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2016

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## EVALUATING INTERNATIONAL STATE CONSTITUTIONALISM

Johanna Kalb\*

### I. THE ORIGINS OF INTERNATIONAL STATE CONSTITUTIONALISM

Over the last ten years, following a series of high profile state and federal court decisions citing foreign and international law,<sup>1</sup> interest has grown in state constitutions as a site of human rights advocacy and enforcement.<sup>2</sup> The arguments in favor of state court engagement have taken two overlapping forms, tracking the competing theories of state constitutionalism more generally. By one account, the international human rights treaties and the rights jurisprudence of other countries offer rich interpretive materials to give meaning to state constitutional provisions, particularly those that lack federal analogues.<sup>3</sup> Advocates of

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1. See *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003) (referencing the decision of the European Court of Human Rights holding that laws proscribing consensual adult homosexual conduct violate the protections of the European Convention on Human Rights); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 966 n.31 (Mass. 2003) (citing to a decision of a Canadian court interpreting the Canadian Charter of Rights and Freedoms when considering whether limiting the right to civil marriage to heterosexual couples violated the state constitution); *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 411 (Mo. 2003) (referencing the Convention on the Rights of the Child (CRC) and other treaties prohibiting the execution of juveniles), *aff'd sub nom. Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (citing the CRC and the practice of other countries in concluding that the Eighth Amendment prohibits the execution of juvenile offenders).

2. Interest in independent state constitutionalism began with Justice William Brennan's Article in the *Harvard Law Review*, in which he called upon state courts to "step into the breach" created by the United States Supreme Court's limited willingness to expand protections for individual rights. William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977); see also William J. Brennan Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986). Justice Brennan built upon and popularized the arguments made by Justice Hans Linde of the Oregon Supreme Court. See Hans A. Linde, *E Pluribus – Constitutional Theory in State Courts*, 18 GA. L. REV. 165 (1984).

3. See Jonathan L. Marshfield, *Foreign Precedent in State Constitutional Interpretation*, 53 DUQ.

this approach point to the shared lineage that links modern state constitutions with these international instruments and with other national documents.<sup>4</sup> This “communitarian”<sup>5</sup> view of international state constitutionalism focuses on the way that international materials can help to advance each state’s particular character, which is “derived from [its] unique history, geography, economy, and relationship to the rest of the country.”<sup>6</sup>

The other account focuses on the role of state courts and constitutions in expanding respect for individual rights and advancing national human rights compliance.<sup>7</sup> By incorporating the rights understandings expressed in the international human rights treaties, state courts, through constitutional and statutory interpretation, can help to satisfy the nation’s international commitments. This is particularly true in areas of law that have historically been reserved to state and local control.<sup>8</sup> Moreover, by adopting rights protections that are broader or different than those found

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L. REV. 413 (2015). A word on definitions is in order here. As a formal matter, treaties that have been ratified, and even those that have only been signed, represent a binding legal commitment on the United States, while “foreign law,” the constitutional or statutory law of other countries, can have only persuasive value. As a practical matter, however, both federal and state courts often rely on international treaty law, foreign law, and the practice of other states for their persuasive authority, sidestepping entirely the question of whether the treaty should have binding legal effect. This was an observation that I made in my previous study of these cases, see Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism After Medellín*, 115 PENN. ST. L. REV. 1051, 1072 (2011), and it remains true with the newer set of cases. When discussing my findings in the briefs and cases, I use the terms “international” and “foreign” to distinguish these sources; however, when I refer generally to “international state constitutionalism,” I mean to reference state courts’ general use of international and foreign law as persuasive sources, tracking the prevalent (if imprecise) practice in the courts. See Melissa Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 630 (2007) (noting that commentators tend “to conflate foreign and international legal sources and to treat both kinds of sources as part of a broad, vaguely defined category known as ‘foreign authority’”); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 10–11 (2006) (highlighting the United States Supreme Court’s ambiguous use of these sources).

4. See Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 CHI. L. REV. 1641, 1641–46 (2014) (noting similarities between state constitutions and foreign national constitutions).

5. See James Rossi, *Assessing the State of State Constitutionalism*, 109 MICH. L. REV. 1145, 1154 (2011) (defining communitarian theory as one that “grounds state constitutional interpretation in the character of an individual state as a political community”).

6. Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 52 (2006). This argument has been made compellingly by Robert Williams. See generally ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* (2009).

7. See Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 59, 370–71 (2006).

8. See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 401–09 (1998) (describing areas in which domestic federal regulatory authority is limited, and arguing that the treaty power should not permit the federal government to exceed these restraints).

in the federal Constitution, state courts can help to deepen and reshape the rights dialogue at the national level. These arguments emphasize the value of state constitutionalism in terms of its contribution to the broader federal constitutional project.<sup>9</sup>

The promise of these forms of international and transnational engagement has drawn the attention of advocates and scholars, but their impact on state constitutional interpretation has been harder to assess.<sup>10</sup> Five years ago, I conducted a survey of state court decisions to learn whether and how these courts were responding to the growing call for state court engagement with international human rights law. The results of the study were mixed. The overall number of references to the major human rights treaties in these cases was very low. Of the state court cases, published and unpublished, available on Westlaw, only 187 included references to any of seven United Nations human rights instruments signed or ratified by the United States.<sup>11</sup> In those rare instances where human rights treaties were invoked by courts for any reason other than to summarily reject a treaty-based claim, they were usually used to help understand the scope or shape of a constitutional or statutory right. The treaties were referenced by state courts, at different levels, to extend the basic right of marriage to same-sex couples,<sup>12</sup> to end the use of capital punishment for juvenile offenders,<sup>13</sup> to protect the rights of the incarcerated,<sup>14</sup> and to require age-appropriate consultation

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9. James Gardner and Paul Kahn are leading proponents of this theory of state constitutionalism. See JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* 253–67 (2005); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1156 (1993) (arguing that “[a]t its best, state constitutional discourse can be an interpretive effort directed at the same principles of the rule of law that underlie federal constitutionalism”).

