

Originalism at Home and Abroad

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

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

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

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INTRODUCTION

Americans obsess about originalism. Originalism's proponents claim that its ability to accord fixed and determinate meaning to a written constitution makes it the legitimate method of constitutional interpretation and essential to constrain judges. Discussion about originalism continues to rage in American academic scholarship,¹ and in the news.² The debate over originalism, however, has chiefly been confined to the experience of originalism in the United States. This preoccupation with originalism—according to popular belief—is a distinctly American phenomenon.³ So goes the conven-

1. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1991); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and the Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611 (1999); Jamal Greene, *Selling Constitutionalism*, 97 *GEO. L.J.* 657 (2009); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 *GEO. WASH. L. REV.* 1127 (1998); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case against Construction*, 103 *NW. U. L. REV.* 751 (2009); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545 (2006); Lawrence B. Solum, *We Are All Originalists Now*, in *CONSTITUTIONAL ORIGINALISM: A DEBATE* 1 (Robert W. Bennett & Lawrence B. Solum eds., 2011); JACK M. BALKIN, *LIVING ORIGINALISM* (2011). For critics of originalism, see, e.g., Mitchell N. Berman, *Originalism is Bunk*, 84 *N.Y.U. L. REV.* 1 (2009); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 *DUKE L.J.* 239 (2009); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 *GEO. L.J.* 713 (2011); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010); Peter J. Smith, *How Different are Originalism and Non-Originalism?*, 62 *HASTINGS L.J.* 707 (2011); David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 *YALE L.J.* 1717 (2003).

2. See, e.g., Kagan Embraces Notion of Enduring Constitution; "We Are All Originalists," *CNSNEWS.COM* (June 20, 2010), <http://www.cnsnews.com/news/article/kagan-embraces-notion-enduring-constitution-we-are-all-originalists>; *Saturday Night Live, Constitutional Corner* (NBC television broadcast Jan. 15, 2011); Amar C. Bakshi, *U.S. Constitution: A Flexible Document*, *GLOBAL PUB. SQUARE* (July 7, 2011), <http://globalpub.licsquare.blogs.cnn.com/2011/07/07/u-s-constitution-a-flexible-document>.

3. See, e.g., Grant Huscroft & Bradley Miller, *Introduction*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 10 (Grant Huscroft & Bradley W. Miller eds., 2011) [hereinafter *CHALLENGE OF ORIGINALISM*] ("Originalist theory has little purchase outside of the United States and it is under pressure within the United States . . ."); Jill Lepore, *The Commandments*, *NEW YORKER*, Jan. 17, 2011, at 70 ("Originalism, which has no purchase anywhere but here [in the United States] . . ."); Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 *U. ILL. L. REV.* 815, 838

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

Beyond American borders, originalist arguments thrive inside and around the courts suggesting that fascination with originalism is not, after all, uniquely American. Australia's judges openly consider original understanding in constitutional interpretation and are "self-consciously 'originalist' to a degree unknown in the United States."⁴ The Turkish Constitutional Court employed an originalist interpretation of the Turkish Constitution's secularism provisions to strike down legislative attempts allowing Islamic headscarves in educational institutions.⁵ Turning to Southeast Asia, the original meaning of the Malaysian Constitution's Islamic establishment clause is the fault line of heated debates over religion and the state.⁶ Across the border, Singapore's national court employed originalist reasoning to decide the constitutionality of the mandatory death penalty.⁷

This Article challenges the conventional view that originalism enjoys little support outside the United States and shows that the story of originalism—both at home and abroad—is more nuanced than has been appreciated. The Article argues that whether originalism thrives, and the form that it takes, is context driven and culturally contingent. Originalism emerges out of the particular cultural, historical, and political conditions of individual states to take distinct variations in practice. The comparative perspective that this Article provides adds nuance to how we think about originalism. First, it complicates existing accounts about the origins of originalism and questions the claim that originalism is necessarily or conceptually re-

(2012) ("American ideas of originalism are not widely adopted outside the United States . . ."); Kim Lane Scheppele, *Jack Balkin is an American*, 25 YALE J.L. & HUMAN. 23 (2013) ("Inquiring this closely into a constitution's original meaning is done almost nowhere else in the world . . ."); Jack M. Balkin, *Why Are Americans Originalist?*, in LAW, SOCIETY AND COMMUNITY: SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL 2 (David Schiff & Richard Nobles eds., 2015) (forthcoming) ("Originalism is mostly unknown outside of the United States.") [hereinafter Balkin (2015 forthcoming)].

4. Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 5 (2009).

5. See Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT'L L. 1239 (2011).

6. See *infra* Part II.A.1.

7. *Yong Vui Kong v. Public Prosecutor* [2010] 3 SING. L. REP. 489; see *infra* Part II.B.1.

quired by a written constitution. Second, it shows that the experiences of countries elsewhere demonstrate that originalism is not necessarily—or even typically—associated with judicial restraint both in terms of deference to legislative outputs and constraining judges from imposing their subjective values into constitutional adjudication. Third, this analysis helps us understand why certain nations—the United States included—favor particular versions of originalism, such as original intent or original meaning.

This Article offers an account of how originalism is practiced in the world beyond the United States. It shows how originalism is employed in two contexts in Southeast Asia that have been unexplored in comparative scholarship.⁸ Malaysia and Singapore present a unique dual case study on originalism: both post-colonial states share a common founding as an independent nation, but have since separated and developed as two sovereign nations.⁹ Both have common law legal systems derived from British legal traditions, independent judiciaries with the power of judicial review, and written constitutions of similar age.¹⁰ Yet the originalist rhetoric that has popular appeal in Malaysia has distinct features and functions from the originalist interpretive methods employed by Singapore's national court to limit judicial rights expansion. These examples map onto broader trends that emerge from the practice of originalism in Australia, Turkey, and the United States. I use the terms “popular” originalism¹¹ and “prudential” originalism to capture the distinctive

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

9. See *infra* notes 114–16.

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

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

features of how originalism operates in these different contexts.

The story this Article tells adds complexity to the dominant conventional accounts in the comparative literature about whether and why originalism thrives outside the United States. Emerging comparative originalism scholarship has either concluded that American-style originalism is rejected elsewhere,¹² or offered various generalized hypotheses—such as a nation’s revolutionary constitutional traditions¹³ or a political leader’s cult of personality¹⁴—to explain the origins of originalism. But current accounts fail to explain why originalist arguments arise in countries outside of the limited cases of each study. Existing accounts are incomplete, I argue, because a country’s attraction to originalist argument stems from cultural and historical traditions—and it is often also connected to temporal, political, or social elements—making it difficult to find a generalized explanation for why originalism thrives across diverse constitutional cultures.

The comparative perspective tests some of the familiar claims in mainstream debates over originalism at home and abroad. First, by decentralizing the United States from the originalism discourse, I question the claim that originalism inevitably follows from judicial interpretation of a written constitution.¹⁵ Comparativism shows us

Movement?, 105 NW. U. L. REV. 1807 (2011); Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism*, 53 ARIZ. L. REV. 827, 850–66 (2011); Rebecca E. Zietlow, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 64 FLA. L. REV. 483, 484 (2012). While the use of originalist arguments as a form of political rhetoric is one of the aspects I highlight in my discussion, I use the term “popular originalism” to encompass several other features as well. See *infra* Part II.A.2.

12. See Greene, *supra* note 4, at 3 (noting the “global rejection of American-style originalism”); Scheppele, *supra* note 3, at 23 (noting that inquiry into a constitution’s original meaning “is done almost nowhere else in the world”); Balkin (2015 forthcoming), *supra* note 3, at 2 (arguing that “the idea of fidelity to the founders . . . is a powerful trope in American constitutional argument, although not in most other constitutional democracies”).

13. See David Fontana, *Comparative Originalism*, 88 TEX. L. REV. 189, 197 (2010) (arguing that “countries whose courts and commentators make originalist arguments tend to come from revolutionary constitutional traditions or are acting in revolutionary constitutional moments”).

14. See Varol, *supra* note 5, at 1246 (arguing that “originalism blossoms when a political leader associated with the creation or revision of the nation’s constitution develops a cult of personality within that nation”).

15. See *infra* Part III.A. See, e.g., WHITTINGTON, *supra* note 1, at 15, 50 (concluding that “a written constitution requires an originalist interpretation” because the Constitution’s

that some countries are originalist, some—including many with written constitutions—are non-originalist, and some are partially originalist. Countries that use originalist arguments may become more or less originalist across different times, and are attracted to different forms of originalism.¹⁶ In light of the geographical and temporal diversity of interpretive approaches across constitutional cultures, the claim that originalism is necessarily required by a written constitution seems difficult to defend.¹⁷

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

status as supreme law “can emerge from the text as intended . . . only if the text has the fixed meaning it is capable of carrying”); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 551–52 (1994) (“[T]he text of the Constitution, as originally understood by the people who ratified it, is the fundamental law of the land The meaning of all . . . legal writings depends on their texts, as they were objectively understood by the people who enacted or ratified them. Originalists do not give priority to the plain dictionary meaning of the Constitution’s text because they like grammar more than history. They give priority to it because they believe that it and it alone is law.”); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1142 (“[O]riginal meaning textualism is the only method of interpreting the Constitution.”).

16. See *infra* Part II.A–B (comparing the practice of popular originalism in Malaysia with prudential originalism in Singapore).

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

18. See *infra* Part III.B.

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

20. See, e.g., Antonin Scalia, *Originalism the Lesser Evil*, U. CIN. L. REV. 849, 863–64

countries elsewhere show the *inverse* phenomenon: historicist originalism has been deployed to judicially expand constitutional provisions and to invalidate the outputs of legislative majorities. Secularists and Islamists in Malaysia mobilize originalist arguments to support judicial expansion of constitutional religious liberty rights or the scope of Islam's constitutional position. And the Turkish Constitutional Court has been criticized as judicially activist for its pro-secularism and originalist decisions to invalidate democratically enacted legislation allowing headscarves in higher educational institutions.²¹

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

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

(1989) (“[T]he main danger in judicial interpretation . . . is that the judges will mistake their own predilections for the law Nonoriginalism . . . plays precisely to this weakness Originalism does not . . . for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”); BORK, *supra* note 1, at 155 (“No other method of constitutional adjudication [besides ‘the approach of original understanding’] can confine courts to a defined sphere of authority”); Steven G. Calabresi, Op-Ed., *The Right Judicial Litmus Test*, WALL ST. J., Oct. 1, 2007, at A23 (“It is legitimate for courts to decide such issues only when they are enforcing the Constitution as originally understood and ratified by the people—and not enforcing the justices’ own views as to what is good public policy.”).

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

22. See *infra* Part III.C.

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

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

I. ORIGINALISM AT HOME

A. *A Brief Overview of the Contemporary Debates in America*

Originalism is a moving target: it has had multiple meanings at various times to different people. This section briefly describes the contemporary landscape of originalist theory and practice in the United States. It is not intended as a comprehensive overview of the vast literature on originalism.²³ Rather, the aim is to provide a basic backdrop of the evolution of multiple forms of originalism and its operation in contemporary America to set the stage for comparing how originalism has developed elsewhere.

Originalism refers to the view that the original understanding of a constitutional provision is fixed at the time it was framed and enacted.²⁴ Some argue that the original understanding is associated

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

24. See Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in CHALLENGE OF ORIGINALISM, *supra* note 3, at 12, 33 (“[M]ost or almost all originalists agree that original meaning was *fixed* or determined at the time each provision of the constitution was framed and ratified. We might call this idea *the fixation thesis*.”).

with the intent of the constitutional framers or ratifiers; others regard it as the original semantic meaning of the constitutional provision's text. Originalists agree that this original understanding should play a significant and substantial role in constitutional interpretation.²⁵ Originalism also encompasses various dimensions in academic, judicial, and popular culture.²⁶ Originalist theory is debated in the legal academy;²⁷ originalist argument is used in constitutional practice by judges and lawyers;²⁸ and originalist rhetoric has popular appeal in public discourse.²⁹ This paper is concerned not only with originalism as an *interpretive* theory, but also with the *practice* and *rhetoric* of originalist argument in legal and political culture.

Originalist theory has evolved dramatically in American academic scholarship over the past thirty years to encompass a variety of approaches.³⁰ Frustration with the perceived activism of the Warren (and Burger) Court following several rights-expansive decisions led conservatives in the 1970s and 1980s to promote a “jurisprudence of original intentions” to restrain judges from inserting their own policy preferences into the Constitution.³¹ Scholars like Robert Bork and Raoul Berger pioneered the first wave of the modern originalist movement by insisting that courts interpret the Constitution according to the original *intent* of the Framers.³² Original intent theory was met with intense criticism. Critics like Paul Brest exposed the difficulties of determining the collective intent of the individuals involved

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

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

27. See *supra* note 1.

28. See Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183 (2012); FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* (2013).

29. See Post & Siegel, *supra* note 1.

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

31. Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 465 (1985).

