FOREIGN LAW AND OPINION IN STATE COURTS

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Not long after the Supreme Court’s decision in Lawrence v. Texas, I was discussing the use of foreign and international law in constitutional interpretation with a federal judge (who shall remain nameless). After a few minutes, this judge, one of the most conservative on the federal bench, said that in his court there are two kinds of authority: binding and persuasive, and that anything that isn’t binding is persuasive. For instance, he could refer to a movie or other popular culture if it helped make his point. He then said that foreign and international law could be far more persuasive than law from the Ninth Circuit.

The fact of the matter is that the Supreme Court and federal and state courts throughout the country have been using foreign and international law in their decisions since the Eighteenth Century. Every member of the current Supreme Court who has sat for a full term has either authored or joined opinions that have used foreign and international law, in some way, to interpret constitutional provisions that facially have no international implications. Until recently, discussions of foreign law in very famous Supreme Court cases, from Dred Scott to Miranda to Roe v. Wade, have gone

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1 539 U.S. 538 (2003).

2 For a good discussion of the early Supreme Court’s use of international views and law, see Steven G. Calabresi & Stephanie Dotson Zimdahl, The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision, 47 WM. & MARY L. REV. 743 (2005). One notable early example from state court is Griswold v. Waddington, 16 Johns. 438 (N.Y. 1819), which cited various foreign authorities in noting that trading with the enemy is a violation of the laws of war.


largely unnoticed. Other discussions of foreign law in famous opinions, such as Justice Harlan’s cryptic use of foreign law in his *Poe v. Ullman* dissent, are still fairly obscure. Listing every case in which this practice has occurred would take far more time than we have here today.

In light of the enormousness of this subject, I will discuss something that is often not mentioned: the way that state courts have used foreign law and international opinions in their recent jurisprudence.\(^8\)

While there’s been much ink shed in the last two years over the relevance of the views of the world community in Supreme Court interpretation, the states have largely been ignored in this commentary.\(^9\) As difficult as it is to construct a coherent narrative of legal trends with the Supreme Court, surveying state law is like watching Brownian motion.

That said, the general scholarly consensus seems to be that foreign law is not often used by contemporary state courts, except in certain discrete areas where the substance of foreign law is necessary to deciding domestic law questions. These areas include serving process, conducting discovery, ensuring recognition of foreign judgments, assessing rights under foreign law in probate and domestic relations matters, deciding choice of law issues, and in interpreting contracts with forum selection clauses. In other words, when the courts really can’t get around it.

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\(^8\) This Article will often use foreign/international law and foreign/international opinion somewhat interchangeably. This is because, to the extent that the debate about citing foreign laws in domestic jurisprudence is about foreign law at all, at least in the public law sphere, the debate is trying to capture something else: that the Supreme Court (and other courts) use foreign laws as a proxy for the opinion of the international community, or at least some suitable subset of that community.

Paradoxically, the Court’s use of foreign law in this way mimics the Court’s, and particularly the conservative members of the Court’s, favored methods of assessing the United States’ tradition and views. For example, in his *Atkins* dissent, Chief Justice Rehnquist stated that only two sources are relevant in determining the American conception of decency: “the work product of legislatures and sentencing jury determinations.” 536 U.S. at 324 (Rehnquist, C.J., dissenting). In many cases, such as the death penalty cases, where legislatures and foreign courts have proscribed the penalty, all the Court has to cite is “the work product of legislatures.” This is not to say that these sources necessarily reflect world opinion, but they’re certainly a logical place to turn.

\(^9\) Two articles that discuss state courts’ use of foreign law and views in some depth are David S. Clark, *The Use of Comparative Law by American Courts (I)*, 42 AM. J. COMP. L. SUPP. 23 (1994), and Alain A. Levasseur & Madeline Herbert, *The Use of Comparative Law by Courts (II)*, 42 AM. J. COMP. L. SUPP. 41 (1994).
Outside these enclaves, however, state courts can and do use foreign law, representing international opinion on social and legal matters, in a variety of areas.

