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# Oklahoma and Beyond: Understanding the Wave of State Anti-Transnational Law Initiatives<sup>†</sup>

MARTHA F. DAVIS\* & JOHANNA KALB\*\*

On November 2, 2010, Oklahoma voters decisively adopted Question 755, a ballot initiative to amend Section 1, Art. VII of the state's constitution by adding the following language:

[State and Municipal courts], when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.<sup>1</sup>

This text was approved by the legislature and designated as a ballot referendum on May 25, 2010.<sup>2</sup> According to press reports, the ballot initiative garnered more than seventy percent approval from Oklahoma voters.<sup>3</sup>

Before the vote could be certified by the Oklahoma State Election Board, Oklahoma resident Muneer Awad filed a lawsuit in the Western District of Oklahoma seeking to enjoin the law on First Amendment grounds.<sup>4</sup> An adherent of Islam, Awad alleged that the law singles out one specific religious legal tradition, Sharia, for special negative treatment.<sup>5</sup> The federal judge granted a preliminary

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\* Professor of Law, Northeastern University Law School. The authors would like to thank Sarah Delorey and Ken Parker for excellent research assistance and Jamil Dakwar, Praveen Fernandes, Peter Krug, Penny Venetis, Hedy Weinberg, and Joseph Thai for their thoughtful comments. The *Indiana Law Journal Supplement* provided excellent editorial assistance. An earlier version of this Essay was published as an Issue Brief by the American Constitution Society.

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1. H.R.J. Res. 1056, 52nd Leg., 2d Sess. (as enrolled May 25, 2010), *available at* <https://www.sos.ok.gov/documents/questions/755.pdf> (outlining the complete text of the legislative resolution).

2. *Id.*

3. See Ariane de Vogue, *Federal Judge Bars Oklahoma Ballot Initiative on Sharia Law*, ABC NEWS (Nov. 29, 2010), <http://abcnews.go.com/Politics/federal-judge-bars-implementation-ballot-initiative-sharia-law/story?id=12269179>.

4. *Id.*

5. See *Awad v. Ziriak*, 754 F. Supp. 2d 1298, 1302 (W.D. Okla. 2010).

injunction, enjoining certification of the entire amendment.<sup>6</sup> As of this writing, an appeal is pending.<sup>7</sup>

The Oklahoma initiative was not the first anti-transnational law measure to be enacted by a state in recent years, but the media focus on the Oklahoma measure far outstripped coverage of the earlier, and milder, measures adopted in Louisiana and Tennessee.<sup>8</sup> In the wake of the Oklahoma enactment, more than twenty state legislatures have considered one or more anti-international law proposals during their 2010–2011 sessions.<sup>9</sup> It is expected that many will be reintroduced when state legislatures reconvene in late 2011. Importantly, as legislative sponsors have received feedback from constituents, their proposals have become increasingly nuanced while still retaining their central anti-transnational impetus.

Anticipating continued debate of these measures in many state legislatures, this Essay first considers these proposals in their larger historical and political context, as an outgrowth of deeply felt beliefs in American exceptionalism and fears of unconstrained judicial decision making. Next, setting aside the First Amendment issues being litigated in Oklahoma, we examine the immediate legal and policy issues raised by these anti-transnational law measures. While these provisions may seem unremarkable at first blush, enactment and implementation of such measures would chill judicial independence and place impossible constraints on the existing legal system.

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6. *Id.* at 1308.

7. *See* Appellants' Opening Br., *Awad v. Ziriah*, No. 10-6273.

8. LA. REV. STAT. ANN. § 9:6001 (Supp. 2011) (prohibiting the application of foreign law in state courts where doing so would violate a litigant's rights under the state or federal constitutions); 2010 Tenn. Pub. Acts Ch. 983 (restricting the application of "any foreign law, legal code or system against a natural person in this state" if "the decision rendered either violated or would violate any right of the natural person in this state guaranteed by the Tennessee Constitution or the United States Constitution or any statute or decision under those constitutions").

9. *See, e.g.*, S. 62, 2011 Leg., Reg. Sess. (Ala. 2011); H.R. 88, 27th Leg., 1st Sess. (Alaska 2011); H.R. 2064, 50th Leg., 1st Reg. Sess. (Ariz. 2011); S. 97, 88th Gen. Assemb., Reg. Sess. (Ark. 2011); S. 1294, 2011 Leg., Reg. Sess. (Fla. 2011); H.R. 45, 2011–2012 Leg., Reg. Sess. (Ga. 2011); S.J. Res. 16, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011); H.R.J. Res. 14, 84th Gen. Assemb., Reg. Sess. (Iowa 2011); H.R. 2087, 2011 Leg. (Kan. 2011); Leg. Doc. 1076, 125th Leg., 1st Reg. Sess. (Me. 2011); H.R. 301, 2011 Leg., Reg. Sess. (Miss. 2011); S. 308, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011); Leg. 647, 102d Leg. 1st Sess. (Neb. 2011); Assemb. 3496, 214th Leg., 2010–2011 Legis. Sess. (N.J. 2010); S.J. Res. 18, 2011 Leg., Reg. Sess. (N.M. 2011); H.R. 640, 2011–2012 Leg., 2011 Sess. (N.C. 2011); H.R. 1552, 2011 Leg., Reg. Sess. (Okla. 2011); H.R. 3490, 119th Gen. Assemb., 1st Reg. Sess. (S.C. 2011); S. 201, 86th Legis. Assemb., 2011 Sess. (S.D. 2011); H.R. 911, 82d Leg., 1st Called Sess. (Tex. 2011); H.R.J. Res. 8, 2011 Leg., 2011 Gen. Sess. (Wyo. 2011).

