v. Gore, Duke Law School Public Law and Legal Theory Working Paper No. 26, at 16 (Dec. 2001), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=293934 (on file with the *Duke Law Journal*).

74. BASU, *supra* note 52, at 10. Professor Melvin Eisenberg has defined the American experience with the common law as follows:

> Much of our law derives from rules laid down in constitutions, statutes, or other authoritative texts that the courts must interpret but may not reformulate. The common law, in contrast, is that part of the law that is within the province of the courts themselves to establish. In some areas of law, like torts and contracts, common law rules predominate. In other areas, like corporations, they are extremely

American history has shown that codification through legislative action has served to gradually replace part of the common law.[75] The first codification in American history was likely the original Articles of Confederation, followed shortly thereafter by the United States Constitution.[76] The key to understanding this codification lies in part in understanding whether or not the United States Constitution was preservative or transformative in scope.[77] Preservative constitutions, like the English (unwritten) constitution, tend to enshrine (so as to protect) longstanding practices that might be endangered by momentary lapses and passions of the public will.[78] In contrast, transformative constitutions, such as the South African Constitution, attempt "not to preserve an idealized past but to point the way toward an ideal future."[79] Transformative constitutions, if bracketed with judicial authority, may produce an activist court, which readily displaces the views of the legislature in favor of an ideal future. For instance, in the words of the Constitutional Court of South Africa:

> [T]he Constitution [of South Africa] is not simply some kind of statutory codification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from [apartheid and racism] . . . to a constitutionally protected culture of openness and democracy and universal human rights for . . . all ages, classes, and colours. . . . The past was pervaded by inequality, authoritarianism, and repression. The aspiration of the future is based on what is "justifiable in an open and democratic society based on freedom and equality." It is premised on a legal culture of accountability and transparency. The relevant provisions of the Constitution must therefore be

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important. In all areas, even those that are basically constitutional or statutory, they figure at least interstitially.

MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 1 (1988).

75. BASU, *supra* note 52, at 10.

76. Throughout the colonial period, the question of the legal force of the common law had been a source of debate. FRED V. CAHILL, JR., JUDICIAL LEGISLATION: A STUDY IN AMERICAN LEGAL THEORY 16 n.26 (1952). Opposition to the common law was at times so intense that acts were passed to prevent its citation. *Id*. The common law was opposed "because it was British and because it contained rules that were not liked in this country." *Id*. Codes were urged "because they were more democratic and because it was thought that a written law would be at once less complex and easier to understand." *Id*.

77. CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 67 (2001).

78. *Id*.

79. *Id.* at 68.

> interpreted so as to give effect to the purposes sought to be advanced by their enactment.[80]

While the United States Constitution may have transformative elements such as the Reconstruction-era amendments,[81] looked at as a whole it is highly preservative.[82] And it is preservative of a certain model of government.[83] The United States Constitution sought to codify the common law inherited from the British, as modified through the American experience, into a set of precise and limited enumerated powers to create a federal government characterized by a separation of powers. James Madison noted that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined."[84] Madison further opined that those powers which "are to remain in the State governments are numerous and indefinite."[85] Madison likewise highlighted the point of limited enumerated powers in his address to the Virginia delegates, convened in Richmond on June 2, 1788, to vote on the new constitution.[86] Responding to Patrick Henry, Madison argued that "the Constitution did not give the federal government authority to intrude on the individual liberties of citizens, and that therefore explicit guarantees were unnecessary."[87] In short, to Madison, the Constitution was a

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80. Shabalala v. Attorney-General, Transvaal, 1996 (1) SALR 725, 740 (CC) (citations omitted).

81. S*ee* SUNSTEIN, *supra* note 77, at 68 (arguing that the United States Constitution has "transformative elements, both in the original rejection of the monarchical heritage and in the constitutional reforms of the Civil War era, rejecting slavery and authorizing the national government to do a great deal to promote equality") (citation omitted).

82. *See* THE FEDERALIST NO. 45, *supra* note 27, at 293 (James Madison):

> If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union, than in the invigoration of its ORIGINAL POWERS. The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained. The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing Congress by the Articles of Confederation. The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them.