Many state courts have used foreign laws and views to interpret and make common law, the arena in which their authority is at its greatest. Just this year, in the disastrous Naxos Records case,\(^\text{10}\) the New York Court of Appeals cited the international community’s views on whether the sale of a sound recording constitutes a “publication” in determining whether certain musical recordings were protected under New York common copyright law.\(^\text{11}\) Numerous state courts have used foreign law in making and revising their tort law. State courts in Wisconsin,\(^\text{12}\) New Jersey,\(^\text{13}\) Louisiana,\(^\text{14}\) and Hawaii\(^\text{15}\) have considered the predominant view in the world that municipalities should be liable for the torts of public actors in reconsidering common law precedents to the contrary.

Similarly, in the seminal case of \textit{Li v. Yellow Cab Co.}, the California Supreme Court cited the laws of France, Austria, and

\(^{10}\) \textit{Capitol Records Inc. v. Naxos of Am., Inc.}, 830 N.E.2d 250 (N.Y. 2005), was disastrous for at least those who wish to encourage entrepreneurs to restore and disseminate seminal music recordings from the early twentieth century.

\(^{11}\) \textit{Id.} at 264 n.9 (noting that the “international community also does not deem the sale of . . . a sound recording to be a ‘publication’” to support its holding that “the public sale of a sound recording otherwise unprotected by statutory copyright does not constitute a publication sufficient to divest the owner of common-law copyright protection”).

\(^{12}\) \textit{See Holytz v. Milwaukee, 115 N.W.2d 618, 622–23 (Wis. 1962) (citing Comment, 42 YALE L.J. 240 (1932), which states that world opinion favors imposing tort liability on a municipality for a public officer’s actions). To be sure, the court cited a law review article summarizing the views of the international community on municipal tort liability rather than the laws themselves. In principal, this usage is no different than the United States Supreme Court’s roughly contemporaneous usage of United Nations reports containing the opinion of the international community rather than the laws themselves in \textit{Trop v. Dulles}, 356 U.S. 86, 102 & n.35 (1958). Moreover, this influential article, which summarizes various foreign nations’ tort laws in an English-language, easily referenced format, surmounted for state courts the practical barriers to using foreign laws present in the era before there were hundreds of law journals and voluminous electronic databases of foreign law.

\(^{13}\) \textit{See McAndrew v. Malarchuk, 162 A.2d 820, 831 (N.J. 1960) (citing the same law review Comment as \textit{Holytz}, 115 N.W.2d 618). There are, of course, other examples of state courts considering foreign views and law in formulating common law tort doctrines. See S.C. R.R. Co. v. Steiner, 44 Ga. 546 (1871) (citing “enlightened opinion of the world” for the proposition that it is appropriate for steam powered locomotives to use public thoroughfares, but holding them civilly liable for certain damages); Magrine v. Spector, 241 A.2d 637, 646 (N.J. Ct. App. 1968) (considering French law in applying strict liability rules to a dentist who used defective instrument).

\(^{14}\) \textit{See Gordon v. New Orleans, 363 So.2d 235, 242 n.2 (La. Ct. App. 1978) (Redmann, J., dissenting) (citing French commentators, Quebec opinion, and the same law review Comment as \textit{Holytz}, 115 N.W.2d 618, for proposition that municipalities should be liable in tort).

\(^{15}\) \textit{See Maki v. Honolulu, 33 Haw. 167 (1934) (citing the same law review Comment as \textit{Holytz}, 115 N.W.2d 618, in finding that municipalities can be liable for torts resulting from garbage disposal).
Portugal in supplanting the traditional contributory negligence system with a pure comparative negligence system, and the Alaska Supreme Court cited the laws of “Austria, Canada, France, Germany, the Philippines, Portugal, and Spain” for the proposition that a comparative negligence system “has long been used in other nations of the civilized Western world.”

State courts also use foreign law when they interpret statutes that have foreign roots. Sometimes this occurs on a macro level, in states that were not English colonies. For instance, Louisiana’s law is descended from the French civil law system, and its courts have often looked to French law, and commenters’ restatements of such law, in their jurisprudence. Similarly, in the Southwest United States, Mexican and Spanish law have lived on in certain doctrines, most notably those involving common property and riparian rights, and are considered by courts in those areas. This also occurs on a micro level, when a particular type of statute descends from a foreign model. For instance, state courts in Montana and Louisiana, among others, have considered the foreign roots of state worker compensation laws probative in those law’s interpretation.

Holographic wills are another such example, being derived from the Napoleonic Code. And don’t forget about the Romans—American courts have never tired of pedantically noting that a legal principle descends from Roman law, and giving a Latin cognate if they can.

