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The Inevitability of Adaptability – Comparative Contributions to Understanding Originalism

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THE INEVITABILITY OF ADAPTABILITY – COMPARATIVE CONTRIBUTIONS TO UNDERSTANDING ORIGINALISM

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ABSTRACT

What can comparative law teach us about originalism as a constitutional interpretation method? After synthesizing existing comparative analyses, this article seeks to redefine comparative law's role in understanding originalism. When defining originalism strictly to require adherence to fixed original meaning, originalism is not used by courts anywhere in the world. Instead, courts use history purposively to understand the intent behind constitutional text as one of many methods of interpretation. Comparative works suggest historical constitutional interpretation has a complex relationship with rights, politics and culture.

Comparative law can provide not only descriptive understandings of originalism but also interrogate its mandate that present-day judges adhere to fixed historical definitions of constitutional provisions. This article challenges originalism's normative mandates by proposing principles about the movement of law between and within legal systems gleaned from comparative law. Two proposed principles are: (1) the "interpretive valve principle" that legal systems need mechanisms to adapt to societal changes, and that legal systems will generally work around artificial barriers to interpretive valves; and (2) the "legal transplant principle" that legal transplants always change from their origin system to the receiving system. Islamic law's development throughout the Islamic diaspora, Europe's reception of Roman law, and post-colonial common law systems' integration of English law highlight these fundamental tenets.

This article applies these principles to equitable originalism, a strict originalist philosophy fixing the meaning of "equity" in Article III to English chancery courts' equitable powers in the 1780s, and limiting federal judges'

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equitable powers to that fixed meaning. Equitable originalism is an artificial barrier to equity, which is an interpretive valve in the U.S. legal system. This dispositive freezing of equity is seen in no other former British colony, and stymies development of equity's inherent corrective function. Equitable originalism will likely face limited success as a sustainable constitutional interpretation method because it is anomalous to the way law moves and develops.

TABLE OF CONTENTS

INTRODUCTION

This article seeks to redefine comparative law's capacity to examine originalism as a constitutional interpretation method. Comparative studies juxtapose originalism in the United States with historical constitutional interpretation methods in other countries, explore originalism's interrelation with rights, politics, and culture, and contextualize its ramifications based on the type of constitution being interpreted. Comparative law can provide not only descriptive understandings of originalism, but also interrogate originalism's mandate that present-day judges are constrained to follow fixed historical definitions of constitutional provisions.

Part II of this article begins by defining originalism as a constitutional interpretation method. Part II emphasizes that originalism is a spectrum of constitutional interpretation methods, and strict originalism requires that present-day decision makers are constrained to meanings of constitutional provisions that were fixed upon ratification. Part II also discusses "equitable originalism," which is a form of originalism focused on the term "equity" in Article III of the U.S. Constitution.

Part III summarizes current comparative analyses of U.S. originalism and historical constitutional methods used by other countries' courts, which have contextualized originalism as a constitutional interpretation method and explored originalism's relationship with politics, culture, history and rights. These descriptive works illustrate that courts commonly use historical analysis as part of a pluralist approach to constitutional interpretation using multiple methods, but courts outside the United States do not use strict originalism. Instead, history is often analyzed as part of a purposive methodology used to understand the purpose behind constitutional text.

Comparative works challenge the notion that originalism necessarily constrains constitutional rights by pointing to countries with more recent constitutions that either direct judges to broadly interpret rights provisions or provide more explicit rights guarantees. In such countries, originalism protects rights. By and large, however, originalism is generally associated with rights retrenchment and conservative political reactions to rights expansions in a legal system. Comparatists also ask whether certain political or cultural conditions foster originalism.

A survey of existing comparative works analyzing originalism leads to two conclusions: (1) when defining originalism strictly to constrain present-day

decisionmakers to a constitutional provision's fixed original meaning at the time of ratification, originalism is not seen anywhere else. Second, most comparative analyses of originalism are descriptive in that they compare originalism with other historical constitutional interpretation methods and identify potential historical and political links with originalism as a concept and backwards-looking constitutional interpretation.

To build on this existing comparative scholarship regarding originalism, Part IV uses principles gleaned from comparative law regarding the way law moves and develops to interrogate originalism's normative assertions that constitutional meaning is fixed and constrains present-day applications. After suggesting comparative law can serve theoretical, normative and descriptive functions, Part IV proposes two principles gleaned from comparative law related to the way legal rules move and develop across and within legal systems, and applies each principle to originalism's normative mandate, with a focus on equitable originalism. This analysis has implications for originalism generally and its incongruence with the way law develops within and across legal systems.

The first "interpretive valve" principle posits that all legal systems need interpretive valves through which law can develop to adapt to societal changes. Islamic law provides an example of a system founded on unchangeable divine law developing interpretive valves to discover Islamic law in unprecedented cases and changing circumstances. Artificial barriers to interpretive valves are generally not successful, and legal systems develop around such barriers like water around a stone. The U.K.'s rejection of the European Court of Justice's prohibition on common law discretionary jurisdiction principles is an example of a legal system's rejection of an artificial barrier.

Equity is a bedrock interpretive valve in the U.S. legal system. Equitable originalism's mandate that federal judges' equitable powers today are constrained to English chancery court's equitable powers in the 1780s is an artificial barrier. Equitable originalism's dispositive freezing of "equity" as it existed in England in the 1780s creates an artificial barrier to judicial application of equitable principles that is seen in no other former British colony, and stymies development of equity's inherent corrective function. As such, equitable originalism will likely face limited success as a sustainable constitutional interpretation method if prior judicial reactions to similar artificial barriers are any indication.

The second principle proposed is that all legal transplants change from the origin system to the receiving system. This tenet is observed in the European

reception of Roman law, the many variations of Islamic law throughout the Islamic diaspora, and the localization of the common law throughout former British colonies. There is no post-colonial country in which English law exists as it did in England in the 1780s. Equitable originalism's requirement that U.S. judges' equitable powers are frozen in the form they existed in English chancery courts hundreds of years ago is anomalous to the way law moves. As such, equitable originalism contradicts the principle that legal transplants always change.

I. DEFINING ORIGINALISM

A. Originalism's Fixation and Constraint Principles

Originalism is a "family of constitutional theories"[1] without a "single definition."[2] A strict originalist analysis adheres to two principles – the "fixation principle" and the "constraint principle."[3] The "fixation principle" asserts that the meaning of a constitutional provision is "fixed" at the time it is ratified.[4] The fixed original meaning of a constitutional provision "may be gleaned from sources like the Constitutional Convention, the ratification debates, the Federalist and Anti-Federalist Papers, actions of the early Congresses and

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[1] Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 11 NW. U. L. REV. 1243, 1245 (2019) [hereinafter, *Originalism Versus Living Constitutionalism*]; Farinacci-Fernós, *Looking for the Correct Tool for the Job: Methodological Models of Constitutional Interpretation and Adjudication*, 52 REV. JURIDICA U. INTER. P.R. 213, 233 (2018) [hereinafter *Looking for the Correct Tool*] (noting "[a]s many scholars have pointed out, there is no one 'originalism'" and citing to multiple scholars identifying varying approaches to originalism).

[2] ERIC SEGALL, ORIGINALISM AS FAITH 8 (2018).

[3] *Originalism Versus Living Constitutionalism*, *supra* note 1, at 1245–46, 1265–66; *see also* D.A. Jeremy Telman, *Originalism as Fable (Reviewing Eric Segall, Originalism as Faith)*, 47 HOFSTRA L. REV. 741, 742 (2018) ("Those who advocate for originalism in constitutional interpretation agree on two principles. First, the 'fixation thesis' affirms that the meaning of each constitutional clause 'is fixed at the time [it] is framed and ratified.' Second, the 'constraint principle' stands for the view that the meaning of the constitutional text should constrain those who interpret, implement, and enforce constitutional doctrine.") (citations omitted); Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1921 (2017) ("Originalism maintains both that constitutional text means what it did at the time it was ratified and that this original public meaning is authoritative. This theory stands in contrast to those that treat the Constitution's meaning as susceptible to evolution over time. For an originalist, the meaning of the text is fixed so long as it is discoverable."). Justice Barrett recently reiterated originalism's tenets as follows: Originalism is "built on two core principles: that the meaning of constitutional text is fixed at the time of its ratification and that the 'discoverable historical meaning has legal significance and is authoritative in most circumstances.'" U.S. v. Rahimi, 602 U.S. 680, 737 (2024) (Barrett, J., concurring) (citations omitted).

[4] *Looking for the Correct Tool*, *supra* note 1, at 235 (explaining the "Fixation Thesis" which holds that the meaning of written text is the meaning "at the time of framing or ratification" and "courts are not empowered to modify or disregard that fixed meaning").

Presidents, and early opinions of the federal courts."[5] Originalists identify a constitutional provision's fixed original meaning by searching for the "public meaning" defined as "the meaning that the text had for competent speakers of American English at the time each provision of the text was framed and ratified."[6] This analysis looks for the meaning terms had "among the general (or generally educated and politically attentive) public at the time they were inserted into the Constitution."[7] The "constraint principle" constrains judges today to apply the constitutional provision's fixed original meaning to cases before them.[8]

Originalism is often juxtaposed with "living constitutionalism."[9] This family of theories reject the fixation and constraint principles, and assert that "constitutional law can and should evolve in response to changing circumstances and values."[10] Originalism can be thought of as a spectrum relative to strict adherence of the fixed and constraint principles.[11] On one end is strict originalism in which fixed original meaning is dispositive above all other considerations. On the other end is a form of originalism that values historical inquiry into original meaning but also considers text, precedent, post-ratification history and tradition, and "considerations of administrability."[12] History, tradition or United States Supreme Court precedent can allow deviation from original public meaning for these more "faint-hearted" forms of originalism.[13]

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[5] Barrett, *supra* note 3, at 1923; Mark Tushnet, *The United States: Eclecticism in the Service of Pragmatism*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE APPROACH 9 (Jeffrey Goldsworthy, ed., 2017).

[6] Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning* [hereinafter *Public Meaning Thesis*], 101 B. U. L. REV. 1953, 1957 (2021).

[7] Tushnet, *supra* note 5, at 35.

[8] *Originalism Versus Living Constitutionalism*, *supra* note 1, at 1245–56, 1265–66.

[9] *Id.* at 1244.

[10] *Id*.

[11] *Id.* at 1247. Yvonne Tew aptly described originalism as "a moving target: It has had multiple meanings at various times to different people." Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. OF TRANSNAT'L L. 780, 788 (2014) [hereinafter *Home and Abroad*].

[12] Tushnet, *supra* note 5, at 42–43 (discussing "considerations of administrability," and see book chapter as a whole discussing other methodologies); *see also* Anna Conley, *A Challenge to "Equitable Originalism" — The History of Injunctions as a Principle-Based Adaptable Judicial Power*, 17 N.Y.U. J. L. & LIBERTY 112, 167–70 (2023) [hereinafter *Challenge to Equitable Originalism*] (discussing various forms of originalism with a focus on history and tradition). As explained by Segall, "[s]ome believe that originalist sources, such as the ratification debates and early Court decisions, should play a decisive or primary role, whereas others think that originalism is just one of many considerations that judges should consider when deciding cases." SEGALL, *supra* note 2, at 2.

[13] Antonin Scalia, *Originalism: The Lesser Evil,* 57 U. CIN. L. REV. 849, 864 (1989) ("[I]n a crunch I may prove a faint-hearted originalist"); SEGALL, *supra* note 2, at 2 ("Other important factors may include tradition, political practices, modern cases, pragmatic concerns relating to the authority of the judiciary, and the real-world consequences of each case").

For example, some originalists posit that originalism should be confined to issues that the United States Supreme Court has not yet addressed, preserving canonical cases such as *Brown v. Board of Education.*[14] Some originalists recognize that identifying the original meaning of vague constitutional texts requires additional interpretation tools beyond historical analysis.[15] This "construction zone" or "zone of determinacy" allows for limited flexibility in strict application of the fixation and constraint principles and the methodology for interpreting vague provisions.[16]

Originalist scholarly debates can look quite different than legal analysis in judicial opinions by "originalist judges."[17] Originalist scholars are often critical of originalist judges' analyses as not adhering to originalism's tenets.[18] Non-originalist scholars criticize self-proclaimed originalist judges' use of multiple methodologies deviating from originalism's mandates.[19] Recent cases from this year's term suggest that current United States Supreme Court justices fall in different places on the spectrum of originalism. In *Vidal, et al. v. U.S. Patent and Trademark Office*, only three justices signed on without qualification to Justice Clarence Thomas' opinion relying solely on history and tradition to find that a names-related trademark restriction did not violate the First Amendment.[20] Justices Brett Kavanaugh and John Roberts concurred but noted the restriction "might well be constitutional even absent such a historical pedigree."[21] Justice Amy Coney Barrett's concurrence took issue with Justice Thomas' sole reliance on history, and questioned the "theoretical justification" for such approach, reasoning that "[r]elying exclusively on history and tradition may seem like a way of avoiding judge-made tests. But a rule rendering tradition dispositive is

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[14] *Public Meaning Thesis*, *supra* note 6, at 1984–85 (discussing hybrid and compromise forms of originalism).

[15] *Originalism Versus Living Constitutionalism*, *supra* note 1, at 1248, 1268.

[16] *Id.* ("At least some constitutional provisions employ terms that are vague or open-textured; these provisions do not provide bright-line rules. Such provisions create a zone of underdeterminancy that allows for doctrinal dynamism consistent with fixed meaning.").

[17] *Id.* at 1254, 1288–92.

[18] *See, e.g.,* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 483–88 (2013) [hereinafter *Construction*]. Originalists have described judicial originalism as relatively "eclectic" or "hybrid" originalism. *Originalism Versus Living Constitutionalism*, *supra* note 1, at 1254; *see also* Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 33 (2009) ("[T]he U.S. Supreme Court is methodologically pluralistic, and the bark of the domestic originalism movement has always been worse than its bite.").

[19] *See, e.g.,* SEGALL, *supra* note 2.

[20] Vidal et al. v. U.S. Patent and Trademark Office, 602 U.S. 286 (2024).

[21] *Id.* at 311 (Kavanaugh, J. concurring).

itself a judge-made test. And I do not see a good reason to resolve this case using that approach rather than adopting a generally applicable principle."[22]

In *U.S. v. Rahimi*, the Court's six justices generally associated with originalism took very different views of originalist methodology, suggesting different positions on a spectrum of originalism. Justice Roberts noted that the Second Amendment is not "trapped in amber" in upholding the constitutionality of a firearm restriction, suggesting a more "faint-hearted" originalism.[23] Justice Neil Gorsuch concurred, but only by a strict originalist rule application.[24] Justice Kavanagh concurred with a focus on the constitution's text as dispositive and posited that precedent should be followed when interpreting ambiguous constitutional provisions, and post-ratification history should be resorted to absent precedent.[25] Justice Kavanaugh asserted that the framers themselves intended post-ratification history to develop subsequent understandings of vague constitutional provisions,[26] while Justice Barrett observed "generally speaking, the use of postenactment history requires some justification other than originalism simpliciter."[27] Justice Thomas dissented, relying on the same strict originalism as espoused by Justice Gorsuch but coming to a different conclusion through historical analysis.[28] These cases illustrate the spectrum of originalism and the lack of strict originalism in practice in U.S. courts.

For the purposes of this article, originalism is defined strictly as a constitutional interpretation method that uses historical analysis to find the original meaning of constitutional provisions and constrains present-day decisionmakers to apply that fixed meaning. The fixation and constraint principles are both descriptive and normative. Originalists engage in a *descriptive* analysis of a constitutional provision's original meaning by engaging in historical analysis.[29] Originalists then assert the *normative* principle that

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[22] *Id.* at 324. (Barrett, J. concurring in part).

[23] *See* U.S. v. Rahimi, 602 U.S. 680, 691 (2024).

[24] *Id.* at 709 (Gorsuch, J., concurring) ("Developments in the world may change, facts on the ground may evolve, and new laws may invite new challenges, but the Constitution the people adopted remains our enduring guide. . . . If changes are to be made to the Constitution's directions, they must be made by the American people").

[25] *Id.* at 715 (Kavanaugh, J., concurring) ("As a general matter, the text of the Constitution says what it means and means what it says. And unless and until it is amended, that text controls").

[26] *Id.* at 725 (Kavanaugh, J., concurring) ("[T]he Framers themselves intended that post-ratification history would shed light on the meaning of vague constitutional text").

[27] *Id.* at 738 (Barrett, J., concurring).

[28] *Id.* at 747 (Thomas, J., dissenting).

[29] Randy Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 479 (2023) (describing the fixation thesis as "the descriptive

judges today are constrained to apply that fixed meaning. Barnett and Solum assert that the constraint principle is normative because it "maintains that constitutional actors *ought* to adhere to the fixed original meaning of the text and not change or amend it to another meaning that they prefer."[30]

U.S. judges have always used historical inquiry as one of many constitutional interpretation tools.[31] Like judges in other countries, U.S. judges' interpretive toolbox includes textualism, structuralism, precedent, purposivism and workability.[32] An originalist judge, however, would view historical analysis of the provision's original meaning as the paramount and generally dispositive inquiry for purposes of constitutional interpretation.[33] Additionally, some originalists posit that "the original public meaning of the constitutional text should be viewed as binding and hence superior in the hierarchy of authority to [horizontal] precedent."[34] A judge constraining herself to a constitutional provision's fixed original meaning, as determined by historical analysis, above potentially hundreds of years of binding precedent, is qualitatively different than a judge using historical analysis as one tool in the constitutional interpretation toolbox. This is something more than simply acknowledging the importance of history in ascertaining the meaning of constitutional text.

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component"). Deciding what sources must be relied upon when identifying the fixed meaning also has a normative component. This is discussed below regarding the dynamic nature of equity at *infra* III.B.1.c and III.B.2.e.

[30] *Id.* at 479.

[31] Tushnet, *supra* note 5, at 38 ("[S]ome version of a jurisprudence of original understanding remains an essential component of nearly all particular resolutions of interpretive controversies . . ."); *see, e.g.,* Ex Parte Yerger, 75 U.S. 85 (1686) (analyzing English history to understand Article I's prohibition on the writ of habeas corpus); Hans v. Louisiana, 134 U.S. 1 (1890) (relying on Federalist No. 81 to interpret Article I's bankruptcy clause); Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (relying on Federalist No. 47 to interpret Article III).

[32] *See* Tushnet, *supra* note 5 (discussing various methodologies included in the "eclectic" approach U.S. judges take to constitutional interpretation).