## I. A REVIEW OF ANTI-TRANSNATIONAL LAW INITIATIVES

*A. History and Typology*

Initiatives to block consideration of foreign or international law have been circulating on the federal and state scenes for several years. Although these categories are often blurred in discussion, foreign law and international law are not, strictly speaking, the same thing. “Foreign law” is understood to refer to “the law of an individual foreign country or, in some instances, of an identifiable group of foreign countries that have a common legal system or a common set of rules in a particular field of law.”<sup>10</sup> Somewhat differently, “international law” refers to “the law in force between or among nation-states that have expressly or tacitly consented to be bound by it,” and is primarily defined by treaty or by custom.<sup>11</sup> For the purposes of this Essay, the phrase “anti-transnational law initiative” is used as an umbrella term to describe any initiative aimed at blocking consideration of foreign or international law.

As early as 2004, both houses of the U.S. Congress considered versions of the Constitution Restoration Act, H.R. 3799, which threatened federal judges with impeachment should they cite foreign or international law other than English common law.<sup>12</sup> Variations on the proposed bill were reintroduced in 2005.<sup>13</sup> That year, a subcommittee of the House Judiciary Committee held a hearing on the issue, but none of the provisions were reported out of committee in either the House or Senate. Subsequent proposals in 2007 and 2009 likewise did not progress beyond committee.<sup>14</sup> These proposals nevertheless generated a lively debate in the academy and among the judiciary concerning judicial independence.<sup>15</sup>

Many state legislatures have also considered measures that would restrict state court judges from foreign and international law citation. These measures fall into three general categories, with a few outliers that do not fit neatly into this typology.

First, the majority of the state statutes that have been enacted or considered are symbolic “conflict of laws” measures that codify existing legal principles. Arizona’s law, signed by Governor Jan Brewer in April 2011, is an example.<sup>16</sup> The statute simply prohibits state courts from enforcing foreign law if the foreign law conflicts with U.S. law or would otherwise deprive individuals of state or federal constitutional or statutory rights.<sup>17</sup> The Tennessee and Louisiana measures that

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10. Frederic L. Kirgis, *Is Foreign Law International Law?*, ASIL INSIGHT (Oct. 31, 2005), <http://www.asil.org/insights051031.cfm>.

11. *Id.*

12. *See* Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. (2004).

13. *See, e.g.*, Constitution Restoration Act of 2005, S. 520, 109th Cong. (2005); Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. (2005).

14. *See* H.R.J. Res. 106, 111th Cong. (2010); H.R. Res. 372, 110th Cong. (2007).

15. *See, e.g.*, Michael J. Gerhardt, *What’s Old Is New Again*, 86 B.U. L. REV. 1287 (2006).

16. H.R. 2064, 50th Leg., 1st Reg. Sess. (Ariz. 2011), (codified at ARIZ. REV. STAT. ANN. §§ 12-3101 to -3103 (Supp. 2011)), *available at* <http://www.azleg.gov/legtext/50leg/1r/bills/hb2064s.pdf>.

17. ARIZ. REV. STAT. ANN. §§ 12-3101 to -3103 (Supp. 2011).

predated the Oklahoma ballot initiative are of that type, and these statutes continue to be the most commonly considered anti-transnational law measures.<sup>18</sup>

Second, a smaller number of state legislatures have, like Oklahoma, proposed strongly worded resolutions, laws, or constitutional amendments that would bar judicial citation or even consideration of foreign and international law. For example, in April 2010, the Idaho state legislature approved a non-binding concurrent resolution stating that “[f]or any domestic issue, no court should consider or use as precedent any foreign or international law, regulation or court decision . . . .”<sup>19</sup> Similarly, the Iowa legislature considered a proposed statute prohibiting state judges from using “judicial precedent, case law, penumbras, or international law as a basis for rulings.”<sup>20</sup> Rather, judges would be limited to the U.S. Constitution, the Iowa Constitution, and the Iowa Code in rendering their decisions.<sup>21</sup>

Third, some of these proposals attempt to circumscribe the role of religion in state court adjudication. The Oklahoma amendment’s ban on consideration of Sharia law is one example. Several other states have entertained far broader language that would ban reliance on any religious doctrine as a basis for ruling.<sup>22</sup>