10. Some have argued that the same is true for the broader project of state constitutionalism. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992).

11. The citations broke down as follows. The International Covenant on Civil and Political Rights (ICCPR) was cited 118 times; the Convention Against Torture (CAT) was cited twenty-four times; the CEDAW was cited four times; the CRC was cited sixteen times; the Genocide Convention was cited four times; the ICESCR was cited three times; the CERD was cited sixteen times; and the CRPD was cited once. See Kalb, *supra* note 3, at n.23.

12. *In re Marriage Cases*, 183 P.3d 384, 426 n.41 (Cal. 2008) (citing the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights).

13. See *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 411 (Mo. 2003) (referencing the Convention on the Rights of the Child and “other international treaties and agreements [that] expressly prohibit the practice”), *aff’d sub nom. Roper v. Simmons*, 543 U.S. 551 (2005).

14. See *Sterling v. Cupp*, 625 P.2d 123, 132 n.21 (Or. 1981) (referencing the UDHR, the ICCPR, and the European Convention to interpret a state constitutional provision to prevent cross-gender pat-downs except in extenuating circumstances).

with children in custody and placement hearings<sup>15</sup> and periodic review of guardianship arrangements to protect the rights of persons with disabilities.<sup>16</sup>

While this use of international human rights law seemed to be meaningful in the cases in which it was applied, my review suggested that it was still quite rare. I concluded that study by considering some of the possible obstacles to this kind of engagement with human rights law, pointing to lack of technical capacity of the judiciary and political resistance as two possible reasons that state courts might avoid considering human rights. In this Essay, I return to these barriers to explore how state court engagement with international human rights law is developing, and to consider how the realities of its practice fit within the broader conversation about the purpose and value of state constitutionalism.

## II. ENABLING AND UNDERMINING INTERNATIONAL STATE CONSTITUTIONALISM

In the five intervening years, the technical capacity of the judiciary to consider international and comparative law arguments has grown tremendously. As a survey of state case briefing depicts, a larger and more diverse set of human rights advocates are filing an increasing number of briefs on a wider variety of cases in state courts across the country. Thus, the technical barriers to state court consideration of human rights arguments appear to be rapidly diminishing.

Over the last five years, there has been a dramatic increase in the number of briefs filed referencing the international human rights treaties that the United States has signed or ratified. As of April 2015, a search performed in the Westlaw AllStates Brief database identified a total of 1108 briefs meeting these criteria. Of those, 692 of these briefs, over half, were filed in the last ten years.<sup>17</sup> The breakdown is as follows:<sup>18</sup>

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15. See *In re Pedro M.*, 864 N.Y.S.2d 869, 872 n.8 (Fam. Ct. 2008); *Batista v. Batista*, No. FA 92 0059661, 1992 WL 156171, at \*6–7 (Conn. Super. Ct. June 18, 1992) (considering the CRC in determining how to weigh the preferences of the child in a custody suit and expressing “great concern and embarrassment that the United States of America is not a signator to that convention”).

16. See *In re Mark C.H.*, 906 N.Y.S.2d 419, 433–34 (Cty. Sur. Ct. 2010). The court explained that as a signatory to Convention on the Rights of Persons with Disabilities, the United States is required by the Vienna Convention “to refrain from acts which would defeat [the Disability Convention’s] object and purpose.” *Id.* at 433 (alteration in original).

17. That is in part attributable to the increased availability of more recent state briefs. For some states, selected briefs are only included in the database beginning in the early 2000s. However, even in those states where a more complete set of briefs are included, the incidence of briefs referencing human rights treaties have grown rapidly. For example, in California, there have been 243 briefs

Treaty	Total Brief Citations	Total Citations in Last 10 Years	Total Citations in Last 5 Years
ICCPR	562	322	144
CRC	134	112	64
CERD	135	64	23
CEDAW	8	7	5
ICESCR	47	27	15
CAT	184	129	68
CRPD	5	5	5
Genocide	34	17	9

Moreover, a review of these briefs suggests a growing interest in and facility with international human rights law among an expanding set of actors. Briefs have been filed in all fifty states, addressing a growing set of issues and claims. Human rights law has been invoked in cases related to bail access,<sup>19</sup> domestic violence,<sup>20</sup> access to counsel,<sup>21</sup> reproductive rights,<sup>22</sup> prison conditions,<sup>23</sup> and housing.<sup>24</sup> The briefs have also grown more sophisticated, citing not just the text of the treaties themselves, but also the interpretive documents of the U.N. treaty bodies,<sup>25</sup> as well as regional and foreign law.<sup>26</sup> This survey also suggests an increasing

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referencing the ICCPR since 1988, and 180 since 2005. In Pennsylvania, there have been sixty-two briefs filed since 1994, and forty-six since 2005.

18. The numbers of citations exceeds the number of total briefs because some filings cite more than one treaty.

19. See Amicus Curiae Brief of New York Civil Liberties Union et al. at 9, *People ex rel. McManus v. Horn*, 967 N.E.2d 671 (N.Y. 2011) (No. 2012-0034) (noting that at the time the legislation was adopted, international law—including the ICCPR—“recognized a defendant’s right to pretrial release barring extraordinary circumstances”).

20. See Brief of Amici Curiae New York City Bar Association et al., *Valdez v. City of N.Y.*, 960 N.E.2d 356 (N.Y. 2011) (No. 2011-0153).

