

THE SUPREMACY CLAUSE AS STRUCTURAL SAFEGUARD OF FEDERALISM: STATE JUDGES AND INTERNATIONAL LAW IN THE POST-*ERIE* ERA

SAM FOSTER HALABI*

Against a backdrop of state constitutional and legislative initiatives aimed at limiting judicial use of international law, this Article argues that state judges have, by and large, interpreted treaties and customary international law so as to narrow their effect on state law-making prerogatives. Where state judges have used international law more liberally, they have done so to give effect to state executive and legislative objectives. Not only does this thesis suggest that the trend among state legislatures to limit state judges' use of international law is self-defeating, it also gives substance to a relatively unexplored structural safeguard of federalism: state judges' authority under the Supremacy Clause to harmonize treaties and customary international law with state constitutional, legislative, and common law, and to influence federal jurisprudence on the scope and effect of binding international law. The Supremacy Clause empowers state judges to adapt international law to maximize benefits for— and minimize disruptions to— state policy objectives. As more areas of traditional state authority are displaced by international law, state judicial management of international law may be the strongest structural protection for state interests.

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* Assistant Professor, The University of Tulsa College of Law. J.D. Harvard, 2005; M.Phil. Oxford, 2001; B.S. Kansas State University, 1999. The author would like to thank Catie Coulter for superb research assistance as well as Dick Fallon, Janet Levit and Marianne Blair for helpful discussions. With respect to the Hague Convention on the Civil Aspects of International Child Abduction, this paper benefited from comments provided by participants at the William & Mary Federal Courts and Civil Procedure Workshop.

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INTRODUCTION

For most of American history, U.S. states have maintained an ambivalent relationship with international law. After they successfully cooperated in their military rejection of British rule, the states welcomed the attributes of sovereignty transferred to them under the law of nations as it existed in 1783.¹ In the early post-war period, however, the states used

1. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1446 (1987) (“The colonies united to declare their independence, but their Declaration proclaimed them to be ‘free and independent states’ Under traditional jurisprudence, sovereign states could enter into treaties with one another, and might even join together in a perpetual federation, or league, without losing their sovereign status This sort of federation by mutual treaty was exactly what the Revolutionaries had in mind when they created the Articles [of Confederation].”) (quoting THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776)); Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U.L. REV. 1027, 1050-51 (2002) (“Because state legislatures—not Congress—were the original repositories of legislative sovereignty transferred from Parliament by revolution, the dogma of exclusive sovereignty (in thirteen iterations) stood as an impediment to the creation of a ‘more perfect Union.’”); Julian Yap, *State Sovereign Immunity and the Law of Nations: Incorporating a Commercial Act Exception into Eleventh Amendment Sovereign Immunity*, 78 U. CIN. L. REV. 81, 105 (2009) (“Thus, under the law of nations, each individual state was regarded as a full sovereign entity in its own right, retaining all sovereign attributes that it had not

their sovereign powers in ways that strained the unity of the new confederation.²

After the War for Independence, [t]he “States passed tariff laws against one another as well as against foreign nations; and, indeed, as far as commerce was concerned, each State treated the others as foreign nations. There were retaliations, discriminations, and every manner of trade restrictions and impediments which local ingenuity and selfishness could devise.” Disputes between the States over border lands and overlapping land grants generated as much, if not more, hostility . . . including periodic border skirmishes between settlers from different States. And conflicting claims to lucrative prize ships and spoils of war seized on the high seas were yet another source of high tension among the States.³

Although the Articles of Confederation prohibited states from entering into any “agreement, alliance or treaty” with foreign powers and, separately, provided that “no two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of [Congress],”⁴ the states regarded the Articles themselves as a treaty among sovereigns.⁵ As a treaty, the Articles gave neither Congress nor individual states effective remedies against breaches. When the constitutional drafters met to correct these and other problems caused by the Articles of Confederation, they determined states should relinquish more sovereign attributes in the transition from confederation to national republic, although

expressly surrendered, including that of sovereign immunity in another sovereign's courts.”) (citations omitted). *Alden v. Maine*, 527 U.S. 706, 713 (1999) (“[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.”). It was around the time of the American Revolution that the term “international law” began to replace the “law of nations,” a change attributed to Jeremy Bentham. See generally Mark W. Janis, *Jeremy Bentham and the Fashioning of “International Law”*, 78 AM. J. INT'L L. 405 (1984).

2. Amar, *supra* note 1, at 1447-48 (“Various states refused to honor requisitions, flouted official judgments in the very limited category of controversies committed to central courts, enacted laws repudiating earlier treaties entered into by Congress, waged unauthorized local wars against Indian tribes, conducted negotiations with foreign nations independently of Congress, and maintained standing armies without congressional permission – all in clear violation of the Articles.”).

3. Lee, *supra* note 1, at 1055 (citation omitted).

4. ACT OF CONFEDERATION OF THE UNITED STATES OF AMERICA (NOV. 15, 1777), *reprinted in* 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 86, 93 (Merrill Jensen ed., 1976).

5. See THE FEDERALIST No. 43, at 279-80 (James Madison) (Clinton Rossiter ed., 1961) (arguing that the Articles of Confederation were a treaty within the context of the ratification debates).

the precise extent of that surrender remains unclear.⁶ The U.S. Constitution largely allocated recognition, formation, and domestic effect of international law to Congress and the President, leaving somewhat diminished “political safeguards of federalism” to protect state interests when Congress defined or codified customary international law, or when the President’s diplomatic agents entered into treaty negotiations.

Due in part to the ambiguities surrounding the redistribution of sovereign power under the U.S. Constitution, individual states, primarily through their legislatures, repeatedly attempted to assert their authority over both customary international law and ratified treaties to limit their influence or preserve state law-making prerogatives.⁷ Federal courts invalidated many of these attempts, applying one of several doctrines of conflict or field preemption flowing from Article VI of the U.S. Constitution.⁸ In the last decade, state governments have discovered that even legal regimes traditionally regarded as well within their constitutional domain may be subject to federal judicial veto as a result of a conflict with customary international law, presidential flexibility in the conduct of foreign affairs or even treaties the U.S. has not ratified.⁹

A new flashpoint has emerged as state legislatures again respond to the increasing influence of international law: state judiciaries. In the past year, Oklahoma adopted a constitutional amendment prohibiting its state judges from “considering” international law; the Arizona and Wyoming legislatures introduced similar constitutional amendments; and, more than 20 state legislatures considered “anti-international law proposals.”¹⁰ These

6. Carlos M. Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2159 (1999) (“[V]iolations of treaties by the states were a major problem during the period of the Articles of Confederation. . . . [T]he Articles were widely perceived to be flawed because they did not provide for the enforcement of treaties against the states. . . . [T]his was a key reason for the Framers’ decision to draft a new Constitution. . . . [T]he state courts failed to enforce treaties during this period because, adhering to the British rule, they understood that treaties were not enforceable in court without legislative implementation.”); see also Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 760 n.81 (2010) (noting disagreement over the scope of the states’ ability to conclude international agreements under the Articles of Confederation and the U.S. Constitution).

7. Fla. Stat. § 901.26 (2011) (“Failure to provide consular notification under the Vienna Convention on Consular Relations or other bilateral consular conventions shall not be a defense in any criminal proceeding against any foreign national and shall not be cause for the foreign national’s discharge from custody.”); see, e.g., Tim Wu, *Treaties’ Domains*, 93 VA. L. REV. 571, 584 n.31 (2007) (listing cases in which the U.S. Supreme Court determined state statutes conflicted with treaties).

8. See Wu, *supra* note 7, at 584-85.

9. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 576 (2005) (striking down Missouri statute authorizing death sentence for convicted persons under 18 years of age) (“As respondent and a number of amici emphasize, Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18.”).

10. S. Con. Res. 1010, 50th Leg., 1st Reg. Sess. (Ariz. 2011); H.R.J. Res. HJ0008, 61st Leg.,

initiatives proceed under presumptions held by many state legislators (and voters) that 1) politically unaccountable federal judges resort to otherwise non-binding international law to resolve disputes that are properly the province of U.S. or state law and 2) state judges emulate this behavior. Rex Duncan, the principal author of Oklahoma's constitutional amendment, State Question 755, stated that he introduced the measure as a "preemptive strike" aimed at preventing Oklahoma judges from mimicking federal judges who, "increasingly embrac[e] the idea that federal courts should look to international law to settle U.S. cases."¹¹

Acknowledging that the first presumption—that federal judges illegitimately apply international law to resolve disputes—is the subject of considerable controversy,¹² this Article challenges the second presumption. It is true that legal historians largely agree that the Framers included the Supremacy Clause precisely *because* they believed state judges would privilege local interests over the national interest, especially its diplomatic or international component.¹³ However, the relevance of this Article is not just to dispute prevailing suspicions that state judges improperly apply international law. The greater contribution is to explore the subtler ways in which state judges wield the Supremacy Clause, rather than wrestle with its constraints. I argue that state judges have regularly used their authority under the Supremacy Clause to shape both U.S. treaties and customary

Gen. Sess. (Wyo. 2011), available at <http://legisweb.state.wy.us/2011/Introduced/HJ0008.pdf&pli=1>; Martha F. Davis & Johanna Kalb, *Oklahoma and Beyond: Understanding the Wave of State Anti-Transnational Law Initiatives*, 87 IND. L.J. 1, 2 n.9 (Supp. 2011) (listing legislative initiatives).

11. Bill Sherman, *Legislator's Proposal Would Ban Use of Sharia Law*, TULSA WORLD, July 18, 2010, http://www.tulsaworld.com/news/article.aspx?subjectid=14&articleid=20100718_18_A1_Viewsd561266.

12. Scholars are divided on whether federal judges generally welcome or reject international law. See, e.g., Gordon A. Christenson, *Federal Courts and World Civil Society*, 6 J. TRANSNAT'L L. & POL'Y 405, 428 (Supp. 1997) ("Very little, if any, 'new' international human rights law has been incorporated in decisions by federal judges without the aid of a statute, despite a tradition in which customary international law is part of U.S. law and treaties are the supreme law of the land."); Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 5 (1995) ("Over the past 200 years, United States judges have developed a series of rules and practices that minimize the role of international law in domestic litigation."). *Contra* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 750 (2004) (Scalia, J., concurring) ("We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law.").

13. Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 843 (2004) ("The inclusion of treaties, as well as statutes, in the Supremacy Clause shows the extent to which the Constitution's framers focused upon state interferences in foreign affairs under the Articles. Perhaps the single greatest foreign affairs challenge under the Articles was that states refused to implement and abide by treaties negotiated by the national government.").

international law to advance their states' administrative and legislative objectives.¹⁴ Indeed, both the text of Article VI and constitutional history suggest that state judges do so.¹⁵ Often using customary international law as their principal authority, state judges have interpreted treaties to protect important state interests like their own citizens' access to state courts and evidence located in foreign jurisdictions; their prosecutors' flexibility in managing criminal cases against foreign aliens; and, their citizens' preferences for private ordering including application of international law in their contracts.¹⁶

In some cases, the U.S. Supreme Court has rejected state judges' interpretations of treaties and customary international law where these interpretations irreconcilably jeopardized federal interests.¹⁷ In others, the U.S. Supreme Court adopted state judges' interpretations as valid and even authoritative under an existing treaty regime.¹⁸ Where the U.S. Supreme Court has not yet decided an issue of treaty or customary international law, state judges and federal judges frame relevant issues through an iterative dialogue.¹⁹ Federal judges rely in part on state judges' interpretations and vice versa. State judges, therefore, influence treaties and customary international law through three principal methods: 1) interpreting treaties so as to harmonize them as completely as possible with the existing legal regime prevailing in a state; 2) influencing federal jurisprudence as to both the content and legal significance of customary international law and the interpretation of treaties; and, 3) shaping the procedural use of treaties and customary international law in state civil and criminal adjudications.

The practical significance of this argument is that, to the extent states seek to preserve their law-making prerogatives in the face of increasingly

14. See *Sei Fujii v. California*, 242 P.2d 617 (Cal. 1952) (en banc) (rejecting rights asserted under the U.N. Charter).

15. Alison L. LaCroix, *Rhetoric and Reality in Early American Legal History: A Reply to Gordon Wood*, 78 U. CHI. L. REV. 733, 749-50 (2011) ("With the negative, Madison attempted to graft a key element of imperial practice—hierarchical legislative review—onto the two-tiered structure of the Confederation. . . . The delegates' rejection of the negative, followed immediately by their taking up a draft provision directing that 'the Judiciaries of the several States' would be 'bound' by the 'supreme law' of the United States, signaled that the institutional focus of federal thought was shifting from legislatures to courts."); Saikrishna Prakash, *Are the Judicial Safeguards of Federalism the Ultimate Form of Conservative Judicial Activism?*, 73 U. COLO. L. REV. 1363, 1369-70 (2002) ("A state court could only meaningfully 'question' the validity of a federal treaty or statute by refusing to enforce such a federal law because it was unconstitutional. In other words, Congress understood that the state courts would review the constitutionality of federal legislation, at least when state and federal law conflicted.").

16. See *infra* notes accompanying Parts II-IV.

17. See *infra* notes accompanying Part II-B.

18. See *Volkswagenwerk Aktiengesellschaft v. Schlunk* 486 U.S. 694 (1988).

19. See *infra* notes accompanying Part II-B.

influential and pervasive international legal regimes, restricting state judges' ability to use international law is self-defeating. Within the wider theoretical literature, this Article contributes to the relatively modest body of scholarship dedicated to studying state judges' use of international law in the post-*Erie* era,²⁰ suggesting that state judges' ability to harmonize treaties and customary international law with state constitutional, statutory and common law provides an important judicial safeguard of federalism.²¹ This safeguard is especially forceful given that state judges manage 95% of all litigation.²² Evidence suggests that a substantial majority of international law developments are also handled by state judges,²³ and many state judges do not "consider themselves bound to follow the decisions of lower federal courts on questions of federal law."²⁴

Given the structural constraints the U.S. Supreme Court has placed upon state executive officials and legislators in directly regulating aspects of foreign relations frequently governed by international law, state judges may represent the strongest safeguard of federalism in the face of

20. Indeed, as far as I know, there is no comprehensive empirical study of state judges' use of international law in the post-*Erie* era. There are, however, many studies of any individual states' judges' use of international law. See, e.g., Julian G. Ku, *The State of New York Does Exist: How States Control Compliance with International Law*, 82 N.C.L. REV. 457 (2004); Thomas R. Phillips, *State Supreme Courts: Local Courts in a Global World*, 38 TEX. INT'L L.J. 557 (2003) (detailing Texas judges' use of international law). There is a robust literature discussing state judges' interpretation of treaties post-ratification, especially the Treaty of Paris and its requirement to protect British assets and creditors. See, e.g., Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095, 2118-19 (1999) (discussing proposed reforms of treaty status under U.S. law in the wake of *Rutgers*); Wythe Holt, "To Establish Justice": *Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1441-42, 1458 (noting widespread state refusal to vindicate claims of British creditors against U.S. debtors in violation of the Treaty of Paris); Thomas H. Lee, *The Safe Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 898 (2006) ("State courts, especially those in the biggest debtor state, Virginia, had proved spectacularly unhelpful in redressing the debt claims of English creditors. This refusal came despite the state courts' obligation under the Supremacy Clause to enforce the debt provisions of the 1783 Treaty of Paris.").

21. Alison LaCroix advances this argument in her excellent study of the judiciary as a solution to the philosophical problem of dual sovereigns. ALLISON LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 171-72* (2010) ("To be sure, the clause looked to judges in the states to enforce this supreme law of the land. It thus set up a procedural overlap between the two levels of government The judges might be nodes of connection between the functional levels of government, but their more significant role was as nodes of separation between the supreme (national, enumerated) law of the land and the ordinary (state) law that operated in all other contexts."). Like many constitutional histories, however, hers makes scant reference to the thoughts or practice of state judges at the time.

22. E. Norman Veasey, *A Response to Professor Francis E. McGovern's Paper Entitled Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1897, 1898 (2000).

23. Phillips, *supra* note 20, at 564 (noting statistics compiled by the Connecticut Bar).

24. Anthony J. Bellia Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1506 (2006).

increasingly influential international law-making.²⁵ Under the U.S. Supreme Court's decisions in *Zschernig v. Miller*²⁶ reaffirmed on narrower preemption grounds in *American Insurance Ass'n v. Garamendi*,²⁷ state statutes or administrative measures face a significant risk of preemption if they impose more than an "incidental effect" on foreign relations, even where those statutes do not directly conflict with a treaty or federal statute.²⁸ Under the U.S. Supreme Court's ruling in *Missouri v. Holland*, the federal government may accomplish through treaty what the Constitution otherwise allocates to the states.²⁹ Moreover, the "political safeguards of federalism" that arguably protect state interests in the federal law-making process are diminished in many international treaty-negotiating processes.³⁰

Whipsawed between international agreements and the customary international law those agreements generate on the one hand, and relatively unforgiving preemption jurisprudence on the other, state judges' ability to choose among interpretive alternatives represents a key structural safeguard for state interests as customary international law as well as bilateral and multilateral treaties govern larger areas of legal authority traditionally occupied by states.³¹ Nevertheless, state legislatures are expressing their frustration at preemptive federal international law-making not only by

25. Indeed, that protection may be significant. The Connecticut Bar Journal, for example, surveys international law developments in Connecticut courts. Between 1993 and 2003, 60% of the reported decisions were from state courts compared with 40% from district courts or the U.S. Court of Appeals for the Second Circuit. Phillips, *supra* note 20, at 564.

26. 389 U.S. 429, 433 (1968).

27. 539 U.S. 396, 417-20 (2003).

28. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 366 (2000).

29. In *Missouri v. Holland*, 252 U.S. 416, 434 (1920), the United States Supreme Court decided that the federal government's ability to make treaties, in that case, the Migratory Bird Treaty Act, is supreme over states' rights arising under the Tenth Amendment. See generally Curtis A. Bradley, *The Treaty Power and American Federalism Part II*, 99 MICH. L. REV. 98 (2000).

30. See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 398, 442 (1998) ("Executive agreements are, quite simply, international agreements concluded by the President without the two-thirds senatorial advice and consent specified in Article II of the Constitution. . . . The Supreme Court has endorsed the constitutional legitimacy of executive agreements, and it has held that even sole executive agreements are supreme federal law and thus supersede inconsistent state law. . . . As a number of commentators have pointed out, the treaty and executive agreement process is more opaque and less representative than the normal federal legislative process.") (citations omitted); see also generally David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963 (2003) (exploring sole executive agreements, Article II treaties, and congressional-executive agreements as deserving varying levels of judicial scrutiny to protect federalism). For the seminal contribution on the political safeguards of federalism, see generally Herbert Wechsler, *The Political Safeguard of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

31. Cf. Bradley, *supra* note 23, at 402-09 (describing areas where the federal government may use the treaty power to regulate in areas traditionally occupied by the states).

attempting to limit state judges' authority to favorably interpret treaties, use customary international law to promote state executive or legislative objectives or respect private ordering undertaken by state citizens, but also to condemn international law altogether.³² Certain international legal norms may in fact subvert or threaten states' broader schemes to protect citizens and promote their interests; other norms may facilitate state efforts to provide for the health, prosperity and safety of their citizens.