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16 532 P.2d 1226, 1236 (Cal. 1975).
18 See Levasseur & Herbert, supra note 9, at 58.
19 It is worth noting, however, that the actual importance of these doctrines has been questioned. See, e.g., Joseph W. Dellapenna, Special Challenges to Water Markets in Riparian States, 21 GA. ST. U. L. REV. 305, 320 & n.105 (2004).
21 E.g., Keane/Sherratt P’ship v. Hodge, 357 S.E.2d 193, 195 n.2 (S.C. Ct. App. 1987) (“The concept of easements appurtenant and dominant estates being considered as one property can be traced to a decision in the first century A.D. by the Roman jurist Celsus.”) (citing OLIVER WENDELL HOLMES, THE COMMON LAW 383–84 (1881)).
through imperial times, to Nazi laws, to then-current West German restrictions.\textsuperscript{23} Similarly, in 1950, a New York Supreme Court cited the Universal Declaration of Human Rights to support its decision prohibiting a labor union that had exclusive negotiating rights with a tavern from forcing the establishment to fire its female barmaids, who were ineligible to join the Union.\textsuperscript{24} This type of case is, however, far rarer than the aforementioned type of cases.

In general, state courts have been very reluctant—far more reluctant than federal courts—to use foreign and international law in interpreting the United States Constitution. They have not viewed the Supreme Court’s use of international views as an invitation to expansively interpret the Constitution. They have, in a notable number of cases, used foreign laws and international views to interpret their own state constitutions, however.

One example that illustrates this disparity between state courts and federal courts is the prevalence of citation to the European Court of Human Rights (ECHR). The ECHR has been cited 6 times in state courts, including dissenting opinions, and on one occasion the court was merely explaining \textit{Lawrence}.\textsuperscript{25} Earlier this summer, the Ninth Circuit cited to many different ECHR decisions in a single case, addressing the Confrontation Clause,\textsuperscript{26} and the court has been cited in about thirty other federal cases.

Much like in the Supreme Court, the context in which the relevance of international opinion is most often addressed is that of the Eighth Amendment, particularly challenging the death penalty or some variant thereof, like the recently-eliminated juvenile death penalty. In general, regardless of the type of foreign or international authority cited, state courts give these arguments a

\textsuperscript{23} Id. at 95–96.
\textsuperscript{25} See People v. Simms, 736 N.E.2d 1092, 1143 (Ill. 2000) (Harrison, C.J., dissenting) (citing British law and ECHR holding that six to eight years awaiting death penalty is “torture or . . . inhuman or degrading treatment or punishment”); State v. Wilder, 748 A.2d 444, 449 n.6 (Me. 2000) (noting that the ECHR has changed historical British common law rules governing corporal punishment); \textit{In re} Heilig, 816 A.2d 68, 79 & n.7 (Md. 2003) (noting that ECHR recognized a right to change/declare gender (as has Maryland law), and noting in dicta conflict between British and other countries laws regarding whether a transsexual could marry someone of his/her original gender); State v. Jenkins, 2004 Ohio 713 (Ohio Ct. App. 2004) (noting that \textit{Lawrence} cited ECHR in \textit{Lawrence} while refusing to extend \textit{Lawrence} to protect obscene material); State v. Wagner, 786 P.2d 93, 110 & n.5 (Or. 1990) (Linde, J., dissenting) (citing ECHR case preventing Britain from extraditing suspect to Virginia because of death row conditions in arguing Oregon death penalty scheme unconstitutional); Sterling v. Cupp, 625 P.2d 123, 131–32 (Or. 1981) (looking globally to discern standards for the treatment of prisoners which uphold the concept of human dignity).
\textsuperscript{26} See Bockting v. Bayer, 399 F.3d 1010, 1017 n.1 (9th Cir. 2005).
chilly reception, whether they are phrased in the context of foreign laws and an evolving standard of decency, or as customary international law binding on the states. While this is not always the case, as the Missouri Supreme Court’s decision in Roper clearly demonstrates, that case is the exception that proves the rule. Aside from Roper, opinions that would clearly use foreign views to interpret the Eighth Amendment have almost always come in dissent.