21. See Amici Curiae Brief of Kidsvoice et al., *In re Termination of M.S.R. & T.S.R. v. Luak*, No. 85729-6, 2011 WL 4562940 (Wash. Sept. 26, 2011).

22. See Amicus Curiae Brief of Medical, Public Health, and Child Welfare Experts in Advocates in Support of Respondent at 38–41, *Lovill v. State*, 319 S.W.3d 687 (Tex. Crim. App. 2009) (No. PD-0401-09) (citing human rights treaty law to argue against the revocation of probation and incarceration of a pregnant woman).

23. See Brief for Amici Curiae at 7, *Vandever v. Comm’r of Corr.*, 106 A.3d 266 (Conn. 2014) (No. S.C. 19036).

24. See Brief for Appellants at 16–18, *Belanger v. Mulholland*, 30 A.3d 836 (Me. 2011) (No. Ken.-11-132) (arguing that the state statute regarding the warranty of habitability should be interpreted, in line with human right standards, to include access to running water).

25. See, e.g., Brief of Amnesty International et al., *State v. Gutierrez*, 324 P.3d 245 (Cal. 2014) (No. S206365).

26. See, e.g., Brief of Amicus Curiae Human Rights Advocates in Support of Appellant at 18–23,

institutional capacity for making human rights claims and arguments. The briefs are filed by a wide range of advocates and institutions including domestic legal advocacy organizations,<sup>27</sup> human rights clinics,<sup>28</sup> and legal aid and bar associations.<sup>29</sup>

While capacity as a barrier is diminishing, political resistance to consideration of the “foreign” and “international” has grown. In 2010, seventy percent of voters supported the “Save our State” amendment to the Oklahoma constitution, which directed the state’s judges not to “look to the legal precepts of other nations or cultures,” and not to consider “international law” or “Sharia law” in their decision-making.<sup>30</sup> After the amendment provision was challenged and struck down on First Amendment grounds, the state legislature enacted a new statute that no longer mentioned Sharia but banned reliance on foreign law unless it provides “the same fundamental liberties, rights, and privileges granted

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State v. Franklin, No. S217699, 2015 WL 3649516 (Cal. June 5, 2015) (describing European and Canadian law on juvenile sentencing); Brief of Amicus Curiae American Bar Association in Support of Appellee at 21, Office of Pub. Advocacy v. Alaska Court Sys. No. S-12999, 2008 WL 5585565 (Alaska Nov. 19, 2008) (citing the European Convention arguing for the appointment of counsel for indigent parents in child custody cases).

27. For example, the Juvenile Law Center, a forty-year-old advocacy organization based in Philadelphia, has filed nineteen briefs citing international treaty law, of which seventeen were filed in the last decade, and eleven in the last five years. The ACLU and its chapters have filed approximately fifty briefs citing the major human rights treaties of which thirty-five were submitted in the last decade.

28. International human rights clinics are becoming more active participants in U.S. advocacy, bringing the expertise developed in their international work to bear on domestic human rights violations. *See, e.g.*, Brief of Amici Curiae Allard, *supra* note 23 (challenging conditions in Connecticut prisons); Brief for Amici Curiae Columbia Law School Human Rights Clinic and Sexuality and Gender Clinics, Cochran v. Commonwealth, 315 S.W.3d 325 (Ky. 2010) (No. 2008-SC-000095-DG) (challenging the prosecution of a pregnant woman based on information obtained during obstetric care); Brief of Amicus Curiae Amnesty International, Disability Rights Legal Center, Human Rights Advocates, Loyola Law School Center for Juvenile Law and Policy, University of San Francisco Center for Law and Global Justice in Support of Defendant-Appellant, People v. Moffett, 324 P.3d 245 (Cal. 2014) (No. S206771).

29. The Maryland Legal Aid Bureau has begun to raise human rights law in relevant cases. *See, e.g.*, Appellant’s Reply Brief, Platt v. Bd. of Appeals, Md. Dep’t of Labor, No. 02417, 2014 WL 6710226 (Md. Ct. Spec. App. Nov. 7, 2014); Brief of Legal Aid Bureau, Inc. et al. as Amici Curiae in Support of Petitioner, Nickens v. Mount Vernon Realty Grp., 54 A.3d 742 (Md. 2012) (No. 03-C-12-4368). Some bar associations are also beginning to file amicus briefs raising human rights law. *See, e.g.*, Brief of Amici Curiae New York City Bar Assoc. et al., Valdez v. City of N.Y., 960 N.E.2d 356 (N.Y. 2011) (No. 2011-0153); Brief of Amici Curiae N.Y.C. Bar Assoc., People v. Harris, 779 N.E.2d 705 (N.Y. 2000).

30. *See generally* MARTHA F. DAVIS & JOHANNA KALB, AM. CONSTITUTION SOC’Y FOR LAW & POLICY, OKLAHOMA STATE QUESTION 755 AND AN ANALYSIS OF ANTI-INTERNATIONAL LAW INITIATIVES (2011); Martha F. Davis & Johanna Kalb, *Oklahoma and Beyond: Understanding the Wave of State Anti-Transnational Law Initiatives*, 87 IND. L.J. SUPP. 1 (2011).

under the United States and Oklahoma Constitutions.”<sup>31</sup>

The negative reception that greeted the Oklahoma amendment in federal court did little to discourage other states from considering international and foreign law bans. By 2013, variations on the Oklahoma model had been introduced in more than one hundred other bills in thirty-one other states.<sup>32</sup> Different versions prohibit consideration of Sharia law, religious laws, foreign religious codes, legal precepts of other nations or cultures, and international law. While only a handful of these restrictions have been adopted,<sup>33</sup> and their language makes the restrictions easy to evade, their popularity sends a clear message to state jurists, many of whom are elected, about the potential costs of referencing these sources in their decision-making.