Oklahoma is the only state to pass a constitutional amendment banning its state judges from applying international law. Using principally, but not exclusively, Oklahoma's experience with both treaties and customary international law, this Article investigates the relationship between state judges and international law as it applies to traditionally state-regulated areas of the law: civil procedure, contracts, criminal law and family law. Methodologically, this Article is in part an exercise in conventional legal scholarship: the analysis of Oklahoma state appellate court decisions and the development of Oklahoma common law. For both practical and theoretical reasons, analysis of appellate court decisions does not adequately capture the broader state judicial historiography. First, Oklahoma courts have not adjudicated cases arising under some of the most important private and public international law treaties. Where these gaps occur, I have analyzed state court appellate decisions from all 50 states. For example, no Oklahoma appellate court has resolved a dispute arising under the Hague Convention on Service of Process. Instead, I examine the ways in which California and Illinois judges have shaped that treaty's interpretation to favor state interests. Second, appellate or even trial level adjudication of private disputes is rare.³³ Potential rather than actual litigants, or those who act and bargain in the shadow of international law, provide key indicators as to how Oklahoma state judges are likely to decide issues of first impression given existing statutory and common law rules. Therefore, this Article also relies on interviews with Oklahoma attorneys, corporate executives, customs agents, police and tribal judges whose lives or work may be affected in the unlikely event that the Oklahoma State Election Board is permitted to certify State Question 755.

Part I of this Article provides a brief background to State Question 755, especially as it fits within the broader debate on state authority to

32. Roger Alford, *International Law Banned in Oklahoma State Courts*, OPINO JURIS, Nov. 3, 2010, <http://opiniojuris.org/2010/11/03/international-law-banned-in-oklahoma-state-courts> ("The backlash against *Lawrence v. Texas*, *Roper v. Simmons*, and *Graham v. Florida* continues. Or perhaps . . . foreign law and international law are collateral damage.").

33. See Marc Galanter & Mia Cahill, "*Most Cases Settle*": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1351-88 (1994).

make or apply international law. Parts II through V examine state courts' actual and predicted use of international law in areas of traditional state regulatory authority: civil procedure, contracts, criminal law and family law. Part VI provides a brief conclusion.³⁴

I. THE SUPREMACY CLAUSE, STATE JUDGES AND INTERNATIONAL LAW

On November 2, 2010, Oklahoma voters overwhelmingly approved a state constitutional amendment which prohibited state judges from considering international law when exercising their judicial authority.³⁵ This measure, formally titled the "Save Our State" amendment or State Question 755, if given effect, amends Section 1, Art. VII of Oklahoma's state constitution by inserting the following language:

[State courts], when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international or Sharia Law. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.³⁶

Before the Oklahoma State Election Board certified the vote, Muneer Awad, a Muslim Oklahoman, challenged the measure principally as it affected the First Amendment's Establishment and Free Exercise Clauses.³⁷

34. Not all treaties, of course, introduce these confrontations. The United States, for example, has ratified the Convention on the Form of an International Will but has not adopted national implementing legislation in favor of state-by-state adoption through the National Conference of Commissioners for Uniform State Laws. See President's Message to Congress Transmitting the Convention Providing a Uniform Law on the Form of an International Will, 1986 Pub. Papers 905-06 (July 2, 1986) available at 1973 U.S.T. LEXIS 321. Oklahoma passed an implementing statute in 2010. OKLA. STAT. tit. 84, §§ 855-59 (2011). Oklahoma is one of relatively few states to have adopted the Uniform International Wills Act.

35. See Trevor Shofner, *State Question 755's Implications Unacceptable, Panel Says*, THE OKLAHOMA DAILY, Nov. 22, 2010, <http://oudaily.com/news/2010/nov/22/state-question-755s-implications-unacceptable-pane/> (noting 70% approval).

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

37. *Awad v. Zirriax*, 754 F. Supp. 2d 1298, 1302 (W.D. Okla. 2010), *aff'd*, 670 F.3d 1111 (10th Cir. 2012); Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction at 6, 13, *Awad v. Zirriax*, 754 F. Supp. 2d 1298 (No. CIV-10-1186-M) 2010 WL 4455372.

Indeed, the “Sharia Law” provision of State Question 755 has drawn as much or more of the scholarly and popular criticism as its anti-international law provisions.³⁸ A federal district judge in Oklahoma City enjoined the Election Board from certifying the measure.³⁹ The U.S. Court of Appeals for the Tenth Circuit affirmed the district court on the Establishment Clause claim alone.⁴⁰ Although the case remains alive, the amendment is unlikely to ever be implemented.⁴¹

The episode illustrates in part the extent of certain states’ reactions to courts, both in the U.S. and in Europe, deferring to the use of Islamic religious norms or principles to adjudicate a range of commercial or family disputes.⁴² State Question 755’s authors explicitly stated that they introduced the amendment in response to decisions from British and New Jersey judges deferring to certain cultural norms associated, rightly or wrongly, with specific Muslim communities.⁴³ Although there is little agreement as to the precise content, hermeneutics or boundaries of so-called “Sharia” law, the episodes in Britain and New Jersey did in fact involve Muslims and/or religious jurisprudence.⁴⁴

38. James C. McKinley Jr., *Judge Blocks Oklahoma’s Ban on Using Shariah Law in Court*, N.Y. TIMES, Nov. 29, 2010, <http://www.nytimes.com/2010/11/30/us/30oklahoma.html>; Martha F. Davis & Johanna Kalb, *Oklahoma State Question 755 and an Analysis of Anti-International Law Initiatives*, AM. CONST. SOC’Y FOR L. AND POL’Y, Jan. 11, 2011, http://www.acslaw.org/files/Davis%20and%20Kalb_Anti-International%20Law.pdf.

39. *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1308 (W.D. Okla. 2010).

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

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

42. See Bill Mears, *Judge Issues Permanent Injunction on Oklahoma Sharia Law Ban*, CNN BELIEF BLOG (Nov. 29, 2010, 4:27 PM), <http://religion.blogs.cnn.com/2010/11/29/judge-issues-permanent-injunction-on-oklahoma-sharia-law-ban/?iref=allsearch> (stating that the Muslim population is not “among the larger communities”).

43. Stephen Clark, *Group Launches Media Blitz in Oklahoma for Anti-Shariah Ballot Initiative*, FOXNEWS.COM (Oct. 20, 2010), <http://www.foxnews.com/politics/2010/10/20/anti-islamic-group-launches-media-blitz-oklahoma-anti-shariah-ballot-initiative/>; Laurie Ure, *Oklahoma Voters Face Question on Islamic Law*, CNN.COM (Nov. 1, 2010), <http://www.cnn.com/2010/POLITICS/10/28/oklahoma.sharia.question/> (citing the New Jersey court’s refusal to enter a restraining order against a spouse on the basis of his religious beliefs as one of the Oklahoma legislators’ motivations).

44. See *S.D. v. M.J.R.* 2 A.3d 412, 418-19 (N.J. Super. Ct. App. Div. 2010) (reversing trial court’s denial of final restraining order on the basis that religiously informed belief diminished criminal intent); Richard Edwards, *Sharia Courts Operating in Britain*, THE TELEGRAPH, Sept. 14, 2008, <http://www.telegraph.co.uk/news/uknews/2957428/Sharia-law-courts-operating-in-Britain.html> (“The government has quietly sanctioned that [sharia courts’] rulings are enforceable with the full power of the judicial system, through the county courts or High Court. . . . Muslim tribunal courts started passing sharia judgments in August 2007. They have dealt with more than 100 cases that range from Muslim divorce and inheritance to nuisance neighbours.”). For one relatively succinct description of pluralism in Islamic legal thought and the interpretation of sharia, see generally Basim Musallam, *The Ordering*

Yet the amendment's authors also intended to limit the application of international law as well as foreign or religious law. The ballot Oklahoma voters received accurately defined international law. The popular reaction embodied in State Question 755 mirrors the debate in the academy over a relatively narrow set of recent U.S. Supreme Court decisions that invalidated state statutes using, in part, multilateral human rights treaties and arguments consistent with customary international law.⁴⁵ The reaction is also consistent with the current, sometimes heated disagreement between scholars who argue that customary international law is coextensive with federal common law and those who assert that it is not law at all without some form of legislative adoption or incorporation.⁴⁶

International law, as legal scholars, diplomatic professionals and state legislators define it, is derived from two principal sources: treaties and custom.⁴⁷ While international law scholars and constitutional theorists disagree as to the status of customary international law—as federal common law, state common law, or neither—they tend to agree on the status of treaties in state courts. The Founders, as part of a relatively comprehensive displacement of state sovereignty over foreign affairs, drafted Article VI of the U.S. Constitution to make ratified treaties supreme federal law, binding on state judges.⁴⁸ Where states threaten treaties

of the Muslim Societies, in THE CAMBRIDGE ILLUSTRATED HISTORY OF THE ISLAMIC WORLD 164 (Francis Robinson ed., 1996).

45. In *Roper v. Simmons*, Justice Kennedy did not invoke customary international law per se but rather the enlightened practice of civilized states. 543 U.S. 551, 578 (2005) (“It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty. . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”).

46. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (arguing that customary international law, without additional administrative or legislative authorization, is not federal common law); Harold H. Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (arguing that customary international law is federal common law); Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT’L L. 265 (2001); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley & Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Arthur M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1 (1995).

47. Article 38(1) of the 1946 Statute of the International Court of Justice is generally regarded as the authoritative statement as to sources of international law: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

48. U.S. CONST. art. VI, cl. 2. In *United States v. Curtiss-Wright Export Corp.*, the U.S. Supreme Court ruled that federal authority over foreign affairs existed prior to and beyond the textual limits imposed by the U.S. Constitution. 299 U.S. 304, 318 (1936). *Curtiss-Wright* has never been overruled,

through executive, legislative or judicial action, federal judges readily invalidate those measures.⁴⁹ The same scholars who argue that customary international law does not have the effect of preemptive federal common law generally agree with this view, although some contend that the treaty power has been unjustifiably used to limit states' rights.⁵⁰

The authors of Oklahoma State Question 755 intended to limit state judges' use of international law as part of a comprehensive defense against a panoply of judicial threats.⁵¹ While both scholarly and media sources have conflated the underlying rationales for the measure, Rex Duncan, an attorney and principal author of the proposed amendment, intended to regulate at least three separate sources of judicial authority: Islamic religious law, foreign law, and international law. With respect to the former, Duncan sought to strip religious law from state judges' consideration, basing his objection on the idea that application of Islamic law would undermine certain "Judeo-Christian principles"⁵² that inform state and federal law. With regard to the latter, Duncan aimed to prevent Oklahoma judges from using international law to "settle U.S. cases."⁵³

The initial draft amendment authorized by the legislature defined neither Sharia law nor international law. The state attorney general supplied these definitions pursuant to the statutory process by which amendments are submitted to Oklahoma voters for approval.⁵⁴ Oklahoma voters received the following definition in connection with the ballot:

but Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* is now regarded as the most important precedent as to the extent of federal foreign affairs authority flowing from delegated powers under Article I and Article II. See 343 U.S. 579, 634-55 (1952).

49. Wu, *supra* note 7, at 573 ("There is, perhaps unsurprisingly, a strong historical pattern of enforcement of treaties against the individual States of the United States.").

50. See JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 272-73 (2005).

51. *Oklahoma Rep Rex Duncan Proposes Law Against Judges Using Sharia Law in State*, YOUTUBE (June 13, 2010), <http://www.youtube.com/watch?v=-LxwPN-2pYw> (quoting resolution author Rex Duncan, "This is a preemptive strike to make sure that liberal judges don't take the bench in an effort to use their position to undermine those founding principles and to consider international law or Sharia Law. The other part of the state question is to prohibit all state courts from considering international or Sharia Law when deciding cases, even in cases of first impression.").

52. *Id.* Duncan never specified which of the principles he referenced belonged strictly to Judaic or Christian traditions and which ones the application of Islamic law might contravene. Because Islam inherited both theological and legal principles from Judaism and Christianity, there is significant overlap.

53. Bill Sherman, *Legislator's Proposal Would Ban Use of Sharia Law*, TULSA WORLD, July 18, 2010, http://www.tulsaworld.com/news/article.aspx?subjectid=14&articleid=20100718_18_A1_VIEWS561266.

54. OKLA. STAT. tit. 34, § 9(c) (1992); Letter from W.A. Drew Edmondson, Okla. Attorney Gen., to M. Susan Savage, Okla. Sec'y of State (June 24, 2010) available at <https://www.sos.ok.gov/documents/questions/755.pdf>.

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.

This definition is, in essence, an accessible form of the definition provided in the Restatement of the Law, Third, Foreign Relations Law of the United States:

International law, as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical.⁵⁵

Thus, Oklahomans did not just adopt a prohibition on the application of Sharia law; they simultaneously adopted a separate and distinctly defined prohibition on international law.

Ratified treaties, of course, are federal law under the U.S. Constitution and binding on state judges:

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.⁵⁶

Strictly read, State Question 755 did not and could not lawfully prohibit state judges from applying valid treaties. Instead, it constrained state judges' use of certain non-domestic legal authorities and prohibited the use of customary international law to the extent such law does not preempt inconsistent state law. The interpretation of treaties often requires resort to both customary international law and the use of legal sources like a treaty's negotiating history, or *travaux préparatoires*.⁵⁷ For example, the

55. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (1987).

56. U.S. CONST. art. VI.

57. *Medellin v. Texas*, 552 U.S. 491, 507 (2008) ("Because a treaty ratified by the United States is 'an agreement among sovereign powers,' we have also considered as 'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the post-ratification understanding' of signatory

Vienna Convention on the Law of Treaties, which the U.S. has not ratified, is a multilateral treaty both federal and state judges use when interpreting treaties.⁵⁸ To the extent it represents non-binding customary international law, State Question 755 has the principal effect of barring its use to interpret treaties.

State Question 755 is in part a response to the U.S. Supreme Court exercising its authority to invalidate state laws using multilateral treaties and foreign precedent.⁵⁹ In *Thompson v. Oklahoma*, the U.S. Supreme Court cited the unratified International Covenant on Civil and Political Rights to support its conclusion that the Eighth Amendment barred Oklahoma's execution of sixteen-year-old juveniles.⁶⁰ In *Roper v. Simmons*, the U.S. Supreme Court ruled unconstitutional a Missouri statute authorizing the death penalty for juveniles younger than eighteen years of age based in part on Article 37 of the United Nations Convention on the Rights of the Child, a multilateral human rights treaty the United States has not ratified.⁶¹ Oklahoma was one of the few states to execute juveniles in the period leading up to the decision. In one judgment clarifying the scope of the Vienna Convention on Consular Relations, the International Court of Justice singled out an Oklahoma criminal defendant convicted and sentenced to death without being notified that he had the right to contact his consulate.⁶² State Question 755 is, therefore, not curious for its attempt to limit the effect of international law, but in the means by which it aimed to do so. Oklahoma judges have generally limited the influence of international law on criminal adjudications. In the one case where Oklahoma state judges relied principally on customary international law to provide a rule of decision, they did so to expand Oklahoma's prosecutorial and territorial interests.⁶³

nations.”).

58. *Busby v. State*, 40 P.3d 807, 814 (Alaska Ct. App. 2002) (“In other words, both federal and state courts have acknowledged and employed the principles of interpretation codified in the Vienna Convention.”) (citing both state and federal authorities); Sam Foster Halabi, *The World Health Organization's Framework Convention on Tobacco Control*, 39 GA. J. INT'L & COMP. L. 121, 134 n.55 (2010) (discussing the dispute as to whether the Vienna Convention is binding U.S. law).

59. Alford, *supra* note 25.

60. *Thompson v. Oklahoma*, 487 U.S. 815, 831 n.34 (1988).

61. Alford, *supra* note 25.

62. *In re Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 12 ¶15 (Mar. 31). See also *Medellin v. Texas*, 552 U.S. 491, 537 n.4 (2008) (noting that, in *Avena*, the ICJ expressed “great concern” that Oklahoma had set the date for Torres's execution).

63. *Hanes v. State*, 973 P.2d 330, 333 (Okla. Crim. App. 1998). Because of Oklahoma's history as sovereign territory for certain Native American tribes – which entered into treaties for the disposition of land not only with the United States, but with each other – Oklahoma courts regularly confront situations in which criminal defendants dispute the jurisdiction of the state for purposes of criminal prosecutions. In *Hanes v. State*, prosecutors in Ottawa County charged Stephen Eugene Hanes, a

Depending on certain factors, state legislatures enjoy at least *some* flexibility in regulating state judges' interpretation of valid treaties under the Supremacy Clause. Indeed, some states have passed narrow statutes with precisely that aim.⁶⁴ The more immediate question State Question 755 poses is: does the conduct of state judges warrant legislative circumscription because that conduct threatens state interests? The plain text of the Supremacy Clause may be read to authorize state judges to undertake at least three inquiries: that laws passed by Congress are "in Pursuance" of the Constitution; that treaties are made "under the authority" of the United States;⁶⁵ and that existing state law really stands "contrary" to valid federal law, including treaties.⁶⁶

The Judiciary Act of 1789 supports this view, allocating to the Supreme Court jurisdiction "where is drawn in question the validity of a treaty or statute of . . . the United States."⁶⁷ Alison LaCroix similarly concluded with respect to the Supremacy Clause:

This [constitutional] structure centered on the Supremacy Clause which bound state-court judges to follow congressional statutes, treaties and even the constitution itself . . . courts and judges would be the mediating agents between the national and state governments, ensuring the supremacy of the general government in its particular areas of competence while minimizing the size of the shadow that national

member of the Cherokee tribe, for fishing protected species of fish in violation of Oklahoma's conservation laws. Hanes argued that, while the bank on which he fished had been conveyed initially to the Cherokee Nation and subsequently, through allotment, to the City of Miami, the underlying riverbed remained Cherokee Nation territory and therefore beyond Oklahoma's jurisdiction. Tracing the history of U.S. treaties with the Seneca and Shawnee tribes and the Cherokee Nation, the court concluded that the Neosho or Grand River formed the boundary between the two nations prior to Oklahoma's entry into the U.S. Because the treaties were silent as to the riverbed, the Oklahoma Court of Criminal Appeals resorted to the "well-settled law of international boundaries" to determine that the Cherokee Nation had included the riverbed with its allotment, thus abandoning any property claim to it.

64. See CONN. GEN. STAT. § 52-59d (2011); FLA. STAT. § 901.26 (2011); N.Y. C.P.L.R. 7502(c) (2005); TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (2011).

65. In *Reid v. Covert*, 354 U.S. 1, 16-17 (1957), Justice Black attributed the difference between laws passed "in Pursuance" of the Constitution and treaties concluded "under the authority" of the United States to the need to ensure the survival of treaties made under the Articles of Confederation through the ratification of the U.S. Constitution.

66. Prakash, *supra* note 15, at 1368 ("By requiring state court review of state law, the Supremacy Clause implicitly authorizes state courts to review federal legislation as well Not *every* federal statute is supreme and therefore entitled to trump contrary state law. Rather, the Supremacy Clause only requires that federal statutes 'made in pursuance' of the Constitution trump contrary state law. Because the Supremacy Clause does not mandate preemption every time a federal statute conflicts with a state law, state courts presented with such conflicts necessarily must decide when the federal statute will trump and when the state law will prevail. In other words . . . state courts engage in judicial review of federal legislation.").

