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## The Unconstitutionality of Oklahoma's SQ 755 and Other Provisions like It That Bar State Courts from Considering International Law

Penny M. Venetis

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**THE UNCONSTITUTIONALITY OF OKLAHOMA’S  
SQ 755 AND OTHER PROVISIONS LIKE IT THAT  
BAR STATE COURTS FROM CONSIDERING  
INTERNATIONAL LAW**

PENNY M. VENETIS\*

I.	INTRODUCTION .....	190
II.	BACKGROUND .....	192
	A. <i>Legislative History of SQ 755</i> .....	192
	B. <i>Statutory and Constitutional Measures Similar to SQ 755</i> .....	194
	C. <i>Successful Establishment Clause Challenge to SQ 755</i> .....	198
III.	DISCUSSION .....	200
	A. <i>SQ 755 Is Poorly Drafted and Internally Contradictory</i> .....	200
	B. <i>On Its Face SQ 755 Violates the Supremacy Clause of the United States Constitution</i> .....	201
	1. The Supremacy Clause Was Incorporated into the Constitution to Prevent States from Violating International Law .....	201
	2. SQ 755 Directly Conflicts with the Supremacy Clause of the U.S. Constitution, Which Establishes Treaties as the “Supreme Law of the Land” .....	203
	3. SQ 755’s Rejection of International Law Directly Conflicts with Well-Settled Law that International Law Is Part of Federal Common Law .....	204
IV.	SQ 755 AND PROVISIONS LIKE IT VIOLATE THE CONSTITUTION’S FULL FAITH AND CREDIT CLAUSE.....	206
	A. <i>A State Cannot Condition Compliance with the Full Faith and Credit Clause on the Content of a Sister State’s Decision</i> .....	207
	1. SQ 755 Impermissibly Conditions Oklahoma’s Compliance with the Full Faith and Credit Clause	

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on Whether or Not the Sister State Uses Sharia Law in Its Opinions .....	207
2. Other State Law Measures Similar to SQ 755 Violate the Full Faith and Credit Clause .....	209
B. <i>SQ 755's Prohibition on Considering International Law or Foreign Law May also Violate the Full Faith and Credit Clause</i> .....	210
V. SEPARATION OF POWERS ISSUES .....	212
VI. SQ 755 AND SIMILAR PROVISIONS WOULD EVISCERATE WELL-ESTABLISHED PRINCIPLES OF COMITY AND WILL NEGATIVELY IMPACT THE INTEGRITY OF STATE COURTS ....	213
VII. THE NEGATIVE IMPACT OF SQ 755 ON ARBITRATION DECISIONS .....	215
VIII. CONCLUSION .....	216

#### I. INTRODUCTION

On November 2, 2010, 70.08% of Oklahoma voters elected to amend their state constitution by adopting State Question 755 (“SQ 755”), also known as the “Save Our State” amendment. SQ 755 prohibits the Oklahoma judiciary from using Sharia Law or international law, and “looking to the precepts of other nations or cultures.”

Although it was under the radar outside of Oklahoma before election day, SQ 755 received a tremendous amount of attention after the measure passed. Articles critical of the ban on Sharia Law appeared in the *New York Times*, the *Wall Street Journal*, and the *L.A. Times*.<sup>1</sup> SQ 755 was even lampooned on the Colbert Report as superfluous and absurd.<sup>2</sup>

<sup>1</sup> See, e.g., Jess Brevin, *Oklahoma Is Sued Over Shariah Ban*, WALL ST. J., Law Section, Nov. 5, 2010, <http://online.wsj.com/article/SB10001424052748704805204575594793733847372.html>; James C. McKinley, Jr., *U.S. Judge Blocks a Ban on Islamic Law*, N.Y. TIMES, Nov. 30, 2010, at A22.; James C. McKinley, Jr., *Oklahoma Surprise: Islam as an Election Issue*, N.Y. TIMES, Nov. 29, 2010, at A12.; Michael A. Helfand, Op-Ed, *A Law We Don't Need: Oklahoma's Amendment Prohibiting Courts from Considering Islam's Sharia Law in Decisions Is the Product of Fear-Mongering*, L.A. TIMES, Nov. 10, 2010, <http://articles.latimes.com/2010/nov/10/opinion/la-oe-helfand-oklahoma-20101110>; Editorial, *Overwrought in Oklahoma: The Passage in Oklahoma of a Ballot Measure that Bans Judges from Considering Islamic Law is an Offense to the Constitution*, L.A. TIMES, Nov. 11, 2010, <http://articles.latimes.com/2010/nov/11/opinion/la-ed-sharia-20101111>; Ariane de Vogue, *Shariah Law Outlawed in Oklahoma State Courts, Ignites Debate: Ban on Legal Deference to Religious Tradition Has National Implications, Critics Say*, ABC News (Washington), Nov. 11, 2010, <http://abcnews.go.com/Politics/shariah-law-ban-oklahoma-renews-debate-draws-legal/story?id=12112985>; Bill Mears, *Judge Issues Permanent Injunction on Oklahoma Sharia Law Ban*, CNN (Washington), Nov. 29, 2010, [http://articles.cnn.com/2010-11-29/us/oklahoma.sharia.law\\_1\\_sharia-law-state-courts-international-law?\\_s=PM:US](http://articles.cnn.com/2010-11-29/us/oklahoma.sharia.law_1_sharia-law-state-courts-international-law?_s=PM:US).

<sup>2</sup> *Colbert Report* (Comedy Central television broadcast Nov. 3, 2010). Colbert stated: “Just because something doesn’t exist, doesn’t mean you shouldn’t ban it,” pointing out that Muslims make up less than four-tenths of one percent of Oklahoma’s population, and Sharia Law poses no real threat. *Id.* To further emphasize the absurdity of passing an anti-Sharia

It appears that the Oklahoma legislators preyed upon the electorate's post-9/11 fears and insecurities to introduce an amendment that was wholly unnecessary. Notably, a search of Oklahoma cases reveals that the state judiciary has never used the word "Sharia" in a published opinion. A search for "Sharia" in Oklahoma federal courts yields one case, *Bastian v. Gonzales*, where the court explained that Indonesia's potential imposition of Sharia law upon an asylum seeker did not justify granting him asylum in the U.S.<sup>3</sup> The *Bastian* court did not interpret, analyze, or discuss any aspect of Sharia law. It is therefore unclear exactly who or what SQ 755 was meant to save. Despite the fact that there was no cognizable threat, the Oklahoma legislature claims that SQ 755 was introduced as a "preemptive strike" against radical Islam.<sup>4</sup>

SQ 755 was immediately and successfully challenged under the First Amendment's Establishment and Free Exercise Clauses. The case, *Awad v. Ziriya*,<sup>5</sup> has been widely covered in the media. But, there is another aspect of SQ 755 that has not received attention outside of academic and human rights circles.<sup>6</sup> In addition to banning Sharia Law, SQ 755 also prohibits Oklahoma courts from considering international law or foreign law.

Other than in the "Background" section, this paper will not discuss Oklahoma's banning of Sharia law. The constitutional issues raised by that portion of SQ 755 were largely addressed in *Awad v. Ziriya*.<sup>7</sup> What is relevant to this discussion, however, is that the coupling of international law with Sharia Law in SQ 755 appears to have been a deliberate attempt to sully international law, a body of law that has been part of U.S. jurisprudence since the founding of our nation.

This paper will discuss SQ 755's many legal deficiencies, focusing primarily on its constitutional infirmities. First, SQ 755 is a clear violation of the Supremacy Clause of Article VI of the U.S. Constitution. The prohibition on looking to international law requires that Oklahoma courts disregard U.S. treaty obligations, and the law of nations (also known as customary international law), which are all binding on American courts.

Second, SQ 755 unconstitutionally limits a state's duty to give full faith and credit to the judicial decisions of other states. The law is clear that no state has the

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Law in Oklahoma, Colbert suggested passing other laws that addressed non-existent threats like laws banning "cat-pilots, baby curling, and man-futon marriage." *Id.*

<sup>3</sup> *Bastian v. Gonzales*, 187 Fed. App'x 891, 895 (10th Cir. 2006).

<sup>4</sup> James C. McKinley, *Judge Blocks Oklahoma's Ban on Using Shariah Law in Court*, N.Y. TIMES, June 29, 2010, at A22.

<sup>5</sup> *Awad v. Ziriya*, No. CIV-10-1186-M, 2010 WL 4814077 (W.D. Okla. Nov. 29, 2010).

<sup>6</sup> See *Colbert Report*, *supra* note 2; see also MARTHA F. DAVIS & JOHANNA KALB, THE IMPACT OF OKLAHOMA STATE QUESTION 755: AN ANALYSIS OF ANTI INTERNATIONAL LAW INITIATIVES (Jan. 2011) (position paper published by the American Constitutional Society discussing some international law issues raised by SQ 755 and provisions like it but not discussing the constitutional implications); COMMITTEE ON FOREIGN AND COMPARATIVE LAW, NEW YORK CITY BAR ASSOCIATION, THE UNCONSTITUTIONALITY OF OKLAHOMA REFERENDUM 755—THE "SAVE OUR STATE AMENDMENT" (Dec. 2010) (ten page position paper discussing some of the constitutional implications of SQ 755).

<sup>7</sup> *Awad*, 2010 WL 4814077.

authority to condition its compliance with the Full Faith and Credit Clause on policy considerations.

Additionally, this paper will discuss ways in which SQ 755 raises separation of powers concerns, violates principles of international comity, and could have a destabilizing effect on legal and business communities.

Finally, this paper will discuss how all of these provisions reflect both a deep misunderstanding and mistrust of the judiciary by the legislative branch.

