

## ASSESSING THE VIABILITY OF STATE INTERNATIONAL LAW PROHIBITIONS

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### I. INTRODUCTION

In 2011, state legislatures considered forty-nine proposals

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and state constitutional amendments that related to or explicitly prohibited state incorporation of international law.<sup>1</sup> Some, like the Oklahoma “Save our State” constitutional amendment, explicitly prohibit courts from referencing or incorporating Sharia law.<sup>2</sup> Rooted in a national anti-Islamic movement,<sup>3</sup> the Oklahoma amendment reflects a concerted effort to prevent Islamic influence within state courts and legislatures.<sup>4</sup> Laboring under the guise of protecting the U.S. Constitution and preventing future terrorist attacks, the singling-out of Islam has been described as plain bigotry.<sup>5</sup> Moderate Islamic groups, along with the American Civil Liberties Union brought a First Amendment suit against the State of Oklahoma.<sup>6</sup> Arguments from both sides stressed the principles of religious freedom and the protection of First Amendment constitutional rights;<sup>7</sup> however, it remains to be seen whether the Oklahoma amendment and like measures comport with the U.S. Constitution.<sup>8</sup> The Tenth Circuit’s decision regarding the amendment’s free exercise provisions provides some framework from which one may assess the viability of similar state

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1. Bill Raftery, *Bans on Court Use of Sharia/International Law: List of All Bills Since 2010, New 2011 Michigan Bill, First 2012 Bill Prefiled*, GAVEL TO GAVEL (Oct. 3, 2011), <http://gaveltogavel.us/site/2011/10/03/bans-on-court-use-of-shariainternational-law-list-of-all-bills-since-2010-new-2011-michigan-bill-first-2012-bill-prefiled/>.

2. H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010).

3. See *About ACT! for America*, ACT! FOR AMERICA, <http://www.actforamerica.org/index.php/learn/about-act-for-america> (last visited Nov. 18, 2012) (creating a forum aimed to rally support and educate Americans on efforts to “protect” Americans from international and Sharia law).

4. Andrea Elliott, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES (July 30, 2011), <http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all>.

5. *Bans on Sharia and International Law*, AMERICAN CIVIL LIBERTIES UNION, <http://www.aclu.org/religion-belief/bans-sharia-and-international-law> (last visited Nov. 26, 2012).

6. *Awad v. Ziriax*, 670 F.3d 1111, 1119 (10th Cir. 2012).

7. See Supplemental Brief of Appellants at 2–8, *Awad v. Ziriax*, 670 F.3d 1111, No. 10-6273 (10th Cir. 2012); Plaintiff-Appellee Awad’s Supplemental Brief at 1–6, *Awad v. Ziriax*, 670 F.3d 1111, No. 10-6273 (10th Cir. 2012).

8. The Western District of Oklahoma issued a preliminary injunction, preserving the constitutional question raised by Petitioner regarding possible infringement of Awad’s First Amendment rights. See *Awad*, 670 F.3d at 1119.

legislative efforts.<sup>9</sup> To date, Arizona, Kansas, Louisiana, South Dakota, and Tennessee have approved Sharia law prohibitions.<sup>10</sup> The remaining efforts, some which are likely to be reintroduced in the 2012–2013 legislative session, provide for a blanket exclusion of international law<sup>11</sup> that likely conflicts with the Supremacy Clause of the U.S. Constitution.

While the specific anti-Sharia provisions of the Oklahoma amendment garner rightful First Amendment challenges, there remain other significant constitutional concerns.<sup>12</sup> Specifically, if the Sharia provision may be severed from the remainder of the Oklahoma amendment,<sup>13</sup> there exist questions regarding the amendment's exclusion of "legal precepts of other nations or cultures."<sup>14</sup> This portion of the Oklahoma amendment more closely mirrors the majority of state legislative proposals that can be characterized as blanket prohibitions on the state court's ability to reference or rely upon international law and customs of foreign nations.<sup>15</sup> The more general international law

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9. See P. Solomon Banda, *Denver Appellate Court to Hear Islamic Law Case*, CBS DENVER (Sept. 12, 2011, 4:59 PM), <http://denver.cbslocal.com/2011/09/12/denver-appellate-court-to-hear-islamic-law-case-2/>. The American Civil Liberties Union and the various amicus briefs supporting Awad's claims argue that by singling out Islam, the Oklahoma amendment runs afoul of U.S. constitutional precedent. See Plaintiff-Appellee Awad's Supplemental Brief, *supra* note 7, at 2–7; Amicus Curiae Brief in Support of Plaintiff-Appellee Submitted By the Association of the Bar of the City of New York & the Islamic Law Committee of the American Branch of the International Law Association at 3–22, *Awad v. Zirriax*, 670 F.3d 1111, No. 10-6273 (10th Cir. 2012) [hereinafter Amicus Curiae Brief in Support of Plaintiff-Appellee].

10. Banda, *supra* note 9; see Bill Raftery, *Bans on Court Use of Sharia/International Law: Pennsylvania bill Introduced*, GAVEL TO GAVEL (Nov. 28, 2011), <http://gaveltogavel.us/site/2011/11/28/bans-on-court-use-of-shariainternational-law-pennsylvania-bill-introduced/>.

11. See Raftery, *supra* note 1 (noting the likelihood of reintroduction of certain bills).

12. *Awad v. Zirriax*, 670 F.3d at 1129–32 (applying the *Larson* test, finding the law would violate Mr. Awad's First Amendment Rights).

13. *Awad*, 670 F.3d at 1132, n. 16 (rejecting Oklahoma's post-oral argument effort to persuade court to sever the Sharia-specific language from the amendment if it were found invalid).

14. See H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. 2 (Okla. 2010).

15. See Raftery, *supra* note 1. In the 2012 legislative session, Alabama and Michigan legislators introduced anti-international law proposals. *Id.* Some legislatures carry over previous session bills; it is thus likely other states will take up

prohibitions may substantively conflict with the Supremacy Clause of the U.S. Constitution. The clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>16</sup>

Whether these blanket provisions would actually prevent incorporation of or reference to Sharia and international law turns upon whether customary international law is federal law.<sup>17</sup> The central analysis is whether the Supremacy Clause permits the several states to exclude international, and presumably, Sharia law.<sup>18</sup> This Comment identifies common language among the state proposals, and then assesses whether these state international law prohibitions have any teeth. Further, with the Supremacy Clause in mind, federal case law regarding incorporation of international law generally is explored in the context of three views on the status of customary international law (CIL) within the United States. Federal courts may consider the discussed viewpoints, among others, in making their decision about whether state bans on reference or incorporating international law are unconstitutional.<sup>19</sup>

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anti-international law provisions in 2012. *See id.*

16. U.S. CONST. art. VI, cl. 2.

17. *See* John T. Parry, *Oklahoma's Save Our State Amendment and the Conflict of Laws* (Lewis & Clark Law School Legal Studies, Research Paper No. 2011-21), available at <http://ssrn.com/abstract=1893707> (providing substantive analysis of Sharia's lack of a truly legal character). *See also* L. Ali Khan, *The Qur'an and the Constitution*, 85 TUL. L. REV. 161, 162, 166, 170, 172-73, 178-79 (2010) (discussing the Qur'an's compatibility with the U.S. Constitution).

18. Parry notes that "whatever the meaning of the amendment . . . Oklahoma courts remain bound by the supremacy clause to apply federal common law and give it preemptive force over state law." Parry, *supra* note 17, at 15. Notably, Parry does provide a clear analysis of the Oklahoma amendment provisions but does not address, in depth, the potential avenues for upholding the international law prohibitions. *See id.* at 3.

19. Parry analyzes the Oklahoma amendment in terms of state choice of law provisions, however he does not discuss at length the result such amendments would have upon the appeals process when federal courts hear cases on the basis of diversity

## II. ISLAM, SHARIA AND NATIONAL SECURITY

A. *Grassroots Islamophobia?*<sup>20</sup>

The Arab American Institute (AAI), founded by James Zogby, defines Islamophobia as “prejudice against, hatred or irrational fear of Islam and Muslims.”<sup>21</sup> According to Zogby and his staff, irrational fear of Islam and Muslims has reached epidemic proportions.<sup>22</sup> Since September 11, 2001, AAI has monitored and reported on increased prejudice and discrimination against Arab Americans.<sup>23</sup> A 2002 poll revealed that almost one in three Arab Americans had “personally experienced” ethnicity-based discrimination and that forty percent of those surveyed knew someone who was the target of discrimination.<sup>24</sup> And, based upon the anti-Islamic rhetoric among state legislatures and 2012 campaign speeches, time has done little to cure American anti-Islamic sentiment.<sup>25</sup> In the last two years, despite the democratic exuberance of the Arab Spring, anti-Islamic rhetoric found its way into the 2012 Republican presidential contest,<sup>26</sup> and spurned U.S. House of

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jurisdiction. Parry, *supra* note 17, at 32.

20. *Islamophobia*, ARAB AMERICAN INST., <http://www.aaiusa.org/page/Issues/Issue%20Briefs/Islamophobia.pdf> (last visited Nov. 20, 2011).

21. *Id.*; *Our Team*, ARAB AMERICAN INST., <http://www.aaiusa.org/pages/our-team> (last visited Nov. 15, 2012).

22. *See Islamophobia*, *supra* note 20 (charging the anti-Islam movement with creating “public hysteria” and stimulating efforts to safeguard the U.S. legal system from a hostile, Sharia takeover).