83. *See* Richard Hodder-Williams, *The Constitution (1787) and Modern American Government*, *in* CONSTITUTIONS IN DEMOCRATIC POLITICS 73, 76 (Vernon Bogdanor ed., 1986) ("[T]he primacy of the legislative branch is symbolized by the first article's attention and concern for Congress; the executive branch was consciously relegated to second place.").

84. THE FEDERALIST NO. 45, *supra* note 27, at 292 (James Madison).

85. *Id*.

86. JAMES F. SIMON, WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES 22 (2002).

87. *Id.* at 24.

document that did not go beyond the limited and specific enumerated powers therein granted to a federal, as opposed to a national, government.

Regardless, the Constitution had to be interpreted, and the task of interpretation fell to the judiciary.[88] At the founding, the Framers faced a dilemma "between a global rejection of any and all methods of constitutional construction and a willingness to interpret the constitutional text in accordance with the common law principles that had been used to construe statutes."[89] The same tension was exposed within the judiciary regarding appropriate tools of analysis.[90] Ultimately, the Court of the 1950s and 1960s firmly ensconced "the preference for judge-made over enacted law that had been so evident in constitutional interpretation at the turn of the century."[91] How did this come to be? As Justice Scalia has argued, the temptation to "carry on the common-law tradition" is to blame.[92]

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88. As William Howard Taft articulated:

> In the United States, however, we have a written Constitution. It declares the fundamental law and it imposes limitations upon the powers of all branches of the Government. Now if any branch of the Government exceeds those powers to which it is thus limited, the act is without authority and must be void. The question is who is to determine whether the act does exceed the authority given. The action of the Supreme Court is confined to the hearing and decision of real litigated cases and the exercise of judicial power between parties. It is essential to the carrying out of this jurisdiction that the court should determine what the law is governing the issue between the litigants.

WILLIAM HOWARD TAFT, POPULAR GOVERNMENT 163 (1913); *see also* THE FEDERALIST NO. 78, at 467–68 (Alexander Hamilton) (Clinton Rossiter ed., 1961):

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. . . .
>
> [This conclusion does not] by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.

89. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 887 (1985).

90. Mary Ann Glendon, *Comment*, *in* A MATTER OF INTERPRETATION 107–08 (Amy Gutmann ed., 1997).

91. *Id.* at 108.

92. ANTONIN SCALIA, A MATTER OF INTERPRETATION 11–14 (1994); *See also* KENNETH W. STARR, FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE 26 (2002) ("It is as Justice Scalia sees it, the temptation to carry on the common-law tradition. Keep making the law. Judges weave contract law, tort law, property law, so why not the 'higher law' of the Constitution?").

This preference for the common law method of judging has led to the current positions in the Supreme Court concerning comparative constitutional analysis. Professor Patrick Glenn articulates well the position that, as architects of judge-made law, judges are "called upon to decide cases or enact norms or give opinions, but the search for law is too important for any potential external source to be eliminated *a priori*."[93] But this *ratio decendi* only holds if the judge considers the task of decisionmaking to be flexible, and places at the apex of the political order the judiciary itself.

B. The Common Law Approach Exemplified

The common law approach to constitutional interpretation produces a flexible approach to decisionmaking. Under this approach, the judge is not constrained by simple text or structure, but has to take into account, as a scientist would, the totality of all evidence in order to render a decision. In this mold, comparative constitutional analysis is appropriate, for it affords the judge an opportunity to see the law as never definitively given and "always to be sought, in the endlessly original process of resolution of individual disputes through law."[94]

Justice Stevens's approach to the resolution of the legal issue in *Atkins* is indicative of this method. The majority opened by referencing the explicit text of the Eighth Amendment that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[95] Emphasizing the accumulation of precedent to determine what is cruel and unusual, the Court noted that through case law "we have read the text of the amendment to prohibit all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive."[96]

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93. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 293 (1987).

94. *Id*.