32. See, e.g., BERGER, *supra* note 19; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986).

in the framing.³³ Jefferson Powell argued that historical evidence demonstrated that the Framers had *not* in fact expected future interpreters to follow their original subjective intent in interpreting the Constitution.³⁴

Widespread criticism of original intent's theoretical and practical defects eventually led originalists to give up looking for the actual *intent* of the Framers in favor of the original *meaning* of the Constitution.³⁵ Justice Scalia played a key role in the "campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning,"³⁶ exhorting originalists to seek "the original meaning of the text, not what the original draftsmen intended."³⁷

Original meaning became the cornerstone of originalist thought. Originalists focused on the idea that the Constitution should be interpreted according to the public meaning of the constitutional text when adopted.³⁸ Original public meaning represented a shift from the *subjective* meaning tied to the intentions of the individual founders to the *objective* meaning of the text.³⁹ As Justice Scalia explained, the originalist should seek the "meaning of the words of the Constitution to the society that adopted it—regardless of what the Framers might secretly have intended."⁴⁰

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

33. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

34. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885–948 (1984–1985); H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513 (1987).

35. See Colby, *supra* note 1, at 720–22; Solum, *supra* note 24, at 16–27.

36. Antonin Scalia, Judge, U.S. Court of Appeals for the D.C. Circuit, Address Before the Attorney General's Conference on Economic Liberties (June 14, 1986), in OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 106 (1987).

37. Scalia, *supra* note 1, at 38.

38. See Barnett, *supra* note 1, at 620 ("[O]riginalism has itself changed—from original *intention* to original *meaning*. No longer do originalists claim to be seeking the subjective intentions of the framers.").

39. See, e.g., Kesavan & Paulsen, *supra* note 15; Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007).

40. Scalia, *supra* note 36, at 106.

interpretation and constitutional construction.⁴¹ The former refers to the exercise to discern the semantic content of the text; the latter is an adjudicative and political exercise to specify constitutional rules when the meaning of the text is vague.⁴² This move acknowledges that constitutional interpretation must be supplemented by constitutional construction when the original public meaning of the text cannot be determined.

Contemporary originalism has continued to encompass increasing varieties of original understanding, and “the originalist tent keeps getting bigger.”⁴³ Jack Balkin’s “living originalism” approach, for instance, attempts to reconcile original meaning with a living constitutionalist view that the Constitution should adapt to changing circumstances.⁴⁴ According to this “method of text and principle,” faithfulness to the Constitution requires fidelity to the Constitution’s text and also to its principles and purposes.⁴⁵ Balkin argues that Justice Scalia’s version of “original meaning” is actually a more limited original *expected applications* approach that “asks how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense.”⁴⁶ Balkin’s original meaning approach, on the other hand, claims to be consistent with a Constitution “whose reach and application evolve over time” as future generations engage in constitutional construction to implement its text and principles.⁴⁷ On this view, originalism and living constitutionalism are “two sides of the same coin.”⁴⁸

Compare this to the “original methods” originalism developed

41. Barnett, *supra* note 1; Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599 (2004).

42. See WHITTINGTON, *supra* note 1, at 7–11 (viewing constitutional interpretation as “essentially legalistic” and constitutional construction as “essentially political”); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 4, 99 (2004) (distinguishing interpretation, which determines the meaning of words, from construction, which “fills the inevitable gaps created by the vagueness of these words when applied to particular circumstances”).

43. Colby & Smith, *supra* note 1, at 257.

44. BALKIN, *supra* note 1, at 3.

45. *Id.* at 14.

46. *Id.* at 7.

47. *Id.* at 3.

48. *Id.* at 21.

by John McGinnis and Michael Rappaport. They argue that “the Constitution should be interpreted according to the interpretative rules that the enactors expected would be employed to understand their words.”⁴⁹ McGinnis and Rappaport defend original methods originalism as normatively desirable on pragmatic grounds: constitutional rules created through the supermajoritarian constitution-making process are likely to have good consequences.⁵⁰

Despite the contemporary academic debates that rage over these theoretical distinctions, it is “difficult to recall a case in which any self-proclaimed originalist judge has perceived daylight between original meaning, original expected application, and original intent.”⁵¹ Scholars often point out that for all Justice Scalia’s “strident claims to follow a consistent constitutional jurisprudence,” he “has in fact drifted among various versions of originalism.”⁵² As an example, while Justice Scalia outspokenly claims to be committed to the authority of original public meaning, he nevertheless believes that capital punishment does not violate the “cruel and unusual” punishment prohibition because its wide use at the time of framing indicates that the Framers did not originally expect the Eighth Amendment to prohibit it.⁵³

In practice, originalist arguments used in the courts do not turn on theoretical distinctions, but they are nevertheless frequently employed by judges and lawyers in constitutional argument. As Scalia observes, in America “the Great Divide with regard to constitutional interpretation, is not that between Framers’ intent and objective meaning, but rather that between *original* meaning . . . and *current* meaning.”⁵⁴ What seems clear is that originalism—regardless of whether from intent or meaning—is alive and well in modern Ameri-

49. McGinnis & Rappaport, *supra* note 1, at 751.

50. *Id.* at 753; *see also* John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 385 (2007).

51. Greene, *supra* note 4, at 10.

52. *See* Colby & Smith, *supra* note 1, at 293; *see also* Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted Originalism,”* 75 U. CIN. L. REV. 7, 13–16 (2006).

53. *See* Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION, *supra* note 1, at 145–46 (“[I]t is entirely clear that capital punishment, which was widely in use in 1791, does not violate the abstract moral principle of the Eighth Amendment.”); *see also* Greene, *supra* note 4, at 10; Colby & Smith, *supra* note 1, at 296–97.

54. Scalia, *supra* note 1, at 38.

can constitutional practice. Consider the landmark case of *District of Columbia v. Heller*,⁵⁵ in which the Supreme Court struck down a handgun ban as unconstitutional based on “the original understanding of the Second Amendment.”⁵⁶

Another feature of originalism in American constitutional practice is its uneasy relationship with precedent that conflicts with original meaning. The role of precedent in originalist theory is by no means uncontested among originalist scholars.⁵⁷ Some originalists—like Robert Bork⁵⁸ and Steven Calabresi⁵⁹—concede some form of *stare decisis* to be consistent with originalism. Several others—including John Harrison,⁶⁰ John McGinnis and Michael Rappaport,⁶¹ and Lee Strang⁶²—argue that originalism allows for precedent on principled grounds.⁶³

Some originalists, however, view precedent as “completely irreconcilable with originalism,” scathingly dismissing those willing to sometimes qualify originalism with *stare decisis* as “would-be originalists.”⁶⁴ Gary Lawson, for instance, insists that “the practice of

55. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

56. *Id.* at 625.

57. See Colby & Smith, *supra* note 1, at 260–62.

58. See, e.g., BORK, *supra* note 1, at 155–59 (arguing that “at the time of ratification, judicial power was known to be to some degree confined by an obligation to respect precedent”).

59. Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311, 340 (2005) (concluding that “practice has settled the matter such that the Court does have an autonomous, implied power to sometimes follow precedent”).

60. See also John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503 (2000).

61. John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 803 (2009) (challenging the common view that originalism is inconsistent with precedent and arguing that “nothing in the Constitution forbids judges from following precedent”).

62. Lee J. Strang, *Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 B.Y.U. L. REV. 1729 (2010).

63. See also Polly J. Price, *A Constitutional Significance for Precedent: Originalism, Stare Decisis, and Property Rights*, 5 AVE MARIA L. REV. 113, 114 (2007) (arguing that “as a matter of original understanding,” due to the original meaning of the “judicial power” in Article III, “an originalist owes some obligation to a nonoriginalist precedent.”).

64. Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22

following precedent is not merely nonobligatory or a bad idea; it is affirmatively inconsistent with the federal Constitution.”⁶⁵ And Randy Barnett argues that a true “originalist simply could not accept that the Supreme Court could change the meaning of the text from what it meant as enacted and still remain an originalist.”⁶⁶ Critics like Henry Monaghan argue that originalists who deny the authoritative nature of precedent in the American constitutional system “cannot account for a good deal of the contemporary constitutional order,” which already “embodies massive departures from any original understanding of the text.”⁶⁷

Judges who invoke originalism in constitutional decision-making have not typically shown deference for longstanding precedent.⁶⁸ Justice Thomas’s originalism is not qualified by considerations of precedent; he has often expressed willingness to overrule settled precedent in the interest of returning to the original understanding.⁶⁹ Justice Scalia has supported abandoning precedent in favor of original meaning in several cases⁷⁰—and recently recanted

CONST. COMMENT. 289, 289 n.2 (2005); *see also id.* at 291 (“Stare decisis is unconstitutional, precisely to the extent that it yields deviations from the correct interpretation of the Constitution.”).

65. Gary Lawson, *The Constitutional Case against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 24 (1994).

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

67. Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 788 (2010).

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

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

70. *See Harmelin v. Michigan*, 501 U.S. 957, 964–65 (1991) (Scalia, J.) (rejecting that the Eighth Amendment contains a proportionality guarantee despite the holding of *Solem v. Helm*, 463 U.S. 277 (1983)); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Scalia, J.) (arguing that *Roe v. Wade* should be overruled); *McConnell v. FEC*, 540 U.S. 93 (2003) (Scalia, J.) (arguing that campaign-contribution limits violate the First Amendment,

his famous declaration of being a “faint-hearted originalist.”⁷¹ Previously, Justice Scalia had acknowledged that he would “adulterate” his originalist philosophy with the doctrine of *stare decisis* on the grounds that originalism without allowance for precedent would be “medicine . . . too strong to swallow.”⁷² No longer, it seems. In a recent interview, Justice Scalia asserts that he will now “try to be an honest originalist;” in other words, one who “will take the bitter with the sweet.”⁷³

The Supreme Court’s decision in *District of Columbia v. Heller* represents the high watermark of originalism’s ascendance in constitutional decision-making.⁷⁴ Relying on the proposition that the original understanding of the Second Amendment “right of the people to keep and bear Arms”⁷⁵ is not limited to a militia-related purpose, the Court invalidated the District of Columbia’s ban on the possession of handguns.⁷⁶ The majority opinion dismissed the sixty-nine year-old Supreme Court precedent on the Second Amendment in *United States v. Miller*⁷⁷ on the basis that *Miller*’s cursory treatment had failed to consider the history of the Second Amendment sufficiently.⁷⁸ Justice Stevens, in his dissent, criticized the majority’s “feeble attempt to distinguish *Miller*” for placing “more emphasis on the Court’s decisional process than on the reasoning in the opinion itself.”⁷⁹ The clear disregard for precedent in *Heller* has prompted scholars to observe that “[w]hen *stare decisis* becomes *stare original-*

despite the contrary ruling in *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990)).

71. Scalia, *supra* note 20 at 864; see also Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG, Oct. 6, 2013, <http://nymag.com/news/features/antonin-scalia-2013-10/> (last visited Mar. 3, 2014) (“I described myself as [a faint-hearted originalist] a long time ago. I repudiate that.”); MARCIA COYLE, *THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION* 165 (2013).

72. *Id.* at 861; see also Scalia, *supra* note 1, at 140 (observing that “*stare decisis* is not part of [his] originalist philosophy” but “a pragmatic exception to it”).

73. Senior, *supra* note 71.

74. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

75. U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

76. *Heller*, 554 U.S. 570.

77. *United States v. Miller*, 307 U.S. 174 (1939).

78. *Heller*, 554 U.S. at 573–76, 579–99, 603–07.

79. *Id.* at 639 (Stevens, J., dissenting).

ist, we have reached a high and unprecedented plane of historicism indeed.”⁸⁰

Finally, and significantly, a striking feature of originalist argument in the United States is its prominent place in the public discourse. Originalism has a popular appeal that extends well beyond the courts. It is discussed in bestselling books,⁸¹ blogs,⁸² radio talk shows,⁸³ newspaper columns,⁸⁴ magazine articles,⁸⁵ at judicial confirmation hearings,⁸⁶ and even on Saturday Night Live.⁸⁷ Empirical analysis conducted by Jamal Greene, Nathaniel Persily, and Stephen Ansolabehere, shows that “most respondents believe judges ought to factor original intent into their interpretations of the Constitution.”⁸⁸ Indeed, polls show that nearly half of Americans believe that the Supreme Court should *only* consider the original intentions of the Constitution’s authors in constitutional interpretation.⁸⁹

80. Greene, *supra* note 1, at 686.

81. See, e.g., MARK R. LEVIN, *MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA* 12–22 (2005). The book was on the New York Times Best Sellers list. *Best Sellers*, N.Y. TIMES, Apr. 24, 2005, at G26, available at <http://query.nytimes.com/gst/fullpage.html?res=9901E5DD103EF937A15757C0A9639C8B63>.

82. See, e.g., THE ORIGINALISM BLOG, <http://originalismblog.typepad.com> (last visited Mar. 14, 2014).

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

84. See, e.g., Kate Zernike, *Beyond New Deal*, N.Y. TIMES, July 3, 2010, available at <http://query.nytimes.com/gst/fullpage.html?res=9B05E2DA153EF930A35754C0A9669D8B63>.

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

86. See, e.g., Jonathan H. Adler, *The Judiciary Committee Grills Elena Kagan*, WASH. POST, June 29, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/29/AR2010062902652.html>.

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

88. See Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 360 (2011).

89. See Greene, *supra* note 1, at 659 (citing Press Release, Quinnipiac University Polling Institute, American Voters Oppose Same-Sex Marriage Quinnipiac University National Poll Finds, But They Don't Want Government To Ban It, (July 17, 2008), <http://www.quinnipiac.edu/institutes-and-centers/polling-institute/search-releases/search-results/release-detail?ReleaseID=1194&What=&strArea=&strTime=28>); see also Balkin (2015 forthcoming), *supra* note 3 at 17 (observing that “[a]lthough originalism presents itself as a theory of how judges should decide cases, originalism appears most prominently in legal and political rhetoric *outside* of courts”).