18. Twenty-five of the anti-international law initiatives considered by state legislatures to date in 2011 are limited in their application to violations of state and federal constitutional rights, including Arizona’s House Bill 2064, the only one to be enacted so far this year. H.R. 88, 27th Leg., 1st Sess. (Alaska 2011); H.R. 2064, 50th Leg., 1st Reg. Sess. (Ariz. 2011); S. 97, 88th Gen. Assemb., Reg. Sess. (Ark. 2011); S. 1294, 2011 Leg., Reg. Sess. (Fla. 2011); H.R. 1273, 2011 Leg., Reg. Sess. (Fla. 2011); H.R. 45, 2011–2012 Leg., Reg. Sess. (Ga. 2011); S. 51, 2011–2012 Leg., Reg. Sess. (Ga. 2011); H.R. 242, 2011–2012 Leg., Reg. Sess. (Ga. 2011); S.J. Res. 16, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011); H.R. 1078, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011); S. 520, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011); H.R. 2087, 2011 Leg. (Kan. 2011); Leg. Doc. 1076, 125th Leg., 1st Reg. Sess. (Me. 2011); H.R. 301, 2011 Leg., Reg. Sess. (Miss. 2011); S. 308, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011); H.R. 708, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011); H.R. 768, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011); Leg. 647, 102d Leg., 1st Sess. (Neb. 2011); Assemb. 3496, 214th Leg., 2010–2011 Legis. Sess. (N.J. 2010); H.R. 640, 2011–2012 Leg., 2011 Sess. (N.C. 2011); H.R. 3490, 119th Gen. Assemb., 1st Reg. Sess. (S.C. 2011); S. 444, 119th Gen. Assemb., 1st Reg. Sess. (S.C. 2011); S. 201, 86th Legis. Assemb., 2011 Sess. (S.D. 2011); H.R. 911, 82d Leg., 1st Called Sess. (Tex. 2011); H.R. 3027, 82d Leg., 1st Called Sess. (Tex. 2011).

19. H.R. Con. Res. 44, 60th Legis., 2d Reg. Sess., 2010 Idaho Sess. Laws 972, *available at* <http://www.legislature.idaho.gov/legislation/2010/HCR044Bookmark.htm> (providing the text of the resolution).

20. H.R. File 2313, 83d Gen. Assemb., 2d Sess. (Iowa 2010), *available at* <http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=Billbook&menu=false&ga=83&hbill=HF2313> (identifying the currently pending text in committee).

21. *Id.* South Carolina has considered a similar proposal. S.J. Res. 1387, 118th Gen. Assemb., 2d Reg. Sess. (S.C. 2010), *available at* [http://www.scstatehouse.gov/sess118\\_2009-2010/bills/1387.htm](http://www.scstatehouse.gov/sess118_2009-2010/bills/1387.htm) (pending in committee).

22. *See* H.R. 2582, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (“A court shall not use, implement, refer to or incorporate a tenet of any body of religious sectarian law into any decision . . . .”); H.R.J. Res. 1004, 86th Sess. Legis. Assemb. (S.D. 2011) (“No such court may apply international law, the law of any foreign nation, or any foreign religious or moral code with the force of law in the adjudication of any case under its jurisdiction.”); H.R.J.

Importantly, some of the proposals that now refer only to foreign and international law are newer incarnations of earlier proposals that explicitly banned consideration of Sharia law.<sup>23</sup> In these states, the anti-international ban may in fact operate as a signal for expressing anti-Islam bias.

Finally, there are some outliers and variations that bear mentioning. For example, responding to critics who expressed concern about the impact of these laws on states' participation in international commerce, a minority of the proposals have carved out exceptions for business contracts that are before the courts and that call for application of foreign or international law.<sup>24</sup> Similarly, in recognition of the role of U.S. courts in enforcing arbitration awards based on religious or foreign law, at least one proposal specifically exempts arbitration proceedings and awards.<sup>25</sup> Finally, at least one proposal has exempted tribal law, recognizing that the tribes may have legitimate recourse to international treaty law.<sup>26</sup>

### *B. What Drives These Measures?*

The recent proliferation of the anti-transnational law initiatives can be attributed to the work of a number of conservative national advocacy organizations.<sup>27</sup> Their

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Res. 57, 82d Legis., Reg. Sess. (Tex. 2011) ("A court of this state may not enforce, consider, or apply any religious or cultural law.").

23. For example, Arizona's House and Senate considered four proposed anti-transnational law initiatives during the last legislative session, including House Bill 2582, which specifically prohibited courts from relying on any case or statute from a non-U.S. jurisdiction or "foreign body" or any "tenet of any body of religious sectarian law" including sharia, canon law, halacha, and karma. See H.R. 2582. The version ultimately adopted and signed into law on April 12, 2011 is much more limited. It prohibits courts and other adjudicators from enforcing any foreign law that would violate the Arizona or Federal Constitutions. See H.R. 2064.

24. See, e.g., S. 97, 88th Gen. Assemb., Reg. Sess. (Ark. 2011) ("This section shall not apply to a corporation, partnership, or other form of business association."); H.R. 1078, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011) ("This chapter does not apply to a contract or agreement in which one (1) or more of the parties is not a natural person."); H.B. 768, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011) ("Without prejudice to any other legal right, the provisions of this section shall not apply when a juridical person is a party to the contract or agreement.").

25. See H.R. 242, 2011–2012 Leg., Reg. Sess. (Ga. 2011) ("This Code section shall not apply to arbitration proceedings or to the confirmation of an arbitration award.").

26. See H.R. 88, 27th Leg., 1st Sess. (Alaska 2011) (as offered by H. Judiciary Comm. Apr. 4, 2011), available at <http://www.legis.state.ak.us/PDF/27/Bills/HB0088C.PDF> ("It is the intent of the legislature that AS 09.68.140, enacted by sec. 3 of this Act, does not address, directly or indirectly, any question of tribal law or the application of tribal law or otherwise address the intersection between state law and tribal law.").