95. Atkins v. Virginia, 122 S. Ct. 2242, 2246 (2002). It bears repeating that throughout this Note the *Atkins* decision is being used as a foil to explore the issue of comparative constitutional analysis. It is not the purpose of this Note to deal with the specific question of whether in *Atkins*, or in any case involving the Eighth Amendment, comparative analysis can inform the agreed-upon standard. To be sure, there are arguments and counterarguments to be made exploring this specific question. My point here is more limited and, I believe, epistemologically more important. In short, the current debate about comparative constitutional law is not a debate about comparativism as such. Rather, the debate exemplified in *Atkins* is a debate about the role of the judiciary within American democracy.

96. *Id.* at 2246 n.7.

Next, the Court explained how the evaluation of excessiveness is to be made.[97] Again, an appeal to case law led the majority to conclude, quoting *Trop v. Dulles*,[98] that "[t]he basic concept underlying the Eighth Amendment is nothing less than the *dignity of man*" and the Amendment "must draw its meaning from *the evolving standards of decency that mark the progress of a maturing society*."[99] The particular words used by the Court are important. This is not about a particular *text* as such, but it is about the "basic *concept* underlying the Eighth Amendment."[100] To the majority, the appropriate approach to be taken when interpreting the Amendment is a conceptual approach evidencing concern for both human dignity and evolving standards of decency. And such a conceptual approach might encompass broader evaluations of evidence than would a textual or structural approach.

Continuing with the analysis, the Court elucidated that the evolving standards are informed by an appeal to "contemporary values," as emphasized most clearly and reliably by legislation enacted by "the country's legislatures."[101] But, adding up the legislative enactments does not resolve the issue. The majority noted that the judgment of the Court itself must be "brought to bear" by asking "whether there is reason to disagree with the judgment reached by the citizenry and its legislators."[102] In sum, what is cruel and unusual punishment for the purposes of the Eighth Amendment is not simply a textual question. Rather, the determination is a conceptual question that relies on evaluating the evidence of state legislative pronouncements in light of a standard of reasonableness as determined by the Supreme Court. In this approach, comparative constitutional analysis can serve an important function.[103]

Anticipating the ultimate outcome, the majority emphasized that "it is not so much the number of these States that is significant, but the consistency of the direction of change" that aids in the

97. *See id.* at 2247 ("A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail.").

98. 356 U.S. 86 (1958).

99. *Atkins*, 122 S. Ct. at 2247 (emphasis added).

100. *Id.* (emphasis added).

101. *Id*.

102. *Id.* at 2247–48.

103. Notice that this is similar to the approach advocated by the Constitutional Court of South Africa. *See supra* note 80 and accompanying text.

determination of whether or not the execution of mentally retarded individuals is cruel and unusual punishment.[104] After canvassing the law of various states, the majority concluded that the practice of executing the mentally retarded "has become truly unusual, and it is fair to say that a national consensus has developed against it."[105]

This statement is particularly interesting for it is buttressed by a footnote that cites the practice of European countries for determining that a national consensus has developed.[106] One might query how the practice of *European* countries helps this majority determine whether or not a *national* consensus has developed against execution of the mentally retarded. In the strict sense, it does not. A *national* consensus would be totally confined to the *nation* that is consenting. But, in a looser conceptual sense—a sense that places not the legislature but the Court at the apex of constitutional governance—comparative analysis does help resolve the question. For, determination of the Eighth Amendment issue is a conceptual question that must be made by the Court, taking into account various indices of reasonableness and not just what is determined reasonable by the state legislatures. In this approach, comparative constitutional analysis allows the judge to determine a "'better solution' for his time and place."[107] And the majority in this case employed constitutional analysis to determine in this time and place that the execution of the mentally retarded was cruel and unusual punishment.

