University of Baltimore Journal of International Law

Volume 2 *Conflicts Within International Law*

Volume II Article 5

2013-2014

2013

International Law for American Courts: Why the "American Laws for American Courts" Movement is a Violation of the United States Constitution and Universal Human Rights

Maria Surdokas
University of Baltimore School of Law

INTERNATIONAL LAW FOR AMERICAN COURTS: WHY THE "AMERICAN LAWS FOR AMERICAN COURTS" MOVEMENT IS A VIOLATION OF THE UNITED STATES CONSTITUTION AND UNIVERSAL HUMAN RIGHTS

MARIA SURDOKAS

ABSTRACT:
In recent years, the "American Laws for American Courts" movement has swept across the country in an attempt to ban international law from U.S. state courts. This article specifically examines the Oklahoma Save Our State Amendment and the Arizona Foreign Decisions Act. In doing so, it addresses both the constitutional and policy problems with these attempts, observing that what the states have been trying to do is neither legal nor practical. It analyzes the inability of individual states to unilaterally avoid compliance with the United States' international law obligations. It notes the absurdity in outlawing international law in order to uphold "American" rights when the well-known goals of international law itself are to protect the rights of all people. Finally, this article provides less extreme alternatives to an outright ban of all international law that will nonetheless support the well-intentioned aspects of the movement.

AUTHOR:
Maria Surdokas was a 2014 graduate of the University of Baltimore School of Law, where she served as a Center for International and Comparative Law student fellow and Vice President of the UB International Law Society.

TABLE OF CONTENTS

I. INTRODUCTION

Over a century ago, the Supreme Court of the United States determined that international law is part of United States law.[1] Support for this concept originates in the U.S. Constitution.[2] Recently, however, there has been a movement across the United States that seeks to prohibit state judges from referring to international law when deciding cases.[3] Although the stated objectives of the various proposed legislative prohibitions and constitutional amendments may seem plausible, banning the application of international law in state courts would be an extremely unfortunate mistake. States do not have the power to unilaterally abrogate the United States' international treaty obligations, and even if they did, the goal of promoting individual rights and human equality is one shared by international law and the American legal tradition.[4]

This comment addresses the constitutionality and effectiveness of the trend towards banning international law, and specifically international treaties, from state courts. Part I provides an overview of the "American Laws for American Courts" movement, and introduces two manifestations of this movement: the Oklahoma Save Our State Amendment and the Arizona Foreign Decisions Act.[5] Part II is divided into four primary subsections. Part II.A examines the states' purpose in passing legislation that prohibits their judges from looking at certain types of non-American laws, such as Sharia law, foreign laws generally, and in particular, international law.[6] Part II.B analyzes the legality of these state actions in the contexts of both compliance with the United States Constitution and the United States' obligations under

---

[1] The Paquete Habana, 175 U.S. 677, 700 (1900) (stating, "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"); *see also* Hilton v. Guyot, 159 U.S. 113 (1895).

[2] *See infra* Part II.B.1.

[3] Ashby Jones & Joe Palazzolo, *State Legislators Target Foreign Law*, WALL ST. J. (Feb. 7, 2012), http://professional.wsj.com/article/SB10001424052970204662204577199372686077412.html?mg=reno64-wsj.

[4] *See infra* Part II.B.

[5] *See infra* Part I.

[6] *See infra* Part II.A.

international law as a nation.[7] Part II.C notes the incongruity between the stated goals of the "American Laws for American Courts" movement and its effects.[8] Finally, Part II.D provides alternatives that will protect rights without violating the Constitution or international law.[9]

II. THE "AMERICAN LAWS FOR AMERICAN COURTS" MOVEMENT

Over the last few years, several states have attempted to prohibit their judges from looking at, being influenced by, or applying any law other than state law.[10] This includes foreign, religious, and international law.[11] Two prominent examples of these attempts include the Oklahoma Save our State Amendment[12] and the Arizona Foreign Decisions Act,[13] although similar actions have been instituted in twenty other states as part of a nationwide trend known as the "American Laws for American Courts" movement.[14]

Oklahoma's attempt to amend its state constitution with the addition of the so-called Save Our State Amendment began in 2010 with a referendum to put the proposed amendment on the ballot.[15] The ballot text informed voters that the amendment would change the Oklahoma state constitution and, specifically, that the addition "makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. It forbids courts from considering or using Sharia Law."[16] Even when judges are faced with cases of first impression, they may not be influenced by any of

---

[7] *See infra* Part II.B.
[8] *See infra* Part II.C.
[9] *See infra* Part II.D.
[10] Jones & Palazzolo, *supra* note 3.
[11] *Id.*
[12] *See* H.R.J. Res. 1056, 52nd Leg., 2d Sess. (Okla. 2010) (Save Our State Amendment).
[13] *See* H.B. 2582, 50th Leg., 1st Reg. Sess. (Ariz. 2011) ("Arizona Foreign Decisions Act").
[14] Jones & Palazzolo, *supra* note 3.
[15] Ken Chan, *Save Our State from Ourselves: The Oklahoma Anti-Sharia Law*, JUSTIA.COM (Nov. 10, 2010), http://onward.justia.com/2010/11/10/save-our-state-from-ourselves-the-oklahoma-anti-sharia-law/.
[16] *Id.*

these "foreign" laws.[17] The ballot further explained that international law, or the law of nations, "is formed by the general assent of civilized nations," and its sources include "international agreements, as well as treaties."[18] Despite efforts by its proponents, the Save Our State Amendment has not been added to the Oklahoma state constitution.[19] Although the proposal won over the public vote,[20] the judiciary shortly thereafter found the amendment unconstitutional.[21]