## II. BACKGROUND

### A. Legislative History of SQ 755

SQ 755 was initially titled House Joint Resolution 1056 (“HJR 1056”). On May 18, 2010, HJR 1056 passed in the Oklahoma House of Representatives by a vote of 82 to 10.<sup>8</sup> On May 24, 2010, HJR 1056 passed in the Oklahoma Senate by a vote of 42 to 2.<sup>9</sup> The Office of the Secretary of State re-numbered HJR 1056 and gave it the title “State Question 755.”

SQ 755 reads:

The Courts provided for in subsection A of this section, when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.<sup>10</sup>

SQ 755 also included a proposed ballot title, which read:

This measure amends the State Constitution. It would change a section that deals with the courts of this state. It would make courts rely on federal and state laws when deciding cases. It would forbid courts from looking at international law or Sharia Law when deciding cases.<sup>11</sup>

A ballot title provides a summary of the proposed amendment and explains vague or unfamiliar terms for voters.

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<sup>8</sup> OKLAHOMA HOUSE OF REPRESENTATIVES, HOUSE VOTES FOR 2010–52ND LEGISLATURE, [http://www.okhouse.gov/Legislation/Show\\_Votes.aspx](http://www.okhouse.gov/Legislation/Show_Votes.aspx) (last visited Mar. 27, 2011).

<sup>9</sup> OKLAHOMA SENATE, OKLAHOMA STATE SENATE 2010 VOTES, [http://www.oksenate.gov/legislation/votes/votes\\_2010/2010\\_votes.aspx](http://www.oksenate.gov/legislation/votes/votes_2010/2010_votes.aspx) (last visited Mar. 27, 2011).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

On May 25, 2010, Secretary of State M. Susan Savage forwarded SQ 755 to Attorney General Drew Edmonson for review, as required by 34 Okla. Stat. § 9(C).<sup>12</sup> On June 2, 2010, Attorney General Edmonson responded that the legislature's proposed ballot title did not comply with Oklahoma law, stating that "[i]t does not adequately explain the effect of the proposition because it does not explain what either Sharia Law or international law is."<sup>13</sup>

On June 4, 2010, Attorney General Edmonson sent a letter to Secretary of State Savage, House Speaker Chris Benge, and Senate President Pro Tempore Glen Coffee, proposing an alternate ballot title.<sup>14</sup> The alternate ballot title read:

This measure amends the State Constitution. It changes a section that deals with the courts of this state. It would amend Article 7, Section 1. 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 relationships 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>15</sup>

This ballot title redraft is legally critical. According to Oklahoma law, when a court is evaluating the legality of a constitutional amendment, the court considers not only the amendment's text, but also the language of the ballot title.<sup>16</sup> Therefore, any deficiencies in the ballot title are considered deficiencies of the whole amendment. As will be discussed below, SQ 755's inclusion of treaties in its definition of

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<sup>12</sup> Letter from M. Susan Savage, Okla. Sec'y of State, to W. A. Drew Edmonson, Okla. Att'y Gen. (May 25, 2010).

<sup>13</sup> 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 Benge, Okla. Speaker of the House of Representatives (June 2, 2010).

<sup>14</sup> 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 Benge, Okla. Speaker of the House of Representatives (June 4, 2010).

<sup>15</sup> *Id.*

<sup>16</sup> *Sw. Bell Tel. Co. v. Okla. State Bd. of Equalization*, 231 P.3d 638, 642 (Okla. 2009) ("When construing a constitutional amendment that was proposed by the Legislature . . . th[e] Court will read the ballot title together with the text of the measure, even if the text of the measure contains no ambiguities or absurdities.").

international law renders the whole amendment unconstitutional under the Supremacy Clause, which makes treaties “the supreme Law of the Land.”<sup>17</sup>

On August 9, 2010, Governor Brad Henry issued an Executive Proclamation ordering that SQ 755, along with its ballot title, be placed on the statewide ballot.<sup>18</sup> Accordingly, when 70.08% of Oklahoma voters elected to adopt the “Save Our State Amendment,”<sup>19</sup> they approved both the ballot title and the actual amendment’s language.

### B. Statutory and Constitutional Measures Similar to SQ 755

SQ 755 is not unique. Several copy-cat bills and constitutional amendments have been proposed or enacted by legislatures across the U.S.<sup>20</sup> These provisions fall into two basic categories: (1) measures that are identical or substantially similar to SQ 755, and (2) choice of law provisions that forbid the application of international law and foreign law when there is a conflict with state or federal law.

Some of these measures track SQ 755 very closely. For example, Wyoming’s HJ 8<sup>21</sup> and Missouri’s HJR 31,<sup>22</sup> which proposed constitutional amendments introduced

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<sup>17</sup> U.S. CONST. art. VI, § 2.

<sup>18</sup> Brad Henry, Governor of Okla., *Executive Proclamation* (Aug. 9, 2010).

<sup>19</sup> OKLAHOMA STATE ELECTION BOARD, SUMMARY RESULTS: GENERAL ELECTION—NOVEMBER 2, 2010, <http://www.ok.gov/elections/support/10gen.html> (last visited Mar. 27, 2011).

<sup>20</sup> See DAVIS & KALB, *supra* note 6.

<sup>21</sup> H.R.J. Res. 8, 61st Leg., Reg. Sess. (Wyo. 2011), available at <http://legisweb.state.wy.us/2011/Introduced/HJ0008.pdf>. HJ 8 reads:

When exercising their judicial authority the courts of this state shall uphold and adhere to the law as provided in the constitution of the United States, the Wyoming constitution, the United States Code and federal regulations promulgated pursuant thereto, laws of this state, established common law as specified by legislative enactment, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia law. The courts shall not consider the legal precepts of other nations or cultures including, without limitation, international law and Sharia law. The provisions of this subsection shall apply to all cases before the respective courts including, without limitation, cases of first impression.

*Id.*

<sup>22</sup> H.R.J. Res. 31, 96th Leg., Reg. Sess. (Mo. 2011), available at <http://www.house.mo.gov/billssummary.aspx?year=2011&bill=HJR%2031>. HJR 31 reads:

The courts provided for in this section, when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Constitution of Missouri, the United States Code, federal regulations promulgated pursuant thereto, and if necessary the law of another state of the United States, provided the law of the other state does not include Sharia law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia law. The provisions of this section shall apply to all cases before the respective courts, including but not limited to cases of first impression.

*Id.*

in early 2011, are nearly identical to SQ 755. Other provisions are slight variations on the theme. For example South Dakota's HJR 1004 is a proposed constitutional amendment that bans the consideration of international law, foreign law, and religious/cultural law; it does not specifically mention Sharia.<sup>23</sup> Texas's HJR 57 does not mention foreign law or international law, but bans the consideration of "religious law" and "cultural law."<sup>24</sup>

While all of these provisions are openly hostile to foreign law and international law, some measures go beyond banning the consideration of non-U.S. law. Arizona's SCR 1010, introduced in Arizona's House of Representatives in January 2011, would forbid the state judiciary from looking to non-U.S. law and from upholding sister state decisions that are based on international law.<sup>25</sup>

Similarly, South Carolina's S. 1387 was a proposed constitutional amendment that would have banned South Carolina courts from looking "to the legal precepts of other nations or cultures."<sup>26</sup> "[T]he courts [would not be allowed to] consider Sharia Law, international law, the constitutions, laws, rules, regulations, and decisions of courts or tribunals of other nations, or conventions or treaties, whether or not the United States is a party."<sup>27</sup> S. 1387 specifically rejected all treaties in the body of the amendment, even those that the United States has ratified.<sup>28</sup>

<sup>23</sup> H.R.J. Res. 1004, 86th Leg., Reg. Sess. (S.D. 2011), available at <http://legis.state.sd.us/sessions/2011/Bills/HJR1004P.htm>. HJR 1004 reads:

The judicial power of the state is vested in a unified judicial system consisting of a Supreme Court, circuit courts of general jurisdiction and courts of limited original jurisdiction as established by the Legislature. No such court may apply international law, the law of any foreign nation, or any foreign religious or moral code with the force of law in the adjudication of any case under its jurisdiction.

*Id.*

<sup>24</sup> H.R.J. Res. 57, 82d Leg., Reg. Sess. (Tex. 2011), available at <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HJR57>. HJR 1057 reads, "A court of this state shall uphold the laws of the Constitution of the United States, this Constitution, federal laws, and laws of this state. A court of this state may not enforce, consider, or apply any religious or cultural law." *Id.*

<sup>25</sup> S. Con. Res. 1010, 50th Leg., Reg. Sess. (Ariz. 2011), available at <http://www.azleg.gov/legtext/50leg/1r/bills/scr1010p.pdf>. SCR 1010 reads:

In making judicial decisions, the courts provided for in subsection A, when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Constitution of this state, the United States code, federal regulations adopted pursuant to the United States code, established common law, the laws of this state and rules adopted pursuant to the laws of this state and, if necessary, the laws of another state of the United States provided the law of the other state does not include international law. The courts shall not look to the legal precepts of other nations or cultures. The courts shall not consider international law.

*Id.*

<sup>26</sup> H.R.J. Res. 8, 118th Leg., Reg. Sess. (S.C. 2009-10), available at [http://www.scstatehouse.gov/sess118\\_2009-2010/bills/1387.htm](http://www.scstatehouse.gov/sess118_2009-2010/bills/1387.htm).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* South Carolina's election rules direct voters to the full text of constitutional amendments, which are posted at the polling place, and a Constitutional Ballot Commission



Additionally, many state legislatures have either proposed or passed statutes that explicitly instruct state courts to ignore foreign law or international law when it conflicts with state or federal law. In May 2010, Louisiana's legislature passed "American and Louisiana Laws for Louisiana Courts."<sup>29</sup> The bill renders void any choice of law provision preferring foreign law that would violate a right guaranteed under either the U.S. Constitution or the Louisiana Constitution.<sup>30</sup> "Tennessee Law for Tennessee Courts" passed in the same month, re-enforces that when applying principles of international comity, the rights guaranteed by the Tennessee and U.S. constitutions are of primary concern.<sup>31</sup> Similar provisions are currently pending in Arkansas,<sup>32</sup> Georgia,<sup>33</sup> Indiana,<sup>34</sup> Missouri,<sup>35</sup> New Jersey,<sup>36</sup> Nebraska,<sup>37</sup> South Carolina,<sup>38</sup> and South Dakota.<sup>39</sup>

These choice of law bills are redundant and serve no legitimate purpose. They do not establish any new law, as it is well settled that the rights guaranteed by the U.S. Constitution and the various state constitutions are the primary concern of U.S. courts.