To demonstrate this, I've assembled some quick statistics on how state courts have treated claims based on prominent human rights

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27 There are hundreds of reported and unreported cases in which state courts have rejected arguments based on international law and the views of the international community in death penalty appeals.


29 I say “clearly” because state courts do not always specify under which constitution they are deciding a case, or making a proposition.

30 See Ex Parte Burgess, 811 So. 2d 617, 631 (Ala. 2000) (Houston, J., concurring in part and dissenting in part) (questioning now-reversed Supreme Court decision that the International Covenant on Civil and Political Rights (ICCPR) and international views do not bar juvenile death penalty); Ex Parte Pressley, 770 So.2d 143, 150 (Ala. 2000) (Houston, J., concurring) (questioning now-reversed Supreme Court decision that ICCPR and international views do not bar juvenile death penalty); Griffin v. State, 741 A.2d 913, 952 (Conn. 1999) (Berdon, J., dissenting) (noting that “[c]ivilized nations” bar capital punishment); People v. Madej, 739 N.E.2d 423, 432 (Ill. 2000) (Heiple, J., dissenting) (citing to “principles of justice generally recognized in the international community” as recognized in Vienna Convention on Consular Relations); Simms, 736 N.E.2d at 1143 (Harrison, C.J., dissenting) (citing British law and ECHR holding that six to eight years awaiting death penalty is “torture or . . . inhuman or degrading treatment or punishment”); People v. Bull, 705 N.E.2d 824, 846–47 (ILL. 1998) (Harrison, J., concurring in part and dissenting in part) (looking to world opinion in holding death penalty unconstitutional based on U.S. and Illinois constitutions); Adams v. State, 271 N.E.2d 425, 439 (Ind. 1971) (DeBruler, J., dissenting) (noting that “there are twenty-three nations of the world which have abolished capital punishment” and listing them); State v. Koskovitch, 776 A.2d 144, 226–27 (N.J. 2001) (Long, J., concurring in part and dissenting in part) (noting that “[t]he international community has moved more quickly toward an understanding of the flaws and dangers inherent in any capital punishment scheme” in a portion of his opinion dissenting on the basis that the death penalty is unconstitutional); id. at 228 (Long, J., concurring in part and dissenting in part) (“We can no longer ignore the fact that . . . a consensus is growing—not only at home, but across the country and around the world—that the death penalty is unfair, unjust and incompatible with present standards of decency.”); Servin v. State, 32 P.3d 1277, 1290 (Nev. 2001) (Rose, J., concurring) (rejecting claim that ICCPR made Nevada death penalty scheme unconstitutional, but accepting claim that Nevada death penalty scheme is barred by international law); Dominguez v. State, 961 P.2d 1279, 1280 (Nev. 1998) (Springer, C.J., dissenting) (ICCPR should bar juvenile death penalty); id. at 1281 (Rose, J., dissenting) (same, but because Senate reservation may not be valid).

Other courts have considered the views of the international community in assessing the constitutionality of a particular means of conducting the death penalty. E.g., Jones v. Butterworth, 701 So. 2d 76, 87 (Fla. 1997) (Shaw, J., dissenting) (citing countries that do not execute persons in dissenting opinion holding electrocution to be cruel and unusual punishment); Wilson v. State, 525 S.E.2d 339, 353 (Ga. 1999) (Sears, J., dissenting in part) (citing world statistics in holding electrocution unconstitutional).
treaties. In the overwhelming number of these cases, the treaties have faired poorly, often being summarily dismissed without dissent. In death penalty cases, for instance, the American Convention on Human Rights has been raised by defendants in six reported cases, to be rejected each time.\textsuperscript{31} The International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has been raised by defendants in eight reported cases, and rejected each time.\textsuperscript{32} The American Declaration of the Rights and Duties of Man has likewise been raised in eight reported cases, and rejected each time.\textsuperscript{33} These tallies do not include unreported decisions where the Court rejected challenges to the death penalty based on international views unsupported by a particular treaty, which are legion.