23. *See* ARAB AMERICAN INST. FOUND., PROFILING AND PRIDE: ARAB AMERICAN ATTITUDES AND BEHAVIOR SINCE SEPTEMBER 11 1 (2002), *available at* <http://www.aaiusa.org/reports/profiling-and-pride-arab-american-attitudes-and-behavior-since-september-11/>.

24. *Id.*

25. Editorial, *The Sharia Paranoia*, L.A. TIMES, May 16, 2011, at A12 (criticizing Americans for treating Muslim citizens like “subversive strangers” and arguing “that attitude is a bigger threat to American values than Sharia is”).

26. Devin Gordon, Chris Heath & Alan Richman, *A Pizza Party With Herman Cain*, GQ, Dec. 2011, <http://www.gq.com/news-politics/politics/201111/herman-cain-interview-alan-richman-chris-heath-devin-gordon> (quoting Cain saying, “one very well known Muslim voice” told him that “a majority of Muslims share extremist views.”).

Representatives investigations into Islamic terrorist threats.<sup>27</sup>

Early presidential campaign stump speeches appealed to grassroots anxiety about an impending Islamic “world domination.”<sup>28</sup> From 2010 to 2011, legislators in more than half of the state legislatures championed legislation to outlaw reference to or incorporation of Sharia law.<sup>29</sup> Far from being independent state efforts, the anti-Sharia and anti-international law proposals draw from the direction and finances of well-heeled, highly educated lobbyists and attorneys in Washington, D.C. and New York City.<sup>30</sup> These organizations have on their payrolls former U.S. Department of State assistant secretaries, retired military officers, former U.S. Congressmen and post-doctoral researchers from some of the top U.S. universities.<sup>31</sup> Credited as the author of the template legislation “American Laws for American Courts,” David Yerushalmi has been attributed as the muscle behind the movement.<sup>32</sup> Based out of Brooklyn, Yerushalmi considers himself an “expert on Islamic law” and insists that the United States is “vulnerable to the encroachment to Islamic law.”<sup>33</sup> There are several organizations funneling support toward passage of Yerushalmi’s legislation, including the Center for Security Policy, a D.C. based organization that aims to

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27. *The Extent of Radicalization in the American Muslim Community and that Community’s Response Before the H. Comm. on Homeland Security*, 112th Cong. (2011) (statement of Rep. Peter King, Chairman, H. Rep. Comm. on Homeland Security).

28. Elliott, *supra* note 4.

29. Raftery, *supra* note 1.

30. See, e.g., *Center Staff*, CTR. FOR SEC. POLICY, <http://www.centerforsecuritypolicy.org/index.xml> (last visited Nov. 20, 2011). The Center for Security Policy takes credit for New York-based opposition to Shariah law. Frank Gaffney, *Center’s Multi-Year Effort to Oppose Shariah Acknowledged by the New York Times*, CTR. FOR SEC. POLICY (Aug. 2, 2011), [http://www.centerforsecuritypolicy.org/p18782.xml?cat\\_id=300](http://www.centerforsecuritypolicy.org/p18782.xml?cat_id=300). Brigitte Gabriel, founder of Florida-based *ACT! for America*, commends passage of anti-Sharia laws in Tennessee and Arizona. *About ACT! for America*, *supra* note 3.

31. See *Center Staff*, *supra* note 30 (listing staff for the organization).

32. Elliott, *supra* note 4; see also *About Us*, LAW OFFICES OF DAVID YERUSHALMI, <http://www.davidyerushalmilaw.com/aboutus.php> (last visited Nov. 20, 2011) (detailing Yerushalmi’s biographical and professional history, including his expertise in national security and Islamic law).

33. Elliott, *supra* note 4.

“undermine the ideological foundations of totalitarianism and Islamist extremism with at least as much skill, discipline and tenacity as President Reagan employed against Communism to prevail in the Cold War.”<sup>34</sup> In short, these are well-orchestrated efforts to protect against a perceived threat to American law.

*B. The Threat Assessment: Possible Inroads for Sharia Law*

Proponents of anti-Sharia and anti-international law legislation argue that state courts should not enforce Sharia law when such enforcement could “violate the U.S. Constitution.”<sup>35</sup> Yerushalmi identifies three concerns regarding Sharia’s place in state courts: (1) granting comity to a foreign judgment, (2) choice of law provisions of contracts, and (3) forum and venue determinations for U.S. clients with Islamic contracting partners.<sup>36</sup> In the first circumstance, a state may be in a position to recognize and enforce a decision made under Sharia law that fails to recognize U.S. Constitutional rights and would effectively support regimes that are “al Qaeda-like in the Muslim world,” or otherwise militant proponents of religious law.<sup>37</sup> The second worry addresses the scenario wherein a court, based upon a private contracting decision, has to decide whether to enforce a contract stipulating resolution in a foreign jurisdiction.<sup>38</sup>

In this scenario, the court may have to enforce a judgment of law that is “intrinsically offensive to our way of life and our state and federal constitutions.”<sup>39</sup> Lastly, there is the possibility that the doctrine of *forum non conveniens* would require a state court to dismiss the case and allow it to proceed in a foreign

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34. *About Us*, CTR. FOR SEC. POLICY, [http://www.centerforsecuritypolicy.org/about\\_us.xml](http://www.centerforsecuritypolicy.org/about_us.xml) (last visited Nov. 20, 2011).

35. Omar Sacirbey, *Islamic Law Ban in State Courts Petitioned by Muslims*, RELIGION NEWS SERV. (Sept. 12, 2011, 10:19 PM), [http://www.huffingtonpost.com/2011/09/12/muslims-ban-islamic-law\\_n\\_959104.html](http://www.huffingtonpost.com/2011/09/12/muslims-ban-islamic-law_n_959104.html).

36. David Yerushalmi, *Criticism of the Oklahoma Amendment Banning Shariah From State Courts: Legitimate or Ill-Considered?*, CTR. FOR SEC. POLICY (Nov. 29, 2010), [http://www.centerforsecuritypolicy.org/p18588.xml?genre\\_id=3](http://www.centerforsecuritypolicy.org/p18588.xml?genre_id=3).

37. *Id.*

38. *Id.*

39. *Id.*

forum, potentially subjecting the American parties to resolve their claims under Sharia law and its less than adequate rights protections.<sup>40</sup> Based upon these concerns, proponents insist that it is well within the province of the states to limit the laws that would compromise its citizens' constitutionally protected rights.<sup>41</sup>

Not surprisingly, there is a deep divide between Yerushalmi and those who oppose state prohibitions on international law.<sup>42</sup> For instance, briefing parties for *Awad v. Ziriox* alleged that the Oklahoma amendment violated the First Amendment to the U.S. Constitution.<sup>43</sup> Appellee, Muneer Awad, serves as executive director of the Oklahoma chapter of the Coalition for American Islamic Relations, and is also represented by counsel from the American Civil Liberties Union.<sup>44</sup> Awad, along with those filing amicus briefs,<sup>45</sup> defended Sharia law and argued in a multifarious manner—some suggesting that Sharia is not a uniform system of law<sup>46</sup>—others insisted that Sharia offers the

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40. See *id.* (noting a Massachusetts court refused removal to Saudi Arabia for a tort case brought by an American woman against a Saudi company because of “the fact that [S]haria discriminates against women and non-Muslims”)

41. See *id.*; see also Raftery, *supra* note 1 (including language from state proposals that excludes international laws, including Sharia, that would compromise rights under the Constitution).

42. Compare AMERICAN CIVIL LIBERTIES UNION, NOTHING TO FEAR: DEBUNKING THE MYTHICAL “SHARIA THREAT” TO OUR JUDICIAL SYSTEM 1 (2011) (arguing that proposed laws limiting international law are incorrectly asserting that “Sharia law’ is somehow taking over our courts,” and “are based on misinformation and a misunderstanding of how our judicial system works”), and *Islamophobia*, *supra* note 20 (describing proposed legislation concerning Sharia law as a response to a “fictional threat”), with Yerushalmi, *supra* note 36 (arguing that the prohibitions on Sharia law are attempts to “prevent an objectively knowable legal-political-military doctrine and system which inherently violates the public policy of the state to protect and to preserve the liberties guaranteed under the state and federal constitutions”).

43. See Plaintiff-Appellee Awad’s Supplemental Brief, *supra* note 7, at 1–2.

44. *Awad v. Ziriox*, 670 F.3d 1111, 1115, 1119 (10th Cir. 2012).

45. See generally Amicus Curiae Brief in Support of Plaintiff-Appellee, *supra* note 9, at 4–5 (describing the terms “Sharia Law” and “Islamic law” as “practically meaningless”); Brief of Amici Curiae the American Jewish Committee et al. in Support of Plaintiff-Appellee, *Awad v. Ziriox*, 670 F.3d 1111, No. 10-6273 (10th Cir. 2012) (defending Sharia law under the *Lemon* test).