In January 2012, the Tenth Circuit ruled on the constitutionality of the Save Our State Amendment.[22] Muneer Awad, Executive Director of the Council on American Islamic Relations-Oklahoma, brought the suit in November 2010, complaining that the amendment violated the Establishment and Free Exercise Clauses because of its ban of Sharia law.[23] The Tenth Circuit, applying strict scrutiny,[24] determined that the state's interest was not sufficiently

---

[17] *See* Eugene Volokh, *Oklahoma House of Representatives Proposes Ban on Use of Foreign Law in Oklahoma Courts*, THE VOLOKH CONSPIRACY (Mar. 19, 2010, 5:11 PM), http://www.volokh.com/2010/03/19/oklahoma-house-of-representatives-proposes-ban-on-use-of-foreign-law-in-oklahoma-courts/.

[18] Chan, *supra* note 15.

[19] John Crook, *Tenth Circuit Upholds Injunction Barring Oklahoma Anti-Sharia, Anti-international Law Constitutional Amendment*, 106 AM.J.INT'L.L. 365, 365-66 (2012).

[20] The proposed amendment garnered approximately 70% of the votes by the people of Oklahoma, enough to be officially adopted. *Id.*

[21] *See* Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012).

[22] *See Id.*

[23] *Id.* at 1118-19. The Establishment and Free Exercises Clauses are part of the First Amendment to the U.S. Constitution and require that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

[24] *Awad*, 670 F.3d at 1129. Strict scrutiny is the level of review used for challenges to the constitutionality of legislation when there is a suspect distinction or fundamental right at issue, such as the suspect discrimination among religions in *Awad*. *Id.*; *see also* Black's Law Dictionary 1558 (9th ed. abr. 2010). To overcome a strict scrutiny challenge and have its legislation upheld as valid, "the state must establish that it has a compelling interest that justifies and necessitates the law in question." Black's Law Dictionary 1224 (9th ed. abr. 2010).

compelling to overcome interference with Awad's religious freedoms.[25] Specifically, the state had not proven that there was an actual problem that the amendment was intended to solve.[26] There was no showing of any previous use by a state court of Sharia, foreign, or international law, and more importantly, no showing that there had ever been a problem regarding reliance on such laws.[27] As a result of the *Awad* case, the injunction to prevent certification of the amendment, granted by the U.S. District Court for the Western District of Oklahoma, was upheld.[28] The Court struck down the Oklahoma Save Our State Amendment solely based on its ban of the religious Sharia law, with no analysis as to the foreign and international law provisions.[29]

Also in 2010, Arizona tried to pass a law known as the Arizona Foreign Decisions Act.[30] Like the Save our State Amendment, the Arizona Foreign Decisions Act sought to prevent the use of law other than state or federal law in a "decision, finding or opinion as controlling or influential authority," or as "a precedent or the foundation for any legal theory."[31] The prohibited laws included "tenet[s] of any body of religious or sectarian law" and "any case law or statute from another country or a foreign body or any jurisdiction that is outside of the United States and its territories."[32]

The Arizona Foreign Decisions Act, however, contained some distinctions from the Save our State Amendment that made it a bit more practical and less extreme.[33] Most significantly, the Arizona state legislature made sure to assert that law based on the Anglo-Saxon legal tradition was not considered "foreign" law.[34] Because many legal

---

[25] *Awad*, 670 F.3d at 1130.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 1132.
[29] *See generally id.* at 1129–31.
[30] *See* H.B. 2582, 50th Leg., 1st Reg. Sess. (Ariz. 2011) ("Arizona Foreign Decisions Act").
[31] *See* Chan, *supra* note 15; *see* Volokh, *supra* note 17; *see* Jones & Palazzolo, *supra* note 3; *see also supra* text corresponding notes 15 & 17.
[32] *See* H.B. 2582.
[33] *See* H.R.J. Res. 1056, 52nd Leg., 2d Sess. (Okla. 2010) (Save Our State Amendment); *see* Chan, *supra* note 15; *see* Volokh, *supra* note 17.
[34] *See* H.B. 2582.

principles in the United States have developed from the English common law, all statutes, case law, and principles based on this heritage that were adopted before the Arizona Foreign Decisions Act remain available to judges, despite their potential classification as "foreign."[35] Additionally, the proposed Act provided an exception to the ban on religious law in "recognition of a traditional marriage between a man and a woman as officiated by the clergy or a secular official."[36] The Arizona Foreign Decisions Act, like the Save our State Amendment, received public support by the people of Arizona, and was signed into law by the governor in April 2011.[37] Unfortunately for proponents, however, the enacting legislation, although approved by the House Judiciary Committee, died in the House Rules Committee when the legislature adjourned.[38]

These state actions are problematic in ways that open the door to seriously negative (and illegal) results. They are discriminatory, as brought to light by the Oklahoma Save Our State Amendment with its singling out of Sharia law.[39] There is furthermore the question of whether there is even a need for states to introduce new legislation that essentially grants permission for judges to disregard potentially useful "foreign" laws.[40] Finally, and most at issue here, is the fact that these state actions attempt to unilaterally ignore international law. This last aspect is neither up to the state legislatures' discretion,[41] nor is it a good idea in an increasingly global world.[42]