27. See Judith Resnik, *Comparative (In)Equalities: CEDAW, the Jurisdiction of Gender, and Transnational Law Production* (manuscript on file with authors) (citing *About Us*, LAW OFFICES OF DAVID YERUSHALMI, P.C., <http://www.davidyerushalmilaw.com/aboutus.php> (David Yerushalmi serves as General Counsel for the Center on Security Policy, and he drafted a model anti-transnational statute.)) According to Professor Resnik, "This 'American Laws for American States' movement is propelled by translocal organizations such as the American Public Policy Alliance, the Center for Security Policy; ACT! For America, Society of Americans for National Existence (SANE); and from Stop the Islamization of America, an

enthusiastic public reception suggests, however, that they are tapping into some deeply held sentiments. Press reports, statements of legislative sponsors, and other public discussions of these proposals indicate that supporters are motivated by a number of disparate concerns, including a perceived need to defend Christian values, concern about state or federal sovereignty, fear of judicial activism, and belief in American exceptionalism.

### 1. Defense of Christian Values

Religion is associated with international law in proposals at both the state and federal levels. For example, both the 2004 and 2005 versions of the Constitution Restoration Act had two major parts. The first barred Supreme Court review of cases in which:

relief is sought against an element of Federal, State, or local government, or against an officer of Federal, State, or local government (whether or not acting in official personal capacity), by reason of that element's or officer's acknowledgement of God as the sovereign source of law, liberty, or government.<sup>28</sup>

The second part of the proposed legislation provided that federal courts, in constitutional matters, could:

not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than the constitutional law and English common law.<sup>29</sup>

The bill itself indicated that its overall purpose was to “limit the jurisdiction of Federal courts in certain cases and promote federalism.”<sup>30</sup> Sponsors of these federal measures stressed the centrality of religion in the founding documents of the United States as well as state constitutions. They also asserted that passage of the Act would protect local government-sponsored religious displays ranging from the Ten Commandments and nativity scenes to the Pledge of Allegiance.<sup>31</sup> Although sponsors seldom addressed the second part of the legislation, it seems apparent that they believed that citation of foreign law was one of the ways in which perceived national religious values might be undermined and that barring such citation would also strengthen federalism.

The Oklahoma amendment and South Carolina proposal support this point. These measures bar courts from considering “international law or Sharia law.”<sup>32</sup> As

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entity related to Stop the Islamization of Europe.” *Id.*

28. Constitution Restoration Act, H.R. 3799, 108th Cong. § 101 (2004); *see also* Constitution Restoration Act, S. 520, 109th Cong. § 101 (2005).

29. Constitution Restoration Act, H.R. 3799, 108th Cong. § 201 (2004).

30. *Id.* at pmb1.

31. *See* News Release, Rep. Robert Alderholt (Ala. 4th Dist.), Congressman Aderholt Introduces Constitution Restoration Act in House (Feb. 17, 2004), *available at* [http://www.house.gov/apps/list/press/al04\\_aderholt/pr040217constitution.html](http://www.house.gov/apps/list/press/al04_aderholt/pr040217constitution.html).

32. H.R.J. Res. 1056, 52d Leg., 2d Sess. (as enrolled May 25, 2010), *available at*

in the case of the federal bill, the Oklahoma bill's supporters focused their rhetoric on the section addressing religion—the Sharia law prohibition. For example, acknowledging that no Oklahoma court had ever cited Sharia law, the measure's author, former Oklahoma Representative Rex Duncan, labeled the proposal a “preemptive strike” against Oklahoma judges who might take steps to implement Sharia law through their opinions.<sup>33</sup> Another group sponsoring “robo calls” in support of the amendment told Fox News, “[T]he constitutional amendment will prevent the takeover of Oklahoma by Islamic extremists who want to undo America from the inside out.”<sup>34</sup> The juxtaposition of international law and Sharia law in these proposals suggests that its supporters believe that judicial consideration of international law also poses an insidious threat to the nation.

## 2. Concerns About State or Federal Sovereignty

Some commentators couch their objections to courts' consideration of international or foreign material in the language of sovereignty.<sup>35</sup> By considering international or foreign law, they argue, federal and state judges cede decision making to foreign judges who do not understand or share American values.<sup>36</sup> Further, this argument posits that judges who cite international material are failing in their obligation to adhere to interpretation of U.S. law as it exists. Closely related to the religious motivation for these proposals described above, the sovereignty objection asserts that the United States stands to lose control over our national sovereignty if judges accord too much domestic authority to foreign courts that are not subject to our system of democratic checks and balances.

## 3. Fears About Judicial Activism

Those who object to consideration of foreign law also associate the practice with judicial activism, despite ample evidence to the contrary. In fact, citation of international and foreign law is a venerable practice in the U.S. judicial system,

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<https://www.sos.ok.gov/documents/questions/755.pdf> (outlining the complete text of the legislative resolution); S.J. Res. 1387, 118th Gen. Assemb., 2d Reg. Sess. (S.C. 2010), available at [http://www.scstatehouse.gov/sess118\\_2009-2010/bills/1387.htm](http://www.scstatehouse.gov/sess118_2009-2010/bills/1387.htm) (pending in committee).

33. See Joel Siegel, *Islamic Sharia Law To Be Banned in, ah, Oklahoma*, ABC NEWS (June 14, 2010), <http://abcnews.go.com/US/Media/oklahoma-pass-laws-prohibiting-islamic-sharia-laws-apply/story?id=10908521#.TrVdbXGQ3FI>.