[33] Greene, *supra* note 18, at 9 (explaining that originalists "privilege the original understanding of [the Constitution] as against organic alterations to that understanding brought about through social change and judicial innovation. It is moreover, to consider the original understanding dispositive or at least presumptively correct in matters of first impression"); *see, e.g.,* Gamble v. United States, 587 U.S. 678, 711–713 (2019) (Thomas, J., concurring) ("By applying demonstrably erroneous precedent instead of the relevant law's text – as the Court is particularly prone to do when expanding federal power or crafting new individual rights – the Court exercises 'force' and 'will,' two attributes the People did not give it. . . We should restore our stare decisis jurisprudence to ensure that we exercise 'mer[e] judgment,' . . . which can be achieved through adherence to the correct, original meaning of the laws we are charged with applying. In my view, anything less invites arbitrariness into judging.") (discussed by Barnett & Solum, *supra* note 29, at 484).

[34] Barnett & Solum, *supra* note 29, at 483. Barnett & Solum argue that vertical precedent, that is higher courts binding lower courts, remains intact even when that precedent is nonoriginalist. *Id.* However, horizontal precedent, prior U.S. Supreme Court decisions' applicability to the U.S. Supreme Court, is below original public meaning, and therefore, supplanted by it. *Id.*

Originalism arose in the United States as a theory of constitutional interpretation in the 1980s.[35] Originalists initially sought to discern the framers' intent when interpreting a constitutional provision's fixed meaning.[36] As explained by Rafi Reznik, originalism "was at its origin intentionalism: setting the judge on a historical quest to figure out the original intent of the Framers and restricting interpretive legitimacy to these boundaries."[37] Most modern originalists now focus instead on identifying a constitutional provision's "original meaning."[38] Scholars have asked whether there is much of a practical difference in the methodology of discerning original intent or meaning. "The interpretive endeavor is still ideally an empirical-historical one, only now the fact it tracks is meaning rather than intent."[39] The idea behind original meaning is to find "the potential understanding of the governed, whose consent legitimized political authority, at the historical moment in which this consent materialized."[40] Despite this difference, originalism continues to "rely heavily on deliberation history to ascertain binding meaning."[41]

Like other methods of constitutional interpretation, originalism is susceptible to "motivated reasoning," in which historical analysis is a means to a desired outcome by a judge.[42] Indeed, "talented judges who have *different* values and

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[35] *See* Scalia, *supra* note 13.

[36] *Home and Abroad*, *supra* note 11, at 789–90.

[37] Rafi Reznik, *The Rise of American Conservatism in Israel*, 8 PENN ST. J. L. & INT'L AFF. 383, 422 (2020).

[38] *Originalism Versus Living Constitutionalism*, *supra* note 1, at 1250 ("Original intent fell out of favor among originalists more than thirty years ago . . . Most contemporary originalists aim to recover the public meaning of the constitutional text at the time each provision was framed and ratified; this has been the dominant form of originalism since the mid-1980s."). Solum discusses the lingering "intentionalism" analysis in some forms of originalism. *Id; see also* Yvonne Tew, *Comparative Originalism in Constitutional Interpretation in Asia*, 29 SING. ACAD. OF L. J. 719, 721 (2017) [hereinafter *Comparative Originalism*] ("[S]ome originalist accounts (such as the first wave of the US originalism movement) focus on the intentions of the framers or drafters of the provision"); Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT'L L. 1239, 1249 (2011) (setting forth multiple objections and methodological difficulties with founders' intent that led to the shift toward original meaning); *Looking for the Correct Tool*, *supra* note 1 (discussing original meaning and original intent as methodologies); Greene, *supra* note 18, at 9.

[39] Reznik, *supra* note 37, at 422.

[40] *Id*. Reznik explained "[p]redicating legitimate authority on popular consent is a liberal principle, placing the judicial focus on the ordinary citizen entering the social contract instead of the expert authority, and hence public meaning rather than intent." *Id.* at 422–23; *see also* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 26 (1982) ("Historical arguments draw legitimacy from the social contract negotiated from the original position . . . textual arguments rest on a sort of ongoing social contract, whose terms are given their contemporary meanings continually reaffirmed by the refusal of the People to amend the instrument").

[41] Reznik, *supra* note 37, at 427.

[42] Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 784 (2022) ("Like everyone else, judges engage in motivated reasoning, given the 'natural tendency of people to favor information that confirms their preexisting beliefs'") (citing FRANK CROSS, THE FAILED PROMISE OF ORIGINALISM 165

visions can deploy each interpretive method to promote their values and visions, each using the interpretive method well within the bounds set by standards of professional competence in using the method."[43] A myriad or dearth of historical sources can result in emphasizing certain sources and under-emphasizing or ignoring others to identify one out of multiple potential fixed meanings.[44]

B. "Equitable Originalism"

Equitable originalism is a form of originalism focused on the original meaning of the term "equity" in Article III of the United States Constitution, which defined the "judicial power" to include jurisdiction "over all cases, in Law *and Equity*."[45] Regarding federal courts' injunctive powers, equitable originalism is best described as follows: "a federal court's jurisdiction in equity extends no further than 'the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the [1789] Judiciary Act.'"[46] In short, to determine whether a

(2013)); *Home and Abroad*, *supra* note 11, at 842 ("[C]ritics of originalism have sought to undermine originalism's claim of constraining judge by pointing to its selective and inconsistent use by judges in practice; the indeterminacy of historical evidence; and the substantial discretion afforded to judges to pick from different versions of originalist theory to reach a desired conclusion"). For a thorough exposition of this viewpoint, *see* SEGALL, *supra* note 2. This criticism is levied against historical constitutional interpretation outside the United States as well. *See*, *e.g.,* Po Jen Yap, *Uncovering originalism and textualism*, *in* CONSTITUTIONAL INTERPRETATION IN SINGAPORE – THEORY AND PRACTICE 131 (Jaclyn Neo, ed. 2016) ("the deployment of originalism and textualism in Singapore as interpretive tools helps to obscure the strategic political choices judges make in support of preserving [the] status quo").

[43] Tushnet, *supra* note 5, at 50.

[44] As Justice Sotomayor recently critically observed, a judge analyzing history to support a reading of the constitution can be "the equivalent of entering a crowded cocktail party and looking over everyone's heads to find your friends." Vidal v. Elster, 602 U.S. 286, 327–28 (2024) (Sotomayor, J., concurring).

[45] U.S. CONSTIT. art. III (emphasis added). James E. Pfander and Jacob P. Wentzel coined the phrase "equitable originalism" in their 2020 article, *The Common Law Origins of Ex Parte Young*, 72 STAN. L. REV. 1269 (2020). Other articles discussing equitable originalism and related concepts include *Challenge to Equitable Originalism*, *supra* note 12, Owen Gallogly, *Equity's Constitutional Source*, 132 YALE L.J. 1213, 1218 (2023); Caprice Roberts, *Remedies, Equity & Erie*, 52 AKRON L. REV. 493, 528 (2018); Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1326–27 (2023); Riley T. Keenan, *Functional Federal Equity*, 74 ALA. L. REV. 895–96 (2023); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003); James E. Pfander & Wade Formo, *The Past and Future of Equitable Remedies: An Essay for Frank Johnson*, 71 ALA. L. REV. 723, 735–732 (2020); Randolph J. Haines, *The Conservative Assault on Federal Equity*, 88 AM. J. BANKR. L.J. 451 (2014).

[46] Whole Woman's Health v. Jackson, 595 U.S. 30, 35 (2021) (Thomas, J., dissenting in part) (citing *Grupo Mexicano de Desarrollo, S.A. v. Allliance Bond Fund, Inc*., 527 U.S. 308 (1999)); *see also* Missouri v. Jenkins, 515 U.S. 70, 130 (1995) (Thomas, J., concurring) (arguing the Court should be "reluctant" to approve lower courts' use of "inherent judicial power" in an "aggressive or extravagant" manner, and instead "we should exercise it in a manner consistent with our history and traditions").

federal judge can issue an injunction in 2025, we must look to whether an English chancery court could issue a similar injunction in the 1780s.

In 1999, Justice Scalia wrote the first (and so far only) United States Supreme Court 5-4 opinion espousing equitable originalism in *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*.[47] The Court reversed a preliminary injunction sought by an unsecured creditor prohibiting the defendant from transferring assets in a breach of contract case seeking only a money judgment. The Court held that U.S. federal courts could only issue relief "traditionally accorded by courts of equity" at the time of the U.S. founding.[48] The Court engaged in historical analysis, including equity treatises, cases from the 1800s and English legal sources to conclude "[b]ecause such a remedy was historically unavailable from a court of equity," the district court had no authority to issue a preliminary injunction prohibiting the disposition of assets in a breach of contract case seeking money damages.[49] In short — the meaning of "equity" was fixed when Article III was ratified as the scope of English chancery court's equitable powers, and today, U.S. judges are constrained by that fixed meaning. Several recent dissents and concurrences by Justices Thomas and Gorsuch suggest equitable originalism is "on the table" for at least some United States Supreme Court justices when analyzing the scope of federal judges' ability to issue injunctions, such as structural or nationwide injunctions.[50]

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[47] *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*, 527 U.S. 308 (1999).

[48] *Id.* at 318.

[49] *Id.* at 333.

[50] *See, e.g.,* Trump v. Hawaii, 585 U.S. 667, 713 (2018) (Thomas, J., concurring) (expressing skepticism that "district courts have the authority" to enter such injunctions, which "did not emerge until a century and a half after the founding" and "appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts"); Dep't of Homeland Security v. New York, 140 S.Ct. 599, 600 (2020) (Gorsuch, J., concurring) ("[u]niversal injunctions have little basis in traditional equitable practice" and "[i]t has become increasingly apparent that this Court must, at some point, confront these important objections to this increasingly widespread practice"); Whole Woman's Health, 142 S.Ct. at 535 (Gorsuch, J.) ("[t]he equitable powers of federal courts are limited by historical practice"); McHenry, et al v. Texas Top Cop Shop, Inc., 604 U.S. ___ (2025) (Gorsuch, J. concurring) (agreeing with court to stay nationwide injunction and noting "I would, however, go a step further and . . . take this case now to resolve definitively the question whether a district court may issue universal injunctive relief."); Bessent, et al. v. Dellinger, 604 U.S. ___ (2025) (Gorsuch, J. concurring) ("Under this Court's precedents, [] a federal court may issue an equitable remedy only if, at the time of the Nation's founding, it was a remedy 'traditionally accorded by courts of equity.'") (citing *Grupo Mexicano*).

II. COMPARATIVE ANALYSES OF ORIGINALISM

A. Introduction and Summary

The bulk of existing comparative research on originalism is descriptive in that it attempts to describe when a legal system might accept or reject originalism as a constitutional interpretation method.[51] Comparatists have analyzed countries in which courts use some form of historical constitutional interpretation method, including Australia, India, Malaysia, Turkey and Israel. Comparatists contrast U.S. originalism with courts' use of history in constitutional interpretation in other countries. The lack of a clear definition of originalism makes comparative originalism analysis difficult. If one defines originalism as requiring strict adherence to the fixation and constraint principles as the dispositive method of constitutional interpretation, then it is unheard of anywhere. Comparative studies have unearthed historical analysis as a common constitutional interpretative tool, but it is used generally to identify the purpose behind a constitutional provision or as one of many other interpretive tools.[52] Some non-U.S. judiciaries utilize history to determine framers' intent or original meaning as part of a purposive pluralist methodology without being constrained by such intent or meaning.

Comparatists also have analyzed originalism's implications for individual rights based on the type of constitution and constitutional text being interpreted. Originalism can result in rights retrenchment as a conservative response to progressive constitutional interpretation. However, originalism can also protect rights and result in progressive rights development depending on the type of constitution and language of the constitutional provision at issue.

Comparatists have hypothesized that originalism may be fostered in countries with old constitutions that were the product of revolutionary

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[51] *See, e.g.*, Jeffrey Goldsworthy, *Introduction*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE APPROACH, *supra* note 5, at 4 [hereinafter *Introduction*] (setting forth "comparative study [that] is primarily descriptive and explanatory, rather than prescriptive"); Greene, *supra* note 18, at 88 ("[t]he variations in practice of constitutional interpretation that we observe across space and time may be explained by variations in the political, culture, and historical landscape in which those practices are situated"); *Comparative Originalism*, *supra* note 38, at 720 (examining "the diversity of approaches to using constitutional history in constitutional interpretation" across "four common-law Asian constitutional systems").

[52] *See generally* Jamal Greene and Yvonne Tew, *Comparative Approaches to Constitutional History*, *in* COMPARATIVE JUDICIAL REVIEW 379 (Erin Delaney & Rosalind Dixon, eds. 2018), https://scholarship.law.columbia.edu/faculty_scholarship/2519 (analyzing six jurisdictions' use of historical interpretation without identifying a non-U.S. court's adherence to the fixed and constraint principle, but instead using history for purposive interpretation or as a basis for judicial deference to other branches).

independence. Comparatists have also analyzed whether cultural markers, such as evangelical faith or public participation in judicial selection, correlate with originalism. Ultimately, existing comparative research suggests there is no one type of constitution, set of historical facts, or political reality that cultivates or discourages historical constitutional interpretation by judges. This section attempts to capture comparative law's existing contributions to understanding originalism before proposing a different comparative lens through which to analyze originalism in Section IV.

B. Pluralist Constitutional Interpretation - History as One of Many Methods

Comparatists have asked whether originalism is a uniquely American phenomenon or present in other countries.[53] Historical analysis is common in other countries, but adherence to originalism's constraint principle is not.[54] Judges worldwide are "guided by similar considerations, including the ordinary or technical-legal meaning of words, evidence of their originally intended meaning or purpose, 'structural' or 'underlying' principles, judicial precedents, scholarly writings, comparative and international law, and contemporary understandings of justice and social utility."[55] Many courts looks to history as one factor in a pluralist interpretive analysis.[56] In these countries, "courts typically supplement historical inquiry with other interpretive methods, whether grounded in text, doctrine, prudential reasoning, or prior precedent," and "constitutional history is one resource among many."[57] A country may tilt

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[53] Sujit Choudhry, *Living Originalism in India? "Our Law" and Comparative Constitutional Law*, 25 YALE J.L. & HUMAN. 1, 2 (2013) ("The American case may be distinctive, but it is not utterly unique"); Greene, *supra* note 18, at 3 (positing that most other countries reject originalism and distinguishing originalism from historical constitutional interpretation in Australia); Jorge M. Farinacci-Fernós, *A Survey of Comparative Methodologies: The Constant Presence and Silent Rise of Intent and History in Constitutional Adjudication*, 54 REV. JURIDICA U. INTER. P.R. 443, 44 (2020) [hereinafter *Survey of Comparative Methodologies*] ("[O]riginalist methodologies, with particular focus on history and intent, have been more ubiquitous around the world than normally thought").

[54] As explained by Erwin Chemerinsky, "[t]here is no middle ground. Either originalism constraints at the price of unacceptable outcomes, or it offers no constraints and is not really originalism (despite some scholars and judges wanting to call it that)." Erwin Chemerinsky, *Prologue*, in SEGALL, *supra* note 2, at xiv.

[55] *Introduction*, *supra* note 51, at 5; *see also Goldsworthy, Conclusion, in* INTERPRETING CONSTITUTIONS: A COMPARATIVE APPROACH, *supra* note 5, at 325 [hereinafter *Conclusion*]. Regarding the various constitutional interpretation methodologies used in the United States, see BOBBITT, *supra* note 40.

[56] *See* Choudhry, *supra* note 53; Varol, *supra* note 38 (analyzing Turkish decisions applying historical analysis to Constitutional provisions regarding secularism).

[57] *Comparative Originalism*, *supra* note 38, at 724; Greene & Tew, *supra* note 52, at 382.

toward or away from historical analysis for a period of time, then move the opposite direction.[58]

For example, the predominant constitutional interpretation methodology in Israel is "Purposive Interpretation," which "is very inclusive with respect to interpretive devices, offering a method of balancing and synthesizing them into an ultimate purpose: legislative history, plain meaning analysis, fundamental values, the legislature's intent, canons of construction – all are welcome."[59] Bolivian judges use "grammatical, systemic, teleological, historical, functional and sociological models of interpretation, among others" despite a constitutional provision mandating that judges rely primarily on founders' intent and text.[60] In Singapore, courts use historical analysis as part of a "heavily formalist" interpretation method with focus on "text and precedent."[61] India is another example of pluralistic constitutional interpretation that includes focus on post-ratification experiences.[62]

Comparatists have closely analyzed constitutional interpretation by Australian courts, which has at times throughout 19th and 20th centuries most closely mirrored originalism as defined in the United States by the fixation and constraint principles, but remains a pluralistic endeavor focusing on more than

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[58] *See Home and Abroad*, *supra* note 11, at 837 ("[C]ountries 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.").

[59] Reznik, *supra* note 37, at 436.

[60] *See* Jorge Farinacci-Fernós, *When Social History Becomes a Constitution: The Bolivian Post-Liberal Experiment and the Central Role of History and Intent in Constitutional Adjudication*, 47 SW. L. REV. 137, 160–61 (2017) [hereinafter *Social History Becomes a Constitution*]. Farinacci-Fernós noted "[t]eleological interpretation is a constant in Bolivian constitutional adjudication" used "after an analysis of the framers' intent." *Id.* (emphasis omitted).

[61] *See* VK Rajah, *Interpreting the Singapore Constitution*, *in* CONSTITUTIONAL INTERPRETATION IN SINGAPORE – THEORY AND PRACTICE, *supra* note 42, at 24–27 (discussing Singapore courts' textualist approach without reference to extrinsic materials); *Comparative Originalism*, *supra* note 38, at 731–33 (discussing several Singapore cases illustrating this historical methodological approach); Yap, *supra* note 42, at 131 ("originalism and textualism, as practiced in Singapore, have been inconsistently observed and applied"). Thio Li-ann suggests that Singapore is moving away from reliance on just text and history, and currently in a "third wave" of constitutional interpretation of "principled pragmatism". Tio Li-ann, *Principled pragmatism and the 'third wave' of communitarian judicial review in Singapore*, *in* CONSTITUTIONAL INTERPRETATION IN SINGAPORE – THEORY AND PRACTICE, *supra* note 42, at 75.

