



AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY



Issue Brief

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January 2011

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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 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.

This text was approved by the legislature and designated as a ballot referendum on May 10, 2010.¹

According to press reports, the ballot initiative garnered more than 70 percent approval from Oklahoma voters.² Before the vote could be certified by the Oklahoma Supreme Court, however, Oklahoma resident Muneer Awad filed a *pro se* lawsuit in the Western District of Oklahoma seeking to enjoin the law on First Amendment grounds.³ An adherent of Islam, Awad alleged that the law singles out one specific religious legal tradition, Sharia, for special negative treatment.⁴ The federal judge granted a preliminary injunction, enjoining certification of the entire amendment.⁵ An appeal has been filed, and Awad has obtained counsel going forward.

The Oklahoma initiative is just the latest in a series of federal and state legislative efforts to prohibit judicial citation of foreign and international law. This Issue Brief places the

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¹Enrolled House Joint Resolution, State Question Number 755, Okla.52nd Legis. (May25, 2010), available at <https://www.sos.ok.gov/documents/questions/755.pdf> (outlining the complete text of the legislative resolution).

²See Ariane de Vogue, *Federal Judge Bars Oklahoma Ballot Initiative on Sharia Law*, ABCNEWS, Nov. 29, 2010, <http://abcnews.go.com/Politics/federal-judge-bars-implementation-ballot-initiative-sharia-law/story?id=12269179>.

³*Id.*

⁴See *Awad v. Zirriax et al.*, No. 10-1186, 2010 WL 4814077, at *2 (W.D. Okla. Nov. 29, 2010).

⁵*Id.* at *9.

Oklahoma initiative within this larger context, and – setting aside the First Amendment issues being litigated in Oklahoma – examines the legal and policy issues raised by these proposals.

I. A Review of Anti-International Law Initiatives

Initiatives to block consideration of foreign or international law have been circulating on the federal and state scene 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.”⁶ 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.⁷ For the purposes of this Issue Brief, the phrase “anti-international 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.⁸ Several variations on the proposed bill were reintroduced in 2005.⁹ 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. These proposals nevertheless generated a lively debate in the academy and among the judiciary concerning judicial independence.¹⁰

Several states have also considered measures that would restrict state court judges from foreign and international law citation. Arizona’s “Foreign Decisions Act,” introduced in both the Arizona House and Senate in 2010, but currently pending in legislative committee, is intended to bar Arizona-based federal and state court judges from referring to any foreign or international law as “controlling or influential authority,” or “precedent or the foundation of any legal theory.”¹¹ There are some nuanced exceptions written into this proposal, including an exemption for federal courts sitting in diversity jurisdiction and case law “inherited from Great Britain” prior to the Act’s effective date. A similar Arizona measure, introduced in 2008, failed to emerge from committee.

In April 2010, the Idaho state legislature passed a non-binding concurrent resolution stating that “[f]or any domestic issue, no court should consider or use as precedent any foreign or

⁶Frederic L. Kirgis, *Is Foreign Law International Law*, ASIL INSIGHT, Oct. 31, 2010, <http://www.asil.org/insights051031.cfm>

⁷*Id.*

⁸See Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. (2004)..

⁹See, e.g., Constitution Restoration Act of 2005, S. 529, 109th Cong. (2005); Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. (2005).

¹⁰See, e.g., M.J. Gerhard, *What’s Old is New Again*, 86 B.U. L.REV. 1287 (2006).

¹¹Arizona Foreign Decisions Act, Ariz. H.B. 2379, 49th Legis. (2010), available at <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/2r/bills/hb2379p.htm>. The idea that state statute could control activities of federal judges is legally problematic, but the bill purports to do just that.

international law, regulation or court decision.”¹² In accordance with the resolution's terms, it was distributed widely to federal and state judiciary and government officials in Idaho. The Iowa legislature is currently considering a proposed statute prohibiting state judges from using "judicial precedent, case law, penumbras, or international law as a basis for rulings."¹³ Rather, judges would be limited to the U.S. Constitution, the Iowa Constitution, and the Iowa Code in rendering their decisions. Finally, the South Carolina Senate is considering a ballot initiative virtually identical to that approved by Oklahoma voters.¹⁴

Press reports, statements of legislative sponsors, and other public discussions of these proposals indicate that they are motivated by a number of disparate concerns, including: a perceived need to defend Christian values, concern about state/federal sovereignty, fear of judicial activism, and belief in American exceptionalism.