Some state legislatures have attempted to go even further to restrict the judiciary's consideration of international and foreign law. In addition to the constitutional amendment discussed above, Arizona's House of Representatives proposed HB 2582 in January 2011. The statute would eliminate the judiciary's ability to use foreign law or international law as either controlling or influential

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may deem a simplified or more detailed explanation of the proposed change to also appear on the ballot. S.C. Code Ann. § 7-13-2110 (2010).

<sup>29</sup> 2010 La. Acts 274, available at [www.legis.state.la.us/billdata/streamdocument.asp?did=722536](http://www.legis.state.la.us/billdata/streamdocument.asp?did=722536).

<sup>30</sup> *Id.*

<sup>31</sup> 2010 Tenn. Pub. Acts 550, available at <http://state.tn.us/sos/acts/106/pub/pc0983.pdf>.

<sup>32</sup> S.B. 97, 88th Gen. Assemb., Reg. Sess. (Ark. 2011), available at [www.arkleg.state.ar.us/assembly/2011/2011R/Bills/SB97.pdf](http://www.arkleg.state.ar.us/assembly/2011/2011R/Bills/SB97.pdf).

<sup>33</sup> H.B. 242, 151st Gen. Assemb., Reg. Sess. (Ga. 2011), available at <http://www.legis.ga.gov/Legislation/en-US/display.aspx?Legislation=32674>.

<sup>34</sup> S.J. Res. 16, 117th Gen. Assemb., Reg. Sess. (Ind. 2011), available at <http://www.in.gov/apps/lisa/session/billwatch/billinfo?year=2011&session=1&request=getBill&docno=0016&doctype=SJR>.

<sup>35</sup> S.B. 308, 96th Gen. Assemb., Reg. Sess. (Mo. 2011), available at [http://www.senate.mo.gov/11info/BTS\\_Web/Bill.aspx?SessionType=R&BillID=4170067](http://www.senate.mo.gov/11info/BTS_Web/Bill.aspx?SessionType=R&BillID=4170067).

<sup>36</sup> A.B. 3496, 214th Leg., Reg. Sess. (N.J. 2010), available at [http://www.njleg.state.nj.us/2010/Bills/A3500/3467\\_I1.HTM](http://www.njleg.state.nj.us/2010/Bills/A3500/3467_I1.HTM).

<sup>37</sup> L.B. 647, 102d Leg., 1st Sess. (Neb. 2011), available at [http://nebraskalegislature.gov/bills/view\\_bill.php?DocumentID=12719](http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=12719).

<sup>38</sup> S. 444, 2011 Leg., 119th Sess. (S.C. 2011), available at [http://www.scstatehouse.gov/sess119\\_2011-2012/bills/444.htm](http://www.scstatehouse.gov/sess119_2011-2012/bills/444.htm).

<sup>39</sup> S.B. 201, 2011 Leg., 86th Sess. (S.D. 2011), available at <http://legis.state.sd.us/sessions/2011/Bill.aspx?Bill=201>.

precedent in decisions.<sup>40</sup> HB 2582 would render void any decision relying in whole or in part on non-U.S. law.<sup>41</sup> In addition, a judge's use of foreign law or international law would be grounds for impeachment and removal from office.<sup>42</sup>

In 2010, the Idaho state legislature passed a similar, although not quite as drastic, resolution that states: "For any domestic issue, no court should consider or use as precedent any foreign or international law, regulation, or court decision."<sup>43</sup> Iowa's House File 2313, a bill introduced on February 5, 2010, limits judicial authority to use only the United States Constitution, the Iowa State Constitution, and the Iowa Code "as the basis for any ruling."<sup>44</sup> It states: "a judicial officer shall not use judicial precedent, case law, penumbras, or international law as a basis for rulings."<sup>45</sup> It is currently pending in Iowa's judiciary committee.

The obvious subtext of all of these provisions is a mistrust of international or foreign law. But, the less obvious subtext is a mistrust of the judiciary. SQ 755 and other provisions like it are clear attempts to limit the power of the courts. Although unsubstantiated, it has been a clarion call of the far right that judges are somehow out of control and must be reined-in. Judges have been receiving threats in unprecedented numbers for simply doing their jobs.<sup>46</sup>

The titles of these provisions are telling. SQ 755 is called the "Save our State" amendment. Louisiana's statute is called the "American and Louisiana Laws for Louisiana Courts." And Tennessee's statute is called "TN Law for TN Courts." The titles imply that the judiciary is applying law that is somehow counter to a state's laws and interests. Because all of the measures ban the use of international and foreign law, the implication is that those bodies of law pose a threat to the very foundation of the administration of justice. This group of laws makes clear that

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<sup>40</sup> H.B. 2582, 50th Leg., Reg. Sess. (Ariz. 2011), available at <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/50leg/1r/bills/hb2582p.htm>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> H.R. Con. Res. 44, 60th Leg., Reg. Sess. (Idaho 2010), available at <http://www.legislature.idaho.gov/sessioninfo/2010/Journals/hday38.pdf>.

<sup>44</sup> H.F. 2313, 83d Gen. Assemb., Reg. Sess. (Iowa 2010), available at <http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=Billbook&menu=false&ga=83&hbill=HF2313>.

<sup>45</sup> *Id.*

<sup>46</sup> A U.S. Department of Justice Report issued on January 4, 2010 stated that there were "critical deficiencies" in the U.S. Justice Department's ability to protect federal judges. EVALUATION AND INSPECTORS DIV., U.S. DEP'T OF JUSTICE, REVIEW OF THE PROTECTION OF THE JUDICIARY AND THE UNITED STATES ATTORNEYS (2009). In 2007 and 2008, there were 1368 threats against federal judges and prosecutors. *Id.* The starkest example of this is Judge John Roll, a George H.W. Bush appointee to the federal bench who was murdered in Arizona when a gunman opened fire on Congresswoman Gabrielle Giffords. Judge Roll received multiple death threats and was under the protection of the U.S. Marshall Service because of one of his rulings. In *Vicente v. Barnett*, Judge Roll refused to dismiss a lawsuit against a rancher and his family who were alleged to have assaulted, detained, and threatened sixteen Mexican immigrants at gunpoint. See John Schwartz, *Amid Shock, Recalling Judge's Life of Service*, N.Y. TIMES, Jan. 9, 2011, at A18.

legislators do not trust judges to carry out one of their core functions—determining which law to apply in their adjudication of cases.

As is demonstrated in this paper, the very existence of these provisions reflects a total lack of understanding of how courts function. Indeed, Associate Justice Stephen Breyer specifically stated that there are instances where judges “must” apply international or foreign law.<sup>47</sup> In the Supreme Court term that began in October 2010, out of eighty cases considered by the Court, six cases involved issues of international or foreign law. Justice Breyer stated that because of the increased global inter-connectedness of commerce and communications it “is the future” for judges to use foreign and international law.<sup>48</sup>

### C. Successful Establishment Clause Challenge to SQ 755

Immediately after SQ 755 passed, Muneer Awad, of Oklahoma’s CAIR (Council on Islamic-American Relations) chapter, filed a motion for a preliminary injunction to prevent the certification of SQ 755’s election results, based exclusively on the First Amendment.

On November 9, 2010, Judge Vicki Miles-La Grange of the U.S. District Court of the Western District of Oklahoma issued a temporary restraining order against the certification of SQ 755. She subsequently converted the temporary restraining order into a preliminary injunction.<sup>49</sup> As a result, SQ 755 cannot go into effect.

The court found that Mr. Awad had standing to bring his action because he is a Muslim residing in Oklahoma, and the “amendment conveys an official government message of disapproval and hostility towards his religious beliefs . . . chilling his access to the government and forcing him to curtail his political and religious activities.”<sup>50</sup>

Judge Miles-La Grange then evaluated Mr. Awad’s motion using a standard four part test.

A movant seeking a preliminary injunction must show: (1) a substantial likelihood of success on the merits; (2) irreparable injury to the movant if the injunction is denied; (3) the threatened injury to the movant outweighs the injury to the party opposing the preliminary injunction; and (4) the injunction would not be adverse to the public interest.<sup>51</sup>

Judge Miles-La Grange found that Mr. Awad’s challenge met all four prongs and granted him a preliminary injunction.<sup>52</sup> Notably, when evaluating Mr. Awad’s claims under the first prong, the court found that there was a substantial likelihood of success on the challenge under both the Establishment and Free Exercise Clauses. Judge Miles-La Grange held that SQ 755’s language “singles out” Mr. Awad’s

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<sup>47</sup> *Due Process: Justice Stephen Breyer, Address at Rutgers School of Law—Newark (Apr. 28, 2011)* (NJN television broadcast June 5 & June 12, 2011).

<sup>48</sup> *Id.*

<sup>49</sup> *Awad v. Ziriaux*, No. CIV-10-1186-M, 2010 WL 4814077, at \*9 (W.D. Okla. Nov. 29, 2010).

<sup>50</sup> *Id.* at \*3.

<sup>51</sup> *Id.* at \*5.