46. See *Awad v. Ziriox*, 754 F. Supp. 2d 1298, 1306 (W.D. Okla. 2010) (“[P]laintiff has presented testimony that ‘Sharia Law’ is not actually ‘law,’ but is religious traditions



basis for democratic constitutionalism.<sup>47</sup> And in opposition to the Oklahoma “Save our State” amendment, the American Civil Liberties Union and the Council on American-Islamic Relations both argued that Sharia prohibitions infringe upon the U.S. Constitutional right to free exercise of religion.<sup>48</sup>

On appeal from the United States District Court for the Western District of Oklahoma, the State of Oklahoma argued Awad did not demonstrate sufficient evidence of injury to have standing in federal court, that his claims were not ripe, and that he failed to show that the “Save our State” amendment actually violates the First Amendment Establishment Clause.<sup>49</sup> The state’s argument rests upon the assumption that Oklahoma citizens have the right to forbid certain sources of law from the state courts.<sup>50</sup> The Tenth Circuit ultimately found for the appellee, finding ripe the First Amendment claim regarding the anti-Sharia provisions of the Oklahoma amendment.<sup>51</sup> The Court found that Awad would be harmed by the amendment because it “*expressly* condemns his religion and exposes him and other Muslims in Oklahoma to disfavored treatment . . . establish[ing] the kind of direct injury-in-fact necessary to create Establishment Clause standing.”<sup>52</sup> The Tenth Circuit also found, on the basis of the Establishment Clause, that the district court did not abuse its discretion when

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that provide guidance to plaintiff and other Muslims regarding the exercise of their faith.”); *see also* Noah Feldman, *Why Shariah?*, N.Y. TIMES MAGAZINE, Mar. 16, 2008, available at <http://www.nytimes.com/2008/03/16/magazine/16Shariah-t.html?pagewanted=all> (characterizing Sharia law as more than legal guidelines).

47. *See* Feldman, *supra* note 46 (stating that to Islamist politicians who support its use, Sharia “means establishing a legal system in which God’s law sets the ground rules, authorizing and validating everyday laws passed by an elected legislature . . . and is expected to function as something like a modern constitution”).

48. *See* Plaintiff-Appellee Awad’s Supplemental Brief, *supra* note 7 (listing both the American Civil Liberties Union and the Council on American Islamic Relations on the brief); *see also id.* at 1–6.

49. *Awad v. Ziriax*, 670 F.3d 1111, 1119–20 (10th Cir. 2012).

50. *See generally* Parry, *supra* note 17, at 1, 3–4 (noting that voters decided to adopt the “Save Our State Amendment” that permitted the use of laws of another state “provided the law of the other state does not include Sharia Law” and arguing that the goal of the amendment is to “redefine the scope of judicial power”).

51. *Awad*, 670 F.3d at 1124.

52. *Id.* at 1123.

it issued a preliminary injunction preventing enforcement of the amendment.<sup>53</sup> The Tenth Circuit reasoned that the amendment sought to singularly prohibit Sharia law from judicial consideration, rather than prohibiting consideration of any religious law.<sup>54</sup> By noting the Sharia-focused aim of the amendment, the court indicated that the amendment was prejudicial against Sharia law and did not provide the same exclusion of other religious laws.<sup>55</sup> The Court made a logical distinction between the provisions that specifically excluded Sharia law and those provisions that excluded other kinds of foreign or international law.<sup>56</sup> By making this distinction, the Court pointed to the two potential areas of proposed exclusion: Sharia law and other kinds of international law.<sup>57</sup> *Awad v. Ziriax* addresses only the Establishment Clause issues raised by the Sharia-specific provisions.<sup>58</sup> However, the remaining language of the Oklahoma act may also raise potential problems with the Supremacy Clause of the Constitution.<sup>59</sup>

### *C. Constitutional History and Precedent*

The Constitution grants to the President the authority “by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.”<sup>60</sup> The Presidential power to negotiate treaties comes coupled with the Supremacy Clause, which states that “the Judges in every

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53. *Id.* at 1119.

54. *Id.* at 1129.

55. *See id.* at 1128–29.

56. *See id.*

57. The amendment bans only one form of religious law—Sharia law. Even if we accept Appellants’ argument that we should interpret ‘cultures’ to include ‘religions,’ the text does not ban all religious laws. The word ‘other’ in the amendment modifies both ‘nations’ and ‘cultures.’ Therefore, if we substituted the word ‘religions’ for ‘cultures,’ the amendment would prohibit Oklahoma courts from ‘look[ing] to the legal precepts of other . . . religions.’ The word ‘other’ implies that whatever religions the legislature considered to be part of domestic or Oklahoma culture would not have their legal precepts prohibited from consideration, while all others would. Thus, the second portion of the amendment that mentions Sharia law also discriminates among religions. *Id.*

58. *Id.* at 1119.

59. *See* U.S. CONST. art. VI, cl. 2.

60. U.S. CONST. art. II, § 2, cl. 2.

State shall be bound” by the laws of the United States, including all Treaties.<sup>61</sup> These provisions reflected the Framers’ concern with maintaining the integrity of the Union and provision of executive authority over and against the states.<sup>62</sup> In *Marbury v. Madison*, the U.S. Supreme Court addressed the proper constitutional boundaries of the American federal system, asserting its jurisdiction over Constitutional interpretation and identification of the law.<sup>63</sup> Chief Justice Marshall notably argued that when there arises a conflict between laws, that the Court was responsible for reconciling the conflict.<sup>64</sup> In addition to establishing the Court as gatekeeper of federal law, in *Missouri v. Holland*, the Court held that the federal government has authority to enforce treaties over and against state law.<sup>65</sup> The generally deferential posture toward federal enforcement of treaty law rests upon the necessity of having a uniform policy between the United States and other nations.<sup>66</sup> In *Missouri v. Holland*, the issue was upholding the U.S. obligation to England

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61. U.S. CONST. art. VI, cl. 2.

62. Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 411 (1998) (noting that the Founders viewed the Presidential authority to negotiate treaties as colored by the presumption of a “clear distinction between domestic and foreign affairs . . . that helped ensure, in the Founders’ minds, that the national government’s power would be limited and, correspondingly, that states’ rights would be protected”); see also Jordan J. Paust, *Medellin, Avena, The Supremacy of Treaties, and Relevant Executive Authority*, 31 SUFFOLK TRANSNT’L L. REV. 301, 318–23 (2008) (discussing the supremacy of treaties over and against state authority, noting that “generations of federal and state judges have consistently recognized the overriding domestic reach of treaty-based law and law radiating from other international agreements to matters that otherwise might have been the prerogative of the state”). Paust includes references to both Federal and State case law, dated as early as 1792, discussing instances where treaty law trumped areas of law traditionally thought of as “the prerogative of the state.” See, e.g., *id.* at 320 nn.76 & 79.

63. See *Marbury v. Madison*, 1 U.S. 137, 177 (1803). In *Marbury*, Chief Justice Marshall famously quipped that “it is emphatically the province and duty of the judicial department to say what the law is.” *Id.* at 177.

64. *Id.*

65. 252 U.S. 416, 434 (1920).

66. THE FEDERALIST NO. 53, at 297–98 (James Madison) (E.H. Scott ed., 1898) (“How can foreign trade be properly regulated by uniform laws, without some acquaintance with the commerce, the ports, the usages, and the regulations of the different States? . . . These are the principal objects of Federal Legislation, and suggest most forcibly, the extensive information which the representatives ought to acquire.”).

in protecting certain species of birds.<sup>67</sup> In order to maintain credibility with its British counterparts, the federal government required authority to fulfill its obligations: namely, enforcing the treaty among the several states.<sup>68</sup> However, the treaty power and international law's relation to domestic law are two distinct concepts. According to Brilmayer, *Missouri v. Holland* reflects the idea that "the best way to understand treaty power is that the states must adhere to treaties not because international law so requires, but because by adopting a treaty the federal government is engaging in the exercise of its foreign relation power."<sup>69</sup> This idea follows the logic that the Supremacy Clause, coupled with the presidential power to engage in foreign relations and to negotiate treaties renders the resultant treaties binding upon the states.<sup>70</sup>

Treaties are international law, as well as the law of nations. In the landmark *Paquete Habana* case, the Supreme Court stated without qualification, "[i]nternational law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction."<sup>71</sup> *The Paquete Habana* formalized what most argue was the prevailing assumption about international law, namely, under the Constitution, the federal government should have "control over the nation's international law obligations."<sup>72</sup>

Those favoring an expansive reading of the decision cite Justice Gray's explanation that "where there is no treaty and no controlling executive legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."<sup>73</sup> The "customs and usages of civilized nations" refer not to treaty

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67. *Holland*, 252 U.S. at 430–32.

68. *Id.* at 434–35.

69. Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 313 (1994).

70. See U.S. CONST. art. VI, cl. 2., art. II, § 2, cl. 2; see also *Constitutional Powers of the President*, in THE PRESIDENCY A TO Z (M. Nelson ed. 2003), available at [http://www.cqpress.com/context/constitution/docs/constitutional\\_powers.html](http://www.cqpress.com/context/constitution/docs/constitutional_powers.html).

71. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

72. Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT'L L. 265, 271 (2001) (quoting Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law after Erie*, 66 FORDHAM L. REV. 393, 412 (1997)).

73. *The Paquete Habana*, 175 U.S. at 700.

law but to the “unwritten law that governs the relations among states and ‘results from a general and consistent practice of states followed by them from a sense of legal obligation.’”<sup>74</sup> According to some, Judge Gray’s statement acknowledges the binding character of customary international law, placing it within the scope of the Supremacy Clause.<sup>75</sup> This reading follows the Restatement (Third) on Foreign Relations, arguing that courts are bound by customary international law, apart from whether there exists a comparable domestic law.<sup>76</sup>

Alternatively, at least a handful of scholars argue that Congress need only pass a law to relieve the United States from its obligation to abide by customary international law.<sup>77</sup> Preventing judicial consideration and enforcement of treaties would be facially unconstitutional under the Supremacy Clause.<sup>78</sup> Further, the proposed state laws seem positively to affirm federal authority to navigate and negotiate international law.<sup>79</sup> Negatively, however, the international exclusionary

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74. *Id.*; Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Position and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495, 1497 (2011) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(1)(c)(2) (1987)).