67. *Id.* at 1369-70.

oversight cast onto the states.⁶⁸

The bulk of scholarly effort toward understanding the Supremacy Clause has focused on whether and to what extent it empowered state judges to review the constitutionality of both federal and state laws.⁶⁹ Scholars have paid less attention to the subtler power of state judges to influence treaties and customary international law through their broad common law-making authority. While the Founders did not necessarily anticipate the changing relationship between treaty-based and customary international law, nor the now-regular use of congressional-executive agreements to accomplish foreign affairs objectives,⁷⁰ they did envision a process whereby state judges implemented treaties (and, presumably, Congressional codifications of the law of nations) against a backdrop of existing state constitutional, statutory, and common law.⁷¹

Academic commentators have divided on the extent to which the U.S. Constitution authorized states to regulate the content and use of international law in their courts. There is little disagreement that the U.S. Constitution supplanted some state foreign affairs authority. For example, Article I, Section 8 of the U.S. Constitution authorized Congress to regulate foreign commerce and to define and punish offenses against the law of nations, while Article II provides for a joint treaty-making process between the President and the Senate. States are further prohibited from entering into any “[a]greement or [c]ompact” with a foreign power or engaging in

68. LaCroix, *supra* note 16, at 171.

69. See, e.g., John Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2052 n.217 (2009) (using the debate between Bradford Clark and Peter Strauss on the meaning of Article VI as representative of this debate); Alison L. LaCroix, *Rhetoric and Reality in Early American Legal History: A Reply to Gordon Wood*, 78 U. CHI. L. REV. 733, 750 n.70 (2011); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1372 (1997); Julian G. Ku, *The State of New York Does Exist: How States Control Compliance with International Law*, 82 N.C. L. REV. 457, 476-77 (2004).

70. Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Law-Making in the United States*, 117 YALE L.J. 1236 (2008); Bradley, *supra* note 23, at 396 (“During the latter part of this century, however, there has been a proliferation of treaties, such that treaty-making has now eclipsed custom as the primary mode of international law-making. Moreover, many of these treaties take the form of detailed multilateral instruments negotiated and drafted at international conferences. These treaties resemble and are designed to operate as international ‘legislation’ binding on much of the world.”) (citations omitted).

71. See Anthony J. Bellia, Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1540 (2006) (“In a few cases, state courts referred to the common law or law of nations in interpreting acts of Congress. . . . [T]he principle was that courts should not interpret statutes to be in derogation of the common law unless the statute derogated from it by express language.”). NAFTA, for example, is not a treaty but was enacted through a congressional-executive agreement. The process by which its relationship with existing federal and state law is clarified is codified at 19 U.S.C. § 3312 (2006).

war without Congressional consent.⁷²

Yet these relatively straightforward propositions conceal numerous ambiguities as to the distribution of state and federal authority according to the Framers' original design. For example, not all treaties are created equal. Some treaties are self-executing; they impart judicially enforceable rights without additional implementing legislation from Congress.⁷³ Courts interpret these treaties with similar, although not perfectly coextensive canons that they use to interpret statutes.⁷⁴ Other treaties are non-self-executing; they do not convey judiciable rights unless Congress incorporates treaty provisions into domestic law.⁷⁵ The effect of the latter type of treaty on state law is disputed.⁷⁶

72. U.S. CONST. art. I, § 10. The U.S. Supreme Court has gone farther than these enumerated powers by asserting that certain "powers inherent in sovereignty" obtain outside the Constitution's text. *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-18 (1936); *see also* *Duncan B. Hollis, Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 770-72 (2010) (noting interpretive disputes over compact clause).

73. *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) ("The rule of equality established by [the treaty] cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts."); Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 656 (2000) ("Courts vary to some extent in the precise test they use to determine whether a treaty is self-executing. Typically, courts consider a variety of factors, such as the treaty's language and purpose, the nature of the obligations that it imposes, and the domestic consequences associated with immediate judicial enforcement.")

74. *See, e.g.,* *Negusie v. Holder*, 555 U.S. 511, 537 (2011) ("When we interpret treaties, we consider the interpretations of the courts of other nations, and we should do the same when Congress asks us to interpret a statute in light of a treaty's language."); *Medellin v. Texas*, 552 U.S. 491, 507 (2008) ("Because a treaty ratified by the United States is 'an agreement among sovereign powers,' we have also considered as 'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the post-ratification understanding' of signatory nations."); *Air France v. Saks*, 470 U.S. 392, 396-397 (1985) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text."); *Foster v. Nielson*, 27 U.S. (2 Pet.) 253, 314 (1829) ("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."); Michael P. van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687 (1998) (objecting to federal courts' adoption of traditional statutory rules of construction to interpret treaties); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[C]ourts interpret statutes in light of the law of nations.")

75. *Medellin*, 552 U.S. at 525-26 ("[T]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.") *See* Wu, *supra* note 7, at 607 (tracing the history of non-self-executing treaties in U.S. jurisprudence to *Camp v. Lockwood*, 1 U.S. (1 Dall.) 393 (Pa. Ct. Com. Pl. 1788).

76. *Compare* Vazquez, *supra* note 5, at 2207 ("A self-executing treaty is a treaty that preempts inconsistent state law without the need for action by the federal legislature, and a non-self-executing treaty is one that does not preempt state law without such action."), and Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1893-94 (2005) (arguing that non-self-executing treaties do not preempt conflicting state law whereas self-executing treaties are preemptive federal law), with Jordan J. Paust, *Avoiding "Fraudulent" Executive*

While questions of treaty interpretation pervade litigation in both federal and state courts, academic commentators most fiercely contest the definition and status, if any, of customary international law. Customary international law, which is generally defined as a rule manifested in widespread state practice conducted out of a sense of legal obligation, has drawn significant attention in recent years, largely due to litigation in federal courts under the Alien Tort Claims Act.⁷⁷ In many of these cases, violations of human rights are asserted to be a violation of customary international law, which, the argument goes, enjoys status as federal common law.⁷⁸

The extent to which customary international law really is federal law—or for that matter, state law—is unclear.⁷⁹ When the U.S. Supreme Court’s decision in *Erie Railroad Co. v. Tompkins* reinforced federal courts’ limited common law making authority under the U.S. Constitution, a number of questions persisted. One of these questions asked to what extent the nineteenth century’s regime of general common law—along with its international content—remained good state law, applicable by federal district courts sitting in diversity.⁸⁰ The conventional view, which Jack

Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights, 42 DEPAUL L. REV. 1257 n.85 (1993) (arguing that in the context of the International Covenant on Civil and Political Rights, “even a non-self-executing treaty preempts inconsistent state law”).

77. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (defining customary international law as a general and consistent practice of nations followed by them from a sense of legal obligation); Anthony A. D’Amato, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 76-87 (1971).

78. See *Sosa v. Alvarez Machain* 542 U.S. 692 (2004); Bradley, *supra* note 63, at 680 (2000); Ryan Goodman & Derek P. Jinks, *Filartiga’s Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 472-73 (1997) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)); Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 295 (1994).

79. Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 3 (2009) (summarizing the debate between “modernists” who argue that customary international law is preemptive federal common law and “revisionists” who argue it is not); Phillips, *supra* note 20, at 562 (noting cases in which federal courts have granted removal from state court based on a theory of customary international law-as-federal common law); Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT’L L. 365, 369-70 (2001-02) (arguing that customary international law comprised “general law” which provided rules of decisions under fairly narrow circumstances).

80. See *Panama Processes, S.A. v. Cities Serv. Co.*, 796 P.2d 276, 282 n.17(C) (Okla. 1990) (discussing whether state court respect for foreign judgments originated as an inherited customary principle from English common law); Bellia & Clark, *supra* note 68, at 47 (“Prior to ratification, states adopted the common law of England, which incorporated the law of nations. After ratification, state courts continued to apply the law of nations as part of their municipal common law, including the common law of crimes”) (citing Connecticut, Massachusetts and Pennsylvania state cases relying on the law of nations); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law after Erie* 66 FORDHAM L. REV., 393, 393-94 (1997).

Goldsmith and Curtis Bradley traced to an early essay by Phillip Jessup analyzing the effect of *Erie* on international law, was that customary international law was part of federal common law. The revisionist view, for which Goldsmith and Bradley are generally credited, asserts that customary international law is not federal law unless authorized as such by Congress and may be part of the common law of the states to the extent that individual states incorporate it.⁸¹

The U.S. Supreme Court has not clarified the issue. Certain decisions strongly suggest that well-defined customary international law is federal common law. In *Banco Nacional de Cuba v. Sabbatino*,⁸² the U.S. Supreme Court applied the “act of state” doctrine—a rule that, with some exceptions, “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”—to respect Cuba’s decision to nationalize its sugar industry.⁸³ The Court wrote that the act of state doctrine represented “a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community [which] must be treated exclusively as an aspect of federal law.”⁸⁴ While the Court noted that not all customary international law is enforceable in federal or state courts, the case has generally stood for the proposition that customary international law has the effect of preemptive federal law.⁸⁵

On the other hand, the U.S. Supreme Court’s recent Eleventh Amendment jurisprudence has suggested that even the federal government’s domain over “international law-making” powers should be strictly construed against the background of state sovereignty prevailing at the time of the ratification.⁸⁶ In *Alden v. Maine*, the Supreme Court decided

81. Ku, *supra* note 38, at 266-67; *see also* Bradley, *supra* note 63, at 671-72 (arguing that the case for federal common law making is stronger for treaties than for customary international law).

82. 376 U.S. 398, 425 (1964).

83. Bellia and Clark, *supra* note 68, at 9 (“The [Sabbatino] decision is best read, however, to reflect adherence to the same allocation of powers principles recognized by the Marshall Court, under which the Court upheld the perfect rights of sovereigns as a means of preserving federal political branch authority over foreign relations . . . Taken in historical context, the best reading of Supreme Court precedent dating from the founding to the present is that the law of nations does not apply as preemptive federal law by virtue of any Article III power to fashion federal common law, but only when necessary to preserve and implement distinct Article I and Article II powers . . .”).

84. *Sabbatino*, 376 U.S. at 425.

85. Carlos M. Vazquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495, 1539-41 (2011) (discussing the relevance of *Sabbatino* for the customary international law-as-federal common law debate).

86. *See* Lee, *supra* note 1, at 1028 (“[T]he founding generation was not only familiar with contemporary international law but also frequently consulted it in matters of statecraft. It is

that the states had relinquished none of their sovereignty “except as altered by the plan of the Convention or certain constitutional Amendments,” primarily the Fourteenth Amendment.⁸⁷ If the Constitution abrogated state sovereign immunity only to that extent, then the enumerated powers given to Congress and the President in the foreign sphere should be no less strictly construed than those given in the domestic sphere, or at least, no less strictly construed than necessary to give the United States the minimum rights a sovereign enjoyed under international law as it existed in 1789.⁸⁸ While many scholars have explored the implications of constitutional structure, text and history for federalism, few have studied what states, particularly state judges, are actually doing with treaties or customary international law.⁸⁹

All sides concur that neither Congress nor the Supreme Court is likely to provide any predictable or sustainable resolution to the proper distribution of state and federal sovereignty. To the extent that the “plan of the Convention” left some sovereign authority over foreign affairs to the states, state executives, legislatures, and judges may appropriately make

unsurprising, then, that the Founders would turn to the settled law of nations for guidance in deciding the domestic law issue of who has standing to sue a State in inter-state and international suits brought in federal court.”)

87. *Alden v. Maine*, 527 U.S. 706, 713, 756 (1999).

88. Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT’L L. 513, 536 (2002); Michael D. Ramsey, *The Power of the States in Foreign Affairs: the Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 369-90 (1999) (arguing that the original understanding did not impart unrestricted federal authority over foreign affairs); Jack L. Goldsmith, *Federal Courts, Foreign Affairs and Federalism*, 83 VA. L. REV. 1617, 1618 (1997) (same); Bellia, Jr. and Clark, *supra*, note 74, at 5 (“Specifically, the Court has respected foreign sovereigns’ “perfect rights” (and close analogues) as a means of ensuring that any decision to commit the nation to war would rest exclusively with the political branches, and not with the judiciary or the states . . . To serve that end, Article III authorized federal jurisdiction over categories of cases – such as those involving admiralty and ambassadors – in which the law of nations would often supply rules of decision.”).

89. Janet Koven Levit, *A Tale of International Law in the Heartland: Torres and the Role of State Courts in Transnational Legal Conversation*, 12 TULSA J. COMP. & INT’L L. 163, 183-84 (2004) (“In part, scholars and practitioners’ neglect of state courts may be a product of some intellectual myopia. The giants of international law typically reside in the political or economic power centers, often affiliated with the nation’s most prestigious law schools, where the Supreme Court and federal appellate decisions dominate almost all casebooks, and where students learn that the most prestigious post-law-school jobs are federal court clerkships . . . State courts thereby recede in the analysis, often out of benign neglect.”); Anna M. Gabrielidis, *Human Rights Begin at Home: a Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139, 179 (2006) (“State courts are often overlooked despite the important role they play in the creation of substantive policies that affect American citizens on an individual and local level . . . In the U.S., the bulk of the judicial workload – over 99 percent – occurs at the state rather than federal level, with 95 percent of U.S. judges working at the state level.”). *But see* Julian G. Ku, *The State of New York Does Exist: How States Control Compliance with International Law*, 82 N.C. L. REV. 457 (2004); Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT’L L. 265 (2001).

and apply law in that domain. Therefore, state judges retain wide discretion over the application of customary international law to disputes before them and circumscribed, though still influential, discretion in interpreting treaties. It is the use of this authority which State Question 755 and similar measures aim to regulate.

Whatever the motivations of Oklahoma legislators in attempting to impose a blanket prohibition on state judges' consideration of international law in disputes before them, Oklahomans and Oklahoma businesses confront a range of issues—idiosyncratic and common—that require regular interaction with international law. Oklahoma entered the United States as a combination of the Oklahoma Territory and the Indian Territory which early on caused its courts to grapple with questions of treaty interpretation.⁹⁰ Oklahoma is also a major producer of crude oil and natural gas; extraction, transportation, and refining of these fuels are frequently governed by contracts specifying application of international law. Oklahoma businesses regularly seek advice from personnel at Tulsa's international sea port, the Port of Catoosa, on potential legal issues related to carriage of goods by sea governed by both treaty⁹¹ and customary international law.⁹² Like other states, Oklahoma courts struggle with the appropriate remedies for alien criminal defendants who are not notified of their right to seek consular assistance upon arrest. Oklahoma judges have used international law to promote executive and legislative objectives in these and other areas.

90. *Simmons v. Whittington*, 112 P. 1018, 1019 (Okla. 1910) (interpreting treaty with the Chickasaw and Choctaw Tribes); *Woodward v. De Graffenried*, 131 P. 162, 163-64 (Okla. 1912) (interpreting the Creek Treaty of 1901); *Marcy v. Bd. of Comm'rs*, 45 Okla. 1 (1914) (interpreting a U.S. treaty with the Seminole Nation). Many of these treaties continue to govern U.S. and state relations with Native American tribes. *See generally* Judith Royster *The Legacy of Allotment*, 27 ARIZ. ST. L. J. 1 (1995).

91. *See Granite State Ins. Co. v. M/V Caribe*, 825 F. Supp. 1113, 1123 (D.P.R. 1993).

92. The Tulsa Port of Catoosa, which includes a range of industries with 63 facilities and approximately 4,000 employees are located at the port shipped 2,266,893 tons of cargo in 2010. *Tulsa Port of Catoosa*, PORT CENTRAL, *Winter 2011*, available at http://www.tulsaort.com/PDFs/PortCentral_2.2011_v.pdf. *See* Joshua Tietsort, Oklahoma State Question 755: Possible Implications (paper on file with author) (citing Interview with Richard Grenville, Director of Logistics and Business Development, Tulsa Port of Catoosa in Tulsa, Okla. (March 10, 2011)). As part of this advice, Grenville will supply sellers a standard bill of lading which incorporates the Hague Rules or the "International Convention for the Unification of Certain Rules of Law relating to Bills of Lading" codified in the United States as the Carriage of Goods by Sea Act at 46 U.S.C. § 30701 *et seq.* (2011). *See State Establishment for Agr. Product Trading v. M/V Wesermunde*, 838 F.2d 1576, 1580 (11th Cir. 1988) for a background of the Hague Rules; *see also Spartus Corp. v. S/S Yafo*, 590 F.2d 1310, 1315 (5th Cir. 1979); 46 U.S.C. § 30702 (2011).

II. CIVIL PROCEDURE

Since 1893, the Hague Conference on Private International Law has served as a forum for the harmonization and unification of choice-of-law rules across a wide range of private law transactions including cross-border evidence gathering, family law, certification of foreign public documents, laws applicable to the estates of deceased persons, and service of process.⁹³ The United States has ratified a small number of treaties drafted under the auspices of the Hague Conference including the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention), the Hague Convention on Taking Evidence Abroad (Hague Evidence Convention), the Convention on the Civil Aspects of International Child Abduction, the Convention on Intercountry Adoption and the Hague Convention on the Legalization of Foreign Public Documents.⁹⁴ State judges have extensive experience applying many of these treaties like the Hague Service Convention and the Hague Evidence Convention.

A. Hague Service Convention

The Hague Service Convention aimed to resolve certain disruptions in transnational litigation caused by differing approaches to service of process. In civil law jurisdictions, for example, service of process is often a function of the state, not of a private party. Unfamiliar litigants, often from common law states, found themselves facing default judgments in civil law jurisdictions because a party had served documents to a local official but the official never forwarded the documents to the opposing party.⁹⁵ For their part, civil law states shared common law states' desire for a uniform, centralized system of process for each state.⁹⁶ The Hague Service Convention explicitly proposed to "create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time" and facilitate mutual judicial cooperation across borders.⁹⁷ The Hague Service Convention accomplished

93. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php (last visited Sept. 23, 2012).

94. See, e.g., *Estate of Tassaras v. Michas*, 404 Ill. App. 3d 825 (2010).

95. *Volkswagenwerk Aktiengesellschaft v. Schlunk* 486 U.S. 694, 703 (1988) (noting that an explicit reason for the convention was elimination of this civil law requirement known as *notification au parquet*).

96. Emily F. Johnson, Note, *Privatizing the Duties of the Central Authority*, 37 GEO. WASH. INT'L. L. REV. 769, 771 (2005) (detailing conflicting interests leading to the Hague Service Convention).

97. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, preamble, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. 6638, 658 U.N.T.S. 163

these objectives by requiring each state to designate a central authority charged with receiving requests—using standardized forms—for service from a judicial officer from another contracting state and, in turn, arranging for service upon the party in the receiving state often through a local court.⁹⁸ For example, the United States’ “central authority” used to be housed in a specialized office in the U.S. State Department, although that function has since been privatized.⁹⁹ Once effected, the central authority sends a certificate of service to the judicial officer who sent the request. The Hague Service Convention allows a receiving state to authorize alternative methods of service, like mail or private process servers, although this election requires a separate designation in the documents contracting parties file with their accession or ratification.¹⁰⁰ The United States joined the treaty in 1967.