---

[35] *See id.* This provision is particularly pertinent when evaluating anti-international law legislation's validity because all state law is founded on the traditions of the British common law. *See* BLACK'S LAW DICTIONARY, 252–53 (9th ed. abr. 2010). Because international law is part of British common law, it is therefore necessarily part of state law.
[36] *See* H.B. 2582.
[37] Bill Raftery, *Bans on Court Use of Sharia/International Law: Law in Arizona, Bills Advance in Missouri and Texas, Failing in Most States*, GAVEL TO GAVEL (May 3, 2011), http://gaveltogavel.us/site/2011/05/03/bans-on-court-use-of-shariainternational-law-law-in-arizona-bills-advance-in-missouri-and-texas-failing-in-most-states/.
[38] *Id.*
[39] H.R.J. Res. 1056, 52nd Leg., 2d Sess. (Okla. 2010) (Save Our State Amendment).
[40] *See also infra* Part II.D.2 for a discussion on the doctrine of comity.
[41] *See infra* Part II.B.
[42] *See infra* Part II.C.

III. THE LEGISLATION PROPOSED BY THE AMERICAN LAWS FOR AMERICAN COURTS MOVEMENT, THOUGH COMMENDABLE IN ITS EFFORTS TO PROMOTE RIGHTS, IS NOT WITHIN THE STATES' CONSTITUTIONALLY GRANTED POWER

A. The Promotion of Rights

State enactments restricting judges from applying law other than state and federal law can be examined both generally and in the context of the specific law prohibited. Although this comment focuses on the prohibition of international law, it is helpful to look at the other provisions in these enactments for context. Examining these provisions and the reasoning behind them provides a stronger understanding of why states want to ban international law, and furthermore, why doing so makes little sense.

Ultimately, the states seem to want to protect the basic rights guaranteed to Americans by the Constitution and by the principles on which the United States was founded.[43] Forcing judges to eschew Sharia law, foreign law, and international law theoretically serves this purpose, each in a particular way.[44] However, promoting rights by banning international law is a dubious concept, as international law is particularly concerned with upholding rights.[45]

1. Sharia Law

States favoring the American Laws for American Courts movement have targeted Sharia law as a type of law categorically opposed to the guarantee of human rights.[46] Although some proposed state legislation merely provides for the elimination of any religious law or doctrine from state courts, the more extreme proposals name Sharia law specifically.[47] The potential merit here lies in the

---

[43] *American Laws for American Courts*, AMERICAN PUBLIC POLICY ALLIANCE, http://publicpolicyalliance.org/legislation/american-laws-for-american-courts/ (last visited Jan. 13, 2013).
[44] *See infra* Part II.A.1–3.
[45] *See infra* Part II.A.3.
[46] *American Laws for American Courts*, *supra* note 43; *see* H.R.J. Res. 1056, 52nd Leg., 2d Sess. (Okla. 2010) (Save Our State Amendment).
[47] *Compare* H.B. 2582, 50th Leg., 1st Reg. Sess. (Ariz. 2011) ("Arizona Foreign Decisions Act")(stating "a court shall not use,

inescapable fact that the Islamic nations using Sharia law have a conception of individual rights different from that generally acknowledged in the United States.[48]

The opportunity to apply a law other than the local, state, or federal law most commonly arises in family law cases, such as for divorce or child custody.[49] The states trying to prevent Sharia law from entering into their courts, therefore, can objectively be seen as attempting to protect the rights of women and children in a way that they might not be able to experience in their own country.[50] Supporters of the American Laws for American Courts movement fear that "Sharia law, as an example of foreign law, may result in the violation, in the specific matter at issue, of a liberty guaranteed by the Constitution of the United States or the public policies of the state in question."[51]

2. Foreign Law

Foreign law is defined as "the law of another country."[52] Therefore, it logically follows that state courts might be hesitant to put too much weight on foreign judgments and laws in order to preserve the emphasis on rights present in the United States, which may not be

---

implement, refer to or incorporate a tent of any body of religious sectarian law"), *with* H.R.J. Res. 1056, 52nd Leg., 2d Sess. (Okla. 2010) (Save Our State Amendment)(stating that the constitutional amendment "forbids courts from looking at . . . from Sharia law when deciding cases").

[48] *See Shariah Law and American State Courts*, Sharia in American Courts, http://shariahinamericancourts.com/?page_id=16.

[49] *See id.*

[50] *Id.* The "Shariah Law and American State Courts" Report notes several categories of issues that may result in the exact sort of feared anti-rights court judgment to be avoided, "including conflicts in the area of polygamy, marriage to non-Muslims, forced marriages, and spousal abuse." *Id.* There are the additional concerns that "some Muslims are proactively interested in ways to legitimately opt out of the United States legal norms that potentially conflict with their Islamic preferences." *Id.*

[51] *Shariah Law*, AMERICAN PUBLIC POLICY ALLIANCE, http://publicpolicyalliance.org/issues-2/shariah-law/ (last visited Jan. 13, 2013).