34. See Stephen Clark, *Group Launches Media Blitz in Oklahoma for Anti-Shariah Ballot Initiative*, FOX NEWS (Oct. 20, 2010), <http://www.foxnews.com/politics/2010/10/20/anti-islamic-group-launches-media-blitz-oklahoma-anti-shariah-ballot-initiative/>.

35. See, e.g., Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Invocations of Foreign and International Law*, 29 FORDHAM INT'L L.J. 507 (2006).

36. Chief Justice John G. Roberts articulated a similar sentiment during his confirmation hearings. Resnik, *supra* note 27 (citing *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 199–201 (2006)). Chief Justice Roberts cited “democratic theory” in viewing non-U.S. law for constitutional interpretation as unwise, albeit not in violation of a judge's oath of office nor appropriately prohibited by Congress. *Id.*



dating back to the founding period.<sup>37</sup> A majority of the U.S. Supreme Court has continued this practice in recent years, sometimes in cases that concern hotly debated issues of law and public policy. For example, in *Roper v. Simmons*, the Supreme Court noted supportive international and foreign law in striking down Missouri's juvenile death penalty under the Eighth Amendment to the U.S. Constitution.<sup>38</sup> Similarly, in *Lawrence v. Texas*, Justice Kennedy's majority opinion noted supportive foreign law in the course of striking down Texas' same-sex sodomy ban under the Fourteenth Amendment.<sup>39</sup>

A fair reading of *Lawrence* and *Roper* makes clear that both decisions are fully supported by domestic law. In fact, writing in a case concerning life imprisonment for juvenile offenders, *Graham v. Florida*, Justice Kennedy commented that

[t]he Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it.<sup>40</sup>

Nevertheless, those who disagree with the Court's conclusions in these and other cases have suggested that international law references are simply vehicles for activist, agenda-driven judges to overstep proper judicial boundaries and depart from the constraints of domestic law.

#### 4. American Exceptionalism

Lurking in the background of these other concerns is the idea that U.S. judges have little to learn from their counterparts in other nations. Voters approving the Oklahoma provision, for example, sent a strong message that judges must limit their consideration to relevant domestic materials even when international materials might shed important light on an issue. This wholesale rejection of the value of consulting international law or foreign decisions in certain circumstances evokes years of "American exceptionalism," during which the United States was internationally criticized for exempting itself from human rights standards that were otherwise universal.<sup>41</sup> Although much academic writing has criticized this approach, the image of an ascendant America on which it is based—the "shining city on a hill"—nevertheless remains a powerful appeal for those who support measures that would isolate U.S. courts from international law.

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37. See Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 8 (2006).

38. 534 U.S. 551, 575–78 (2005).

39. 539 U.S. 558, 573, 576–77 (2003).

40. 130 S. Ct. 2011, 2034 (2010).

41. See, e.g., Steven G. Calabresi, "A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law, 86 B.U. L. REV. 1335, 1393 (2006).

Regardless of their motivation, many of these anti-transnational initiatives violate the federal Constitution and all will damage the United States' foreign policy in ways that will significantly impact American citizens and businesses. Moreover, a closer look at these proposals shows that they would actually undermine the states' ability to participate independently on the international stage and would require the federal government to take more intrusive measures to ensure domestic compliance with the nation's international commitments. Thus, the proposals would have the contrary effect of limiting, rather than expanding, the states' autonomy and authority within our federalist structure.

## II. LEGAL AND POLICY IMPLICATIONS OF ANTI-TRANSNATIONAL INITIATIVES

The impact of the proposed anti-transnational initiatives, should they be widely enacted, would be dramatic and devastating to our legal system. The proposals undermine principles of federalism, since our constitutional structure requires that state courts, in some instances, consider and apply both international and foreign law. The federal government has been careful to preserve that sphere of state authority. Further, as described below, the practical impact of these measures will likely be negative for state and local governments, businesses, and individuals operating in today's global economy. While the legal consequences vary with the exact language of the proposal, the following discussion highlights the common challenges they present.

### *A. Anti-Transnational Law Initiatives Undermine Our Federalism*

#### 1. Treaties

The U.S. Constitution provides that "all Treaties . . . shall be the supreme Law of the Land."<sup>42</sup> Thus, a treaty that has been signed by the President and approved by a two-thirds majority of the Senate has the status of federal law. Moreover, state constitutions "almost always explicitly or implicitly acknowledge the binding nature of ratified treaties."<sup>43</sup> The prominence accorded to treaties in both the federal and state constitutions reflects the understanding that "if the United States [is] to bargain effectively, the national government must not only have the power to conclude treaties but [also] to compel states to observe them."<sup>44</sup>

Some of the treaties that the United States has signed regulate the behavior of national governments, such as those in the area of arms control and trade relations. Increasingly, however, as the world becomes more integrated through globalization, international treaty law has developed to protect the rights of individuals at home and when traveling and working abroad, as well as to facilitate business transactions occurring across national borders. For example, the United States is party to the Vienna Convention on Consular Relations, which guarantees

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42. See U.S. CONST. art. VI, cl. 2.