Originalism gained its cultural prominence in America today largely as a result of political and social mobilization.⁹⁰ By promoting originalism as a reaction to the perceived excesses of the Warren Court, the Reagan administration mobilized the originalist movement as a conservative judicial philosophy.⁹¹ In public rhetoric, originalism continues to feature in the national conversation about the proper role of the United States judiciary. Outside the academy, Rush Limbaugh's call to "[a]ppoint an originalist not an activist" reflects a populist perception.⁹²

Elena Kagan declared at her confirmation hearing in 2010, "[w]e are all originalists."⁹³ Not everyone would agree, nor would they agree on what being an originalist means. But that such statements resonate not only within the courts but also in the larger political culture is testament to the significance and influence of originalism in America's public dialogue.

B. Comparative Originalism: An Oxymoron?

The conventional view is that originalism is distinctly an American phenomenon. It is widely thought that "[o]riginalist theory has little purchase outside of the United States."⁹⁴ "Originalism," according to Jack Balkin, "is mostly unknown outside of the United States."⁹⁵ Kim Scheppele similarly observes that "[i]nquiring this closely into a constitution's original meaning is done almost nowhere else in the world."⁹⁶ And Michel Rosenfeld explains that "[i]n Eu-

90. See Greene, *supra* note 4, at 17; Post & Siegel, *supra* note 1, at 548.

91. See Greene, *supra* note 1, at 680–81; see also JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 154 (2005); Post & Siegel, *supra* note 1, at 554 ("Since the 1980s, originalism has primarily served as an ideology that inspires political mobilization and engagement. Its success and influence is due chiefly to its uncanny capacity to facilitate passionate political participation.").

92. See The Rush Limbaugh Show, *supra* note 83, at 12; Greene, *supra* note 4, at 11.

93. See Adler, *supra* note 87.

94. Huscroft & Miller, *supra* note 3, at 10; see also Lepore, *supra* note 3.

95. Balkin (2015 forthcoming), *supra* note 3, at 2; see also Balkin, *supra* note 3, at 838 (observing that "American ideas of originalism are not widely adopted outside the United States").

96. Scheppele, *supra* note 3, at 23.

rope . . . recourse to originalism is virtually nonexistent.”⁹⁷ Unsurprisingly, originalism scholarship has been dominated by American debates over originalism.⁹⁸

Comparative originalism, as a result, is typically thought of as an oxymoron. Jamal Greene has probed the United States’ preoccupation with originalism by examining constitutional interpretation in Canada and Australia, two foreign legal regimes that he views as comparable to the United States in many key respects.⁹⁹ From his comparative analysis of these two countries, Greene concludes that originalism has an appeal in America that is missing in other nations.¹⁰⁰ Greene observes that originalism is “an exceedingly unpopular view around the world,”¹⁰¹ and that American-style originalism is indeed globally rejected.¹⁰²

Not all scholars agree. David Fontana argues, in response to Greene’s article, that “countries whose courts and commentators make originalist arguments tend to come from revolutionary constitutional traditions.”¹⁰³ According to Fontana, “the most relevant” factor explaining a country’s affinity for originalist arguments is “whether or not its constitution created the nation that lives under the constitution, or whether the constitution merely reorganized the institutions of the country but did not create the nation that lives under the constitution.”¹⁰⁴ The problem with Fontana’s distinction, however, is that it fails to explain why originalist arguments have been employed

97. Rosenfeld, *supra* note 10, at 656.

98. *See supra* note 1.

99. Greene, *supra* note 4, at 5 (observing that Canada and Australia are “stable, liberal, federal democracies with independent judiciaries, well-established traditions of judicial review, and written constitutions of long standing” and also “have common law legal regimes derived from British practice” like the United States).

100. *Id.* at 6 (arguing that “the historicist appeals that support American originalism have a potency here that is found in few foreign constitutional courts, not least the two most like our own”).

101. *Id.* at 19.

102. *Id.* at 3 (“The notion that the meaning of a political constitution is, in any practical sense, fixed at some point in the past and authoritative in present cases is pooh-poohed by most leading jurists in Canada, South Africa, India, Israel, and throughout most of Europe . . .”).

103. Fontana, *supra* note 13, at 197.

104. *Id.* at 190.

in Turkey where “[t]he constitution that established Turkey—the revolutionary constitution—was scrapped and replaced with reorganizational constitutions following military coups in 1960 and 1980.”¹⁰⁵ Nor, as I will discuss, does it accommodate the example of Singapore, which also has a reorganizational, rather than revolutionary, constitution.¹⁰⁶

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

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

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

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

106. See *infra* Part II.B.1.

107. Varol, *supra* note 5, at 1246.

108. See *infra* notes 114–21 and accompanying text.

109. See *infra* notes 219–21 and accompanying text. Although Lee Kuan Yew, the first Prime Minister of Singapore, is widely regarded as the founding father of the modern Singapore republic, he is not associated with the framing of Singapore’s Constitution. In Singapore, Lee Kuan Yew is recognized as a political leader, not a constitutional founder.

cus on the same countries: Canada, New Zealand, Australia, the United Kingdom, South Africa, France, Germany, and India.¹¹⁰ But many of these commonly studied constitutions may not be the most relevant case studies for examining originalist arguments.¹¹¹ As Fontana recognizes, this may explain “why much of the salience of originalism around the world has been missed to this point.”¹¹² I seek to contribute to the emerging body of scholarship on comparative originalism by examining the emergence of originalism in two unexplored contexts.

II. ORIGINALISM ABROAD

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

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

110. Fontana, *supra* note 13, at 194.

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

112. *Id.* at 199.

Sarawak—joined the Federation to form the new nation of Malaysia.¹¹³ Two years later, political tensions led to Singapore’s separation from Malaysia to become its own sovereign state on August 9, 1965.¹¹⁴

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

A. Popular Originalism in Malaysia

1. Secular and Islamic Originalist Rhetoric in Malaysia

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

Five legal experts from the United Kingdom and the Com-

113. See generally JOSEPH M. FERNANDO, *THE MAKING OF THE MALAYAN CONSTITUTION* (2002); Poh-Ling Tan, *From Malaya to Malaysia*, in *CONSTITUTIONAL LANDMARKS IN MALAYSIA: THE FIRST 50 YEARS 1957–2007*, at 25 (Andrew Harding & H.P. Lee eds., 2007) [hereinafter *CONSTITUTIONAL LANDMARKS*].

114. See generally Kevin Y.L. Tan, *Singapore: In and Out of the Federation*, in *CONSTITUTIONAL LANDMARKS*, *supra* note 113, at 55.

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

116. See generally Rais Yatim, *The Road to Merdeka*, in *CONSTITUTIONAL LANDMARKS*, *supra* note 113, at 1.

monwealth were appointed to form a constitutional commission chaired by Lord Reid, a judge from the United Kingdom, to draft the constitution for the newly independent state.¹¹⁷ This was a deliberate decision by the locally elected Alliance party,¹¹⁸ and the Malayan leaders gave the Reid Constitutional Commission specific terms of reference that the local representatives had already negotiated and agreed on.¹¹⁹ The Commission's task was essentially a technical one of translating into legal terms what had already been politically settled.¹²⁰

The Constitution that was drafted established a federal system of government with a legislative, executive, and judicial branch,¹²¹ and a constitutional monarch as the head of the federation.¹²² Malaysia's constitutional structure is based on a parliamentary system modeled after Westminster, and also possesses a written constitution containing an explicit bill of rights.¹²³ The power of judicial review over the constitutionality of legislation and executive action is implicitly assumed as a natural corollary of the Constitution's supremacy clause.¹²⁴

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

117. See Joseph M. Fernando, *The Reid Commission: A Question of Balance*, in *THE MAKING OF THE MALAYAN CONSTITUTION*, *supra* note 113, at 95.

118. See JOSEPH M. FERNANDO, *FEDERAL CONSTITUTIONS: A COMPARATIVE STUDY OF MALAYSIA AND THE UNITED STATES* 12–13 (2007) (explaining that “the choice of an independent body made up of legal experts from the Commonwealth was a conscious choice of the ruling Alliance party and was intended to avoid local prejudices in the framing of the Constitution”).

119. FEDERATION OF MALAYA CONSTITUTIONAL COMMISSION, *REPORT OF THE FEDERATION OF MALAYA CONSTITUTIONAL COMMISSION* ¶ 3 (1957) [hereinafter REID REPORT].

120. ANDREW HARDING, *THE CONSTITUTION OF MALAYSIA: A CONTEXTUAL ANALYSIS* 32 (2012).

121. MALAY. CONST. pt. IV, arts. 39–65; pt. IX, arts. 121–31.

122. *Id.* pt. IV, arts. 32–37.

123. *Id.* pt. II, arts. 5–13.

124. *Id.* pt. I, art. 4(1) (“This Constitution is the supreme law of the Federation and any law . . . which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.”).

inter-ethnic negotiations and compromise, a declaration that “Islam is the religion of the Federation; but other religions may be practised in peace and harmony” was included in the Constitution.¹²⁵ The scope of this declaration has been the focus of much of the debate on the place of Islam in Malaysia’s constitutional system.

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

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

* * *

Initial originalist interpretation in Malaysia focused on the original intent of the constitutional framers in a manner consistent with legalistic interpretive methods influenced by the British tradition of parliamentary supremacy. In the landmark 1988 decision of *Che Omar bin Che Soh v. Public Prosecutor*,¹²⁶ the Supreme Court—

125. *Id.* pt. I, art. 3(1). See generally Joseph M. Fernando, *The Position of Islam in the Constitution of Malaysia*, 37 J. SOUTHEAST ASIAN STUD. 249 (2006).

126. (1988) 2 MALAYAN L.J. 55.

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

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

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

127. The Supreme Court (known as the Federal Court after 1994) is the highest appellate court in Malaysia. The appellate courts in Malaysia consist of the Federal Court, the Court of Appeal, and the High Court.

128. MALAY. CONST. pt. I, art. 3(1) (“Islam is the religion of the Federation; but other religions may be practised in peace and harmony.”).

129. (1988) 2 MALAYAN L.J. at 56.

130. *Id.* at 57.

131. *Id.* at 56–57.

132. *Id.* at 56.

laws passed by Parliament “must be imbued with Islamic and religious principles,” insisting that this was “contrary to the constitutional and legal history of the Federation.”¹³³

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

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

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

133. *Id.* at 57.

134. *Teoh Eng Huat v. Kadhi Pasir Mas (Susie Teoh)*, (1990) 2 MALAYAN L.J. 300.

135. *Id.* at 300–01. The Guardianship of Infants Act, No. 351 (1961) (Malay.) governs the rights and powers of a parent or guardian of a non-Muslim child. There was no assertion of disagreement by Susie’s other parent over her father’s application. By the time the appeal was before the Supreme Court, Susie had reached the age of majority and the declarations were dismissed with no costs. The appeal, therefore, was of purely academic—and political—interest.

136. *Susie Teoh*, (1990) 2 MALAYAN L.J. at 301.

137. *Id.* at 301–02 (citing the REID REPORT, *supra* note 119, ¶ 169).

138. *Id.* at 302.

holding the civil family law statute while emphasizing that religious freedom would be maintained for adults over the age of majority.¹³⁹

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

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

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

139. Andrew Harding, *Islam and Public Law in Malaysia: Some Reflections in the Aftermath of Susie Teoh's Case*, 1 MALAYAN L.J. xci, xcvi (1991).

140. *Che Omar Bin Che Soh v. Pub. Prosecutor*, (1988) 2 MALAYAN L.J. 55, 57.

141. Jaclyn Ling-Chien Neo, *Malay Nationalism, Islamic Supremacy and the Constitutional Bargain in the Multi-Ethnic Composition of Malaysia*, 13 INT'L J. ON MINORITY & GROUP RTS. 95, 104–05 (2006).

142. Ramlan Said, *Islamic State Issue Dominates*, NEW STRAITS TIMES (Malay.), Oct.

Originalist rhetoric became increasingly salient in legal and public discourse, but with a change in tone. To fuel the movement toward greater Islamization, supporters of a more Islamic state mobilized historicist language to promote judicial *expansion* of Islam's constitutional scope. Unlike before, originalist arguments were no longer employed in service of judicial restraint. Instead, advocates employed originalist appeals in support of shifting away from established precedent and to prioritize Islam's constitutional position over individual constitutional rights, such as religious freedom.¹⁴⁴

Consider the case of *Meor Atiqulrahman* in 1999.¹⁴⁵ Schools in Malaysia prohibit Muslim students from wearing religious headgear—like the *serban*—according to education policy on school uniforms. The High Court held that school bans on wearing the *serban* were unconstitutional because “Islam is the dominant religion amidst other religions which are practised in the country.”¹⁴⁶ To support this expanded interpretation of Islam's constitutional position, Justice Noor used historical arguments about the Constitution's founding to assert that the “Malay rulers demanded that the clause ‘[t]he Muslim or Islamic faith to be the established religion of the Federation’ be in-

27, 2001, at 6; see also *Malaysia Recognised as Islamic Nation*, NEW STRAITS TIMES (Malay.), Aug. 11, 2001, at 4.