[62] *See* Supreme Court Advocates-on-Record Assoc. v. Union of India, (2016) 5 SCC 808, ¶ 81 (examining "experiences gained, after the Constitution became operational i.e., after the people of this country came to govern themselves, in terms of the defined lines, and the distinctiveness of functioning, set forth by the arrangement and allocation of responsibilities expressed in the Constitution."). This case is discussed at *Comparative Originalism* , *supra* note 38, at 723, 734–36. Tew described constitutional interpretation in India as "pluralistic." *Id.* at 738; *see also Survey of Comparative Methodologies*, *supra* note 53, at 456–60.

fixed historical meaning.[63] Despite originalism's current "moment" in the United States, even the United States Supreme Court has remained pluralistic, as opposed to rigidly originalist.[64] Even Australia, which has re-embraced original meaning and intent as the touchstone for constitutional interpretation is "like ours, pluralistic."[65]

C. Historical Inquiry and Purposive Analysis

Courts often look to history to understand the purpose of constitutional provisions.[66] Purposive analysis unearths the purpose of a constitutional provision by "reference to the character of the larger objects" of the Constitution, the text, "the historical origins of the concepts enshrined" and the purpose and meaning of other constitutional provisions.[67] Jorge Farinacci-Fernós discusses three types of purposes requiring historical inquiry: (1) "the purpose that drove lawmakers to adopt a particular legal provision," (2) the "purpose of the

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[63] For comparative analyses of Australian constitutional interpretation, *see* Jeffrey Goldsworthy, *Australia: Devotion to Legalism*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE APPROACH, *supra* note 5 [hereinafter *Devotion to Legalism*]; Hon. Justice Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 MELB. U. L. REV. 1 (2000) (discussing various approaches to constitutional interpretation taken by Australian judges and advocating the living tree approach); *Survey of Comparative Methodologies*, *supra* note 53, at 445–50; Greene, *supra* note 18, at 40–61 (discussing the rise of legalism and reference to original meaning by Australian judges throughout the 1900s). Goldsworthy describes Australia's current approach as a "moderately originalist methodology, which attempts to reconcile permanence with adaptability to changed circumstances by taking a purposive approach, and construing the Constitution's words in broad, general terms consistent with original understandings." *Devotion to Legalism*, *supra* note 63, at 152. Greene concludes that pursuant to Australian courts' interpretive methodology, "history can be generative rather than constraining." Greene, *supra* note 18, at 61.

[64] *See* David Fontana, *Comparative Originalism*, 88 TEX. L. REV. 180, 192 (2009) ("Some of the time the American Supreme Court relies on originalism, sometimes it does not.").

[65] Greene, *supra* note 18, at 60 (discussing Australian Justice James McHugh's characterization of Australian originalism as "faint-hearted" in reference to Justice Scalia's use of the term); *Home and Abroad*, *supra* note 11, at 829 (same).

[66] *See* NORMAN DORSEN, MICHAEL ROSENFELD, ANDRÁS SAJÓ, SUSANNE BAER & SUSANNA MANCINI, COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 286, n. 1 (4th ed) ("to be sure, certain other constitutional adjudicators look to the intent of the constitution makers in the course of interpreting constitutional provisions"); *Looking for the Correct Tool*, *supra* note 1, at 227 ("To different degrees, almost all of the main methodological models account in some way for the concept of purpose, whether in ascertaining meaning or in the process of application"); *see, e.g.*, *Comparative Originalism*, *supra* note 38, at 723 (discussing India and Japan's use of historical interpretation as "an interpretive approach that looks to the overarching purposes of the constitutional project"); Greene & Tew, *supra* note 52, at 387 (discussing the German Federal Constitution Court's approach as "purposive or teleological" and noting Malaysian courts have used a "purposive interpretation of the Constitution's fundamental liberties").

[67] *See* R v. Big M Drug Mart [1985] 1 S.C.R. 295, 344 (Dickson, J.) (Canada), set forth and discussed at Peter W. Hogg, *Canada: From Privy Council to Supreme Court, in* INTERPRETING CONSTITUTIONS: A COMPARATIVE APPROACH, *supra* note 5, at 88–89.

provision itself," and (3) the constitution's "over-arching purpose."[68] Purposive historical methodology is not strict originalism.[69] Analyzing history as a teleological method may or may not follow the "fixed" originalist requirement, and does not follow the constraint principle. Purposive historical methodology uses history not to bind current and future generations to a fixed historical meaning, but as part of a present-day analysis of meaning and application. As explained by Yvonne Tew, some courts use history "to identify a problem the Constitution or its particular provisions were meant to remedy" and not to "bind a constitutional interpreter to resolve current problems just as the framers and drafters would have contemplated."[70]

In addition to purposive analysis, the United States and other countries' courts rely on history in non-originalist ways including (1) looking to founders' intent or intended application without binding current decisionmakers to such intent or intended application, (2) identifying a historical backdrop, and (3) applying formalist textual interpretations. These methods do not constrain current judges to such fixed original meaning, and therefore, are also not strict originalism. Instead, it is purposive and pluralist methodology that includes history as one of several interpretive methods used for present-day application.

Tew identified Malaysian courts' use of founders' intent when interpreting the Malaysian constitution's reference to Islam.[71] Tew explained that some Malaysian courts have relied on historical analysis to defend secularism in Malaysia by focusing on the Malaysian Constitution's "secular foundations."[72] Jamal Greene and Tew have observed that even Canada, "[n]otwithstanding its commitment to living tree interpretation . . . has, on occasion, leaned heavily on the intentions of the Constitution's framers."[73] Similarly, Farinacci-Fernós

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[68] *Looking for the Correct Tool*, *supra* note 1, at 227.

[69] *Accord* Hogg, *supra* note 67, at 89 (noting that "a purposive approach" may "yield a broad scope for a right" and is not necessarily "generous" or originalist).

[70] *Comparative Originalism*, *supra* note 38, at 723.

[71] *Home and Abroad*, *supra* note 11; *Comparative Originalism*, *supra* note 38, at 722, 729 ("[O]riginalist discourse in Malaysia is characterized by a focus on the intent of the framers and the history surrounding the constitution-making process, rather than the textual meaning. Historical evidence is viewed favourably as an extrinsic interpretive aid to determine the actual intentions of individual framers."); Greene & Tew, *supra* note 52, at 397.

[72] *Comparative Originalism*, *supra* note 38, at 727; Greene & Tew, *supra* note 52, at 397.

[73] Greene & Tew, *supra* note 52, at 386 (noting Canadian courts have relied on history "most conspicuously in cases involving historical compromises that underwrite Canadian federalism and its relationship to tribes" citing, for example, R v. Blais [2003] 2 S.C.R. 236); *see also Survey of Comparative Methodologies, supra* note 53, at 452–53 ("for all [Canada's] apparent anti-originalist practice, history and intent *do* play a role in

describes Puerto Rican courts' historical analysis of constitutional text as focused "more on purpose and scope."[74]

"Historical backdrop" is defined as "rules of law that aren't derivable from the Constitution's text, but instead are left unaltered by the text, and in fact are protected by the text from various kinds of legal change."[75] Examples include "democracy, responsible government, the rule of law, the independence of the judiciary, the protection of civil liberties and federalism."[76] Greene and Tew noted that a court may "invoke" such historical backdrops even when "committed to evolving constitutional norms."[77] Puerto Rico is an example of this, where the judiciary will interpret "lack of expected debate as indicative of what the meaning of the provision must be."[78] Again, historical backdrop inquiry as part of a purposive or pluralistic inquiry is not strictly originalist.[79]

Unlike Malaysia or India's use of historical analysis, Singapore courts have used history to justify a "deferential approach to the political branches" and "as a prudent doctrine."[80] While originalism is often associated with constraining the judiciary and deference to other branches, originalism is not synonymous with formalism, textualism, or legislative deference.[81] In fact, one criticism of

constitutional adjudication in Canada. What is universally rejected is the binding nature of the framers' original expected applications").

[74] Jorge M. Farinacci-Fernós, *Originalism in Puerto Rico: Original Explication and its Relation with Clear Text, Broad Purpose and Progressive Policy*, 85 REV. JUR. U.P.R. 203, 234 (2016) [hereinafter *Originalism in Puerto Rico*].

[75] Stephen Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1816 (2012), cited and discussed by Greene & Tew, *supra* note 52, at 381. Greene and Tew pointed to *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). *Id*. *Seminole Tribe* relied on *Hans v. Louisiana*, 134 U.S. 1 (1890), a notorious U.S. example of a court relying on history to find sovereign immunity for states against suits by their own citizens, despite the absence of such language in Article III of the U.S. Constitution or the 11th Amendment. Greene and Tew cited to 25 BVerfGE 352, ¶¶ 27–34 (1969) as an example of a court's identification of a historical backdrop. *Id.*

[76] Hogg, *supra* note 67, at 91.

[77] Greene and Tew, *supra* note 52, at 381.

[78] *Originalism in Puerto Rico*, *supra* note 74, at 237.

[79] *See, e.g.,* Hogg, *supra* note 67, at 91 ("When an unwritten constitutional principle is enforced [as if it were an express term], it is hard to avoid the conclusion that the Constitution has been amended by judicial fiat . . . .").

[80] *Comparative Originalism*, *supra* note 38, at 732; *Home and Abroad*, *supra* note 11, at 816–29.

[81] BOBBITT, *supra* note 40, at 7 ("At times textual argument is confused with historical argument, which requires the consideration of evidence extrinsic to the text."). For a detailed discussion of textualism in U.S. constitutional interpretation, *see id.* at 25–38.

strict originalism is that it can be atextual to the extent that historical analysis results in assigning meaning to text that is not stated or obviously implied.[82]

Comparative analyses of historical constitutional interpretation methods highlight the potential role of "motivated reasoning"[83] in constitutional interpretation methodology. Judges in Malaysia and Turkey have looked to framers' secular intent to preserve their constitutions' secular roots in the face of growing Islamic sentiment.[84] Conversely, "[p]roponents of Malaysia's Islamization have employed historicist rhetoric to expand Islam's constitutional scope."[85] Over time, Malaysian courts have interpreted the Malaysian constitution's reference to Islam as "stealth theocracy" allowing Islam to enjoy heightened status relative to other religions.[86]

To summarize Sections III.B and III.C, other countries' courts use historical constitutional interpretation as part of pluralist and purposive analysis, neither of which are strict originalism as defined by the fixation and constraint principle. Section IV attempts to explain originalism's absence in other countries by highlighting originalism's inconsistency with principles regarding the way law moves and develops. Before moving on, however, some other comparative contributions to understanding originalism are noteworthy for a comprehensive understanding of comparative analyses to date.

D. Originalism's Implications Based on the Type of Constitution

Comparative analyses have compared the different implications of historical interpretive methods, including originalism, based on the type of constitution being interpreted. This important work, largely done by Farinacci-Fernós, dispels the idea that originalism is intrinsically conservative or rights restrictive. Originalism's impact on rights and its relationship with political and cultural links can be understood only in relation to the legal system and the constitution being interpreted.

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[82] *See, e.g.,* Resnik, *supra* note 45, at 241–42 (describing *Grupo Mexicano*'s equitable originalist holding as creating "new, and atextual, constraints on the federal judicial role"); *Devotion to Legalism*, *supra* note 63, at 159 (discussing Australia's "traditional style of legalism [that] emphasised textual meaning, severely limited extraneous evidence of original intent, minimized implications, and downplayed the role of policy considerations").

[83] Sachs, *supra* note 42, at 784.

[84] *Home and Abroad*, *supra* note 11; Varol, *supra* note 38.

[85] Greene & Tew, *supra* note 52, at 396 nn. 113–17 (discussing multiple cases in which secularists and Islamicists have used historical constitutional interpretation); *Home and Abroad*, *supra* note 11.

[86] Yvonne Tew, *Stealth Theocracy*, 58 VA. J. INT'L L. 31 (2018) [hereinafter *Stealth Theocracy*].

Several types of constitutions exist, including framework constitutions, liberal democratic framework constitutions, and teleological constitutions.[87] Framework constitutions, which tend to be older, set forth general government structures in more general terms without articulating positive rights.[88] Liberal democratic framework constitutions "add to the basic framework of government set up by the structural text by including individual liberties and political rights."[89] While the United States Constitution was initially a framework constitution, with the Bill of Rights it became a liberal democratic framework constitution.[90] Teleological constitutions articulate socioeconomic rights in addition to civil and political rights.[91] In addition, more recent "ideological constitutions" not only set forth frameworks, and civil, political, and socioeconomic rights but also "entrench within the text and structure of the Constitution itself public policy choices and preferences, as well as actual commands and principles relating to the economic system and social organization."[92]

Where an older framework constitution or liberal democratic framework constitution makes no mention of socioeconomic or progressive rights, an originalist approach necessarily results in rights retrenchment. Put simply, if the constitution does not set forth rights, then an originalist interpretation would result in no rights implied or otherwise developed by courts. Similarly, where a constitution states a small handful of civil and political rights, an originalist

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[87] *Looking for the Correct Tool*, *supra* note 1, at 213–17; *see also* Ulrich K. Prueß, *Patterns of Constitutional Evolution and Change in Eastern Europe*, *in* CONSTITUTIONAL POLICY AND CHANGE IN EUROPE 101 (Joachim Hesse & Nevil Johnson eds., 1995) (setting forth a typology of (1) "countr[ies] with a long history of constitutionalism [] deeply rooted in its political culture—such as Britain or the USA" in which the constitution is a first step in a "gradual progression of consecutive steps" in the society leading toward establishment of civil and political rights and ultimately to "generation of the welfare state", with its "bundle of legal rights to social benefits"; (2) Post-World War II Constitutions in less "ingrained constitutional democracies" that account for "lack of a continual and consecutive [] formation of a nation-state and of a democratic constitution" through increased "welfare state pledges and guarantees"; and (3) post-communist Eastern and Central European countries' teleological constitutions which account for the lack of an established constitutional democracy through "particular constitutional pledges, such as the right to safe and healthy working conditions, [] annual paid leave, [] social security . . . and the right to education").

[88] *Looking for the Correct Tool*, *supra* note 1, at 240 –41.

[89] Jorge M. Farinacci-Fernós, *Post-Liberal Constitutionalism*, 54 TULSA L. REV. 1, 31 (2018).

[90] *Originalism in Puerto Rico*, *supra* note 74, at 215.

[91] *Id.*

[92] *Id.* at 216; *see also Conclusion*, *supra* note 55, at 341 (discussing three recent constitutions' "express references to founding values and structural principles, which encourage a normative approach to interpretation").

interpretation would prevent interpretation of such rights as a nucleus for progressive or related rights.[93] In such situations, originalism restricts rights.

Where, however, a teleological or ideological constitution sets forth such rights, originalism would protect and further rights.[94] For more modern teleological or ideological constitutions, the framers can direct the judiciary to protect the rights and structures overtly set forth in more detail than older framework constitutions.[95] Bolivia's 2009 "post-liberal teleological constitution" illustrates an emerging modern constitution that fundamentally re-structures the state with express collective and individual rights and "clear redistributive and communitarian goals."[96] Bolivia's 2009 Constitution not only overhauls the civil and political rights paradigm seen in many western constitutions, but it also mandates socio-economic reorganization.[97] Bolivia's constitution expressly directs Bolivia's Pluri-National Constitutional Court to "give preference" to the framers' intent "as demonstrated by its documents, acts, and resolutions as well as the literal tenor of the text."[98] When Bolivian judges strictly adhere to the framers' intent as mandated by the constitution, they engage in a form of originalism that is progressive and protective of rights.[99]

Farinacci-Fernós' analysis of the Puerto Rican constitution and judiciary's constitutional interpretation is another example of historical interpretation as protecting rights.[100] Farinacci-Fernós explained that Puerto Rico's 1952

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[93] *Comparative Originalism*, *supra* note 38, at 726 (Tew observed that "provisions guaranteeing individual rights . . . stated in broader, abstract terms as standards or principles . . . often call for construction and development by future generations.").

[94] *See Looking for the Correct Tool*, *supra* note 1, at 217 (newer teleological constitutions "guard against failure of [] socially unequal polities and [] allow the people to govern themselves, not just through the election of representatives that will govern on their behalf, but through popular enactment of constitutional texts and structures that bypass the indirect aspects of representative democracy."); *see also Survey of Comparative Methodologies*, *supra* note 53, at 444 (challenging the view that "originalism is inherently conservative or reactionary" when applied "in the context of post-liberal teleological constitutions that were the result of transcendental social processes").

[95] *See Introduction*, *supra* note 51, at 5 ("Only rarely do express constitutional provisions require specific considerations to be taken into account.").

[96] *See Social History Becomes a Constitution*, *supra* note 60, at 139–40.

[97] *Id.* at 143–46.

[98] CONSTITUTION OF BOLIVIA 2009, art 196 (ii), https://aaps.gob.bo/images/MarcoLegal/Leyes/CPE.pdf [Spanish], https://www.constituteproject.org/constitution/Bolivia_2009 [English]. Article 196 is discussed by *Social History Becomes a Constitution*, *supra* note 60, at 152–54.

[99] *See Social History Becomes a Constitution*, *supra* note 60, at 155 (discussing T.C.P. 17 Junio 2013, Sentencia Constitucional 850/2013, at 10) ("The original intent of the framers, as expressed during the constitutional creation process, has played a significant and decisive role in constitutional adjudication in Bolivia" and noting "occasions when the Court characterizes it as 'originalist interpretation.'").

[100] *Originalism in Puerto Rico*, *supra* note 74.

Constitution's framers took "a progressive, rights-protective, expansive, broad, and socially oriented approach to the Constitution and its future interpretation and application."[101] Because rights are overtly "entrenched"[102] in the constitutional text, the Puerto Rican judiciary's reliance on the framers' intent results in rights protection, as opposed to rights retrenchment.[103] Relatedly, Tew asserted "clear rules" in constitutions tend to "limit discretion in future application."[104] Where a constitution clearly establishes a right, an originalist judge is constrained to protect such right.

E. Originalism, Conservative Politics, and Rights

A rich body of comparative work analyzes originalism's relationship with individual rights and a nation state's politics. These studies illustrate that in addition to the type of constitution at issue, the relationship between politics and originalism can impact rights. Originalism has arisen in multiple countries as a reaction to progressive constitutional interpretations identifying implied rights. Several scholars explain the rise of originalism in the United States as a backlash against the expansion of rights in the United States in the 1960s and 1970s, particularly under Chief Justice Earl Warren.[105] As explained by Morton Horwitz, "it seemed hard to take [originalism] as anything more than an attack on the *Warren* Court and on its liberal views of the Constitution."[106] It is

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[101] *Id.* at 213.

[102] *Id.* at 245 ("Because of the nature of [socioeconomic] rights and the rationale behind them – mistrust of ordinary politics susceptible to hijacking by powerful economic forces-, the new entrenched content of modern constitutions is generally, of a progressive nature.").

[103] *Id.* at 219 (Despite the Puerto Rican judiciary's long-standing adherence to the founders' original intent to protect rights enshrined in Puerto Rico's progressive modern constitution, the Puerto Rican judiciary has relied on original intent to decline to adopt implied rights.); *see id.* at 205–10 (discussing AAR, ex parte, 187 DPR 835 (2013) (finding the constitutional protection against "sex" discrimination did not include "gender" discrimination based on historical analysis of the founders' intent regarding the word "sex")).

[104] *Comparative Originalism*, *supra* note 38, at 726.