Perhaps as a result of the backlash against foreign and international law citation, the tremendous growth in cases in which human rights arguments are raised has not translated into a dramatic change in state

31. See OKLA. STAT. ANN. tit. 12, § 20(B) (West, Westlaw through 2015 1st Sess.) (“Any court, arbitration, tribunal, or administrative agency ruling or decision shall violate the public policy of this state and be void and unenforceable if the court, arbitration, tribunal, or administrative agency bases its rulings or decisions in the matter at issue in whole or in part on foreign law that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights, and privileges granted under the United States and Oklahoma Constitutions, including but not limited to due process, freedom of religion, speech, or press, and any right of privacy or marriage as specifically defined by the Constitution of this state.”).

32. See FAIZA PATEL, MATTHEW DUSS, & AMOS TOH, CTR. FOR AM. PROGRESS, *Foreign Law Bans: Legal Uncertainties and Practical Problems* (2013), <https://cdn.americanprogress.org/wp-content/uploads/2013/05/ForeignLawBans-1.pdf> [<https://perma.cc/X54J-5U9S>]; see, e.g., S. 62, 2011 S., Reg. Sess. (Ala. 2011); H. 88, 27th Leg., 1st Sess. (Alaska 2011); S. 1010, 50th Leg., 1st Reg. Sess. (Fla. 2012); H. 45, 151st Gen. Assemb., Reg. Sess. (Ga. 2011); S. 16, 117th Gen. Assemb. 1st Reg. Sess. (Ind. 2011); H. Conc. Res. 44, 60th Leg., 2d Reg. Sess. (Idaho 2010); H. 575, 84th Gen. Assemb., Reg. Sess. (Iowa 2011); S. 79, 84th Leg., Reg. Sess. (Kan. 2012); H. 386, Leg. Reg. Sess. (Ky. 2012); H. 785, Leg. Reg. Sess. (La. 2010); H. 811, 125th Leg., 1st Reg. Sess. (Me. 2011); H. 4769, 96th Leg., Reg. Sess. (Mich. 2011); S. 2281, 87th Leg., 2nd Reg. Sess. (Minn. 2011); H. 301, 126th Leg., Reg. Sess. (Miss. 2011); H. 31, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011); Leg. 647, 102d Leg., 1st Reg. Sess. (Neb. 2011); H. 1422, 162d Gen. Ct., Reg. Sess. (N.H. 2011); Assemb. 919, 215th Leg., 1st Ann. Sess. (N.J. 2012); S. Res. 18, 50th Leg., 1st Sess. (N.M. 2011); H. 640, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011); H. 2029, 195th Gen. Assemb., Reg. Sess. (Pa. 2011); S.B. 444, 119th Gen. Assemb., 1st Reg. Sess. (S.C. 2011); H. 1004, 86th Leg. Assemb., Reg. Sess. (S.D. 2011); H. 3768, 169th Gen. Assemb., Reg. Sess. (Tenn. 2010); H. 57, 82d Leg., Reg. Sess. (Tex. 2011); H. 296, 58th Leg., Gen. Sess. (Utah 2010); H. 631, Leg. Reg. Sess. (Va. 2012); H. 3220, 80th Leg., Reg. Sess. (West. Va. 2011); H. Res. 8, 61st Leg., Gen. Sess. (Wyo. 2011).

33. As of January 2015, five states had adopted some form of foreign law ban. See Judith Resnik, *Constructing the Foreign: America Law's Relationship to Non-Domestic Sources*, in COURTS AND COMPARATIVE LAW 437, 460 (Andenas & Fairgrieve eds. 2015) (citing ARIZ. REV. STAT. ANN. §§ 12-301 to 3103 (2012); KAN. STAT. ANN. § 60-5103 (West, Westlaw through 2015 Reg. Sess.); LA. STAT. ANN. § 9:6001 (2015); S.D. CODIFIED LAWS § 19-8-7 (2015); TENN. CODE ANN. §§ 20-15-101 to -106 (West, Westlaw through 2016 Reg. Sess.)).



courts' uses of these instruments. Five years later, the total number of cases citing these treaties is 255, a sizable jump from 2010, but still a very small number in absolute terms when compared to the thousands of cases decided by state courts every year.<sup>34</sup> Moreover, the vast majority of the new cases still are in the same handful of areas; the most common use of international law is to challenge the application of the death penalty or of a sentence of life without parole.<sup>35</sup> These claims continue to be summarily rejected (for the most part) by state courts, even in Eighth Amendment cases, where a long line of Supreme Court precedent relies on international law and foreign practice, and where detailed briefs are filed raising these arguments.<sup>36</sup>

Nonetheless, despite their infrequent appearance in the opinions, the human rights treaties do shape state court consideration of rights claims in some areas, particularly in the area of family law, where state courts exercise broad authority. Human rights treaty law, especially the CRC and the CRPD, continues to be invoked by courts to ensure that family law proceedings are inclusive and that the voices of vulnerable parties are adequately represented in these significant decisions. For example, in 2014, the Supreme Court of Ohio invoked the CRC in deciding whether a court may exclude a child from custody proceedings ancillary to a divorce.<sup>37</sup> The Court noted that “[a] child’s right to participate in custody

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34. The breakdown is as follows. The ICCPR has been cited 154 times; CAT has been cited forty-four times; CRC has been cited twenty-seven times; the Genocide Convention was cited four times; the ICESCR was cited three times; the CERD was cited twenty-one times; and the CRPD was cited twice. For a more extensive study of these cases, see *THE OPPORTUNITY AGENDA, HUMAN RIGHTS IN STATE COURTS 2014* (2014), [http://opportunityagenda.org/files/field\\_file/2014.2.06.HumanRightsinStateCourts.pdf](http://opportunityagenda.org/files/field_file/2014.2.06.HumanRightsinStateCourts.pdf) [<https://perma.cc/3G2T-LVDW>].