143. See, e.g., Said, *supra* note 142; Tommy Thomas, *The Social Contract: Malaysia's Constitutional Covenant*, (2008) 1 MALAYAN L.J. cxxxii, clxxv–clxxvi; Li-ann Thio & Jaclyn Ling-Chien Neo, *Religious Dress in Schools: The Serban Controversy in Malaysia*, 55 INT'L & COMP. L.Q. 671 (2006) (describing the Prime Minister's declaration as “a populist attempt to gain political support in a country where Muslims are a majority comprising some 60.4% of the population”); Hassan Saeed, *Apostasy Laws in Malaysia: Jurisdiction and Constitutionality*, in FREEDOM OF RELIGION, APOSTASY, AND ISLAM 160 (Abdullah Saeed & Hassan Saeed eds., 2004) (calling Islamization “a convenient tool” to achieve UMNO's objective of maintaining the political power it had enjoyed since independence).

144. Compare originalism in practice in the United States. Greene observes that “*Heller*, *Crawford*, and *Apprendi* exemplify a remarkable turn in constitutional law wherein originalist arguments are used not to restrain constitutional updating but to overrule longstanding precedential lines with substantial reliance interests at stake.” Greene, *supra* note 1, at 689.

145. *Meor Atiqulrahman bin Ishak v. Fatimah bte Sihi*, (2000) 5 MALAYAN L.J. 375 (High Court, Seremban). The High Court occupies the lowest tier in Malaysia's appellate court structure, which comprises of the High Court, the Court of Appeal, and the Federal Court (previously known as the Supreme Court).

146. *Id.* at 375, 377 (translated from Malay).

cluded to recognize the supremacy of Islam.”¹⁴⁷

The judge focused heavily on constructing a historical account of the constitutional bargain to argue that the constitutional framers had intended to secure Islam’s dominant position as the result of a social contract between the Muslims and non-Muslims.¹⁴⁸ The accuracy of the High Court’s historical account of the Malay rulers and original founding intent is highly questionable: critics have called it “revisionist,” “erroneous,” and wrought with “historical amnesia.”¹⁴⁹ But what is striking is that the judge insists on using history and original intent in support of his expansive interpretation of the Islamic constitutional clause despite established Supreme Court precedent in *Che Omar* confining Islam’s scope in Article 3 to “rituals and ceremonies.”¹⁵⁰

Reactive originalism continued its ascendancy and its expansion of Islam’s public law role. Apostasy cases, in particular, brought into sharp tension the Article 3 declaration of Islam as the state religion and the Article 11 religious freedom guarantee.¹⁵¹ In *Lina Joy v. Majlis Agama Islam*,¹⁵² the High Court held that the constitutional right “to profess and practice” one’s religion did not extend to Muslims who wished to leave Islam without the approval of the Sharia Courts.¹⁵³ Interpreting religious freedom to mean that

147. *Id.* at 385; *see also id.* at 384.

148. *Id.* at 384.

149. Thio & Neo, *supra* note 143, at 681–83.

150. *Che Omar Bin Che Soh v. Pub. Prosecutor*, (1988) 2 MALAYAN L.J. 55, 56.

151. MALAY. CONST. pt. I, art. 3(1) (“Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.”); *id.* pt. II, art. 11(1) (“Every person has the right to profess and practice his religion and, subject to Clause (4), to propagate it.”).

152. *Lina Joy v. Majlis Agama Islam Wilayah & Anor*, (2004) 2 MALAYAN L.J. 119 (H.C.).

153. *Id.* at 144. In practice, obtaining an order of apostasy from the Sharia Courts for a Malay-Muslim appears virtually impossible. There are no official statistics or empirical evidence of persons who have applied for and been granted an apostasy order by the Sharia Courts. Benjamin Dawson & Steven Thiru, *The Lina Joy Case and the Future of Religious Freedom in Malaysia*, LAWASIA J. 151, 160 (2007). This is unsurprising as apostasy is regarded as an offence under the state legislation of several states in Malaysia punishable by fines, imprisonment, or even whipping. *See, e.g.*, Administration of the Religion of Islam and the Malay Custom Enactment of 1982 (amended 1989), § 185 (Pahang) (specifying that apostasy is an offence punishable by a fine or imprisonment not exceeding three years, and whipping not exceeding six strokes); Perak Islamic Criminal Law Enactment of 1992, § 13

Muslims could freely convert out of Islam could not be reconciled with the constitutional declaration of Islam as the religion of the federation. The High Court judge insisted that such an interpretation “would result in absurdities not intended by the framers of the [Federal Constitution].”¹⁵⁴ Instead, Justice Faiza Tamby Chik reasoned that “[f]reedom of religion under art 11(1) must be read with art 3(1) which places Islam in a special position as the main and dominant religion of the Federation”¹⁵⁵ “[T]o give effect to the intention of the framers of our [C]onstitution,” the judge claimed, religious freedom must be qualified by the other constitutional provisions on Islam.¹⁵⁶

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

Despite the same Reid Report explicitly stating that insertion of the clause would “in no way affect the present position of the Federation as a Secular state,” Justice Faiza concluded that Article 3 “has a far wider and meaningful purpose than a mere fixation of the official religion.”¹⁶⁰ The majority opinion in the Court of Appeal¹⁶¹ and

(specifying that “[a]ny Muslim who willfully [sic], either by his action or words or in any manner, claims to denounce the Religion of Islam or declares himself to be a non-Muslim is guilty of an offence of deriding the Religion of Islam and shall, on conviction, be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.”).

154. *Lina Joy*, 2 MALAYAN L.J. at 129[18].

155. *Id.* at 144[60].

156. *Id.* at 129[19].

157. *Id.* at 127[13].

158. *Id.*

159. *Id.* at 128[16].

160. *Id.* at 127[14], 128[18].

the Federal Court¹⁶² affirmed the High Court's decision. *Lina Joy* could not be recognized officially as no longer a Muslim without obtaining approval from the Sharia Courts.

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

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

161. *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan*, (2005) 5 ALL MALAY. REP. 663, 690[27]–91[29], 690 (C.A.).

162. *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan*, (2007) 3 ALL MALAY. REP. 585 (F.C.).

163. *Che Omar Bin Che Soh v. Pub. Prosecutor*, (1988) 2 MALAYAN. L.J. 55, 56.

164. *Meor Atiqulrahman bin Ishak v. Fatimah bte Sihi*, (2000) 5 MALAYAN L.J. 375 384.

165. *Lina Joy v. Majlis Agama Islam Wilayah & Anor*, (2004) 2 MALAYAN L.J. 119 (H.C.), at 128[18].

166. *Lina Joy*, 3 ALL MALAY. REP. at 623[53]–24[53].

167. *Id.*

the founding fathers of this great nation had in mind when they framed this sacred document.”¹⁶⁸

Justice Malanjum emphasized that Islam’s special position in Article 3(1) “was never intended to override any right, privilege or power explicitly conferred by the Constitution.”¹⁶⁹ Since the Constitution is the supreme law, he found it “abundantly clear” that all laws must be “in conformity with the provisions of the Constitution including those dealing with fundamental liberties.”¹⁷⁰ Strikingly, proponents on either side of these competing constitutional narratives over the nation’s identity claim that their position on the Constitution’s secular or Islamic basis is supported by the constitutional framers’ original intent.

The battle over the original understanding in Malaysia has also reached beyond the issue of religion and the state. Judges advocating a purposive and rights-expansive interpretation of the bill of rights in the Malaysian Constitution also use the language of originalism to support their constitutional interpretation approach. Instead of rejecting the constitutional historicism of the Islamist movement, political liberals promoting a rights-oriented approach to constitutional interpretation systematically refer to the original commitments of the framers.¹⁷¹ Judges who advocate this living constitutionalism approach exhort the courts to “adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution.”¹⁷² According to this view, the framers *themselves* had contemplated the necessity of constitutional construction by future generations: “the terms in which these provisions of the Constitution

168. *Id.* at 619[23].

169. *Id.* at 623[53]–24[53].

170. *Id.* at 624[54].

171. *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor*, (2010) 2 MALAYAN L.J. 333, 339 (observing that “the provisions of the Constitution, in particular the fundamental liberties guaranteed . . . must be generously interpreted”).

172. *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan*, (1996) 1 MALAYAN L.J. 261, 288; *see also* *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia*, (1999) 1 MALAYAN L.J. 266, 271 (“[T]he Federal Constitution, unlike any ordinary statute, does not merely declare law It also confers upon individuals certain fundamental and inalienable human rights, such as equality before the law. Its language must accordingly receive a *broad and liberal construction in order to advance the intention of its framers.*”) (emphasis added).

are expressed necessarily co-opts future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights.”¹⁷³

Proponents of this originalist approach support empowering Malaysian judges to protect individual rights from legislative infringement by *expanding* the scope of enforceable constitutional rights. Judges adopting this view have shown themselves willing to find implied fundamental rights and to expand the right to life,¹⁷⁴ equality,¹⁷⁵ and the freedom of expression and association.¹⁷⁶ In some ways, this original understanding approach reflects the living originalism approach advocated by Jack Balkin,¹⁷⁷ which views fidelity to the text and general principles of the Constitution as compatible with changing constitutional norms.¹⁷⁸

Originalist arguments have not been confined to the courts. Scholars and commentators regularly invoke originalist rhetoric in debates over Malaysia’s secular or Islamic identity. Some scholars argue that “history and the essential character of the country” are the “most important” reasons supporting Islam’s supremacy.¹⁷⁹ According to this view, the framers had intended to resurrect Islamic law from British rule and entrench it in the Constitution.¹⁸⁰ Writing ex-

173. *Lee Kwan Woh v. Pub. Prosecutor*, (2009) 5 MALAYAN L.J. 301, 312 (quoting *Boyce v. The Queen* [2004] UKPC 32).

174. Malaysian courts have found that the right to life protects the right to access to court (*Sivarasa Rasiah*, (2010) 2 MALAYAN L.J. 333); employment (*Tan Tek Seng*, (1996) 1 MALAYAN L.J. 261); livelihood under native customary land rights (*Nor Anak Nyawai*, (2005) 3 CURRENT L.J. 555); and the right to fair trial (*Lee Kwan Woh*, (2009) 5 MALAYAN L.J. at 316).

175. *Sivarasa Rasiah*, 2 MALAYAN L.J. 333.

176. *Muhammad Hilman bin Idham v. Kerajaan Malaysia*, (2011) 6 MALAYAN L.J. 507.

177. BALKIN, *supra* note 1.

178. *Id.* at 3.

179. Abdul Aziz Bari, *Islam in the Federal Constitution: A Commentary on the Decision of Meor Atiqulrahman*, 2 MALAYAN L.J. cxxix, cxxxv (2000).

180. See, e.g., Mohamed Ismail Shariff, *The Legislative Jurisdiction of the Federal Parliament in Matters Involving Islamic Law*, 3 MALAYAN L.J. cv, cx (2005) (“There is nothing in Article 3 that restricts the natural meaning of the term ‘Islam.’ And there is no reason to circumscribe its meaning to rituals and ceremonies only It is suggested that what the framers of the Constitution have in fact done is to resurrect the lost or hidden power relating to Islamic law, that which was taken away by the British, and entrenched it in Article 3.”).

tra-judicially, Faiza Chik forcefully employed historical arguments to reiterate his position in *Lina Joy*¹⁸¹ that the Malaysian Constitution cannot be read to afford Muslims freedom of conscience.¹⁸² On the other side of the debate, secularists vigorously defend the original commitments of the Malaysian Constitution as secular, arguing that historical evidence during the founding demonstrates that the framers had clearly intended the nation to be a secular state.¹⁸³ Others have trenchantly criticized the judicial expansion of Islam's position for promoting a "revisionist" view of the constitutional founding.¹⁸⁴

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

181. *Lina Joy v. Majlis Agama Islam Wilayah & Anor*, (2004) 2 MALAYAN L.J. 119 (H.C.).

182. Faiza Thamby Chik, *Malay and Islam in the Malaysian Constitution*, 1 MALAYAN L.J. cxxix, cxlii (2009).

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

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

185. See *supra* notes 143–44.

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

that the religious provisions contained in the Malaysian Constitution “disqualify Malaysia from being a secular state.”¹⁸⁷

In the popular media, Malaysia’s constitutional framers and founding are frequently invoked.¹⁸⁸ References to the “founding fathers” or “framers” in the same sentence as the “constitution” appeared in three major Malaysian publications 305 times from 2001 to 2004 and 285 times from 2005 to 2009.¹⁸⁹ This attention to the framers’ intent has not diminished perceptibly: from 2009 to 2012, these terms appeared in the same publications 216 times. Appeals to the framers and the founding remain part of the national conversation over a variety of issues.¹⁹⁰ Originalist rhetoric has public salience in Malaysia: it is a prominent subject of academic discourse on constitutional interpretation and occupies a significant space in political and popular discourse.

2. Features of Popular Originalism

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

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

187. Malik Munip, *Is Malaysia an Islamic or Secular State?*, NEW STRAITS TIMES (Malay.), (Nov. 16, 2012), <http://www.nst.com.my/opinion/columnist/is-malaysia-an-islamic-or-secular-state-1.171584>.