[52] BLACK'S LAW DICTIONARY 720 (9th ed. 2009).

similarly emphasized in foreign legal systems and cultures.[53] The official website for the American Laws for American Courts movement explains that "America has unique values of liberty which do not exist in foreign legal systems," rights which include "freedom of religion, freedom of speech, freedom of the press, due process, right to privacy, [and the] right to keep and bear arms."[54] It is understandable that state courts would want to uphold these "unique values" and avoid having to follow any other influential law or judicial decision that acts contrary to those values.[55]

3. International Law

Moving away from the tentative merits and the separate set of problems and solutions posed by the states' ban on Sharia and foreign law, attempts to restrict international law must now be examined. Unfortunately, there is much less obvious reasoning behind the bans on international law than there is for the restrictions on religious and foreign law. It must be assumed, therefore, that the purpose behind the provisions directed at international law is similar to the purposes of the other bans.[56]

The provisions themselves provide little reason to think that outlawing international law should be any different than outlawing religious or foreign law.[57] The Oklahoma Save Our State Amendment straightforwardly describes international law as "the law of nations . . . formed by the general assent of civilized nations [which includes] treaties."[58] The Arizona Foreign Decisions Act includes international organizations under its definition of "Foreign Body," mentioning specifically, "the United Nations and any agency thereunder, the European Union and any agency thereunder, an international judiciary, the International Monetary Fund, the Organization of Petroleum Exporting Countries, the World Bank and the Socialist International."[59] These examples seem to indicate that states should be wary of

---

[53] *American Laws for American Courts*, *supra* note 43.
[54] *Id.*
[55] *Id.*
[56] *See infra* Part II.A.1–2.
[57] *See* H.R.J. Res. 1056, 52nd Leg., 2d Sess. (Okla. 2010) (Save Our State Amendment); *see* H.B. 2582, 50th Leg., 1st Reg. Sess. (Ariz. 2011) ("Arizona Foreign Decisions Act").
[58] H.R.J. 1056.
[59] *See* H.B. 2582 at sec.(f).

international law because, like foreign law, it was developed by people who have a different understanding of rights than that held by the United States and its legal system.[60]

Another purpose behind the ban on international law, one that is perhaps less openly acknowledged, is that Americans may not feel readily disposed to relinquish legal control of domestic issues to an international body.[61] This agenda can be inferred from U.S. jurisprudence regarding treaties.[62] In *Medellin v. Texas*, the Supreme Court ruled on the enforceability of decisions handed down by the International Court of Justice (ICJ) in state courts.[63] When the President and the Senate accepted the provisions in the United Nations Charter concerning the ICJ, the Supreme Court wrote: "[I]f ICJ judgments were regarded as automatically enforceable domestic law, they would be immediately and directly binding on state and federal courts pursuant to the Supremacy Clause [but] there is no reason to believe that the President and Senate signed up for such a result."[64] Clearly, the United States, as represented by the Supreme Court Justices handing down the *Medellin* decision, felt uneasy about giving up its own ability to regulate what laws are enforceable in the United States.[65]

This idea is reiterated when the *Medellin* court continued, "Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution . . . They also recognized that treaties could create federal law, but again through the political branches."[66] It is therefore plausible, that like the federal government, the state governments wish to retain as much control as possible over what laws are enforceable in their domestic jurisdictions, and the way they see necessary to accomplish that goal is by banning any intrusion of international law in their state courts. In fact, the American Laws for American Courts website directly advocates that "state legislatures have a vital role to play in preserving those constitutional rights and American values of liberty and freedom"

---

[60] *See* H.B. 2582; *see generally infra* Part II.A.2.
[61] *See* Medellin v. Texas, 552 U.S. 491, 510–11, 515 (2008).
[62] *Medellin*, 552 U.S. at 510–11, 515; *see also* Part II.B.2.
[63] *See generally Medellin*, 552 U.S. at 491.
[64] *Id.* at 510–11.
[65] *Id.*
[66] *Medellin*, 552 U.S. at 515.

that could be jeopardized if state judges are permitted to use international law in their determinations and judgments.[67]

However, it also seems that the hostile attitude towards international law taken by some states is an extreme attitude, and one that is not legally correct.[68] International law is not consistently included as a separate provision, and is more often considered a subset of foreign law.[69] In other words, legislation developed by an international organization is seen as coming from a foreign legal system, comparable to laws coming from a foreign nation.[70] This attitude is not accurate, as the international legal community differentiates foreign law as law that is local to a particular country from international law as the law common to all countries.[71] Even the website dedicated toward promoting the American Laws for American Courts movement glosses over international law as an independent cause for concern, including it only briefly in its model legislation section as a possible type of foreign legal system.[72]

B. Legality of Individual States Banning International Law

International law can be broken down into four subsets: treaties, customary law, general principles of law recognized by civilized nations, and judicial decisions and scholarly teachings.[73] The legality of banning each of the four types of international law may be analyzed separately, but this Comment will focus solely on treaties.

---

[67] *American Laws for American Courts*, *supra* note 43.
[68] *See, e.g.,* H.R.J. Res. 1056, 52nd Leg., 2d Sess. (Okla. 2010) (Save Our State Amendment).
[69] *See* H.R.J. Res. 1056; see H.B. 2582, 50th Leg., 1st Reg. Sess. (Ariz. 2011) ("Arizona Foreign Decisions Act").
[70] *Compare* H.R.J. Res 1056, *with* H.B. 2582.
[71] International Law is defined as "the legal system governing the relationships between nations…embracing not only nations but also such participants as international organizations and individuals (such as those who invoke their human rights or commit war crimes)." BLACK'S LAW DICTIONARY 700 (9th ed. 2010).
[72] *American Laws for American Courts*, *supra* note 43. The Arizona Foreign Decisions Act seems to be one of the states to have closely adopted the proposed model legislation. *See* H.R.J. Res. 1056.
[73] Statute of the International Court of Justice art. 38, para. 1.