A. *Defense of Christian Values*

Religion is associated with international law in many of these proposals. For example, both the 2004 and 2005 versions of the Constitutional 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.¹⁵

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 English constitutional and common law up to the time of the adoption of the Constitution of the United States.¹⁶

The bill itself indicated that its overall purpose was to “limit the jurisdiction of Federal courts in some cases and promote federalism.” 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

¹²House Concurrent Resolution No. 44, State Affairs Comm., Idaho 60th Legis. (2010), *available at* <http://www.legislature.idaho.gov/legislation/2010/HCR044Bookmark.htm> (providing the text of the resolution).

¹³House File 2313, Iowa 83rd Gen. Assemb. (Feb. 5, 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).

¹⁴S. 1387- Joint Resolution, S.C. 118th Gen. Assemb. (Apr. 22, 2010), *available at* http://www.scstatehouse.gov/sess118_2009-2010/bills/1387.htm (pending in committee).

¹⁵ Congressional Restoration Act, S. 529 (109th Cong.), § 101, *supra* n. 9.

¹⁶*Id.* at § 102.

government-sponsored religious displays ranging from the Ten Commandments and nativity scenes to the Pledge of Allegiance.¹⁷ 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 and South Carolina bills support this point. In these measures, courts are specifically barred from considering “international law or Sharia law.” As on the federal level, the Oklahoma bill's supporters focused their rhetoric on the portion of the bill addressing religion – in the case of Oklahoma, 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. Another group sponsoring “robo calls” in support of the amendment told Fox News that “the constitutional amendment will prevent the takeover of Oklahoma by Islamic extremists who want to undo America from the inside out.”¹⁸ The juxtaposition of international law and Sharia law in the proposal suggests that its supporters believe that judicial consideration of international law also poses an insidious threat to the nation.

B. Concerns About State or Federal Sovereignty

Some commentators couch their objections to courts' consideration of international or foreign material in the language of sovereignty.¹⁹ 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. 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 posits that the U.S. stands to lose control over our national sovereignty if we accord too much domestic authority to foreign courts that are not subject to our system of democratic checks and balances.

C. Fears About Judicial Activism

Objectors 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, dating back to the founding period.²⁰ 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.*

¹⁷See 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.

¹⁸See Stephen Clark, *Group Launches Media Blitz in Oklahoma for Anti-Shariah Ballot Initiative*, FOXNEWS, Oct. 20, 2010, <http://www.foxnews.com/politics/2010/10/20/anti-islamic-group-launches-media-blitz-oklahoma-anti-shariah-ballot-initiative/>.

¹⁹See, 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).

²⁰See Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006).

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.²¹ Similarly, in *Lawrence v. Texas*, Justice Kennedy's majority opinion noted supportive foreign law in the course of striking down Texas's same-sex sodomy ban under the Fourteenth Amendment.²²

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.²³

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.

D. *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 U.S. was internationally criticized for exempting itself from human rights standards that were otherwise universal.²⁴ 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.

Regardless of their motivation, these anti-international initiatives violate the federal Constitution and will damage 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

²¹543 U.S. 551, 575-78 (2005).

²²539 U.S. 558, 573, 576-77 (2003).

²³130 S.Ct. 2011, 2034 (2010).

²⁴See, e.g., Steven 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 (2006).

have the contrary effect of limiting, rather than expanding, state autonomy and authority within our federalist structure.