75. See, e.g. JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 5–8 (1st ed. 1996) [hereinafter PAUST, INTERNATIONAL LAW] (explaining the theoretical basis of the link between customary international law and the Supremacy Clause).

76. See *id.* at 6–7 (arguing that customary international law is “federal substantive law” and therefore equally binding upon the states as a law passed by Congress or a treaty negotiated by the executive branch).

77. Ku, *supra* note 72, at 266–68 (providing a brief survey of the debate between revisionists and nationalists). According to Ku, Harold Koh is among those who advance the nationalist perspective by arguing that CIL is federal law. *Id.* at 266 (citing Harold Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998)). Ku cites to Curtis Bradley and Jack Goldsmith, revisionists, for the proposition that CIL must be directly incorporated before it is binding upon domestic courts. Ku, *supra* note 72, at 266–67 (citing Curtis A. Bradley & Jack A. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997)).

78. The Supremacy Clause clearly states all treaties are the “supreme Law of the Land.” U.S. CONST. art. VI, cl. 2. See also *The Paquete Habana*, 175 U.S. at 700 (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . .”).

79. See H.J.R. 1056, 52d Leg., 2d Sess. (Okla. 2010) (stipulating that “the courts of this state uphold and adhere to the law as provided in federal and state constitutions,” which would include the Supremacy Clause).

requirements of the state law, if deemed Constitutional, may cause state judicial decision-making to undesirably interfere with or undermine national foreign policy.<sup>80</sup> If the state laws, in fact, intend to exclude CIL from state courts, then it is prudent to consider the debate regarding the status of CIL in the United States within the context of treaties and the laws of the United States under the Supremacy Clause.<sup>81</sup>

*D. Treaties: Self-executing, Non-self-executing*

Consideration of the Supreme Court's distinction between self and non-self-executing treaties aids in considering the scope of these proposed anti-Sharia state laws. However, this discussion pertains only narrowly to whether a state must abide by a treaty that is non-self-executing. In *Foster v. Neilson*, Chief Justice Marshall described the difference between self and non-self-executing treaties.<sup>82</sup> The case involved settling a dispute about title to land in modern-day Florida.<sup>83</sup> Justice Marshall described the terms of an 1819 treaty between Spain and the United States by defining the principle by which two nations agree and bind one another to certain standards:

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a *different* principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any

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80. See, e.g., Parry, *supra* note 17, at 9 (“Under a straightforward textual reading, the amendment appears to ban recognition of judgments rendered by the courts of other countries if those judgments also rely on the law of another country (or on one of the other proscribed sources of law).”).

81. See generally Vázquez, *supra* note 74, at 1497–1501 (questioning whether the United States can prohibit courts from giving effect to CIL).

82. *Foster v. Nielson*, 27 U.S. 253, 314 (1829).

83. See *id.* at 299–300.

legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.<sup>84</sup>

Chief Justice Marshall's insistence that a treaty must be executed by the law has been long criticized and discussed, not for its description of the diplomatic process, but rather for the confusion rendered regarding the Court's application of and enforcement of international law.<sup>85</sup> Critics of Justice Marshall's distinction note that the Constitution does not require that a treaty be self-executing in order to be subject to the Supremacy Clause and therefore binding upon the states.<sup>86</sup> Those sympathetic to the inherently binding character of treaties point to the Restatement (Third) of Foreign Relations Law, indicating that a treaty ought to be treated as binding unless the instruments explicitly "require domestic implementing legislation or otherwise express an intention that they not be self-operative."<sup>87</sup> The Restatement suggests a presumption that all treaties are self-executing and can be equated to providing international law the force of domestic federal law.<sup>88</sup> Since the Constitution grants sole authority to the executive to make treaties, the Constitution does not require Congress to follow its ordinary legislative processes in order for the treaty instrument to have the character and enforceability of domestic federal law.<sup>89</sup> Thus, non-self-executing treaties look more like CIL, which under the broad reading of *Paquete Habana*, would be considered

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84. *Id.* at 314 (emphasis added).

85. *See, e.g.*, PAUST, INTERNATIONAL LAW, *supra* note 75, at 57 ("[I]t is worth noting that other writers have rightly recognized that Chief Justice Marshall's related criterion of 'contract . . . to perform a particular act' does 'not itself provide a workable test to determine whether a provision in a treaty requires legislative action.'" (ellipses in original, citations omitted)).

86. *Id.* at 58–69.

87. *Id.* at 59, 73 n.92.

88. *Id.* at 59.

89. *Id.* ("The Senate and President also have an express power to make a treaty, which is supreme law of the land, and the mere existence of a concurrent power does not obviate either the existence or the exercise of another.").

international law and therefore law of the United States.<sup>90</sup> For Paust, the judicially created category of treaties is nonsensical within the constitutional framework.<sup>91</sup> He argues that “[t]he distinction found in certain cases between ‘self-executing’ and ‘non-self-executing’ treaties is a judicially invented notion that is patently inconsistent with express language in the Constitution affirming ‘all Treaties . . . shall be the supreme Law of the Land.’”<sup>92</sup> Proponents of this view believe treaties should be presumed to be self-executing, linking the obligation to affirm the supremacy of all treaties to the Court’s practice of using CIL to inform and enforce domestic law.<sup>93</sup> Professor Paust notes that even though “the self-executing treaty doctrine does not apply to customary international law,” courts may legitimately use and incorporate non-self-executing treaties indirectly “[b]ecause non-self-executing treaties often are evidence of customary international law, these treaties can affect the municipal law of the United States.”<sup>94</sup> Importantly, the distinction between self-executing and non-self-executing treaties must always be viewed in light of the Constitution’s language that “all Treaties” are binding.<sup>95</sup>

*E. The Status of CIL within American Jurisprudence*

Lea Brilmayer puts her finger on the problem of CIL with the following syllogism:

- 1.[If a]ll federal laws preempt inconsistent state law under the Supremacy Clause; [and]
- 2.[If i]nternational law is federal law;
- 3.[Then i]nternational law preempts contrary state

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90. *Id.* at 7, 64 (“[E]ven non-self-executing treaties can operate through the supremacy clause to prevail over inconsistent state law. . .”).

91. *Id.* at 51.

92. *Id.*

93. *Id.* at 59.

94. *Id.* at 63.

95. See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land . . .”) (emphasis added).



law.<sup>96</sup>

There is some debate among jurisprudential scholars about CIL's authority within domestic courts.<sup>97</sup> The extent to which the Oklahoma amendment and similar state efforts may constitutionally preclude judicial consideration of CIL depends on the position federal courts take.<sup>98</sup> Those who argue CIL is federal law treat CIL as federal law, and therefore within the province of federal courts.<sup>99</sup> Conversely, Vazquez argues CIL is general law, and therefore not federal law and not binding on states via the Supremacy Clause or otherwise.<sup>100</sup>

The Supremacy Clause serves as a proving ground for the viability of the state anti-international law proposals. There are two major concepts relevant to this debate, the content of CIL and the status of federal common law.<sup>101</sup> While the definition of CIL is clear enough,<sup>102</sup> for purposes of this article, it is prudent to more closely define federal common law. The definition of federal common law bears upon whether states ought to treat CIL as federal law subject to the Supremacy Clause or as a more general kind of law without the same obligation.<sup>103</sup>

### III. THE STATES AND CIL

While the federal judiciary ultimately binds the states, the states typically maintain authority to control the substantive rules for “tort, contract, commercial transactions, crimes, property, wills, and family [law].”<sup>104</sup> Further, states have the

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96. Brilmayer, *supra* note 69, at 295.

97. *See generally* Vázquez, *supra* note 74, at 1497–1501.

98. Vázquez, *supra* note 73, at 1500–01.

99. *See id.* at 1497–98 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(1)(c)(2) (1987)).

100. *See id.* at 1498.

101. *See* Vázquez *supra* note 74, at 1498–1500 (distinguishing between three approaches to understanding CIL: the modern, intermediate, and revisionist).

102. *Id.* at 1497 (“[T]he unwritten law that governs the relations among states and ‘results from a general and consistent practice of states followed by them from a sense of legal obligation.’”) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(1)(c)(2) (1987)).

103. *See id.* at 1522–38.

104. *See* JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 88 (2005). *But see* PAUST,

right to employ force in the case of civil war and states may also use non-violent measures to incrementally counter unfavorable federal law.<sup>105</sup> And, while states maintain this authority, they also have authority to enforce greater protections for their citizens in the event the federal law does not do so.<sup>106</sup> Consider the case where some states provide the right for same-sex partners to be recognized as dependents or married.<sup>107</sup> Under these circumstances, the federal government does not acknowledge such a right, but the states are free to do so.<sup>108</sup>

In this way, one may say that states maintain a considerable degree of latitude to protect the rights of their citizens beyond those rights provided by the Constitution. However, state courts operate under the thumb of the federal courts in so far as the Supremacy Clause requires states to “continue to observe existing federal standards until they are expressly reversed by the Supreme Court.”<sup>109</sup> And while the states may influence the Supreme Court’s decisions over time, the Constitution generally prohibits the states from enacting proposals that would violate the preemptive character of federal law.<sup>110</sup>

Some scholars debate the extent to which CIL currently falls within the jurisdiction of federal or state law. Central to this discussion rests the notion that some scholars, in spite of case law to the contrary, insist that CIL is not binding upon the states and therefore CIL lacks the preemptive character of federal law under the Supremacy Clause.