188. See, e.g., Che Omar Bin Che Soh v. Pub. Prosecutor, (1988) 2 MALAYAN L.J. 55; Malik Intiaz, *Latifah Mat Zin: Reaffirming the Supremacy of the Constitution*, DISQUIET BLOG (July 29, 2007), <http://malikintiaz.blogspot.com/2007/07/latifah-mat-zin-reaffirming-supremacy.html>.

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

190. See, e.g., David Tih, *Uphold Founding Fathers’ Legacy*, NEW STRAITS TIMES (Malay.), Aug. 31, 2010, at 40; Art Harun, *Secular or Non-Secular: What History Tells Us*, MALAYSIAN INSIDER (Nov. 8, 2012), <http://www.themalaysianinsider.com/sideviews/article/secular-or-non-secular-what-history-tells-us-art-harun1>.

al restoration in line with the founding of the Malaysian nation and Constitution as an independent break from its Western colonial past.¹⁹¹ Secularists in Malaysia—comprised primarily of political and social liberals—champion a secularist original understanding of the founding and view a generous and purposive interpretive approach to individual rights as in line with the framers' intent.¹⁹² In both cases, arguments about the original understanding are not used to constrain constitutional expansion but to motivate constitutional updating—whether toward a more politically conservative or liberal constitutional vision from the status quo.

Consider also Turkey, whose constitutional provisions on secularism have also been the site of originalist debate.¹⁹³ The Turkish Constitutional Court employed methodology “solidly grounded in originalism” in two decisions to strike down legislation allowing students to wear headscarves in educational institutions for violating the Turkish Constitution's secularism provisions.¹⁹⁴ Many critics have called the Turkish Constitutional Court judicially activist for interfering with the democratic outputs of the political process.¹⁹⁵ In Turkey, the use of originalist reasoning by the Court has been viewed as a tool to expand its power and jurisdiction against the legislative branch. It has its strongest support among secular elites in Turkey, who are a part of the Turkish left.¹⁹⁶ Originalist approaches in Malaysia and Turkey are not characterized by political or judicial conservatism; instead, their use in these contexts has typically been associated with activist judging.

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

191. See *supra* notes 146–66 and accompanying text.

192. See *supra* notes 127–41, 166–79 and accompanying text.

193. See Varol, *supra* note 5.

194. *Id.* at 1262.

195. See, e.g., Hootan Shambayati, *The Guardian of the Regime: The Turkish Constitutional Court in Comparative Perspective*, in CONSTITUTIONAL POLITICS IN THE MIDDLE EAST 99, 117 (2008); Asli Ü. Bâli, *The Perils of Judicial Independence: Constitutional Transition and the Turkish Example*, 52 VA. J. INT'L L. 235 (2012); Günes Murat Tezcür, *Judicial Activism in Perilous Times: The Turkish Case*, 43 LAW & SOC'Y REV. 305 (2009); Varol, *supra* note 5, at 1245.

196. Varol, *supra* note 5, at 1278.

public discourse.¹⁹⁷ Judges, lawyers, scholars, politicians, and activists mobilize originalist arguments to support their claims over Malaysia's secular or Islamic status because of the public appeal of such arguments. Originalism's popular appeal has been observed elsewhere—most prominently in the United States.¹⁹⁸ In America, originalism not only occupies a prominent place in its public and political culture, but has also become a “site of popular mobilization.”¹⁹⁹ In Turkey, too, originalism is “not confined to the judicial sphere”—as Varol observes, “[e]ven the Turkish politicians’ criticisms of the judiciary feature heated debates over originalism.”²⁰⁰

What appears to be a common thread among these countries is that originalism's salience does not depend primarily on its analytical utility as an interpretive method. Rather, the force of originalist arguments stems from its social and political salience.²⁰¹ Originalism as an argumentative approach has particular appeal in these countries because it “provides its proponents a compelling language in which to seek constitutional change through adjudication and politics.”²⁰²

Third, the practice of originalism in Malaysia is largely dismissive of precedent.²⁰³ The Malaysian Supreme Court's decision in *Che Omar* established clear precedent for recognizing the legal system as secular and confining Islam's role to rituals and ceremonies.²⁰⁴ Yet judges and commentators who support the Islamization movement downplay the Supreme Court's precedent as incompatible with their originalist arguments supporting an expansion of Islam's primacy in the Constitution.²⁰⁵ Precedent is not regarded as a constraint that qualifies the application of an originalist approach. The

197. See *supra* notes 180–190.

198. See *supra* notes 81–94.

199. See Post & Siegel, *supra* note 1, at 548.

200. Varol, *supra* note 5, at 1274.

201. See Post & Siegel, *supra* note 1, at 549 (arguing that “[t]he current ascendancy of originalism does not reflect the analytic force of its jurisprudence, but instead depends upon its capacity to fuse aroused citizens, government officials, and judges into a dynamic and broad-based political movement”).

202. *Id.*

203. See generally Greene, *supra* note 4, at 16 (observing that a “distinguishing characteristic of the latest originalism movement [in America] is its hostility to precedent”).

204. *Che Omar Bin Che Soh v. Pub. Prosecutor*, (1988) 2 MALAYAN. L.J. 55, 56–57.

205. See *supra* notes 165–66, 179–83, and accompanying discussion.

tension between originalism and precedent is also resonant in United States constitutional practice: as Greene observes, Supreme Court decisions like “*Heller*, *Crawford*, and *Apprendi* exemplify a remarkable turn in constitutional law wherein originalist arguments are used not to restrain constitutional updating but to overrule longstanding precedential lines with substantial reliance interests at stake.”²⁰⁶

Fourth, the originalist appeals in Malaysia rely heavily on constitutional historicism. Originalist arguments in Malaysia have not centered on the objective public meaning of the text at the time of drafting. Rather, interpretation of the Constitution is strongly influenced by the constitutional history surrounding its drafting. Historical evidence is viewed favorably as an extrinsic interpretive aid to originalist understanding. Take, for instance, the Malaysian Court of Appeal’s treatment of an academic article in the *Cambridge Law Journal* written by Professor Jennings—one of the framers of the Constitution. The Court relied on this extrinsic evidence to decide how to interpret constitutional provisions about the head of state’s right to dismiss a chief minister.²⁰⁷ Justice Zainun Ali openly encouraged the Court to “have regard to extraneous matters such as [the Jennings’] article . . . in order to distill the original and true intent behind constitutional provisions.”²⁰⁸ This historicist-orientation has meant that originalism in Malaysia is focused predominantly on the original intent of the framers.²⁰⁹

Moreover, historical constitutional argument in Malaysia is used to generate change from the constitutional status quo.²¹⁰ Recall, for instance, the Malaysian High Court judge in *Lina Joy*,²¹¹ who argued that the historical negotiations which resulted in the insertion of the Islamic clause in Article 3(1) indicated that the clause was “not

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

207. *Zambry bin Abd Kadir v. Mohammad Nizar bin Jamaluddin*, (2009) 5 MALAYAN L.J. 464.

208. *Id.* at 534.

209. *See infra* Part III.C.

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

211. *Lina Joy v. Majlis Agama Islam Wilayah & Anor*, (2004) 2 MALAYAN L.J. 119 (H.C.).

merely ‘to fix’ the official religion of the state.’²¹² Historicist appeals to the framers and the founding are employed to promote an expansive constitutional interpretation of Islam’s position²¹³ or individual rights provisions.²¹⁴ The Turkish Constitutional Court’s originalist approach is also heavily historicist: it is focused on interpreting the Turkish Constitution’s secularism provisions in line with the historical meaning of Mustafa Kemal Atatürk’s reforms and principles.²¹⁵

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

B. Prudential Originalism in Singapore

1. Singapore’s Death Penalty and Originalist Reasoning

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

212. *Id.* at 128[18].

213. *See supra* notes 146–50, 162–69, and accompanying text.

214. *See supra* notes 171–176 and accompanying text.

215. Varol, *supra* note 5, at 1277 (noting that in Turkey the “carefully delineated distinctions between originalist methods are without a difference” as “[a]ll three originalist modes yield the same result, primarily because original meaning, intent, and expected application all focus on ascertaining the meaning of Atatürk’s reforms and principles”).

216. Greene, *supra* note 4, at 6.

217. *Id.*

218. *See generally* LI-ANN THIO, A TREATISE ON SINGAPORE LAW 02.070–02.086 (2012).

The union was unhappy and brief. Political and ethnic tensions between the Federal Government of Malaysia and Singapore's state government led to Singapore separating from the Federation of Malaysia to become its own sovereign nation on August 9, 1965.²¹⁹ The Singapore Constitution was not drafted as a new constitutional document. Before the separation, Singapore was governed by the Federal Constitution of Malaysia and its own individual state constitution. After separating from Malaysia, the new Constitution of Singapore was a composite of three documents: the State Constitution of Singapore, with amendments after becoming a separate state; the Republic of Singapore Independence Act (RSIA) 1965; and the provisions of the Federal Constitution of Malaysia that the RSIA made applicable.²²⁰

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

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

219. See generally Tan, *supra* note 114; Li-ann Thio, *Setting the Constitutional Context*, in TREATISE ON SINGAPORE LAW, *supra* note 218.

220. See Kevin Tan, *The Evolution of Singapore's Modern Constitution: Developments from 1945 to the Present Day*, 1 SING. ACAD. L.J. 17 (1989).

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

222. Cf. *id.* art. 153 (on the special position of the Malays and indigenous natives).

223. Cf. *id.* art. 160(2) (specifying that the criteria for being "Malay" includes, among other things, "a person who professes the religion of Islam").

224. See THIO, *supra* note 218, at 02.095 (Note: in contrast to Malaysia, where the Malay-Muslims are the largest ethnic and religious group, the Malays and Indians are minorities in the Chinese-dominated population of Singapore).

Commission Report articulated several broad framing principles of the modern Singapore Constitution and made specific recommendations on keeping and modifying specific constitutional provisions.²²⁵ Many regard the Wee Constitutional Commission as “the next best thing to convening a full-fledged constituent assembly to craft a constitution.”²²⁶

The power of judicial review is not expressly provided in the Singapore Constitution, but has been recognized by the courts as an implicit part of its Article 4 supremacy clause.²²⁷ Singapore’s judicial power is vested in the Supreme Court and subordinate courts.²²⁸ The composition and jurisdiction of the Supreme Court of Singapore is specified by the Constitution; it is made up of a Court of Appeal and a High Court.²²⁹ The Singapore Court of Appeal became Singapore’s final court of appeal after the right of appeal to the Judicial Committee of the Privy Council was abolished in 1994.

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

225. CONSTITUTIONAL COMMISSION 1966, REPORT OF THE CONSTITUTIONAL COMMISSION 1966, ¶ 13 (Singapore Government Printer, 1966) [hereinafter WEE REPORT]. See generally Li-ann Thio, *The Passage of a Generation: Revisiting the Report of the 1966 Constitutional Commission*, in EVOLUTION OF A REVOLUTION: FORTY YEARS OF THE SINGAPORE CONSTITUTION 7 (Kevin Tan & Li-ann Thio eds., 2009) [hereinafter EVOLUTION].

226. Kevin Tan & Li-ann Thio, *Introduction*, in EVOLUTION, *supra* note 225, at 2.

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

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

229. *Id.* art. 94(1) (“The Supreme Court shall consist of the Court of Appeal and the High Court with such jurisdiction and powers as are conferred on those Courts by this Constitution or any written law.”). The Court of Appeal exercises appellate criminal and civil jurisdiction, while the High Court exercises both original and appellate criminal and civil jurisdiction. Supreme Court of Judicature Act, ch. 322, pt. II, s.3 (Sing.).

influenced by the British legal tradition of parliamentary supremacy.²³⁰ Originalism had not featured prominently in Singapore's constitutional jurisprudence until a recent 2010 decision on the constitutionality of the mandatory death penalty.²³¹ The Singapore Court of Appeal's originalist methodology in this case is consistent with its legalism in constitutional interpretation. Its originalism is employed to curb judicial discretion; it is focused on text, deferential to precedent, and has little popular appeal outside the courts. This section examines the apex Singapore court's prominent originalist decision in *Yong Vui Kong v. Public Prosecutor*.²³²

* * *

Nineteen-year-old Yong, a Malaysian national, was arrested in 2008 for carrying several packages of heroin.²³³ He was convicted of trafficking more than forty grams of heroin. Drug trafficking offences carry a mandatory death penalty under Singapore law and Yong was sentenced to death.²³⁴ He appealed, arguing that the mandatory death penalty was an unconstitutional violation of the right to life under the Singapore Constitution, which provides under Article 9(1) that: "No person shall be deprived of his life or personal liberty save in accordance with law."²³⁵ Yong argued that the mandatory death penalty was an inhuman punishment that could not be considered "in accordance with law" under Article 9.

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

230. See generally Li-ann Thio, *Beyond the "Four Walls" in an Age of Transnational Judicial Conversations: Civil Liberties, Rights Theories, and Constitutional Adjudication in Malaysia and Singapore*, 19 COLUM. J. ASIAN L. 428 (2006); Li-ann Thio, *Protecting Rights*, in *EVOLUTION*, *supra* note 225, at 193.

231. *Yong Vui Kong v. Public Prosecutor (Yong)*, [2010] 3 SING. L. REP. 489.

