

# Foreign Precedent in State Constitutional Interpretation

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## INTRODUCTION

Americans are rightly proud that they created the first successful written constitutions.<sup>1</sup> But constitutionalism is now an international phenomenon.<sup>2</sup> Since the United States Constitution was ratified, there have been an estimated 879 constitutional systems

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1. See RICHARD B. BERNSTEIN, *AMENDING AMERICA* 5 (1993) (“The invention of the written constitution is one of the greatest achievements of the Anglo-American political tradition.”).

2. See generally ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 7–11, 94–103 (2009) (describing a global study of the world’s national constitutions written after 1789).

adopted around the world.<sup>3</sup> Some failed quickly, but others have endured and helped to stabilize volatile societies. Constitutionalism now has a rich international history, and the United States is one of many countries with a proud and meaningful constitutional tradition. It is not surprising, therefore, that American courts are sometimes caught “peeking abroad” to see what they might glean from other constitutional systems.<sup>4</sup>

Yet the use of foreign law in constitutional interpretation has been met with intense criticism and commentary. Indeed, few subjects in constitutional law have attracted more attention in the last two decades. Justices, scholars, politicians, and pundits have all weighed in on how and whether American courts should consider foreign law when interpreting domestic constitutional provisions.<sup>5</sup> The issue is now standard stock for questioning at judicial confirmation hearings,<sup>6</sup> and law reviews have dedicated hundreds—perhaps thousands—of pages to related analysis and commentary.<sup>7</sup>

Despite this impressive tome of literature, this essay draws attention to an issue that the vast majority of commentators have overlooked.<sup>8</sup> Almost all of the commentary on this issue has focused exclusively on whether it is appropriate for judges to use foreign precedent when interpreting the U.S. Constitution. Hardly anyone has stopped to ask whether state constitutional interpretation raises unique comparative issues or whether existing criticisms of using foreign precedent apply equally to state constitutional interpretation.<sup>9</sup>

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3. This estimate is tabulated based on data available from the Comparative Constitutions Project (CCP). See COMPARATIVE CONSTITUTIONS PROJECT, <http://comparativeconstitutionsproject.org> (last visited Oct. 18, 2013). The CCP is a large-scale academic initiative designed to collect all of the world’s constitutions in a single, accessible repository. See Ed Finkel, *Constitution Mining*, A.B.A. J., Mar. 2014, at 11 (discussing the repository).

4. See John Yoo, *Peeking Abroad?: The Supreme Court’s Use of Foreign Precedent in Constitutional Cases*, 26 HAWAII L. REV. 385, 387–88 (2004) (describing the Supreme Court’s use of foreign precedent in recent cases).

5. See Richard Alford, *Four Mistakes in the Debate on “Outsourcing Authority”*, 69 ALB. L. REV. 653, 656–64 (2006) (describing the many voices that have spoken on the issue).

6. See, e.g., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Committee on the Judiciary United States Senate*, 109th Cong. 200–01 (2005) (Chief Justice Roberts responding to questions regarding the use of foreign law) [hereinafter *Chief Justice Roberts Hearing*].

7. See, e.g., Symposium, “Outsourcing Authority?” *Citation to Foreign Court Precedent in Domestic Jurisprudence*, 69 ALB. L. REV. 1 (2006).

8. Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359 (2006) (analyzing this issue as it relates to state constitutional rights).

9. To be sure, many scholars have discussed how international law is applied in state courts and even in state constitutional interpretation. See, e.g., Davis, *supra* note 8, at 370–71; Mark W. DeLaquil, *Foreign Law and Opinion in State Courts*, 69 ALB. L. REV. 697 (2006); Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State*

This essay suggests that the debate regarding comparative analysis may be very different when a judge is interpreting a state constitutional provision rather than the U.S. Constitution.<sup>10</sup> The purpose of this short essay is certainly not to provide an exhaustive treatment of the issue. The goal is more modest. This essay aims only to provide some preliminary thoughts and observations that will open the door for future investigation and analysis. To do this, the essay focuses on only two of the many issues that have arisen in the debate regarding interpretation of the U.S. Constitution. These two issues are especially helpful in illustrating relevant ways that state constitutional interpretation may differ from federal constitutional interpretation.

First, some advocates for the use of foreign constitutional law suggest that foreign precedent may be relevant to interpreting the U.S. Constitution because many foreign constitutions trace their lineage to the U.S. Constitution.<sup>11</sup> Because of this overlapping “ancestry,” those documents presumably share systemic similarities with the U.S. Constitution that make comparisons sound and informative.<sup>12</sup> For example, if Germany’s equal protection guarantee was modeled after the U.S. Constitution, it might be helpful for

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*Constitutionalism After Medellin*, 115 PENN ST. L. REV. 1051, 1070–72 (2011); Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1626–34 (2006). However, this literature has not fully tackled whether the debate regarding the use of foreign precedent—especially foreign constitutional precedent—to interpret the U.S. Constitution is different for state constitutional interpretation. *But see* Christine Durham, *The Influence of International Human Rights Law on State Courts and State Constitutionalism*, 90 AM. SOC’Y INT’L L. PROC. 259, 60–61 (1996) (touching briefly on this issue); Davis, *supra*, at 376–84 (addressing this issue in the context of international human rights law but not separately addressing the use of foreign constitutional law).

10. It is important to clarify that this essay is primarily concerned with the use of foreign constitutional law—and to a lesser extent international law—to interpret the meaning of a constitutional provision. State and federal courts may cite international law in a variety of other contexts, such as the interpretation and application of treaties and the enforcement of contracts. This essay does not address those uses of international law. *See A Conversation Between U.S. Supreme Court Justices: The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia & Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519, 521 (Norman Dorsen ed. 2005) (Justice Scalia making this same qualification); *see also* Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J. L. & PUB. POL’Y 291, 295 (2005) (making a more subtle distinction in this regard).

11. *See, e.g.*, *United States v. Then*, 56 F.3d 464, 468–69 (2d Cir. 1995) (Calabresi, J., concurring) (“These countries are our ‘constitutional offspring’ and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues.”); *see also* Heinz Klug, *Model and Anti-Model, The United States Constitution and the “Rise of World Constitutionalism”*, 2000 WIS. L. REV. 597, 597 (explaining that “both advocates and detractors of the American experience assume that the United States is, at the beginning of the twenty first century, the hegemonic model [for constitutionalism in other countries].”).

12. *See Then*, 56 F.3d at 468–69 (“Wise parents do not hesitate to learn from their children”).