A treaty, also called convention or accord, is defined as "an international agreement concluded between two or more states in written form and governed by international law."[74] By their nature, treaties hold a great deal of weight as formal written contracts, and therefore seem to command compliance.[75]

In the United States, international treaties between the United States and the global community fall under the power of the federal government, not the individual states.[76] As the United States acts as one nation for the purposes of foreign interactions, it is accordingly better that it present one unified international presence. There are numerous sources for this division of power—primarily legal documents—such as the U.S. Constitution and case law handed down from the U.S. Supreme Court.[77]

4. U.S. Constitution

Article I, Section 10 lists some of the powers that are denied to the states and reserved for the federal government.[78] Clause One declares, "No State shall enter into any treaty, alliance, or confederation."[79] Clause Two forbids states from laying "any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws" or if Congress consents.[80] Finally, Clause Three prohibits states from engaging in any action related to war, "unless actually invaded," the state is "in such imminent danger as will not admit of delay," or Congress consents.[81] These provisions clearly indicate that individual states may not take unilateral action on an international level without the consent of the federal government or the existence of some extraordinary countervailing concern.[82]

If the Constitution forbids states from becoming actively involved in international matters, it should follow that the intent behind

---

[74] BLACK'S LAW DICTIONARY 1292 (9th ed. abr. 2010).
[75] *See id.*
[76] *See* U.S. CONST. art. I, § 10.
[77] *See infra* Part II.B.1–2
[78] U.S. CONST. art. I, § 10.
[79] U.S. CONST. art. I, § 10, cl. 1.
[80] U.S. CONST. art. I, § 10, cl. 2.
[81] U.S. CONST. art. I, § 10, cl. 3.
[82] *See* U.S. CONST. art. I, § 10.

Article I, Section 10 also forbids states from individually dropping out of international matters in which the United States has involved in as a whole.[83] A federal system, such as the one in the U.S., generally reserves much power to the local levels of government, however it does not grant them the power to override decisions made by the federal government.[84] Article VI, Section 1, Clause Two synthesizes this important concept.[85] The so-called "Supremacy Clause" states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[86]

Thus, the logic follows that states may not affirmatively act as individuals on the international plane, they may not disregard decisions made by the federal government, and therefore, they may not unilaterally decide to disregard an international treaty to which the United States is a party.[87] In fact, such an intention has been recognized in the congressional records concerning U.S. support of various international treaties.[88] Regarding human rights treaties in particular, ratification normally occurs with the "understanding that state and local governments implement treaty obligations pertaining to matters within

---

[83] *See id.*

[84] *See* U.S. CONST. amend. X (stating, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.") This provision is relevant here because it confirms that the powers enumerated in Article I, Section 10 are those "prohibited by it [the Constitution] to the States." U.S. CONST. amend. X; U.S. CONST. art. I, § 10. Therefore, the 10th Amendment confirms that all international matters are to be under the regulation and initiation of the federal government, not the individual states. U.S. CONST. amend. X.

[85] *See* U.S. CONST. art. VI, § 1, cl. 2.

[86] *Id.*

[87] *See* U.S. CONST. art. I, § 10; *see* U.S. CONST. art. VI, § 1, cl. 2.

[88] *See* Risa E. Kaufman, *"By Some Other Means": Considering the Executive's Role in Fostering Subnational Human Rights Compliance*, 33 CARDOZO L. REV. 1971, 1974 (2012).

their jurisdiction," despite the power limitations the Constitution commands.[89]

5. Non-self-executing Treaties and *Medellin*

In Supreme Court decisions discussing the United States' obligation under international law, the central issue often concerns the difference of function between self-executing treaties and non-self-executing treaties.[90] The United States tends to consider international treaties to be non-self-executing, meaning that there must be some enacting legislation proffered by Congress before the treaty can be binding on the states as domestic law under the Supremacy Clause of the Constitution.[91] However, it is acknowledged that a treaty to which the United States is a party nevertheless "creates an international law obligation on the part of the United States, [although] it does not of its own force constitute binding federal law."[92]

The recent and much discussed *Medellin* case elaborates on not only on the difference between self-executing and non-self-executing treaties, but also on the role of the federal and state governments regarding the international obligations formed by treaties.[93] When there is no enacting congressional legislation for a treaty, it is not part of United States law and cannot be enforced as

---

[89] *Id.*; *see also Medellin*, 552 U.S. at 505 (stating that a treaty ordinarily "depends for the enforcement of its provisions on the interest and the honor of the government which are parties to it.").

[90] *See, e.g. Medellin*, 552 U.S. at 491.

[91] Kaufman, *supra* note 88, at 1974. To determine whether a treaty is self-executing or non-self-executing, interpretation must begin with the text of the treaty itself. *Medellin*, 552 U.S. at 506. The language of the treaty, and additionally evidence of signatory intent based on the negotiations and previous drafts, will indicate whether the signatories clearly intended the treaty to automatically become domestic law, or whether some other step was to be made prior to domestic execution. *Id.* at 505, 507.