What are the implications of this approach? Effectively, the majority has made three jurisprudential moves. First, it has determined that the Eighth Amendment is not mere text, but that it is a concept that has to be interpreted based on the common law precedent of excessiveness.[108] Second, the majority has emphasized that the determination of what is excessive is a determination that must be made by reference in some degree to state legislative pronouncements.[109] Third, the majority has determined that the pronouncements of state legislatures do not *per se* resolve the issue, and that the Court itself is the ultimate arbiter of what is excessive in

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104. *Atkins*, 122 S. Ct. at 2249.

105. *Id*.

106. *See id.* at 2250 n.21 ("[W]ithin the *world community*, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.") (emphasis added).

107. ZWEIGERT & KÖTZ, *supra* note 33, at 15.

108. *Atkins*, 122 S. Ct. at 2246–47.

109. *Id.* at 2247.

terms of evolving standards of decency.[110] With this approach, comparative constitutional analysis provides "advice on legal policy"[111] that aids in the Court's decision. There is something striking, however, about this approach. Is the role of the Court to advise on legal policy or to expound the law? And should the Court be the institution empowered, even above a national consensus of state legislatures, to determine by its own standards that a punishment is excessive? The dissenting opinions in *Atkins* foreshadow an answer to these questions by emphasizing the separation of powers, federalism, and democratic concerns with this approach.

C. Contra *Comparative Constitutional Analysis*

The dissenting opinions in *Atkins* articulate well the various pitfalls of comparative analysis. The dissenters note that the Constitution is a text that should be interpreted through recourse to textualism and structuralism, if due deference is to be given to concerns of federalism, separation of powers, and democracy.

The textualist approach is one grounded in the separation of powers and reservations as to the completeness of the common law method.[112] The completeness of the common law method has been called into question by legal realism.[113] Legal realism challenged the idea that the judge discovered the law by showing that the judge makes the law.[114] This in turn poses problems for a framework of government that is divided between a legislative branch and a judicial one. With this realization, textualists argue that "the main danger in judicial interpretation . . . is that the judges will mistake their own predilections for the law."[115] In a similar vein, James Madison, referencing Montesquieu, noted that if "the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the*

110. *Id.* at 2247–48.

111. ZWEIGERT & KÖTZ, *supra* note 33, at 11.

112. In beginning this Section with a brief summary of textualism, I mean not to imply that the Chief Justice or Justice Scalia is using this view of the Constitution as their only means of interpretation. Rather, by beginning with textualism, I hope to set the stage for the more general discussions of text, structure, federalism, separation of powers, and democracy that are emphasized throughout the dissenting opinions and this Section.

113. SCALIA, *supra* note 72, at 10.

114. *Id.*

115. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989).

legislator."[116] Should the legislative function and the judicial function be joined, there would be a greater chance of tyranny.[117] For, in so doing, the judicial function usurps the ability of the people to say what the law is and to determine for themselves what kind of constitutional polity to live in.

Perhaps the clearest statement of this position is put forward by Justice Scalia in his essay *A Matter of Interpretation*.[118] There, Justice Scalia emphasizes that the Justices of the U.S. Supreme Court inherited a common law tradition whereby the judges themselves, through deciding cases, develop principles of law binding not only on the parties in the particular case at hand, but also on other judges—in particular the Courts of Appeals—handling future cases.[119] To combat this tendency, Justice Scalia urges judges to become textualists. Treating the Constitution as text limits some of the democratic difficulties of having a Supreme Court which not only interprets law but also makes it. As Justice Scalia notes: "In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though, not an interpretation that the language will not bear."[120] To do otherwise, Justice Scalia argues, would be to engage in "a common-law way of making law, and not the way of construing a democratically adopted text."[121] And neither the Framers' intent nor the text of the Constitution itself can "possibly lead to the conclusion that its only effect is to take the power of changing rights away from the legislature and give it to the courts."[122]

D. The Textualist Approach Exemplified

The minority opinions in *Atkins* evidence the textualist approach to comparative constitutional interpretation. As Chief Justice Rehnquist argued, the question before the Court in *Atkins* was

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116. THE FEDERALIST NO. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961).

117. *See id.* at 301 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

118. SCALIA, *supra* note 72.

119. *Id.* at 38–39.

120. *Id.* at 37.

121. *Id.* at 40.