American courts to look at Germany's equal protection jurisprudence in instances where Germany has already decided analogous cases.<sup>13</sup>

As explained in more detail below, if we accept this methodological premise, state constitutions are actually better candidates for comparative analysis than the U.S. Constitution. A recent study has shown that the U.S. Constitution "has become an increasingly unpopular model for constitutional framers" around the world.<sup>14</sup> In fact, the U.S. Constitution is increasingly atypical regarding core issues such as individual rights and government structure.<sup>15</sup> State constitutions, on the other hand, have become increasingly similar to most foreign national constitutions regarding certain core features such as positive rights, the frequency of amendment, and the range of policy issues that are constitutionalized.<sup>16</sup> State constitutions seem to have more systemic similarities to foreign constitutions than the U.S. Constitution does. Thus, state constitutions may be better candidates for reliable and helpful comparative analysis.

Second, one of the main criticisms of using foreign precedent to interpret the U.S. Constitution is that it may impose foreign norms and preferences on the American people without their consent.<sup>17</sup> This is an objection based on democratic theory and political legitimacy. On this view, judges should not interpret the U.S. Constitution by reference to foreign precedent because the Constitution is meant to embody the preferences and commitments of the American people free from control by any foreign power.<sup>18</sup> Incorporating foreign precedent risks delegating constitutional power to foreign

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13. This was precisely the issue in *United States v. Then*, 56 F.3d at 468–69; Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1226 (1999) (describing the issue in *Then*).

14. David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 769 (2012) (reviewing "the written constitutions of every country in the world over the last six decades," which amounted to "729 constitutions adopted by 188 different countries from 1946 to 2006").

15. *Id.* at 768–89.

16. See Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 CHI. L. REV. 1641, 1644–46 (2014).

17. See, e.g., Delahunty & Yoo, *supra* note 10, at 299 (objecting to the use of foreign precedent interpreting the U.S. Constitution because "it would subject American citizens to the judgments of foreign and international courts, and the Constitution makes no provision for the transfer of federal power to entities out of our system of government."). Justice Scalia articulated a similar criticism in *Thompson v. Oklahoma*, when he wrote: "[T]he views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution." 487 U.S. 815, 869 (1988) (Scalia, J., concurring).

18. See *infra* notes 71–106 and accompanying text.

institutions and undermines the democratic legitimacy of the U.S. Constitution.

As explained in more detail below, even if we accept this as a valid criticism, it may be less applicable to state constitutionalism.<sup>19</sup> For one thing, state judges are more democratically accountable for their constitutional rulings than are federal judges.<sup>20</sup> Federal judges have life tenure, and the federal power of judicial review is effectively insulated from responsive democratic action because the U.S. Constitution is incredibly difficult to amend.<sup>21</sup> These realities accentuate democracy concerns related to the use of foreign precedent in federal constitutional interpretation. State judges, on the other hand, are often elected or are subject to popular recall. State constitutions are also relatively easy to amend. All of these factors significantly mitigate any democracy concerns associated with foreign law in state constitutional interpretation. Indeed, states have actually recalled judges based on their constitutional rulings<sup>22</sup> and many states have adopted amendments responding to state constitutional rulings.<sup>23</sup> This suggests that the use of foreign precedent in state constitutional interpretation is less likely to produce meaningful democracy deficiencies.

Additionally, state judges have a long tradition of engaging in a form of comparative analysis because they regularly consult precedent from sister states and federal courts.<sup>24</sup> Indeed, state constitutionalism is not as tightly tethered to traditional interpretive methods such as text, history, and local culture. Rather, state constitutionalism has a long tradition of engaging in comparative, normative constitutional dialogue with other jurisdictions; albeit other U.S. jurisdictions. This comparative tradition has no strong analog

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19. See Davis, *supra* note 8, at 382.

20. See *infra* notes 107–134 and accompanying text.

21. See Sanford Levinson, *The Political Implications of Amending Clauses*, 13 CONST. COMMENT. 107, 120–22 (1996) (criticizing Article V's amendment procedures as too difficult and creating democracy deficiency).

22. See Zachary J. Siegel, *Trecall Me Maybe? The Corrosive Effect of Recall Elections on State Legislative Politics*, 86 U. COLO. L. REV. 307, 340 (2015) ("In 2010, for example, three Iowa Supreme Court justices were recalled after a unanimous decision to legalize same-sex marriage in the state.").

23. See John Dinan, *State Constitutional Amendments and Individual Rights in the Twenty-First Century*, 76 ALB. L. REV. 2105, 2113–18 (2013) (collecting and describing amendments that overruled state high court decisions in criminal procedure, tort law, and abortion rights).

24. See James N.G. Cauthen, *Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations*, 66 ALB. L. REV. 783, 790–94 (2003) (examining state court citations of sister-state precedent in cases involving constitutional interpretation); see also G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 199–201 (1998) (explaining that state constitutional interpretation has comparative history that is not paralleled in federal constitutional interpretation); Davis, *supra* note 8, at 382.

in federal constitutional interpretation and it suggests that state constitutionalism might be a more fertile ground for international comparativism than federal constitutional interpretation.

This essay has two major parts. Part I considers whether state constitutions are better candidates for comparative analysis than the Federal Constitution based on their content and function. Part II considers whether the democracy critique that some scholars have raised regarding the use of foreign precedent in federal constitutional interpretation is less applicable to state constitutionalism.

I. ARE STATE CONSTITUTIONS BETTER CANDIDATES FOR  
COMPARATIVE INTERPRETIVE ANALYSIS THAN THE FEDERAL  
CONSTITUTION?

In a well-known opinion, Judge Guido Calabresi of the United States Court of Appeals for the Second Circuit argued that decisions from constitutional courts in Germany and Italy were relevant to interpreting the Fifth Amendment's Equal Protection Clause.<sup>25</sup> Judge Calabresi argued that these foreign precedents were relevant to American constitutional interpretation because the German and Italian Constitutions "unmistakably draw their origin and inspiration from American constitutional theory and practice."<sup>26</sup> According to Judge Calabresi, those foreign constitutional systems are "our 'constitutional offspring'" and "[w]ise parents do not hesitate to learn from their children."<sup>27</sup>

Underlying Judge Calabresi's argument is an important methodological assumption about comparative constitutional analysis. He seems to suggest that when looking for comparative insight, it is best to draw from constitutions that share a theoretical "lineage." This assumption has strong intuitive appeal. If one is looking for guidance from foreign constitutional systems, the most reliable and informative comparisons will likely come from countries with systemic similarities. All comparisons will have limitations, but the most reliable comparisons will presumably come from systems that have the most relevant similarities.<sup>28</sup>

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25. *United States v. Then*, 56 F.3d 464, 468–69 (2d Cir. 1995); see Tushnet, *supra* note 13, at 1226–27 (discussing this opinion by Judge Calabresi).