[92] *Medellin*, 552 U.S. at 522–23. In other words, even when Congress has not created legislation specifically making a treaty binding as the supreme law of the land under Article VI, Section 1, Clause 2, the United States is still obligated to honor its commitment under international law, notwithstanding how domestically enforceable the treaty currently stands. *Id.*

[93] *See generally Medellin*, 552 U.S. at 491.

such, despite the commitment the United States has made under international law.[94] The *Medellin* court, citing to Alexander Hamilton's Federalist No. 33, distinguishes between actual federal laws and treaties, "comparing laws that individuals are 'bound to observe' as 'the supreme law of the land' with 'a mere treaty, dependent on the good faith of the parties.'"[95] If there has been no implementing legislation, a treaty may be assumed to be merely a "good faith" obligation, rather than a binding commitment enforceable in all United States courts.[96]

The *Medellin* case dealt with the aftermath of the ICJ case, *Case Concerning Avena and Other Mexican Nationals (Mex. V. U.S.*), 2004 I.C.J. 12, which found the United States in violation of its duties under the Vienna Convention on Consular Relations.[97] The United States had failed to properly advise fifty-one Mexican nationals, including the plaintiff, Medellin, of their rights under the Vienna Convention, and because of this, the ICJ determined that those fifty-one nationals should have their convictions and sentences under Texas law reviewed.[98] Despite the ICJ decision in *Avena*, and a memorandum written by then President George W. Bush advising the Texas courts to adhere to the decision, Texas refused to reconsider those fifty-one criminal cases.[99] The issues therefore presented to the U.S. Supreme Court in *Medellin* were whether the *Avena* decision could be "directly enforceable as domestic law in a state court in the United States" as a judicial decision handed down from an international tribunal, and whether the President's memorandum made it enforceable, whether or not the decision alone was sufficient to make it so.[100]

---

[94] *Medellin*, 552 U.S. at 505.
[95] *Id.*
[96] *Id.* However, the principle of good faith adherence to treaties is seen as much more than a "mere" obligation; rather, it is an important principle for the international legal community, as indicated by the inclusion of the concept "*pacta sunt servanda*" in the Vienna Convention on the Laws of Treaties. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 (stating, "every treaty in force is binding upon the parties to it and must be performed by them in good faith"). The phrase literally means, "agreements must be kept." BLACK'S LAW DICTIONARY 957 (9th ed. abr. 2010).
[97] *Medellin*, 552 U.S. at 491.
[98] *Id.*
[99] *Id.* at 498.
[100] *Id.*

The Supreme Court determined that the Vienna Convention was a non-self-executing treaty, and therefore that its provision that parties must respect ICJ decisions is not binding on state courts.[101] The Court specifically looked at the language "undertakes to comply," taken from Article 94(1) of the United Nations Charter.[102] The finding by the Court matched the argument offered by the United States, that "the phrase 'undertakes to comply' is not 'an acknowledgement that an ICJ decision will have immediate legal effect in the courts of U.N. members,' but rather 'a *commitment* on the part of U.N. Members to take *future* action through their political branches to comply with an ICJ decision.'"[103] The *Medellin* court determined that the Texas state courts were not themselves obligated to follow the Vienna Convention or the U.N. Charter, as the relevant provisions were not to be considered as federal law; in order for this international treaty to be binding to the states, the federal government had to take enforcing action.[104]

When the *Medellin* rationale is applied to the state actions comprising the American Laws for American Courts movement, it seems as though *Medellin* provides an excuse from the seemingly airtight obligations commanded in the U.S. Constitution.[105] The fact remains, however, that no matter how domestically enforceable a treaty may be, the treaty, or, as in *Medellin*, the affected judgment of an international tribunal, still creates an international obligation on the part of the United States.[106] Therefore, *Medellin* cannot be counted on by proponents of banning international law to allow them to escape the requirements of the Constitution.[107] When a state disregards international law, it is effectively violating international law on behalf

---

[101] *Id.* at 508–09.
[102] *Id.* at 508. Article 94(1) of the UN Charter states that "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party." U.N. Charter art. 94, para. 1.
[103] *Medellin*, 552 U.S. at 508 (emphasis in original).
[104] *Id.* at 509–10.
[105] *Compare* U.S. CONST. art. VI, § 1, cl. 2 (the Supremacy Clause's command that "all Treaties made . . . shall be the supreme Law of the Land"), *with Medellin* 552 U.S. at 498 (the Supreme Court's proposition that non-self-executing treaties are not directly enforceable against the states).
[106] *Medellin*, 552 U.S. at 522–23.
[107] *See id.*

of the United States as a whole.[108] Even if the American Laws for American Courts legislation specifically stated that only non-self-executing treaties were to be banned, ignoring such treaties would nevertheless be a violation of the United States' responsibility to adhere in good faith to international law.[109]

C. Effective Promotion of Rights

A pressing question to ask next, regardless of legality, is whether these laws are in the end a good idea. When comparing the stated purposes of the American Laws for American Courts movement with the general goals of international law, it becomes apparent that both ultimately attempt to promote the same thing: rights.[110] Additionally, it is often impractical to eliminate what could be an important and relevant piece of law from a judge's available sources.[111]