This is certainly not to say that dissenting state court opinions do not use foreign law or views in attacking the death penalty. With the exception of \textit{Roper}, no majority state court opinion has used these sources to find the death penalty unconstitutional under the U.S. Constitution.\textsuperscript{34} Concurring and dissenting opinions in Connecticut,\textsuperscript{35} Indiana,\textsuperscript{36} Alabama,\textsuperscript{37} Nevada,\textsuperscript{38} Illinois,\textsuperscript{39} Oregon,\textsuperscript{40}

\textsuperscript{31} See Trimble v. State, 478 A.2d 1143, 1161 (Md. 1984); State v. Herring, 762 N.E.2d 940, 960 (Ohio 2002); State v. Tenace, 2003 Ohio 3458 (Ct. App. June 30, 2003); Cauthern v. State, 145 S.W.3d 571, 596 (Tenn. 2004); Thompson v. State, 134 S.W.3d 168, 175 (Tenn. 2004); State v. Hall, 976 S.W.2d 121, 160 (Tenn. 1998). The prevalence of cases from Ohio and Tennessee likely has much to do with the way in which courts in those states report cases.


\textsuperscript{34} Nor would this necessarily be expected from a state court following the Supreme Court’s admonition in \textit{Agostini v. Felton}, 521 U.S. 203, 237 (1997), not to overrule Supreme Court precedent based on other cases that appear to have undermined such precedent. As the Missouri Supreme Court’s decision in \textit{Roper} shows, and as Justice Scalia's \textit{Roper} dissent points out at some length, see 543 U.S. 551, 628–30 (2005) (Scalia, J., dissenting), state courts have not always obeyed this dictate.


\textsuperscript{37} See \textit{Ex Parte Burgess}, 811 So. 2d 617, 630 (Ala. 2000) (Houston, J., concurring in part and dissenting in part).


\textsuperscript{40} See \textit{State v. Wagner}, 786 P.2d 93, 101 (Or. 1990) (Linde, J., dissenting).
and Wyoming have all relied on foreign laws or views in opinions stating that the death penalty, or some variant thereof, is unconstitutional. In so doing, the courts have cited various authorities—from counting countries, as a 1971 dissenting Indiana Supreme Court Justice did, to arguing that the states were prohibited from executing persons by the International Covenant on Civil and Political Rights.

There are, of course, valid jurisprudential reasons for not applying these documents as rules of decision. Each of the aforementioned treaties has either not been ratified, is not self-executing, or has been neutered by Senate reservations. These cases do demonstrate that state courts have been hesitant to follow the Supreme Court’s lead and consider foreign views as de rigeur in Eighth Amendment jurisprudence.

Outside of the death penalty, state courts in California and Washington have used the Universal Declaration of Human Rights (Universal Declaration) to support their conclusions that the United States Constitution implies a fundamental right to intrastate travel, a tricky constitutional issue that has led to disparate decisions in state and federal courts across the country. The West Virginia Supreme Court likewise cited the Universal Declaration in criticizing the Supreme Court’s refusal to find a fundamental right to education.

Foreign and international laws have gained more traction when state courts are interpreting their own constitutions. In the 1959 case of Commonwealth v. Cater, the Pennsylvania Supreme Court counted as relevant the abolition of the death penalty in England in imposing a culpability requirement for felony-murder. Interestingly, the holding of this case was nearly identical to that of Enmund v. Florida, where the Supreme Court also used foreign

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44 See In re White, 97 Cal. App. 3d 141, 149 n.4 (1979) (citing Universal Declaration to support proposition that intrastate travel is constitutional right without specifying whether the right is located in the United States Constitution or the California Constitution); Eggert v. Seattle, 505 P.2d 801, 802 (Wash. 1973) (citing Universal Declaration to support the proposition that intrastate travel has “historically been a concern of both English and American people”).
45 See Pauley v. Kelly, 255 S.E.2d 859, 864 n.5 (W. Va. 1979) (citing Universal Declaration to support the proposition that Supreme Court in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), could have found education to be a fundamental right).
views.47

More notably, in the 1972 case of People v. Anderson, the California Supreme Court cited Trop v. Dulles and the views of the international community to support its holding that capital punishment violated the California Constitution’s prohibition against cruel and unusual punishment.48 In the opinion, the court listed forty countries that had abolished the death penalty either in law or in fact, although the list did include countries that had executed persons a handful of times.49 While Anderson is no longer good law—the California Constitution was subsequently amended by the voters to permit capital punishment—in 1993, the High Court of Zimbabwe cited Anderson in prohibiting the death penalty after a prisoner had spent a prolonged time on death row.50