122. *Id.* at 41.

> whether a national consensus deprives Virginia of the constitutional power to impose the death penalty on capital murder defendants like petitioner . . . who indisputably are competent to stand trial, aware of the punishment they are about to suffer and why, and whose mental retardation has been found an insufficiently compelling reason to lessen their individual responsibility for the crime.[123]

While taking umbrage with what the Chief Justice termed a view to state legislative history that was a "a *post hoc* rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency," the Chief Justice's main aim in writing was to point out the "defects in the Court's decision to place weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion."[124]

The Chief Justice approached the issue by first noting that it is contemporary *American* values that are dispositive in determining evolving standards of decency.[125] Such American values ought to be, therefore, determined by looking to the voice of the people: their elected representatives in the legislatures. For, in a democracy, legislatures, and "not courts, are constituted to respond to the will and consequently the moral values of the people."[126] Urging restraint, the Chief Justice noted that Supreme Court precedent has cautioned against using "'the aegis of the Cruel and Unusual Punishment Clause' to cut off the normal democratic processes."[127] For the Chief Justice, this is not just a question about federalism and judicial restraint, but also a question of objectivity.[128] In short, while the majority relied upon a certain common law conception of the law in

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123. Atkins v. Virginia, 122 S. Ct. 2242, 2252 (2002).

124. *Id.* at 2252–53.

125. *Id.* at 2253.

126. *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 175–76 (1976)).

127. *Id*.

128. *See id.* at 2253–54:

> In my view, these two sources—the work product of legislatures and sentencing jury determinations—ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values firmly supported by our precedents. More importantly, however, they can be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.

reaching its conclusion, the Chief Justice's dissent evidenced concerns of federalism, democratic legitimacy, and objectivity.

Justice Scalia as well articulated concerns with the majority's approach. Justice Scalia began by noting that a punishment is cruel and unusual if it falls within one of two limited categories: "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted . . . and modes of punishment that are inconsistent with modern 'standards of decency,' as evinced by objective indicia, the most important of which is 'legislation enacted by the country's legislatures.'"[129]

To Justice Scalia, the first prong of the analysis requires one to look to the text as the Framers used it.[130] Quickly, Justice Scalia concluded that the execution of the mildly mentally retarded would not have been considered cruel and unusual in 1791.[131] The second prong is to look to evolving standards of decency as made plain through recourse to objective factors, as opposed to the "subjective views of individual Justices."[132] The objective standards to be looked to are the statutes passed by legislatures of the United States.[133] For Justice Scalia, it "will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives."[134] As such, what really underlies the majority's opinion in this case in the words of Justice Scalia is a "pretension to a power confined *neither* by the

129. *Id.* at 2260 (citations omitted).

130. *Id*.

131. *Id*. As a side note, one might observe that Justice Scalia uses a version of comparative constitutional analysis by referencing the writings of Blackstone to determine, as of the framing, what the words "cruel and unusual" meant. *Id*. While some commentators might take this as evidence that Justice Scalia is employing comparative constitutional analysis even though he decries the same, a more limited point might be made. Justice Scalia is using, what might be termed, foundational comparative analysis *only* to determine the actual context and meanings of the text of the Constitution to render thereby a reasonable construction to the language. Justice Scalia is not saying that the comparison is persuasive authority for determining the contemporaneous federal constitutional question, which is how the majority in both *Atkins* and *Lawrence* utilizes the comparative enterprise. Rather, it is an aid to the judge in determining the text to be interpreted, thereby resolving the constitutional quandary. Assuming *arguendo* that Justice Scalia is engaged in a more complete use of comparative analysis, this is a limited analysis indeed. For, it would likely end at the framing. As such, comparative constitutional analysis for Justice Scalia would have little or no relevance for determining evolving standards of decency, or other standards, for contemporary America.

132. *Id.* at 2261. To be sure, some might think that Justice Scalia's own interpretation of non-comparative factors has at least the same potential for subjectivity.