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INTERNATIONAL LAW, *supra* note 75, at 384 n.72 (noting that treaties may override those areas of the law traditionally reserved for the states).

105. GARDNER, *supra* note 103, at 88–89.

106. *Id.* at 88

107. *See, e.g.*, Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 959–64 (Mass. 2003) (assessing the right to same-sex marriage under the Massachusetts Constitution).

108. While the Ninth Circuit has found unconstitutional a California proposition opposing same-sex marriage, this holding is not yet binding on states outside of the jurisdiction. *See Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012).

109. GARDNER, *supra* note 104, at 108.

110. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 225–26 (2000) (discussing the “overlap” between federal and state law and the Constitutional grant of certain exclusive federal powers).

### A. CIL as Federal Law

The traditional position long held by those including Harold Koh, is that that CIL is a part of domestic American law.<sup>111</sup> From this perspective, like the Court in *The Paquete Habana*, “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”<sup>112</sup> Citing references to both Framers and early case law, this perspective insists that CIL has always been federal law.<sup>113</sup>

In a paper addressing one of the more radical approaches to the status of CIL, Koh criticizes a more radical approach, and insists upon the basic tenants of the traditional position.<sup>114</sup> He notes that the early Supreme Court spent a significant amount of time addressing issues related to the law of nations.<sup>115</sup> He argues that U.S. “history and doctrine, separation of powers, federalism, and democratic values” all undermine the revisionist argument and affirm the traditional viewpoint.<sup>116</sup>

Following this argument, Koh first insists that Bradley and Goldsmith misread *Erie Railroad Co. v. Tompkins* and *Banco Nacional de Cuba v. Sabbatino*.<sup>117</sup> Specifically, Koh argues that Bradley and Goldsmith read *Erie* to have “effect[ed] a near complete ouster of federal courts from their traditional role in construing customary international law norms.”<sup>118</sup> The traditional view argues that CIL is in no way related to the kind of law at issue in *Erie*.<sup>119</sup> Since Congress maintains the ability

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111. Harold Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1824 (1998).

112. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

113. Vázquez, *supra* note 74, at 1516.

114. Koh, *supra* note 111, at 1824–26.

115. *Id.* at 1825 & n.8 (citing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815)).

116. *Id.* at 1827 (citing Bradley & Goldsmith, *supra* note 77, at 820–21) (arguing that Bradley and Goldsmith failed to substantiate their claims).

117. *Id.* at 1830.

118. *Id.* at 1831.

119. *See id.* at 1831–33 (pointing out that *Erie* dealt with a conflict of state and federal law, not international law).

to define and punish offenses under the law of nations, the federal courts also retain the right to “make federal common law rules with respect to international law.”<sup>120</sup> Further, Koh insists that applying the principles of *Erie* to international law would have the effect of creating “unreviewable” state court decisions on matters of international law.<sup>121</sup>

Koh observes that the *Erie* distinction between state and federal law was clarified by the Court in *Sabbatino*.<sup>122</sup> *Sabbatino* affirmed the principle that it is well within the province of the Court to determine questions of CIL, and that the Court exercised caution to avoid the possibility of “divergent and perhaps parochial state interpretations.”<sup>123</sup> Koh notes that the “proper” take on *Erie* and *Sabbatino* is that federal courts can incorporate CIL into federal common law unless a federal directive precludes it.<sup>124</sup>

Secondly, Koh reads case law after *Sabbatino* as generally coinciding with the Tenth Amendment.<sup>125</sup> Unlike Bradley and Goldsmith, who argue that by applying CIL federal courts circumvent the legislative process, Koh argues that the Tenth Amendment never afforded the states authority over such matters.<sup>126</sup> Furthermore, the power to negotiate treaties and the like was “specifically removed from the states by other constitutional provisions.”<sup>127</sup> Koh argues that when the Framers delegated powers to Congress and the Executive regarding international law, it would be only expected that federal, rather

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120. *Id.* at 1831. Koh cites examples of this power, including the Alien Tort Claims Act and Piracy Act. *See id.* at 1831 n.40; Alien Tort Claims Act, 28 U.S.C. § 1350 (1994); Piracy Act, Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112, 113–14; Piracy Act, Act of Apr. 30, 1790, § 28, 1 Stat. 118.

121. Koh, *supra* note 110, at 1832 (citing Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 741–43 (1939)).

122. *Id.* at 1832–33.

123. *Id.* at 1834 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964)) (discussing Judge Jessup’s discussion regarding *Erie*).

124. *Id.* at 1835.

125. *Id.* at 1848.

126. *Id.*

127. *Id.*

than state, judges would have authority over such matters.<sup>128</sup> Koh insists that to follow Bradley and Goldsmith is to create “an unprecedented new state role in the making, interpretation, and incorporation of international law norms,” one that is unwarranted based upon the Constitution and federal case law.<sup>129</sup>

At least one scholar, while affirming CIL as federal law, denies that it is binding or preemptive of state law in all circumstances.<sup>130</sup> Professor Vázquez’s perspective echoes some of Koh’s concerns and adds some of his own worries to the discussion. Because this article labors under the presumption that the state legislation aims to avoid conflict with the Constitution, it assumes that states like Oklahoma seek to validly exclude some kind of international law. Should the states adopt Koh’s position, they would be hard pressed under the Constitution to justify any blanketed state exclusion of international law. Therefore, one may first consider the divergent perspectives to consider what the states have in mind.

Professor Vázquez holds that some, but not all, CIL binds the states and the federal Executive.<sup>131</sup> Vázquez refutes the Bradley and Goldsmith critique that if CIL is federal common law, then all CIL is federal common law.<sup>132</sup> The fault of this all-or-nothing approach can be sourced in a misunderstanding of federal common law generally.<sup>133</sup> CIL is not like federal common

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128. *Id.* at 1850.

129. *Id.* at 1852; *see also* Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS L. REV. 205, 208–09 & nn.7–8 [hereinafter Paust, *In Their Own Words*] (detailing evidence from Framers debates, early Supreme Court decisions, and related documents supporting the historical acceptance of CIL as binding upon the states).

130. Michael D. Ramsey, *International Law as Non-preemptive Federal Law*, 42 VA. J. INT’L L. 555, 572–73 (2001–2002). *See generally* Vázquez, *supra* note 74, at 1515 (arguing that what relates adherents of the modern position of CIL is an agreement that it binds states, regardless of its impact on federal law, but Vázquez believes that state law is only preempted when CIL imposes obligations on state officials).

131. Vázquez, *supra* note 74, at 1501.

132. *Id.* at 1501, 1515.

133. *See id.* at 1501 (“set[ting] forth the affirmative case for the modern position based on constitutional structure, original intent, and pre- and post-*Erie* doctrine . . .”).

law because it is not created by federal judges and Congress cannot “unilaterally change or eliminate it.”<sup>134</sup> When federal judges apply CIL, they are recognizing norms on the basis of *opinio juris*,<sup>135</sup> not on the basis of policy preferences.<sup>136</sup> The practice of applying CIL follows the practice of applying common law generally, and when appropriate, federal courts can and should apply CIL as part of the federal common law.<sup>137</sup>

Vázquez treats CIL like federal law because “[v]iolations of international law by the States are attributable to the nation as a whole.”<sup>138</sup> Because the nation bears the repercussions of the several states’ actions, CIL must be federal law because of the Founders’ concern that “the peace of the WHOLE ought not be left at the disposal of a PART.”<sup>139</sup> The Founders, Vázquez observes, wanted the federal government be able to preserve the union and avoid schismatic state intermeddling in foreign policy.<sup>140</sup> Further, given the obvious and intended hurdles involved in the legislative law-making process, the Framers would not have intended to require a traditional law-making process to implement international law.<sup>141</sup> Placing the nation’s security in the hands of the burdensome state law-making

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134. See Ramsey, *supra* note 130, at 558. See generally Vázquez, *supra* note 73, at 1513–14 (“[M]odern position has never maintained that all of customary international law is federal law insofar as it is sought to be applied to invalidate the acts of foreign states or of the federal government.”).

135. See BLACK’S LAW DICTIONARY 1201 (9th ed. 2009) (“The principle that for conduct or a practice to become a rule of customary international law, it must be shown that nations believe that international law (rather than moral obligation) mandates the conduct or practice.”); see also *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (“The law of nations ‘may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.’”) (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61, 5 L.3d.57 (1820)).

136. Vázquez, *supra* note 74, at 1511.

137. Beth Stephens, *Sosa, the Federal Common Law and Customary International Law: Reaffirming the Federal Courts’ Powers*, 101 AM. SOC’Y INT’L L. PROC. 269, 270 (2007).

138. Vázquez, *supra* note 74, at 1517.

139. *Id.* at 1517–18 (quoting THE FEDERALIST NO. 80, at 444 (Alexander Hamilton) (Clinton Rossiter ed., 1999)).

140. *Id.* at 1518–19.