[105] *See* Tushnet, *supra* note 5, at 35; *Originalism Versus Living Constitutionalism*, *supra* note 1, at 1256–60; Reznik, *supra* note 37, at 420 (describing originalist interpretive methodology as part of "[t]he successful campaign to 'undo the Warren Court legally' which resulted in a 'paradigmatic shift' in American legal discourse [that] was anchored in conservative interpretive methods, newly articulated in response to the liberal ones") (citing William P. Marshall, *The Judicial Nomination Wars*, 39 U. RICH. L. REV. 819, 821 (2005) and Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 658 (1990)); Greene, *supra* note 18, at 6, 69–70; *Home and Abroad*, *supra* note 11, at 789; Telman, *supra* note 3, at 742–43. For a detailed exposition of the development of originalism as a response to the Warren court and in subsequent decades, *see* SEGALL, *supra* note 2.

[106] Morton J. Horwitz, *The Bork Nomination and American Constitutional History*, 39 SYRACUSE L. REV. 1029, 1033 (1988).

unsurprising, therefore, that originalism is associated with political conservatism in the United States.[107]

Comparatists have observed a similar trend in Australia, where Chief Justice Murray Gleeson's "strict and complete legalism"[108] emerged after Chief Justice Anthony Mason's "purposive interpretation" and establishment of "implied individual rights" under the Australian constitution.[109] Similarly, comparatists have noted that Australia's relatively older framework constitution "combine[s] textual and historical obscurity with substantive silence and elite roots, resulting in an originalist interpretation of it" as "inherently conservative in nature."[110] In such a situation, the only avenue for progressive rights is the legislature or constitutional amendment.[111]

Rafi Reznik links Israel's reception of American-style originalism as part of a larger conservative moment in Israel.[112] Reznik argues "the link between conservatism and interpretive methods is a marriage of convenience. Methodology is chosen in order to rationalize ideology-driven results and internalize them into the legal doctrine."[113] Reznik asserts that a theory of

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[107] *Looking for the Correct Tool*, *supra* note 1, at 236 (In the late 1970s and early 1980s, originalism began with the purpose "(1) to constraint the discretion of judges in developing constitutional law, and (2) to re-direct the judicial power in a more conservative direction."); *Home and Abroad*, *supra* note 11, at 797 ("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."); Jack Balkin, *Rabbi Akiva and the Crowns*, 104 B.U. L. REV. 101, 125 (2024) ("conservative originalism has allowed movement conservatives to express their changing values and commitments through the language of constitutional law"); Robert Post & Reva Siegel, *Originalism as a Political Practice, The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 549 (2006) ("The current ascendancy of originalism does not reflect the analytical 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."), cited and discussed at *Home and Abroad*, *supra* note 11, at 816. Tew also noted "[a]mong the general public, originalism is routinely associated with judicially conservative values" and "as necessary for curbing activist judges." *Id.* at 841.

[108] *See* MURRAY GLEESON, THE RULE OF LAW AND THE CONSTITUTION 85 (2000) (quoting Owen Dixon, Swearing in of Sir Owen Dixon (Apr. 12, 1982), *in* (1952) 85 C.L.R. xi, xiv (Austl.)) (quoted and discussed by Greene, *supra* note 18, at 27 n. 325, 57 n. 398).

[109] Greene, *supra* note 18, at 52, 69–70.

[110] *Survey of Comparative Methodologies*, *supra* note 53, at 447; *see also Home and Abroad*, *supra* note 11, at 844 ("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 cultures 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.").

[111] *Survey of Comparative Methodologies*, *supra* note 53, at 447.

[112] Reznik, *supra* note 37. Reznik explained the rise of originalism as related to "the ongoing political project in Israel whereby American conservatism serves as a source of inspiration or the political Right." *Id.* at 410.

[113] *Id.* at 421.

"purposive originalism" is attempting to replace Israel's long-standing "purposive interpretation" method, which largely resembled the Warren Court's "teleological interpretivism."[114] "Purposive originalism" "end[s] the empirical question at the moment of enactment."[115] It "favors empirical over normative considerations, giving specific primary to legislative history, because it searches for the original intent of the legislature" and "views the meaning of text as fixed at the time of its enactment."[116] Reznik asserts that originalism's reliance on "deliberation history" to identify "fixed meanings at fixed times" "constitutes a 'conservative bias' warranting an application not only of a centuries-old moral vision, but one that took for granted the exclusion of most groups in society from the political body."[117]

In these examples, historical constitutional interpretation is associated with the retrenchment of rights. However, comparatists identify countries in which historical constitutional interpretation protects rights. In India, for example, courts have looked to the framers to identify the principles and purposes underlying constitutional provisions.[118] This has generally led to the protection of emerging individual rights and voiding of legislative enactments.[119] For example, in 2009, in *Naz Foundation v. India*, the High Court of Delhi at New Delhi looked back to founders' intent to discern the principles behind Article 21 of the India Constitution protecting due process, and ultimately concluded the founders intended that provision to be a catalyst for "social revolution" that necessitated the protection of emerging rights.[120] The Court reasoned that "fundamental rights had their roots deep in the struggle for independence" at India's founding.[121] As Chaudry noted, the Court interpreted the India

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[114] *Id.* at 386, 397.

[115] *Id.* at 437.

[116] *Id.* at 438.

[117] *Id.* at 427 (citing William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist But Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1317 (1998)).

[118] *See Comparative Originalism*, *supra* note 38, at 723, 736–38 (discussing *Gopalan*, *Naz Foundation* and *Supreme Court Advocates-on-Record Assoc. v. Union of India* and noting "[t]he Indian Constitution's starting point is usually invoked to identify the purpose behind the broader plan established at the nation's founding. References to the framers of the Indian Constitution are used to support arguments about these constitutional purposes."); Choudhry, *supra* note 53 (discussing A.*K. Gopalan v. Madras*, and *Naz Found.,* (2009) WP(C) No. 7455/2001"); Greene & Tew, *supra* note 52, at 394 (discussing examples of various ways Indian courts have utilized history in constitutional interpretation).

[119] *See Comparative Originalism*, *supra* note 38, at 736–38. *Gopalan* is an exception to this trend in India's courts, in which historical analysis was used to refuse to expand substantive due process rights; *see id.* at 737; Choudhry, *supra* note 53.

[120] *Naz Found*., ¶ 80 (discussed in Choudhry, *supra* note 53).

[121] *Id.* ¶ 52 (discussed and cited in Chaudhry, *supra* note 53, at 14).

Constitution's due process clause to reflect the framers' "hope and expectation that one day the tree of true liberty would bloom in India."[122] Again, purposive use of history without constraining decisionmakers to fixed original meaning is not strict originalism.[123] While purposive historical analysis may protect rights, strict originalism may not.

Tew's research on Malaysia shows that historical constitutional interpretation can serve as a "bulwark" against retrenchment of secular rights where a constitution overtly establishes a secular state in the face of pressure from religious majorities.[124] In Malaysia, advocates and courts use historical inquiries to "advocate a purposive approach to interpreting the Malaysian Constitution's provisions on fundamental liberties."[125] Like India, historical constitutional interpretation in Malaysia identifies the framer's "true intention" to "protect individual rights from legislative infringement by *expanding* the scope of enforceable rights" and identifying implied rights by "looking at the Malaysian Constitution's text and founding principles."[126]

Tew observed that in recent years both secularists and Islamists relied on framers' intent to advocate for their own different visions of the role of Islam in the state.[127] This observation coupled with the political genesis of originalism in the United States, its transplant as a tool of conservatives in Israel, and its use in Bolivia to expand rights in line with a teleological and ideological constitutional upheaval, leads to the conclusion that originalism may be more about politics than a country's age, constitution type, history, or existing judiciary's methodological toolbox.[128]

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122 *Id*.

123 *Accord* Tushnet, *supra* note 5, at 37 (translating original understanding to present day generally requires "first identifying the principles" constitutional provisions embodied "at the time they were written" and translating them in a way that "achieve[s] the same goals. . . . The metaphor of translation preserves the shell of a jurisprudence of originalist understanding, but leaches out everything inside the shell; it seems to be originalist, but is not").

124 *Stealth Theocracy*, *supra* note 86, at 41; Varol, *supra* note 38; Greene & Tew, *supra* note 52, at 397 (historical argument in Malaysia is usually employed by political liberals in support of a rights-expansive constitutional adjudication approach not associated with judicial constraint"). Greene & Tew observed that even in the United States, more "liberal" justices rely on history. Greene & Tew, *supra* note 52, at 385. They also observed that history can be used to understand structural constitutional provisions, pointing to the Federal Germany Constitutional Court's decision in *Parliament Dissolution Case*, 1 BVerfGe 462/06 (2008), ¶ 53 (allowing dissolution of parliament).

125 *Comparative Originalism*, *supra* note 38 at 728.

126 *Id.* at 728–29.

127 *See Home and Abroad*, *supra* note 11, at 814 – 816, 842–843.

128 *Accord id.* at 833 ("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.").

F. Originalism and Culture

Some comparatists have analyzed whether originalism is associated with cultural factors, such as public participation in judicial selection and faith-based cultures. With regard to public participation, comparatists analyze the interplay between the public and the courts, such as judicial selection and public reaction to judicial decisions.[129] Current originalism rhetoric in the United States is "discussed on talk radio and in best-selling books; in blogs and in newspaper columns, in president campaigns and at water coolers,"[130] even if the public's concept of the actual tenets of originalist interpretive methodology is fuzzy at best.

The very public United States "ritual wherein Court nominees are meticulously demolished by partisans over several months" is not present in other countries.[131] As explained by Greene and Tew, "[j]udges in constitutional rights cases invariably serve a political function. Their audience is not merely the parties to the litigation . . . but also includes a broader public."[132] Accordingly "constitutional methodology, and originalism in particular, has become a site for popular political mobilization."[133] Therefore, courts can use rhetoric regarding constitutional interpretation as part of a larger cultural discussion.[134]

Another interesting cultural inquiry is the relationship between religious culture and originalism. Comparatists have built off U.S. scholarly works linking

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[129] Greene, *supra* note 18, at 4, 17, 72 –74; *Comparative Originalism*, *supra* note 38, at 725. Tew noted "The Malaysian Constitution has public salience in Malaysia and narratives about its founding and those involved in its framing carry authority in the public sphere." *Id.* at 729.

[130] Greene, *supra* note 18, at 17; *see also* Tew, *supra* note 11, at 796 (listing these public venues and adding "magazine articles, judicial confirmation hearings and even on Saturday Night Live").

[131] Greene, *supra* note 18, at 72; *see also* Reznik, *supra* note 37, at 440–47 (observing that "[t]he judicial appointment process [in Israel] is far less political than the American one" but observing that recent Israeli politicians have pushed the more partisan judicial selection approach and public rhetoric seen in the United States). Reznik quotes a lawyer at a litigation-focused Non-Governmental Organization being interviewed in Bini Aschkenasy, *Has Ayelet Shaked Succeeded to Revolutionarize the Supreme Court?*, THE MARKER (Feb. 10, 2019), https://www.themarker.com/law/.premium-1.6917440 (quoting the lawyer, "For the first time we have stopped evaluating judges professionally and analyzing them with legal tools, and have started evaluating them according to their worldview.").

[132] Greene & Tew, *supra* note 52, at 382. Tew observed Malaysian courts using "ideological, rather than methodological" "originalist rhetoric." *Home and Abroad*, *supra* note 11, at 810.

[133] Greene, *supra* note 18, at 7; *see also Conclusion*, *supra* note 55, at 327 ("the impression conveyed by the political battles that now attend the confirmation of Supreme Court nominees is that interpretive standards are deeply conflicted in the United States").

[134] Greene & Tew, *supra* note 52, at 382–83.

originalism's "ancestor worship"[135] with evangelical culture. Scholars have long observed parallels between religious faith and Americans' attitudes toward the Constitution.[136] Reznik recently wrote that the U.S. "originalist/living constitution debate is unique" because of the "exceptional, perhaps sacred or fetishistic status of the United States Constitution in American public discourse."[137] Reznik observed "[t]here are analytical as well as historical ties between liberalism, progress, and secularization (all value reform), versus conservatism, dogma, and religion (all value orthodoxy)."[138] As explained by Morton Horwitz during the nascent rise of originalism: "constitutional law is the successor to religion and religious categories of an increasingly secularized society. Originalism in constitutional doctrine shares the same psychological yearning for certainty that religious fundamentalism does. The idea of [ ] a starting point that is true beyond criticism is deep both in religious and in legal thought."[139]

Although not addressed in this article, comparative inquiry into this "originalism as faith" hypothesis is a ripe area for further research. Australia leans toward originalism, yet "the whole idea of the Constitution as an object of quasi-religious veneration, inspiration, and redemption is alien to Australians,"[140] which undermines this hypothesis. Are non-U.S. courts that embrace historical constitutional interpretation in religious societies? Are courts that have overtly rejected originalism in less religious societies? What can we learn about this hypothesis from legal systems founded on religion, such as Islamic law?

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[135] Kirby, *supra* note 63; *see also* Greene, *supra* note 18, at 26, 63; Lael K. Weis, *What Comparativism tells us about originalism*, 11 (4) I-CON 842–69, 855 (2013).

[136] SANFORD LEVINSON, CONSTITUTIONAL FAITH *passim* (1988); Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1294 (1937) ("the very habits of mind begotten by an authoritarian Bible and a religion of submission to a higher power have been carried over to an authoritarian Constitution and a philosophy of submission to a 'higher law;' and a country like America, in which its early tradition had prohibited a state church, ends by getting a state church after all, although in a secular form") (quoted and discussed by Greene, *supra* note 18, at 79); Dorsen, et al, *supra* note 66, at 287 n. 2 ("American proclivities toward originalism may have much less to do with democracy than the fact that, as some have suggested, the Constitution in the U.S. figures as the center piece of a nearly universally shared civil religion").

[137] Reznik, *supra* note 37, at 389.

[138] *Id.* at 424.

[139] Horwitz, *supra* note 106, at 1033 (cited in part by Reznik, *supra* note 37, at 424).

[140] Jeffrey Goldsworthy, *Constitutional Cultures, Democracy, and Unwritten Principles*, 3 U. ILL. L. REV. 683, 687 (2012) [hereinafter *Constitutional Cultures*], cited and discussed by *Home and Abroad*, *supra* note 11, at 830.

G. Originalism and Revolutionary Constitutions

Some comparatists have linked history-focused constitutional interpretation with revolutionary independence.[141] As David Fontana explained, "[w]here a constitution is revolutionary, the countries tend to be more focused on the founding moment and so tend to focus more on what might be called an interpretive originalism."[142] For example, India's constitution was "indissolubly linked to a narrative of the nation's independence" and therefore, its "national identity" is inextricably bound to its constitutional moment.[143] Similarly, Tew noted that in the United States and Malaysia, courts look to history "because they are tied successfully to a constitutional narrative about the nation's independence that resonates with the people."[144] Revolutionary constitutions may foster originalism because the founders are imbued as the archetype of a subsequent nation state's political identity.[145] In such cases, Farinacci-Fernós posited that historical analysis "is premised on continued acceptance of and fidelity to the constitutional project, particularly when it has express ideological connotations."[146]

Revolutionary constitutions are juxtaposed with constitutions that were imposed by colonizers or other outside influences, such as Japan and Germany's post-WWII constitutions or Australia and Canada's British-influenced charters.[147] In the "absence of a comparable moment of sovereignty,"[148] originalism in such cases would not trigger nostalgic and imbedded concepts or archetypes associated with the birth of a new national identity. Where a constitution is associated with constitutions drafted by colonizers early in the

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[141] Varol, *supra* note 38, at 1246; Fontana, *supra* note 64.

[142] Fontana, *supra* note 64, at 196.

[143] *Comparative Originalism*, *supra* note 38, at 733. Tew explained "historical arguments appear to thrive, for instance, in constitutional contexts where there is popular identification with narratives associated with the constitution's founding." *Id.* at 741.

[144] *Id.* at 741; *see also* Greene, *supra* note 18, at 71 ("the antirights orientation of American originalism also relates significantly to its aggrandizement of the American founding").

[145] *See* Greene, *supra* note 18 at 6 ("A political identity so formed is not easily refashioned in light of evolving contemporary circumstances, at least not overtly."). Fontana posited "the founding moment and the role of the constitution in that moment creates a series of national and cultural ideas and individuals that will be relevant for years to come." Fontana, *supra* note 64, at 196.

[146] *Survey of Comparative Methodologies*, *supra* note 53, at 462.

[147] *See* Greene, *supra* note 18, at 64 (Germany and Japan's constitutions were "forcibly imposed from without" and Canada and Australia's framers "were subjects of the British Crown and did not enjoy formal lawmaking authority"); Fontana, *supra* note 64, at 191 (Australia and Canada's foundational documents "simply reorganized existing communities rather than created those communities"); *Survey of Comparative Methodologies*, *supra* note 53, at 453–56.

[148] Greene, *supra* note 18, at 67.

post-colonial transition period, such as some African countries, founders' intent "could carry negative weight."[149] A fascinating example of this is Hong Kong, in which courts' interpretations of Hong Kong's 1997 Basic Law are at odds with the Standing Committee of the National People's Congress of the People's Republic of China.[150] The Hong Kong Court of Final Appeal has "refused to adopt the original intent approach endorsed by the Standing Committee" given obvious tension between Hong Kong and Mainland China's views of Chinese sovereignty and related rights issues in Hong Kong.[151]

In a related but separate vein, Ozan Varol posited the "cult-of-personality hypothesis" 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."[152] Varol argued that this historical nucleus "explains why originalism has thrived in nations such as Turkey and the United States, where the nation's founders have developed a strong cult of personality."[153]

Australia and Singapore courts' relatively heavy reliance on history suggests that whether a constitution is revolutionary may not be predictive of a court's reliance on historical interpretive methodology. Comparatists point to both countries as the closest to U.S. originalism,[154] yet neither of those countries' constitutions were revolutionary.[155] Additionally, Israel "has no full-fledged

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[149] *Comparative Originalism*, *supra* note 38, at 725, discussing Hastings W. O. Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox*, *in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 65, 68, 72 (Douglas Greenberg ed., 1993); Greene & Tew, *supra* note 52, at 383 (same). *But see* Fontana, *supra* note 64, at 197 (arguing that post-colonial constitutions of "African and Latin America, for instance, foster many originalist arguments").

[150] *See* Greene & Tew, *supra* note 52, at 394.

[151] *Id.* at 395.

[152] Varol, *supra* note 38, at 1246; *see also* Fontana, *supra* note 64, at 197 ("Revolutionary constitutions, then, promote originalism because of the particular reverence associated with the individual figures associated with the creation of the Constitution."); *Comparative Originalism*, *supra* note 38, at 725 (discussing Varol's research regarding Turkey and the "cult of personality" surrounding Ataturk).

[153] Varol posited that originalism has failed in nations such as Australia, where the founders are held in no special reverence. Varol, *supra* note 38.