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

233. *Id.*

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

235. CONST. OF THE REP. OF SING. art. 9(1).

Yong's counsel pointed to Privy Council decisions in several Caribbean states with British post-colonial constitutions, all of which had overturned the mandatory death penalty legislation on the basis that it was an inhuman punishment.²³⁶ The Court considered this to be an unwarranted and expansive interpretation of the term "law" in Article 9 and dismissed the idea that judges should change legal norms to reflect the "civilised norms of humanity."²³⁷ The Court refused to find an implied prohibition against inhuman punishment in the Singapore Constitution, reasoning that the lack of an explicit textual provision and constitutional history at the time of drafting indicated that the framers had deliberately omitted to incorporate such a prohibition.²³⁸

The starting point of the Court's originalist approach is text-focused. The Court rejected the relevance of foreign decisions because, unlike the post-colonial Caribbean constitutions, the Singapore Constitution did not contain an express prohibition against inhuman punishment.²³⁹ The Chief Justice emphasized that the other Commonwealth cases were decided "in a different *textual* context,"²⁴⁰ and reasoned that the lack of any explicit textual provision prohibiting inhuman punishment was evidence of the framers' original understanding of Article 9.²⁴¹

The Singapore Constitution's fundamental liberties provisions were based on the 1957 Malayan Constitution drafted by the Reid Constitutional Commission.²⁴² The Court placed particular emphasis on the fact that the Reid Commission had *not* recommended a prohibition against inhuman treatment in the Malayan Constitution, even though such a provision already existed in the European Convention on Human Rights at the time of Malaya's independence when its Constitution was drafted. The Court concluded that the omission was not due to ignorance or oversight on the part of Malaya's constitu-

236. See, e.g., *R. v. Watson* [2005] 1 A.C. 472; *Bowe v. The Queen* [2006] 1 W.L.R. 1623; *Reyes v. The Queen* [2002] 2 A.C. 235 (P.C.).

237. *Yong Vui Kong v. Public Prosecutor (Yong)*, [2010] 3 SING. L. REP. 489, [52].

238. *Id.* at [60]–[75].

239. *Id.* at [61].

240. *Id.* at [50] (emphasis in original).

241. *Id.* at [61].

242. *Id.* at [62].

tional drafters.²⁴³ Since the Reid Constitutional Commission had not included an express textual prohibition against inhuman treatment, the Court's opinion was that to find that Article 9 encompassed such a prohibition would be "to legislate new rights into the Singapore Constitution under the guise of interpreting existing constitutional provisions."²⁴⁴

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

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

243. *Id.*

244. *Id.* at [59].

245. *Id.* at [64].

246. *Id.* at [72].

247. P.J. Yap, *Constitutionalising Capital Crimes: Judicial Virtue or 'Originalism' Sin?*, SING. J. LEGAL STUD. 281, 284 (2011).

248. *See* Yong Vui Kong v. Public Prosecutor (*Yong*), [2010] 3 SING. L. REP. 489 [64].

drafters of the Constitutions. It seems strange in this context that Parliament's decision to reject the Commission's proposal should be considered legitimate evidence of an "original" intent not to prohibit inhuman treatment.²⁴⁹

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

Yet in the same judgment, the Chief Justice made clear that laws allowing torture could not be permitted²⁵³—even though the 1966 Commission's recommendation to prohibit torture was also not incorporated into Singapore's Constitution. The Court attempts to justify this distinction by noting that the Home Minister had explicitly stated that torture is wrong during parliamentary debates in 1987.²⁵⁴ But a ministerial statement two decades after the Commission's report has little to do with the *original* intent of the *framers*, whether one regards the framing to be at the time of Singapore's independence in 1963 or associated with the 1966 Constitutional Commission.²⁵⁵ The Court's deviation from its original intent approach when it would produce implausible results illustrates its

249. Yap, *supra* note 247, at 284.

250. See, e.g., *id.*; Yvonne McDermott, Yong Vui Kong v. Public Prosecutor and the Mandatory Death Penalty for Drug Offences in Singapore: A Dead End for Constitutional Challenge?, 1 INT'L J. HUM. RTS. & DRUG POL'Y 35, 40–41 (2010).

251. WEE REPORT, *supra* note 225, at ¶ 14.

252. THIO, *supra* note 218, at 16.

253. Yong, [2010] 3 SING. L. REP. 489, at [75] (noting that "[t]his conclusion does not mean that, because the proposed Art 13 included a prohibition against torture, an Act of Parliament that permits torture can form part of 'law' for the purposes of Art 9(1)").

254. *Id.*

255. See Yap, *supra* note 247, at 285.

“faint-hearted” originalism.²⁵⁶

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

2. Features of Prudential Originalism

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

The first key distinguishing feature between popular originalism and prudential originalism is that the latter has little popular reception outside the courts. Despite the Singapore Court of Appeal’s use of originalism at the highest judicial decision-making level, originalist arguments have little popular resonance in political or public discourse. Politicians rarely invoke constitutional values or refer to the framers in political debate; instead, their views are predominantly characterized by political pragmatism.²⁵⁹ Scholarly dis-

256. See Scalia, *supra* note 20, at 864.

257. Yong, [2010] 3 SING. L. REP. 489, at [92].

258. *Id.*

259. See, e.g., *Singapore Parliamentary Debates, Official Report* (Aug. 27, 2008), By-Elections Motion, vol. 84, col. 3328 (statement of Lee Hsien Loong, Prime Minister) (“I am here not to argue constitutional niceties . . . but to set out *the political realities* of what works for Singapore and how Singapore has to operate in order that this Government will function

course over originalism is virtually non-existent; the Court of Appeal's originalist decision in *Yong* attracted a few academic commentaries,²⁶⁰ but has not ignited any further academic debate in Singapore. Critics of the Court's decision dismiss originalism altogether as an unsatisfactory method of constitutional interpretation for Singapore,²⁶¹ in contrast to the battle waged by secularists and Islamists in Malaysia to claim the authority of the framers on their side.²⁶²

The Singapore Court of Appeal's use of originalism reflects its deferential approach to the political branches: the court employs originalism as a *prudential* doctrine to avoid interfering with legislation enacted by the political process. The Court's original intent analysis is strained largely because it is focused on *legislative* intent, rather than the framers' intent. For instance, it gives great weight to the Parliament's act of not implementing the Constitutional Commission's recommendation to insert a prohibition against inhuman treatment four years after the Singapore Constitution came into effect.²⁶³

This stands in stark contrast to the Turkish Constitutional Court's use of originalism to strike down democratically enacted statutes in the headscarves cases.²⁶⁴ The Singapore Court of Appeal's originalist reasoning is solidly focused on upholding legislation enacted by Parliament. The Court's concern of preventing judges from "acting as legislators in the guise of interpreters of the Singapore Constitution" runs through its entire opinion.²⁶⁵ Supporters of the decision in *Yong* approve of originalism precisely because it is perceived to constrain the judiciary from acting improperly political vis-à-vis the legislature. Singapore scholar Li-ann Thio writes approvingly: "Originalism here acts to restrain judicial discretion. This avoids the spectre of juristocracy, where activist judges advance

well for Singaporeans.") (emphasis added).

260. See Li-ann Thio, *It is a Little Known Legal Fact: Originalism, Customary Human Rights Law and Constitutional Interpretation*, 2010 SING. J. LEGAL STUD. 558 (2010); Yap, *supra* note 247; Jack Tsen-Ta Lee, *The Mandatory Death Penalty and a Sparsely Worded Constitution*, 127 L.Q. REV. 192 (2011); McDermott, *supra* note 250.

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

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

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

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

265. *Yong Vui Kong v. Public Prosecutor (Yong)*, [2010] 3 SING. L. REP. 489, at [92].

a political agenda through applying their subjective values in interpretation.²⁶⁶

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

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

266. Thio, *supra* note 260, at 570.

267. *See supra* note 231.

268. *Yong*, [2010] 3 SING. L. REP. 489, at [61].

269. *Id.* at [52].

270. *Id.* at [49] (reasoning that the mandatory death penalty is "*par excellence* a policy issue for the Legislature and/or the Executive, and not a judicial issue for the Judiciary").

271. *Id.* at [13]–[32], [52]–[54].

272. *See, e.g.*, Ong Ah Chuan v. Public Prosecutor [1981] A.C. 648 (P.C.), Nguyen Tuong Van v. Public Prosecutor [2004] 1 S.G.C.A. 47.

take into account the Privy Council's changed position on the mandatory death penalty.²⁷³ Unlike how originalist arguments were employed to fuel Malaysia's Islamization movement despite clear Supreme Court precedent to the contrary affirming the Constitution's secular basis,²⁷⁴ the Singapore Court of Appeal does not use originalism in a manner that creates tension with precedent. Quite the opposite: both are viewed as complementary elements of a conservative interpretive methodology.

The manner in which originalism is applied in Singapore is unsurprising in light of its specific constitutional conditions. Constitutionalism in Singapore, Thio explains, "reflects a predominant constitutional pragmatism or realism, which is focused on experience . . . rather than an idealistic focus on abstract values."²⁷⁵ Part of this can be traced to the Singapore Constitution's pragmatic beginnings as a basic working plan for governance hastily cobbled together after its separation from Malaysia. Unlike Malaysia's Constitution, which was inextricably connected to its nation's birth and independence from its colonial past, Singapore's Constitution "emerged out of the ashes of a failed inter-communal experiment that was the Federation of Malaysia."²⁷⁶ Singaporeans do not regard their Constitution in an idealized light, nor view it as a source of aspirational values or national identity. As Singapore's first Prime Minister Lee Kuan Yew emphasized, the "main thing about the Constitution is that it must work."²⁷⁷

Political, rather than legal, constitutionalism is the dominant

273. See, e.g., McDermott, *supra* note 250, at 38; Li-ann Thio, *The Death Penalty as Cruel and Inhuman Punishment before the Singapore High Court? Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in Public Prosecutor v Nguyen Tuong Van (2004)*, 4 O. U. COMM. L.J. 213 (2004); Michael Hor, *The Death Penalty in Singapore and International Law*, 8 SING. Y.B. INT'L L. 105 (2004); C.L. Lim, *The Constitution and the Reception of Customary International Law: Nguyen Tuong Van v. Public Prosecutor*, SING J. LEGAL STUD. 218 (2005).

274. *Che Omar Bin Che Soh v. Pub. Prosecutor*, (1988) 2 MALAYAN. L.J. 55.

275. See THIO, *supra* note 218, at 02.060.

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

277. *Singapore Parliamentary Debates, Official Report* (Dec. 22, 1965), Constitution (Amendment) Bill, vol. 24, col. 421 (statement of Lee Kuan Yew, Prime Minister).

constitutional mode in Singapore. Singapore's legal culture is "more accurately identified with the practice of political constitutionalism, where the focus is on political methods of accountability and the pre-eminent role of the political branches in saying what the Constitution is."²⁷⁸ In the absence of a historical nation, Singapore's national ideology has been shaped by political values promoted by the Government.²⁷⁹ Public discourse during the 1990s was dominated by a focus on cultural "Asian" values, rather than on constitutional principles or historical origins.²⁸⁰ Deference to political authority and constitutional pragmatism remain defining features of Singapore's public law culture.

* * *

The High Court of Australia provides another comparative example of a national court that applies a form of *prudential* originalism. Australia's constitutional court is "self-consciously 'originalist' to a degree unknown in the United States."²⁸¹ Australia's general interpretive approach is heavily textualist and formalistic, and the form of originalism that has developed is closely aligned with the predominantly legalistic interpretive approach of its apex court.²⁸² According to Justice McHugh of the High Court, "most Australian judges have been in substance what Justice Scalia of the United States Supreme Court once called himself—a faint-hearted originalist."²⁸³ Precedent is treated as authoritative and central to the court's interpretive methodology, rather than as aberrational when not in line

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

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

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

281. Greene, *supra* note 4, at 5.

282. See generally, Jeffrey Goldsworthy, *Australia: Devotion to Legalism*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 106 (Jeffrey Goldsworthy ed., 2007).

283. See *Eastman v The Queen* (2000) 203 CLR 1, 44 (Austl.) (observing that "most Australian judges have been in substance what Justice Scalia of the United States Supreme Court once called himself—a faint-hearted originalist").

with history.²⁸⁴ Judicial restraint is promoted not through historicist appeals, but through “a focus on text and existing doctrine.”²⁸⁵ Originalist interpretation remains solely the province of its courts, and the public appeal that originalism possesses in America is missing from Australian originalism.²⁸⁶ As Greene observes, Australian originalism is “more broadly practiced but less reactionary and less historicist than American originalism.”²⁸⁷ Originalism in Australia—like in Singapore—looks different from its American counterpart.

That originalism thrives in Australia in this form makes sense in the context of Australian constitutional culture. The Australian High Court is acknowledged as one of the most legalist national courts and its originalism stems from this formalistic interpretive approach.²⁸⁸ Unlike the U.S. Constitution, the Australian Constitution is a “prosaic document expressed in lawyer’s language.”²⁸⁹ Enacted as a statute by the British Parliament in 1900, it consists of structural provisions setting up a framework for governance and does not contain a bill of rights or any aspirational principles. Australians regard the Constitution as a basic legal agreement that establishes a framework for political governance, not as an object of aspirational ideals. As Jeffrey Goldsworthy explains, Australians “seem perfectly able to identify themselves as a historically continuing people, characterized by some basic shared values and commitments, without their Constitution playing a larger part in the narrative, except as the essential legal device by which federation was attained.”²⁹⁰ Indeed, “[t]he whole idea of the Constitution as an object of quasi-religious veneration, inspiration, and redemption is alien to Australians.”²⁹¹

284. *Id.* at 5 (observing that “Australia’s judges, lawyers, and theorists are less likely than their American counterparts to marry constitutional historicism to judicial restraint”).