35. The exception is the CAT, which was invoked in almost one-third of the cases to avoid deportation.

36. See Appellant’s Opening Brief at 245, *People v. Dworak*, No. S135272 (Cal. filed Feb. 4, 2014), 2014 WL 1046638 (arguing that California’s death penalty law violates the ICCPR); Appellant’s Opening Brief, *State v. Serrano*, 324 P.3d 1274 (Or. 2014) (No. S058390) (arguing that Oregon’s death penalty statutes violate the ICCPR because the statutes fail to adequately limit the cases in which death may be imposed); Appellant’s Opening Brief at 77, *Moore v. State*, No. 55091, 2012 WL 3139870 (Nev. Aug. 1, 2012), 2010 WL 10932173 (arguing against the death penalty, noting that Nevada is prohibited under the ICCPR from “arbitrarily” depriving any citizen of his or her life); see also Brief of Amicus Curiae American Civil Liberties Union Foundation of Nebraska at 5–8, *State v. Castenada*, No. S-11-0023, 842 N.W.2d 740 (Neb. 2014), 2012 WL 5855987 [hereinafter Amicus Brief of ACLU of Nebraska] (arguing that sentencing juveniles to life sentences without parole violates international law, including the Convention Against Torture); Brief for Appellant at 36–43, *Commonwealth v. Jacobs*, No. 182 EDA 2010, 2011 WL 7121005 (Pa. Super. Ct. Oct 24, 2011), *vacated*, 69 A.3d 238 (Pa. 2013), 2010 WL 7698880 (arguing that sentences of life without parole for juveniles are barred by international law, including the Convention on the Elimination of Racial Discrimination).

37. *In re A.G.*, 13 N.E.3d 1146, 1153 (Ohio 2014).

litigation is an evolving issue,” citing to the provision of the CRC which provides that when children have an interest in a pending case, “they shall be given an opportunity to participate in the proceedings and make their views known.”<sup>38</sup> Similarly, when considering a petition to terminate a guardianship for a person with intellectual disabilities, the Surrogate’s Court of New York County found that under both state law and the CRPD, the State was required to employ the least restrictive means available to achieve its objective of protecting the individual and the community.<sup>39</sup> The Court in *In re Guardianship of Dameris L.*<sup>40</sup> noted that “[w]hile the CRPD does not directly affect New York’s guardianship laws, international adoption of a guarantee of legal capacity for all persons, a guarantee that includes and embraces supported decision making, is entitled to ‘persuasive weight’ in interpreting our own laws and constitutional protections.”<sup>41</sup> In both cases, the treaty was invoked not as a binding legal standard, but as a point of reference that helped to shape the court’s understanding of the interests at stake. And, perhaps notably, for the first time that I have been able to identify, a state court invoked a treaty in order to articulate a legal standard that it would ultimately reject. In *Ex parte E.R.G.*,<sup>42</sup> the Supreme Court of Alabama struck down the Alabama Grandparent Visitation Act as an unconstitutional interference of the State with the parents’ fundamental right to direct the upbringing of his or her children. In reaching this conclusion, the Alabama Court critiqued the “best-interest-of-the-child”<sup>43</sup> standard of the CRC, along with the standard’s application by courts in Pennsylvania, North Carolina, and Washington.<sup>44</sup>

Even when treaty-based arguments or claims are rejected, these cases may be part of a broader inter-court and inter-branch dialogue that ultimately leads to recognition and realization of a right. State court human rights litigation has been an integral part of coordinated campaigns to abolish the juvenile death penalty and enforce the Vienna Convention on Consular Rights. In the former case, this campaign ultimately resulted in a success in state court that was affirmed by the

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38. *Id.*

39. *In re Guardianship of Dameris L.*, 956 N.Y.S.2d 848 (Sur. Ct. 2012).

40. 956 N.Y.S.2d 848 (Sur. Ct. 2012).

41. *Id.* at 855.

42. 73 So.3d 634, 639 (Ala. 2011).

43. *Id.* at 658 n.14.

44. *Id.* at 393.

United States Supreme Court.<sup>45</sup> In the latter, movement towards compliance with the treaty regime occurred despite and in the midst of a string of losing decisions in both state and federal courts.<sup>46</sup>

Over the last five years this strategy was replicated in the campaign to end juvenile life without parole (JLWOP). Following the Supreme Court's determination in *Miller v. Alabama*<sup>47</sup> that sentencing juvenile offenders to mandatory life without parole violates the Eighth Amendment,<sup>48</sup> state courts had to determine whether this holding applies retroactively.<sup>49</sup> In many of these cases, either the parties or the amici argued that JLWOP violates the United States' international law obligations.<sup>50</sup> Most opinions did not reference these treaty-based

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45. See Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 995 (2008) (describing the integrated campaign of advocacy and litigation that culminated in *Roper v. Simmons*); Margaret E. McGuinness, *Exploring the Limits of International Human Rights Law*, 34 GA. J. INT'L & COMP. L. 393, 413 (2006) (describing the use of foreign and international law arguments in the anti-death penalty campaign).

46. See Janet Koven Levit, *Does Medellín Matter?*, 77 FORDHAM L. REV. 617, 630 (2008) (arguing that by the time the Supreme Court rejected the availability of a judicial remedy for violation of the treaty right to consular notification, "a core goal of Vienna Convention litigation, compliance, had been met").

47. \_\_\_ U.S. \_\_\_, 132 S. Ct. 2455 (2014).

48. *Id.* at 2464.