141. *Id.* at 1520.

process would place the entire nation in a precarious position with respect to maintaining a coherent and enforceable foreign policy.<sup>142</sup> For Vázquez, binding CIL must be self-executing because otherwise the domestic law-making process would impose structural inhibitions to CIL enforcement.<sup>143</sup>

Vázquez argues that CIL has always been, even before *Erie*, subject to Supreme Court review.<sup>144</sup> Prior to *Erie*, while state courts made decisions relating to CIL, these decisions were part of the general common law, and this pre-*Erie* common law significantly differs from contemporary state common law.<sup>145</sup> Vázquez cites pre-*Erie* case law to suggest that all CIL decisions were reviewable and that the only two positions with respect to the state role in CIL decisions were: “state-to-state branch of customary international law had the force of preemptive federal law and that it had the status of general common law.”<sup>146</sup>

Since *Erie*, Vázquez, like the Bradley and Goldsmith,<sup>147</sup> has looked to *Banco Nacional de Cuba v. Sabbatino* to properly characterize CIL.<sup>148</sup> In *Sabbatino*, the Court considered the act of state doctrine, the principle that “precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.”<sup>149</sup> For Vázquez, even though the *Sabbatino* court recognized that limits of CIL, the Court’s dicta citing then Professor Philip C. Jessup supports the notion that CIL is federal law.<sup>150</sup>

However, Vázquez argues that CIL is not universally

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142. *See id.* at 1519–20.

143. *Id.* at 1520–21.

144. *Id.* at 1522, 1525–26, 1532–33.

145. *Id.* at 1523. Note also how this follows with the notion that CIL is not the same as regular common law. *See id.*

146. *Id.* at 1525–26.

147. *See infra* note 163–93.

148. Vázquez, *supra* note 74, at 1535.

149. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 400–01 (1964).

150. Vázquez, *supra* note 74, at 1535–36; *Sabbatino*, 376 U.S. at 425; Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International law*, 33 AM. J. INT’L L. 740, 743 (1939) (“Any question of applying international law in our courts involves the foreign relations of the United States and can thus be brought within a federal power.”).

binding on the states because the constitution gives the President of the authority to execute foreign policy and to recommend policies to Congress.<sup>151</sup> Specifically, the Constitution grants to the President the “Power, by and with the Advice and Consent of the Senate, to make Treaties.”<sup>152</sup> This approach aims to dash Bradley and Goldsmith’s hopes that *Sabbatino* stands for the proposition that CIL is not federal law.<sup>153</sup>

Vázquez also looks to *Sosa v. Alvarez-Machain* as demonstration that CIL is federal law and therefore binding on the states.<sup>154</sup> In *Sosa*, the Court considered whether Alvarez-Machain had a cause of action for certain CIL violations under the Alien Tort Statute,<sup>155</sup> including his abduction from Mexico for a criminal trial in the United States.<sup>156</sup> The Court held that Alvarez-Machain did not have a right of action for the alleged CIL violations.<sup>157</sup> On this basis, Vázquez insists the Court simply did not acknowledge a particular cause of action but in no way diminished CIL as federal law.<sup>158</sup> Vázquez stresses that *Sosa* did not directly address the status of CIL as federal or state law, but the Court did recognize that federal common law could, in some circumstances, recognize a cause of action for some CIL violations.<sup>159</sup> Because the Court recognized Jessup’s view on CIL, Vázquez argues that the Court came just shy, if not functionally agreeing with his position.<sup>160</sup> While Vázquez concedes that CIL does not garner blanketed treatment as preemptive federal law, enforcement of preemptive CIL norms is possible.<sup>161</sup> In applying CIL as binding federal law, the Court ought follow the requirements set forth in *Sosa*, including

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151. Vázquez, *supra* note 74, at 1545–46.

152. U.S. CONST. art. II, § 2, cl. 2.

153. See Vázquez, *supra* note 74, at 1538–46 (discussing how *Sabbatino* stands for the notion that CIL is sometimes federal law, but not always).

154. *Id.* at 1546–47.

155. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697 (2004); 28 U.S.C § 1350 (2006).

156. *Sosa*, 542 U.S. at 697.

157. *Id.*

158. Vázquez, *supra* note 74, at 1546–47.

159. *Id.* at 1550.

160. *Id.* at 1553–54.

161. *Id.* at 1622–23.



demands for clarity and breadth of acceptance.<sup>162</sup>

*B. The Revisionists: CIL is not federal law*

In opposition to both the traditional perspective and Vázquez, Curtis Bradley, Jack Goldsmith, and David Moore, take issue with the notion that CIL “automatically” is federal law and therefore CIL provides both a basis for federal question jurisdiction and CIL can be used to preempt state law and maybe even executive branch and federal legislation.<sup>163</sup> For them, prior to *Erie*, common law was not federal law and lacked the status applied to federal law under the Supremacy Clause.<sup>164</sup> Since common law lacked federal status, federal court interpretations did not bind state courts.<sup>165</sup>

*Erie*, then, reflected three principles: First, federal common law requires a federal source.<sup>166</sup> Second, it must be “interstitial” in that “courts are to develop it only in retail fashion to fill in the gaps, or interstices, of federal statutory or constitutional regimes.”<sup>167</sup> Third, federal common law making is a process that derives law from extant law, not by judicial policy decisions.<sup>168</sup> Based upon these three principles, federal common law is limited in scope and always maintains a relationship with a federal source.

While each of these principles shape this perspective, the requirement that all federal common law have a federal source instructs their view on CIL’s proper place.<sup>169</sup> Accordingly, Bradley takes issue with the traditional interpretation of *Paquete*.<sup>170</sup> Contrary to the notion that international law included CIL, he argues that in order to be incorporated into

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162. *Id.*

163. Curtis A. Bradley et al., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 872 (2007).

164. *Id.* at 875.

165. *Id.*

166. *Id.* at 878–80.

167. *Id.* at 880.

168. *Id.*

169. *See id.* at 878–81 (explaining the three principles with emphasis on federal common law requiring a federal source).

170. *Id.* at 883.

federal common law, CIL must have a federal source.<sup>171</sup> Put another way, Congress must first explicitly incorporate CIL before those customs become federal common law.<sup>172</sup> Following this view, the revisionists interprets *Sabbatino* as incorporating only “select CIL principles” and not providing blanket incorporation of CIL as federal common law.<sup>173</sup>

Thus framing *Sabbatino*, Bradley looks to *Sosa* as providing definitive clarity regarding two aspects of CIL status: CIL was historically nonfederal, general common law, and that Congress had used legislation to authorize a handful of CIL causes of action—in other words, certain CIL principles had been federalized by Congressional authorization.<sup>174</sup> And, even with Congressional authorization, the revisionists capitalize upon the *Sosa* Court’s rigorous two-part standard for recognizing CIL causes of action.<sup>175</sup> Because the Court did not provide wholesale incorporation of CIL, CIL ought not be treated as federal common law.<sup>176</sup>

Specifically, Bradley notes the requirement that the plaintiff show a necessary link between the CIL cause of action and her complaint.<sup>177</sup> He insists that *Sosa* refuted the modern position that CIL has always been a part of American common law.<sup>178</sup> Bradley insists there is no congressional or executive authorization to make CIL binding law as federal common law.<sup>179</sup>

Further, Bradley harps on the Court’s limited incorporation of CIL, rather than “wholesale incorporation of CIL” as Koh insists.<sup>180</sup> The presumption is not in favor of CIL as preemptive law. Rather, the presumption is that in order for CIL to be

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171. *Id.* at 886.

172. *Id.*

173. *Id.*

174. *Id.* at 891.

175. *Id.* at 896–97.

176. *Id.* at 891–92.

177. *Id.* at 900.

178. *Id.* at 902.

179. *Id.* at 904.

180. *Id.* at 905.

preemptive, it must be federal law.<sup>181</sup> And, the only way for it to become federal law is for Congress or the Executive branch to formally make it so.<sup>182</sup> It is only then that CIL preempts state law.<sup>183</sup>

In addition to *Sosa* and *Sabbatino*, Bradley argues that federal courts lack jurisdiction to hear most CIL claims.<sup>184</sup> First, he takes up federal question jurisdiction (putting aside the Alien Tort Statute as the basis for jurisdiction) and argues 28 U.S.C. § 1331 does grant federal district courts jurisdiction over CIL claims.<sup>185</sup> While § 1331 provides the courts with “original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States,” the revisionists argue that because the Framers did not understand CIL as federal law, the statute does not include CIL as part of the “laws of the United States.”<sup>186</sup> As such, § 1331 provides no jurisdictional authority for federal courts to hear claims arising out of CIL.<sup>187</sup>

The revisionists then counter the argument that 28 U.S.C. § 1332 provides district courts diversity jurisdiction over CIL claims.<sup>188</sup> Under § 1332, district courts have original jurisdiction, among other scenarios, when the case involves citizens of a State and citizens or subjects of a foreign state or citizens of different states and in which citizens or subjects of a foreign state are additional parties.<sup>189</sup> Bradley argues that *Erie* stands for, in part, the insufficiency of diversity jurisdiction as the basis for application of general common law.<sup>190</sup> Then, he further distinguishes diversity jurisdiction from other *Sosa* jurisdiction noting that diversity jurisdiction provides

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181. *See id.* at 900–05 (discussing several reasons why wholesale incorporation is inappropriate).

182. *Id.* at 903.

183. *Id.* at 900–05.

184. *Id.* at 912.

185. Bradley, *supra* note 163, at 911–14. *But see* Paust, *In Their Own Words*, *supra* note 128, at 253 (locating CIL’s place within the “laws of the United States”).

186. 28 U.S.C. § 1331 (2000); Bradley, *supra* note 163, at 912–13.

187. Bradley, *supra* note 163, at 912–13.

188. *Id.* at 914.

189. 28 U.S.C. § 1332(2), (3) (2006).