133. *Id.*

134. *Id.* (quoting Thompson v. Oklahoma, 487 U.S. 815, 865 (1988) (Scalia, J. dissenting)).

moral sentiments originally enshrined in the Eighth Amendment (its original meaning) *nor even* by the current moral sentiments of the American people."[135]

To be sure, this strong language well articulates the dissenters' concern with the role of the Supreme Court in interpreting the U.S. Constitution. It also explains a pitfall with the Supreme Court's use of comparative constitutional analysis. By using comparative analysis, the Court sets itself up to usurp the law from its organic ground: the American people. In light of this critique, in the next Part this Note urges restraint as to the uses of comparative constitutional analysis in interpreting the Constitution.

III. THE PROBLEM OF COMPARATIVE ANALYSIS

As has been explained elsewhere, the comparative method itself may be questionable.[136] Not least of these many critiques is the question of its relational viability, objectivity, and democratic legitimacy.[137] As Professor Dieter Grimm contends, a constitution "goes back to an act taken by or at least attributed to the people, in which they attribute political capacity to themselves."[138] Such an action places the people in a reflexive relationship to their government, which is in accord with American notions of liberalism and constitutional democracy. Using comparative constitutional analysis—a device that is outside the *demos*—as an aid in interpretation poses serious practical and theoretical problems for constitutional democracy. For instance, modern liberal democracies, like the American democracy, tend to justify judicial authority "in terms of the rule of law."[139] Rule-of-law arguments in a liberal democracy tend to produce an argument for "legislative sovereignty in its narrowest and least reflective sense."[140] Yet, the Supreme Court's decisions in *Atkins* and *Lawrence* show that state legislative sovereignty may be overcome, in part, through appealing to comparative constitutionalism. While such an approach might be

135. *Id.* at 2265.

136. *See* Jonathan Hill, *Comparative Law, Law Reform and Legal Theory*, 9 OXFORD J. LEGAL STUD. 101, 101–15 (1989) (illustrating that the method of comparative law may in its applied version be faced with very serious problems).

137. *Id.*

138. Dieter Grimm, *Does Europe Need a Constitution?*, 1 EUR. L.J. 282, 290 (1995).

139. Carol Harlow, *Voices of Difference in a Plural Community*, 50 AM. J. COMP. L. 339, 341 (2002).

140. *Id.*

acceptable to a common lawyer, there is one important difference when interpreting the Constitution. Under the common law approach, legislatures had the power to overturn common law doctrines. Yet, when interpreting the Constitution in this fashion serious questions confront democratic legitimacy, for democracy cannot prevail absent the improbability of constitutional amendment.

The law is imbedded in the culture and history of the people.[141] Montesquieu reasoned that the law is related to the nature of the people and derived from the spirit of the people, which is their culture.[142] And in America, Tocqueville articulated that the law is both an expression of culture and the hope for forming a culture based on first principles.[143] In effect, culture affects the law and law affects culture. Through the law, societies formulate certain interests at the cultural level, which are translated into demands that are responded to within the legal system.[144] Thus, the law can be seen as an expression of the cultural desires of the people, and culture is seen as the hand which drives the law. Through the law, communities engage in the process of understanding themselves through symbolic expression.[145] As such, it is hard to disaggregate legislation from its cultural instantiation. Professor Pierre Legrand observes:

> As an accretion of cultural elements, it [a rule of law or piece of legislation] is buttressed by important historical and ideological formations. A rule does not have any empirical existence that can be significantly detached from the world of meanings that defines a

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141. The Supreme Court's most clear acknowledgement of this notion is in the area of substantive due process. When determining whether a right is fundamental, the Court relies on *American* history and tradition. *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) ("[W]e have regularly observed that the Due Process clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition . . . .'" (citations omitted)).

142. *See* CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS bk. 1, ch. 3, at 104–05 (David Wallace Carrithers ed., Univ. of Cal. Press 1977) (1748) ("[The laws] should be adapted in such a manner to the people for whom they are made, as to render it very unlikely for those of one nation to be proper for another.").