49. As this Essay went to press, the United States Supreme Court resolved this question, holding in *Montgomery v. Louisiana*, 577 U.S. \_\_\_, 136 S. Ct. 718 (2016), that the *Miller* ruling applies retroactively, and that prisoners now serving mandatory life sentences for crimes committed while they were children are entitled to have their sentences reevaluated or to be considered for parole. *Id.*

50. See Brief of Amici Curiae in Support of Defendant-Appellant at 45, *People v. Gutierrez*, 324 P.3d 245 (Cal. 2014) (No. S206365) (arguing that life sentence without parole for a juvenile offender is impermissible under the Convention on the Elimination of All Forms of Racial Discrimination); Amicus Brief of ACLU of Nebraska, *supra* note 36 (arguing that sentencing juveniles to life without parole "could constitute cruel, inhuman or degrading treatment or punishment" in violation of the CAT); Defendant's Brief and Record Appendix, *Commonwealth v. Deal*, No. 2014-P-1182, 2016 WL 705195 (Mass. App. Ct. Feb. 23, 2016), 2014 WL 4147774 (arguing that life without parole sentences for juveniles violates the ICCPR and the Supreme Court's holding in *Miller*); Defendant's Brief and Record Appendix, *Commonwealth v. Littles*, No. 2014-P-1536, 2015 WL 3634488 (Mass. App. Ct. Jan. 5, 2015), 2015 WL 370069 (arguing that a life sentence without parole for a juvenile offender violated the ICCPR and the Convention on the Rights of the Child and that given the Supreme Court's ruling in *Miller*, defendant should be re-sentenced); Brief of Amicus Curiae on Behalf of Jovon Knox at 29, *Commonwealth v. Knox*, 50 A.3d 749 (Pa. Super. Ct. 2012) (No. 599 WDA 2009) (arguing that the life sentence without parole for a juvenile offender violated the ICCPR); Appellant's Brief at 27, *Commonwealth v. Klinger*, No. 121 EDA 2011, 2011 WL 6388047 (Pa. Super. Ct. Sept. 15, 2011), 2011 WL 4614024 (noting that the Human Rights Committee, oversight authority for the ICCPR, determined that sentencing juvenile offenders to life without parole violates Article 24(1) of the ICCPR, which states that every child shall have "the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State," and Article 7, which prohibits cruel and unusual punishment).

arguments, however, in *Diatchenko v. District Attorney for Suffolk District*,<sup>51</sup> the Supreme Judicial Court of Massachusetts referenced the CRC in holding that *Miller* applied retroactively to cases on collateral review.<sup>52</sup> The *Diatchenko* decision was then cited by other state courts, in support of their own determination that *Miller* applied retroactively.<sup>53</sup>

Treaty-based arguments may also shape judges' and justices' consideration of a particular rights claim, even if the results are not apparent in their constitutional decision-making. Here in Washington, the Washington State Supreme Court has been asked at least twice in the last decade to recognize a right to civil counsel as part of its state constitutional guarantees.<sup>54</sup> Both times, a detailed amicus brief was filed, articulating the international law arguments for extending the right to counsel.<sup>55</sup> The Court rejected both claims without commenting on the international law arguments that were raised by the parties and amici.<sup>56</sup> Yet, simultaneously, the Washington State Supreme Court has also taken a leadership role in expanding access to legal services in the state through its adoption of an innovative Limited License Legal Technician program, which creates a new category of professionals, who receive a shorter and less expensive course of training, to provide assistance to persons going through divorce, custody, and other common family law proceedings.<sup>57</sup> So while the Court has so far rejected constitutional claims as a way of expanding access to counsel in civil cases, it has used its administrative authority both to elevate the status of the right to counsel and to push for its realization within the boundaries of the state.

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51. 1 N.E.3d 270 (Mass. 2013).

52. *Id.* at 276.

53. *See, e.g.*, *State v. Mantich*, 842 N.W.2d 217 (Neb. 2014); *State v. Mares*, 335 P.3d 487 (Wyo. 2014). Similarly in *Montgomery*, the United States Supreme Court did not reference foreign and international law, but it did reference *Diatchenko* in its decision. *Montgomery*, 577 U.S. \_\_\_, 136 S. Ct. at 725.

54. *See King v. King*, 162 Wash. 2d 378, 174 P.3d 659 (2007) (examining whether an indigent parent has a constitutional right to counsel in a dissolution proceeding); *In re Dependency of M.S.R. & T.S.R.*, 174 Wash. 2d 1, 271 P.3d 234 (2012) (considering whether children have a constitutional right to counsel in parental termination proceedings). In one case, the state constitutional argument was not squarely before the Court. The constitutional right to counsel argument was raised for the first time on appeal. *Id.* at 4, 271 P.3d at 237. While the Court chose to consider the federal constitutional claim, it rejected the case as an inappropriate vehicle for considering the full scope of article I, section 3 of the Washington State Constitution. *Id.* at 20 n.11, 271 P.3d at 245 n.11.

55. *See generally*, Corrected Amicus Curiae Brief of International Law Scholars in Support of Appellant, *King* 162 Wash. 2d 378, 174 P.3d 659 (No. 79978-4).

56. *See generally*, *In re Dependency of M.S.R. & T.S.R.*, 174 Wash.2d 1, 271 P.3d 234; *King*, 162 Wash. 2d 378, 174 P.3d 659.

57. *See Brooks Holland, The Washington State Limited License Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. 75 (2013).

Meanwhile, outside the courts, a variety of other state and local actors have become increasingly engaged in helping to protect and advance human rights. As the Human Rights Institute at Columbia Law School has detailed, several cities have become active agents in human rights compliance, both by endorsing treaty principles and by creating special commissions or directing city agencies to consider human rights principles in the performance of their duties.<sup>58</sup> In some cases, these resolutions have followed the rejection of a treaty-based claim in state or federal court.<sup>59</sup> Thus, it seems possible and even likely that rejected treaty-based arguments can help to generate awareness of and engagement with rights claims.