<sup>52</sup> *Id.* at \*9.

religion (Islam) and can be reasonably understood as a state sanctioned “disapproval of [the] plaintiff’s faith.”<sup>53</sup>

The opinion also noted that Sharia Law is not a codified set of laws, but rather a religious/cultural tradition.<sup>54</sup> Therefore, using the umbrella term “Sharia Law” would foster excessive governmental entanglement with religion because it forces Oklahoma courts to determine which religious doctrines are included and which are not.<sup>55</sup>

In addition, Judge Miles La-Grange found that SQ 755 is not facially neutral because it singles out Sharia Law. Furthermore, she found that there was a reasonable probability that SQ 755 would not allow Mr. Awad’s will to be probated by an Oklahoma court because it includes “elements of the Islamic prophetic traditions.”<sup>56</sup> Judge Miles-LaGrange also noted that there was a reasonable probability that SQ 755 would preclude Muslims from bringing actions in state court under the Oklahoma Religious Freedom Act or the U.S. Constitution if their claims were based on the exercise of their religion.<sup>57</sup> Therefore, Judge Miles-La Grange held that Mr. Awad’s challenge had significant likelihood of success on the merits.

Moreover, when analyzing the third prong of the preliminary injunction test, the balance of harms, Judge Miles-La Grange ruled in favor of Mr. Awad. She found, in part, that the defendants were not aware of any Oklahoma state courts that had used Sharia Law or the precepts of other nations in a decision.<sup>58</sup>

Finally, when applying the fourth prong of the preliminary injunction test, Judge Miles-La Grange found that granting a preliminary injunction would not be adverse to the public interest. In her opinion, Judge Miles-La Grange stated that “the public has a more profound and long-term interest in upholding an individual’s constitutional rights,” than it does in seeing the will of the voters carried out.<sup>59</sup> As additional support, Judge Miles-La Grange pointed to the Oklahoma Religious Freedoms Act, which prohibits governmental entities from impinging on the free exercise of religion.<sup>60</sup>

On December 1, 2010, the Oklahoma Attorney General appealed the preliminary injunction.<sup>61</sup> The order preventing the election results from being certified is still in effect, however. The success in the *Awad* case and Judge Miles-La Grange’s lengthy and well-executed opinion provides a more than adequate legal framework for future successful challenges of other statutes or state constitutional provisions similar to SQ 755 that prevent courts from considering Sharia Law.

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<sup>53</sup> *Id.* at \*6.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at \*7.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at \*8.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Oklahoma AG Appeals Preliminary Injunction Against SQ 755*, ZTRUTH.COM (Dec. 2, 2010), <http://ztruth.typepad.com/ztruth/> (search “Oklahoma AG Appeals Preliminary Injunction”).

This paper will focus on aspects of SQ 755 that have not been challenged in court. It will discuss the legality of banning the consideration of international law in state courts. This discussion is applicable not only to SQ 755 but also to the other similar statutory and constitutional provisions being considered throughout the country.

### III. DISCUSSION

#### A. *SQ 755 Is Poorly Drafted and Internally Contradictory*

SQ 755's language is internally inconsistent. The measure is paradoxical because it directs Oklahoma courts to uphold the U.S. Constitution, but later forbids courts from applying international law, which, according to SQ 755's ballot title, includes treaty law.<sup>62</sup> Under the Supremacy Clause of the U.S. Constitution, treaty law is "the supreme Law of the Land."<sup>63</sup> By SQ 755's terms, an Oklahoma court confronted with an issue governed by treaty law must both disregard the treaty law, while at the same time recognize the treaty as binding federal law.

In addition, SQ 755's prohibition on applying international law is in direct conflict with the amendment's direction to uphold and adhere to federal law. As will be discussed below in greater detail, international law has been considered a part of federal law for centuries.<sup>64</sup> It is impossible to "uphold" and "adhere" to federal law, while simultaneously banning an area of law that has been a part of American law since this country was founded.<sup>65</sup>

SQ 755's direction to "uphold" and "adhere" to the law of another state as long as the other state does not include Sharia Law in its judicial decisions is also problematic. The Full Faith and Credit Clause does not allow state courts to pick and choose which decisions they will "uphold" or "adhere" to.<sup>66</sup> Oklahoma cannot disregard a sister state's decision based on the content of that decision. As drafted, SQ 755 simultaneously bans an Oklahoma court from enforcing a sister state decision that considered Sharia Law while compelling the court to adhere to the U.S. Constitution, which requires upholding that same decision under the Full Faith and Credit Clause.

Unfortunately, a state constitutional amendment cannot be invalidated for being contradictory. But jurists charged with interpreting SQ 755 can use these internal inconsistencies to continue to use international law when warranted. They can place greater emphasis on the portion of SQ 755 that mandates that the court uphold the U.S. Constitution. This would override the portion of SQ 755 that forbids considering international law. Using this interpretive approach, courts could uphold their constitutional obligation to use international law in appropriate circumstances and justify their decision by using SQ 755's own language. If courts adopt this

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<sup>62</sup> 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 Benge, Okla. Speaker of the House of Representatives (June 24, 2010).

<sup>63</sup> U.S. CONST. art. VI, § 2.

<sup>64</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

<sup>65</sup> *See, e.g., The Nereide*, 13 U.S. 388, 423 (1815).

<sup>66</sup> *See Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998).

method of construction, SQ 755 would only prohibit the application of international law that does not involve treaties or that is not a part of federal common law.

*B. On its Face SQ 755 Violates the Supremacy Clause of the United States Constitution*

The Supremacy Clause of the United States Constitution is very clear that federal law, which includes treaty law, is the “supreme Law of the Land.”<sup>67</sup>

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>68</sup>

1. The Supremacy Clause Was Incorporated into the Constitution to Prevent States from Violating International Law

The legislators who drafted SQ 755 and other provisions like it have shown a distinct lack of historical understanding about the U.S. Constitution and the reasons it was enacted. In drafting the Constitution, the Founding Fathers wanted to ensure that international treaties were respected by the states. They made sure the Constitution reflected this desire by including treaties as “the supreme Law of the Land” in the Supremacy Clause.<sup>69</sup>

So, legislators who claim to be introducing these measures to uphold the sanctity of the U.S. Constitution, are actually subverting one of the main purposes of its drafters. Anyone who has completed a basic U.S. history class knows that the Articles of Confederation were abandoned, in large part, because they gave the national government very little authority over the states. The Supremacy Clause of the U.S. Constitution was adopted to provide the federal government with a check against state laws that run counter to the national interest. One of the Supremacy Clause’s specific targets was states’ failure to adhere to U.S. treaty obligations.

As Justice Story stated in his 1833 Commentaries on the Constitution of the United States, under the Articles of Confederation, “[t]he difficulty of enforcing even the obligations of the Treaty of [Paris] of 1783 was a most serious national evil.”<sup>70</sup> The states’ refusal to adhere to treaty obligations after the Revolutionary War was so problematic that the British cited various state laws as an excuse for failing to execute their responsibilities under the treaty. The British threatened not to withdraw from the American Confederacy unless the states honored the Treaty of Paris.

Article IV of the Treaty of Paris of 1783 between Great Britain and the new American Confederacy specifically guaranteed that there would be no legal

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<sup>67</sup> U.S. CONST. art VI, § 2.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 262 (Da Capo Press 1970) (1833).

impediment to collecting war-related debts.<sup>71</sup> In a letter to Secretary of State John Adams, the British complained of state enactments that specifically prohibited the British from collecting debts in various states.<sup>72</sup> After investigating the complaints, Secretary of Foreign Affairs John Jay “documented numerous violations of the Treaty of [Paris] by the United States.”<sup>73</sup>

“Great Britain made loud complaints of infractions . . . on the part of the several states, and demanded redress.”<sup>74</sup> Due to the states’ failure to observe their obligations, Britain would not surrender the western ports as required by the treaty. The entire nation “was consequently threatened with . . . calamities . . . on the . . . western borders, and was in danger of having its public peace subverted through its mere inability to enforce the treaty stipulations.”<sup>75</sup>

For example, in *Rutgers v. Waddington*, Elizabeth Rutgers, the owner of a brewery that had been occupied by British soldiers during the war, sued for rent under the New York Trespass Act of 1783.<sup>76</sup> Among the defenses that Alexander Hamilton, Waddington’s attorney, raised was that the Trespass Act was invalid because it was preempted by the Treaty of Paris.<sup>77</sup> Under the Treaty of Paris both nations agreed that claims for “compensation, recompense, retribution or indemnity” due to the war were “renounced and released.”<sup>78</sup> Hamilton argued that “when two or more laws clash that which relates to the most important concerns ought to prevail.”<sup>79</sup>

The court did not address Hamilton’s argument and the case was later settled. But, *Rutgers v. Waddington* is considered by some to be the first articulation of the supremacy of federal law in American jurisprudence.<sup>80</sup>

In 1787, Congress attempted to address the states’ failure to comply with the Treaty of Paris.<sup>81</sup> Congress passed resolutions that directed states to comply with the Treaty under the authority of the Articles of Confederation. But the resolutions were “controversial and, in any event, the federal Government lacked a mechanism for making state courts enforce treaties.”<sup>82</sup> Under the Articles of Confederation treaties

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<sup>71</sup> CHRISTOPHER R. DRAHOZAL, *THE SUPREMACY CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 8 (2004).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> STORY, *supra* note 70, § 262.

<sup>75</sup> *Id.*

<sup>76</sup> DRAHOZAL, *supra* note 71, at 9.

<sup>77</sup> Robert S. Lambert, *A Hint of Judicial Review*, in 1 *HISTORIC U.S. COURT CASES* 155, 156 (John Johnson ed., 2001).

<sup>78</sup> *Id.* (quoting *Rutgers v. Waddington* (N.Y. City Mayor’s Ct. 1784)).

<sup>79</sup> DRAHOZAL, *supra* note 71, at 9-10 (quoting *Rutgers*).

<sup>80</sup> DRAHOZAL, *supra* note 71, at 9.

<sup>81</sup> *Id.* at 9-10.

<sup>82</sup> Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 *AM. J. INT’L L.* 695, 698 (1995).