143. *Cf.* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 46 (Phillips Bradley ed., Alfred A. Knopf, Inc. 1946) (1835):

> Social condition is commonly the result of circumstances, sometimes of laws, oftener still of these two causes united; but when once established, it may justly be considered as itself the source of almost all the laws, the usages, and the ideas which regulate the conduct of nations: whatever it does not produce, it modifies.

144. *See generally* Lawrence M. Friedman, *Erewhon: The Coming Global Legal Order*, 37 STAN. J. INT'L L. 347 (2001).

145. Pierre Legrand, *What "Legal Transplants"?*, *in* ADAPTING LEGAL CULTURES 55, 68 (David Nelken & Johannes Feest eds., 2001).

> legal culture; the part is an expression and a synthesis of the whole: it resonates.[146]

Yet, when the Court employs comparative constitutional analysis, not only is the judicial capacity to use such analysis called into question, so is the prudence of such action.

The role of the courts in a democratic system is to use judicial authority cautiously so as not to upset the important acculturation of society through the legislative process. Yet, as Professors Carrington and Powell note, the Court may have "lost touch with its responsibility for the nurture and protection of representative government and has acquired the habit of deciding just about any interesting question that comes its way with little or no regard for the preferences of those who were elected to decide them."[147] There are problems with this approach to judicial review. According to Professors F. L. Morton and Rainer Knopff, liberal democracies work "only when majorities rather than minorities rule, and when it is obvious to all that ruling majorities are themselves coalitions of minorities in a pluralistic society."[148] Going further, they add that "[r]epresentative institutions facilitate this fundamental democratic disposition" while "judicial power undermines it."[149] In short, however "correctly" they may rule, judges "can serve a Republic, but can never rule one."[150] The courts were not protected in American constitutional government "in order that they might, in their wisdom, govern us; they were protected so that there would be no interference with the law's governing us."[151] The Court, therefore, would be well advised to use caution when confronted with the option of employing comparative constitutional analysis, lest it run the risk of joining the judicial and legislative functions.[152]

The American culture is one where the legislature passes the law and the judiciary expounds upon it. To be sure, this either/or dichotomy is too simplified to recognize the inevitable lawmaking

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146. *Id.* at 59.

147. Carrington & Powell, *supra* note 73, at 3.

148. F.L. MORTON & RAINER KNOPFF, THE CHARTER REVOLUTION AND THE COURT PARTY 149 (2000).

149. *Id*.

150. PAUL D. CARRINGTON, STEWARDS OF DEMOCRACY 224 (1999).

151. CAHILL, *supra* note 76, at 8.

152. *See* THE FEDERALIST NO. 47, *supra* note 116, at 303 (James Madison) ("The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised by the legislative councils.").

comparative law—besides the general observation that it would not be consonant with American culture, society, and mores—imposes a normative construct of others on American law and thus on the American people. As President Abraham Lincoln cautioned:

> [T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.[156]

CONCLUSION

This Note seeks to show that the use of comparative analysis, at least for the current Supreme Court, is not just about whether comparative law should have persuasive authority. Instead, the current debate raging on the Court and exemplified in *Atkins v. Virginia* and *Lawrence v. Texas* is about the proper role of the judiciary in a separation of powers system. This is a debate that should be ongoing. The debate should not be obfuscated by recourse to the notion that the majorities in *Atkins* and *Lawrence* are being proactive and the minority is showing a brand of American exceptionalism. The appropriateness of comparative constitutional analysis has only a tangential connection to whether America is a hegemonic or exceptionalist power. Instead, comparative constitutional analysis does have something to do with the nature of the law. And the nature of law in the American democracy should perhaps breed caution on the part of the judiciary. If the American judiciary is to live up to the promise of the founding to create a government "of the people, by the people, and for the people,"[157] then restraint will have to be exercised in this important area of judicial decisionmaking.

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156. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *reprinted in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 133, 139 (Bicentennial ed. 1989).

157. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), *reprinted in* FAMOUS SPEECHES BY EMINENT AMERICAN STATESMEN 103, 103 (Frederick C. Hicks ed., 1929).