The Hague Service Convention is officially incorporated into Federal Rule of Civil Procedure 4(f)(1).¹⁰¹ Many states have incorporated the treaty through statute,¹⁰² judicial doctrine,¹⁰³ or amendment to state rules of civil procedure.¹⁰⁴ State judges regularly apply the treaty.¹⁰⁵ While no Oklahoma court has yet adjudicated a dispute over service made under the treaty, Oklahoma judges have interpreted the state long-arm statute to “extend jurisdiction of the Oklahoma courts to the outer limits permitted by the . . .

(entered into force for the United States on February 10, 1969) [hereinafter Hague Service Convention].

98. *Volkswagenwerk Aktiengesellschaft*, 486 U.S. at 698 (1988).

99. Hague Service Convention, <http://www.hagueservice.net/> (last visited Sept. 23, 2012).

100. See Hague Service Convention, *supra* note 86, art. 10 (“Provided the State of destination does not object, the present Convention shall not interfere with:

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.”).

101. See FED. R. CIV. P. 4(f)(1) (expressly authorizing the means of service designated by the Hague Convention).

102. See, e.g., CONN. GEN. STAT. § 52-59d (2011).

103. See, e.g., *Selco, S.R.L. v. Webb*, 727 So. 2d 796, 799 (Ala. 1998) (“Service of process on corporations of foreign countries that are members of the Hague Convention, such as Selco, must be perfected according to the terms of the Hague Convention Treaty.”).

104. See, e.g., CAL. CIV. PROC. CODE § 413.10 (Deering 2012).

105. See, e.g., *Selco*, 727 So. 2d at 800 (invalidating default judgment against Italian company for failure to effect service under the terms of the Hague Service Convention); *Parsons v. Bank Leumi Le-Israel, B.M.*, 565 So. 2d 20, 25 (Ala. 1990) (determining that Alabama defendant was properly served by Israeli plaintiff under Hague Convention); *Rivers v. Stihl, Inc.*, 434 So. 2d 766, 770 (Ala. 1983) (threatening effective sanction for foreign official’s failure to play by the rules).

United States Constitution.”¹⁰⁶ It is in the context of giving effect to state long-arm statutes that state judges have shaped the applicability of the treaty.

In two key areas, state judges have exercised significant influence on the treaty’s scope: 1) the conditions under which the treaty applies, and 2) whether the treaty permits service through means other than the central authority designated by the treaty text. In *Volkswagenwerk Aktiengesellschaft v. Schlunk*,¹⁰⁷ the U.S. Supreme Court adopted Illinois’ state judges’ determination that a domestic subsidiary may serve as an agent for service of process on a foreign corporation, even where that agency is involuntary and the determination is made under state law.¹⁰⁸ State judges have also limited the constraints of the treaty through their influence on using alternative means of service under Article 10(a).

1. State Judicial Limitation of the Treaty’s Scope

When Herwig Schlunk’s parents were killed in an automobile accident in Cook County, Illinois, he brought a defective design suit in Illinois state court against the distributor of the vehicle, Volkswagen of America, Inc. Volkswagen of America first denied that it designed the automobile and second argued that it was not an agent for the actual manufacturer, its German parent corporation, *Volkswagenwerk Aktiengesellschaft* (“VW”).¹⁰⁹ Schlunk amended his complaint to include VW as a party, but VW entered a limited appearance for purposes of quashing service, asserting that it could only be served pursuant to the Hague Service Convention.¹¹⁰ Despite the language in Article 1 of the Service Convention requiring that the treaty apply “in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad,” the Illinois trial judge determined that Volkswagen of America was VW’s agent for service of process as a matter of Illinois law:

VWoA is a wholly-owned subsidiary of VWAG, a majority of the members of the board of directors of VWoA are members of the board of management of VWAG, and VWoA is the exclusive importer and distributor of VWAG products sold in the United States pursuant to a manufacturer-importer agreement entered into between VWAG and VWoA . . . VWoA and VWAG are so closely related that VWoA is an agent for service of process as a matter of law, notwithstanding VWAG’s

106. *Winston Indus., Inc. v. Dist. Ct.*, 560 P.2d 572, 574 (Okla. 1977).

107. 486 U.S. 694, 709-08 (1988).

108. *Id.* at 709-08.

109. *Id.*

110. 112 Ill. 2d 595 (1986).

failure or refusal to have made such a formal appointment of VWoA as its agent. The . . . plaintiff's service of process [is] effective under the Supreme Court rules and Illinois code, and [is] not in conflict with "The Convention On the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters" (Hague Convention), which ⁱⁱⁱ applie[s] only to service of process outside the United States.

The Illinois appellate court affirmed the trial court's ruling noting that "[i]f the supremacy clause permits service on agents within the forum State, despite the existence of the Hague Convention (which says nothing about locally appointed agents), it should not matter how that agency relationship came about."¹¹² The Illinois Supreme Court rejected VW's appeal.¹¹³ VW then sought review by the U.S. Supreme Court.¹¹⁴

While the U.S. Supreme Court's decision undertook an extensive analysis of the treaty's text and negotiating history focusing on the meaning of "service" within the Convention, the effect of the decision was to adopt the state trial court's decision that the treaty did not apply. Justice O'Connor concluded: "Where service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no further implications."¹¹⁵ The decision effectively validated Illinois' decision that it could narrow the Hague Service Convention's applicability, facilitating product liability suits like Schlunk's in Illinois courts.¹¹⁶

111. Schlunk v. Volkswagenwerk Aktiengesellschaft, 503 N.E.2d 1045, 1046 (Ill. App. Ct. 1986).

112. *Id.* at 1048.

113. *Id.* at 1046.

114. The U.S. Supreme Court granted certiorari because some state supreme courts had determined that the Hague Service Convention provided exclusive means of service, although, as the Illinois appellate court noted, none of these cases involved a state judicial determination that a theory of involuntary agency rendered the treaty inapplicable. The federal Supreme Court framed the issue as whether "an attempt to serve process on a foreign corporation by serving its domestic subsidiary which, under state law, is the foreign corporation's involuntary agent for service of process" was "compatible with the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965 (Hague Service Convention)." Volkswagenwerk Aktiengesellschaft v. Schlunk 486 U.S. 694, 696-98 (1988). For the Illinois appellate court's discussion of these cases, see Schlunk v. Volkswagenwerk Aktiengesellschaft, 503 N.E.2d at 1047-49.

115. *Volkswagenwerk*, 486 U.S. at 707. In a concurring opinion, Justice Brennan noted the problem that adopting the Illinois state courts' decision posed for the national interest under the treaty. He found "it implausible that the Convention's framers intended to leave each contracting nation, and each of the 50 States within our Nation, free to decide for itself under what circumstances, if any, the Convention would control." *Id.* at 708.

116. See also *Ex parte Volkswagenwerk Aktiengesellschaft*, 443 So. 2d 880 (Ala. 1983) (authorizing service under an alter ego theory of corporate unity to avoid Hague Convention requirements).

2. State Judicial Expansion of Alternative Means of Service to Facilitate Access to State Courts

State judges have also influenced the unsettled question as to whether the Hague Service Convention authorizes parties to send service via international registered mail instead of through the designated central authority. Article 10(a) of the treaty reads:

Provided the State of destination does not object, the present Convention shall not interfere with—a) the freedom to send judicial documents, by postal channels, directly to persons abroad¹¹⁷

Article 10(a) uses the word “send” instead of “serve” leading some defendants to argue that the provision referred to judicial documents issued subsequent to formal service of process, which must be accomplished through designated “central authorities.” In one of the earliest cases implicating the treaty, a state trial judge in California determined that Article 10(a) permitted a plaintiff in a product liability suit to serve a defendant through international registered mail.¹¹⁸ The California appellate court affirmed, reasoning that:

The reference to ‘the freedom to send judicial documents by postal channels, directly to persons abroad’ would be superfluous unless it was related to the sending of such documents for the purpose of service. The mails are open to all. Moreover, the reference appears in the context of other alternatives to the use of the ‘Central Authority’ created by the treaty. If it be assumed that the purpose of the convention is to establish one method to avoid the difficulties and controversy attendant to the use of other methods, it does not necessarily follow that other methods may not be used if effective proof of delivery can be made.¹¹⁹

The U.S. Second Circuit Court of Appeals adopted that court’s reasoning when deciding that the Hague Service Convention authorized service of process by mail:

The service of process by registered mail did not violate the Hague Convention. Plaintiffs declined to follow the service route allowed under Article 5 of the Convention, which permits service via a “Central Authority” of the country in which service is to be made. Instead,

117. Hague Service Convention, *supra* note 86, art. 10.

118. *Shoei Kako Co. v. Superior Court*, 33 Cal.App.3d 808, 821 (Ct. App. 1973).

119. *Id.* (citations omitted). (“Although there is some merit to the proposed distinction it is outweighed by consideration of the entire scope of the convention. It purports to deal with the subject of service abroad of judicial documents.”).

plaintiffs chose to follow the equally acceptable route allowed under Articles 8 and 10. *See Shoei Kako v. Superior Court*, 33 Cal.App.3d 808, 109 Cal.Rptr. 402 (1973).¹²⁰

Indeed, California state jurisprudence interpreting the treaty is as or more developed than federal jurisprudence insofar as breadth of authorities consulted and clarity of analysis are concerned. In *Denlinger v. Chinadotcom Corp.*, a Silicon Valley-based California resident worked for a Hong-Kong based employer.¹²¹ After his employer fired him, Denlinger brought an action for wrongful termination in California court and served his former employer through registered mail. The employer asserted that service was defective because the plaintiff had not served it through its central authority. The California appellate court looked to language in the Convention, interpretation from both state and federal authorities, declarations other contracting parties issued in connection with ratification, an opinion from the U.S. State Department, as well as guidance from the treaty's governing body. The court concluded that both "the text and context of the Convention demonstrate that the Convention is meant to apply only to service of process, and that fact undermines respondents' claim that Article 10(a) is meant to cover the mailing of nonservice of process judicial documents only."¹²² While the broader effect of the ruling was to again interpret Article 10(a) as permitting service by mail, the more immediate effect was to facilitate access to California courts, in that particular case, in an action by a California resident against a foreign employer.¹²³

In the context of the Hague Service Convention, not only have state

120. *Ackermann v. Levine*, 788 F.2d 830, 838-39 (2d Cir. 1986). State judges, of course, struggle with difficult matters of interpretation just as federal judges do. The split between the Second Circuit and the Eighth Circuit on the Hague Service Convention Article 10(a) issue is traceable to the split between two California appellate court decisions. In *Bankston v. Toyota Motor Corp.*, the Eighth Circuit Court of Appeals adopted the reasoning of the California appeals court decision in *Suzuki Motor Co. v. Superior Court*. 889 F.2d 172, 174 (8th Cir. 1989). In *Suzuki Motor Co. v. Superior Court*, the court found that because service of process by registered mail was not permitted under Japanese law, it was "extremely unlikely" that Japan's failure to object to Article 10(a) was intended to authorize the use of registered mail as an effective mode of service of process, particularly in light of the fact that Japan had specifically objected to the much more formal modes of service by Japanese officials which were available in Article 10(b) and (c). 249 Cal.Rptr. 376, 379 (Cal. Ct. App. 1988).

121. 110 Cal. App. 4th 1396 (Ct. App. 2003).

122. *Id.* at 1401.

123. *See Sbarro, Inc. v. Tukdan Holdings, Ltd.*, 921 N.Y.S.2d 873, 839 (N.Y. Sup. Ct. 2011) ("Moreover, a Special Commission of the Hague Convention that met in 2003 considered the issue and concluded that the term 'send' in article 10 (a) is to be understood as meaning 'service' through postal channels."); *Cantara v. Peeler*, 701 N.Y.S.2d 556 (N.Y. Sup. Ct. 1999) (permitting service by mail on three Canadian criminal defendants).

judges' interpretations loosened constraints imposed by the treaty (*Schlunk*), expanded access to state courts through alternative means of effecting service (*Shoei Kako*) and generally influenced federal jurisprudence, state judges have also used their rules of civil procedure to influence the treaty's scope and effect. New York courts, for example, have determined that parties may waive the applicability of the Hague Service Convention through contract and serve parties via email under certain circumstances.¹²⁴ In *Tataragasi v. Tataragasi*, a North Carolina appellate court determined that strict compliance with the treaty was excusable where an "arbitrary refusal of service" was shown.¹²⁵ In *Broad v. Mannesmann*, the Washington Supreme Court determined that use of the Convention tolled the statutory service period, thus allowing a product liability suit by two Washington residents against a German corporation to proceed.¹²⁶ The net effect of these and other decisions is to preserve and facilitate citizens' access to state courts, even if that access is, on occasion, used by foreign plaintiffs against defendant state citizens.¹²⁷

B. Hague Evidence Convention

As with the Hague Service Convention, the drafters of the Hague Evidence Convention intended to harmonize and substantiate the various diplomatic protocols and informal processes that characterized transnational civil and commercial discovery prior to its adoption.¹²⁸ Hague Conference participants developed the Evidence Convention to minimize the difficulties courts and lawyers faced when attempting to obtain evidence from countries with "markedly different legal systems."¹²⁹ Generally a compromise between civil law jurisdictions in which judges actively managed discovery and common law jurisdictions which entitled parties' attorneys to drive the evidence-gathering process, the Hague Evidence Convention established procedures for judicial communication over the taking of evidence in the jurisdiction of another signatory state.¹³⁰

124. See e.g., *Alfred E. Mann Living Trust v. ETIRC Aviation S.A.R.L.*, 910 N.Y.S.2d 418, 421-22 (N.Y. App. Div. 2010) ("[W]e see no reason why the requirements of the [Hague] Convention may not be waived by contract.")

125. 477 S.E.2d 239, 263 (N.C. Ct. App. 1996).

126. 10 P.3d 371 (Wash. 2000).

127. See, e.g., *Parsons v. Bank Leumi Le-Israel, B.M.*, 565 So. 2d 20 (Ala. 2000) (affirming foreign court judgment against Alabama citizen).

128. Hague Service Convention, *supra* note 86; see also *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 176 Cal. Rptr. 874 (Cal. Ct. App. 1981).

129. *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, (1987) 482 U.S. 522, 531 (1987) (citing S. Exec. Doc. No. A, 92nd Cong., 2d Sess., at VI (1972)).

130. See e.g., *id.* at 534-35 (describing the purposes of the treaty).

1. State Judicial Circumscription of the Treaty: the First Resort Rule

State judges, who faced the earliest disputes implicating the treaty, decisively determined that it did *not* provide the exclusive means of evidence-gathering in civil litigation involving a foreign national from a signatory country.¹³¹ Instead, state judges fashioned an interpretive alternative which ultimately shaped the U.S. Supreme Court's resolution of the Evidence Convention's mandatory scope. As an issue of first impression in California state courts, judges determined that parties seeking discovery of evidence located in a foreign jurisdiction must first attempt to obtain that evidence through Hague Convention channels. However, should the treaty create unreasonable hurdles to discovery, state judges could impose appropriate remedies under state rules of discovery.¹³² This "first resort" rule represented state judges' efforts to give relatively limited effect to a treaty acknowledged to be federal law. According to these early decisions, the Hague Evidence Convention merely codified general principles of judicial comity which had long faced judges presiding over litigants from foreign jurisdictions and did not deprive them of their ultimate ability to order discovery.¹³³

From the first disputes in federal court involving the treaty, federal judges determined that the treaty offered only recommendations intended to facilitate transnational judicial comity as opposed to binding constraints on evidence-gathering. After federal judges interpreted the treaty as entirely permissive, consistently referring to California state jurisprudence on the matter, state judges began to eliminate their "first resort" requirements or

131. See *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 109 Cal. Rptr. 219, 221-22 (Cal. Ct. App. 1973) ("Whatever the generous provisions of the California discovery statutes, courts ordering discovery abroad must conform to the channels and procedures established by the host nation . . . [however s]hould a foreign-based litigant such as VWAG hide behind diplomatic walls, the California courts may deal with that situation when it appears."); *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 176 Cal. Rptr. 874, 885 (Ct. App. 1981) ("Once again we stress that we do not question the jurisdiction of the trial court to order VWAG, as a party to the lawsuit before it, to give discovery in West Germany. With the qualifications we have stated under California law, the orders are appropriate to the action and VWAG is legitimately subject to the orders. We conclude only that the trial court, in the exercise of judicial restraint based on international comity, should have declined to proceed other than under the Hague Convention at this stage."); *Morton-Norwich Products, Inc. v. Rhone-Poulenc, S.A.*, No. 6525, 1981 Del. Ch. LEXIS 501, at *7-8 (Del. Ch. Nov. 24, 1981) ("I have some difficulty in believing that the Hague Convention was meant to provide the exclusive avenue of relief in this type of situation . . . Under the laws of this State Morton-Norwich is entitled to the pre-trial production of relevant documents for the purpose of framing the issues for trial.").

132. See *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 109 Cal. Rptr. at 221-22.

133. See *id.* See also *Wilson v. Lufthansa German Airlines*, 489 N.Y.S.2d 575, 577 (Ct. App. 1985) ("[The] Hague Evidence Convention does not affect the discovery of information in the United States and that, with respect to information available only in foreign countries, its application is discretionary.").

determine, on first impression, that the treaty offered only limited protections to foreign defendants.¹³⁴ Indeed, in its most authoritative pronouncement on the Hague Evidence Convention, the U.S. Supreme Court by a 5-4 majority rendered the treaty “optional” subject to a case-by-case comity analysis.¹³⁵ Relying on precedent from California, New Jersey, Texas, and West Virginia state courts, Justice Blackmun’s dissent advocated the “first resort” approach initially articulated by state judges.¹³⁶

It might be argued that, in the interest of federalism, state judges should have pioneered the “strongly optional” interpretive alternative. However, as one federal district court concluded, acknowledging the contributions of California state judges, “[t]he [state] cases may be further reconciled by the possibility that California courts felt more obliged to yield to the supremacy of a federal treaty over state laws, whereas the [Pennsylvania federal district court] was confronted as we are with the federal rules and a federal treaty on essentially equal footing.”¹³⁷ Stated differently, state judges assumed that the treaty had at least *some* effect as federal law. Within that limitation, their contributions make more sense: emphasizing the treaty’s non-exclusiveness for purposes of obtaining discovery abroad and conditioning application of the treaty on its functionality.¹³⁸

2. Using the Hague Evidence Treaty to Give Effect to Plaintiffs’ Choice of State Forum

While the evidence is somewhat mixed,¹³⁹ state judges have also

134. See, e.g., *Sandsend Fin. Consultants, Ltd. v. Wood*, 743 S.W.2d 364, 366 (Tex. App. 1988) (“We accordingly hold that the Hague Evidence Convention is a permissive supplement to the Texas Rules of Civil Procedure. As a permissive supplement, it is within the trial court’s discretion to determine whether the Hague Convention procedures should be used as a first resort.”); *Am. Home Assurance Co. v. Societe Commerciale Toutelectric*, 128 Cal. Rptr. 2d 430, 433 (Ct. App. 2002) (“We hold that the rule of first resort to the Hague Convention announced in *Volkswagenwerk Aktiengesellschaft v. Superior Court* (1981) 123 Cal. App. 3d 840, 858 [176 Cal. Rptr. 874] (*Volkswagenwerk*) has been superseded by the balancing test provided in *Aerospatiale*.”); *Volkswagen of Am. v. Otto Durr Beteiligungs GmbH*, 37 Pa. D. & C.3d 165, 170 (Pa. Ct. Com. Pl. 1984) (“These documents contain no statements which suggest in any way that the Convention was intended to supplant the liberal discovery procedures of our courts when the assistance of a foreign court is not sought.”).