“[were] binding in moral obligation, but could not be constitutionally carried into effect.”<sup>83</sup>

Early constitutional scholarship derided Congress’s ability to compel states to comply with federal treaty obligations prior to the adoption of the Constitution.<sup>84</sup> Discussing the problems that the early nation faced under the Articles of Confederation, Justice Story wrote that “[b]eing invested by the articles of confederation with a limited power to form commercial treaties, [Congress] endeavored to enter into treaties with foreign powers upon principles of reciprocity.”<sup>85</sup> However, “[i]t was further pressed upon us, with a truth equally humiliating and undeniable, that congress possessed no effectual power to guaranty the faithful observance of any commercial regulations; and there must in such cases be reciprocal obligations.”<sup>86</sup>

In April 1787, James Madison identified state violations of the “law of nations and of treaties” as one of the main problems that prompted the Constitutional Convention.<sup>87</sup> The framers considered several plans for creating a more functional federal government.<sup>88</sup> The framers rejected the Virginia Plan, which permitted the federal government to negate state laws that violated federal obligations.<sup>89</sup> Instead, the framers adopted the New Jersey plan, which included a version of what we now know as the Supremacy Clause.<sup>90</sup>

The history of the Supremacy Clause clearly shows that it was specifically drafted to ensure that treaties would be enforced not only by the federal government, but also by the states. State legislators who have proposed statutes or constitutional amendments that forbid the consideration of treaty law show a distinct lack of historical understanding of the U.S. Constitution in general and the Supremacy Clause in particular. They have completely disregarded the role that treaty law and the U.S.’s international obligations played in the adoption of the Constitution itself and have failed to grasp the role that treaties have played in the development of American jurisprudence.

## 2. SQ 755 Directly Conflicts with the Supremacy Clause of the U.S. Constitution, Which Establishes Treaties as the “Supreme Law of the Land”

SQ 755 defines international law as including “international agreements, as well as treaties.”<sup>91</sup> This violates the Supremacy Clause on its face.

The Supremacy Clause explicitly includes treaty obligations as the “supreme Law of the Land.” In *Baldwin v. Franks*, the U.S. Supreme Court makes clear that

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<sup>83</sup> *Ware v. Hylton*, 3 U.S. 199, 277 (1796).

<sup>84</sup> STORY, *supra* note 70, § 262.

<sup>85</sup> *Id.* § 261.

<sup>86</sup> *Id.*

<sup>87</sup> JAMES MADISON, *VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES* (1787).

<sup>88</sup> DRAHOZAL, *supra* note 71, at 11-12.

<sup>89</sup> *Id.* at 12.

<sup>90</sup> *Id.*

<sup>91</sup> H.R.J. Res. 1056, 52d Leg., 2d Sess. (Okla. 2010).



states are obligated to abide by treaty provisions.<sup>92</sup> *Baldwin* held that “treaties made by the United States and in force are part of the supreme law of the land, and . . . they are as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States.”<sup>93</sup> States have the same obligation to international law as does the federal government.

While the word “treaties” does not appear in the amendment itself, SQ 755’s ballot title uses “treaties” in its definition of international law. The people of Oklahoma voted on the ballot title when they passed SQ 755.

Under Oklahoma law, a “ballot title is a contemporaneous construction of the constitutional amendment and as such weighs heavily in determining its meaning.”<sup>94</sup> The Oklahoma Supreme Court recently held that “[w]hen construing a constitutional amendment that was proposed by the Legislature . . . th[e] Court will read the ballot title together with the text of the measure, even if the text of the measure contains no ambiguities or absurdities.”<sup>95</sup> The “Court will do so because those who framed and adopted the amendment considered the text of the measure and its ballot title together.”<sup>96</sup>

The Oklahoma Supreme Court went on to say that “[t]he understanding of the Legislature as the framers and of the electorate as the adopters of the constitutional amendment is the best guide for determining an amendment’s meaning and scope, and such understanding is reflected in the language used in the measure and the ballot title.”<sup>97</sup>

Under this rule of construction, articulated by the Oklahoma Supreme Court, the inclusion of the word “treaties” in SQ 755’s definition of international law renders the entire provision unconstitutional. SQ 755’s ballot title makes clear that the state judiciary cannot consider a body of law that has been explicitly deemed the “supreme Law of the Land” by the U.S. Constitution. As such, SQ 755 is in direct conflict with the Supremacy Clause and is pre-empted by it.

### 3. SQ 755’s Rejection of International Law Directly Conflicts with Well-Settled Law that International Law Is Part of Federal Common Law

A state law is pre-empted by the Supremacy Clause when it directly conflicts with the force or purpose of federal law.<sup>98</sup> Both history and case law make clear that international law, or the law of nations, is a well-established part of federal common law. As noted in *Filartiga v. Pena-Irala*, “[t]he law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution.”<sup>99</sup>

<sup>92</sup> *Baldwin v. Franks*, 120 U.S. 678 (1887).

<sup>93</sup> *Id.* at 683.

<sup>94</sup> *Austin, Nichols & Co. v. Okla. Cnty. Bd. of Tax-Roll Corrs.*, 578 P.2d 1200, 1204 (Okla. 1978).

<sup>95</sup> *Sw. Bell Tel. Co. v. Okla. State Bd. of Equalization*, 231 P.3d 638, 642 (Okla. 2009).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

<sup>99</sup> *Filartiga v. Pene-Irala*, 630 F.2d 876, 886 (1980).

In an 1815 case, *The Nereide*, the U.S. Supreme Court held that it “is bound by the law of nations which is a part of the law of the land.”<sup>100</sup> The Court confirmed its position in *The Paquete Habana*, decided in 1900, when it said that “[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>101</sup>

More recently, in *Sosa v. Alvarez-Machain*, the Supreme Court explicitly upheld the federal judiciary’s power to incorporate new international norms that are actionable under the Alien Tort Claims Act through their “residual common law discretion.”<sup>102</sup> In *Sosa*, the Court relied in part on its 1964 decision in *Banco Nacional de Cuba v. Sabbatino*, where it stated that “it is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances.”<sup>103</sup>

Although the Supreme Court cautioned lower courts to exercise restraint in finding new international norms,<sup>104</sup> even a restrictive reading of *Sosa* leads to the inescapable conclusion that customary international law remains a viable part of federal common law. Even Justice Scalia, who in his concurrence questioned the federal judiciary’s authority to find causes of action that did not exist when the Alien Tort Statute was enacted, acknowledged that at least some portion of the “Law of Nations” is binding on all U.S. courts.<sup>105</sup>

Moreover, the *Sosa* majority specifically rejected Justice Scalia’s position when it held that the federal courts are free to adjudicate claims based on “a narrow class of international norms” that have developed since the adoption of the Alien Tort Statute.<sup>106</sup> Furthermore, the majority cited *The Nereide* and *The Paquete Habana*, noting that “[f]or two centuries [the Supreme Court] ha[s] affirmed that the domestic law of the United States recognizes the law of nations”<sup>107</sup> and added that “[i]t would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.”<sup>108</sup>

The Supreme Court also rejected the argument that *Erie v. Tompkins* eliminated the federal judiciary’s ability to create common law. “*Erie* did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way.”<sup>109</sup> To support its finding, the

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<sup>100</sup> *The Nereide*, 13 U.S. 388, 423 (1815).

<sup>101</sup> *The Paquete Habana*, 175 U.S. 677, 700 (1900).

<sup>102</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 738 (2004).

<sup>103</sup> *Id.* at 729-30 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964)).

<sup>104</sup> *Id.* at 731.

<sup>105</sup> *Id.* at 749 (Scalia, J., concurring).

<sup>106</sup> *Id.* at 729.

<sup>107</sup> *Id.* at 729-30.

<sup>108</sup> *Id.* at 730.

<sup>109</sup> *Id.* at 729.

Court cited a number of cases, including *Texas Industries, Inc. v. Radcliff Materials, Inc.*, where the Court recognized “that ‘international disputes implicating . . . our relations with foreign nations’ are one of the ‘narrow areas’ in which ‘federal common law’ continues to exist.”<sup>110</sup>

SQ 755 and provisions like it violate the Supremacy Clause of the U.S. Constitution because they foreclose the consideration of a body of federal common law that is binding on states. For example, general maritime law mandates the consideration of customary international law in certain circumstances.<sup>111</sup> States are obligated to apply general maritime law under the “‘reverse-*Erie*’ doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.”<sup>112</sup> Therefore, if a state court could not look to international law in a maritime case, it would be in violation of the clear dictates of the U.S. Supreme Court.

Not surprisingly, Oklahoma courts have acknowledged the importance of federal common law. In an Oklahoma district court case, *American Petrofina Co. v. Nance*,<sup>113</sup> which was later affirmed by the Court of Appeals for the Tenth Circuit,<sup>114</sup> the court stated that “[f]ederal common law is federal law as much as if it had been enacted by Congress.”<sup>115</sup> The *Petrofina* court further explained that a conflict with federal common law would preempt any state law.<sup>116</sup> Customary international law has long been categorized as being federal common law.<sup>117</sup> Accordingly, enacting an amendment that forecloses the use of international law in decision-making is clearly against federal law, making the amendment unconstitutional.

In conclusion, the U.S. Supreme Court has acknowledged and upheld international principles for centuries because “[i]nternational law is part of our law.”<sup>118</sup> Even the most restrictive view of customary international law must acknowledge that it is binding on all American courts and cannot be ignored by any state judiciary. Therefore, any attempt to remove customary international law from state courts is unconstitutional on its face.

#### IV. SQ 755 AND PROVISIONS LIKE IT VIOLATE THE CONSTITUTION’S FULL FAITH AND CREDIT CLAUSE

Article IV, § 1 of the U.S. Constitution provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every

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<sup>110</sup> *Id.* at 730 (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981)).