[154] *See, e.g.,* Greene & Tew, *supra* note 52, at 390 ("We are aware of no constitutional or apex court that more consistently understands its role in terms of discerning the historical meaning of its constitution's language than the High Court of Australia"); *id.* at 398 (describing a Singapore Court of Appeal decision interpreting the Singapore Constitution as "self-consciously originalist, focusing on the text and framers' intent").

[155] *See* Rajah, *supra* note 61, at 23 ("Our Constitution did not have a storied birth. There were no grand speeches by founding fathers at a constitutional convention. We came into nationhood suddenly, and needed a working constitution in short order"); Greene & Tew, *supra* note 52, at 298 (Singapore's constitution was "based on the 1957 Independence Malayan Constitution, which was drafted by a Constitutional Commission chaired by Britian's Lord Reid."); *Constitutional Cultures*, *supra* note 140, at 686 (Australians "seem perfectly able to identify themselves as a historically continuing people, characterized by some basic shared values and

constitution," and its judiciary has steadfastly utilized purposive interpretation for decades until recently, as some Israeli judges have embraced American-style originalism.[156] It is not a revolution that explains this in Israel, but originalism's link to conservative political ideologies.[157] To parse this hypothesis, one must differentiate between originalism and historical analysis. While purposive reliance on history may harmoniously co-exist with revolutionary constitutions, strict originalism that constraints decisionmakers to fixed original public meanings without regard to founders' intent may not.

H. Originalism and a Constitution's Age

Some comparatists have pointed to a constitution's age as a factor in a country's receptivity to originalism. Greene posited that "the passage of time has [a] tendency to lionize historical figures and cohorts" in the United States, and emphasized our "revolutionary rather than evolutionary" constitution.[158] Greene contrasted newer constitutions in which judges and legislators may have personal knowledge or direct involvement crafting foundational documents.[159] Reznik posited that Israel's lack of a constitution and the "recency of [Israel's] human rights Basic Laws, obviate the empirical inclination to search for original intentions, understandings, or meanings."[160] This tracks Greene's suggestion that younger foundational documents are less susceptible to historical methodology.

However, Reznik goes on to discuss the recent rise of American-style originalism in Israel, suggesting that age is not dispositive of whether a judiciary will embrace historical interpretation. Similarly, Farinacci-Fernós' analysis of Puerto Rico's relatively young constitution and the Puerto Rico judiciary's vigorous adherence to the founders' progressive intent further illustrates that a constitution's age is not dispositive of whether a judiciary embraces

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commitments, without their Constitution playing a larger part in the narrative, except as the essential legal device by which federation was attained.") (cited and discussed by *Home and Abroad*, *supra* note 11, at 830); *see also Survey of Comparative Methodologies*, *supra* note 53, at 446 ("The Australian Constitution was hardly the result of a popular-driven, dynamic democratic process"); Fontana, *supra* note 64, at 198 (Canada and Australia's constitutions "postdated some basic cultural and political understandings in Canada and Australia, and so did the creators of the Canadian Charter and the Australian Constitution.").

156 Reznik, *supra* note 37, at 390.

157 *Id.*

158 Greene, *supra* note 18, at 6. Greene discusses his hypothesis that a constitution's age impacts receptivity to originalism at *id.* at 63.

159 *Id.* at 64–65.

160 Reznik, *supra* note 37, at 392.

originalism.[161] Logic suggests that modern constitutions would be more susceptible to originalism, as they would have more recent, comprehensive, and easily accessible drafting records.[162]

Regardless of whether a constitution's age is or is not dispositive of whether a judiciary will turn to originalism, a constitution's age should be considered when analyzing the accuracy of originalist methodology. Originalist methodology for old framework constitutions creates "inevitable" difficulties, "inherent in the use of very general language to govern practical affairs over a long period of unpredictable social and technological advance."[163] An old constitution's language can "become anachronistic" and be based on wholly different circumstances.[164] Additionally, old constitutions have less documentation upon which originalists can base their analysis.[165]

There is an obvious difference between a Bolivian judge interpreting a legislator's official statement "we have to smash the colonial State" just over a decade ago[166] and a U.S. judge interpreting the term "equity" written over 230 years ago.[167] The older a constitution is, and the more vague the language used, the less likely originalism is to "get it right," the more susceptible it is to "motivated reasoning" and the more likely it is to be at odds with contemporary societal values. One would expect, therefore, a more purposive methodological approach to old framework constitutional provisions, such as Article III and the term "equity" discussed below.

This section's comprehensive overview of comparative analyses of originalism suggests that strict originalism is not seen elsewhere despite other countries' courts utilizing history as part of pluralist and purposive constitutional

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[161] *Originalism in Puerto Rico*, *supra* note 74.

[162] *See id.* at 212 (noting that modern constitutions "are recent processes that created vast amounts of accessible and intelligible records full of detail, explanation and content" which "further[s] the case for some sort of originalist approach").

[163] *Devotion to Legalism*, *supra* note 63, at 114 (cited and discussed at *Survey of Comparative Methodologies*, *supra* note 53, at 446).

[164] *Survey of Comparative Methodologies*, *supra* note 53, at 446; Hogg, *supra* note 67, at 87 ("the weight of legislative history diminishes with the passage of time, as the views of the framers become less and less relevant to contemporary conditions").

[165] *See* BOBBITT, *supra* note 40, at 11–12 (noting that U.S. constitutional "records of the debates are so scanty that full discussion of any point has been last," that the "convention met in secret without official minutes" to try to "conceal dissent" and "achieve consensus"). Bobbitt also noted that "the debates that were recorded are fragmentary and indicate little more than highly particular or highly general propositions." *Id.* at 12.

[166] T.C.P. 28 Mayo 2014, Declaración Constitucional 30/2014, at 10 (quoted and discussed at *Social History Becomes a Constitution*, *supra* note 60, at 157).

[167] Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999).

interpretation. It further suggests that political realities and aims, as opposed to historical factors, are more closely linked to courts' use of historical analysis when interpreting constitutions. The next section builds on this framework by looking at originalism through a different comparative lens. Instead of comparing originalism with other constitutional interpretation methods, Section IV scrutinizes equitable originalism's normative constraint principle using principles derived from comparative observations of how law moves across legal systems and develops within legal systems.

III. COMPARATIVE LAW PRINCIPLES APPLIED TO EQUITABLE ORIGINALISM

A. Introduction and Summary

As detailed above, current comparative analyses contextualize originalism as a constitutional interpretation method and explore originalism's relationship with politics, culture, history and rights. Can comparative law interrogate originalism's normative assertions that constitutional meaning is fixed and constrains present-day applications? In this section, I propose two principles gleaned from comparative law and apply them to equitable originalism's mandate that federal judges' equitable powers are constrained to English chancery powers in the 1780s. The two principles are (1) legal systems require "interpretive valves," which are mechanisms through which a legal system develops, and which are largely impervious to "artificial barriers" attempting to cut off such mechanisms; and (2) legal transplants always change when moving across legal systems. These principles are then applied to analyze equitable originalism as a constitutional interpretation method. These principles are descriptive by asserting a general theory of how law develops across and within legal systems. These principles are normative by labeling equitable originalism's normative mandate as an artificial barrier to equity, which is an interpretive valve, and positing that equitable originalism contradicts the fundamental tenet that rules necessarily change across legal systems.

As to the first principle, equitable originalism demands that equity remains in its static form as it was in England in the 1780s unless legislation provide otherwise, thereby creating an artificial barrier to judicial development of equity as a longstanding interpretive valve in the U.S. legal system. Examples in the common law and Islamic law legal traditions illustrate legal systems' need for interpretive valves, and that artificial barriers are generally unsuccessful in stopping the development facilitated by established interpretive valves.

As to the second principle, the constraint principle's mandate that U.S. judges today are constrained to follow the meaning of "equity" in English chancery courts in the 1780s also contravenes the tenet that legal transplants always change from one legal system to another. Article III's grant of equitable judicial powers to federal judges is a legal transplant from England. Many legal systems throughout the world have legal transplants from England as former British colonies. Throughout the common law world, countries have adapted such transplants to their own unique circumstances. Indeed, historical analysis establishes that the "United States received English common law with an expectation that it would change," and equity was expected to change as the corrective supplement to the changing common law.[168] Equitable originalism's fixed and constraint principles are anomalous to English equity's development in all post-colonial common law legal systems and to the movement of laws generally.

Why do we care about these apparent contradictions? First, they allow comparative law to dip its toe into normative discussions using its unique lens of various legal systems throughout history to suggest intrinsic criticisms of originalism as a constitutional interpretation method. Second, they may assist predictive analyses of originalism's potential efficacy and implications as a constitutional interpretation method. Equitable originalism mandates stagnation in the guise of legislative deference where the legislation traditionally has had no role, thereby artificially restricting the federal judiciary's remedial powers.[169] Common law legal systems have proved resistant to artificial barriers on judicial discretion in the proper application of equitable principles as economies, societies and technologies change.

B. Comparative Principles

Comparison can do more than compare rules or other aspects of legal systems.[170] It can also distill principles and conceptual frameworks by exploring law across history and nation state borders that improve foundational

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[168] *Challenge to Equitable Originalism*, *supra* note 12, at 163.

[169] *See* Haines, *supra* note 45, at 478–92 (noting equitable originalism as seen in *Grupo Mexicano* guts equitable jurisdiction by requiring that the legislature, as opposed to federal courts exercising equity jurisdiction, is the only avenue to address injustices when legal remedies are inadequate).

[170] For a related discussion of comparative law as a discipline, see Catherine Valcke, *Comparative Law as Comparative Jurisprudence: The Comparability of Legal systems*, 52 AM. J. COMP. L. 713, 716 ("while most comparatists have resigned themselves to having comparative law remain instrumental, a few have stubbornly pursued their quest of an end that might lie within, one that would allow comparative law to come to form an academic discipline in its own right").

understandings of law.[171] In 1995, William Ewald observed the shifting sands of post-functionalist comparative law and advocated for "comparative jurisprudence" as a separate field, concerned not as much with comparison and methodology as coupling with legal philosophy to reap the "yield" of comparisons to "draw philosophical conclusions about law in general."[172] Esin Örücü has suggested comparative law is more than varying methodologies of comparison but also "a science of knowledge with its own sphere; an independent science, producing theoretical distillate."[173] Örücü has written that comparative law can provide "access to legal knowledge . . . to fulfil its essential task of furthering the universal knowledge and understanding of the phenomenon of law."[174] Comparative law is particularly well-poised to develop theoretical and normative principles regarding how legal rules and systems change, yet no sustainable theoretical framework has developed.[175] With this background – two comparative law theoretical principles regarding legal change are proposed.

1. Principle One – All Legal Systems Need Interpretive Valves and Will Grow Around Artificial Barriers

a. The Concept of an "Interpretive Valve"

An "interpretive valve" is a mechanism embedded in a legal system that allows law to develop and adapt to change, whether it be societal, economic,

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[171] *See* David Nelken, *Towards a Sociology of Legal Adaptation*, *in* ADAPTING LEGAL CULTURES 3, 16 (David Nelken & Johannes Feest eds., 2001) ("scholars argue that we need to go beyond such traditional pursuits and reach toward what has been called comparative legal studies" including potentially going from "classification to theoretical understanding and explanation").

[172] William Ewald, *Comparative Jurisprudence (I): What Was it Like to Try a Rat?*, 143 UNIV. PA. L.R. 1889, 1944 (1995).

[173] Esin Örücü, *Developing Comparative Law*, *in* COMPARATIVE LAW A HANDBOOK 44 (Esin Örücü & David Nelken eds., 2007) [hereinafter *Developing Comparative Law*]. Örücü argued "[l]ooking at the world of law and the environment in which it lives, comparative law can provide knowledge about 'law as rules', 'law in context' and 'law as culture', thus enabling us to have comprehensive and in-depth knowledge of the legal phenomena and their interactions in society. Comparative law draws from the pool of models to illustrate the general points it is making." *Id.* at 45.

[174] *Id.* at 46. In a related vein, several decades ago Rodolfo Sacco suggested that the "primary and essential aim of comparative law as a science" is "better knowledge of legal rules and institutions." R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 5 (1991) (re-stated and discussed in Roger Cotterrell, *Is there a logic of Legal Transplants*?, *in* ADAPTING LEGAL CULTURES, *supra* note 171, at 76).

[175] *See* Donald L. Horowitz, *The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change*, 42 AM. J. COMP. L. 233 (1994) (discussing existing theories of change, including the evolutionist, utilitarian, social change and intentionalist approaches, each approach's inadequacies, and concluding "[n]o adequate general understanding of legal change currently exists").

technological or other change. Without some mechanism for law to develop and adapt, the gulf between society and law widens and ultimately reduces law's legitimacy within society. Examples of interpretive valves are constitutional amendment, legislation, or teleological constitutional interpretation applying original principles to present-day situations.

Religious legal systems are useful in understanding the need for interpretive valves because they are generally based on the word of God, which is unchangeable. For example, "[a]bsent an interpretive mode that takes into account evolving societal conditions, an originalist interpretation of the Qur'an would permanently freeze the conditions that existed in the seventh century."[176] Despite the Qur'an as the word of God, Islamic law utilizes supplementary sources of law as interpretive valves to facilitate development of Islamic law in various legal systems.[177] Even religious legal systems with a divine origin, such as the Qur'an, utilize interpretive valves to allow the law to adapt and change.

The main sources of *Shari'ah* (Islamic law) are the Qur'an and the *Sunnah*.[178] *Sunnah* are accounts of Muhammad's statements and conduct, as transmitted by his companions, which serves as a guide for Muslims.[179] Islamic law utilizes the concept of *fiqh*, which includes several legal reasoning methods enabling Islamic law experts to "deduce and apply Shari'ah principles" to new situations.[180] As explained by Wael Hallaq, the primary objective of *fiqh* is "to lay down a coherent system of principles through which a qualified jurist could extract rulings for novel cases."[181] Hallaq explained that *fiqh* is the "umbrella under which synchronic and diachronic variations" of Islamic law existed.[182] *Fiqh* allows a jurist to apply primary sources of law to "discover rulings for

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[176] Varol, *supra* note 38, at 1266–67.

[177] For a related analysis of how law develops in Judaism, see Balkin, *supra* note 107, and H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 98–128 (3d ed. 2007).

[178] Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, *in* UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY 4 (Hisham Ramadan ed., 2006) ("There are two primary sources of Islamic law—the Qur'an (Koran) and the *Sunnah* . . . ."); HAIDER ALA HAMOUDI & MARK CAMMACK, ISLAMIC LAW IN MODERN COURTS 14–16 (2018).

[179] Abdal-Haqq, *supra* note 178, at 4.

[180] *Id.* at 5. Abdal-Haqq explained "[t]he process of *deducing* and *applying* Shari'ah principles and injunctions in real or hypothetical cases or situations is called *fiqh* or *Islamic jurisprudence*" as well as "the collective body of laws deduced from Shari'ah through the use of fiqh methodology." *Id.*; *see* GLENN, *supra* note 177, at 174 (fiqh is "sometimes referred to in western writing as the 'science' of Islamic law or jurisprudence, though its literal meaning is simply that of 'understanding'") (citations omitted).

[181] WAEL HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNĪ UṢŪL AL FIQH 5 (1997).

[182] *Id.* at vii.

unprecedented cases."[183] Using *fiqh*, dispute resolution under Islamic law is a "dynamic process" in which "all cases may be seen as different and particular, and for each which the precisely appropriate law must be carefully sought out" by "bring[ing] together the objectively determined circumstances of the case and the appropriate principles of the shari'a."[184]

Fiqh, the science of discovering Islamic law in new situations, is accomplished by *ijtihad*, or individual reasoning.[185] *Ijtihad* is "the maximum effort expended by the jurist to master and apply the principles and rules of [fiqh] for the purpose of discovering God's law."[186] *Itjihad*'s root word, *jihad*, means struggle, leading the term *itjihad* to refer to interpretive effort.[187] One method of *ijtihad* is *qiyas* in which an Islamic law expert identifies *Shari'ah* rules or principles and engages in inductive analogical reasoning to determine how *Shari'ah* might be applied in a new situation.[188] For example, if the Qur'an prohibits alcohol from fermented fruit, then by analogy beer from fermented grain is also prohibited.[189] Other forms of *ithihad* include allowing a consensus of scholars to establish a previously undetermined issue in Islamic law (*ijma*), consideration of the public interest (*ijtihan*), and local custom that does not contravene *Shari'ah* (*urf*).[190] This example illustrates that even where a legal system originates from the unchangeable word of God, interpretive valves must exist to allow jurists and decisionmakers to develop the law to apply to changing circumstances and fill gaps.

b. Artificial Barriers to Interpretive Valves

An artificial barrier to a legal system's development is a prohibition on the continued use of an existing interpretive valve. What happens to a legal system when an artificial barrier is introduced in a legal system? Like water flows around a stone, a legal system will find ways to adapt and change in spite of artificial barriers. As such, artificial barriers appear ineffective as a mechanism

183 *Id.* at ix.
184 GLENN, *supra* note 177, at 178.
185 Abdal-Haqq, *supra* note 178, at 16–21.
186 Wael Hallaq, *Was the Gate of Ijtihad Closed?*, 16 INT'L J. OF MIDDLE EAST STUD. 2, 2 (1984).
187 HAMOUDI & CAMMACK, *supra* note 178, at 16.
188 *See* HALLAQ, *supra* note 180, at 4–5 (*qiyas* allows an Islamic law expert (*mujtahid*) to "discover the judgment [] of an unprecedented case" by identifying "a similar case in which legal acts are different but legal facts are the same" and applying analogical reasoning "to reach the ruling of the case in question"); HAMOUDI & CAMMACK, *supra* note 177, at 16.
189 HAMOUDI & CAMMACK, *supra* note 178, at 16.
190 Abdal-Haqq, *supra* note 178, at 17–19.

to prevent continued use of interpretive valves deeply rooted in a legal system's framework. Artificial barriers are relatively rare, and are distinct from changes in a legal system that operate within existing allowable interpretive valves.

An example of an artificial barrier's impact on interpretive valves is U.K. courts' response to the European Court of Justice (ECJ) attempts to prohibit common law discretionary jurisdiction doctrines such as forum non conveniens and anti-suit injunctions.[191] Forum non conveniens is a judge-made common law doctrine that allows a judge with jurisdiction over a case and defendant to decline to exercise such jurisdiction in favor of a more convenient forum. Anti-suit injunctions are equitable remedies in which a judge orders a party not to file suit or participate in court proceedings in another country.