26. *Then*, 56 F.3d at 469.

27. *Id.*

28. There is a great body of literature discussing the methodological problems inherent in comparative constitutional analysis. It is not the purpose of this essay to examine those issues in relation state constitutionalism. This essay is also not intended to suggest that state constitutionalism is a panacea for methodological problems inherent in the comparative enterprise.

If this is accepted as a valid methodological criterion for comparative constitutional analysis, then there is reason to believe that state constitutions are actually better candidates for comparative analysis than the U.S. Constitution. This is because the U.S. Constitution has become a global outlier relative to most foreign constitutions. State constitutions, on the other hand, increasingly look very similar to most foreign constitutions and have even incorporated some provisions directly from international law. In other words, state constitutions now bear a much stronger family resemblance to foreign constitutions than does the U.S. Constitution.

This section first considers how the U.S. Constitution is increasingly atypical when compared to other national constitutions and then examines the ways that state constitutions are increasingly analogous to foreign national constitutions. The section ends with a brief discussion regarding the future implications of comparative interpretive approaches in state constitutionalism.

A. *The Federal Constitution Now Bears a Weak Resemblance to Most Foreign Constitutions*

A recent global empirical study by Professors David Law and Mila Versteeg found that there is a “growing divergence of the U.S. Constitution from the global mainstream of written constitutionalism.”<sup>29</sup> Law and Versteeg found that, when compared to the written constitutions of every country in the world over the last sixty years,<sup>30</sup> the United States Constitution is an outlier regarding the individual rights that it protects, the individual rights that it omits, and the government structure that it creates.<sup>31</sup> Significantly, they found that “[w]hether the analysis is global in scope or focuses more specifically upon countries that share historical, legal, political, or geographic ties to the United States, the conclusion remains the same.”<sup>32</sup> In other words, to use Judge Calabresi’s analogy, it appears that there is no longer a strong family resemblance between the U.S. Constitution and other national constitutions.

Regarding individual rights, Law and Versteeg found that the vast majority of foreign national constitutions converge on a core set of individual rights that include positive rights such as freedom

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29. Law & Versteeg, *supra* note 14, at 769.

30. *Id.* at 770 (describing data set).

31. *Id.*

32. *Id.*

of movement, the right to work and unionize, and the right to education.<sup>33</sup> The U.S. Constitution omits many of these “core” rights.<sup>34</sup> Moreover, the U.S. Constitution contains various rights that are very uncommon among foreign national constitutions; such as the right to bear arms, separation of church and state, and the right to a public trial.<sup>35</sup> Law and Versteeg conclude that if the United States is looking for foreign jurisdictions with analogous bills of rights, the most similar constitutions are Liberia’s Constitution through 1983, Tonga’s Constitution through 2006, and the Philippines’ Constitution through 1972<sup>36</sup>—hardly the comparisons that one would expect for the U.S. Constitution.

Law and Versteeg reach a similar conclusion regarding the structural components of the U.S. Constitution.<sup>37</sup> They find that only twelve percent of all national constitutions establish a federal structure analogous to the United States, and most national constitutions establish parliamentary systems rather than the presidential system used in the United States.<sup>38</sup> Moreover, most national constitutions adopt a form of judicial review very different from the model originating from *Marbury v. Madison*.<sup>39</sup> Under the U.S. model, judicial review is exercised by courts of general jurisdiction only in the context of an actual controversy.<sup>40</sup> However, in most other systems, “the power to decide constitutional questions is exercised exclusively by a specialized constitutional court that stands apart from the regular judiciary” and can decide constitutional issues in the abstract.<sup>41</sup>

In sum, Law and Versteeg found that when compared to foreign constitutions, the U.S. Constitution is now a very distant family relative and an “increasingly atypical document.”<sup>42</sup> This suggests that the U.S. Constitution might be a weak candidate for comparative analysis.

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33. *Id.* at 773.

34. *Id.* at 779.

35. *See id.* at 778–79.

36. *Id.* at 784.

37. *Id.* at 785–96.

38. *Id.* at 785–86.

39. *Id.* at 973–96.

40. *Id.* at 794 (citing Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391 (2008) (discussing the differences between American-style judicial review and European-style judicial review)).

41. Law & Versteeg, *supra* note 14, at 794–95.

42. *Id.* at 853.



*B. State Constitutions Bear a Stronger Resemblance to Most Foreign Constitutions*

Although there seems to be a growing divergence between foreign constitutions and the U.S. Constitution, the opposite appears to be true for state constitutions.<sup>43</sup> State constitutions appear to be converging with foreign constitutional trends. Professors Versteeg and Emily Zackin recently conducted a “systematic comparison of [U.S.] state constitutions to the world’s national constitutions.”<sup>44</sup> They found that state constitutions are very similar to most foreign national constitutions in key respects.<sup>45</sup>

First, like the vast majority of the world’s constitutions, state constitutions contain many positive rights that the U.S. Constitution omits (such as a right to free education, labor rights, social welfare rights, and environmental rights).<sup>46</sup> Versteeg and Zackin found that every state constitution includes at least some of the major socioeconomic rights that characterize most foreign constitutions and which the U.S. Constitution omits entirely.<sup>47</sup>

Second, like most foreign national constitutions, state constitutions are frequently amended or revised.<sup>48</sup> Indeed, while the U.S. Constitution is revised only once every fourteen years (according to Versteeg and Zackin’s index), foreign national constitutions are revised roughly once every five years and state constitutions are revised once every three years.<sup>49</sup> Thus, state constitutions and foreign national constitutions are both characterized by regular constitutional change through formal amendment,<sup>50</sup> whereas changes to the U.S. Constitution occur primarily through judicial review because the Constitution is extremely difficult to amend.<sup>51</sup>

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43. See generally Versteeg & Zackin, *supra* note 16, at 1641–47 (discussing similarities between state constitutions and foreign national constitutions).

44. *Id.* at 1644.

45. *Id.* at 1705 (“America’s state constitutions evince many of the same design choices as the constitutions of other countries, including commitments to positive rights and democratic responsiveness.”).

46. *Id.* at 1681–88. Other scholars have also observed this similarity between state constitutions and foreign national constitutions. See Davis, *supra* note 8, at 360; JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 184–88 (2009).

47. Versteeg & Zackin, *supra* note 16, at 1685.

48. *Id.* at 1672.

49. *Id.* at 1674–75 (noting that a revision rate of .07 for the U.S. Constitution equals an amendment roughly every fourteen years).