285. Greene, *supra* note 4, at 41.

286. See Weis, *supra* note 17, at 8 (noting that Australian originalism does not share the popular reception in Australia that originalism has in American constitutional culture).

287. Greene, *supra* note 4, at 41.

288. Jeffrey Goldsworthy, *Conclusions*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY, *supra* note 283, at 321, 328.

289. Anthony Mason, *The Australian Constitution in Retrospect and Prospect*, in REFLECTIONS ON THE AUSTRALIAN CONSTITUTION 7, 8 (Robert French et al. eds., 2003).

290. Jeffrey Goldsworthy, *Constitutional Cultures, Democracy, and Unwritten Principles*, 3 U. ILL. L. REV. 683, 686 (2012).

291. *Id.* at 687.

In Australia, rights protection is viewed as a matter belonging to the political realm, not the constitutional one.²⁹² Consequently, the Australian Constitution does not feature prominently in the public or political discourse: it “remains largely in the background and only occasionally attracts a modicum of public attention.”²⁹³ Indeed, a 1992 poll reported that a third of the Australian population were unaware that Australia had a written constitution.²⁹⁴ The Constitution has much less cultural or popular significance in Australia than in the United States—or, Malaysia and Turkey. This difference in constitutional conditions makes it far more persuasive to think of the Australian Constitution as a formalistic legal document; its High Court’s legalistic interpretive approach—including its originalist methodology—is in line with this constitutional framework.²⁹⁵ As a result, “the conditions of constitutionalism in Australia have given rise to a distinct interpretative tradition, of which originalism is a natural outgrowth or component.”²⁹⁶

* * *

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

III. IMPLICATIONS

A. *Complicating the Story*

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

292. *Id.*

293. *Id.* at 685.

294. See Stephen Donaghue, *The Clamour of Silent Constitutional Principles*, 24 FED. L. REV. 133, 146, n.87 (1996) (referencing a poll conducted by Irving Saulwick).

295. See Weis, *supra* note 17, at 14–15.

296. *Id.* at 3.

way originalism looks and functions is shaped by its cultural, historical, and political landscape. This may seem an unsurprising conclusion, but recognizing that originalism is culturally dependent adds texture to debates over originalism in two ways. First, it contributes to emerging scholarship on comparative originalism by complicating the story told so far by current accounts. Second, it questions the claim that originalist interpretation necessarily follows from written constitutionalism.

Until recently, it was widely assumed that originalism has little purchase outside of the United States.²⁹⁷ Emerging scholarship on comparative originalism has begun to question this assumption. There have been, broadly speaking, two prevailing views. The first view affirms the conventional narrative that originalism is indeed rejected by nations outside the United States.²⁹⁸ But perspectives that focus on particular features of “American-style” originalism are often inevitably colored by implicit assumptions about how originalism looks from an American lens.²⁹⁹ They sometimes simply fail to accommodate the different forms of originalist discourse present in other countries.

Other scholars acknowledge the presence of originalist arguments elsewhere and attempt to attribute a country’s affinity to originalism to various general hypotheses, such as a country’s revolutionary constitutional traditions,³⁰⁰ or a political leader’s cult of personality.³⁰¹ The trouble is that none of these explanations fully work. Originalist rhetoric thrives in countries that do not fit the accounts

297. See *supra* note 3.

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

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

300. Fontana, *supra* note 13, at 197.

301. Varol, *supra* note 5, at 1246.

provided by these studies.³⁰² Part of this may be because existing scholarship on originalism abroad has been confined to a limited number of countries so far: Australia,³⁰³ Canada,³⁰⁴ Germany,³⁰⁵ and Turkey.³⁰⁶ Existing accounts are also incomplete, I argue, because a country's attraction to originalism is culturally contingent, making it difficult to find a generalized explanation for why originalism thrives across diverse constitutional cultures.

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

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

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

302. See *supra* Parts II.A, II.B.

303. See, e.g., Greene, *supra* note 4; Goldsworthy, *supra* note 8; Goldsworthy, *supra* note 290; Weis, *supra* note 17.

304. See, e.g., Greene, *supra* note 4.; cf. Miller, *supra* note 8 (arguing that a proper understanding of the *Persons Case* is consistent with an originalist interpretation rather than the "living tree" approach to constitutional interpretation that has become associated with Canadian constitutional jurisprudence).

305. See, e.g., Scheppele, *supra* note 3.

306. See, e.g., Varol, *supra* note 5.

tures of America culture: lionization of the Framers; the revolutionary character of American sovereignty; backlash against the rights revolution of the Warren and Burger Courts; the politicization of the judicial-nomination process; a culturally and politically assimilative ethos; and a relatively religious culture.³⁰⁷ Jack Balkin, too, agrees that “American originalism has been produced by a combination of historical and cultural factors.”³⁰⁸ Likewise, originalist arguments have popular salience in Malaysia and Turkey because of cultural features and political traditions associated with the nation’s founding or constitutional framing.³⁰⁹ Originalism’s success requires “an audience sensitized by culture and by history.”³¹⁰

In these societies, *popular* originalism functions as more than an interpretive method. Originalist argument of this kind, as Greene suggests, is best understood as an argument about constitutional *ethos*.³¹¹ Drawing on Philip Bobbitt’s typology of constitutional argument, it is a form of ethical argument: a “constitutional argument whose force relies on a characterization of American institutions and the role within them of the American people.”³¹² As Richard Primus recognizes, “the deeper power of originalist argument sounds in the romance of national identity.”³¹³

Secularists and Islamists in Malaysia and Turkey battle so deeply over the original understanding of the constitutional provi-

307. Greene, *supra* note 4, at 62–82.

308. See Balkin (2015 forthcoming), *supra* note 3, at 7 (explaining that these factors include America’s revolutionary tradition and protestant religious tradition; the contemporaneous emergence of the American state, nation, and people with the Constitution; and Americans’ reverence for the Constitution and special veneration for the founding generation).

309. See *supra* Part II.A.2.

310. See Greene, *supra* note 4, at 82 (arguing that originalism’s success requires “not just an argument, or even one coupled with a movement, but also an audience sensitized by culture and by history”).

311. *Id.* at 82–88 (arguing that originalist argument is a species of ethical argument, i.e., an argument “driven by a narrative about the American ethos”).

312. Philip Bobbitt, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 94 (1984).

313. Richard Primus, *The Functions of Ethical Originalism*, 88 *TEX. L. REV.* 79, 80 (2010); see also Robert C. Post, *Theories of Constitutional Interpretation*, 30 *REPRESENTATIONS* 13, 29 (1990) (characterizing historical arguments that claim that the Framers speak for present generations as “neither more nor less than a characterization of the national ethos”).

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

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

314. See Carolyn Evans, *Constitutional Narratives: Constitutional Adjudication on the Religion Clauses in Australia and Malaysia*, 23 EMORY INT'L L. REV. 437, 438 (2009) (“Constitutional narrative in this context is a culturally and legally created story about the role, purpose, history, and relevance of the constitution in a particular society.”).

315. *Id.* at 454.

316. Jamal Greene also points to religion as one of the features that sensitizes the American audience to originalism. According to Greene, “the originalism movement that so glorifies the Constitution's original understanding is conspicuously commingled with an evangelical movement that tends to disfavor departures from the original meaning of God's word.” Greene, *supra* note 4, at 7; see also, *id.* at 78–81.

317. See Balkin (2015 forthcoming), *supra* note 3, at 18.

318. See CROSS, *supra* note 28, at 14.

319. *Id.* at 16 (“[O]riginalism may be used as a tool for other ends The theoretical attractiveness of originalism to the public makes it a particularly desirable tool to pursue other ends and may even embolden the justices to go further than they otherwise might.”); see also Berman, *supra* note 1, at 8 (“[O]riginalism . . . is not merely false but pernicious . . . because of its tendency to be deployed in the public square—on the campaign trail, on talk

that originalism can be employed—not necessarily insincerely—to support vastly different constitutional visions.

Consider the various versions of originalist theory in the United States. Take, for instance, Randy Barnett’s “presumption of liberty” originalism, which would expand the scope of enforceable constitutional rights,³²⁰ or Jack Balkin’s living originalism, which views *Roe v. Wade* as correctly decided.³²¹ Both are the antitheses of the originalism of Justice Scalia and Robert Bork,³²² which was born out of a conservative movement that sought to limit judicial expansion of unenumerated rights.³²³ And in *District of Columbia v. Heller*, Justice Scalia and Justice Stevens each relied on different originalist interpretations to reach contrasting positions over whether the Second Amendment protects the right of an individual to carry a gun for confrontation.³²⁴ Similarly, secularist and Islamist factions in Malaysia both employ originalist arguments to support opposite conclusions on the scope of Islam’s constitutional power.³²⁵ Yet other Malaysian judges argue that the framers’ truly intended an individual rights-oriented approach to constitutional interpretation that would empower judges to protect constitutional rights against legislative infringement.³²⁶

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

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

320. BARNETT, *supra* note 42, at 253–69.

321. 410 U.S. 113 (1973); see Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 319–36 (2007).

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

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

324. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788, 2790–2801, 2804–05 (2008) (Scalia, J., majority opinion); cf. *id.* at 2822, 35–37, 39, 41 (Stevens, J., dissenting).

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

326. See *supra* notes 172–77 and accompanying text.

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

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

327. Scalia, *supra* note 20, at 854.

328. WHITTINGTON, *supra* note 1, at 15.

329. *Id.* at 56; *see also* Calabresi & Prakash, *supra* note 15, 551–52 (1994).

330. WHITTINGTON, *supra* note 1, at 49. *See also* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1250 (1994) (“[O]riginalist interpretivism is not simply one method of interpretation among many—it is the only method that is suited to discovering the actual meaning of the relevant text”); Kesavan & Paulsen, *supra* note 15, at 1142 (“[O]riginal meaning textualism is the only method of interpreting the Constitution”); Saikrishna B. Prakash, *Unoriginalism’s Law Without Meaning*, 15 CONST. COMMENT. 529, 544 (1998) (“When we accept some text as law, we also commit to the law’s original meanings Indeed, to embrace the legitimacy of words as law without their original, ordinary meanings is to embrace nothing.”).

331. *See generally*, Scheppele, *supra* note 3.

332. *See* Greene, *supra* note 4, at 88.

The variations in the practice of originalism across the world reinforces the idea that whether—and when—originalism takes hold in a country is influenced by cultural and historical traditions, rather than conceptual arguments. If originalism is an argument about constitutional ethos, its authority and appeal are ultimately connected to how closely a society identifies with the particular constitutional narrative on offer³³³—not because of an inherent link to written constitutionalism. Nor does it appear necessarily linked to a capacity to provide fixed and objective criteria for constitutional interpretation.³³⁴ Indeed, the opposite phenomenon appears on display in Malaysia and Turkey: because the language of originalism has popular appeal in these countries, constitutional actors seize on originalist arguments to support opposing positions on significant constitutional issues.

The claim that originalist interpretation follows from treating the Constitution as a form of written law may be a more plausible justification for constitutional systems where the Constitution is regarded formalistically as a statute or basic legal document for governance.³³⁵ For instance, the Australian Constitution was initially conceived as a British statute; it does not contain a bill of rights or any aspirational formulations and is not an object of veneration. Singapore's Constitution originated as a hasty reorganization of its governance following its separation from Malaysia; as a result, it is viewed pragmatically and not in an idealized light. The form of originalism that thrives in both countries is strikingly similar: their national courts employ textualist originalist methods in a legalistic manner consistent with a formalistic view of the Constitution. Lael Weis argues that the “Australian constitutional system is a *better* fit for an originalist theory of interpretation” because it is “more plausible to treat Australian constitutionalism as reducible to the written

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

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

335. *See* Weis, *supra* note 17.

constitution,” compared to the central founding role that the U.S. Constitution has in American constitutionalism.³³⁶

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

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

B. Originalism and Judicial Restraint

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

336. *Id.* at 3.

337. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1285 (1999).

338. *See* Colby, *supra* note 1 at 714 (“Judicial constraint was its heart and soul—its *raison d’être*.”).