### III. ASSESSING THE PROSPECTS OF INTERNATIONAL STATE CONSTITUTIONALISM

In sum, the last five years have witnessed a marked increase in the energy expended towards both incorporating and resisting the international and the foreign. Despite the detailed direction provided by scholars and advocates, and even by some courts' judges and justices,<sup>60</sup> state courts have shown limited appetite for drawing on international materials in their decision-making. And although measurement of these references is more challenging, citations to the practice of other constitutional and regional courts also seems to be quite rare.<sup>61</sup>

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58. See generally COLUMBIA LAW SCH. HUMAN RIGHTS INST., BRINGING HUMAN RIGHTS HOME: HOW STATE AND LOCAL GOVERNMENTS CAN USE HUMAN RIGHTS TO ADVANCE LOCAL POLICY (2012), <https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/Bringing%20Human%20Rights%20Home.pdf> [https://perma.cc/JDD6-WBYY] (last visited Sept. 15, 2015).

59. For example, several American cities have adopted resolutions recognizing the human right to be free from domestic violence and acknowledging that state and local government have a duty to adopt policies that secure this right. See Joann Kamuf Ward & Erin Foley Smith, *Freedom from Violence: A Fundamental Human Right*, CITIES FOR CEDAW (Oct. 3, 2014), <http://citiesforcedaw.org/freedom-from-violence-a-fundamental-human-right/> [https://perma.cc/2KJL-8AF8]. These resolutions were adopted in the wake of the 2005 decision of the United States Supreme Court in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), rejecting the respondent's claim that she had a constitutional right to enforcement of her restraining order—and the subsequent holding of the Inter-American Commission on Human Rights, finding that the United States had violated the human rights of Ms. Lenahan (formerly Gonzales) and her three deceased children. In that case, the absence of judicial remedies has helped to motivate a successful legislative advocacy campaign. *Id.*

60. See, e.g., Shirley S. Abrahamson & Michael J. Fischer, *All the World's a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273 (1997); Margaret H. Marshall, "Wise Parents Do Not Hesitate to Learn from Their Children": *Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633 (2014).

61. Tracking foreign references is more challenging than locating references to the international

In one view, these results are just more evidence of the failure of the communitarian vision of state constitutionalism. Yet, ending the story here would miss a substantial amount of important activity. As I have tried to illustrate, state court advocacy has been an integral part of successful national and local campaigns to reshape a variety of rights at the local, state, and federal levels. The impact of this work is easier to assess in accordance with the functionalist theories that measure the value of state constitutionalism in terms of the way that it influences the federal-state dialogue over rights. The last five years of briefs also suggest that the practice of international state constitutionalism is also more of a national effort than a bounded one. These state and local activities are often connected to a broader national and transnational movement that seeks out friendly fora to test new arguments and claims.<sup>62</sup> And while, at first glance, the state foreign and international law bans might seem to be more expressive of a communitarian<sup>63</sup> theory of state constitutions, scratching beneath the surface reveals that these efforts too are the product of a national and transnational network of

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human rights treaties. For a window into how frequently state courts cite to other jurisdictions, I searched the Westlaw database for the names of the high courts that have been actively engaged in the practice of foreign citation and surveyed the cases that have been decided in the last ten years. The Constitutional Court of South Africa was referenced once by the Supreme Court of the Navajo Nation. *See Shorty v. Greyeyes*, 12 Am. Tribal Law 16 (2014). The Canadian Supreme Court has been referenced in thirteen cases, of which two involved analysis of Canadian law for its persuasive authority (as opposed to situations in which the consideration of foreign law was required under a choice of law doctrine). *See In re Sheila W.*, 835 N.W.2d 148, 149 (2013) (considering the Court's analysis of the mature minor doctrine); *E.S. v. SS*, No. 23009/07 (N.Y. Sup. Ct. Feb. 17, 2010) (referencing, at a party's direction, a parallel decision of the Supreme Court of Canada in a dispute over maintenance and support). The Supreme Court of the United Kingdom was cited once. *See Allen v. Hamden Plains Cemetery Ass'n*, No. CV095031784, 2015 WL 3652242, at \*4 (Conn. Super. Ct. May 19, 2015) (reviewing the Supreme Court's analysis of the nondelegable duty doctrine). The jurisprudence of the European Court of Human Rights was cited four times for its persuasive authority. *See Lantz v. Coleman*, No. HHDCV084034912, 2010 WL 1494985, at \*18 (Conn. Super. Ct. Mar. 9, 2010); *Comm'r of Corr. v. Coleman*, 38 A.3d 84, 111 (Conn. 2012); *People v. Pratcher*, No. A117122, 2009 WL 2332183 (Cal. Ct. App. July 30, 2009), *as modified on denial of reh'g* (Aug. 26, 2009); *State v. Santiago*, 49 A.3d 566, 697 (Conn. 2012) (Harper, J., concurring in part and dissenting in part), *opinion set aside and supplemented on reconsideration*, 122 A.3d 1 (Conn. 2015). The Inter-American Court of Human Rights has not been cited in any opinions since 2005.

62. Many of the organizations and advocates who are engaged in filing these briefs are part of the Bringing Human Rights Home Network, a project of the Columbia Law School Human Rights Institute, which seeks to connect and equip lawyers around the United States who are using human rights strategies in their domestic work. Now in its fifteenth year, the Network has 800 members in thirty-seven states. *See* Risa E. Kaufman, *The Bringing Human Rights Home Lawyers' Network: A Profile*, 41 HUM. RTS. MAG., no. 2, 2015, at 20.