190. Bradley, *supra* note 163, at 914–15.

jurisdiction for “party-based” rather than “particular legal claims.”<sup>191</sup> Having dismissed both case law and jurisdictional arguments for CIL, Bradley maintains the proper role of CIL is limited and always, and everywhere, constrained by the political branches of the federal government.<sup>192</sup> Citing *Paquete* again, he stresses that CIL is part of, but is not equated to, federal law.<sup>193</sup>

#### IV. ASSESSING THE STATE PROHIBITIONS

The deeply entrenched debate between the traditional view and the revisionists provides helpful background on the place of CIL within the American legal system.<sup>194</sup> Because the Supreme Court has not yet considered whether the anti-international law proposals, this debated provides a helpful framework by which to consider the legislative proposals. And, depending upon the success of the anti-international law efforts, federal courts may be in a position to further refine the status of CIL. If it is what the traditional view says it is and CIL is indeed a part of our law, then the state proposals would have no chance at excluding references to or consideration of international law. If, however, Bradley has it right, then there may be room, while superfluous in effect, for states to limit jurist consideration of CIL that has not been explicitly incorporated by the federal political branches.

The Oklahoma anti-international law proposal instructs state courts to not look at “legal precepts of other nations or cultures . . . [t]he provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.”<sup>195</sup> Because the original text was unclear, the Oklahoma Attorney General drafted an explanatory ballot title, providing definitions for key terms within the proposed amendment.<sup>196</sup> The relevant part of the definition

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191. *Id.* at 915.

192. *Id.* at 914.

193. *Id.* at 936.

194. Ku, *supra* note 72, at 266–67 (observing the “fierce” debate among legal scholars about the status of CIL and emphasizing that “[t]he outcome of this debate will have significant practical consequences”).

195. H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. 2 (Okla. 2010).

196. Letter from W. A. Drew Edmonson, Okla. Att’y Gen., to M. Susan Savage, Okla. Sec’y of State, Glenn Coffee, Okla. Senate President Pro Tempore, and Chris

reads:

This measure amends the State Constitution . . . it makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. It forbids courts from considering or using Sharia Law.

International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationship with persons.

The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties.

Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed.<sup>197</sup>

In parsing the Oklahoma amendment, and similar prohibitions, it is relevant to properly define the body of law that the states hope to exclude. For these purposes, it is helpful to note how the terms “foreign” and “international” law typically refer to different bodies of law.<sup>198</sup> Foreign law refers 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>199</sup> Foreign law would then encompass what is traditionally considered Sharia law, as it is the law of both foreign nations and recognizable people groups.<sup>200</sup> International law refers to

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Benge, Okla. Speaker of the House of Representatives (June 4, 2010).

197. *Id.*

198. Martha F. Davis & Johanna Kalb, *Oklahoma and Beyond: Understanding the Wave of State Anti-Transnational Law Initiatives*, 87 IND. L. J. SUPP. 1, 3 (2011).

199. *Id.* at 3 (quoting Frederic L. Kirgis, *Is Foreign Law International Law?*, ASIL INSIGHT (Oct. 31, 2005), <http://www.asil.org/insights051031.cfm>).

200. *See, e.g., Saudi Arabia Country Report on Human Rights Practices*, U.S. DEPT. OF STATE (Feb. 25, 2004), available at <http://www.state.gov/j/drl/rls/hrrpt/2003/27937.htm> (noting that the Saudi government is founded upon “the Basic Law [that] sets out the system of government . . . [and] [p]rovides that the Islamic holy book the Koran and the Sunna (tradition) of the Prophet Muhammad are the country’s Constitution”).

“the law in force between or among nation-states that have expressly or tacitly consented to be bound by it;” it also includes those customs and norms recognized as the law of nations.<sup>201</sup> International law, in this sense, also includes CIL and the “law of nations.”<sup>202</sup> To the degree that Islamic law falls within foreign laws, it raises questions of choice of law and with the Full Faith and Credit Clause of the Constitution.<sup>203</sup>

With respect to prohibitions on international law, depending upon the courts’ interpretation of the term “international law” and the proper place of CIL within that body of law, the state legislative proposals potentially violate the Supremacy Clause.<sup>204</sup> Under the Supremacy Clause, treaty law is the supreme law of the land; therefore, the Oklahoma proposal provides the courts conflicting directives: on the one hand the judiciary is to abide by and uphold the U.S. Constitution, on the other hand the judiciary ought not consider international law, which could include treaty law.<sup>205</sup> Because treaty law is unquestionably included within the Supremacy Clause, the anti-international law proposals cannot be applied to enforcement of treaties.<sup>206</sup> The tension here would make it virtually “impossible” to both “uphold’ and ‘adhere’ to federal law, while simultaneously banning an area of law that has been part of American law since this country was founded.”<sup>207</sup>

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201. Davis & Kalb, *supra* note 198; PAUST, *INTERNATIONAL LAW*, *supra* note 75, at 3 (“In our history customary international law has also been received as part of the ‘law of nations,’ a phrase used interchangeably by our courts with the phrase ‘international law’ from the dawn of the United States.”).

202. PAUST, *INTERNATIONAL LAW*, *supra* note 75, at 3.

203. U.S. CONST. art. IV, § 1. This section states that “Full Faith and Credit shall be given in each State to public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” *Id.* See Penny M. Venetis, *The Unconstitutionality of Oklahoma’s SQ 755 and Other Provisions Like that Bar State Courts from Considering International Law*, 59 CLEV. ST. L. REV. 189 (2011) (discussing the various potential conflicts between the anti-international law provisions and the Constitution).

204. Venetis, *supra* note 203, at 191.

205. U.S. CONST. art. VI, cl. 2; H.R.J. Res. 1056, 52nd Leg., 2d Reg. Sess. 2 (Okla. 2010); Venetis, *supra* note 203, at 200.

206. Venetis, *supra* note 203, at 201.

207. *Id.* at 200 (citing *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815)).

Looking to case law even prior to *Paquete*, Venetis refers to the 1815 *Nereide* case, noting the Court's reliance upon the law of nations to inform its decision.<sup>208</sup> In *Nereide*, the Court refused to

[D]epart from the beaten track prescribed for us, and to tread the devious and intricate path of politics . . . because no fixed rule is prescribed by the law of nations, congress has not left it to this department to say whether the rule of foreign nations shall be applied to them, but has by law applied that rule.<sup>209</sup>

Venetis uses this early acknowledgment of the laws of nations to point to the difficulty in separating CIL from federal law generally.<sup>210</sup> Despite this tension, the amendment is not facially invalidated—rather, the courts will have to address just what, if any, international law might be constitutionally prohibited by the several states. If the courts were to permit the possibility of excluding some international law, given constitutional constraints, CIL would be but one of the possible areas of permissible exclusion.<sup>211</sup>

Both the Framers' intent and the Constitution itself reflect the Executive's authority to both negotiate and enforce treaties in the several states.<sup>212</sup> Putting aside the references to treaties, the states may be able to validly exclude CIL. In order to consider the international law prohibitions, they would need to be found severable from those explicitly Sharia-related provisions.<sup>213</sup> However, to validly exclude CIL, two things must hold true: CIL must not be, as the revisionist's worry, part of federal common law. Second, *Paquete* cannot be understood as a blanket inclusion of CIL as federal law. If the courts follow the alternative view, then the state anti-international law provisions would be invalid both for the prohibition on reference

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208. *Id.* at 205.

209. *The Nereide*, 13 U.S at 422–23.

210. Venetis, *supra* note 203, at 200.

211. *Id.* at 200–01.

212. *Id.* at 203 (noting James Madison's worry, in debating Constitutional provisions, about state violations of the law of nations and treaties, and the need for the Supremacy Clause).

213. *See* *Awad v. Ziriax*, 670 F.3d 1111, 1129 (10th Cir. 2012).

to treaties and reference to international law generally.<sup>214</sup>

As one scholar suggests:

The primary basis for reluctance to employ customary international law against the states is that this is a task for the federal elected branches to undertake. This objection can be met by preserving for those branches a right to reverse judicial decisions invalidating state practices . . . [a] resolution is a presumption that Congress will ordinarily want the states to comply with international law unless it has explicitly stated otherwise.<sup>215</sup>

Following this logic, *Sosa* stands for the principle that some, but not all CIL gives rise to a federal cause of action. And, if there were a federal cause of action, under the Supremacy Clause, these laws would necessarily be binding on the states.<sup>216</sup> Therefore, *some* CIL would be binding upon the states and a blanket prohibition would be unconstitutional. By this reading, prohibitions on CIL are all-or-nothing. “[A]ny attempt to remove [CIL] from state courts is unconstitutional on its face” because CIL is part of federal law and therefore preemptive of contrary state law.<sup>217</sup>

However, if federal courts were to give a more lenient reading to the state prohibitions, then they could be acceptably interpreted to prohibit those CIL principles that have not yet been incorporated into federal law.<sup>218</sup> To do so, the courts would have to look to Bradley’s views to justify the exclusion of CIL from state courts. Then, courts could possibly find room to exclude those CIL principles that have not yet been incorporated by the political branches.<sup>219</sup> In order for that to occur, the state court would need to follow a process of first evaluating whether issues presented implicated CIL. Then, the court would need to presume the CIL was not binding and look to see whether Congress had incorporated these customs. If there were no

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214. Venetis, *supra* note 203, at 204–05.

215. Brilmayer, *supra* note 69, at 299.

216. Venetis, *supra* note 203, at 205.

217. *Id.* at 206.

218. *Id.* at 205–06.