339. *See* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 601 (2004) (noting that “originalism was a reactive theory motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger Courts”); Colby, *supra* note 1, at 716 (explaining that originalism “arose as a by-product of the conservative frustration with the broad, rights-expansive decisions of the Warren and Burger Courts”).

interpretation to curb judicial expansion of constitutional rights that interfered with the output of democratically enacted bodies. Its supporters portrayed originalism as a tool of judicial restraint because it promoted deference to the decisions of those with political authority.³⁴⁰

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

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

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

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

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

344. Jonathan R. Macey, *Originalism as an "ism,"* 19 HARV. J.L. & PUB. POL'Y 301, 302, 304 (1995). See also Michael Stokes Paulsen, *How to Interpret the Constitution (And How Not To)*, 115 YALE L.J. 2037, 2062 (2006) (arguing that the "existence of reasonably

The shift in focus from judicial restraint in the sense of refraining from invalidating outputs of the democratic process to judicial constraint in the sense of constraining judicial discretion in the academic discourse,³⁴⁵ however, has not affected its appeal in practice. As a matter of political and popular appeal, the language of judicial restraint—and constraint—has been crucial to originalism’s success.³⁴⁶ Among the general public, originalism is routinely associated with judicially conservative values. “In popular discourse,” Balkin observes, originalist “advice is primarily directed at judges, who, it is feared, are tempted repeatedly to stray from the framers’ vision and substitute their personal political predilections from the country’s basic law.”³⁴⁷

Originalism continues to be portrayed in American popular constitutional culture as necessary for curbing activist judges.³⁴⁸ As an example, take Rush Limbaugh’s declaration:

The court is out of control. The court is made up now of nine people, some of whom are simply substituting their own personal policy preferences or foreign law or whatever to find in legal cases that come before them. If you’re going to have members of the Supreme Court look at the document and find something in it that isn’t there, then the Constitution is meaningless! . . . This whole thing is about reorienting the court for constitutionalism. Another word for that is *originalism*. You go back and you check the originalists, the Founders. It’s there, and if the Constitution doesn’t provide for it, you don’t make it up.³⁴⁹

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

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

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

347. Balkin (2015 forthcoming), *supra* note 3, at 1.

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

349. The Rush Limbaugh Show, *It’s Not All About Roe v. Wade* (Oct. 11, 2005),

To be sure, critics of originalism have sought to undermine originalism's claim of constraining judges by pointing to its selective and inconsistent use by judges in practice;³⁵⁰ the indeterminacy of historical evidence;³⁵¹ and the substantial discretion afforded to judges to pick from different versions of originalist theory to reach a desired conclusion.³⁵² Other scholars have argued that non-originalist methods, such as common law constitutionalism or precedent-based approaches, offer more effective means of constraining judicial discretion.³⁵³ These critiques offer important insights made from within the American discourse over originalism. I provide a comparative perspective to these debates by providing an account of how courts elsewhere creatively deploy originalist arguments in a context-dependent manner.

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

transcript available at http://www.rushlimbaugh.com/daily/2005/10/11/it_s_not_all_about_roe_v_wade.

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

351. See, e.g., Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL’Y 437 (1995); Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning*, 52 UCLA L. REV. 217 (2004).

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

353. See, e.g., David Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL’Y 137 (2011); Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271 (2005).

cretion both to promote *expansive* constitutional interpretation and to *invalidate* democratically enacted legislation. Originalist arguments have been employed in practice to achieve judicially expansive constitutional interpretation in Malaysia, and also to empower the Turkish judiciary vis-à-vis the legislature. The features of American-style originalism—with its focus on constitutional historicism and its popular appeal in the public arena—are associated in these contexts with assertive or reactive judging against the existing constitutional order.

Secularists and Islamists in Malaysia on both sides of the debate over religious establishment and the state strive to mobilize originalist arguments to support either judicial expansion of religious liberty rights or Islam's constitutional scope of power.³⁵⁴ Islamists assert that an originalist interpretation supports a broader reading of the Islamic establishment clause that would expand theocratic elements of the Malaysian Constitution. Secularists, on the other hand, argue that a constitutional interpretation approach that would limit Islam's role and judicially protect individual rights against legislative infringement would be in line with the framers' original intent. The fact that both sides of the divide can claim different originalist understandings of Islam's constitutional position highlights the substantial discretion available to judges employing originalist arguments in constitutional practice.³⁵⁵

In Turkey, the judiciary has employed originalism to assert its power and jurisdiction against the elected branches.³⁵⁶ The Turkish Constitutional Court thwarted the legislature's attempt to allow Islamic headscarves in higher educational institutions using originalist reasoning in two decisions to return the Turkish Constitution to its secular roots.³⁵⁷ The Court's controversial pro-secularism decisions striking down democratically enacted legislation have led to the Court being called "an activist institution that has wrongfully injected itself into the Turkish political process through unprincipled opin-

354. See *supra* Part II.A.1.

355. See MALAY. CONST., art. 3(1) ("Islam is the religion of the Federation; but other religions may be practised in peace and harmony.").

356. See *supra* Part II.A.2.

357. See generally Varol, *supra* note 5; Jill Goldenziel, *Veiled Political Questions: Islamic Dress, Constitutionalism, and the Ascendance of Courts*, 61 AM. J. COMP. L. 1 (2013); Bâli, *supra* note 195.

ions.”³⁵⁸ In Turkey—as is often also the case in Malaysia—it is “primarily secular elites who support originalist interpretations of the Constitution.”³⁵⁹ In neither of these countries is the language of originalism associated with the cabining of judicial discretion or deference to the legislative process.

To Americans, judicial restraint and the early originalist movement are usually associated with political conservatism, particularly in the shadow of the Warren Court’s perceived judicial activism. The opposite phenomenon is apparent in Malaysia and Turkey: originalism is frequently the domain of political liberals seeking to increase the courts’ oversight of the legislative process or judicial expansion of individual rights.³⁶⁰ Originalism in these contexts is not intrinsically linked to constraining judicial discretion nor does it serve politically conservative values. These examples demonstrate originalism’s potential to be appropriated for judicially liberal or conservative ends in countries where ideas about the founding or framing have popular appeal. Popular originalism has salience in these contexts not merely as an interpretive tool,³⁶¹ but as a rhetorical means of appealing to a particular constitutional vision.³⁶² The features of *popular* originalism have at least as much—if not greater—affinity to what is viewed as activist or expansive judging than judicial constraint of any kind.

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

358. Varol, *supra* note 5, at 1245; *see also supra* note 195.

359. Varol, *supra* note 5, at 1239.

360. *See id.* at 1278 (noting that originalism “has its following primarily with secular elites in Turkey, who form a part of the social democrats—i.e., the Turkish left”).

361. Indeed, Balkin acknowledges that despite the immense preoccupation with originalism in United States discourse, “it is not even the dominant form of argument among American judges” and that cases decided primarily through originalist methods, like *Heller* and *McDonald*, are rare. Jack Balkin, *The American Constitution as “Our Law,”* 25 *YALE J.L. & HUMAN.* 113, 124 (2013).

362. *See* Greene, *supra* note 4, at 84–85.

strained by precedent, and has no popular appeal in political or public discourse.³⁶³ In short, the prudential originalism employed in these countries has little in common with the originalism in practice in the United States.

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

C. Original Understanding (or Intent or Meaning)

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

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

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

363. See *supra* Part II.B.2; see also Weis, *supra* note 17, at 9 (noting the differences between Australian originalism and American originalism, and arguing that “it would be a mistake to assume that a robust popular constitutional culture and central founding moment or a socially profound rights jurisprudence are necessary components of originalism simply because they are necessary to understand the reception of originalism in the United States”).

ers is an obvious manifestation of this affinity toward constitutional historicism. Original intent dominates the courts' originalist jurisprudence in Malaysia.³⁶⁴ Extrinsic historical evidence is used not merely to provide an understanding of the context, but as a tool to determine the actual intentions of individual framers.³⁶⁵ Original meaning is referred to occasionally but it is not focused on discovering the objective public meaning of the text. Rather, judges and lawyers in practice rely on historical sources as subjective evidence of the text's original meaning.

This emphasis on historical meaning is also reflected in the Turkish Constitutional Court's originalist approach to the headscarves cases.³⁶⁶ Varol observes that "original intent continues to form a part of the Turkish Constitutional Court's originalist methodology" and the Court looks to readily available evidence of "Ataturk's writings, video and audio recordings of his speeches, as well as second-hand accounts of his statements" to ascertain his intent.³⁶⁷

Scholarly distinctions between the different methods of originalism have little practical significance to the constitutional practice of Malaysia or Turkey. Secularists and Islamists in Malaysia do not battle over whether to focus on the framers' intent or the original meaning of the text, but over whether the historical arguments support their originalist interpretation.³⁶⁸ Varol observes that the Turkish Constitutional Court's use of originalist methods "yield the same result primarily because original meaning, intent, and expected application all focus on ascertaining the meaning of Ataturk's reforms and principles."³⁶⁹ The overriding theme that emerges from originalism in practice in Malaysia—as well as in Turkey—is a focus

364. See *Che Omar Bin Che Soh v. Pub. Prosecutor*, (1988) 2 MALAYAN L.J. 55, 56; *Teoh Eng Huat v. Kadhi Pasir Mas (Susie Teoh)*, (1990) 2 MALAYAN L.J. 300, 301; *Meor Atiqulrahman bin Ishak v. Fatimah bte Sihi*, (2000) 5 MALAYAN L.J. 375, 384F; *Lina Joy v. Majlis Agama Islam Wilayah & Anor*, (2004) 2 MALAYAN L.J. 119 (H.C.), at 129 [18]; *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan*, (2007) 3 ALL MALAY. REP. 585 (F.C.), at 3; *Lee Kwan Woh v. Pub. Prosecutor*, (2009) 5 MALAYAN L.J. 301, 311.

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

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

367. *Id.*

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

369. Varol, *supra* note 5, at 1277.

on historical understandings and the intentions of the constitutional framers.

To Americans, originalism—whether focused on intent or meaning—is also characterized by constitutional historicism. As Greene notes, “American scholars, not to mention the lay public, tend to lump together original intent and original meaning as two different ways of practicing a methodology whose essential features they share: attention to a fixed historical meaning.”³⁷⁰ The original intent of the Framers dominated the first wave of American originalist jurisprudence, and the United States’ “constitutional practice continues to privilege intentionalism.”³⁷¹ Although academic originalist theory has shifted away from original intent toward original public meaning, American lawyers and judges continue to quote from historical texts from the Founders like *The Federalist*,³⁷² suggesting that the intent of the Framers “remain a vital source of American constitutional wisdom.”³⁷³ Indeed, citation to statements of the Framers or ratifiers increased during the period that original-meaning originalism gained prominence.³⁷⁴

As Balkin points out, “[d]espite the dominance of original public meaning originalism in academic theory, lawyers . . . continue to treat particular members of the founding generation differently than a dictionary or concordance.”³⁷⁵ Historicist original understanding—particularly, original intent—continues to matter in practice and in popular discourse because the Framers carry authority in Ameri-

370. Greene, *supra* note 4, at 61.

371. Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1686 (2012).

372. *See id.* at 1686.

373. Greene, *supra* note 4, at 34–35.

374. *See* Greene, *supra* note 371 at 1691 (“From 1986 to 2002, according to Professor Melvyn Durchslag, the Supreme Court referenced *The Federalist* in forty-two percent more cases (ninety-eight cases) than during the preceding sixteen years, with Justice Scalia writing nearly one-fifth of those opinions.”) (citing Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here Than Meets the Eye?*, 14 WM. & MARY BILL RTS. J. 243, 295, 297 (2005)); *see also* Greene, *supra* note 371, at 1691 (“*The Federalist* was cited more often in the nineteen years from 1980 to 1998 than in the eighty previous years combined.”) (citing Ira C. Lupu, *Time, the Supreme Court, and The Federalist*, 66 GEO. WASH. L. REV. 1324, 1328 (1998)).

375. Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 653 (2013).

ca's constitutional narrative.³⁷⁶

In stark contrast, originalist methodology in Singapore and Australia is focused on textual meaning, rather than on intent or historical evidence. The Singapore Court of Appeal's originalism in *Yong* is heavily text-oriented;³⁷⁷ the Court found that the lack of an explicit textual prohibition against inhuman treatment indicated that the mandatory death penalty did not infringe upon the constitutional due process guarantee.³⁷⁸ The Court's occasional reference to original "intent" is misleading: the Court is concerned with the intent of Parliament—a reflection of the influence of British legal traditions—not the constitutional framers.³⁷⁹ Put another way, its application of original "intent" is in service of legislative deference; the Singapore Court employs originalism as a tool that is part of its prevailing legalistic interpretative approach.

Australian originalism is also decidedly focused on original textual meaning, rejecting the search for the subjective intent of its framers in favor of the objective public meaning of the text.³⁸⁰ Even when the High Court of Australia reversed its previous stance on extrinsic evidence to permit consultation of convention debates, it emphasized:

Reference to [legislative history] may be made not for the purpose of substituting for the meaning of the words used the scope and effect . . . which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of the language used [and] the subject to which that language was directed.³⁸¹

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

376. Greene, *supra* note 371, at 1696–97 (arguing that “original understandings are authoritative . . . because they reflect a set of values that are offered by proponents as uniquely or especially constitutive of American identity”).

377. *Yong Vui Kong v. Public Prosecutor*, [2010] 3 SING. L. REP. 489 (Sing. C.A.).

378. *Id.* at 61–63.

379. *Id.* at 64–74.

380. See Goldsworthy, *supra* note 282, at 123–27.

381. *Cole v Whitfield* (1988) 165 CLR 360, 385 (Austl.).

original objective meaning, not subjective intent.³⁸² Justice Heydon, one of the chief proponents of originalism presently on the bench, dismissed the search for original intent as “both delusive and lacking in utility.”³⁸³

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

CONCLUSION

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

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

382. See *Brownlee v The Queen* (2001) 207 CLR 278, 285 (Austl.).

383. *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 277 (Austl.).

384. Greene, *supra* note 4, at 61.

Finally, it brings a fresh analytical lens to long-running debates over originalist methodology by providing a broader understanding of why some countries, including the United States, are attracted to historicist or textualist versions of originalism.

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

Recognizing the diversity in the use of originalist arguments elsewhere not only illuminates our understanding of originalism abroad, but also changes how we think about some of the assumptions that inform the debates over originalism at home.