43. Martha Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 366 (2006).

44. BRADFORD PERKINS, *THE CREATION OF A REPUBLICAN EMPIRE, 1776-1865*, at 59 (1993).

Americans detained while traveling abroad in signatory countries the right to notify the consulate.<sup>45</sup> The United States has also signed numerous investment treaties that protect the property of U.S. corporations located in other countries and guarantee these companies equal access to those countries' courts in the event of disputes.<sup>46</sup> These kinds of international instruments often overlap with areas of state regulation and control.

Mindful that joining these international regimes may inhibit state prerogatives, the U.S. government has been selective about the treaties it adopts<sup>47</sup> and thoughtful in its approach to implementation of those treaties.<sup>48</sup> In some cases, this approach has meant ratifying a treaty with specific provisions preserving states' authority to control compliance with the instrument's obligations. For example, in adopting the Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, the Senate included a federalism understanding which reserves the power to implement these treaties to the states to the extent that they touch on historic areas of state control.<sup>49</sup> In other instances, the federal government has worked collaboratively with the states to implement its international obligations through state law.<sup>50</sup> For example, rather than passing federal legislation to implement the Convention Providing a Uniform Law on the Form of the International Will,<sup>51</sup> the State Department has worked to amend the Uniform Probate Code to bring it into compliance with the Convention, and has encouraged states to adopt the amendments.<sup>52</sup> The federal government is sensitive to the impact of these international instruments on state law and engages with the states in their implementation in order to limit encroachment on their authority. Anti-transnational initiatives interfere with the nuanced and dynamic

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45. See Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 21 U.S.T. 77, 101, 596 U.N.T.S. 261, 292 (entered into force Mar. 19, 1967).

46. See, e.g., North American Free Trade Agreement, U.S.-Can.-Mex., ch. 11, Dec. 17 1992, 32 I.L.M. 289 (1993) (including protections for most-favored-nation treatment, prohibitions on performance requirements, and providing for dispute resolution either in the host country's domestic courts or through arbitration).

47. See Kurt H. Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law*, 102 U. PA. L. REV. 323, 357-62 (1954).

48. See Julian Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 477, 500 (2004).

49. See 138 CONG. REC. 8,068-71 (1992) (ratifying the International Covenant on Civil and Political Rights); 140 CONG. REC. 14,326-27 (1994) (ratifying the International Convention on the Elimination of All Forms of Racial Discrimination).

50. See Ku, *supra* note 48 at 500-07.

51. See Convention Providing a Uniform Law on the Form of an International Will, 102d Cong., 137 CONG. REC. S12131 (daily ed. Aug. 2, 1991). The Convention makes wills written pursuant to its requirements valid regardless of the nationality of the testator or the location of his or her assets. See Convention Providing a Uniform Law on the Form of an International Will, Oct. 26, 1973, INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, <http://www.unidroit.org/english/conventions/1973wills/1973wills-e.htm>.

52. See Ku, *supra* note 48 at 501-04. The Oklahoma legislature adopted the International Wills Act in 2010. See Uniform International Wills Act, 2010 Okla. Sess. Laws 383, S.B. 889 (codified as amended at OKLA. STAT. tit. 84, §§ 350-51, 852-59 (2010)).

relationship that the federal government and states have built, and continue to build, on these issues.

## 2. Customary International Law

In addition to treaties, some customary international law norms are binding in the United States as federal common law.<sup>53</sup> Customary international law is made up of legal rules developed out of the shared practice of a majority of nations acting out of a sense of legal obligations. Historically, states have played a significant independent role in incorporating customary international law into their own common law in order, for example, to properly distribute the property of deceased foreign nationals or to resolve tax claims related to the property of foreign sovereigns.<sup>54</sup> Because state courts have been willing and able to resolve these questions of customary international law, the federal government has often deferred to their authority to do so rather than setting a binding federal standard and requiring the states to comply.<sup>55</sup> Anti-international initiatives threaten this flexibility. Their passage would force the federal government to adopt legislation to ensure enforcement of customary international law in the states, which would limit state court creativity and autonomy.

## 3. Comity

In addition to preventing state courts from considering transnational law, many of the proposed bills would prevent judges from considering foreign law, including the judgments of the courts of other nations.<sup>56</sup> This would put an end to a common practice in state courts that dates back to this country's founding. Under the doctrine of comity, state courts have often voluntarily deferred to the judgments of foreign courts unless doing so would contradict the state's public policy. The U.S. Supreme Court has described the practice as

neither a matter of absolute obligation, on the one hand, nor of mere courtesy or good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international

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53. *See* *The Paquete Habana*, 175 U.S. 677, 700 (1900) (finding the United States bound by the customary international law rule barring the seizure of unarmed coastal fishing vessels during wartime because “[i]nternational law is part of our law.”). The U.S. Supreme Court has recently reiterated the continued enforceability of a “narrow class of international norms” in domestic courts. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

54. *Ku*, *supra* note 48, at 476–77 (“State courts have actually played a crucial role in the initiation as well as development of certain doctrines of customary international law without any supervision or intervention from the federal courts.”).

55. *Id.* at 478–90.

56. *See supra* notes 19–20 and accompanying text (discussing proposed statutes from Iowa and Idaho).

duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.<sup>57</sup>

Based on the principle of comity, state courts regularly consider the decisions of foreign courts when resolving family law, estate, or contract disputes involving the activities of Americans while abroad or of foreign nationals living in the United States.<sup>58</sup> For example, courts have chosen to honor or enforce the custodial and financial decisions made by a foreign court when entering a divorce decree after one or both of the parties move to the United States.<sup>59</sup> The states' ability to consider and defer to these foreign judgments prevents unnecessary tensions in the nation's foreign relations and prevents state courts from being used unfairly by parties who have received an adverse determination elsewhere.