135. *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 533 (1987).

136. *Id.* at 540 (Blackmun, J. dissenting).

137. *Murphy v. Rex-Trusion Systems, Inc.*, 101 F.R.D. 360, 363 (D. Vt. 1984).

138. See e.g., *Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 539-40.

139. A Lexis search using the key words “‘Hague’ /10 ‘evidence’” and “‘forum non conveniens’” yielded 94 federal appellate and district court cases. Of those, 49 orders granted motions to dismiss based in part on the difficulties or complexities of using Hague Convention processes, 17 orders denied motions to dismiss based on forum non conveniens because of the access the Hague Convention provided while the remaining 28 cases mentioned the Hague Convention in passing or did not consider

appeared to use the Hague Evidence Convention as a shield against attempts to dismiss on forum non conveniens grounds while federal judges have generally used the treaty as a reason to grant, not deny, forum non conveniens motions.¹⁴⁰ In other words, a trial court considering whether or not to dismiss an action because an alternative forum exists may give preference to the plaintiff's choice of forum because the Hague Evidence Convention provides means to obtain evidence abroad; or a trial court may use the Hague Evidence Convention as a means to reject plaintiff's choice of forum because the treaty's processes are slow and expensive. State judges have tended toward the former while federal judges have tended toward the latter. An appellate court in Arizona, for example, specifically required a trial court to weigh the availability of the Hague Evidence Convention when determining whether to dismiss on the basis of *forum non conveniens* so as to respect plaintiff's choice of forum.¹⁴¹ Delaware judges have been resolute in allowing plaintiffs to use the availability of Hague Evidence Convention procedures to overcome the "overwhelming hardship" movants for forum non conveniens dismissal must show to be

motions to dismiss based on forum non conveniens. *See, e.g.*, *Clerides v. Boeing Co.*, 534 F.3d 623, 629-30 (7th Cir. 2008) (dismissing the case rather than require parties to use the Hague Convention to obtain the testimony of a large number of non-party witnesses through letters rogatory). *But see, e.g.*, *Crosstown Songs U.K. Ltd. v. Spirit Music Grp., Inc.*, 513 F. Supp. 2d 13, 17 (S.D.N.Y. 2007) ("If this suit is not dismissed, [Defendant] will have to engage in the time-consuming and expensive process of obtaining essential documentary evidence and witness testimony under the Hague Convention."); *Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507, 526-27 (S.D.N.Y. 2006) ("Even if some testimony of non-parties could be obtained . . . under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters . . . [the] circumstances would cause not only financial hardships, but significant delays in preparing the case for trial."); *Melgares v. Sikorsky Aircraft Corp.*, 613 F. Supp. 2d 231, 244 n.8 (D. Conn. 2009) (describing obtaining testimony of Spanish witnesses through letters rogatory as "a difficult and time-consuming—if not altogether futile—endeavor"); *Da Rocha v. Bell Helicopter Textron, Inc.*, 451 F. Supp. 2d 1318, 1325 (S.D. Fla. 2006) (describing letters rogatory as "notoriously inefficient"); *Kultur Int'l Films v. Covent Garden Pioneer, FSP.*, 860 F. Supp. 1055 (D.N.J. 1994); *contra Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604 (3d Cir. 1991) (noting Hague Convention as a reason to reverse district court's grant of motion to dismiss).

140. Using the same search, *supra* note 124, out of 23 state cases, state judges denied motions to dismiss for forum non conveniens on 13 occasions and granted three, while the remaining seven did not implicate the Hague Evidence Convention or considered discovery motions instead of motions to dismiss. *See, e.g.*, *Warburg, Pincus Ventures, L.P. v. Schrappner*, 774 A.2d 264, 270-71 (Del. 2001) (requiring party to use Hague Convention procedures where it did not show "that true hardship would result if it is forced to resort to Hague Convention procedures to obtain discovery"); *Ison v. E.I. Dupont De Nemours & Co.*, 729 A.2d 832 (Del. 1999); *Candlewood Timber Grp., L.L.C., v. Pan Am. Energy*, 859 A.2d 989, 998 (Del. 2004); *Lluerma v. Owens Ill., Inc.*, No. 04C-09-122 ASB, 2009 Del. Super. LEXIS 214, at *27 (Super. Ct. 2009) ("Although such circuitous routes to accessing evidence [such as the Hague Convention procedures] are somewhat cumbersome, and would place most of the burden on defendants, this factor does not present the defendants with an overwhelming hardship." (some internal quotation marks omitted)).

141. *Parra v. Cont'l Tire N. Am., Inc.*, 213 P.3d 361, 365-66 (Ariz. Ct. App. 2009).

excused from Delaware courts.¹⁴² In New Jersey, a party must show that they have made an attempt to obtain discovery, through the Hague Convention or otherwise, before filing a motion to dismiss based on forum non conveniens.¹⁴³ In Pennsylvania, the treaty is not applicable unless “a party is . . . seeking the assistance of a foreign court in connection with discovery requests addressed to a foreign entity.”¹⁴⁴ In New York the treaty is applicable mainly to obtain discovery from non-parties where the evidence is located in a signatory country.¹⁴⁵ While no Oklahoma court has had occasion to decide an issue related to discovery requested from a custodian abroad, the Oklahoma Supreme Court has invoked similar preferences for plaintiffs’ choice of forum, even when little evidence is located in Oklahoma.¹⁴⁶ This widespread state judicial preference in favor of plaintiffs’ choice of forum is especially important given the presumptive enforceability of choice of forum and choice of law clauses many Oklahoma citizens include in their contracts. The ability of state judges to interpret treaties, use and apply customary international law, and otherwise engage with international law-making plays a key role in giving effect to a broad set of underlying state legislative objectives, including private

142. See *In re Asbestos Litigation*, 623 A.2d 546, 549-50 (Del. Super. Ct. 1992) (rejecting Finnish defendants’ argument that production of documents located in Finland must be accomplished through the Hague Evidence Convention); *Wright v. Am. Home Prods.*, 768 A.2d 518, 536-37 (Del. Super. Ct. 2000); *Eisenmann Corp. v. GMC*, No. 99C-07-260-WTQ, 2000 Del. Super. LEXIS 25, at *33-36 (Super. Ct. 2000); *Varo v. Owens-Illinois*, 948 A.2d 673, 684 (N.J. Super. Ct. App. Div. 2008). (“If anything, it would appear that important evidence relevant to claims and defenses is located in each jurisdiction, and there is no reason to believe that the costs and burdens of litigating here favor plaintiffs to the detriment of defendant. And to the extent defendant suffers any burden at all, it seems equally shared by plaintiffs, and, in any event, may very well be mitigated by modern means of discovery such as videotaped testimony, telephonic conferencing and *de bene esse* depositions, designed to facilitate the gathering of evidence.”).

143. See *Kurzke v. Nissan Motor Corp.*, 752 A.2d 708, 714 (N.J. 2000) (“New Jersey courts should be especially accommodating to their own citizens seeking justice at home. ‘[A]n action by or against a resident will ordinarily not be dismissed as being in an inconvenient forum.’ . . . Although domestic residence is not decisive, ‘there is a strong presumption in favor of retaining jurisdiction where the plaintiff is a resident who has chosen his [or her] home forum. A nonresident’s choice of forum is entitled to substantially less deference.’” (alteration in original) (citations omitted)); *Moake v. Source Int’l. Corp.*, 623 A.2d 263, 264-66 (N.J. Super. Ct. App. Div. 1993) (affirming trial court’s rejection of foreign defendants demand that interrogatories be served according to Hague Evidence Convention). see also *Umana v. SCM S.p.A.*, 737 N.Y.S.2d 556, (App. Div. 2002) (affirming trial court’s denial of motion to compel based on Hague Evidence Convention).

144. *Volkswagen of Am. v. Otto Durr Beteiligungs GmbH*, 37 Pa. D. & C.3d 165, 172 (Pa. Ct. Com. Pl. 1984).

145. See *Matter of Agusta*, 567 N.Y.S.2d 664 (N.Y. App. Div. 1991).

146. See, e.g., *Binder v. Shepards, Inc.*, 133 P.3d 276, 278 (Okla. 2006) (the chosen forum would ‘establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience,’ or when the ‘chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems,’ may the court exercise its discretion to dismiss the case.” (alteration in original) (citations omitted) (some internal quotation marks omitted)).

ordering.

III. CONTRACTS

State judges in Oklahoma and elsewhere frequently face questions of treaty application and the relevance of customary international law for a range of contracting regimes. The Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention) and the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Montreal Convention) govern contracts between state residents and international air carriers; state judges frequently interpret these treaties using both persuasive and binding federal authority as well as secondary sources originating from the treaty's negotiating history. State judges frequently interpret treaty terms using state law¹⁴⁷ to limit or extend the treaties' application,¹⁴⁸ or shape evidentiary and procedural burdens that adapt the treaties to the existing rules of contract construction prevailing in a state.¹⁴⁹ State judges regularly construe the Warsaw and Montreal Conventions using both persuasive and binding authority from federal courts,¹⁵⁰ and engage in iterative dialogue with them.¹⁵¹ Less frequently, state judges interpret the Convention on the

147. See, e.g., *D'Arrigo v. Alitalia*, 745 N.Y.S.2d 816, 818 (Civ. Ct. 2002) ("Since the Warsaw Convention does not specifically define the word 'writing,' the court will look to New York law for guidance.").

148. See, e.g., *Koehler v. SAS*, 674 N.E.2d 112, 116-17 (Ill. App. Ct. 1996); *Zuliana de Aviacion v. Herrera*, 763 So.2d 499, 501 (Fla. Dist. Ct. App. 3 Dist. 2000) ("[The plaintiffs] were turned over to the National Guard and taken to a restroom in the terminal where the National Guard performed the strip search. As this occurred after disembarkation, the Warsaw Convention does not apply."); *Malek v. Air France*, 827 N.Y.S.2d 485, 487 (N.Y. Civ. Ct. 2006) (citing *Weiss v. El Al Israel Airlines, Ltd.*, 433 F.Supp.2d 361 (S.D.N.Y. 2006)); *N.Trust Co. v. Am. Airlines, Inc.* 491 N.E.2d 417, 423 (Ill. App. Ct. 1985) ("We conclude that article 17 of the Convention does not apply to this case because there was no accident, but that the plaintiffs may bring a cause of action against the air carrier under traditional common law rules.").

149. See, e.g., *Manion v. Pan Am. World Airways*, 55 N.Y.2d 398, 405-06 (N.Y. 1982) (The "assertion of the Convention's liability limitations is an affirmative defense [and] the party asserting the defense generally bears the burden of proof."); *Kodak v. Am. Airlines*, 805 N.Y.S.2d 223, 225 (N.Y. App. Div.1982) ("An air carrier's failure to prove delivery of the passenger ticket precludes it from invoking the Convention's limitation of liability."); *Am. Airlines v. Am. Home Assurance Co.*, 731 So.2d 810 (Fla. Dist. Ct. App. 1999) (finding recovery of attorneys' fees under state statute permissible as long as overall damage cap imposed by Warsaw Convention not exceeded).

150. See, e.g., *Schmoltdt Importing Co. v. Pan Am. World Airways, Inc.*, 767 P.2d 411, 412-16 (Okla. 1989) (applying Warsaw Convention to claim by Oklahoma resident); *Berson v. Delta Air Lines*, No. 095012616, 2010 Conn. Super. LEXIS 2089, at *3-4 (Super. Ct. Aug. 17, 2010) (finding no liability under Montreal Convention which supplemented Warsaw Convention).

151. *E. Airlines v. King*, 557 So.2d 574, 575 (Fla. 1990) ("The related cases in federal court were appealed to the Eleventh Circuit Court of Appeals. That court relied on the [Florida appellate court's] decision in *King* to uphold the state claim for mental distress but noted that the issue was pending in this court.").

Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which provides common standards for court recognition and enforcement of foreign and non-domestic arbitral awards.¹⁵² More importantly, state judges interpret contracts in which the parties themselves have agreed on the application of customary international law or a particular treaty.

A. Contracts which Specify both a State Forum and Choice of International Law

Oklahoma businesses engaged in international commerce regularly adopt contracts that include both choice of forum and choice of law clauses, the application of which are implicated by legislative mandates that may affect their enforceability. Under Oklahoma law, both choice of law and choice of forum clauses are presumptively enforceable.¹⁵³ Indeed, the Oklahoma legislature has specifically required that its judges interpret all contracts using the same rules, to give effect to the mutual intent of the parties, to resort to the language of the contract and to give effect to every provision of a contract if possible.¹⁵⁴ In short, the Oklahoma legislature, as many states, strongly favors the predictability and stability that facilitate private ordering.¹⁵⁵

In many contexts, international law facilitates rather than obstructs this legislative policy. For example, the International Association of Drilling Contractors (“IADC”) is a world-wide drilling contractor trade organization, which, among other activities, drafts and distributes standard contract forms.¹⁵⁶ While these contracts, which tend to favor drilling contractors over operators, are frequently negotiated and re-drafted, they nevertheless contain forum selection, choice of law, and industry standard

152. *Corcoran v. Ardra Ins. Co.*, 77 N.Y.2d 225, 228 (N.Y. 1990) (“We conclude that the Convention, as a United States treaty, preempts conflicting Federal and State law, but that it excepts the Superintendent from arbitration in this case and allows him to proceed against Ardra in the main action. Accordingly, we affirm the order of the Appellate Division.”).

153. *Adams v. Bay, Ltd.*, 60 P.3d 509, 510-11 (Okla. Civ. App. 2002) (“A forum selection clause acts as a stipulation wherein the parties ask the court to give effect to their agreement by declining to exercise its jurisdiction. Absent compelling reasons otherwise, forum selection clauses are enforceable. . . . A party who brings suit in a forum other than the selected forum bears the burden of persuading the court that enforcement of the forum clause would be unfair or unreasonable); *see generally* *Campbell v. American Int'l. Grp., Inc.*, 976 P.2d 1102 (Okla. Civ. App. 1999) (applying German law).

154. *See also* OKLA. STAT. ANN. tit. 15 § 151 et. seq. (1993).

155. Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L.J. 77, 95 (2009) (“While there is not a strict logical connection between General Contract Law and a preference for private ordering, there is a strong contingent and historical connection.”).

156. Lisa B. Brown & Harold J. Flanagan, *Onshore Drilling Contracts, Avoiding the Pitfalls of Form Drilling Contracts*, available at <http://www.liskow.com/PublicationFiles/Flanagan.pdf>.

provisions that implicate the use and application of international law.¹⁵⁷ For example, the IADC standard form contract requires that the parties abide by specific operating procedures as set forth in prevailing statutory and administrative rules, but where operating procedures are not addressed, parties must use standard industry practice as documented in IADC publications.¹⁵⁸ That standard, in turn, is assessed as a function of international, not state or national, practices in the industry.¹⁵⁹ These contracts often specify that actions arising out of the contract must be brought in an Oklahoma forum.¹⁶⁰

While no definitive empirical study of these provisions in Oklahoma contracts exists, there is some evidence to suggest that they occur in industries as varied as banking,¹⁶¹ insurance contracts,¹⁶² natural gas extraction,¹⁶³ telecommunications,¹⁶⁴ and, with respect to employment

157. Owen L. Anderson, *The Anatomy of an Oil and Gas Drilling Contract*, 25 TULSA L.J. 359, 364 (1990).

158. *See Dupre v. Chevron U.S.A., Inc.*, 913 F. Supp. 473, 480 (E.D. La. 1996).

159. INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS - HEAT, SAFETY AND ENVIRONMENTAL CASE GUIDELINES, <http://www.iadc.org/hsecase/index.html> (last visited September 20, 2012). *See also* Contract between Harken Energy and Parker Drilling Company, available at <http://contracts.onecle.com/harken/parker.svc.1997.07.22.shtml>. (“CONTRACTOR’S STANDARD OF PERFORMANCE – CONTRACTOR warrants that the operation and maintenance of Contractor’s Equipment will be performed safely and in good and workmanlike manner in accordance with accepted international oilfield practices and in compliance with all applicable laws, rules and regulations in effect as of the effective date of this Contract . . . CONTRACTOR further covenants, warrants and represents that all work performed by it hereunder shall be conducted in accordance with accepted international safety regulations.”).

160. *See Quicksilver Res. Inc. v. Eagle Drilling, L.L.C.*, No. H-08-0868, 2010 U.S. Dist. LEXIS 39863, at *3 (S.D. Tex. May 24, 2011) (“GOVERNING LAW: This contract shall be construed, governed, interpreted, enforced and litigated, and the relations between the parties determined in accordance with the laws of County of Cleveland, State of Oklahoma.”).

161. *See, e.g., DR Oil Ltd. P’ship. v. Bank of Oklahoma*, No. 4:10cv01265 BSM, 2011 WL 1884161, at *1 (W.D. Ark. May 18, 2011) (“Each forum selection clause establishes that if a lawsuit is initiated, it must be brought in Tulsa County, State of Oklahoma.”).

162. *See, e.g., Pyramid Diversified Servs., Inc. v. Providence Prop. and Casualty Ins. Co.*, 433 Fed. Appx. 687, (N.D. Fla. 2009) (“The parties agree that any legal action, suit or proceeding relating to this Agreement or the transactions contemplated hereby, shall be instituted in a federal or state court sitting in Oklahoma County, Oklahoma, which shall be the exclusive jurisdiction and venue of said legal proceedings.”).

163. *See, e.g., Terms and Conditions, CHESAPEAKE ENERGY*, <http://www.chk.com/pages/terms.aspx> (last visited September 20, 2012). (“If federal jurisdiction exists over any action, suit or proceeding arising out of or in any way connected with any claim involving Chesapeake, you agree that the United States District Court for the Western District of Oklahoma has exclusive jurisdiction. When federal jurisdiction does not exist over that action, suit or proceeding, you and Chesapeake designate the Circuit Court for the County of Oklahoma, Oklahoma, for the exclusive resolution of that dispute and submit to the jurisdiction of that court.”).

164. *Cable-La, Inc. v. Williams Communs., Inc.*, 104 F. Supp. 2d 569, 572 (M.D. N.C. 1999) (“The contract provides that Oklahoma law governs all contractual disputes and that any lawsuit to enforce the contract shall be brought in Tulsa County, Oklahoma, or in the United States District Court

contracts, apply across a wide range of industry sectors.¹⁶⁵ In one case, a major Oklahoma energy interest was negotiating the purchase of key replacement equipment when State Question 755 passed. The European seller used the issue to resist the buyer's insistence that any disputes be resolved in an Oklahoma state court as it could not guarantee an Oklahoma judge would enforce aspects of the purchase agreement specifying the application of EU law.¹⁶⁶ As the Association of the New York Bar asserted in its amicus brief before the Tenth Circuit, "by prohibiting the application of mandatory and voluntarily assumed elements of international law, SQ755 would render critical aspects of contracts unenforceable or indeterminable."¹⁶⁷

B. U.N. Convention on Contracts for the International Sale of Goods

As part of a strategy to increase export-driven job creation in the state, the Oklahoma Department of Commerce has established web-based support as well as international trade offices to facilitate commercial ties between Oklahoma businesses and foreign buyers.¹⁶⁸ The Department of Commerce advises businesses to plan for a number of legal and strategic issues that face businesses seeking to enter new markets or earn contracts with new foreign buyers. The legal and strategic issues include export financing alternatives, regulatory and contractual legal requirements, and transportation methods.¹⁶⁹ Along with the U.S. Department of Commerce, the Oklahoma Department provides general advice to Oklahoma businesses on import/export laws, customs inspections, and the U.N. Convention on Contracts for the International Sale of Goods.¹⁷⁰

The United Nations Convention on Contracts for the International Sale

for the Northern District of Oklahoma.").