50. *Id.* at 1705 (noting that state constitutions and most foreign national constitutions are characterized by “democratic responsiveness”).

51. See generally Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355 (1994) (arguing that constitutional change is necessary in any system and if amendment procedures are arduous, change will likely occur through judicial review).

Third, state constitutions are similar to foreign national constitutions in the broad range of subjects that they address.<sup>52</sup> The U.S. Constitution is remarkably brief and “bare-bones.”<sup>53</sup> It covers the most basic structural issues necessary to establish government and basic negative rights.<sup>54</sup> Most other constitutions (including state constitutions) cover many more subjects and even address specific policy choices.<sup>55</sup> Versteeg and Zackin found that state constitutions are similar to most foreign constitutions in that they also “cover topics such as fiscal policy and economic development, management of natural resources, and matters of cultural significance and citizen character.”<sup>56</sup>

In addition to Versteeg and Zackin’s comprehensive study, there is also anecdotal evidence that state constitutions are increasingly converging on international constitutional trends. The Constitutions of both Montana and Puerto Rico have included references to human “dignity” based on the use of that concept in the Universal Declaration of Human Rights.<sup>57</sup> Similarly, New Jersey amended its Constitution in 1945 to guarantee women’s equality because of a “world-wide demand for equal rights” and because women’s equality was a principle set out in the Charter of the United Nations.<sup>58</sup>

Another anecdotal similarity between state and foreign constitutions is the structure of judicial review. Although no state has created a special “constitutional court” with exclusive jurisdiction to decide constitutional issues, many states expressly allow their supreme courts to issue advisory opinions regarding constitutional issues.<sup>59</sup> Indeed, some state constitutions even require state supreme courts to issue advisory opinions to other branches of government.<sup>60</sup>

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52. See Versteeg & Zackin, *supra* note 16, at 1652–66.

53. *Id.* at 1652–53 (noting that the U.S. Constitution is among the shortest in the world).

54. *Id.* at 1653 (quoting Chief Justice John Marshall as saying: “[O]nly [the Constitution’s] great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.”).

55. *Id.* at 1659.

56. *Id.* at 1658–59.

57. See Resnik, *supra* note 9, at 1628 (describing these provisions in Montana and Puerto Rico’s constitutions).

58. See *id.* (quoting Letter from Mrs. James E. Carroll, Mrs. George T. Vickers & Miss Mary Philbrook to the Chairman and Delegates to the New Jersey Constitutional Convention (June 20, 1947), in Robert F. Williams, *The New Jersey Equal Rights Amendment: A Documentary Sourcebook*, 16 WOMEN’S RTS. L. REP. 69, 111 (1994) (collecting evidence regarding the influence of international law on New Jersey’s 1945 constitutional amendment)).

59. See ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 739–44 (3d ed. 1999).

60. *Id.* at 739 (“Many state constitutions . . . provide for, and under certain circumstances, require, the issuance by the state’s highest court of advisory opinions to other branches of government.”).

Thus, like many foreign constitutional courts, state supreme courts can decide constitutional issues outside the context of litigation. This potentially has an impact on how constitutional norms are developed by state courts, and suggests another possible similarity to foreign constitutional structure.

C. *The Relative Fertility of State Constitutions for Comparative Analysis*

These similarities and differences raise the possibility that state constitutions may be better candidates for comparative interpretative analysis than the U.S. Constitution. For one thing, states that have explicitly modeled constitutional provisions after contemporary foreign provisions can “mine their own histor[y]” for the relevance of foreign law.<sup>61</sup> In those states, generic interpretive methods—text, history, etc.—provide a direct gateway to foreign constitutionalism. Indeed, any attorney litigating under a state constitutional provision with foreign origins could quickly find herself drawing comparisons to foreign constitutional precedent based on the provision’s history.<sup>62</sup>

For example, in *Snetsinger v. Montana University System*, the Montana Supreme Court considered whether Montana’s Constitution guaranteed equal treatment to same-sex couples regarding employment benefits.<sup>63</sup> In a concurring opinion, Justice Nelson argued that the court should interpret the human-dignity clause to prohibit discrimination against same-sex couples.<sup>64</sup> In support of his argument, Justice Nelson noted that the clause “follows a history of international and foreign constitution-making and human rights declarations . . . and reflects the international community’s focus on human dignity as a fundamental value.”<sup>65</sup> Although the Montana Supreme Court has not yet used the “dignity clause” to incorporate

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61. See Resnik, *supra* note 9, at 1628 (describing this as a “port of entry” for foreign and international law).

62. See THE OPPORTUNITY AGENDA, HUMAN RIGHTS IN STATE COURTS (2014) (noting that international and foreign law is part of domestic practice and stating that “the report is intended for public interest lawyers, state court litigators, and judges . . . interested in integrating compliance with international human rights law into their domestic policies”) [hereinafter THE OPPORTUNITY AGENDA]; see also TARR, *supra* note 24, at 205–08 (noting that state constitutions often copy or model provisions based on sister-state constitutions, and this history is relevant to interpretation).

63. *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 447 (Mont. 2004).

64. *Id.* at 456–57 (Nelson, J., concurring).

65. *Id.* at 458 (Nelson, J., concurring). But see Vicki C. Jackson, *States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 28–30 (2004) (noting that human dignity clause has played a “secondary and at best complementary role” in interpreting the Montana Constitution because the “international” meaning of the phrase has been lost in Montana jurisprudence).

broader international norms, Justice Nelson's analysis illustrates the potential for incorporating comparative analysis through these sort of "borrowed" provisions.<sup>66</sup>

State constitutions, however, may be better candidates for comparative analysis even when specific provisions do not directly originate from foreign sources. Comparative constitutionalism can be valuable for judges struggling with how an interpretation will affect the provision's actual operation.<sup>67</sup> By examining how similar provisions have functioned in similar constitutional systems, judges can better assess their interpretive options. Because state constitutions increasingly share more common features with foreign constitutions, they may offer more relevant and reliable comparisons to foreign constitutions.<sup>68</sup>

Comparative analysis will always present difficult methodological problems, but state constitutions may provide more fertile ground for comparison to foreign constitutions because of their increasing systemic similarities to foreign constitutions, which are not present in the U.S. Constitution. If state constitutions continue their trajectory towards convergence with foreign constitutionalism, it will be interesting to see whether litigators increasingly draw on foreign sources, and whether state courts are more sympathetic to comparative analysis.