In a series of cases while the United Kingdom was part of the European Union (EU), the ECJ held that such discretionary jurisdiction doctrines were incompatible with the *lis pendens* approach to parallel proceedings set forth in EU treaties[192] and prohibited U.K. courts from using them.[193] The *lis pendens* approach to parallel proceeding followed a relatively rigid approach to situations where the same or related suits are filed in the courts of multiple countries, which requires that once one court is "seised" by the initiation of a civil action, the "second seised" court must stay or dismiss proceedings in all circumstances.[194] Discretionary jurisdiction doctrines act as interpretative valves by giving judges flexibility to apply equitable principles to changing circumstances unique to specific cases, enforce choice of court and arbitration agreements, and prevent

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[191] Anna Conley, *Comparing Essential Components of Transnational Jurisdiction: A Proposed Methodology*, 31 TUL. J. INT'L & COMP. L. 1, 53–54 (2023) [hereinafter *Transnational Jurisdiction*].

[191] The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (Brussels Convention). The Brussels Convention on Jurisdiction and Recognition of Judgments in Civil and Commercial Matters, J.O. L 299/32 (1972), *amended by* O.J. L 304/77 (1978), *amended by* O.J. L 388/1 (1982), *amended by* O.J. L 285/1 governed jurisdiction in transnational civil cases involving EU member states from 1968 until 2001, when the Brussels I Regulation, largely similar to the Brussels Convention, entered into force. Council Regulation No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) [hereinafter Brussels I Regulation]. The Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters, commonly termed the "Lugano Convention," closely mirrors the Brussels Convention and Brussels I Regulation, and applies to members of the European Free Trade Association. After Brexit, the United Kingdom requested to join the Lugano Convention but the EU declined to allow the U.K. to accede.

[193] Case C-159/02, Turner v. Grovit, 2004 E.C.R. I-03565; Case C-281/02, Owusu v. Jackson, 2005 E.C.R. I-1445; Case C-185/07, Allianz SpA et al v. West Tankers, Inc., ECLI:EU:C:2009:69 (E.C.J. February 10, 2009).

[194] Council Regulation No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in civil and Commercial maters (Recast), 2012 O.J. (L. 251), amended by O.J. (L 163/1) and O.J. (L 54.1) art. 29; Brussels I Regulation, *supra* note 191, art. 27; Brussels Convention, *supra* note 191, art. 21.

forum shopping. The ECJ's prohibition on these doctrines was an artificial barrier that prevented judicial application of these discretionary jurisdiction doctrines.

In *Owusu v. Jackson*, the ECJ found the unpredictability inherent in forum non conveniens could not co-exist with the Brussels approach.[195] U.K. scholars were openly hostile to the ECJ erecting these barriers to discretionary doctrines.[196] One scholar observed that "[i]t took the English courts only a matter of weeks after the decision in *Owusu* to state that the case did not restrict the application of [forum non conveniens] where proceedings were brought in England in breach of an exclusive jurisdiction clause for the courts of a non-Member State."[197] U.K. scholars and courts considered expedited jurisdiction procedures that allow the first-seised court to quickly dispose of such cases, and "case-management" stays in which a court grants what is essentially a forum non conveniens stay packaged in another name.[198]

In *Turner v. Grovit,* the ECJ found the Brussels regime prohibited English courts from issuing anti-suit injunctions against proceedings in member states.[199] In *West Tankers*, the ECJ prohibited anti-suit injunctions even when used to enforce an arbitration agreement.[200] U.K. lawyers and scholars loudly resisted *Turner* and *West Tankers*.[201] "A call to arms rallied to find ways to 'restrict the ambit' of ECJ decisions voiding common law discretionary doctrines and 'reinvent the common law's influence.'"[202] Edwin Peel's discussion of the post-*West Tankers* legal landscape noted "one can expect the creative process of the common law to swing into action, if it has not already

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195 Case C-281/02, Owusu v. Jackson, 2005 E.C.R. I-1445.

196 For a discussion of U.K. scholars' reactions, see *Transnational Jurisdiction*, *supra* note 191, at 51–54.

197 *See* Jonathan Harris, *Understanding the English Response to the Europeanisation of Private International Law*, 4 J. PRIV. INT'L. L. 347, 382 (2008), *referring to* Konkola Copper Mines PLC v. Coromin [2005] 2 Lloyd's Rep. 555 (Q.B.) (discussing damages and "case management" stay possibilities). *Id.* at 388, 391; *see also* Petr Briza, *Choice of Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation be the Way out of the Gasser-Owusu Disillusion?*, 5 J. PRIV. INT'L. L. 537, 549 (2009).

198 *See* Harris, *supra* note 197, at 386–87, *referring to* Samengo-Turner v. J&H Marsh & McLennan (Serv.) Ltd. [2007] EWCA (Civ) 723 [44], [2008] ICR 18 [44] (Eng.) (issuing an anti-suit injunction against New York proceedings to protect employer U.K. company's right pursuant to the Brussels Convention to be sued in place of domicile).

199 Case C-159/02, Turner v. Grovit, 2004 E.C.R. I-03565, ¶ 31.

200 Case C-185/07, Allianz SpA et al v. West Tankers, Inc., ECLI:EU:C:2009:69, ¶ 34.

201 *See* Jacob Grierson, *Comment on West Tankers v. RAS Riunione Adriatica di Sicurta S.p.A*, 26 J. INT'L ARB. 891, 896 (2009) ("Much ink has already been spilled, and considerable anger vented, about Kokott, A.G.'s opinion and the ECJ's judgment in the *West Tankers* case.").

202 *Transnational Jurisdiction*, *supra* note 191, at 53 (citing Harris*, supra* note 196, at 348).

done so."[203] U.K. courts began considering potential creative ways to enforce arbitration agreements in the face of the ECJ's prohibition on anti-suit injunctions, including damages awards for stalling the jurisdiction of a chosen court or arbitral tribunal.[204] Since Brexit, U.K. courts once again use these discretionary jurisdiction doctrines, including in cases involving EU member states.[205]

Arguably, the ECJ's artificial barrier to the United Kingdom's use of discretionary jurisdiction doctrines as interpretive valves actually strengthened the discretionary doctrines' reach because the ECJ prohibitions led to the United Kingdom's recognition of their value and usefulness.[206] For example, one U.K. scholar discussed anti-suit injunctions as follows: "It is well known that many continental lawyers have a peculiar hostility to the anti-suit injunction. As an antidote to jurisdictional shenanigans its usefulness is second to none, but its roots did not lie in civilian legal systems. So it had to go, as the dullardism of the lowest common denominator asserted itself."[207]

Islamic law is also instructive. Consider *ijtihad* as a well-established interpretive valve for Islamic scholars and judges to develop Islamic law across "the Islamic diaspora."[208] At some point between the tenth and fourteenth centuries, some Islamic scholars posit that Islamic jurists attempted to "close the door in *Ijtihad*" with the assumption that "any principles of Shari'ah that could be deducted or extracted through ijtihad already had been deduced or extracted."[209] The "closing of the door on ijtihad" is associated with a period of

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[203] Edwin Peel, *Arbitration and anti-suit injunctions in the EU*, 125 L. Q. REV. 365, 368 (2009).

[204] Sunrock Aircraft Corp. Ltd. v. Scandinavian Airline Sys. Denmark-Norway-Sweden [2007] EWCA (Civ) 882 [37], [2007] 2 Lloyd's Rep 612 [37] (Eng.) ("Damages can be awarded for a loss incurred by the failure to comply with the terms of an exclusive jurisdiction clause.").

[205] *See, e.g.,* Ebury Partners Belgium SA/NV v. Technical Touch BV [2022] EWCH 2927 (Comm) [134] (granting anti-suit injunction restraining Belgian party from proceeding in Belgian court based on forum selection clause specifying the Courts of England); *see* Lorna E. Gillies, *Appropriate Adjustments Post Brexit: Residual Jurisdiction and Forum Non Conveniens in UK Courts*, 3 J. BUS. L. 161 (2020) ("UK courts' application of the doctrine of forum non conveniens will also become more prevalent, regardless of the defendant's domicile.").

[206] *See, e.g.,* Trevor C. Hartley*, The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws*, 54 INT'L. & COMP. L. Q. 813, 828 (2005) ("The crass insistence that common law rules must be abolished even where no Community interest is at stake is the feature of this judgment that will cause most difficulty for lawyers in England.").

[207] Adrian Briggs, *Case Comment: Anti-Suit Injunctions and Utopian Ideals*, 120 L.Q. REV. 529, 530 (2004).

[208] GLENN, *supra* note 177, at 214.

[209] Abdal-Haqq, *supra* note 178, at 20.

"centuries long stultification of Islamic law from which Islamic law continues to suffer to this day."[210]

Many Islamic law scholars reject the historical assertion that *ijtihad* was ever prohibited, and assert that in fact, *ijtihad* has remained a consistent method by which Islamic jurists developed and applied *Shari'ah*. For example, Muhammad Iqbal argued "the closing of the door of Ijtihad is pure fiction suggested partly by the crystallization of legal thought in Islam, and partly by that intellectual laziness which, especially in the period of spiritual decay, turns great thinkers into idols."[211] Additionally, Wael Hallaq has engaged in extensive historical analysis to prove "the gate of ijtihad was not closed in theory or practice," and argued "ijtihad is indispensable in legal theory because it constituted the only means by which jurists were able to reach judicial judgements decreed by God."[212] Other scholars have identified Islamic jurists using *itjihad* through the period after which the "gate of *ithijad*" was alleged to have closed, further supporting Hallaq and Iqbal's assertions.[213] Patrick Glenn suggests the continued legitimacy of scholarly consensus (*ijma*) as a source of law impliedly allowed for the development of Islamic law through *ijtihad*.[214] The strong current of scholarship rejecting the concept that *itjihad*, an important interpretive valve, was ever prohibited by an artificial barrier (the gate), illustrates a legal tradition's resistance to artificial barriers on interpretive valves.

Perhaps then, a legal system must have interpretive valves through which law can develop. This is the normative aspect of the first principle. Artificial barriers will generally be ineffective when they prohibit interpretive valves that are deeply ingrained in a legal framework. This theory may explain why strict originalism has not taken root in other legal systems, and why instead we see only purposive and pluralist historical interpretation in countries outside the United States. As discussed in the next section, this theory may also explain why a majority of the United States Supreme Court has not re-affirmed equitable

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[210] HAMOUDI & CAMMACK, *supra* note 178, at 18.

[211] MUHAMMAD IQBAL, RECONSTRUCTION OF RELIGIOUS THOUGHT IN ISLAM 137 (3d ed. 1989) (1929) (cited and discussed in Abdal-Haqq, *supra* note 178, at 21). Abdal-Haqq discusses multiple other Islamic scholars who "advocate the exercise of individual reasoning consistent with Qur'anic and Sunnah principles." Abdal-Haqq, *supra* note 178, at 21; s*ee also* GLENN, *supra* note 177, at 203 ("Some say the door should be re-opened, at least for the least precise of the koranic injunctions; others say it is already open, or even never closed.") (citations omitted).

[212] HALLAQ, *supra* note 181, at 4.

[213] HAMOUDI & CAMMACK, *supra* note 178, at 19.

[214] GLENN, *supra* note 177, at 204 ("Collective ijtihad [] would be nothing other than ijma, a constantly valid source").

originalism since its initial appearance in 1999 in *Grupo Mexicano*'s 5-4 opinion. Finally, it may also explain why even if the United States Supreme Court re-affirms equitable originalism in subsequent cases, lower federal courts will likely interpret such artificial barrier to judicial equitable powers narrowly.

c. Equitable Originalism as an Artificial Barrier to Equity

Judicial interpretation of constitutional provisions is an interpretive valve in the United States and other countries.[215] "Constitutions inevitably include ambiguities, vagueness, inconsistencies and 'gaps,'"[216] which require judicial interpretation and application to unique facts before the court in each case. Indeed, "even if the world remained the same, the courts would still have to apply the text to unpredictable human and institutional behavior, and a superstructure of judge-made law would become encrusted onto the text."[217] Even very detailed constitutions, such as India's constitution, require judicial interpretation. As explained by S.P. Sathe, "[d]espite its detail and specificity, it contains expressions that are pregnant with various nuances, which must be articulated from time to time."[218]

Amending a constitution is generally very difficult, thereby requiring some amount of purposive interpretation and reliance on precedent to apply constitutional provisions to changing circumstances. As explained by Mark Tushnet, "[b]ecause the U.S. constitution is difficult to amend, interpretation, rather than amendment, must carry the burden of adjusting those constitutional arrangements as seems necessary."[219] In fact, the Canada Supreme Court has

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[215] Tushnet, *supra* note 5, at 49 ("Constitutional interpretation in the United States is the means by which the Constitution is recurrently revised to accommodate the general values embodied in the constitution with the realities of governance in a changing world.").

[216] *Conclusion*, *supra* note 55, at 321 (citations omitted).

[217] Hogg, *supra* note 67, at 90.

[218] S.P. Sathe, *India: From Positivism to Structuralism, in* INTERPRETING CONSTITUTIONS: A COMPARATIVE APPROACH, *supra* note 5, at 231.

[219] Tushnet, *supra* note 5, at 7. The United States Constitution has been amended only 27 times since 1789. *Id.* at 15. Tushnet noted "[w]ith a less cumbersome amendment process, constitutional amendments would perform that function." *Id.* at 49. He also noted that amendment and interpretation "are obviously not equivalent" and noted that constitutional amendments "have a more obvious warrant in the people's (current) views about constitutional values and the realities of governance than constitutional interpretation does." *Id.* This may be a two-sided coin in that if a judiciary takes a living constitutionalism interpretive approach, constitutional amendment is less frequent because it is unnecessary; *see* Hogg, *supra* note 67, at 85 (asserting that Canada's constitution "changed very little" in the late 1800s because "the Privy Council was implicitly following a 'living tree' approach").

"explicitly cited the difficulty of amending its Constitution as a justification for allowing 'growth and development over time.'"[220]

Strict originalism is a barrier to constitutional interpretation as a heavily relied-upon interpretive valve. As explained by Peter Hogg, "[t]he point of originalism is to deny that the courts may use the power of interpretation to new conditions and new ideas. For the originalist, adaptation can only come through the power of amendment."[221] Varol made a related point when analyzing originalism, that "[f]or originalism to survive, the legislature must have a workable avenue for amending the Constitution when the original understanding of that document no longer comports with prevailing norms."[222] Varol argued that amendments to the constitution must be a realistic option if originalism is the dominant interpretive methodology.[223]

Equitable originalism demands that "equity" in Article III remain in its static form as it was in England in the 1780s unless legislation provide otherwise, thereby creating an artificial barrier to judicial development of equity as a long-standing interpretive valve in the U.S. legal system. Equity typifies the concept of an interpretive valve.[224] In the common law, equity is a deeply entrenched interpretive valve intended to "respond to changing economies, technologies and cultures."[225] The concept of equity as an adaptable judicial power to soften the application of the sometimes harsh edges of black letter law has existed since Aristotle and was firmly embedded in the English concept of judicial legal power adopted by the U.S. founders in Article III.[226] The original meaning of "equity" in the 1780s was a principle-based judicial power that could and should adapt to societal changes.[227] As explained by Justice Story, "[w]here a new condition

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[220] *See Conclusion*, *supra* note 55, at 342 (quoting Hunter v. Southam [1884] S.C.R. 145, 155); *see also* Hogg, *supra* note 67, at 77.

[221] Hogg, *supra* note 67, at 86.

[222] Varol, *supra* note 38, at 1287.

[223] *Id.* ("[T]he availability of a constitutional-amendment mechanism – however difficult it may be—as a safety valve for altering the original meaning of the Constitution may be a prerequisite for originalism to serve as a legitimate interpretive method.").

[224] *See* Reznik, *supra* note 37, at 428–29 (discussing common law tradition of adjudication as "an incremental evolution of order that responds to social reality from within rather than pre-planned by political authorities; an articulation of the values of the local community" and pointing to maxims as "expressing such inclinations").

[225] *Challenge to Equitable Originalism*, *supra* note 12, at 155.

[226] *Id.* at 154 (In 1835, Justice Story "traced equity's corrective function to Aristotle's definition of equity as 'the correction of the law wherein it is defective by reason of its universality'") (citing JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AMERICA § 3 (W.H. Lyon ed., 14th ed. 1918) (1835)).

[227] *See Challenge to Equitable Originalism*, *supra* note 12.

exists, and legal remedies afforded are inadequate or none are afforded at all, the never-failing capacity of equity to adapt itself to all situations will be found equal to the case, extending old principles, if necessary, not adopting new ones, for that purpose."[228] This highlights a key weakness in originalism's normative mandates–why would we fix and constrain a constitutional provision when its original meaning "approved of the possibility that the process of interpretation would apply the text in ways that were unanticipated at the time of drafting"?[229]

Equitable originalism's attempt to crystalize "equity" as its meaning in another country's courts in the 1780s is an artificial barrier to equity's unique role as an adaptable judicial power to ensure just and fair application to black letter law as a judicial interpretive valve.[230] Restricting present-day judicial equitable powers to English chancery courts' powers in the 1780s is an extreme example of the potential "stagnation" associated with originalism.[231] Equitable originalism has parallels with the closing of the door on *ijtihad*. To the extent that Islamic law jurists attempted wide-spread efforts to stop further development of Islamic law at a certain point, the "stultification"[232] it created is similar to the "stagnation"[233] associated with originalism. To the extent the door on *ijtihad* was in fact never closed, this illustrates a legal system's need to have interpretive valves.

So how have U.S. courts responded to this artificial barrier to equity, which is a foundational interpretive valve in the U.S. legal system? Looking at how U.S. court have responded to *Grupo Mexicano*, the first (and so far only) United States Supreme Court equitable originalism holding, is instructive.[234] Not surprisingly, like U.K. courts' adaptations minimizing the ECJ's restrictions on common law discretionary jurisdiction doctrines, U.S. courts have limited the scope of *Grupo Mexicano*'s artificial barrier to judicial equity development.[235]

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228 *See, e.g.,* Story, *supra* note 226, § 4.

229 Hogg, *supra* note 67, at 86.

230 *See Challenge to Equitable Originalism*, *supra* note 12, at 158–60.

231 *See* Reznik, *supra* note 37, at 425 ("Originalism enables subjection of present generations to the preferences of past ones. It thereby construes society as an entity superior to the individuals comprising it, and translates stagnation and dogma into interpretive doctrine.") (citations omitted).

232 HAMOUDI & CAMMACK, *supra* note 178, at 18.

233 *See* Reznik, *supra* note 37, at 425.

234 Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999). For a more detailed discussion of this case and reference to other discussions of this case, see *Challenge to Equitable Originalism*, *supra* note 12, at 116–18.