More obliquely, the Louisiana Supreme Court in State v. Perry noted that “[n]o insane offender has been executed in the civilized world for centuries” in response to the State’s attempt to coerce a prisoner into taking antipsychotic medicine to make him competent to be executed.51

State courts have used foreign law and views to interpret their state constitutions outside of the death penalty context as well. In Quail v. Municipal Ct., a California court of appeals cited an Austrian high court decision requiring compensation for attorneys who represent indigent defendants to suggest that the California Constitution may contain a corresponding right.52

Another particularly notable instance where foreign and international authorities were used to interpret a state constitution is the Oregon Supreme Court’s decision in Sterling v. Cupp.53 In Sterling, the court cited various human rights treaties “as contemporary expressions of the same concern with minimizing needlessly harsh, degrading, or dehumanizing treatment of prisoners” in holding that the Oregon Constitution guaranteed male

49 Id. at 898.
51 610 So. 2d 746, 766 (La. 1992).
53 625 P.2d 123 (Or. 1981); contra id. at 140 (Tanzer, J., dissenting) (“Standards formulated by organizations and institutions such as the American Bar Association and the United Nations are worthy of respectful attention from the legislature or the executive branch, but they are no substitute for the constitution and they do not provide a mandate for judicial intervention.”).
prisoners the right not be patted down by female guards.  

Several years later, the Utah Supreme Court followed *Sterling* in defining legal standards for “unnecessary abuse” where prison officials administered grossly negligent medical treatment to a prisoner.  

California and Pennsylvania courts have compared provisions in their state constitutions to those in the Universal Declaration of Human Rights, and one New Jersey court used the views of the world community to justify the use of eminent domain to build a sports complex.

Finally, in *Goodridge v. Department of Public Health*, the Supreme Judicial Court of Massachusetts interpreted the commonwealth’s constitution as prohibiting Massachusetts from preventing same-sex couples from marrying when heterosexual couples were permitted to marry. After doing so, the court was confronted with a question of what to do next: decree that same-sex marriage should be permitted, or invalidate the entire statutory marriage scheme. In choosing the former option, the court noted that it faced “a problem similar to one that recently confronted the Court of Appeal for Ontario,” and it explicitly concurred in that court’s remedy.

While this is certainly not an exhaustive treatment of state courts’ use of foreign laws and international views in interpreting their constitutions, the number of these opinions exceeds those interpreting the United States Constitution.

I think there are several reasons for the discrepancy between state and federal courts’ use of foreign law and international views in interpreting their respective constitutions. The predominant reason is likely that state courts are simply more authoritative in interpreting their own constitutions than they are in interpreting

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54 Id. at 131 (majority opinion).
57 See *N.J. Sports & Exhibition Auth. v. McCrane*, 292 A.2d 580, 599, 600–01 (N.J. Super. Ct. 1971) (noting that sports are popular in the “world community,” and that if the “world community had such respect for law, the threat of war would be ended forever,” in holding that it did not violate the public purpose funds provision of the New Jersey Constitution to give land on which a sports stadium would be built).
59 Id. at 969.
the U.S. Constitution. If a court is going to consider international opinion, why do it when another court can reverse you?

Similarly, state constitutions are often far longer and more descriptive than the federal Constitution. This makes it possible for states to find positive rights, like a right to a minimum standard of subsistence, by reference to foreign law, as courts in California and Connecticut have. It also opens courts to considering international views in interpreting rights like privacy that are explicit in some state Constitutions, but arguably only implicit in the U.S. Constitution. A closely related issue is that the language of state constitutions often differ from the U.S. Constitution regarding similar rights. For instance, the Sterling court found its right of male prisoners not to be patted down by female guards in a provision that prevented prisoners from being treated with “unnecessary rigor.”

Finally, litigants tend to prefer a federal forum when they raise claims under the United States Constitution.

In early 2004, all the law review articles addressing the use of foreign law and foreign views in constitutional interpretation in any comprehensive manner, that were not written in the context of pure comparative constitutionalism, would have fit a few binders. In the last year, the practice has become one of the primary issues of debate in constitutional interpretation, and it would take a bookshelf.

Thank you very much.

60 625 P.2d 123, 128 n.9 (Or. 1980).
61 Indeed, at the time these remarks are published, I expect that my attempts at tallying court cases will be obsolete.