## II. IS THE DEMOCRACY CRITIQUE LESS APPLICABLE TO STATE CONSTITUTIONALISM?

This section argues that concerns about democracy and the use of foreign precedent may carry less weight in the context of state constitutional interpretation. There are at least two reasons for this. First, as a pragmatic matter, state judges are generally more democratically accountable than federal judges.<sup>69</sup> To the extent state judges may use the power of judicial review to impose unwanted foreign norms on state communities, those communities have meaningful recourse. This means that state judges have more freedom to engage in comparative constitutional analysis because their constitutional decisions are effectively subject to popular review. Second, state constitutional interpretation has a long history

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66. See Jackson, *supra* note 65, at 31 (discussing this issue).

67. See Tushnet, *supra* note 13, at 1228.

68. Professor Davis has made this some point regarding positive rights in state constitutions and international law treaties. Davis, *supra* note 8, at 360; see also Kalb, *supra* note 9, at 1055-56.

69. See Davis, *supra* note 8, at 382 (addressing this in relation to the use of international human rights treaties).

of comparative analysis that is not paralleled in federal constitutional jurisprudence.<sup>70</sup> State courts regularly examine precedent from sister-states and federal courts when interpreting their state constitutions. This interpretative analysis often resembles a dialectic approach to constitutional norms that is well suited to international comparative analysis. Before explaining these arguments further, it is important to understand the democracy critique that scholars have raised regarding foreign precedent in federal constitutional interpretation.

#### A. *The Democracy Critique*

There are many subtle versions of the “democracy critique,”<sup>71</sup> but they share a rather straightforward concern. Namely, that allowing foreign precedent to affect interpretation of the U.S. Constitution risks imposing a foreign community’s preferences on the American people without their consent.<sup>72</sup> Proponents of this critique are concerned that by using foreign precedent to interpret the U.S. Constitution, the Supreme Court is in effect forcing foreign values, norms, and ideas on non-consenting Americans.<sup>73</sup>

This position is evident in Justice Scalia’s various opinions criticizing the Court’s use of foreign law in constitutional interpretation. In *Thompson v. Oklahoma*,<sup>74</sup> for example, Justice Scalia characterized the use of foreign precedent to interpret “cruel and usual punishment” under the Eighth Amendment as “totally inappropriate as a means of establishing the fundamental beliefs of *this Nation*.”<sup>75</sup> He continued by stating, “the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”<sup>76</sup> After all, according to Justice Scalia, “[w]e must never forget that it is a Constitution for the *United States of America* that we are expounding.”<sup>77</sup>

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70. See TARR, *supra* note 24, at 199.

71. See Alford, *supra* note 5, at 659–60 (listing critics of the use of foreign law in constitutional interpretation).

72. Chief Justice Roberts stated this clearly in his confirmation hearing. He stated that as “a matter of democratic theory,” it is questionable to rely on a decision by a foreign judge because “no president accountable to the people appointed that judge, no Senate accountable to the people confirmed that judge.” *Chief Justice Roberts Hearing*, *supra* note 6, at 200–01.

73. See Delahunty & Yoo, *supra* note 10, at 299.

74. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

75. *Id.* at 868 n.4 (Scalia, J., dissenting) (emphasis added).

76. *Id.*

77. *Id.*

Although Justice Scalia has subsequently articulated other criticisms of using foreign law in constitutional interpretation,<sup>78</sup> his recurring refrain is a concern that the Court is substituting foreign preferences for those of the American people as expressed in the Constitution.<sup>79</sup>

Professor Jed Rubenfeld has developed this critique further. Professor Rubenfeld has distinguished between “democratic constitutionalism” and “international” or “universal” constitutionalism.<sup>80</sup> According to Professor Rubenfeld, international constitutionalism “is based on the idea of universal rights and principles that derive their authority from sources outside of or prior to . . . democratic processes.”<sup>81</sup> These meta-principles “constrain all politics,” are “supranational,” and are self-legitimizing.<sup>82</sup> Consequently, on this view, constitutional norms are identified by reference to universal constitutional principles rather than by allegiance to any particular national constitutional tradition.<sup>83</sup> This means that constitutional precedent has universal application.

Democratic constitutionalism, on the other hand, holds that constitutionalism is about a set of “legal and political commitments” made by a particular society through the process of adopting and maintaining a constitution.<sup>84</sup> Under this view, a constitution is “the foundational law a particular polity has given itself through a special act of popular lawmaking.”<sup>85</sup> Democratic constitutionalism is therefore linked tightly to popular sovereignty and nationalism.<sup>86</sup> According to democratic constitutionalism, constitutional norms

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78. Justice Scalia’s most elaborate criticism of the use of foreign law in constitutional interpretation is probably his dissent in *Roper v. Simmons*, 543 U.S. 551, 622–28 (2005) (describing various problems, including inherent methodological problems in comparative analysis).

79. Justice Scalia has consistently made this point. See also *Atkins v. Virginia*, 536 U.S. 304, 347 (2002) (“Equally irrelevant are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people.”); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (“Constitutional entitlements do not spring into existence because . . . as the Court seems to believe . . . *foreign* nations decriminalize conduct) (emphasis in original).

80. See Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1999 (2004).

81. *Id.*

82. *Id.*

83. *Id.* (“Because these rights and principles are supranational, they can and in theory should be both designed and interpreted by neutral international experts, rather than by national political actors.”).

84. *Id.* at 1999.

85. *Id.* at 1975.

86. *Id.*

are tested and approved based on whether they conform to the constitutional commitments of the relevant national polity.<sup>87</sup> These commitments can be counter-majoritarian in the sense that they bind future majorities, but they are not “counter-democratic” because they represent a “nation’s self-given law” adopted through democratic processes.

Professor Rubinfeld (and others) argue that constitutionalism in the United States is based primarily on a “democratic” constitutional theory.<sup>88</sup> That is, in the United States, constitutional norms are tested and approved based upon whether they conform to “our” political commitments expressed in the Constitution. This does not mean that constitutional norms are static. Constitutional change is inevitable; either through popular amendment or judicial interpretation. In the United States, however, constitutional change through judicial interpretation is generally legitimated—at least ostensibly—based upon whether it conforms to principles from America’s own constitutional tradition.<sup>89</sup> Thus, pursuant to this view, foreign precedent is inappropriate when interpreting the U.S. Constitution because constitutional legitimacy is necessarily nationalistic.<sup>90</sup>

Professor John Yoo has articulated a similar critique. According to Professor Yoo, the use of foreign precedent in constitutional interpretation has the “potential” to “subject American citizens to the judgments of foreign and international courts.”<sup>91</sup> Professor Yoo ar-

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87. This does not mean that democratic constitutionalism does not recognize universal normative principles. *Id.* at 2001. Rather, democratic constitutionalism recognizes that universal principles will nevertheless require “real human beings” to enforce them, and humans will “disagree with one another, perhaps radically, about what the principles are or how to interpret them or how to apply them in real life.” *Id.* Thus, democratic constitutionalism holds that the best way to legitimate constitutional law is through democratic political processes, “first in the making of a Constitution, and then in the election of representatives.” *Id.*

88. *Id.* at 1975 (“American constitutional history has always displayed a commitment to democratic constitutionalism.”); Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1309 (2005) (stating that U.S. constitutionalism is based on “our” polity). Indeed, the Preamble to the United States Constitution states: “We the people of the United States . . . ordain and establish this Constitution for the United States of America.” U.S. CONST. pmbl.