The primary goal of the American Laws for American Courts movement is that "no U.S. citizen or resident should be denied the liberties, rights, and privileges guaranteed in our constitutional republic."[112] States fear that non-American laws and judicial decisions handed down from any kind of subjectively-defined foreign system might not uphold American constitutional rights in the way they ought to be upheld; as a consequence, all religious, foreign, and international law should be removed from consideration in a state court by a state judge.[113] Only state and federal law, therefore, is assumed to be capable of protecting the rights of Americans.[114]

Although this vision might have some, albeit dubious, merit regarding those religious laws and foreign laws coming from countries with very different cultural norms, it seems counterintuitive to ban international law, considering that much of international law has been developed with the primary intention of protecting and promoting human rights.[115] The Preamble to the Charter of the United Nations proclaims "[w]e the peoples of the United Nations determined . . . to

---

[108] *See id.*
[109] *See supra* note 96 and accompanying text.
[110] *See infra* Part II.A; *see also* U.N. Charter pmbl.
[111] *See supra* Part II.C.
[112] *American Laws for American Courts*, *supra* note 43.
[113] *See infra* Part II.A.
[114] *See infra* Part II.A.
[115] *See, e.g.* U.N. Charter pmbl.

reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . ."[116] This sounds like the Preamble to the United States' own central document, which, as almost any American could recite, states, "We the people of the United States . . . secure the Blessings of Liberty to ourselves and our Posterity . . . ."[117] It is apparent that both documents, and therefore the entities they govern, hold the well-being of their constituents as paramount importance.[118] It could even be argued that the United Nations is more concerned with the protection of the fundamental rights of the individual than the United States, based only on the plain text of the provisions quoted above.[119]

Although the lofty goals of the drafters and signatories usually appear in the preamble of a document, there are other document sections that indicate the strong emphasis on rights present in international law. Article I of the UN Charter provides a more detailed explanation of the purposes and principles of the United Nations.[120] The United Nations intends "to develop friendly relations among nations based on respect for the principle of equal rights" and to also "achieve international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[121]

Numerous international agreements have as their sole aim the promotion and protection of rights for all people, such as the Universal Declaration of Rights,[122] the International Covenant on Civil and Political Rights,[123] and the International Covenant on Economic, Social,

---

[116] *Id.*
[117] U.S. CONST. pmbl.
[118] *See* U.N. Charter pmbl.; U.S. CONST. pmbl.
[119] *Compare* U.N. Charter pmbl. (which openly uses the term "rights" twice), *with* U.S. CONST. pmbl. (where the support of rights is merely inferable).
[120] *See* U.N. Charter art. 1, para. 1-4.
[121] *Id.* para. 2-3.
[122] Universal Declaration of Human Rights pmbl., G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).
[123] International Covenant on Civil and Political Rights pmbl., G.A. Res. 2200 (XXI), U.N. Doc A/RES/2200(XXI) (Dec. 16, 1966).

and Cultural Rights.[124] All three of these documents contain the same significant language in their Preambles: "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[125]

A final comment is one that is perhaps the most significant to the argument that the United States needs international law to effectively promote human rights. Historically, U.S. courts have had a friendly disposition towards international law.[126] In fact, it was intended that the courts would, in the words of a former U.S. legal advisor to the State Department, "not merely accept, but would actively pursue, an understanding and incorporation of international law standards out of a decent respect for the opinions of mankind."[127] The American legal tradition, therefore, originated from British common law and subsequently developed with a strong connection to the legal tradition of a more global community.[128] Even traditionally "American" concepts such as "liberty, equal protection, due process of law, and privacy have never been exclusive U.S. property, but have long carried global meaning."[129] It then follows that the promotion and protection of rights is an endeavor best carried out on a global scale, based not just on the relevant international efforts towards that end, but on the United States' own legal upbringing.

D. **A More Effective Means of Protecting Rights**

If states want to protect the rights of their citizens, there are other methods they can employ that will further this goal without the methods themselves causing an additional problem. There are some limited remedies available under international law for addressing such a violation. More apt, however, is the idea that states should rely on their

---

[124] International Covenant on Economic, Social and Cultural Rights pmbl., G.A. Res 2200 (XXI), U.N. Doc A/RES/2200(XXI) (Dec. 16, 1966).
[125] G.A. Res. 217, *supra* note 122, at pmbl.; G.A. Res. 2200, *supra* note 123, at pmbl.; G.A. Res 2200, *supra* note 124, at pmbl.
[126] *See* Harold Hungju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L. L. 43, 44–46 (2004).
[127] *Id.* at 44.
[128] *Id.* at 44–46; *see also* BLACK'S LAW DICTIONARY, 252–53 (9th ed. abr. 2010).
[129] Koh, *supra* note 122 at 47 (internal quotation marks omitted).

existing comity provisions when faced with a conflict between state law and one of the types of law banned by the state actions being discussed.