Thus, the states have always had a significant role to play in mediating the relationship between international, foreign, and domestic law, both independently in the exercise of their own sovereignty and as required by federal law. The federal government has acknowledged the states' role in fulfilling the United States' legal commitments and has often deferred to state autonomy in this area. Preventing the judiciary from considering international law claims disrupts this cooperative relationship between the states and the federal government. If implemented, these measures would prevent states from fulfilling their obligations under the U.S. Constitution and would create tensions in the United States' relations with other nations.

### *B. Policy Implications for American Citizens and Businesses*

#### 1. Undermining International Reciprocity and Domestic Predictability

The decision to forbid state jurists from considering international law also has serious consequences both for that state's residents and businesses, and for the United States as a whole. A single state's refusal to permit its courts to enforce the United States' international obligations puts the entire nation's credibility at risk, with potentially devastating results for the country's ability to protect its citizens and businesses. On a wide range of matters, including the detection and prevention of terrorism, the regulation of trade and monetary policy, and the protection of the environment, the success of the United States' efforts depends upon its ability to follow through on its international commitments.

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57. *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

58. *See, e.g., Hosain v. Malik*, 671 A.2d 988 (Md. App. 1996) (enforcing custody determination of Pakistani court); *Will of Brown*, 505 N.Y.S.2d 334 (N.Y. Sur. 1986) (giving effect to Korean divorce decree in the execution of a will); *Kwongyuen Hangkee Co. v. Starr Fireworks, Inc.*, 634 N.W.2d 95 (S.D. 2001) (enforcing judgment of Hong Kong court in contract dispute based on principle of comity).

59. *See, e.g., Leitch v. Leitch*, 382 N.W.2d 448, 448–49 (Iowa 1986) (upholding Canadian court's child support decree for American citizen who married and divorced in Canada); *Yu v. Zhang*, 885 N.E.2d 278 (Ohio Ct. App. 2008) (giving effect to divorce granted in China).

Furthermore, sending the message that the United States will not observe its international obligations may prevent U.S. citizens and businesses from receiving those protections when working or traveling internationally or transnationally. For example, if they are arrested while traveling abroad, U.S. citizens may no longer be assured of their right to notify the consulate, if state courts are unwilling to provide a remedy when state law enforcement officers fail to grant this right reciprocally to foreign nationals.<sup>60</sup>

Businesses may also find it more difficult to enter into international transactions if the courts of their state are unwilling to uphold their obligation to apply international law. According to Professor Peter Krug of the University of Oklahoma, “successful international business transactions require, and benefit from, a firmly-established legal infrastructure that provides adequate comfort—legal certainty—for those who wish to participate in the global marketplace.”<sup>61</sup> After the Oklahoma amendment, for example, foreign businesses may decline to enter into contracts with Oklahoma companies if state courts refuse to apply the United Nations Convention on Contracts for the International Sale of Goods (CISG) instead of the Uniform Commercial Code (UCC) when considering a contract dispute arising between an Oklahoman and a foreign business.<sup>62</sup> Similarly, foreign companies may be concerned about ending up in litigation in state courts if that means that they are denied the protection of the treaties on judicial assistance to which the United States is a party, like the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.<sup>63</sup> The resulting uncertainty in the business environment will discourage international relationships with state businesses, which is likely to have an economic cost to the state and to the nation. Finally, even in states which have yet to enact these anti-transnational law provisions, the proposals themselves may create sufficient uncertainty to encourage companies to site their transactions elsewhere.

## 2. Limiting Contractual Freedom of Business and Individuals

Beyond the issues of reciprocity in foreign courts and stability at home, these initiatives interfere with the ability of businesses and individuals to designate the law—foreign or domestic—that will be applied to enforce or interpret their agreements. Perhaps corporate parties are involved in a series of transactions, some

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60. The United States is a party to the Vienna Convention on Consular Relations, which requires signatories to inform detained foreign citizens of their right to contact their consulate under the Convention. *See* Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 21 U.S.T. 77, 101, 596 U.N.T.S. 261, 292 (entered into force Mar. 19, 1967).

61. Peter Krug, Editorial, *State Question 755: An Unnecessary Harm to Oklahoma*, NORMAN TRANSCRIPT, Oct. 2, 2010, <http://normantranscript.com/letters/x1760133151/State-Question-755-An-unnecessary-harm-to-Oklahoma>.

62. The United States ratified the CISG. *See* United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3. Under the Supremacy Clause, the CISG supersedes UCC-based state law in places where they conflict. *See* U.S. CONST. art. VI, cl. 2.

63. The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Oct. 15, 1970, 3 U.S.T. 2555, 847 U.N.T.S. 231.

of which are governed by foreign law, and the parties want the contracts to be construed and enforced consistently. Or perhaps individual parties have concurred on a contractual arbitration clause designating law outside of the United States as the applicable decisional law in a will or prenuptial agreement for reasons of religion or because of family considerations. In either case, an Oklahoma-type provision would undermine the parties' ability to seek enforcement of these consensual contractual arrangements in a state's courts, since the courts would be precluded from considering foreign law even when the parties agreed on its application.