165. See *T.D. Williamson, Inc. v. Plant Servs, Inc.*, No. 06-CV-0089-CVE-PJC, 2006 U.S. Dist. LEXIS 78666, at *10-11 (N.D. Okla. Oct. 27, 2006) (enforcing Tulsa County choice of forum selection clause between electrical consulting firm and employee even though employee never covered Oklahoma).

166. Anonymous interviews, (Feb. 20, 2011) and (Oct. 26, 2011).

167. Brief for Ass'n of the Bar of New York and the Islamic Law Comm. of the American Branch of the Int'l Law Ass'n as Amicus Curiae Supporting Appellee, *Awad v. Zirriax*, 670 F.3d 1111 (10th Cir. 2012) (No. 10-6273), available at <http://www2.nycbar.org/pdf/report/uploads/20072117-AmicusBriefAwadvZirriaxUSCourtofAppealsTenthCircuit.pdf>.

168. *Trade Training and Exporting – Exporting FAQs*, OKLAHOMA DEPARTMENT OF COMMERCE, <http://dev3.okcommerce.gov/v2/FDI-And-Trade/Trade-Training-And-Networking/Exporting-FAQs> (last visited Oct. 20, 2012).

169. *Exporting Basics*, OKLAHOMA DEPARTMENT OF COMMERCE, <http://www.okcommerce.gov/Commerce/About/rc/Exporting-Basics> (last visited Sept. 20, 2012).

170. *The Importance of International Business and Export Counseling Assistance From the U.S. Commercial Service*, EXPORT.GOV (OCT. 17, 2011), http://export.gov/oklahoma/oklahomaservices/eg_us_ok_040500.asp.

of Goods (CISG),¹⁷¹ which entered force in the U.S. on January 1, 1988,¹⁷² is similar to the Uniform Commercial Code (UCC) in that it provides a set of rules which not only add greater certainty to international contracts, but also shapes negotiations over the parties' substantive and procedural objectives.¹⁷³ Many of its provisions represent compromises between commercial norms prevailing in the contracting states, and its force is driven by a transnational jurisprudential matrix of courts, arbitral tribunals, and scholarly commentators.¹⁷⁴

Because the U.S. Senate ratified the CISG as a self-executing treaty, its terms apply to international sales contracts when the parties are located in signatory countries and the parties do not explicitly opt out of its terms.¹⁷⁵ While the CISG follows the UCC in most respects, it also differs in materially relevant ways. Article 19 of the CISG treats the "battle of forms" problem differently than the Oklahoma Commercial Code.¹⁷⁶ Article 19(1) provides that "[a] reply to an offer which purports to be an acceptance but contains additions, limitations, or other modification is a rejection of the offer and constitutes a counter-offer."¹⁷⁷ The corresponding Oklahoma statute provides that "[a] definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms."¹⁷⁸

171. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1983), 19 I.L.M. 668 (1980) (entered into force on Jan. 1, 1988); 15 U.S.C.A. App. at 49; 52 Fed. Reg. 6262-80, 7737 (1987); U.N. Doc. A/Conf. 97/18 (1980) [hereinafter CIGS].

172. *Status 1980 United Nations Convention on Contract for the Int'l Trade of Goods*, UNITED NATIONS COMM'N ON INT'L TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

173. JOSEPH LOOKOFKY, UNDERSTANDING THE CISG IN THE USA 1 (2d ed. 2004); CISG, *supra* note 156, art. I(a); *see also* Delchi Carrier Spa v. Rotorex Corp., 71 F.3d 1024, 1028-31 (2d Cir. 1995).

174. Joshua D.J. Karton & Lorraine de Germiny, *Has the CISG Advisory Council Come of Age?*, 27 BERKELEY J. INT'L L. 448, 450 (2009).

175. Elizabeth D. Lauzon, *Annotation, Construction and Application of United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 200 A.L.R. Fed. 541 (2005); *see also* MAIA – Terms, Conditions, & Refunds Policy, MARTIAL ARTS INDUSTRY ASSOCIATION, <http://www.masuccess.com/legal.aspx> ("Your order from this website or from MAIA's catalog shall be governed in all respects by the laws of the State of Oklahoma, U.S.A. without its choice of law provisions, and not by the 1980 U.N. Convention on contracts for the international sale of goods . . . You agree that jurisdiction and venue in any proceeding directly or indirectly arising out of or relating to the purchase of goods from MAIA not exceeding \$4500.00 will be in the small claims division of District Court of Oklahoma County, Oklahoma.")

176. Like many states, Oklahoma codifies the Uniform Commercial Code according to the code's formal sections, so that UCC §2-207 is the same as OKLA. STAT. ANN. tit. 12A § 2-207 (2004).

177. CISG, *supra* note 156, art. IX(1).

178. OKLA. STAT. ANN. tit. 12A, §2-207 (2004).

Similarly, Article 11 of the CISG dispenses with the Statute of Frauds, so that a contract may be proven by any means, including witnesses,¹⁷⁹ while the Oklahoma Commercial Code requires the contract be reduced to writing for “a contract for the sale of goods for the price of Five Hundred Dollars (\$500.00) or more.”¹⁸⁰ The CISG also eliminates the parol evidence rule, so that parties may resort to a wider range of evidence to prove both the existence of a contract and the meaning of terms.¹⁸¹

Parties regularly opt out of the CISG and state judges regularly enforce the parties’ intent that other laws govern their disputes.¹⁸² Indeed, state judges have noted the importance of the convention for facilitating international trade and enforce the treaty where it applies.¹⁸³ In *Orthotec, LLC v. Eurosurgeal, S.A.*,¹⁸⁴ where the parties disputed the CISG’s applicability, the state appellate panel engaged in an extensive analysis of the underlying factual dispute as a function of both the CISG and California law to conclude that the appellant suffered no prejudice even if the trial court improperly denied that party’s request for CISG jury instructions.¹⁸⁵

As with the Hague Service Convention, state judges have also limited the treaty’s applicability where it appears that a foreign defendant attempts to strategically avail itself of the treaty, i.e., the parties’ agreement shows a

179. HENRY GABRIEL, PRACTITIONERS GUIDE TO THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) AND THE UNIFORM COMMERCIAL CODE (UCC) 36 (1994).

180. OKLA. STAT. ANN. tit. 12A, §2-201 (2004).

181. *Filanto v. Chlewich Int’l Corp.*, 789 F. Supp. 1229, 1238 (S.D.N.Y. 1992); OKLA. STAT. ANN. tit. 12A, §2-202 (2004).

182. *Frank’s Int’l, Inc. v. Smith Int’l, Inc.*, 249 S.W.3d 557, 563 (Tex. App. 2008) (noting, “[t]he parties expressly agreed that the [CISG] does not govern the matters set forth in the agreements.”); *BAAN, U.S.A. v. U.S.A. Truck, Inc.*, 105 S.W.3d 784, 786 (Ark. Ct. App. 2003) (in explaining the applicable law the court looked to the contract and quoted, “[t]he [CISG] shall not apply to this agreement.”); *Technical Support Servs., Inc. v. Int’l Bus. Machs. Corp.*, 856 N.Y.S.2d 26, 29 (App. Div. 2007) (In quoting from a section in the contract to show waiver of a right to jury trial, the section also included, “[t]he [CISG] does not apply.”).

183. *Promaulayko v. Amtorg Trading Corp.*, 540 A.2d 893, 897 (N.J. Super. Ct. App. Div. 1988) (noting the “progress [] made to minimize the problems [in international trade] through such efforts as the [CISG]”), *rev’d*, 562 A.2d 202 (N.J. 1989); *KSTP-FM, L.L.C. v. Specialized Comm’ns, Inc.*, 602 N.W.2d 919,926 (Minn. Ct. App. 1999) (dismissing because the CISG applied to the contract but did not confer rights to the plaintiff as a third-party beneficiary).

184. *Orthotec, L.L.C. v. Eurosurgeal, S.A.*, No. BC270958, 2007 WL 1830810 (Cal. Ct. App. June 27, 2007).

185. See *Orthotec*, 2007 WL 1830810, at *2. (Cal. Ct. App. June 27, 2007) (“(1) the initial draft of the agreement provided for application of the CISG; (2) [OrthoTec] believed potential distributors would be uncomfortable with a treaty governing the parties’ relationship and discussed the matter with [Eurosurgeal]; (3) [Eurosurgeal] agreed to eliminate the application of the CISG; and (4) the final version of the agreement omitted any reference to the CISG and provided only for the application of California law.”).

lack of intent to invite the treaty's application.¹⁸⁶ For example, in *Vision Fire & Sec., Ltd. v. EMC Corp.*, an Australian corporation sued a Massachusetts corporation for its alleged failure to purchase a certain number of smoke detectors where the parties never reached a final written agreement. If the CISG applied, EMC would be deprived of a defense based on the Statute of Frauds. While certain negotiations leading to EMC's purchase of Vision's product occurred in Australia with the Australian corporate parent, the court concluded that Vision's Maryland subsidiary bore the closest relationship with the transaction. The court reasoned that the "CISG does not apply to the sale of goods between parties if one party has 'multiple business locations' unless it is shown that the party's international location 'has the closest relationship to the contract and its performance.'"¹⁸⁷ Indeed, the ability for state judges to resort to the CISG's negotiating history is crucial because it contains so many "proposals and counterproposals" which may support a decision shaped by existing state statutory or common law.¹⁸⁸

State Question 755, and other measures now circulating in other state legislatures, do not and cannot by their terms prevent state judges from applying the CISG (it is, after all, federal law), but they may deprive judges of international interpretive sources, including customary international law, and, more importantly, they cloud the certainty that both the UCC and CISG intended to give contracting parties. As Peter Krug phrased it:

International trade advances vital sectors of Oklahoma's economy, including agriculture, manufacturing, and natural resources development. According to the Oklahoma Manufacturers' Association, firms in the state exported goods valued at \$5.1 billion in 2008. In 2009, the Oklahoma Department of Commerce declared that "Oklahoma exports remain an engine of growth for the state economy." Why does SQ 755 pose a threat? It is because successful international business transactions require, and benefit from, a firmly-established legal infrastructure that provides adequate comfort — legal certainty — for those who wish to participate in the global marketplace. A seller of goods faces risks that something will go wrong with the transaction. . . . These risks become even more acute when sales are made across borders. To protect themselves, businesses rely on contracts that will be enforced, if necessary, by the courts. But when buyers and sellers are from different

186. *Vision Fire & Sec., Ltd. v. EMC Corp.*, No. 034305BLS, 2005 WL 705107, at *1 (D. Mass. Feb. 28, 2005).

187. *Id.* (quoting WILLIAM A. HANCOCK, GUIDE TO THE INTERNATIONAL SALE OF GOODS CONVENTION, sec. 101.006 (2002) (finding that all the business dealings transpired in Massachusetts, including all price quotations, sales, and orders.).

188. Karton & de Germiny, *supra* note 159, at 461.

countries, questions will arise about the proper body of law for the court to apply. Here, Oklahoma courts and contracting parties benefit from established precedent and decades of experience in deciding these matters. In some cases, like all U.S. courts, they must apply an international treaty on contracts for the sale of goods in order to do this. By prohibiting Oklahoma courts from considering . . . international law, SQ 755 threatens to undermine this system of precedent and the contractual expectations of businesses and their foreign partners.¹⁸⁹

Thus, the broader executive and legislative objectives promoting Oklahoma's integration into international commerce are correspondingly advanced not by limiting state judges' ability to use international law, but rather by applying that law where its citizens choose it to govern their contracts.

IV. CRIMINAL LAW

Criminal trials in Oklahoma, as other states, are generally resolved without resort to international law. Yet police, prosecutors, and criminal defense attorneys do, with some frequency, wrestle with at least one U.S. treaty: the Vienna Convention on Consular Relations.¹⁹⁰ That treaty, which the U.S. Senate ratified in 1969, and which courts interpreted as self-executing, requires that when a foreign national is arrested or detained, authorities of the receiving State must notify that person "without delay" of the right to have his or her country's local consular officer contacted.¹⁹¹ The consular officer may then facilitate legal defense, notify its citizen of additional rights or other advice and/or initiate diplomatic communications intended to minimize the effect of arrests of foreign nationals on relations between states.

189. Peter Krug, *State Question 755: An Unnecessary Harm to Oklahoma*, THE NORMAN TRANSCRIPT, Oct. 2, 2010, <http://normantranscript.com/opinion/x1760133151/State-Question-755-An-unneccessary-harm-to-Oklahoma/print>; see also *In re Application of the Okla. Bar Ass'n to Amend the Rules of Prof'l Conduct*, 171 P.3d 780, 830 (Okla. 2007) ("The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law."); Allison E. Butler, *The International Contract: Knowing When, Why, and How to "Opt Out" of the United Nations Convention on Contracts for the International Sale of Goods*, 76 FLA. B. J. 24, 26 (2002) ("As an ethical consideration, Florida attorneys have the duty to act in their clients' interest. Hence, even if a client insists that Florida law should control a contract, a practitioner should have enough knowledge of the convention to fully inform the client as to the pros and cons of its application.")

190. Vienna Convention on Consular Relations, Dec. 24, 1969, 21 U.S.T. 77.

191. Bruno Simma & Carsten Hoppe, *From LaGrand and Avena to Medellin - A Rocky Road Toward Implementation*, 14 TUL. J. INT'L & COMP. L. 7, 27 (2005).

If the terms of the treaty are breached—that is, if the foreign national is not notified of his or her right to seek consular assistance, then does the detained foreign national enjoy an enforceable, private right of action in a criminal proceeding against him or her? If so, what is the form and effect of that right? On these questions, the U.S. Supreme Court and the United Nations principal judicial arm, the International Court of Justice, (“ICJ”) diverged over a period when the Oklahoma Court of Criminal Appeals needed clear guidance on the validity and scope of the defense.¹⁹² In this context, Oklahoma judges, like judges in Oregon, Wisconsin and Virginia, fashioned remedies that minimized the effect of ICJ jurisprudence.

In *Breard v. Greene*, the U.S. Supreme Court, on the narrow issue before it, determined that failure to raise a defense based on the Vienna Convention in a state judicial proceeding barred the use of that defense in a subsequent federal habeas proceeding.¹⁹³ In that case, Paraguayan national Angel Francisco Breard challenged his conviction by a Virginia state court because he had not been informed of his right under Article 36 of the treaty to have the Paraguayan consulate contacted prior to conviction and sentencing, a claim he raised for the first time in his habeas petition. The Supreme Court’s decision was based on straightforward application of federal law:

The Vienna Convention—which arguably confers on an individual the right to consular assistance following arrest—has continuously been in effect since 1969. But in 1996, before Breard filed his habeas petition raising claims under the Vienna Convention, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which provides that a habeas petitioner alleging that he is held in violation of “treaties of the United States” will, as a general rule, not be afforded an evidentiary hearing if he “has failed to develop the factual basis of [the] claim in State court proceedings.” 28 U.S.C. § 2254(a), (e)(2) (1994 ed., Supp. IV). Breard’s ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently enacted rule, just as any claim arising under the United States Constitution would be.¹⁹⁴

192. The United States ratified the Vienna Convention on Consular Relations’ Optional Protocol concerning the Compulsory Settlement of Disputes in 1969, which gave the ICJ compulsory jurisdiction over “disputes arising out of the interpretation or application of the Convention.” Vienna Convention on Diplomatic Relations Optional Protocol Concerning the Compulsory Settlement of Disputes art. 1, Apr. 18, 1961, T.I.A.S. 6280. In 2005, the United States announced its withdrawal from the Optional Protocol as a result of other countries’ challenges to executions in the U.S. in which their nationals did not receive notification of their rights to have access to their consulates. The U.S. was the first country to invoke the protocol before the ICJ, successfully suing Iran for the taking of 52 U.S. hostages in Tehran in 1979.

193. *Breard v. Greene*, 523 U.S. 371, 378-79 (1998).

194. *Id.* at 376.

The Supreme Court also clarified at least two aspects of the case with respect to international law. First, although Paraguay had filed a petition with the ICJ which had jurisdiction to interpret the Vienna Convention on Consular Relations, by its terms, the treaty was to be “exercised in conformity with the laws and regulations of the receiving State.”¹⁹⁵ Second, the Supreme Court noted, “neither the text nor the history of the Vienna Convention clearly provides a foreign national a private right of action in United States’ courts to set aside a criminal conviction and sentence for violation of consular notification provisions.”¹⁹⁶ The U.S. Supreme Court strengthened both of these conclusions in subsequent challenges to state court convictions based on the failure to notify criminal defendants of their rights to consular notification.¹⁹⁷

In 1999, when Germany challenged U.S. practices under the Vienna Convention (the *LaGrand* case), the International Court of Justice determined that the Vienna Convention on Consular Relations *did* confer certain “individual rights” to contracting States’ nationals as a result of Article 36.¹⁹⁸ These rights included the right to challenge convictions and sentences based on violations of Article 36’s notification and communication provisions.¹⁹⁹ The ICJ held that parties to the Convention “shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.”²⁰⁰ In a 2004 judgment issued in response to a challenge brought by Mexico on behalf of its citizens facing execution in the U.S. (the *Avena* case) the ICJ clarified that states did not have to overturn convictions on the basis of notification failure, but convictions and sentences required review in light of any specific violations of Article 36 and the manner in which Convention violations might have affected the nationals’ rights.²⁰¹ Moreover, the ICJ insisted that these review and reconsideration remedies flow from judicial rather than executive processes; executive clemency or pardon procedures did not provide

195. *Id.* at 375 (quoting Vienna Convention on Diplomatic Relations Optional Protocol Concerning the Compulsory Settlement of Disputes art. 36(2), Apr 18, 1961 [1970] 21 U.S.T., at 101).

196. *Id.* at 377.

197. *See, e.g.*, *Stewart v. LaGrand*, 526 U.S. 115, 118-20 (1999); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 337, 346-52 (2006); *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

198. *See LaGrand (Germany v. U.S.)*, Judgment, 2001 I.C.J. 466, ¶¶ 77, 89. (June 27) [hereinafter “*LaGrand*”].

199. *See id.* ¶¶ 77, 86-89, 125.

200. *Id.* ¶ 128.