89. Stated differently, in the United States, federal judges do not have a general mandate to locate and apply universal constitutional norms. Rather, judges must locate constitutional norms by “interpreting” the Constitution of the United States.

90. See Anderson, *supra* note 88, at 1307 (“[T]he fact that other communities might have different or better ways of approaching even the same issue is frankly irrelevant.”).

91. See Delahunty & Yoo, *supra* note 10, at 298–99. Professor Yoo notes that in several recent Supreme Court opinions, the Court’s constitutional jurisprudence required it to “measure state action—execution of juveniles and the mentally retarded and the criminalization of homosexual sodomy—against social norms.” *Id.* at 298. “To determine the content of such

gues that this sort of delegation of sovereignty offends the Appointments Clause, which, according to Yoo, is designed to ensure that federal power is given only to “officials who are accountable solely to elected representatives, and thus ultimately to the American People.”<sup>92</sup> Yoo does not explain precisely how life-tenured Supreme Court Justices are “accountable” to the American public, but he concludes that “international and foreign courts do not meet this standard.”<sup>93</sup> Yoo also believes that deferential use of foreign precedent might offend Article III.<sup>94</sup> According to Yoo, Article III authorizes only federal judges (not foreign courts or governments) to decide “cases and controversies” arising under the Constitution.<sup>95</sup> Yoo concludes that by using foreign precedent to decide constitutional cases, Supreme Court Justices effectively delegate authority to foreign institutions in violation of Article III.<sup>96</sup>

Professor Yoo also argues that the use of foreign precedent to interpret the Constitution “undermines the textual and structural basis for *federal* judicial review.”<sup>97</sup> According to Yoo, “judicial review finds its origins in the nature of the Constitution as a document that delegates power from the people to the government.”<sup>98</sup> “Judicial review operates,” according to Yoo, “because the Court . . . must follow the Constitution above any inconsistent [law].”<sup>99</sup> The Court is obligated to enforce the Constitution as supreme because “it represents the delegation of power from the people to their government.”<sup>100</sup> Yoo concludes that the Court is therefore acting outside its delegated authority if it looks to foreign precedent for constitutional meaning.<sup>101</sup>

Professor Roger Alford has articulated a further variation on the democracy critique. Professor Alford notes that certain constitutional rules have expressly incorporated majoritarian standards.<sup>102</sup> For example, the Court’s Eighth Amendment cruel and unusual punishment jurisprudence requires the Court to examine whether

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norms, the Court looked to European precedent as indicative of world opinion on the question.” *Id.* Professor Yoo argues that this use of precedent has the potential to turn into a form of deference that would effectively delegate sovereignty. *Id.*

92. *Id.* at 300.

93. *Id.*

94. *Id.*

95. *Id.* at 301.

96. *Id.* at 301–02.

97. *See* Yoo, *supra* note 4, at 394.

98. *Id.*

99. *Id.* at 397.

100. *Id.*

101. *Id.* at 398–99.

102. Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L. L. 57, 59 (2004).



there is a “national consensus” regarding the civility of a particular punishment.<sup>103</sup> According to Alford, the use of foreign precedent in this analysis is inappropriate because it creates the possibility that the Eighth Amendment might be “interpreted to give expression to international majoritarian values” that actually thwart a national consensus within the United States.<sup>104</sup> Alford also notes that to the extent a national consensus does not exist, our federal structure is designed to protect the “reserved power of the states to assess which punishments are appropriate for which crimes.”<sup>105</sup> Thus, using foreign precedent to interpret the Eighth Amendment is further inappropriate because it conflicts with federalism.<sup>106</sup>

All of these critiques raise subtle concerns about using foreign precedent to interpret the Constitution. Nevertheless, they all share a common fear: Allowing foreign precedent to effect constitutional meaning risks imposing a foreign community’s preferences on the American people without their consent—and sometimes even against their express wishes. However, none of these scholars investigate whether their critiques apply equally to the interpretation of state constitutions. This is the question to which this essay now turns.

*B. State Judges Are Often More Democratically Accountable for Their Decisions*

Much of the concern flowing from the democracy critique stems from the fact that federal judges exercising the power of judicial review are effectively insulated from political accountability. They have life tenure, and it is very unlikely that their constitutional rulings can be changed through constitutional amendment or Congressional action.<sup>107</sup> Thus, according to the democracy critique, if federal judges use foreign precedent to interpret the U.S. Constitution,

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103. *Id.*

104. *Id.* at 59–61 (“Reliance on global standards of decency undermines the sovereign limitations inherent in federalist restraints.”).

105. *Id.* at 61.

106. *Id.*

107. See Kathleen M. Sullivan, *Constitutional Amendmentitis*, AM. PROSPECT, Fall 1995, at 20–27 (explaining that federal amendment does not offer a realistic method of overruling supreme court decisions); Dinan, *supra* note 23, at 2114 (noting that some federal amendments were intended to overrule Supreme Court decisions, but emphasizing that this has occurred only four times since the Constitution was ratified in 1788). In response to the Supreme Court’s use of foreign precedent, some representatives introduced the Constitution Restoration Act, which would, among other things, prevent federal judges from using foreign precedent in their decisions. See generally Michael J. Gerhardt, *The Role of Judges in the Twenty-First Century*, 86 B.U.L. REV. 1267, 1284–86 (discussing the Act). The constitutionality of the Act has been strongly questioned. See *id.* (quoting Justice Scalia as saying, “[n]o one is more opposed to the use of foreign law than I am, but I’m darned if I think it’s up to

foreign institutions will effectively have power to influence America's supreme fundamental law, and the American people have no real recourse.<sup>108</sup>

This is not to suggest that federal judges should be democratically accountable on a decision-by-decision basis. The federal judiciary, especially the Supreme Court, is clearly designed to be insulated from ordinary politics. However, the insulation of federal judges accentuates the democracy critique. If federal judges were somehow accountable for their constitutional rulings, there would be less concern that using foreign precedent in those rulings is tantamount to delegating authority to foreign officials. Stated differently, if the American people had real opportunities to respond to constitutional rulings, the democracy deficiency created by relying on foreign precedent would be lessened.