II. Legal and Policy Implications of Anti-International Initiatives

Oklahoma's constitutional amendment directs state courts to follow federal law; however, it also forbids state courts from considering international law. These two directives are irreconcilable because some international law is part of the federal law that state judges and justices are bound to enforce. Far from reinforcing federalism, Oklahoma's proposed restrictions undermine it, since our constitutional structure requires that state courts, in some instances, consider and apply both international and foreign law – and the federal government has been careful to preserve that sphere of state authority. Further, as described below, the practical impact of these measures is likely to be negative for state and local governments, businesses, and individuals operating in today's global economy.

A. Anti-International Initiatives Undermine Our Federalism

1. *Treaties*

The federal Constitution provides that “treaties are the Supreme Law of the Land.”²⁵ Thus, a treaty that has been signed by the President and approved by a two-thirds vote of the Senate has the status of federal law. Moreover, state constitutions “almost always explicitly or implicitly acknowledge the binding nature of ratified treaties.”²⁶ 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 to compel states to observe them.”²⁷

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 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 Americans detained while traveling abroad in signatory countries the right to notify the consulate. The United States has also signed numerous bilateral 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. These kinds of international instruments often overlap with areas of state regulation and control.

²⁵See U.S. Const. art. II, §2, cl. 2.

²⁶Martha Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 366-67 (2006).

²⁷BRADFORD PERKINS, *THE CREATION OF A REPUBLICAN EMPIRE, 1776-1865* 59 (1993).

Mindful that joining these international regimes may inhibit state prerogatives, the U.S. government has been selective about the treaties it adopts²⁸ and thoughtful in its approach to implementation.²⁹ In some cases, this 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.³⁰ In other instances, the federal government has worked collaboratively with the states to implement its international obligations through state law.³¹ For example, rather than passing federal legislation to implement the Convention Providing a Uniform Law on the Form of the International Will,³² 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.³³ 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-international initiatives interfere with the nuanced and dynamic 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.³⁴ 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.³⁵ Because state courts have been willing and able to resolve these questions of customary international law, the federal government has often deferred to their

²⁸See Kurt 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).

²⁹See 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).

³⁰See 138 Cong. Rec. 8,068-71 (1992) (ratifying the ICCPR); 140 Cong. Rec. 14,326-27 (1994) (ratifying the CERD).

³¹See Ku, *supra* note 29 at 463-44.

³²See Convention Providing a Uniform Law on the Form of an International Will, 102nd Cong., 137 Cong. Rec. S12131 (daily ed. Aug. 2, 1991) (Sup. Doc. No. X/A.102/1:137/121). The Convention makes wills completed pursuant to its requirements valid regardless of the nationality of the testator or the location of his assets. See Convention Providing a Uniform Law on the Form of an International Will (Washington, D.C., Oct. 26, 1973), available at <http://www.unidroit.org/english/conventions/1973wills/1973wills-e.htm> (last visited Dec. 16, 2010).

³³See Ku, *supra* note 29 at 501-4. The Oklahoma legislature adopted the International Wills Act in 2010. See Okla. S.B. 889 (2010).

³⁴See *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 United States 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).

³⁵Ku, *supra* note 29 at 477 (“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.”).

authority to do so rather than setting a binding federal standard and requiring the states to comply.³⁶ Anti-international initiatives threaten this flexibility.

3. Comity

In addition to preventing state courts from considering international law, the Oklahoma amendment and others like it would prevent judges from considering foreign law, including the judgments of the courts of other nations. This would put an end to a common practice in Oklahoma 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 state public policy. The United States Supreme Court has described the practice as:

neither a matter of absolute obligation, on one hand, nor of mere courtesy and 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 to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.³⁷

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.³⁸ 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 moves to the United States.³⁹ 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 state and federal government. If implemented, these measures would prevent states like Oklahoma from fulfilling their obligations under the federal Constitution and would create tensions in the United States' relations with other nations.

³⁶*Id.* at 478-490.

³⁷*Hilton v. Guyot*, 159 U.S. 113, 163-164 (1895).

³⁸*See, e.g.*, *Kwongyuen Hangkee Company, LTD. 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); *Will of Brown*, 132 Misc. 2d 811 (N.Y. Sur. 1986) (giving effect to Korean divorce decree in the execution of a will); *Hosain v. Malik*, 108 Md. App. 284 (Md. App. 1996) (enforcing custody determination of Pakistani court).