235 *See* Pillow Menu, LLC v. Super Effective, LLC, 20-cv-03638-STV, 2021 WL 3726205, at *17 (D. Colo. Aug. 19, 2021) ("Courts 'have interpreted *Grupo Mexicano* narrowly so as to apply its holding only to actions asserting *solely* legal causes of action or actions involving assets in which no lien or other equitable interest in

Almost immediately after *Grupo Mexicano* was decided, the Fourth Circuit interpreted it narrowly in *United States ex rel Rahman v. Oncology Associates*.[236] The Court held a district court could still issue a preliminary injunction in a case seeking money damages as long as the plaintiff also asserted equitable claims, such as unjust enrichment, and requested the court freeze assets related to such claims.[237] Multiple circuits have followed suit.[238] Where plaintiffs assert legal and equitable claims, as long as there is a "nexus" between the equitable claims and the assets to be frozen, courts have consistently rejected defendants' arguments that plaintiffs are artfully pleading equitable claims to obtain pre-judgment attachment orders.[239]

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the assets is claimed.'") (citing Matrix Partners VIII, LLP v. Nat. Res. Recovery, Inc., No. 1:08-CV-547, 2009 WL 175132, at *4 (E.D. Tex. Jan. 23, 2009) (emphasis in original); *see also* U.S. ex rel Rahman v. Oncology Associates, 198 F.3d 489, 496, 498 (4th Cir. 1999) ("*Grupo Mexicano*'s holding is carefully circumscribed, providing specifically that the general equitable powers of the federal courts do not include the authority to issue preliminary injunctions in actions solely at law. . . That money damages are claimed along with equitable relief does not defeat the district court's equitable powers."); Johnson v. Couturier, 572 F.3d 1067, 1083–84 (9th Cir. 2009) ("[T]he holding of *Grupo Mexicano* is limited to cases in which only monetary damages are sought. The Supreme Court expressly stated that a preliminary injunction barring asset transfer is available where the suit seeks equitable relief."); Rubin v. Pringle (In re Focus Media Inc.), 387 F.3d 1077, 1085 (9th Cir. 2004) ("*Grupo Mexicano* thus exempts from its proscription against preliminary injunctions freezing assets cases involving bankruptcy and fraudulent conveyances, and cases in which equitable relief is sought.").

[236] United States ex. rel Rahman, 198 F.3d 489, 496 (1999). For a collection of appellate and district court cases addressing this limitation, *see* W. Heritage Ins. Co. v. Rds Group, 2010 U.S. Dist. LEXIS 160187, at *9–10 (S.D. Iowa, June 22, 2010); *see also* Amazon.com, Inc. v. WDC Holdings LLC, 1:20-cv-00484-LO-TCB, 2021 WL 3878403, at *5–7 (4th Cir. 2021) (following *Rahman* and affirming preliminary injunction). *But see* Faville v. Munro, 22-cv-11911-DJC, 2022 WL 17363511 (D. Mass. Dec. 1, 2022) (denying preliminary injunction because plaintiffs did not identify nexus between equitable claims and assets sought to be frozen).

[237] *Rahman*, 198 F.3d at 496 ("when the plaintiff creditor asserts a cognizable claim to specific assets of the defendant or seeks a remedy involving those assets, a court may in the interim invoke equity to preserve the *status quo* pending judgment where the legal remedy might prove inadequate and the preliminary relief furthers the court's ability to grant the final relief requested.").

[238] *See* Johnson, 572 F.3d at 1083–84; Rubin, 387 F.3d at 1085; *see also* Animale Group Inc. v. Sunny's Perfume Inc., 256 Fed.Appx. 707, 709 (5th Cir. 2007); CSC Holdings, Inc. v. Redisi, 309 F.3d 988, 996 (7th Cir. 2002); Kennedy Bldg. Assocs. v. CBS Corp., 476 F.3d 530, 535 (8th Cir. 2007); SEC v. ETS Payphones, Inc., 408 F.3d 727, 734 (11th Cir. 2005).

[239] *Rahman*, 198 F.3d at 495, 496–97; Newby, 188 F.Supp.2d at 701. For a useful discussion of the scope of the nexus requirement, see Travelers Cas. and Sur. Co. of America v. Beck Develop. Co., 95 F.Supp.2d 549, 554 (E.D. Va. 2000) (asserting a plaintiff may establish an equitable interest in defendant's assets by (1) plaintiff "hav[ing] a direct interest in [] property" defendant possesses or (2) where defendant comes into possession "as a result of his own fraud or other misconduct." The plaintiff must do more than "merely" allege "a combination, possession of property . . . and a claim for equitable relief."). Some cases have refused to grant preliminary injunctive relief even where a plaintiff has asserted an equitable claim in conjunction with a claim for damages; *see, e.*g., Coley v. Vannguard Urban Improvement Assoc. Inc., 12-cv-5565, 2016 WL 7217641, at *5 (E.D.N.Y. Dec. 13, 2016) (denying preliminary injunction because "the 'heart' of Plaintiff's complaint is unquestionably legal," but restraining defendants' assets under state law) (citations omitted); Corp. Comm'n of Mille Lacs Band of Obibwe Indians v. Money Ctrs. Of Am., Inc., 915 F.Supp.2d 1059, 1062–64 (D. Minn. 2013); Oak Leaf

Much like the ECJ decisions resulted in renewed defense and appreciation of discretionary jurisdiction doctrines by U.K. courts and scholars, *Grupo Mexicano* has paradoxically strengthened federal courts' equity jurisdiction. Post-*Grupo Mexicano* cases illustrate an equity renaissance through lengthy opinions explaining why claims for unjust enrichment, restitution remedies such as constructive trust, disgorgement and accounting are equitable even if based in statute, related to a contract, or seeking monetary relief.[240] U.S. courts have emphasized pre-*Grupo Mexicano* caselaw that courts have heightened equitable powers when the public interest is involved,[241] and that some statutory claims are equitable in nature and thereby allow preliminary equitable relief.[242] Since *Grupo Mexicano*, the United States Supreme Court has not expanded equitable originalism beyond the unsecured creditor preliminary injunction context, although it is likely coming given recent United States Supreme Court dissents and concurrences.[243] When and if attempts to do so occur, it is likely that federal courts will respond by finding ways to continue utilizing equity to further its foundational, adaptive and supplementary role.

Without any viable mechanism for replacing judicial development of equity by constitutional amendment, equitable originalism will be a barrier to the development of judges using equity flexibly as intended in Article III. It is possible, therefore, that this not only explains the long gap between *Grupo Mexicano* and a second United States Supreme Court decision re-affirming equitable originalism, but also predicts that further equitable originalism mandates will meet with limited success.

Outdoors, Inc. v. Double Dragon Int'l, Inc., 812 F.Supp.2d 944, 947–48 (C.D. Ill. 2011). This interpretation of *Grupo Mexicano* represents the minority approach taken by courts.

240 *See, e.g., Rahman*, 198 F.3d at 498 (holding a constructive trust based on unjust enrichment is equitable even where monetary relief is sought); *Newby*, 188 F.2d at 702–706 (engaging in lengthy discussion of history and development of restitution claims as equitable). Although *Newby* declined to grant a preliminary injunction, it was for other reasons and not pursuant to defendant's arguments under *Grupo Mexicano*. 188 F.2d at 708–709.

241 *See, e.g., Rahman,* 198 F.3d at 497 (courts may "go . . . farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved") (citation omitted).

242 *Newby*, 188 F.Supp.2d at 700 ("the statutory authorization for equitable remedies, even when those remedies are in the form of a monetary award, does not strip them of their equitable character").

243 *See Challenge to Equitable Originalism*, *supra* note 12, at 120.

2. *Principle Two – Legal Transplants Always Change from One Legal System to Another*

a. The Definition of "Legal Transplant"

Legal transplants are aspects of one legal system "transplanted" to another.[244] Legal transplants can happen in a myriad of ways, as involuntary transplants, such as mandated colonial laws, or as voluntary transplants, such as a legal system voluntarily adopting a model law.[245] Use of the word "legal transplant" today is problematic given its association with Alan Watson's flawed assumptions that rules are discrete entities that can travel across legal systems without change.[246] Scholars use many terms in place of "legal transplant."[247] Esin Örücü and Máximo Langer use the term "legal translation" in place of legal

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[244] For a discussion of various approaches to legal transplants, see *Transnational Jurisdiction*, *supra* note 191, at 10–11; *see also* MATHIAS SIEMS, COMPARATIVE LAW 287–321 (3d ed. 2022); Michele Grazaidei, *Comparative Law, Transplants, and Receptions*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 464 (Mathias Reimann & Reinhard Zimmerman eds., 2d. ed. 2019); William Twining, *Diffusion of Law: A Global Perspective*, 49 J. LEGAL PLURALISM 1 (2004) (setting forth legal transplant scholarship in a variety of disciplines); Nelken, *supra* note 171, at 31 (identifying methods of transfer including borrowing from one country by another, soft law and harmonization of private law).

[245] *See* Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 885 (2003) (setting forth typology of four legal transplants, including the "cost-saving transplant", the "externally-dictated" transplant, the "entrepreneurial transplant" and the "legitimacy-generating transplant").

[246] For criticisms of Watson's conception of a transplantable legal rule, see Nelken, *supra* note 171, at 11 ("Watson and Ewald's discussion of legal transplants could well be regarded as simply too one-sided and polemecial to contribute much to any future collaboration between the approaches of comparative law and sociology of law"); Lawrence Friedman, *Some Comments on Cotterrell and Legal Transplants*, *in* ADAPTING LEGAL CULTURES, *supra* note 171, at 93 ("Anyone who has the slightest interest in law a social or historical phenomenon simply cannot take seriously Watson's notions about how law changes (or fails to change) and about the causality and direction of change. . . . Legal systems are not static in the least.").

[247] Esin Örücü, '*Legal Families' and 'Mixing Systems'*, *in* COMPARATIVE LAW A HANDBOOK, *supra* note 173, at 176 [hereinafter *Legal Families*] ("Some of the terms employed for analysis of movements today are 'seepage', 'contaminant', 'irritant', 'underlay, 'overlay', 'cross-fertilisation', 'incremental reception', 'competing systems', 'hyphenated legal systems', 'layered law', 'change', 'choice', 'prestige', efficiency', 'elite' and 'historical accident'. Any one of these terms may be appropriate for the analysis of a specific move and for the explanation of a specific growth."); Biagio Andó, *The Feature of* Droit Commun *in the* Disposition Preliminaire *of the Civil Code of Quebec: A Clue to the Bijurality of the Legal System?*, *in* THE DIFFUSION OF LAW: THE MOVEMENT OF LAWS AND NORMS AROUND THE WORLD 147 (Sue Farran, James Gallen, Jennifer Hendry & Christa Rautenbach, eds., 2016) ("Words such as 'transplantation', 'reception' and/or 'transposition' have become widespread terms in the scholarly debate, each underlying a different point of view on how the circulation of law may occur and has occurred throughout history."). For a discussion on the various terms used to define the movement of a law or aspect of a legal system from one system to another, see Nelken, *supra* note 171, at 16–20; *see also* Esin Örücü, *Infusion of the Diffused: Four Circles of Diffusion Infusing the Legal System of Turkey*, *in* THE DIFFUSION OF LAW: THE MOVEMENT OF LAWS AND NORMS AROUND THE WORLD, *supra* note 247, at 7 (discussing various terms and concepts related to legal transplants) [*Infusion of the Diffused*].

transplant.[248] Örücü suggests translation as a "more nuanced and productive heuristic device" and "transposition" to "highlight the crucial importance of the tuners who adjust the mix, adapting it to the new instrument."[249] Langer prefers "translation" because "transplant" does not capture the possibility that "in many cases, legal concepts and practices are transferred on some conceptual levels but not others," and to highlight that "even when reformers try to imitate a legal idea or practice as closely as possible, this new legal idea may still be transformed" based on various "forces in the receiving system."[250] William Twining uses the term "diffusion" to capture the many ways aspects of one legal systems spread to another.[251]

Pierre LeGrand rejects the concept of a legal transplant altogether, arguing that law is not an "autonomous entity unencumbered by historical, epistemological, or cultural baggage."[252] LeGrand argued a legal rule's meaning is only understood as interpreted by the legal culture within which it is located, which is subject to unique historical and culture conditions and epistemological assumptions.[253] As well-stated by Eoin Carolan, "[a] legal norm does not enjoy an independent existence. It develops and is operated within the confines of a particular social and institutional structure, with its own culture and pattern of power distribution."[254]

These terms illustrate the nuance involved in the process in which one legal system receives legal rules or other aspects of a legal system from another. Different perspectives about terminology reinforce the proposition that movement of legal ideas across legal system necessarily result in modifications. The term "legal transplant" here refers to diffusions and transpositions of some aspect of a legal system into another, not as a free-floating legal rule moving untethered from history, culture or philosophy of the origin and receiving systems.

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[248] *See Infusion of the Diffused*, *supra* note 247, at 173; M*áximo Langer, From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure,* 45 HARV. INT'L L.J. 1, 29 (2004).

[249] See *Infusion of the Diffused*, *supra* note 247, at 173.

[250] Langer, *supra* note 248, at 30–31.

[251] Twining, *supra* note 244, at 5 (setting forth legal transplant scholarship in a variety of disciplines).

[252] Pierre Legrand, *The Impossibility of "Legal Transplants",* 4 MAASTRICHT J. EUR. & COMP. L. 111, 114 (1997) ("The meaning of the rule is [] a function of the interpreter's epistemological assumptions which are themselves historically and culturally conditioned.").

[253] *Id.*; *see also* Andó, *supra* note 247 at 157 (discussing D. Jutras' assertion that "the implantation of a rule or institution in a different soil cuts the links between the imported rule or institution and its exporter").

[254] Eoin Carolan, *Diffusing Bad Ideas*, *in* THE DIFFUSION OF LAW: THE MOVEMENT OF LAWS AND NORMS AROUND THE WORLD, *supra* note 247, at 229.

b. Legal Transplants Always Change

Legal transplants necessarily change when introduced to new legal systems.[255] Therefore, how a rule operates in the origin country will be different in the receiving country. When a legal transplant occurs, the transplanted rule is morphed as it grows in the social, cultural, economic and political ecosystem of the receiving legal system.[256] Legal systems use imported rules for purposes and in ways different from the exporting country, which necessarily transforms the rule, sometimes dramatically, as it interacts with the purposes, legal stakeholders, and epistemological and cultural assumptions of the new system.[257] As stated by one comparatist, "the transfer of law . . . involves human learning, and learning cannot take place without improvisation and experimentation" which "takes place in a cultural context."[258] Practically speaking, "[t]here is always an historical context, an existing legal, social and/or religious framework in which the past will continue to exist alongside the new introductions."[259]

c. English Law as a Legal Transplant in Former Colonies

Many countries colonized by England grappled with the contours of English law as a legal transplant upon independence or de-colonization. English law did not exist on a blank canvas in former colonies, and newly-formed nation states had localized conditions and norms that interacted with transplanted English law

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[255] *See* Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV. 11, 12 (1998) ("legal irritants . . . will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change"); Twining, *supra* note 244, at 24 ("[N]o serious student of diffusion can assume that what is borrowed, imposed or imported *remains the same.*") (emphasis original).

[256] Teubner, *supra* note 255, at 19 (a "legal transfer . . . has to be assimilated to the deep structure of the new law, to the social world constructions that are unique to the different legal culture . . . [including] different styles of legal reasoning, modes of interpretation [and] views of the social world."); Langer, *supra* note 248, at 12 ("every legal transplant also involves interactions between concrete people with a concrete set of individual dispositions", and therefore, "procedural systems – and any other structures of interpretation and meaning – can change over time"); Graziadei, *supra* note 244 at 452 ("the new environment often required an adaptation to new circumstances as well as imaginative change"). As early as 1935, comparative law scholars have taken issue with the assumption that law can freely move as an "independent hypostasis" considered in isolation from culture and society; *see, e.g.,* Albert Kocourek, *Factors in the Reception of Law*, 10 TUL. L. REV. 209, 228 (1935) (emphasizing that "(1) political conditions; (2) the literary character of the sources [of law]; (3) the forces of law propagation; and (4) cultural (and especially economic) conditions" act as "coefficients of law").

[257] *See* Twining, *supra* note 244, at 24 ("how and to what extent any particular 'import' retains its identity or is accepted, ignored, used, assimilated, adapted, rooted, resisted, rejected, interpreted, enforced selectively, and so on depends largely on local conditions").

[258] Graziadei, *supra* note 244, at 469.

[259] Farran et al., *supra* note 247, at 3.

that had diffused into the system. English law as promulgated in English chancery and common law courts necessarily looked different in colonies.[260] Different courts, different actors, and most importantly, local conditions and existing norms necessarily diffused into the legal system thereby differentiating it from English law in England.

Comparatists' study of the common law tradition in former English colonies illustrate mixed systems in which localized normativity co-exists with threads taken from English presence.[261] Comparatists and U.S. legal history scholars recognize that the U.S. legal system drew from many sources, not just English law. Glenn wrote, in the United States, "the common law was reconceptualized as a local, official product, as a 'means of fitting the common law into an emerging system of popular sovereignty.'"[262]

Pamela Martino describes this as "the 'localisation' of the common law."[263] Martino discusses changes in the Privy Council's approach to deciding appeals as one manifestation of such localization.[264] Beginning in 1833, a committee of the Privy Council acted as a "final court of jurisdiction for appeals against judgments of the Commonwealth, the British Overseas Territories and States that were independent from the British Crown."[265] Early on, the Privy Council emphasized its role as ensuring interpretations of law across colonies "as nearly as possible the same."[266] However, with decolonization and the increased recognition of self-determination, for over 100 years the Privy Council has respected local customs and laws when hearing appeals from countries that continue to voluntarily allow appeals to it. Martino noted early Twentieth Century cases in which the Privy Council acknowledged "when an appellate Court in a colony which is regulated by English law differs from an appellate Court in England, it is not right to assume that the Colonial Court is wrong."[267] Martino observed "[t]he diffusion of the common law through the empire meant

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[260] *See, e.g., Challenge to Equitable Originalism*, *supra* note 12, at 129–31 (discussing equity in U.S. colonies prior to ratification).

[261] *See* GLENN, *supra* note 177, at 248–49 ("the idea of a single common law tradition has been sorely tried, by national affirmation and national identities" and "[t]he common law, though identifiable, is a weak identifier").

[262] GLENN, *supra* note 177, at 250 (citations omitted).

[263] Pamela Martino, *The Judicial Committee of the Privy Council*, *in* THE DIFFUSION OF LAW: THE MOVEMENT OF LAWS AND NORMS AROUND THE WORLD, *supra* note 247, at 61.

[264] *Id.* at 59–76.

[265] *Id.* at 61.

[266] Trimble v. Hill (1879) 5 App. Cas. 342, 345. This case and quote are set forth in Martino, *supra* note 263, at 63.