Unlike federal judges, state judges are often accountable to the public for their rulings in various direct and indirect ways.<sup>109</sup> First, state constitutions are generally much easier to amend, which means that the public regularly contributes to constitutional dialogue through the amendment process.<sup>110</sup> In 2012 alone, there were 135 proposed state constitutional amendments in thirty-five different states, with voters in twenty-eight states approving 92 amendments.<sup>111</sup> Although amendment rates vary, even the most static state constitution (Vermont) is amended on average at least once every four years.<sup>112</sup> When compared to the U.S. Constitution, which has been amended only twenty-seven times since 1788, it is fair to say that contemporary state constitutionalism is characterized by a high degree of popular involvement in constitutional politics.

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Congress to direct the Court how to make its decisions.”). Although congressional action is a theoretical response, it seems unlikely to be successful. *See also* Darlene S. Wood, *In Defense of Transjudicialism*, 44 DUQ. L. REV. 93 (2005) (discussing the Act).

108. Of course, federal judges are not entirely insulated from democratic processes. *See* Rubinfeld, *supra* note 80, at 1997–98. Federal judges are subject to a highly-political nomination process, they may be impeached for misconduct, and they are themselves members of society. *See id.* But these are relatively weak forms of democratic accountability; especially when compared to the methods of democratic accountability that exist at the state level.

109. *See* Davis, *supra* note 8, at 382 (addressing this in relation to the use of international human rights treaties).

110. *See* Dinan, *supra* note 23, at 2113–14.

111. *See generally* COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 4–6 (2014).

112. This is based on a simple average annual amendment rate calculated by dividing the number of amendments by the number of years the constitution has been in force. *See id.* (providing data on the Vermont Constitution).

Moreover, state constitutional amendments often respond to specific constitutional rulings by state courts.<sup>113</sup> Responsive amendments can take various forms.<sup>114</sup> Sometimes amendments outright invalidate state court rulings.<sup>115</sup> A recent example is Proposition 8 in California, which overturned the California Supreme Court's ruling that the California Constitution prohibited the state from denying same-sex couples marriage licenses.<sup>116</sup> Other amendments modify state court rulings without completely invalidating them.<sup>117</sup> Still other amendments preempt anticipated state court rulings.<sup>118</sup> For example, in 2002, Florida adopted an amendment to prevent the Florida Supreme Court from ruling that the death penalty violated Florida's Constitution.<sup>119</sup> These preemptive amendments are often triggered by earlier rulings suggesting that state courts might reach an undesired constitutional interpretation in a future case.<sup>120</sup>

Some states have even amended their constitutions to address the use of foreign law in state courts.<sup>121</sup> Oklahoma amended its Constitution to state that, "courts shall not look to the legal precepts of other nations or cultures," and specifically "the courts shall not consider international law or Sharia law."<sup>122</sup> Alabama recently amended its Constitution to state: "The public policy of this state is to protect its citizens from the application of foreign laws when the application of a foreign law will result in the violation of a right guaranteed by the Alabama Constitution or of the United States Constitution."<sup>123</sup> The Amendment goes on to prohibit state judges from "enforc[ing] a foreign law if doing so would violate any state

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113. See Janice C. May, *Constitutional Amendment and Revision Revisited*, 17 *PUBLIUS* 153, 175–76 (1987) (documenting all amendments overruling state high-court rights decisions between 1970 and 1985); Dinan, *supra* note 23, at 2108, 2113–18 (doing the same for 2000 to 2012).

114. See Dinan, *supra* note 23, at 2113.

115. *Id.* at 2113–18.

116. See *Id.* at 2108 (discussing Proposition 8 and California Supreme Court ruling); see generally KENNETH P. MILLER, *DIRECT DEMOCRACY AND THE COURTS* (2009) (discussing overruling amendments).

117. See May, *supra* note 113, at 178.

118. See Dinan, *supra* note 23, at 2118–22.

119. *Id.* at 2120 (quoting amendment and discussing it as a preemptive amendment).

120. See *id.* at 2119 (noting that states sometimes engage in preemptive amendments based on actions taken by high courts in other states).

121. See Aaron Fellmeth, *U.S. State Legislation to Limit Use of International and Foreign Law*, 106 *AM. J. INT'L L.* 107, 111 (2012) (discussing state constitutional amendments); Justin R. Long, *State Constitutions as Interactive Expression of Fundamental Values*, 74 *ALB. L. REV.* 1739, 1739 (2011) (discussing such an amendment in Oklahoma).

122. H.J.R. No. 1056, § 1 (2010) (amending OKLA. CONST. art. 7, § 1(c)). See Long, *supra* note 121, at 1741. A federal judge ultimately found that the amendment violates the First Amendment to the U.S. Constitution. See *Awad v. Ziriaux*, 966 F. Supp. 2d 1198, 1207 (W.D. Okla. 2013).

123. ALA. CONST. amend. 884, § 1350.

law or a right guaranteed by the Constitution of this state or of the United States.<sup>124</sup> Although there are serious concerns with these amendments, they nevertheless illustrate that state judges are relatively accountable to the public regarding constitutional issues.<sup>125</sup>

An additional factor affecting the accountability of state judges is that many of them do not have life tenure.<sup>126</sup> Thirty-eight states have some type of popular election to select high court judges.<sup>127</sup> Seven of those states have outright partisan elections, fourteen states have nonpartisan elections, and seventeen states require initially-appointed judges to run in an uncontested retention election after their initial appointment expires.<sup>128</sup> Several states also require appointed judges to be reappointed and confirmed by the legislature after their initial term.<sup>129</sup> At least six states also permit voters to recall judges by petition.<sup>130</sup> There is recent anecdotal evidence from Iowa showing that voters are willing to remove high court justices based on disagreement over constitutional rulings.<sup>131</sup> These procedures for judicial accountability stand in stark contrast to the insulated nature of federal judicial appointments. They also suggest that state constitutional law is more populist and democratically accountable than federal constitutional law because state constitutional law does not evolve primarily through judicial review.<sup>132</sup>

There are real concerns associated with a democratically accountable judiciary. Those concerns have been well documented and discussed.<sup>133</sup> However, because most states provide their citizens with at least one meaningful method of controlling the content of their state constitutions, the democracy critique seems less pressing in state constitutional interpretation than it does in federal constitutional interpretation. The power of judicial review at the federal level is significantly more insulated from democratic processes than

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124. *Id.*

125. *See* Durham, *supra* note 9, at 261 (referring to this as state judges' "democratic credentials").