1. Article 94(2)

The *Medellin* court mentioned that if one country feels that another country has violated its treaty obligations, the injured party may seek a remedy under international law.[130] Article 94(2) of the UN Charter provides:

If any party to a case [to the ICJ] fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.[131]

The U.S. Supreme Court has taken this article to mean that decisions handed down by international tribunals, such as the ICJ, are not enforceable as local law and are therefore categorized under the non-self-executing treaty doctrine.[132] The Court states that this provision "confirms that the U.N. Charter does not contemplate the automatic enforceability of ICJ decisions in domestic courts. Article 94(2) . . . provides the sole remedy for noncompliance."[133] Article 94(2) seemingly permits local courts to have a reprieve from the burdens of international judicial decisions, as the Court continues, "the U.N. Charter's provision of an express diplomatic—that is, nonjudicial—remedy is itself evidence that ICJ judgments were not meant to be enforceable in domestic courts."[134] Although a plea to the UN Security Council could be a potential solution for the party that has been wronged by one country in violation of its international obligation, it is certainly not the most practical or effective means of protecting rights in United States state courts. Additionally, Article 94(2) only provides recourse for violations of ICJ judgments, not for violations or general disregard of international law in treaty form.[135]

---

[130] *Medellin,*552 U.S. at 509.
[131] U.N. Charter art. 94, para. 2.
[132] *See Medellin*, 552 U.S. at 509.
[133] *Id.*
[134] *Id.*
[135] *See* U.N. Charter art. 94, para. 2; *see Medellin*, 552 U.S. at 509.

2. Comity

A better method of protecting rights that does not involve an outright ban of any and all non-American law is for courts to perform a case-by-case evaluation when a conflict comes up. Comity may also be used to appease states' concerns about international law.

Comity is defined as "[a] practice among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition or legislative, executive, and judicial acts."[136] Generally, this means that courts, such as the state courts discussed in this Comment, should hold it in good practice to look at foreign judgments and rather than deciding the case or issue anew, determine whether the standing foreign decision would violate state law or public policy.[137] If the foreign judgment is not in violation of any important state interest, the foreign judgment should be upheld by the state court.[138] The practice of comity would appear to already provide for the purposes of these recently proposed enactments, making them seem unnecessary as superfluous legislation.[139]

Throughout history, American courts have used comity to enforce foreign laws in situations ranging from private matters to larger scale business dealings between nations.[140] In 1839, the Supreme Court discussed the merits of comity between different countries, particularly where the rights of an individual are at stake.[141] The Court wrote, "it is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one, will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned."[142] Before any proponent of the American Laws for American Courts movement can object to this, it should be noted that the Supreme Court continued,

> Courts of justice have always expounded and executed [foreign laws] according to the laws of the

---

[136] BLACK'S LAW DICTIONARY 244 (9th ed. abr. 2010).
[137] Joel R. Paul, *The Transformation of International Comity*, 71 LAW & CONTEMP. PROBS. 19, 23 (2008).
[138] *See id.*
[139] *See supra* Part II.A.
[140] *See generally* Paul, *supra* note 137.
[141] Bank of Augusta v. Earle, 38 U.S. 519, 589 (1839).
[142] *Id.*

> place in which they were made; *provided that law was not repugnant to the laws or policy of their own country*. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered; and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong; that Courts of justice have continually acted upon it, as a part of the voluntary law of nations.[143]

Clearly, comity has a longstanding tradition in U.S. courts, even state courts, and has provided a working method for allowing non-American laws to come in when useful, but keeping them out of American courts when their implementation would be an affront to American values.[144]

A form of comity could be used when the conflicting law is international law. Neither the states nor the American Laws for American Courts movement give specific examples of when an international law may be at issue in a state court,[145] but if such situation did arise, state judges could apply the public policy test to determine if the international law should be used. By using this already available provision, no state would have the need to create legislation like the Oklahoma Save Our State Amendment or the Arizona Foreign Decisions Act.

A related doctrine relevant to this discussion is the "Charming Betsy" rule used for the interpretation of federal statutes.[146] Moving higher up the judicial hierarchy, it has been established that because international treaties are the law of the land, federal laws cannot be in violation of treaties without violating the United States' obligations

---

[143] *Id.* (emphasis added).
[144] *See id.*; *see also* Paul, *supra* note 137, at 38.
[145] *See* H.R.J. Res. 1056, 52nd Leg., 2d Sess. (Okla. 2010) (Save Our State Amendment); *see* H.B. 2582, 50th Leg., 1st Reg. Sess. (Ariz. 2011) ("Arizona Foreign Decisions Act"); *see American Laws for American Courts*, *supra* note 43.
[146] Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804).

under international law.[147] To that end, the Supreme Court has noted, "it has been observed that an act of Congress ought never to be construed to violate the law of nations if any other construction remains."[148] No law in the United States should be interpreted to violate international law.[149] Following that analysis, it becomes obvious that if Congress must interpret itself to be in compliance with international law, states must be obligated to do the same.

IV. CONCLUSION

The American Laws for American Courts movement is a nationwide trend that has arguably positive goals, but is going about accomplishing them in a way that is sure to violate more rights than it protects.[150] Banning international law outright from state courts is not an effective means of promoting the rights of individuals.[151] Furthermore, state governments do not have the power to enact legislation like the Oklahoma Save Our State Amendment or the Arizona Foreign Decisions Act under the U.S. Constitution.[152] As both legal scholars and the United States Supreme Court itself have indicated, "like it or not, both foreign and international law are already part of our law."[153] It is clearly inescapable that international law is United States law, and state legislatures should not be permitted to declare otherwise.

---

[147] *See supra* Part II.B; *see also* U.S. CONST. art. IV, § 1, cl. 2.
[148] *Murray*, 6 U.S. at 118.
[149] *See id.*
[150] *See supra* Part II.C.
[151] *See supra* Parts II.C–D.
[152] *See supra* Part II.B.
[153] Koh, *supra* note 126 at 57; *see also* The Paquete Habana, 175 U.S. 677, 700 (1900).