63. *See supra* note 4 and accompanying text.

actors.<sup>64</sup>

Returning then to the competing understandings of state constitutionalism, this survey suggests that as a general matter, on the rare occasions in which state courts engage with international and foreign sources, they understand themselves primarily as participants in a larger federal rights conversation. Nonetheless, the debates over the anti-foreign law bans illustrate that state constitutions do offer sites for popular engagement with law as a source of state identity. And the variations in the way that these debates have played out (despite the shared origins of the proposed bills) point to differences in the ways that the legislators and voters in the various states view themselves in interaction with both the national and international.<sup>65</sup> Thus the argument that state constitutions are a site where state identity is made (as opposed to where it is found) resonates in these cases.<sup>66</sup> Foreign and international law is not invoked to express state political identity, but rather to create it.<sup>67</sup>

The project of international state constitutionalism is most coherent when understood through a lens proposed by Justin Long. Long has argued for the benefits of “intermittent state constitutionalism,” recognizing that state constitutional actors have multiple identities, and therefore that the choices that they make as to when and how to invoke state constitutional law are themselves meaningful and constitutive of state identity.<sup>68</sup> By choosing the state law as the site for resolving a

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64. See Judith Resnik, *Comparative (In)Equalities: CEDAW, the Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production*, 10 INT'L J. CONST. L. 531, 554 (2011) (“The ‘American Laws for American States’ movement is itself border-crossing, 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 the Stop the Islamization of America, an entity that also crosses oceans as it is related to Stop the Islamization of Europe.”).

65. In South Dakota, for example, lawmakers first proposed a constitutional amendment that would ban the use of “international law, the law of any foreign nation or any foreign religious or moral code” in state courts. In response, a mix of local and national actors spoke out to criticize the ways in which adopting the amendment would isolate the state of South Dakota from valuable forms of international cooperation, with economic and practical implications for the state’s citizens. Tim Murphy, *SD Rep. Who Authored Abortion Bill Nixes Sharia Ban*, MOTHER JONES (Feb. 18, 2011, 2:38 PM), <http://www.motherjones.com/mojo/2011/02/sd-rep-who-authored-abortion-bill-nixes-sharia-ban> [https://perma.cc/BY42-DM8W]. As a result, the bill that was ultimately passed was limited to preventing the enforcement of “religious codes.” H. 1253, 87th Leg., Reg. Sess. (S.D. 2012) (signed into law March 12, 2012).

66. Long, *supra* note 6, at 87.

67. As Justin Long explains, “The doctrine that state communities express their character in state constitutions, which can then be read like tarot cards by the state high courts is wrong logically and empirically . . . Rather . . . the opposite relation exists: state constitutions and constitutional decisions help to create a sense of cultural statehood, not express it.” *Id.*

68. *Id.* at 92; see also Robert A. Shapiro, *Identity and Interpretation in State Constitutional Law*,

particular legal question, state actors communicate a message about its significance to that political community. Long suggests that this is productive; the occasional “[e]mphasis on the state as a unique community permits citizens to deal with each other as different, without sacrificing the common aspects of national identity.”<sup>69</sup>

By its very nature, international state constitutionalism problematizes the idea of a single consistent understanding of state constitutional purpose. In some instances, state courts do rely on international and foreign sources to offer broader or different constitutional protections for individual liberties.<sup>70</sup> However, when they do so through reliance on a ratified international treaty or as subnational actors representing the United States in the global community,<sup>71</sup> they also act to reinforce federal authority and to provide additional fora for articulating rights in ways that should resonate nationally.<sup>72</sup> Thus, any decision invoking international law is always part of this larger national and global rights dialogue, regardless of its framing. Moreover, even if (and perhaps because) the incidence of foreign and international citation is rare, the choice to invoke these sources in a particular case communicates something about its stakes for the state community.

## CONCLUSION

This project began with an attempt to quantify state courts’ use of international human rights treaty law. What this study suggests is that frequency may not be the most meaningful metric for evaluating these cases. Rather the promise of international state constitutionalism may be

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84 VA. L. REV. 389, 406 (1998).

69. Long, *supra* note 6, at 102.

70. See, e.g., *In re Marriage Cases*, 183 P.3d 384, 426 n.41 (Cal. 2008) (citing to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights in support of its determination that marriage is a basic civil right); *Moore v. Ganim*, 660 A.2d 742 (Conn. 1995) (referencing the UDHR in arguing that the Connecticut Constitution creates a governmental obligation to provide for minimal subsistence); *Sterling v. Cupp*, 625 P.2d 123, 132 (Or. 1981) (citing the UDHR and the ICCPR in support of its conclusion that cross-gender pat downs of prisoners’ intimate bodily areas violate the state constitutional ban on unnecessarily rigorous treatment of prisoners).

71. See *Diatchenko v. Dist. Attorney for the Suffolk Dist.*, 466 Mass. 655, 671 (2013) (“As John Adams recognized over 215 years ago, we belong to an international community that tinkers towards a more perfect government by learning from the successes and failures of our own structures and those of other nations.” (citing J. ADAMS, PREFACE, A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (1797))).

72. See Lawrence G. Sager, *Cool Federalism and the Life-Cycle of Moral Progress*, 46 WM. & MARY L. REV. 1385, 1391 (2005) (positing that national norm transformation may begin with state-level “moral” experimentation).



better understood through closer examination of when and under what circumstances state courts invoke international and foreign law, and the institutional arrangements that facilitate or inhibit it. Just as intermittent state constitutionalism allows for and enables the co-existence of state identity and national patriotism, these occasional cases situate particular rights questions within a global context. They help to constitute state political identity while simultaneously engaging the state citizenry in a conversation that transcends state and national borders.