<sup>111</sup> *Black Diamond S.S. Corp. v. Robert Stewart & Sons, Ltd.*, 336 U.S. 386, 396-97 (1949).

<sup>112</sup> *Offshore Logistics v. Tallentire*, 477 U.S. 207, 223 (1986).

<sup>113</sup> *Am. Petrofina Co. v. Nance*, 697 F. Supp. 1183 (W.D. Okla. 1986).

<sup>114</sup> *Am. Petrofina Co. v. Nance*, 859 F. 2d 840 (10th Cir. 1988).

<sup>115</sup> *Am. Petrofina Co.*, 697 F. Supp. at 1187.

<sup>116</sup> *Id.*

<sup>117</sup> *See Sosa*, 542 U.S. at 730.

<sup>118</sup> *Id.*

other State.”<sup>119</sup> This means that states have an obligation to respect and uphold the law of other states. The Full Faith and Credit Clause requires that “[a] judgment entered in one State must be respected in another provided that the first State had jurisdiction over the parties and the subject matter.”<sup>120</sup>

SQ 755 runs afoul of the Full Faith and Credit Clause in two ways. The first renders SQ 755 unconstitutional on its face. The second way is less clear cut and would depend on how a judge interpreted SQ 755.

*A. A State Cannot Condition Compliance with the Full Faith and Credit Clause on the Content of a Sister State's Decision*

When applying choice of law principles, a state court can use public policy as a guide, however, “[r]egarding judgments . . . the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.”<sup>121</sup> There is “no roving ‘public policy exception’ to the full faith and credit due judgments.”<sup>122</sup>

In *Finstuen v. Crutcher*, the Tenth Circuit applied these principles to invalidate an amendment to an Oklahoma statute that read “this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.”<sup>123</sup> The Tenth Circuit held that the statute was a violation of the Full Faith and Credit Clause because out-of-state adoption orders are “judgments” and therefore due the same deference as any other judicial determination.<sup>124</sup> In rendering its decision, the panel made clear that the Tenth Circuit recognizes no public policy exception to the rule “that credit must be given to the judgment of another state.”<sup>125</sup>

1. SQ 755 Impermissibly Conditions Oklahoma's Compliance with the Full Faith and Credit Clause on Whether or Not the Sister State Uses Sharia Law in its Opinions

As with most challenged laws, the ultimate determination of SQ 755's constitutionality rests on the interpretation that a reviewing court adopts. The U.S. Supreme Court has held that if a state enactment is “‘readily susceptible’ to a narrowing construction that would make it constitutional, it will be upheld.”<sup>126</sup> But, a reviewing court should not strain to find a constitutional interpretation, the provision “‘must be ‘readily susceptible’ to the limitation.”<sup>127</sup>

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<sup>119</sup> U.S. CONST. art. IV, § 1.

<sup>120</sup> *Nevada v. Hall*, 440 U.S. 410, 421 (1979).

<sup>121</sup> *Baker*, 522 U.S. at 233.

<sup>122</sup> *Id.*

<sup>123</sup> *Finstuen v. Crutcher*, 496 F.3d 1139, 1142 (10th Cir. 2007).

<sup>124</sup> *Id.* at 1156.

<sup>125</sup> *Id.* at 1153.

<sup>126</sup> *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988).

<sup>127</sup> *Id.*

“When . . . called upon to interpret state law,” the Tenth Circuit is obligated to “look to rulings of the highest state court, and if no such rulings exist, [the Panel] must endeavor to predict how the high court would rule.”<sup>128</sup> The court must interpret the language as it is actually used, “not in any abstract sense.”<sup>129</sup>

In pertinent part, SQ 755 provides that Oklahoma “[c]ourts . . . shall uphold and adhere to . . . 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.”<sup>130</sup> The most expansive reading of that language leads to the conclusion that Oklahoma courts may never “uphold” or “adhere” to the law of another state if that state has ever used Sharia law in its judicial decisions. Therefore, an Oklahoma court could conceivably conclude that if a New Jersey trial court used a precept of Sharia Law to determine a custody case, Oklahoma courts would thereafter be foreclosed from “upholding” or “adhering to” New Jersey judicial opinions.

On the other hand, a restrictive interpretation of SQ 755 dictates that Oklahoma courts are not empowered to “uphold” or “adhere to” the law of another state only if the decision in question was based on Sharia Law.<sup>131</sup>

Either interpretation places an impermissible condition on Oklahoma courts’ responsibility to uphold the judgments of sister states. Under the rule adopted in *Baker, Hall, and Finstuen*, no state court is empowered to disregard a judgment rendered in another state, regardless of the law the other state applied.

If enacted, SQ 755 would conflict with the Full Faith and Credit Clause in many ways. For instance, many Muslims dictate that their estates are to be distributed in accordance with Sharia principles. In fact, Mr. Awad’s concern that his will, which was drawn up in accordance with Sharia Law, would not be probated by an Oklahoma court was one of the reasons that Judge Miles-La Grange found that he had standing in *Awad*.<sup>132</sup>

It does not take much creativity to imagine a situation where a Muslim with a will similar to Mr. Awad’s would not be protected under Oklahoma law. Under SQ 755, a Muslim who owns property in Oklahoma but resides in another state may not be able to properly distribute his or her assets. In this scenario, the testator’s will is drawn up in accordance with Sharia Law, which means that an out-of-state probate court would have “considered” Sharia Law when issuing an order to distribute his or her assets. An Oklahoma court would not be empowered to “uphold” the out-of-state order. Therefore, the Oklahoma court would be in violation of the Full Faith and Credit Clause. Similar issues could arise over marriages, divorces, adoptions, and contracts, which are all areas where at least some Muslims seek to abide by Sharia Law.

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<sup>128</sup> *Finstuen*, 496 F.3d at 1148 (quoting *Lovell v. State Farm Mut. Auto. Ins. Co.*, 466 F.3d 893, 899 (10th Cir. 2006)).

<sup>129</sup> *Id.* (quoting *In re Estate of Little Bear*, 909 P.2d 42, 50 (Okla. 1995)).

<sup>130</sup> H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010).

<sup>131</sup> The definition of the word “law” is also problematic, as it could just mean statutory law, but the presence of the language relating to judicial decisions seems to indicate that the actual judgments of state courts are implicated or, more likely, the actual target of the provision.

<sup>132</sup> *Awad*, 2010 WL 4814077, at \*4.

## 2. Other State Law Measures Similar to SQ 755 Violate the Full Faith and Credit Clause

Arizona's legislature proposed a constitutional amendment, SCR 1010, that states: "courts . . . shall uphold and adhere to . . . if necessary, the laws of another state of the United States provided the law of the other state does not include international law."<sup>133</sup> As discussed earlier, the particular condition that a state places on its compliance with the Full Faith and Credit Clause is immaterial; any condition is unconstitutional.

Arizona's condition, however, is particularly problematic because it explicitly singles out international law. This position directly contradicts federal law. In *Skiriotes v. Florida*, the U.S. Supreme Court held that "[i]nternational law is a part of our law and as such is the law of all States of the Union."<sup>134</sup> Therefore all state courts are required to recognize, uphold, and apply international law.

Not surprisingly then, Arizona state courts have recognized the importance of international law and its needed application at the state level. In *State v. Miller*, the Arizona Court of Appeals held that international law governed the extent of Arizona's extraterritorial jurisdiction.<sup>135</sup> In *Miller*, the state indicted the defendant for his role in disposing of diamond rings that were stolen from a JC Penney in Arizona.<sup>136</sup> The case was dismissed at the trial level for lack of jurisdiction because the criminal conduct that the prosecution alleged occurred entirely outside of Arizona.<sup>137</sup> On appeal the state claimed that the court had jurisdiction based on an Arizona statute that allowed for the prosecution of anyone that caused a "result" in Arizona.<sup>138</sup>

First, relying in part on *Skiriotes*, the Arizona Court of Appeals held that international law governed a U.S. state's extraterritorial jurisdiction.<sup>139</sup> Next, the court looked to a variety of sources, including the *Restatement (Second) of the Law of Foreign Relations of the United States*, before determining that like a nation-state, Arizona only has the authority to prescribe law for extraterritorial conduct when it has a "substantial effect" within the state.<sup>140</sup> Noting that the continued deprivation of property did not constitute a "substantial effect," the court upheld the dismissal because "Arizona must conform to international law in its exercise of extraterritorial jurisdiction."<sup>141</sup>

This principle is not limited to Arizona courts. For instance, in *Peters v. McKay*, the Oregon Supreme Court applied international law to find that a state escheat

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<sup>133</sup> S. Con. Res. 1010, 50th Leg., Reg. Sess. (Ariz. 2011), available at <http://www.azleg.gov/legtext/50leg/1r/bills/scr1010p.pdf>.

<sup>134</sup> *Skiriotes v. Florida*, 313 U.S. 69, 72-73 (1941).

<sup>135</sup> *State v. Miller*, 755 P.2d 434, 436 (Ariz. Ct. App. 1988).

<sup>136</sup> *Id.* at 435.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 436.

<sup>140</sup> *Id.* at 437-38.

<sup>141</sup> *Id.* at 439.

statute must be tolled during wartime.<sup>142</sup> In *State v. Marley*, even though the Hawaiian Supreme Court ultimately found that international law was inapplicable to the case at bar, it recognized that *Skiriotes* requires that “‘international law’ takes precedence over . . . state statutes in . . . limited situations.”<sup>143</sup>

If enacted, SCR 1010 would render Arizona courts powerless to uphold and adhere to decisions like *Miller* and *Peters* or to abide by decisions that recognize the principle articulated in *Marley*. Paradoxically, an out-of-state court could find that its decision is void in Arizona because the judge applied the legal reasoning of *Miller*, an Arizona case. This result would be not only comical, but also unconstitutional under the Full Faith and Credit Clause.