For businesses dealing with global transactions and incorporating foreign legal regimes, the inability to rely on domestic courts for enforcement is a very serious impediment. It is no wonder, then, that some of the more recent state legislative proposals include exemptions for businesses.<sup>64</sup> While perhaps assuaging the concerns of the business community, these proposals would create a disturbing two-tiered system wherein individuals effectively have less contractual freedom than corporate interests. A corporation could look to the state courts to enforce a contract incorporating French law, while an individual could not.

In sum, much of the international law to which the United States is committed exists to protect American citizens and companies in their international and transnational interactions, and to preserve their freedom of contract in an increasingly diverse and globalized world. Even a single state's decision to forbid its jurists from doing their part in meeting the United States' international obligations will place these protections at risk for all Americans.

### *C. Judicial Independence*

In addition to the threat that the anti-transnational law proposals pose to the state and the nation's participation in the international legal framework, they also have immediate consequences for the independence and autonomy of state judiciaries. The consideration and adoption of these initiatives, even in their mildest forms, will likely have a chilling effect on judicial deliberation. In an age when state judges are increasingly the subjects of targeted electoral campaigns based on their judicial opinions, these initiatives send the messages to judges that they will be punished for their consideration of international or foreign law.

Judicial independence is a constitutive principle of the United States government. As Justice Sandra Day O'Connor has explained:

[t]he Founders of our Nation, having narrowly escaped the grasp of a tyrannical government, saw fit to render federal judges independent of the political departments with respect to their tenure and salary as a way of ensuring that they would not be beholden to the political branches in their interpretation of laws and constitutional rights.<sup>65</sup>

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64. See *supra* note 24 and accompanying text.

65. Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV. 479, 482–83 (2009).

At the state level, judges are selected by a variety of different mechanisms, including, as is the case in Oklahoma, by election.<sup>66</sup> Despite the variation, there is some consistency; in each of the fifty states, judges are elevated to, and removed from, the bench according to established and transparent rules.<sup>67</sup> A jurist selected for the bench decides the cases that arise according to the law of the state and the nation without interference in the decision-making process. The independence of U.S. judges is admired internationally and has been replicated in new democracies around the world.<sup>68</sup>

The anti-transnational law initiatives threaten the independence of state judges by instructing them that certain law is beyond the scope not just of their enforcement powers, but beyond their ability to consider in their deliberations. By directing judges how to decide the cases before them, these proposals purport to constrain judges in their decision making in a way that is historically unprecedented in this country and threatens the core values animating our judicial system. Moreover, these proposals handicap state judges and justices from considering potentially informative sources in order to reach the best outcomes in the cases before them. Jurists in every state draw regularly on the comparative experience of other states and of the federal government in their decision making. In some circumstances, however, the relevant parallel experience may come from beyond national boundaries, or the state standard to be interpreted may require an examination of the national or international consensus. For example, California statutes provide that a person exporting electronic waste to foreign countries must do so “in accordance with applicable United States or applicable international law.”<sup>69</sup> Similarly, Alaska law prohibits commercial fishing of halibut in a manner inconsistent with the regulations of the International Pacific Halibut Commission,<sup>70</sup> a public international organization established by a convention between Canada and the United States.<sup>71</sup> The amendment cuts Oklahoma’s jurists off from the world of comparative experience, impoverishes the development of the state’s statutory law, and undermines its constitutional and common law jurisprudence.

#### CONCLUSION

At its core, the anti-transnational law initiatives appear to address the desire of a state’s citizens for accountability in judging. Oklahoma-type initiatives and amendments can be viewed as attempts to ensure that judges do not impose

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66. See OKLA. STAT. tit. 20, § 3 (2010).

67. For a state-by-state explanation of the rules governing judicial selection, retention, and removal, see *Judicial Selection in the States*, AM. JUDICATURE SOC’Y, <http://www.judicialselection.us/>.

68. See Sandra Day O’Connor, *Fair and Independent Courts: Remarks by Justice O’Connor*, 95 GEO. L.J. 897, 897 (2007) (“[T]he United States’ judiciary has been the envy of the world for many years, as other nations have attempted to emulate our own judicial system.”).

69. See CAL. PUB. RES. CODE § 42476.5 (West 2004).

70. See ALASKA ADMIN. CODE tit. 5, § 28.092 (1989).

71. See *About IPHC*, INT’L PAC. HALIBUT COMM’N, <http://www.iphc.washington.edu/about-iphc.html> (describing the origination and purpose of the commission).



religious law, do not impose laws that reflect un-American values, and do not deviate from democratic checks by relying on foreign opinions. What the advocates for these initiatives fail to recognize is that it is impossible to bar judicial “consideration” of any source. If anything, these proposals force judges and justices to be less transparent in their reasoning or (if they try to abide by the strict letter of the provision) to reach incorrect decisions. Moreover, as the new versions of the amendments demonstrate—with their exceptions for international business transactions, international arbitral agreements, and tribal law—unwinding the relationship between domestic and international law is no easy task.

As unlikely as these provisions are to promote their intended goal, the consequences of these sorts of measures for the states and for the nation are severe. The federal government’s capacity to protect American citizens and businesses on the international stage is directly related to its ability to guarantee our nation’s reciprocal compliance. The actions of the states threaten our national commitment to honoring our international obligations and undermine the states’ ability to work cooperatively with the federal government to implement them.