[267] Martino, *supra* note 262, at 64 (quoting Robins v. National Trust Co. Ltd. [1927] AC 515, 519).

that local variants of English common law gradually evolved and in turn became an integral part of the common law. In the former colonies therefore the common law tradition gave rise to new applications and forms."[268]

Greene observed this same trend in Privy Council decisions involving Canada beginning in the 1930s.[269] In *The Persons Case*, the Privy Council interpreted the British North America Act (BNA Act) to allow women to hold office in the Canadian Senate.[270] The Privy Council held that the BNA Act "planted in Canada a living tree capable of growth and expansion within its natural limits."[271] The Privy Council explained that it intended to give the BNA Act a "liberal interpretation" so that Canada "may be a mistress in her own house, as the provinces to a great extent, but within certain limits, are mistresses in theirs."[272]

This led to another explicit rejection of uniformity as a privy council goal in the 1960s, when the Privy Council held "the need for uniformity is not compelling" and confirmed the "independence of local courts from having to always follow the common law as stated by the House of Lords and the Privy Council."[273] Not surprisingly, the highest courts of countries subject to Privy Council final appeal have acknowledged the importance and binding nature of local variations of common law in the face of diverging English precedent.[274] Martino argued the Privy Council's receptivity and acknowledgment of "the heterogeneity of national experiences within the Commonwealth has given flexibility in time and space to the common law legal tradition" thereby "safeguarding its survival in related but alternative forms."[275] In sum, post-

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[268] *Id*.

[269] *See* Greene, *supra* note 18, at 22–24 (discussing Edwards v. Attorney-General for Canada (*The Persons Case*), [1930] A.C. 124 (P.C.) (appeal taken from Canada).

[270] *Id*. at 22–23.

[271] *Id.*

[272] *Id*. Greene discusses a number of cases after *The Persons Case* in which the Privy Council was less open to variation leading to abolition of appeal to the privy council in Canada in 1949; *see* Greene, *supra* note 18, at 24–26.

[273] Martino, *supra* note 263, at 66–67 (quoting Consolidated Press Ltd. V. Uren, [1969] 1 AC 590, 641, Hart v. O'Connor, [1985] 1 AC 1000, 1017 and de Lasala v. de Lasala, 1980 AC 546, 558). Martino also cites to G.W. Bartholomew, *English Law in* Partibus Orientalium, *in* THE COMMON LAW IN SINGAPORE AND MALAYSIA 25 (A.J. Harding ed., 1985) (stating "the Privy Council is thus recognizing that the common law may speak with different accents in different parts of the world. There is no assumption of universality and no necessary policy of the desirability of uniformity.") Martino, *supra* note 263, at 66, n. 32.

[274] Martino points to examples of this in Parker v. The Queen, (1963) 111 CLR 610, 632 (Aus. High Court) and Skelton v. Collins, (1966) 116 CLR 94, 135 (Aus. High Court). Martino, *supra* note 263, at 66.

[275] Martino, *supra* note 263, at 68.

colonial experiences across the world establish the uncontroversial assertion that legal transplants always change.

d. Other Examples of the Principle that Legal Transplants Always Change

Europe's reception of Roman law is a useful example of the principle that legal transplants always change. Europe's reception of Roman law was not reception of Roman substantive law made 1,000 years earlier, but reception of "an accepted 'mind-set', which formed the basis for political and legal thought throughout Europe."[276] Roman law began developing with the founding of Rome in 753 BC, and was marked by the Twelve Tables in 450 BC and the classical period of Roman law in the first two centuries of the Christian era. After the division of the Roman empire in 395 AD and the fall of the western empire in 506, Justinian reigned over the eastern empire from 527 – 565. Justinian compiled a set of works reflecting Roman law during the classical period, seeking an internally consistent exposition of Roman law, and sought to wipe away any discrepancies or disagreements in the sources his jurists compiled.[277]

Justinian's compilations were rediscovered, and scholars began to interpret and study Roman law. Scholars interpreting Roman law as part of Europe's reception of Roman law as a major part of the *ius commune* of Europe were Glossators (11th and 12th centuries) and subsequently, Commentators (14th and 15th centuries). Glossators' interpretations of Roman law, known as "the Gloss" became crucially important to anyone attempting to understand Roman law. Glossators' goal in interpreting Roman law was to "discover the principles" inherent in them and use those principles in contemporary cases, such as "elements of a rational procedure for implementing the law, the nature of legislative authority and of the relationship between local law and imperial law."[278] Glossators understood Roman law through its application to present-day situations.[279] When scholars began analyzing Roman law they "felt free to

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[276] PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 67 (9th ed. 2005). Stein describes Roman law's influence on European legal history as creating a "permanent sediment of Roman law terms residing in moral and political discourse and in international diplomacy." *Id.* at 115.

[277] *See id.* at 35 (Justinian "observed he who corrects what is not stated accurately deserves more praise than the original writer.").

[278] *Id.* at 48, 57.

[279] Franz Wieacker, *The Importance of Roman Law for Western Civilization and Western Legal Thought*, 4 B.C. INT'L & COMP. L. REV. 257, 276 (1981) ("For the Bolognese jurists Justinian's *Digest* was not a mass of lifeless texts. They made the timeless problems the texts posed their own concern"); O.F. ROBINSON, T.D.

adapt and reinterpret it whenever they had sufficient reasons to do so."[280] What was "Roman law" necessarily changed depending on the needs, legal culture, and existing laws and norms in the areas in which it percolated.[281]

Similarly, Commentators sought to adapt the civil law to "contemporary problems" and find in Justinian's compilations and the Gloss "rules which would be appropriate for late medieval society but would still carry the authority of imperial law."[282] Commentators sought out the "rationale" behind Roman law to justify new laws and imbue them with imperial clout.[283] Commentators analyzed Roman law's interaction with other sources of law.[284] Like the Glossators, the Commentators saw Roman law as "principles" and a source of ideas that created "new doctrines to face new situations" which paved the way for continued reliance on Roman legal principles as European legal systems evolved.[285] The Glossators' and Commentators' interpretations of Justinian's compilations became the "go to" sources of Roman law for European scholars

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FERGUS & W.M. GORDON, EUROPEAN LEGAL HISTORY § 3.3.4 (3d ed. 2000) (describing Glossators' view of Roman law as a "living system").

[280] Grazaidei, *supra* note 244, at 464. Application of Roman law to modern situations was necessary as the Glossators' function of teaching future imperial administrators and clergy. ROBINSON, FERGUS & GORDON, *supra* note 279, § 3.3.4.

[281] GLENN, *supra* note 177, at 141 (explaining that "if Roman law could be looked at as a base of legal learning, much of it had a peculiarly Roman look, requiring recasting for the modern Europe"); Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 AM. J. COMP. L. 343, 347 (1991) [hereinafter Sacco II] (explaining that "the Justinian corpus gave rise to a body of rules explicit in none of its texts and in constant evolution"); *see also* Grazaidei, *supra* note 244, at 446 ("Justinian's compilation itself had seen the light thanks to the selective appropriation and the interpolation of the original sources").

[282] STEIN, *supra* note 276, at 71, 74. Stein discusses an example of Bartolus, a commentator, resolving a conflict between a Roman rule requiring five witnesses to witness a will signing and a Venetian custom requiring only three witnesses. Applying the principle of recognizing a testator's last wishes found in Roman law, Bartolus determined only three witnesses were required. This is an example of using a Roman principle of law to justify applying local custom instead of Roman substantive law. *Id.* at 72.

[283] *Id.* at 72 (explaining that "[by] making explicit the rationale that seemed to lie behind the spare rulings of the Roman texts, Bartolus was able to produce a set of new rules, which could claim to enjoy the authority of imperial laws"); *see also* K. ZWEIGERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 100 (3d ed. 1998) (discussing Paul Koschaker's theory that Roman law's authority and claim to validity was more important than any "qualitative superiority of Roman law"); Twining, *supra* note 244, at 8 n. 14 (same); JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 9 (3d ed. 2007) (explaining that Bologna jurists during the Medieval Renaissance "recognized the high intellectual quality" of Roman law which "carried not only the authority of the pope and the emperor, but also the authority of an obviously superior civilization and intelligence"); KOCOUREK, *supra* note 256, at 219 (explaining that Roman law's superiority was "generally assumed").

[284] ROBINSON, FERGUS & GORDON, *supra* note 279, § 4.6.1.

[285] *Id.* § 4.6.5–4.6.8.

applying Roman law to new situations.[286] Essentially, "Roman law" was interpretations of interpretations of interpretations spanning over a millennium.

As humanism took root, European scholars became interested in distillation of Roman law principles prior to the Glossators and Commentators for use in state-based codes.[287] In France at the end of the fifteenth century, scholars attempted to understand the "true" Roman law prior to the Glossators' and Commentators' interpretations and applications.[288] However, this historical endeavor led humanists to discover "how different their sixteenth-century society was than the society of ancient Rome," and they questioned "whether it was appropriate to seek to use Roman law as a model for contemporary France at all."[289] Ultimately, although Roman law was venerated as a legal paradigm and Roman law concepts and principles were adopted, substantive Roman law took a back seat to customary laws at the time of codification in France and other European nation states.[290] Similarly, in the German codification process, "[t]he German Romanists were not interested in tracing the way in which Roman law had been adapted to serve the needs of contemporary society by the work of the Commentators . . . [T]hey wanted to reveal the inherent theoretical structure that was inherent in the texts."[291]

The takeaway from the European reception of Roman law is that European empires and subsequent nation states received Roman law not as it was in 450 BC, during the classical period, or even when Justinian reduced it to the compilations. During the long process from reception to the *ius commune* of Europe to nation states and the French Code of 1804 and the German Code of 1896, Roman law was not accepted whole cloth.[292] Instead, it was utilized as a

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[286] *Id.* § 3.2.2 (discussing importance of Glossators' work "in the long process of assimilation of elements of Roman law into European legal systems").

[287] STEIN, *supra* note 276, at 121.

[288] *Id.* at 78.

[289] *Id*.

[290] *See* ZWEIGERT & KÖTZ, *supra* note 283, at 75 (explaining that the French Code of 1804 "carefully absorbs the results of a long historical development, and most of it is a felicitous blend of traditional legal institutions from the *droit écrit* of the South, influenced by Roman law and the *droit coutumier* of the North, influenced by the Germanic-Frankish customary law"). Stein discusses Germany's approach to codification, which was "based primarily on 'natural law and reason' with Roman law included only if it fitted in with them." STEIN, *supra* note 276, at 112 (citing Frederick the Great). Stein noted that after the German code, Roman law ceased to be applicable, even in a modernized form, in any significant European state. *Id.* at 128.

[291] STEIN, *supra* note 276, at 119.

[292] *See also* Sacco II, *supra* note 281, at 347 ("Methodologically, these results were achieved by studying substantive law without regard to the procedures in which it is enmeshed, through the use of dialectic, and the free pursuit of the raison d'etre of the rule. The journey began with a letter of the corpus iuris and ended with the final draft of the German Civil Code. It was long indeed.").

method of legal thinking that expressed "basic principles, which should lie behind the laws of all peoples" and procedural concepts that were adapted to the societies' needs.[293] When courts applied Roman substantive law, it was applied together with canon law, feudal law, and traditional law, depending on the type of case.[294] Roman law as interpreted and applied over more than 1,000 years was but one ingredient in the "bran tub" of the *ius commune* of Europe prior to codification.[295] In the same way Roman law was incorporated as a paradigmatic concept of law that was overlaid by changing substantive law, English equitable principles were incorporated in the United States to adapt to changing conditions, and in fact have adapted to change over hundreds of years in the U.S. legal system.[296]

Islamic law is also illustrative of the principle that legal transplants always change.[297] Although there is one Qu'ran, there are many varying manifestations of Islamic law throughout the world. Each country influenced by Islamic law "is different, and each allows for resort to Islamic law under different circumstances."[298] Following Muhammad's death in 632 AD, Islam spread rapidly across the Middle East, North Africa, India and Spain.[299] During Islamic law's "classical period" from 900 to 1700, multiple jurist schools emerged, each with differing views on *sunnah* and *fiqh*.[300]

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[293] STEIN, *supra* note 276, at 61 ("what the civil law supplied was a conceptual framework, a set of principles of interpretation that constituted a kind of universal grammar of law"); MERRYMAN & PÉREZ-PERDOMO, *supra* note 283, at 10 (describing Roman law as interpreted by the Glossators and Commentators as "a common body of law and of writing about law, a common legal language, and a common method of teaching and scholarship"). Stein noted that as early as the Edict of Euric in 475 after the fall of the western empire and before Justinian's rule, Visagoths relied on Roman law in this conceptual manner when developing its law. STEIN, *supra* note 276, at 31.

[294] STEIN, *supra* note 276, at 61.

[295] GLENN, *supra* note 177, at 13 (describing the analogy of a bran tub, which is a tub of bran in which presents are concealed that can be dipped into as a game to see what you get, for legal traditions, which are made up of various influences and legal transplants); *see also* MERRYMAN & PÉREZ-PERDOMO, *supra* note 283, at 15 (discussing various subtraditions of the civil law tradition, including Roman civil law, canon law and commercial law).

[296] *See Challenge to Equitable Originalism*, *supra* note 12.

[297] *See* Horowitz, *supra* note 176 (discussing Malaysia's unique reception of Islamic law and observing that Islamic law looks very different throughout the Islamic diaspora).

[298] HAMOUDI & CAMMACK, *supra* note 178, at 4.

[299] *Id.* at 14 ("[I]n less than two centuries, Islam had grown from a faith community of marginal importance along a strip of city-states in the Arab desert . . . to the controlling force as far west as the Pyrenees, along modern France's southern border, and as far east as the edges of India, thereby encompassing lands as diverse as Egypt, Spain, and Afghanistan.").

[300] *Id.* at 6; *see also* Abdal-Haqq, *supra* note 178, at 24–29 (discussing the development of Islamic schools of jurisprudence and their differences).

With the rise of the nation state, the majority of Muslims now reside in nation states in which Islamic law is codified in European-style codes that are hybrids of Islamic and western legal rules and concepts.[301] Through codification, nation states influenced by Islamic law have adapted *Shari'ah* to changing circumstances and conceptions of the individual and society.[302] For example, the Tunisian family law code has long outlawed polygamy despite *Shari'ah* allowing the practice with certain conditions.[303] The preamble to Morocco's Family Code explained modifications to provisions regarding women as part of a "modernist democratic social project."[304] The Preamble explained the drafting committee's directive from Moroccan King Mohamed VI to have "fidelity" to *Shari'ah* while "encouraging the use of ijtihad to deduce laws and precepts, while taking into consideration the spirit of our modern era and the imperatives of development, in accordance with the Kingdom's commitment to internationally recognized human rights."[305] These examples illustrate the continued development of Islamic law across the "Islamic diaspora."[306]

e. Application of the Second Principle to Equitable Originalism

If it is inevitable that legal transplants change from one system to another, and English rules changed as legal transplants in former English colonies, then one would expect English transplants to change as the United States legal system developed. Although the underlying principles of equity have remained relatively unchanged, the application of those principles has developed to apply

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[301] Abdal-Haqq, *supra* note 178, at 25; HAMOUDI & CAMMACK, *supra* note 178, at 2 ("Islamic law is a form of law that prevailed in a governance structure that is quite different from the modern nation-states in which nearly the entire world's population, Muslim and non-Muslim, currently lives").

[302] HAMOUDI & CAMMACK, *supra* note 178, at 31 (explaining that in some nation states, "codifications of certain areas of law [] replicate [] the juristic determinations of a given school, or, in some cases, a combination of different schools, while leaving other areas of law governed by European transplanted law"); GLENN, *supra* note 177, at 314 ("[T]he exchange between Islamic law and other laws [] often takes place beneath a constitutional umbrella of a host state.").

[303] Tunisia Personal Status Code, Art. 18 ("Polygamy is prohibited. Marrying more than one woman shall incur a punishment of one year's imprisonment and a fine of 240,000 francs or either of these"), *translated in* George N. Sfeir, *The Tunisian Code of Personal Status (Majallat Al-Ahw Al Al-Shakhsiy Ah)*, 11 MIDDLE E.J. 309 (1957).

[304] Official Gazette General Provisions Sherifyan Dahir n. 1.04.22 issued on February 3, 2004 to Implement Law No. 70.03 as the Family Code *translated in* GLOBAL RIGHTS, THE MOROCCAN FAMILY CODE (MOUDAWANA) OF FEBRUARY 5, 2004, https://www.studocu.com/row/document/universite-ibn-zohr/moroccan-family-code-and-islamic-law/moudawana-english-translation/48167338.

[305] *Id.* The Preamble explained that protecting women and children's rights and "preserving mens' dignity" in fact "adhere [] to Islam's tolerant ends and objectives, notably justice, equality, solidarity, ijtihad and receptiveness of the spirit of our modern era and the requirements of progress and development." *Id.*

[306] GLENN, *supra* note 177, at 214.

to changes in society and technology.[307] This parallels the reception of Roman law as a reception of legal principles and legal reasoning structures applied to changing circumstances, and Islamic law's varying manifestations through "the Islamic diaspora"[308] in various schools and nation states.

For over two hundred years, the United States legal system trusted judicial discretion with the flexible application of equity in each unique case.[309] Why then, would a constitutional interpretation method suddenly crystalize the term as used in England 230 years ago after hundreds of years allowing equity to adapt to changing circumstances? Why would the United States be the only former British colony that transplanted English equity in the 1780s and crystallized it in that form for centuries? A comparatist would look at such a method and likely surmise, "well that's not going to work." If asked why, perhaps it is enough to say "because legal transplants just don't work that way."

CONCLUSION

Comparative law provides a rich multi-dimensional lens through which to better understand originalism by juxtaposing it with other historical constitutional interpretation methods, identifying its interrelation with politics, culture and rights, and contextualizing its ramifications based on the type of constitution being interpreted. Comparative inquiries highlight originalism's aberrance as a constitutional interpretation method by illustrating that no other country's courts strictly adhere to originalism's mandates.

In addition to these rich comparisons, we can look at originalism through a different comparative lens. Instead of comparing originalism with other constitutional interpretation methods, we can interrogate originalism's normative mandates through application of principles regarding how law moves and is developed. When applied to equitable originalism, a form of strict originalism, both the fixed and constraint principles are incompatible with tenets of comparative law, including the need for interpretive valves and inevitability that legal transplants change between the original system and the receiving system.

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307 *Challenge to Equitable Originalism*, *supra* note 12, at 156–60.
308 GLENN, *supra* note 177, at 214.
309 *Challenge to Equitable Originalism*, *supra* note 12, at 160–63.

Originalism's dispositive freezing of "equity" as it existed in England in the 1780s creates an artificial barrier to judicial application of equitable principles that is seen in no other former British colony, and stymies equity's inherent corrective function. As such, equitable originalism will likely face limited success as a sustainable constitutional interpretation method if prior judicial reactions to similar artificial barriers are any indication.