*B. SQ 755’s Prohibition on Considering International Law or Foreign Law May also Violate the Full Faith and Credit Clause*

The portion of SQ 755 that forbids Oklahoma courts from considering international law and the legal precepts of other nations (foreign law) may be read as a *de facto* prohibition on upholding out-of-state judgments that are based on those doctrines.<sup>144</sup> This of course would violate the Full Faith and Credit Clause.

But, there is a way that the portion of SQ 755 that forbids the consideration/application of foreign and international law can be read constitutionally. This section discusses both scenarios.

States consider both international law and foreign law in a variety of situations, including “serving process, conducting discovery, ensuring recognition of foreign judgments, assessing rights under foreign law in probate and domestic relations matters, deciding choice of law issues, and in interpreting contracts with forum selection clauses.”<sup>145</sup> Although international law and foreign law are distinct, for purposes of this analysis, the distinctions are immaterial.

The U.S. Supreme Court has discussed the ubiquity of international and foreign law in American courts. In *Sosa v. Alvarez-Machain*, the Supreme Court included the following citations to show that in some cases, the presumptive choice of law is foreign law.<sup>146</sup>

*Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975) (per curiam) (noting that Texas would apply Cambodian law to wrongful-death action involving explosion in Cambodia of an artillery round manufactured in United States); *Thomas v. FMC Corp.*, 610 F. Supp. 912 (M.D. Ala. 1985) (applying German law to determine American manufacturer’s liability for negligently designing and manufacturing a Howitzer that killed decedent in Germany); *Quandt v. Beech Aircraft Corp.*, 317 F.

<sup>142</sup> *Peters v. McKay*, 238 P.2d 225 (Or. 1951).

<sup>143</sup> *State v. Marley*, 509 P.2d 1095, 1107 (Haw. 1973).

<sup>144</sup> The difference between foreign law and international law does not matter for the purposes of the Full Faith and Credit Clause. Oklahoma courts must uphold out-of-state judgments based on either doctrine.

<sup>145</sup> Mark DeLaquil, *Outsourcing Authority? Citation to Foreign Court Precedent in Domestic Jurisprudence: Foreign Law and Opinion in State Courts*, 69 ALB. L. REV. 697, 698 (2006).

<sup>146</sup> *Sosa*, 542 U.S. at 706-07.

Supp. 1009 (D. Del. 1970) (noting that Italian law applies to allegations of negligent manufacture in Kansas that resulted in an airplane crash in Italy); *Manos v. Trans World Airlines*, 295 F. Supp. 1170 (N.D. Ill. 1969) (applying Italian law to determine American corporation's liability for negligent manufacture of a plane that crashed in Italy).<sup>147</sup>

Along these lines, a majority of states have enacted the Uniform Foreign Money-Judgments Recognition Act (UFMJRA) of 1962, or its 2005 revision, the Uniform Foreign-Country Money Judgments Recognition Act.<sup>148</sup> Under UFMJRA, most states treat the money award of a foreign court as a sister state judgment.<sup>149</sup> Once a state court has found a foreign judgment enforceable under UFMJRA, it "has the same effect as a domestic judgment."<sup>150</sup> As discussed earlier, domestic judgments are entitled to full faith and credit throughout the nation.

A state cannot subvert its duty to uphold the judgments of sister state courts by enacting policy exclusions in its constitution. Therefore, all states are required to give full faith and credit to sister state judgments regardless of whether the judgment in question considered international law or foreign law. For instance, if a New York court reached a decision in a contract case by applying French law, that decision would be valid in every state in the union. But, SQ 755 calls that conclusion into question. It is not clear that Oklahoma courts would be allowed to "uphold" or "adhere" to an out-of-state decision that is based on foreign law.

Under the established rule of comity between states laid down in *Baker, Hall*, and *Finstuen*, a state cannot direct its courts to disregard a decision of another state, regardless of the body of law upon which the decision was based. Therefore, any attempt to circumscribe a state court's duty to uphold a sister state's judgment, regardless of the doctrine the sister state drew on for its decision, is indeed a facial violation of the Full Faith and Credit Clause.

Unlike the portion of SQ 755 that forbids an Oklahoma court from upholding out-of-state decisions that are based on Sharia Law, which is void on its face, a challenge to the prohibition on looking to international law or foreign law will largely depend on a court's interpretation of the amendment's text. As such, SQ 755 is likely subject to a constitutional interpretation. In the amendment's text, the prohibition on looking to international law or foreign law is separate from the portion that dictates that an Oklahoma court cannot "uphold" or "adhere" to the law of another state. Since those portions are separate, a court could reasonably find that Oklahoma courts are empowered to uphold the judgments of sister states, even when the judgments are based on international law or foreign law.

A state court is not generally empowered to inquire into the merits of a sister state's judgment. Most notably, in *Fauntleroy v. Lum*, the U.S. Supreme Court held that a Mississippi court must enforce the judgment of a court in Missouri even where

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<sup>147</sup> *Id.*

<sup>148</sup> John A. Spanogle, *The Enforcement of Foreign Judgments in the U.S.—A Matter of State Law in Federal Courts*, 13 U.S.-MEX. L.J. 85, 92 (2005).

<sup>149</sup> See, e.g., *Societe Civile Succession Richard Guino v. Redstar Corp.*, 63 Cal. Rptr. 3d 224, 229 (Cal. Ct. App. 2007) (finding that a three million franc attorney's fee award was enforceable as a foreign judgment).

<sup>150</sup> *McCaffery v. Green*, 931 P.2d 407, 408 (Alaska 1997).



the Missouri decision was based on a misinterpretation of Mississippi law.<sup>151</sup> Therefore, an Oklahoma court will not necessarily have to “look to the legal precepts of other nations or cultures”<sup>152</sup> in order to uphold a sister state judgment that is based on foreign or international law.

If a court reads the provision narrowly, however, and rejects a sister state’s decision based on international or foreign law, that decision could be challenged as a violation of the Full Faith and Credit Clause.

#### V. SEPARATION OF POWERS ISSUES

Upon first reading, it would appear that SQ 755 raises separation of powers issues. Separation of powers is the term that describes the distribution of authority amongst the branches of government. When one branch intrudes on the domain of another, the doctrine of separation of powers is normally invoked to invalidate the action.

SQ 755 specifically forbids the judiciary from considering both international law and foreign law, which seems to intrude on the independence of the judiciary. But upon closer inspection, SQ 755 stands up to a separation of powers challenge because it is a constitutional amendment. Constitutional amendments fundamentally alter the balance of power amongst the political branches. Therefore, many states, including Oklahoma, generally hold that an amendment to the state constitution cannot violate the document itself.<sup>153</sup>

There are a few state legislatures that have introduced bills, rather than constitutional amendments, that would forbid state judiciaries from considering international law. These measures are more susceptible to challenges based on separation of powers.

The distribution of powers amongst a state’s political branches is not generally a federal concern.<sup>154</sup> However, a state legislature’s intrusion on a state judiciary may run afoul of the separation of powers mandated by the state’s constitution. Unlike the U.S. Constitution, which does not contain an explicit separation of powers requirement, many state constitutions do include express separation of powers requirements.<sup>155</sup>

Since the Great Depression, separation of powers has diminished on the federal level, but the doctrine remains vital in many states.<sup>156</sup> Although it would be a

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<sup>151</sup> See *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908).

<sup>152</sup> H.R.J. Res. 1056, 52d Leg., 2d Sess. (Okla. 2010).

<sup>153</sup> See, e.g., *E. Okla. Bldg. & Constr. Trades Council v. Pitts*, 82 P.3d 1008, 1012 (Okla. 2003) (stating that the Oklahoma Supreme Court “fail[ed] to understand how an amendment to the Oklahoma Constitution could be found to violate that constitution”); *Strauss v. Horton*, 207 P.3d 48 (Cal. 2008) (finding that a constitutional amendment that overruled a California Supreme Court’s decision implicitly amended the California Constitution rendering the earlier decision moot).

<sup>154</sup> *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 225 (1908) (“[W]hen . . . a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned.”).

<sup>155</sup> Stanley H. Friedelbaum, *State Courts and the Separation of Powers: A Venerable Doctrine in Varied Contexts*, 69 ALB. L. REV. 1417, 1421 (1998).

<sup>156</sup> *Id.* at 1418.

mistake to apply the federal conception of separation of powers to every state, most state constitutions do require some semblance of judicial independence.<sup>157</sup> Telling courts which law they can and cannot consider when deciding a case is arguably a violation of the judicial independence that most state constitutions guarantee the judiciary.

Whether or not a provision violates a particular state's conception of separation of powers will largely depend on the language of the provision, the text of the state constitution, and the relevant case law that establishes the limit of the legislature's authority to direct the judiciary. While legislatures are generally empowered to direct courts by adopting positive law, forbidding the application of a valid and viable doctrine that has been respected in the U.S. for hundreds of years usurps one of the judiciary's core functions, which is to determine which law is applicable in a given case.

Regardless, however, of whether the legislature's regulation of the judiciary raises separation of powers issues that rise to a constitutional level, SQ 755 and provisions like it reflect a mistrust and misunderstanding of the role of the judiciary. These provisions ignore that individual judges are kept in check by the appellate process. Any judge who strays too far from precedent can be re-calibrated by the appellate court that reviews his decision. This holds true of trial courts and of first-level appellate courts. Moreover, the make-up of state supreme courts also provides an internal check. Because supreme courts are composed of multiple individuals, first-level appellate decisions are scrutinized by multiple judges who are interpreting and reviewing the law.

This does not mean that all judges agree, or that litigants agree with judges' interpretations of the law. But, the multiple checks on judges that are built into the system at least guarantee that if a judge blatantly disregards or makes up the law, a reviewing court will correct his breach of duty. It is inconceivable that a state's entire judicial system is so biased or corrupt that everyone within it will compromise well-settled legal principles.