126. *See* AM. BAR ASS'N, FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES (2014).

127. *Id.*

128. *Id.*

129. *Id.*

130. *See* Siegel, *supra* note 22, at 339–40.

131. *Id.* at 340 ("In 2010, for example, three Iowa Supreme Court justices were recalled after a unanimous decision to legalize same-sex marriage in the state.").

132. *See* David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2050 (2010) (calling judicial elections "systematic and pervasive mechanism for popular constitutionalism").

133. *See* Nicole Mansker & Neal Devins, *Do Judicial Elections Facilitate Popular Constitutionalism; Can They?*, 111 COLUM. L. REV. 27 (2011).

at the state level. To the extent the democracy critique is a valid objection to using foreign precedent in federal constitutional interpretation, the democratic accountability of state judges suggests it may not apply with equal force to state constitutionalism. State judges have more freedom for “flexibility, evolution, and experimentation than do those of federal courts” because there are democratic processes accessible to the public that can adjust or correct state rulings.<sup>134</sup> This freedom may include the ability to “peek abroad” for insight from foreign jurisdictions.

C. *State Constitutional Interpretation already has a History with “Comparative” Interpretation*

State constitutionalism may be well suited to foreign precedent because state judges already engage in a form of comparative analysis.<sup>135</sup> One of the great frustrations for many state constitutional scholars is that state judges tend to ignore evidence of state-specific constitutional meaning and instead resort to normative and comparative methods of constitutional interpretation.<sup>136</sup> Indeed, despite Justice Brennan’s famous pleas to state judges to interpret state constitutions independent of analogous federal rights, many state judges continue to overlook unique state sources in their interpretation of state constitutional provisions.<sup>137</sup> Scholars have offered a variety of reasons to explain this,<sup>138</sup> but regardless of the reasons, it remains true that state constitutional interpretation often does not follow ordinary interpretive methods such as textualism, originalism, or references to “historically identifiable qualities of the state community.”<sup>139</sup>

Instead, state constitutional interpretation often looks less like the act of interpreting the meaning of a particular text, and more like a general normative “inquiry into the legal boundaries of majoritarian choice.”<sup>140</sup> That is, state courts evaluate the various normative and institutional options available to them and select the

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134. See Durham, *supra* note 9, at 261. Another way to look at the situation is that state constitutional rulings are subject to implicit democratic endorsement by citizens because citizens have real opportunities to respond to those rulings. When citizens do not use those methods, they have implicitly endorsed the court’s rulings.

135. See TARR, *supra* note 24, at 199–208.

136. See Lawrence Friedman, *Path Dependence and External Constraints on Independent State Constitutionalism*, 115 PENN ST. L. REV. 783, 783 (2012).

137. *Id.*

138. *See id.*

139. See Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1147 (1993).

140. *Id.* at 1160.

option that they believe best serves the public good.<sup>141</sup> That analysis often involves comparative inquiries into the choices other states have made.<sup>142</sup> Indeed, comparative analysis between states is a frequent and distinctive form of analysis in state constitutional interpretation.<sup>143</sup> A recent empirical study found that state high courts cite to sister-state precedent in over one-third of all constitutional cases that they decide.<sup>144</sup> Moreover, in seventy-seven percent of those cases, the courts cited several out-of-state decisions.<sup>145</sup> The study concluded that this is evidence of a comparative enterprise between states regarding state constitutional interpretation.<sup>146</sup>

Thus, many state judges already seem to view constitutional interpretation as a collective search for constitutional meaning that is not necessarily tied directly to their state communities. Obviously, there are meaningful differences between comparing constitutions from subnational units within the same country and comparing constitutions from an entirely different country, culture, and political system. However, as compared to the U.S. Constitution, where some would argue that constitutional interpretation is limited to identifying the commitments of the underlying polity, state constitutionalism has a broader comparative tradition.<sup>147</sup> This comparative tradition may provide fertile ground for foreign comparative analysis.

#### CONCLUSION

As other scholars have noted, litigants are increasingly using international sources in their submissions to state courts.<sup>148</sup> This may be because there has been a concerted effort in recent years to educate judges and litigants on relevant international and foreign

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141. *Id.*

142. *See* Cauthen, *supra* note 24, at 783 (“While there are other sources of authority to which the court may turn to resolve state constitutional questions, including its own previous decisions, state constitutional language, and state constitutional history, the court may ultimately look to out-of-state decisions for guidance.”).

143. *See* TARR, *supra* note 24, at 199 (“One distinctive aspect of state constitutional interpretation is that it occurs—and state judges perceive it as occurring—in the context of what might be called ‘a universe of constitutions.’”).

144. *See* Cauthen, *supra* note 24, at 790.

145. *Id.*

146. *Id.* at 785 (“These results provide initial empirical support for horizontal federalism”).

147. *See* TARR, *supra* note 24 (“Although justices of the U.S. Supreme Court consult the Court’s own precedents in interpreting the Federal Constitution, they rarely pay close attention to how state judges have dealt with similar state provisions or how foreign jurists have interpreted analogous provisions in their national constitutions.”).

148. *See* THE OPPORTUNITY AGENDA, *supra* note 62, at 4 (explaining that “the range of cases in which international law arguments are offered seems to have increased . . .”).

law.<sup>149</sup> Organizations like the American Civil Liberties Union and American Bar Association now have regular practice-oriented conferences on international and foreign law.<sup>150</sup> An organization called “The Opportunity Agenda” even has an entire program dedicated to international and foreign law in state courts that provides recommendations for legal advocacy.<sup>151</sup> Thus, all indications are that state courts will increasingly be faced with foreign and international law from litigants. It is therefore important that scholars and judges consider the theoretical issues associated with using foreign law in state constitutional interpretation.

This essay is merely a brief foray into some important issues that should be fully investigated going forward. However, it aims to highlight the overlooked notion that state constitutions may be fundamentally different candidates for foreign constitutional analysis than the U.S. Constitution. Consequently, the many critics and proponents of using foreign precedent in federal constitutional interpretation should consider whether their arguments hold equal weight when applied to state constitutions. That inquiry will surely prove valuable for litigants and state judges who are increasingly faced with global sources of constitutional meaning without a clear theoretical framework from which to begin.

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149. See Kalb, *supra* note 9, at 1070–71.

150. See *id.*

151. See THE OPPORTUNITY AGENDA, *supra* note 62, at 1–16 (explaining the project).