219. Bradley, *supra* note 163, at 886.



treaty or Congressional action, then the court could potentially exclude the CIL provision from its analysis and decision making process. Rather than assuming the supremacy of CIL over state law, the court would be in a position to require “the federal government to adopt legislation to ensure enforcement of customary international law in the states.”<sup>220</sup> However, the scope of state CIL prohibitions would apply only to those principles that had not yet been incorporated, or intended to be incorporated.<sup>221</sup> As federal courts recognized CIL causes of action, the state anti-international measures would not prohibit these incorporated CIL principles.<sup>222</sup>

*A. Other Potential Constitutional Issues*

In no uncertain terms, due to the aspirational character of the state anti-international law proposals, the proposals could have unintended effects upon the states’ own definition of common law.<sup>223</sup> In Oklahoma, as Professor Parry notes, the amendment could demand greater clarity regarding the content of state common law.<sup>224</sup> By his lights, the “Save Our State” amendment makes general reference to the acceptability of common law but does not clarify whether it means pre-*Erie* common law or common law as it is understood under Oklahoma law or something broader, potentially including some principles of CIL. Under Oklahoma law:

The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall

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220. Davis & Kalb, *supra* note 198, at 11.

221. See Bradley, *supra* note 163, at 886–87 (suggesting that only the principles of CIL that have not yet already been incorporated by Congress can be prohibited by the states).

222. *Id.*

223. Parry, *supra* note 17, at 12–14 (explaining the problems the proposals could create regarding common law).

224. *Id.*

be liberally construed to promote their object.<sup>225</sup>

Despite this definition, the language of the “Save Our State” Amendment does not give sufficient clarity to determine whether the acceptable law that is common to Oklahoma or a broader sense of common law.<sup>226</sup>

In addition to the potentially troublesome process of refining state definitions of common law, there are also those proposals that refuse to acknowledge or uphold decisions made by judges in other states.<sup>227</sup> This would put Oklahoma (and those states that pass similar restrictions on their judiciary) squarely at odds with the requirements of the federal Full Faith and Credit Clause<sup>228</sup> and due process.<sup>229</sup> In this vein, judges, abiding by the Oklahoma amendment would not be able to uphold the terms of a contract negotiated in another state, if the terms of the contract implicated CIL. In the event that two parties contracted to apply the laws of another state, or of another nation, Oklahoma judges would not be able to enforce the contract because in doing so the court would have to acknowledge, by default, foreign law. Somewhat related, the state prohibitions may come in conflict with the federal *Charming Betsy* canon. The *Charming Betsy* canon emerged from Supreme Court dicta stating:

[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.<sup>230</sup>

Following this logic, federal courts have long interpreted congressionally enacted statutes under the presumption that they were not intended to conflict with the laws of nations.<sup>231</sup>

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225. OKLA. STAT. tit. 12, § 2 (2006).

226. Parry, *supra* note 17, at 12.

227. *Id.* at 16–18.

228. *Id.*; U.S. CONST. art. IV, § 1.

229. Parry, *supra* note 17, at 16–18; U.S. CONST. amend. XIV, § 1.

230. *Murray v. Charming Betsy*, 6 U.S. 64, 118 (1804).

231. See Alex Canizares, *Is Charming Betsy Losing Her Charm? Interpreting U.S. Statutes Consistently with International Trade Agreements and the Chevron Doctrine*, 20

The extent to which this same principle applies to the states is unclear. Some have proposed that if the canons were understood to extend to the state judiciary, then states would labor under the presumption that most CIL is federal law or at the very least, courts should avoid conflicts unless prohibited by the Constitution.<sup>232</sup> It is important to recognize that the *Charming Betsy* canon is a canon and nothing more. The Supreme Court allows the federal government to establish policies that run afoul of CIL.<sup>233</sup> In doing so, *Charming Betsy* does not have the same binding authority as would a regular Supreme Court opinion.<sup>234</sup> However, if Koh's viewpoint were to prevail on a constitutional challenge to an anti-international proposal, it could be very likely that the *Charming Betsy* canon would be persuasive to the Court in formalizing the federal and therefore binding nature of CIL. However, as Brilmayer observes, it is highly unlikely that a blanket incorporation of CIL as federal law will prevail—much less enforcement of the *Charming Betsy* canon upon the states.<sup>235</sup> Instead, both sides may be appeased if the Court were to “deny that customary international law is part of our law,” and work to formalize desirable causes of action by means of the political branches.<sup>236</sup> Yet, again, this all turns upon whether the federal courts are willing to concede either view on CIL.

In discussing the relationship between the federal and state judiciary, one scholar approaches the use of international law as federal judicial fact finding.<sup>237</sup> He suggests that often the reference to international law supports a finding of legislative fact and therefore these references are not actually incorporating international law.<sup>238</sup> Thus, most often the

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EMORY INT'L L. REV. 591, 600–07 (2006) (outlining the historical application of the *Charming Betsy* canon).

232. Brilmayer, *supra* note 69, 319–20.

233. *Id.* at 332–33.

234. *Id.* at 334 n.114.

235. *Id.* at 343.

236. *Id.*

237. See A. Christopher Bryant, *Foreign Law as Legislative Fact in Constitutional Cases*, 2011 BYU L. REV. 1005, 1005 (2011) (explaining international law use in courts as determining legislative facts).

238. *Id.* at 1007.

Supreme Court refers to foreign law not as binding authority over and against federal domestic law; rather, the foreign law is used “merely as evidence of a legislative fact made relevant by the Court’s domestic constitutional jurisprudence.”<sup>239</sup> In this manner, a justice may refer to or even provide evidence of a certain standard, and may do so when trying to understand the scope and proper application of a domestic law.<sup>240</sup> In other words, a foreign law serves as a fact that helps the Court determine how a domestic law ought be applied. This process is often confused with the wholesale trumping of domestic by international law.<sup>241</sup> This is a minor point, but suppose the Supreme Court makes reference to foreign law, as it did in *Atkins v. Virginia* to affirm that it was un-cognizable to use the death penalty for crimes committed by mentally retarded offenders.<sup>242</sup> Such a reference, though serving as a finding of fact and not deference to international law, would be potentially curtailed by the state anti-international law proposals. And, while Bryant rightly notes the confusing nature of foreign law as findings of fact,<sup>243</sup> there is still room to consider these kinds of references to international law as substantively different from CIL giving rise to a cause of action as federal law.

Lastly, the proposals could have a disruptive effect on the balance of powers between the judiciary and the political branches on both the state and federal level. Despite the fact that the states have “always” had a role in foreign policy, the anti-international law amendments would have a negative rather than positive effect on foreign policy.<sup>244</sup> These state-level prohibitions could inappropriately “constrain” the judicial decision-making process, in a sense, unnecessarily limiting that which the court could consider in making the law.<sup>245</sup> These concerns, while not directly related to the enforcement of the

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239. *Id.*

240. *See id.* (describing the use of foreign law as mere evidence in determining constitutional cases).

241. *Id.* at 1020–21.

242. *Id.* at 1015–17 (citing *Atkins v. Virginia*, 536 U.S. 304 (2002)).

243. *Id.* at 1022–23.

244. Davis & Kalb, *supra* note 198, at 11–12.

245. *Id.* at 15.

Supremacy Clause, bear upon the relation between state and federal courts and between the state judiciary and legislature.<sup>246</sup> As Davis and Kalb rightly warn, these prohibitions could isolate state jurists from other court decisions and potentially diminish judicial decision-making transparency.<sup>247</sup> In short, justice could be compromised.

## V. CONCLUSION

Given the popularity of state anti-Sharia and anti-international law provisions, it is likely that federal courts will have to address constitutional challenges regarding the degree to which CIL is binding upon states. This Comment has labored under the presumption that the First Amendment claims pending on appeal are likely severable from the remainder of the Oklahoma amendment. In which case, this Comment has tried to anticipate the line of argument possible for and against the binding character of CIL upon the states. The revisionists and Koh could get their day in court—and should these proposals go before federal courts, judicial opinion will inevitably have to refine its position on the incorporation and character of CIL.

These state anti-international proposals may be unsuccessful in their prohibition of Sharia law but may have some impact on the degree to which states must adhere to CIL. In some measure, if only for academic discussion, the state proposals force the need for incremental progress on defining and refining the proper place of CIL within the American legal system. In doing so, those state anti-international law proposals may have a significant effect on domestic jurisprudence—but not the effect the state legislatures had intended.

If federal courts rely upon the traditional view, the anti-Islamicists' greatest fears may be realized: international law may trump state law and their xenophobic legislation would

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246. *Cf. id.* at 15 (noting concern that anti-transnational law initiatives will threaten the independence of state jurists by holding international law beyond the scope of their enforcement, harming comparative law making and leading to the inference that the legislature is divesting power from state judiciaries).

247. *Id.* at 15–16.

be deemed unconstitutional. The practical consequences of the alternative, should the revisionists prevail in spite of case law to the contrary, are vast and demand further consideration. One possible issue of note rests in the growing number of tort claims related to human rights violations abroad.<sup>248</sup> One scholar calls *Sosa* a victory, not because it made clear the entire content of CIL, but, rather, because a cause of action may in fact be inferred from CIL.<sup>249</sup> The degree to which this victory gives rise to a CIL-based cause of action in every state remains to be seen. In the meantime, states are free to experiment with prohibitions against the reference to or reliance upon federal law. Only once federal courts have an opportunity to flesh out CIL's place in American law will it become clear whether states may legitimately restrict judicial consideration of international law.

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248. Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 458–59 (2011).

249. Ralph G. Steinhardt, *The Traffic Light Theory of Sosa v. Alvarez-Machain*, 101 AM. SOC'Y INT'L L. PROC. 272, 272 (2007).