SQ 755 and provisions like it throw a wrench into the very workings of the legal system. While not challengeable on constitutional or other grounds for doing so, those provisions serve to de-stabilize Oklahoma and other state courts.

#### VI. SQ 755 AND SIMILAR PROVISIONS WOULD EVISCERATE WELL-ESTABLISHED PRINCIPLES OF COMITY AND WILL NEGATIVELY IMPACT THE INTEGRITY OF STATE COURTS

In addition to running afoul of the Constitution, SQ 755 and similar provisions also clash with general principles of comity. Although this does not make them vulnerable constitutionally, it calls into question generally accepted rules of judicial interpretation and places courts at a loss for how to resolve disputes that require the application of foreign and international law.

Courts regularly apply judgments from other jurisdictions and foreign courts in deciding a host of cases, including cases with family law issues, contract disputes, and testamentary issues. As a general rule, the laws and judgments of foreign nations are typically granted consideration under the principle of comity, as long as they do not conflict with public policy.<sup>158</sup> This is also true in Oklahoma. Indeed, a

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<sup>157</sup> *Id.* at 1421, 1431.

<sup>158</sup> *See, e.g.,* Am. Online Inc. v. Superior Court, 108 Cal. Rptr. 2d 699 (Ct. App. 2001).

1903 Oklahoma case defines comity as: “the courtesy by which nations recognize within their own territory, or in their own courts, the peculiar institutions of another nation or the rights and privileges acquired by its citizens in their own land.”<sup>159</sup>

Without the ability to look to foreign and international law to extend this courtesy, Oklahoma and other courts bound by provisions similar to SQ 755 will have a difficult time adjudicating cases that come before them. Those cases are not cutting edge cases of first impression. Rather, they are in large part, bread-and-butter cases with no notable jurisprudential implications. For example, in *Leitch v. Leitch*,<sup>160</sup> a couple had been married in Canada and later divorced in Canada. The Canadian divorce decree required that one spouse pay the other \$2,500 per month in child support payments. The paying spouse then moved to Iowa, where he fell behind on payments. Using principles of comity, the Iowa court upheld and enforced the Canadian child support decree.<sup>161</sup>

Similarly, in *Compagnie Generale de Fourrures*,<sup>162</sup> a French corporation sued a New York corporation for breach of contract. Since the “meeting of the minds” had occurred in France, the court applied French contract law to resolve the dispute.<sup>163</sup>

Courts have also considered foreign law in circumstances relating to testamentary disposition.<sup>164</sup> For example, a New Jersey court had to determine whether a man had been domiciled in France or New Jersey.<sup>165</sup> The court looked to French law to adjudicate this question. French law required persons to apply and be approved for a domiciliary permit by French authorities before they could be considered legally domiciled in France. Since the man had never complied with that requirement, the New Jersey court held that the man had never been domiciled in France and was domiciled in New Jersey.<sup>166</sup>

As these cases demonstrate, state courts throughout the nation apply comity principles in a uniform manner and as a matter of course. If SQ 755 and other provisions like it go into effect, courts will be precluded from using well-established methods of interpretation. Additionally, courts will have to re-litigate routine issues already addressed by foreign courts.

This will place an unnecessary burden on state court systems. It will also have an impact on litigants and their lawyers. If these provisions go into effect and eviscerate principles of comity, lawyers would not be able to evaluate applicable law and counsel their clients. Litigants and lawyers will not be able to rely on Oklahoma courts (and other courts in states with similar provisions) for a fair adjudication of their claims.

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<sup>159</sup> *Myatt v. Ponca City Land & Improvement Co.*, 1903 O.K. 15, ¶ 9 (Okla. 1903).

<sup>160</sup> *Leitch v. Leitch*, 382 N.W.2d 448, 448-49 (Iowa 1986).

<sup>161</sup> *Id.* at 452.

<sup>162</sup> *Compagnie Generale de Fourrures & Pelleteries, Anciens Etablissements Haendler & Fils v. Simon Herzig & Sons Co.*, 153 N.Y.S. 717, 718-21 (Sup. Ct. 1915).

<sup>163</sup> *Id.*

<sup>164</sup> *See Harral v. Harral*, 39 N.J. Eq. 279 (1884).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

This has the potential of undermining the validity of the state courts. Courts will be seen as provincial tribunals that put local interests over well-settled legal doctrines, rather than as neutral arbiters of the law. Indeed, Justice Breyer recently stated that in order for courts to retain their legitimacy, the “law has to be stable. . . . People have to live their lives depending upon law.”<sup>167</sup> He made clear that consistency is essential for the administration of justice by our courts and their continued survival.

#### VII. THE NEGATIVE IMPACT OF SQ 755 ON ARBITRATION DECISIONS

Additionally, SQ 755 calls into question the Oklahoma state courts’ enforcement of arbitration decisions between Oklahoma and foreign companies. At least two of Oklahoma’s commercial statutes, the Uniform Arbitration Act and the Uniform Enforcement of Foreign Judgments Act, provide that contracts may incorporate arbitration clauses,<sup>168</sup> and that foreign judgments will be recognized in arbitration.<sup>169</sup> These well-established commercial statutes govern contract disputes. The plain language of SQ 755 however, could trump the application of international and foreign law to resolve those disputes—overriding the contracting parties’ negotiated-upon choice of law provisions.

The legislature clearly did not take into account the economic impact and negative consequences that SQ 755 would have on state corporations doing business with foreign entities. Oklahoma’s vigorous transportation, energy, and oil sectors are areas where state contracts subject to international arbitration clauses could be trumped by the amendment. The state’s international business agreements and important trade contracts in these sectors will be depressed if foreign or international entities are not guaranteed their contract rights in Oklahoma courts.<sup>170</sup>

To illustrate this, an Oklahoma builder may enter into a contract with a British cement company that incorporates either the American Arbitration Association (AAA) or another resolution system such as the International Center for the Settlement of Investment Disputes (ICSID) for dispute resolution procedures. The

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<sup>167</sup> *Due Process*, *supra* note 47.

<sup>168</sup> OKLA. STAT. tit. 12, § 1857 (2010). This Act applies to a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties. Such “agreement[s] [are] valid, enforceable and irrevocable, except upon a ground that exists at law or in equity for the revocation of the contract.” *Id.*

<sup>169</sup> OKLA. STAT. tit. 12, § 721 (2010).

The clerk shall treat the foreign judgment in the same manner as a judgment of the district court of any county of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings . . . as a judgment of a district court of this state and may be enforced or satisfied in like manner.

*Id.*

<sup>170</sup> This discussion has focused primarily on the impact of SQ 755 on Oklahoma contracts. But these issues would arise in other states with provisions similar to SQ 755. Given the extent of international trade agreements and arbitration clauses in this country, it is certain that prohibiting the consideration of international law will cause confusion and have significant impact on courts’ ability to interpret contracts in other states that have provisions similar to SQ 755.

contract may also specify that English law would apply to any disputes. If the Oklahoma builder has a claim against the British company arising in the course of performance of that contract, it would be handled by the AAA or ICSID, which would apply English law. When a judgment ultimately issues from that arbitration, it is unclear how the Oklahoma state court could enforce that judgment under SQ 755.

The losing party could attempt to block the judgment's enforcement under SQ 755's prohibition on applying foreign or international law. This is true even though Oklahoma's statutes pertaining to contract enforcement make clear that the builder's arbitration decision should be governed by the state's commercial statutes mandating uniform enforcement of foreign judgments. SQ 755, in contrast, would enable a litigant to argue that Oklahoma courts cannot honor the arbitrator's decision or enforce it because international law was used by the arbitrator. The impact on the foreign or international entities being sued in Oklahoma would be confusion and a mistrust of Oklahoma's judicial system.

#### VIII. CONCLUSION

Constitutional and statutory provisions like Oklahoma's SQ 755 that are proliferating throughout the country are unconstitutional in several respects. Aside from the obvious First Amendment problems, which have been successfully challenged in court, these provisions also run afoul of other constitutional provisions, namely the Supremacy Clause and Full Faith and Credit Clause. This makes them subject to facial challenges on those grounds. Comparable statutory provisions currently being contemplated by several states also may run afoul of the supremacy clauses of the constitutions in those states.

Provisions that prevent courts from applying international law, including treaty law, ignore the history of the Constitution in general and the formation of the Supremacy Clause in particular. One of the reasons that the Supremacy Clause was added to the Constitution by the Founding Fathers was so that states would respect international treaties. This was critical to our survival as a nation, as the British refused to withdraw from the American Confederacy because states were violating provisions of the Treaty of Paris that ended the Revolutionary War.

As this paper also discusses, SQ 755 and provisions like it have the potential of disrupting entire state legal systems. Courts will be constrained if they can no longer adhere to the well-established principle of comity, which requires states to recognize foreign judgments that rely on foreign or international law. This will impact the legal system as a whole. Judges will have to invent new ways to decide cases and will have to re-litigate issues that have already been decided. Consequently, lawyers will not be able to counsel their clients. The strengths and weaknesses of particular cases cannot be assessed if traditional and well-established principles of comity are no longer in effect.

These provisions also impact businesses. International businesses may think twice about doing business with Oklahoma and other states with provisions similar to SQ 755 if they cannot incorporate foreign or international law into contracts or arbitration provisions.

The obvious sentiments underlying these provisions are deep-seated xenophobia and contempt for the "foreign" and "international." As this paper discusses, however, the subtext is less obvious, but equally troubling. These provisions reflect a deep mistrust of the judiciary as a separate branch of government. They are attempts by legislators to regulate the courts. Implicit in these provisions is the

notion that judges cannot be trusted to administer justice and that they must be stopped from subjugating state interests to foreign and international interests. But, these provisions display a lack of understanding of how the judiciary functions. As such, they de-legitimize state courts by forcing them to diverge from well-established decision-making principles. This serves no good purpose in a country that is respected for its adherence to the rule of law, which is made possible only through the continued existence of an independent judiciary.