201. *See Avena and Other Mexican Nationals (Mexico v. U.S.)*, 2004 I.C.J. 12. 60-63. *available at* <http://www.icj-cij.org/docket/files/128/8188.pdf>.

sufficient guarantees, as the United States argued.²⁰²

A. *Valdez v. State*: Incorporating Evidentiary, but not Preemptive, Effects from the Vienna Convention on Consular Relations

Oklahoma prosecutors faced the consular notification issue twice during the long period over which the U.S. Supreme Court and the ICJ developed these competing doctrines. In *Valdez v. State*,²⁰³ an Oklahoma jury convicted and sentenced Mexican national Gerardo Valdez to death for killing Juan Barron during a drunken, late-night altercation over whether the Bible—according to Valdez—required him to murder Barron because of his sexual orientation.²⁰⁴ After the Oklahoma Court of Criminal Appeals affirmed his original conviction and he exhausted remedies available under habeas review in the federal courts,²⁰⁵ the defendant argued that his conviction and sentence should be overturned because the state failed to notify him of his right to contact his consulate.²⁰⁶ Oklahoma state prosecutors argued that Valdez failed to raise the claim as part of his original criminal trial and therefore defaulted on the claim while Valdez asserted that the ICJ's *LaGrand* judgment required that the appellate court grant relief as a result of the failure to notify the Mexican consulate.²⁰⁷ The case arose after *Breard* but before the U.S. Supreme Court could clarify the effect of the ICJ's judgment in *LaGrand*.²⁰⁸

202. *Id.* at ¶¶ 136-143; see also *Avena and Other Mexican Nationals (Mex. V. U.S.)*, Counter-Memorial of the United States of America, at 109-121 (Nov. 3, 2003), available at <http://www.icj-cji.org/docket/files/128/10837.pdf>. In its submission to the ICJ, the United States described former Illinois Governor George Ryan's commutation of three death sentences named in the *Avena* case on account of these nationals not having received consular information required by Article 36. *Id.* at 114, n.247.

203. 46 P.3d 703 (Okla. Crim. App. 2002). Like Texas, Oklahoma divides its courts between civil and criminal appellate chambers so that the Oklahoma Court of Criminal Appeals is the state's highest court of appellate review for criminal cases.

204. *Valdez v. Ward*, 219 F.3d 1222, 1227-28 (10th Cir. 2000).

205. *Valdez*, 900 P.2d 363 (Okla. Crim. App. 1995).

206. *Valdez*, 219 F.3d at 1227-28.

207. *Id.*

208. Intervening decisions from the U.S. Tenth Circuit Court of Appeals and other federal courts offered little guidance on the extent of the individual remedy available under Article 36. See *United States v. Chanthadara*, 230 F.3d 1237, 1255 (10th Cir. 2000). ("Contrary to the government's position, the Supreme Court in *Breard* 'treated the issue of whether the provision creates any judicially enforceable rights as an open question, stating . . . that the Vienna Convention 'arguably' creates individual rights."): *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000) (en banc) (citing *Breard v. Greene*, 523 U.S. 371 (1998)); *United States v. Minjares-Alvarez*, 264 F.3d 980, 986 (10th Cir. 2001) ("It remains an open question whether the Vienna Convention gives rise to any individually enforceable rights."); *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam) (The court states that the Vienna Convention "arguably confers on an individual the right to consular assistance following arrest") (quoting *Minjares-Alvarez*, 264 F.3d 980, 986).

The Oklahoma Court of Criminal Appeals thoroughly reviewed the ICJ's decision, but ultimately determined that *Breard* had sufficiently contemplated the role of the ICJ when determining that procedural default barred Valdez's claims. Without binding its prosecutors to the ICJ's judgment, the appellate court shaped its decision to give effect to the determination of the Oklahoma Pardon and Parole Board, which had recommended clemency:

The Government of Mexico retained experts and experienced attorney(s) to assist Valdez. Through investigation of his background and medical history, it was learned Valdez suffers from severe organic brain damage; was born into extreme poverty; received limited education, and grew up in a family plagued by alcohol abuse and instability. Most significant of these findings, according to counsel for Valdez, is that he experienced head injuries in his youth which greatly contributed to and altered his behavior

While arguments can be made that trial counsel could have requested funds to hire expert witnesses, it is evident that trial counsel's inexperience in capital litigation caused him to believe such funds were unavailable. We cannot ignore the significance and importance of the factual evidence discovered with the assistance of the Mexican Consulate.²⁰⁹

209. *Valdez*, at para. 18, 22 (“The State of Oklahoma insists Petitioner has procedurally defaulted this claim because it is not based upon new law, and this Court, under the limited review afforded under Oklahoma’s Capital Post–Conviction Act, is not entitled to grant relief on that basis *LaGrand* is not a “new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state.” 22 O.S. 2001, § 1089(D)(9).”). It might be argued that the U.S. Supreme Court’s decision in *Breard* was a decisive interpretation of the Vienna Convention on Consular Relations, and therefore Oklahoma state judges were bound to apply it as federal law. However, the U.S. Supreme Court itself noted that it should “give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such” even if implementation ultimately belonged to the “receiving state.” See also Simma & Hoppe, *supra* note 176, n.185 (“Valdez’s case received a lot of attention by international law scholars due to the correspondence between the Legal Adviser for the United States State Department, William H. Taft, and Governor Keating of Oklahoma and the Oklahoma State Pardon and Parole Board in 2001. In a first set of letters Taft asked the Governor and the Parole Board respectively to give careful consideration to the pending clemency request. The Parole board at that point recommended to commute Valdez’s sentence to life in prison without the possibility of parole, and Governor Keating issued a thirty-day stay of Valdez’s execution. About a week later, when the ICJ had rendered its judgment in *LaGrand*, Taft once again sent a letter to Governor Keating, this time asking him to specifically consider the question whether Valdez had been prejudiced by the violation of his Article 36 rights. On July 20, 2001, Governor Keating denied the clemency petition, concluding that the violation of article 36 had had no prejudicial effect on Valdez’s conviction or sentence. On August 17, however, the Governor granted another stay of execution to allow Valdez to pursue once more a claim for postconviction relief before the Oklahoma Court of Criminal Appeals. Valdez’s claim succeeded, and his sentence was indeed finally converted into one of life in prison without the possibility of parole. In this (second) hearing on postconviction relief, the Oklahoma Court of Criminal Appeals, however, explicitly refused to discuss Valdez’s claim in terms of the Vienna Convention. The court based its decision exclusively on the fact

The Oklahoma Court of Criminal Appeals rejected any reading of *Valdez* which might conflate the ICJ's judgment with preemptive federal common law or even subsequently binding state law. The appellate court instead remanded the case for resentencing based on its general statutory power to set aside a sentence for "a miscarriage of justice . . ." ²¹⁰ State judges in Virginia and Wisconsin similarly dismissed any binding effect of ICJ jurisprudence. ²¹¹ The Oregon Supreme Court also concluded that the Vienna Convention conferred no individual rights without citing the ICJ's judgments. ²¹²

B. *Torres v. State*: Defining "Prejudice" under the Vienna Convention on Consular Relations under State, not Federal or International, Law

Just as the Oklahoma Court of Criminal Appeals considered Gerardo Valdez's claim after *Breard* but before *LaGrand*, the court also faced the meaning of "prejudice" after the ICJ had issued a judgment interpreting that principle under the Vienna Convention, but before the U.S. Supreme Court clarified it under federal law. In *Sanchez-Llamas v. Oregon* ²¹³ and *Medellin v. Texas*, ²¹⁴ the U.S. Supreme Court adopted state court interpretations that refused individual remedies under the Vienna Convention. The Court further rejected the ICJ's judgment in *Avena and Other Mexican Nationals* as preemptive federal common law and also circumscribed the power of the Executive to unilaterally declare international law binding federal law.

In *Torres v. State*, ²¹⁵ an Oklahoma jury sentenced Osbaldo Torres to death for the 1993 killings of Oklahoma City residents Francisco Morales and his wife, Maria Yanez. After Torres exhausted his state appeals and federal habeas review, he filed a subsequent challenge to his conviction based on the failure of state authorities to inform him, after he was detained, that he had the right to contact the Mexican consulate. ²¹⁶ The Oklahoma Court of Criminal Appeals remanded the case to the trial court

that counsel for Valdez was ineffective, namely that Valdez's attorneys would have had to look into exculpatory evidence located in Mexico regarding his mental capacity.").

210. OKLA. STAT. tit. 20, § 3001.1 (1980).

211. See *Bell v. Virginia*, 563 S.E.2d 695, 706 (Va. 2002); *State v. Navarro*, 659 N.W.2d 487, 493 (Wis. Ct. App. 2003).

212. *State v. Sanchez-Llamas*, 108 P.3d 573, 577 (Or. 2005).

213. 548 U.S. 331 (2006).

214. 552 U.S. 491 (2008).

215. 120 P.3d 1184 (Okla. Crim. App. 2005). For the Oklahoma Court of Criminal Appeals' review of Torres's case see *Torres v. State*, 962 P.2d 3 (1998).

216. *Torres*, 120 P.3d at 1185-86.

for an evidentiary hearing on whether the failure to inform Torres of his consular assistance rights caused “actual prejudice.” The trial court determined that this failure had in fact prejudiced Torres:

In finding that Torres was prejudiced by the violation of his Vienna Convention rights, the trial court used the following three-prong test: (1) whether the defendant did not know he had a right to contact his consulate for assistance; (2) whether he would have availed himself of the right had he known of it; and (3) whether it was likely that the consulate would have assisted the defendant . . . Under this test, prejudice is presumed if all three factors are present . . . The defendant must present evidence showing what efforts his consulate would have made to assist in his criminal case.²¹⁷

In upholding the trial court’s determination, the appellate court grounded its decision in the basic reciprocity guaranteed under the treaty:

The essence of a Vienna Convention claim is that a foreign citizen, haled before an unfamiliar jurisdiction and accused of a crime, is entitled to seek the assistance of his government . . . The issue is not whether a government can actually affect the outcome of a citizen’s case, but whether under the Convention a citizen has the opportunity to seek and receive his government’s help. This protection extends to every signatory of the Convention, including American citizens. It is often impossible to say whether a particular action in a criminal trial could affect the outcome. However, it is possible to show what particular assistance, if any, a government would offer its citizen defending against a crime in a foreign country. That is the right and privilege safeguarded by the Convention. This Court is unwilling to raise the bar beyond that which the Convention guarantees. If a defendant shows that he did not know he could have contacted his consulate, would have done so, and the consulate would have taken specific actions to assist in his criminal case, he will have shown he was prejudiced by the violation of his Vienna Convention rights.²¹⁸

In the aftermath of *Torres*, a number of scholars suggested that the decision represented a triumph of international law prevailing in state court.²¹⁹ A

217. *Id.* at 1186.

218. *Id.* at 1187.

219. Alex Glasshauser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25, 70 (2005) (“Unlike the brother in that case, though, the Mexican petitioner was spared, as Oklahoma was more solicitous than the Supreme Court of the decision of the International Court. After the International Court’s final judgment, the Oklahoma Court of Criminal Appeals ordered that the petitioner receive a new hearing.”); see also Simma & Hoppe, *supra* note 176, at 44 (describing Torres as a “welcome first.”); Reynaldo Anaya Valencia et al., *Avena and the World Court’s Death Penalty*

closer reading of the decision suggests otherwise. The Oklahoma Court of Criminal Appeals in fact imposed a significant burden on the defendant—proving that “the consulate would have taken specific actions to assist in [a] criminal case”—and granted Torres no additional relief beyond that already given by Oklahoma Governor Brad Henry.²²⁰ Indeed, Justice Stevens, in his *Medellin* concurrence, noted that the Oklahoma Court of Criminal Appeals had undertaken precisely the minimal process that might be extrapolated from *Avena*.²²¹ The Court of Criminal Appeals furthermore noted that its decision was “consistent with,” not required by, the prejudice standard articulated by the ICJ in *Avena*.²²² State judges in Colorado, Indiana, Iowa, Minnesota and New Jersey adopted similar variations on the test, effectively hollowing out any substantive defense it might provide.²²³

The U.S. Supreme Court eventually clarified in *Medellin v. Texas* that while the ICJ’s decisions were still entitled to “respectful consideration,” its decision in *Avena* did not create automatically binding federal law applicable to state prosecutions.²²⁴ The Supreme Court also clarified that President Bush could not, without additional Congressional authorization, order states to comply with the *Avena* decision.²²⁵ If the history of the Hague Evidence Convention is any guide, the Oklahoma Court of Criminal

Jurisdiction in Texas: Addressing the Odd Notion of Texas’s Independence from the World, 23 YALE L. & POL’Y REV. 455, 491 (2005) (“The Torres case may provide a roadmap for the future. States wishing to heed the judgment of the ICJ can, through their court systems, order review and reconsideration hearings to determine whether a defendant was harmed by the failure to provide consular notification and access under the Vienna Convention.”).

220. See Simma & Hoppe, *supra* note 176, at 39-42 (analyzing the significant burden the test places upon defendants).

221. See 552 U.S. 491, 537 (2008) (Stevens, J. concurring) (“The cost to Texas of complying with *Avena* would be minimal, particularly given the remote likelihood that the violation of the Vienna Convention actually prejudiced Jose Ernesto Medellin . . . It is a cost that the State of Oklahoma unhesitatingly assumed.”).

222. See *Torres*, 120 P.3d at 1188. (“Torres has provided ample evidence that the Mexican government takes its consular obligations to its citizens very seriously, particularly when those citizens are capital defendants in another country. The Mexican government has a tradition of active assistance extending back to the 1920s, and provided extensive assistance to capital defendants in 1993, the year of Torres’s arrest. Had the consulate been contacted, it would have monitored Torres’s case, consulted with and offered assistance to his attorney, and helped gather evidence, particularly in preparation for the second stage of trial. [T]he protection of Mexican nationals who face capital proceedings or capital trials is one of the highest priority of the Mexican Consular representatives. All their efforts are focused on trying to avoid the imposition of the death penalty.”) (citations omitted).

223. See *People v. Preciado-Flores*, 66 P.3d 155, 161 (Colo. App. 2002); *State v. Lopez* 633 N.W.2d 774, 783 (Iowa 2001); *Zavala v. State*, 739 N.E.2d 135, 142 (Ind. 2000); *State v. Cevallos-Bermeo*, 754, A.2d 1224, 1227 (N.J. Super. Ct. App. Div. 2000).

224. *Medellin v. United States*, 552 U.S. 491, 513 at n.9 (2008) (quoting *Breard v. Greene*, 523 U.S. 371, 375 (1998)).

225. See Memorandum for the Attorney General on Compliance with the Decision of the International Court of Justice in *Avena*, (Feb. 28, 2005).

Appeals may, if given another opportunity, overrule *Torres* or limit it to its facts. As Janet Levit's study on post-*Medellin* police practices has demonstrated, that opportunity may never arise. Police departments, state legislatures and state administrative agencies around the country have worked in connection with the U.S. State Department to ensure that arrestees are notified of their rights to consular assistance, obviating the need for judicial remedies.²²⁶ Oklahoma's jurisprudence on the Vienna Convention is yet another example of how state judges adapt international law to limit constraints on state legislative and executive actors.

IV. FAMILY LAW

Over the last three decades, Congress has increasingly regulated family law—a traditional area of authority reserved to states—with a range of both mandatory and permissive legal regimes meant to assure certain federal interests.²²⁷ Citing the relationship between delinquent family maintenance obligations and federal welfare assistance, for example, Congress has imposed a mandatory regime under which states must actively pursue those delinquent in family maintenance obligations.²²⁸ With respect to child custody decisions, Congress passed the Parental Kidnapping Prevention Act (PKPA) to eliminate so-called “haven” states—states where a parent could take a child to obtain a more favorable custody judgment—by requiring state judges to defer to the continuing jurisdiction of any decree issued by previous state judge with jurisdiction over a case.²²⁹

226. Janet Koven Levit, *Does Medellin Matter?*, 77 *FORDHAM L. REV.* 617, 626-27 (2008) (describing how police practices have evolved to include consular notification rights as a function of legislative and executive, not judicial, action).

227. Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 *CORNELL J.L. & PUB. POL'Y* 267, 269-70 (2009) (“Until recently, family law was viewed as the province of state governments. In the tradition of dual federalism, states were sovereign in this area, and the national government played a relatively minor role.”).

228. *Id.* at 275-76, 282. (“Following its first ventures into family policy in the nineteenth and early twentieth centuries, Congress claimed a more significant role with the Aid to Dependent Children program . . . this narrow focus began to widen in 1974 when Congress instituted a series of new programs to improve child support enforcement and paternity determination, protect children from neglect and abuse, and increase delinquency prevention efforts and improve state juvenile justice systems. Since 1974, these programs have expanded significantly, with Congress frequently drawing on sources of authority beyond its spending power to legislate in a range of family law contexts . . . As the AFDC program expanded and national politics shifted, Congress began to search for ways to contain or reduce costs.”) (citations omitted).

229. Congress enacted the Parental Kidnapping Prevention Act, and the Uniform Child Custody Jurisdiction and Enforcement Act, 28 U.S.C. 1738A, to assist parents to regain their children when unlawfully taken by the other parent. The Parental Kidnapping Prevention Act (PKPA) reaffirms a court's duty to give full faith and credit to a decree rendered by a state court and provides that a court of another state must defer to the continuing jurisdiction of the state that rendered the original decree. Congress specifically invoked its Article IV power to effect full faith and credit between the states.

Although the PKPA itself does not provide mechanisms for enforcement, the Act makes the Federal Parent Locator Service available in all custody cases and makes the federal Fugitive Felony Act applicable to interstate child abductions.²³⁰ The increasing role of Congress and the President in these family law areas has facilitated the U.S. government's engagement with a number of Hague Conference family law treaties previously rejected as encroaching upon areas of authority reserved to the states.²³¹

The U.S. has signed (but not ratified) the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children,²³² and the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.²³³ The purpose of the former treaty is to protect children in international situations by "avoid[ing] conflicts between their legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of children" through international co-operation and promoting the "best interests of the child."²³⁴ The latter treaty aims to effectuate the "recovery of child support and other forms of family maintenance" in the international setting by establishing a system of co-operation between the Contracting States that will ensure Contracting States make available applications for child support or other forms of family maintenance, recognize child support or other family maintenance orders, and effectively

Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3566.

230. See Estin, *supra* note 210, at 305-06 (describing the developments leading to the passage of the PKPA).

231. *Id.* at 279-80 ("State laws governing paternity, adoption, foster care, child support, and child protection now evolve based on a federal design, as do laws regulating the family behavior of individuals who receive federally supported welfare benefits. The cost of these programs to the national government shows a substantial federal commitment to family policy and children's welfare."); David F. Cavers, *International Enforcement of Family Support*, 81 COLUM. L. REV. 994, 1000-02 & 1007-12 (1981); see also Gloria Folger DeHart, *Comity, Conventions, and the Constitution: State and Federal Initiatives in International Support Enforcement*, 28 FAM. L.Q. 89, 110 (1994) (noting that state governments can enter into compacts with foreign governments).

232. *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children: Status table*, Hague Conference on Private Int'l Law, available at http://www.hcch.net/index_en.php?act=conventions.status&cid=70 (last visited Nov. 14, 2011).

233. *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance: Status table*, Hague Conference on Private Int'l Law, available at http://www.hcch.net/index_en.php?act=conventions.status&cid=131 (last visited Nov. 14, 2011).