³⁹*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*, 175 Ohio App. 3d 83 (2008) (giving effect to divorce granted in China).

B. Policy Implications for American Citizens and Businesses

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, from the detection and prevention of terrorism to the regulation of trade and monetary policy to the protection of the environment, the success of the United States' efforts depends upon its ability to follow through on its international commitments.

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, U.S. citizens may no longer be assured of their right to notify the consulate if they are arrested while traveling abroad, if state courts are unwilling to provide a remedy when state law enforcement officers fail to grant this right reciprocally to foreign nationals.⁴⁰ 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. "[S]uccessful 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."⁴¹ After the Oklahoma amendment, 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 instead of the UCC when considering a contract dispute arising between an Oklahoman and a foreign business.⁴² Similarly, foreign companies may be concerned about ending up in litigation in Oklahoma's courts if that means that they are denied the protection of the treaties on judicial assistance to which the United States is the party, like the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. The resulting uncertainty in the business environment will discourage international relationships with Oklahoma businesses, which will have an economic cost to the state and to the nation.

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. 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.

⁴⁰The 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, adopted Apr. 24, 1963, art. 36, 21 U.S.T. 77, 1010, 596 U.N.T.S. 261, 292 (entered into force Mar. 19, 1967).

⁴¹Peter Krug, Editorial, *State Question 755: An unnecessary harm to Oklahoma*, The NORMAN TRANSCRIPT (Oct. 2, 2010), available at <http://normantranscript.com/letters/x1760133151/State-Question-755-An-unnecessary-harm-to-Oklahoma>.

⁴²The United States ratified the CISG. See United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 19 I.L.M. 668 (1980). Under the Supremacy Clause, the CISG supersedes UCC-based state law in places where they conflict. See U.S. CONST. art. VI, cl. 2.

C. Judicial Independence

In addition to the threat that the Oklahoma amendment poses to the state and the nation's participation in the international legal framework, it also will have immediate consequences on the independence and autonomy of the state's judiciary.

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.⁴³

At the state level, judges are selected by a variety of different mechanisms, including, as is the case in Oklahoma, by election. Despite the variation, there is some consistency; in each of the 50 states, judges are elevated to, and removed from, the bench according to established and transparent rules. 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.

The Oklahoma amendment and other similar 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." 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 value 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 person exporting electronic waste to foreign countries must do so "in accordance with applicable United States or applicable international law."⁴⁴ Similarly, Alaska law prohibits commercial fishing of halibut in a manner inconsistent with the regulations of the International Pacific Halibut Commission,⁴⁵ a public international organization established by a convention between Canada and the U.S.⁴⁶ The amendment cuts Oklahoma's jurists off from the

⁴³Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV. 479, 482-83 (2009)

⁴⁴See CAL. PUB. RES. CODE § 42476.5 (West 2004).

⁴⁵See AK ADMIN. CODE tit. 5, § 28.092 (1989).

⁴⁶See International Pacific Halibut Commission, available at <http://www.iphc.washington.edu/about-iphc.html> (last visited Dec. 16, 2010) (describing the origination and purpose of the commission).

world of comparative experience, impoverishing the development of the state's statutory law, as well as its constitutional and common law jurisprudence.

III. Conclusion

At its core, the Oklahoma amendment's bar on the consideration of foreign or international law appears to address the desire of the state's citizens for accountability in judging; the amendment can be viewed as an attempt to ensure that judges do not impose religious law, that they do not impose law that does not reflect American values, or that they do not deviate from democratic checks by relying on foreign opinions. What the proponents of the amendment fail to acknowledge, however, is that it is impossible to bar judicial "consideration" of any source – particularly when, as described above, international law is relevant to the dispute. If anything, the amendment forces 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. And as unlikely as these provisions are to promote their intended goal, the consequences of these sorts of measures for Oklahoma 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. Oklahoma's action threatens our national commitment to honoring our international obligations and undermines the states' ability to work cooperatively with the federal government to implement them.