234. *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children: Full text*, Hague Conference on Private Int'l Law, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=70 (last visited Nov. 14, 2011).

enforce the orders when necessary.²³⁵ As Ann Laquer Estin has noted, harmonization of these treaties with domestic U.S. law will be difficult because of “our approach to federalism and the traditional role of state governments in family law.”²³⁶

The United States *has* ratified the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (Hague Adoption Convention). Congress passed the implementing Intercountry Adoption Act in 2000 although the State Department only finalized implementing regulations relatively recently.²³⁷ The U.S. has also ratified the Hague Convention on Civil Aspects of International Child Abduction (Hague Abduction Convention), implemented by Congress as the International Child Abduction Remedies Act (ICARA).²³⁸ The drafters of the Hague Abduction Convention intended to address the increasing incidence of parents taking their children across international borders in an attempt to obtain more favorable custody determinations.²³⁹ The intended effect of the treaty is to return the child to the state of his or her habitual residence, so that that state’s courts may resolve any custody disputes, minimizing any advantage that the abductor might obtain from fleeing to a second state.²⁴⁰ While there has been significant litigation over the Hague

235. *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance: Full text*, Hague Conference on Private Int’l Law, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=131 (last visited Nov. 14, 2011).

236. Ann Laquer Estin, *Families Across Borders: the Hague Childrens’ Conventions and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47, 50 (2010).

237. *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption: Status table*, Hague Conference on Private Int’l Law, http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last visited Nov. 14, 2011). Estin, *supra* note 219, at 83 (describing the long process involved in finalizing regulations and depositing the instrument of ratification).

238. See Ann Laquer Estin, *Families and Children in International Law*, 12 TRANSNAT’L L. & CONTEMP. PROBS. 271, 276 (2002) (“Although the United States has participated in the Hague Conference since 1964, it has not ratified any of the marriage and divorce treaties, most likely because family law is understood in the United States to be a subject of state jurisdiction while international treaty-making is the province of the federal government.”).

239. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89. PmbI. (determining to respond to “the harmful effects of [children’s] wrongful removal or retention and establish procedures to ensure their prompt return.”).

240. See Elisa Perez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, in 3 Acts and Documents of the Fourteenth Session of the Hague Conference on Private International Law 426, 429 (1981), available at <http://www.hcch.net.upload.expl28.pdf>. (last visited Sept. 18, 2012) (“The framework of the Convention . . . will tend in most cases to allow a final decision on custody to be taken by the authorities of the child’s habitual residence prior to its removal.”); Karin Wolfe, *A Tale of Two States: Successes and Failures of the 1980 Hague Convention on the Civil Aspects of International Child Abduction in the United States and Germany*, 33 N.Y.U. J. INT’L L. & POL’Y 285, 290 (2000) (“Typically, the left-behind parent would then file custody proceedings and/or marital dissolution proceedings in the state of marital residence. The abducting parent would simultaneously

Abduction Convention in federal and state courts, there has been almost none under the Hague Adoption Convention. The Hague Abduction Convention is therefore the most important of the family law treaties for examining state judges' behavior.

A. Hague Abduction Convention

Under the Hague Abduction Convention, any person seeking the return of a child may commence a civil action by filing a petition in a court where the child is located.²⁴¹ The petitioner bears the burden of showing by a preponderance of the evidence that the removal or retention was wrongful. The respondent must show by clear and convincing evidence that one of a limited number of exceptions apply.²⁴² The Hague Convention does not authorize a foreign court to determine the merits of the underlying custody claim.²⁴³ The foreign court is limited to deciding whether the child should be returned to his or her state of habitual residence.²⁴⁴ The implementing statute grants to state courts and United States district courts "concurrent original jurisdiction of actions arising under the Convention,"²⁴⁵ a provision inserted over the objection of the Reagan administration which favored exclusive state court jurisdiction.²⁴⁶ The statute offers modest modifications to the treaty text, requiring simply that courts "shall decide the case in accordance with the Convention."²⁴⁷

While federal and state judges are prohibited from scrutinizing the "merits of the underlying custody claim," the Hague Abduction Convention itself divides parental rights into "rights of custody" and "rights of access."²⁴⁸ Article 3 of the treaty by its terms limits a "wrongful" removal

file custody proceedings in the abducted-to state. Courts based jurisdiction on a variety of theories, ranging from protective measures to a transfer of habitual residence to inherent jurisdiction over nationals.").

241. 42 U.S.C. § 11603(b) (2006).

242. 42 U.S.C. § 11603(e)(1)(A)-(2)(A) (2006). Most often claimed is that the child's return would result in grave danger of psychological harm. See *Friedrich v. Friedrich*, 78 F.3d 1060, 1063-64 (6th Cir. 1996).

243. 42 U.S.C. § 11601(a)(4) (2006).

244. See Julia A. Todd, *The Hague Convention on the Civil Aspects of International Child Abduction: Are the Convention's Goals Being Achieved?*, 2 IND. J. GLOBAL LEGAL STUD. 553, 554 [Need Pincite] (1995); Marianne Blair, *International Application of the UCCJEA: Scrutinizing the Escape Clause*, 38 FAM. L.Q. 547, 549-50 (2004).

245. 42 U.S.C. § 11603(a) (2006).

246. See *International Child Abduction Act, Hearing Before Subcomm. on Courts and Administrative Practice of the S. Judiciary Comm.*, 100th Cong. (Feb. 23, 1988); Linda Silberman, *Hague International Child Abduction Convention: A Progress Report*, 57 LAW & CONTEMP. PROBS. 209, 262-63 (1994).

247. 42 U.S.C. 11603(d) (2006).

248. Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 222,

to one violating “rights of custody,” while Article 8 appears to similarly limit the return remedy.²⁴⁹ In *Viragh v. Fordes*, a Massachusetts Family Court judge determined that the Hague Abduction Convention did not entitle a non-custodial parent to assert a right of return for violation of access rights only. In *Viragh*, the custodial parent moved with her two children from Hungary to the United States notwithstanding a Hungarian court’s award of visitation to the non-custodial parent. When she informed her ex-husband that she would not return to Hungary with the children, he brought an action in Massachusetts Family Court seeking enforcement of a right of return under the Hague Abduction Convention. Reasoning from the text of the treaty, the Massachusetts Supreme Judicial Court affirmed: “the Convention does not mandate any specific remedy when a noncustodial parent has established interference with rights of access.” Rather, nations are instructed in Art. 21 to “promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject,” as well as to “take steps to remove, as far as possible, all obstacles to the exercise of such rights.”²⁵⁰

The ruling, plausibly supported by the text of the treaty, had the effect of opening a narrow window into foreign courts’ custody orders as well as limiting the treaty’s most drastic remedy—return. It also influenced the Second Circuit’s decision in *Croll v. Croll* to limit the treaty’s applicability to violations of established “rights of custody.”²⁵¹ The Fourth and Ninth Circuits adopted the conclusion of the *Croll* majority with the additional effect that “rights to access” belonged exclusively in state courts.²⁵² In *Abbott v. Abbott*, the U.S. Supreme Court ultimately rejected the division between “rights of custody” and “rights of access” where an underlying custody order granted a non-custodial parent consent to any visit outside of the country of habitual residence, but validated the *Viragh* approach where

T.I.A.S., No. 11670, 1343 U.N.T.S. 89 (“The objects of the present Convention are . . . to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”).

249. *Id.* at art. 3.

250. *Viragh v. Fordes*, 612 N.E.2d 241, 247 (Mass. 1993).

251. *Croll v. Croll*, 229 F.3d 133, 138 (2nd Cir. 2000) (“One such remedy is a writ ordering the custodial parent who has removed the child from the habitual residence to permit, and to pay for, periodic visitation by the non-custodial parent with access rights.”); *see also* Hague Convention on the Civil Aspect of Child Abduction, *supra* note 231, at art. 26.

252. *See Fawcett v. McRoberts*, 326 F.3d 491, 500 (4th Cir. 2003); *Gonzalez v. Gutierrez*, 311 F.3d 942, 949 (9th Cir. 2002). *But see* *Furnes v. Reeves*, 362 F.3d 702, 720, n.15 (11th Cir. 2004) (adopting the reasoning of then Judge Sotomayor’s *Croll* dissent); Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 TEX. INT’L L.J. 41, 49 (2003) (“Federal courts in the United States have held that they do not even have jurisdiction to hear a claim for enforcement of access rights.”).

only access rights were at issue.²⁵³

B. The Hague Abduction Convention as a Lesson in the Judicial and Political Safeguards of Federalism

Notwithstanding some efforts of state judges to limit the treaty's effect, state judges have not diverged in their interpretation of the treaty's terms as significantly as in other treaty contexts. While it would require greater empirical study of judicial attitudes to explain the convergence between state and federal ICARA jurisprudence, the treaty provides several legislative and judicial lessons which may guide federal negotiators as they enter into more agreements which overlap or displace traditional state authority.

For example, no serious interpretive divergence has emerged between state and federal judges when adjudicating affirmative defenses available under the Hague Abduction Convention. Once a petitioner establishes that a child was wrongfully removed from his or her state of habitual residence, a federal or state judge may still reject the child's return if a respondent shows by clear and convincing evidence that:

- a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
- b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation . . . [or] if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.²⁵⁴

State judges do not appear to grant these affirmative defenses with any greater frequency than federal judges do.²⁵⁵ Indeed, as Thomas Johnson has complained, "with an approximately 90% overall return rate, both federal and state courts in the United States have given foreign parents and their

253. *Abbott v. Abbott*, 130 S. Ct. 1983, 1992 (2010).

254. The Hague Convention on the Civil Aspects of Child Abduction, *supra* note 231, at art. 13.

255. See Gary Zalkin, Note, *The Increasing Incidence of American Courts Allowing Abducting Parents to Use the Article 13(b) Exception to the Hague Convention on the Civil Aspects of International Child Abduction*, 23 SUFFOLK TRANSNAT'L L. REV. 265 (1999) (citing in equal measure state and federal courts narrowing the scope of inquiry under the affirmative defenses); *Renovales v. Roosa*, No. FA 91 0392232 S, 1991 Conn. Super. LEXIS 2215 (Conn. Super. App. 1991) (denying grave risk defense based on relocation).

governments little to complain about . . .”²⁵⁶

In some ways, federalism safeguards are built into both the text of the treaty and the consensus behind its adoption. Both federal and state trial courts have noted the case-by-case inquiry required for a number of determinations under the treaty.²⁵⁷ The drafters of the treaty deliberately included ambiguities because defining certain terms, especially “custody”, caused disagreement.²⁵⁸

Yet it also appears to be a treaty where the political safeguards of federalism are manifest and robust. After extensive consultations between the U.S. State Department and affected constituencies,²⁵⁹ Congress passed ICARA with strong support from both chambers.²⁶⁰ The same pressure has caused Congress to periodically revisit the Hague Abduction Convention and to address early evidence that other signatory states have not enforced the treaty with the same rigor as American federal and state judges.²⁶¹ A similarly inclusive process governed the ratification of the Hague Adoption Convention.²⁶² Unlike the Hague Service Convention and the U.N. Convention on Contracts for the International Sale of Goods, Hague Abduction Convention disputes almost always involve natural persons, depriving state judges of one of the methods by which they have effectively narrowed treaties’ application: blurring corporate relationships between foreign parent corporations and domestic, state-law incorporated subsidiaries.

256. Thomas A. Johnson, *The Hague Child Abduction Convention: Diminishing Returns and Little to Celebrate for Americans*, 33 N.Y.U. J. INT’L L. & POL. 125, 130 (2000).

257. *Friedrich v. Friedrich*, 983 F.2d 1396, 1402 (6th Cir. 1993). See also Curtis Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 A.J.I.L. 675, 677-78 (1998) (noting treaty contexts in which the federal government safeguarded state interests).

258. Pérez-Vera, *supra* note 223, at ¶ 84 (“[S]ince all efforts to define custody rights in regard to . . . particular situations failed, one has to rest content with the general description given [in the text].”). See also A.E. Anton, *The Hague Convention on International Child Abduction*, 30 INT’L & COMP. L.Q. 537, 550 (1981) (calling the grounds of refusal “a compromise”).

259. Estin, *supra* note 219, at 67 (citing Peter H. Pfund, *Contributing to Progressive Development of Private International Law: the International Process and the United States Approach*, 249 *Recul Des Cours: Collected Courses of the Hague Academy of International Law* 1, 25-26, 73 (1996)).

260. See Ion Hazzikostas, Note, *Federal Court Abstention and the Hague Child Abduction Convention*, 79 N.Y.U. L. REV. 421, 424 n.13 (2004) (“Despite strong eventual support for ICARA in both houses of Congress, the issue of potential encroachment upon the role of state courts in custody disputes was contentious.”); Estin, *supra* note 219, at 103 (“Whatever the outer limits of the foreign commerce and foreign relations powers, both Congress and the Executive Branch evaluate federalism concerns before enacting legislation of this nature, and both branches have clearly understood the importance of coordinating our treaty obligations with the family law systems that exist in the states.”).

261. Estin, *supra* note 219, at 75-76 (describing Congressional remedial action on the treaty).

262. *Id.* at 90-91 (“[I]ndividual states began to enter reciprocal arrangements with foreign governments to establish, recognize, and enforce child support orders, following a trail blazed by Gloria DeHart, who negotiated many of these agreements as Deputy Attorney General in California.”).

In tandem with greater state participation and control over the political process leading to the Hague Abduction Convention, federal district judges have appeared to generally respect the significant state family law interests at stake. In many cases, federal district judges have invoked *Younger* or *Colorado River* doctrines to abstain from adjudicating Hague Abduction Convention claims so that state judges may protect important state family law interests.²⁶³ While federal appellate courts have been generally hostile to these abstention decisions, it may explain the synchronicity between state and federal judges on key aspects of the treaty.²⁶⁴

V. CONCLUSION

This Article has argued that state judges play an important role in harmonizing international law with state executive and legislative objectives, limiting the disruptive effect of treaties, using customary international law to advance state interests and applying international law where state citizens choose it to govern their contractual relationships. In short, state judges contribute an important structural safeguard of federalism vis-à-vis international law. It is certainly true that state judges do not always subordinate treaties and customary international law to state interests. As the example of the Hague Evidence Convention shows, state judges sometimes give greater weight to treaties than federal judges do. State judges have also on occasion invalidated state legislative measures using as their main authority the federal government's preemptive foreign affairs powers.²⁶⁵ As Anna Maria Gabrielidis has documented, state judges have also used international treaties and customary international law to clarify state constitutional law which often provides greater protection to

263. See, e.g., *Witherspoon v. Orange Cnty. Dep't of Soc. Servs.*, 646 F. Supp. 2d 1176, 1180 (2009) ("Federalism gives states authority over matters of marriage, family, and child welfare. This case deals with those interests . . . the state proceeding gives Ms. Witherspoon an adequate opportunity to raise the issues she seeks to raise here in federal court."); *Grieve v. Tamerin*, No. 00-CV-3824, 2000 U.S. Dist. LEXIS 12210 (E.D.N.Y. Aug. 25, 2000) (holding that *Younger* abstention was appropriate where the petitioner had filed a Hague Convention petition in state court previous to filing it in federal court); *Cerit v. Cerit*, 188 F. Supp. 2d 1239 (D. Haw. 2002) (ruling that it was appropriate to abstain from ruling on a Turkish man's ICARA petition when he had already made an ICARA argument in Hawaii state court."); *But see Hazbun Escaf v. Rodriguez*, 191 F. Supp. 2d 685, 688, 692 (E.D. Va. 2002) (criticizing *Cerit* and denying motion to dismiss based on abstention).

264. See, e.g., *Silverman v. Silverman*, 338 F.3d 886, 895 (8th Cir. 2003); *Yang v. Tsui*, 416 F.3d 199 (3d Cir. 2005); *Gaudin v. Remis*, 415 F.3d 1028 (9th Cir. 2005); *Holder v. Holder*, 305 F.3d 854 (9th Cir. 2002).

265. *Bethlehem Steel Corp. v. Bd. of Comm'rs*, 80 Cal. Rptr. 800 (striking down California's "buy American law" citing *U.S. v. Curtiss-Wright Corp.*); *Mitsubishi Materials Corp. v. Superior Court*, 113 Cal. App. 4th 159 (2003) (invalidating California's law giving WWII POW's a cause of action for forced labor for Japanese corporations based on the preemptive effect of the U.S.'s 1951 Treaty of Peace with Japan art. 14 3 U.S.T. 3169, 3180 (1951)).

citizens than the U.S. Constitution.²⁶⁶ Yet the weight of the evidence, at least in the modern era in which the U.S. increasingly uses treaties to displace state law, suggests that state judges are blunting the full force of international law on state interests.

I conclude with some parting observations and warnings about implications of this Article. State court detractors may use the evidence herein to support familiar arguments that state judges cannot be trusted to enforce the U.S.'s international commitments.²⁶⁷ This is not necessarily the case. From the Founding, state judges have always enjoyed broader common law-making powers than federal judges and view themselves as more collaborative partners in the law making process along with state legislatures and (often, less unified) executives.²⁶⁸ If we take seriously Alison LaCroix's argument that the judiciary became the "institutional focus of federal thought" at the time of the drafting debates, then we *should* expect state judges to exercise their judicial power consistently with a structurally imposed federalism mandate.²⁶⁹

Even if one adopts a more skeptical view of state judges and their relationship with international law, then there are implications for the wider criticism now leveled at state judges from federal judges, scholars and state legislators alike. Constitutional initiatives like State Question 755 aimed at limiting state judges' use of international law are directly traceable to federal judicial application of broadly construed preemption doctrines.²⁷⁰ While the Oklahoma state legislature may not affect judicial behavior through clearly unconstitutional efforts like State Question 755, it may, for example, regulate state judges' job security.²⁷¹ Indeed, in states like Oklahoma, where trial, but not appellate, judges are popularly elected,²⁷²

266. Anna Maria Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139, 179 (2006).

267. Renée Lettow Lerner, *International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade*, 2001 B.Y.U. L. REV. 229, 253 (2001) ("There is a large literature on the relative merits of federal and state courts. These scholars are addressing the question of whether state courts are capable of adequately enforcing federal rights and of deciding diversity cases. Many writers have concluded that state judges are quite capable of handling these cases; a sizable contingent has argued the opposite.")

268. Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 93 TEX. L. REV. (forthcoming 2013).

269. LaCroix, *supra* note 14, at 750.

270. Justice Ginsburg effectively advocates that position in her *Garamendi* dissent. See also *El Al Isr. Airlines v. Tseng*, 119 S.Ct. 662, 675 (1999) ("Our home-centered preemption analysis, therefore, should not be applied, mechanically, in construing our international obligations.")

271. Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1143-44 (2010).

272. Scott D. Wiener, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187 n.38 (1996)

those seeking to abolish judicial elections, particularly partisan elections, face significant hurdles as state judges increasingly appear to play a crucial structural role in guarding against perceived illegitimate encroachments on state authority by the federal government.

One need not sweepingly advocate direct, partisan elections for state judges in order to understand that states may use direct elections as a way to subtly but effectively assert their sovereignty in a legal landscape where state sovereignty jurisprudence is, at best, unclear. Framed within the context of international law—and the corresponding limitations states face for direct participation in international law-making—states' continued use of partisan elections makes more sense. In short, the judicial and political safeguards of federalism may operate in a hydraulic dynamic; advocates for merit-based judicial selection in states will struggle as long as political safeguards at the national level seem inadequate. In an era where bilateral and multilateral treaties increasingly regulate areas traditionally reserved to the states, state judges now play an important modifying role which may be rendered unnecessary given the right federal judicial and legislative protections.