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Exceptionalism Unbound: Appraising American Resistance to Foreign Law

Mark C. Rahdert

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Exceptionalism Unbound: Appraising American Resistance to Foreign Law

Cover Page Footnote

Professor of Law, Temple University Beasley School of Law. This article is based in part on a presentation I gave at a conference entitled “Through the Looking Glass: National Engagement with International and Foreign Law & Government,” sponsored by Monash University and held in Manly, Australia in December 2010. Portions of the article (including portions of the Introduction, Parts I (B) and II, and the Conclusion) are drawn from that earlier presentation. I would like to thank Dean Bryan Horrigan, who organized the conference, and the other participants for their helpful comments and suggestions. I would also like to thank Kelsey Lee for her research assistance. Lastly, I’d like to thank Dean JoAnne Epps and Temple University for their generous research grant support.

EXCEPTIONALISM UNBOUND: APPRAISING AMERICAN RESISTANCE TO FOREIGN LAW

Mark C. Rahdert⁺

I. BANNING SHARIA: CONSTITUTIONAL LIMITS ON RELIGIOUS EXCEPTIONALISM	551
II. WHOLESAL EXCEPTIONALISM.....	562
A. <i>Four Levels of AFIL</i>	564
1. <i>Jurisdiction</i>	565
2. <i>Rules of Decision</i>	566
3. <i>Matters of Interpretation</i>	567
4. <i>Questions of Evidence</i>	569
B. <i>The Wisdom of Wholesale Exceptionalism</i>	569
1. <i>False Premises</i>	570
2. <i>Overbreadth</i>	573
3. <i>Non-necessity and Inefficiency</i>	574
4. <i>Uncertainty</i>	578
5. <i>Unenforceability</i>	579
6. <i>The Effects of Globalization</i>	582
III. SELECTIVE EXCEPTIONALISM	584
A. <i>The Contrast between Wholesale and Selective Exceptionalism</i>	588
B. <i>Standards for Selective Exceptionalism</i>	595
1. <i>Legal Text</i>	596
2. <i>Legal Structure</i>	598
3. <i>Political Institutions</i>	598
4. <i>Legal Tradition</i>	599
C. <i>The Values of Dialogue and Engagement</i>	601
IV. CONCLUSION	602

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“We know we belong to the Land, And the Land we belong to is grand!”

– Lyrics from “Oklahoma!” by Oscar Hammerstein¹

These are certainly interesting political times. There have been sharp shifts in voter sentiment in the last several national elections.² In 2000, Al Gore secured the popular vote, but George W. Bush won the electoral vote with some help from the U.S. Supreme Court.³ President Bush’s reelection in 2004 ushered in what promised to be the strongest Republican presidency since Ronald Reagan, given that the Republican Party controlled both Houses in Congress.⁴ However, in 2006, after military setbacks in Iraq and natural disasters at home, the party that seemed ascendant two years before lost Congress to the Democrats in an election widely viewed as a rebuke of Bush Administration policies.⁵

Subsequently, in 2008, the Democrats captured the White House and strengthened their congressional majorities, providing them control of both the Executive and Legislative Branches for the first time in close to a generation.⁶ Pundits predicted a new era of progressive lawmaking.⁷ Yet, just two years later,

1. OSCAR HAMMERSTEIN & RICHARD RODGERS, OKLAHOMA! 58, Act 2, Scene 4 (1943).

2. See *infra* notes 4–6 and accompanying text.

3. See *Bush v. Gore*, 531 U.S. 98, 110 (2000) (deciding the results of the 2000 Presidential election in Florida after a contentious recount, which in turn determined the national result); see also John Woolley & Gerhard Peters, *Election of 2000*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=2000> (last visited Mar. 8, 2016).

4. See *Party Divisions of the House of Representatives*, HISTORY, ART & ARCHIVES, UNITED STATES HOUSE OF REPRESENTATIVES, <http://history.house.gov/Institution/Party-Divisions/Party-Divisions/> (last visited Mar. 8, 2016) [hereinafter *Party Divisions: House of Representatives*]; see also *Party Division in the Senate, 1789–Present*, UNITED STATES SENATE, <http://www.senate.gov/history/partydiv.htm> (last visited Mar. 8, 2016) [hereinafter *Party Division: Senate*]; John Woolley and Gerhard Peters, *Election of 2004*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=2004> (last visited Mar. 8, 2016).

5. In 2006, a midterm election, the Republican Party lost control of both houses of Congress to the Democratic Party. See Bart Mongoven, *The Political Aftermath of Hurricane Katrina*, STRATFOR (Aug. 29, 2007), https://www.stratfor.com/political_aftermath_hurricane_katrina; see also *Party Divisions: House of Representatives*, *supra* note 4; *Party Division: Senate*, *supra* note 4.

6. See John Woolley and Gerhard Peters, *Election of 2008*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=2008> (last visited Mar. 8, 2016) (noting that in 2008, a presidential election year, the Democratic Party’s candidate, Barack Obama, was elected President); see also *Party Divisions: House of Representatives*, *supra* note 4; see also *Party Division: Senate*, *supra* note 4.

7. *Reaching for a New Deal: President Obama’s Agenda and the Dynamics of U.S. Politics*, RUSSELL SAGE FOUNDATION, <http://www.russellsage.org/research/reaching-for-new-deal-read-more> (last visited Mar. 8, 2016) (“Pundits and politicians alike have compared Barack Obama’s

in 2010, the Democrats lost control of the House of Representatives.⁸ Although President Barack Obama was re-elected in 2012, Republicans strengthened their control over the House of Representatives and executed effective political blocking power in the Senate.⁹ The Republicans regained control of the Senate in 2014, making it even more difficult for the Obama Administration to fulfill new legislative initiatives.¹⁰ The overall effect was years of federal political stalemate between the Democratic and Republican Parties.¹¹ Evidently, the political symbol that best captures the electoral mood of the public in the United States is neither a red elephant nor a blue donkey (the symbols of the Republican and Democratic Parties, respectively), but rather a red-and-blue yo-yo.

Amid these national political tremors, one of the more obscure, yet potentially legally significant, developments of the 2010 midterm election occurred in Oklahoma.¹² In a statewide referendum, voters approved a change to the Oklahoma state constitution, adopting restrictions on state judges which have subsequently been enacted in other states and could play a significant role for U.S. law in the future.¹³ Dubbed the “Save Our State” (“SOS”) Amendment, the measure forbade Oklahoma state judges from considering or using

ambitious policy initiatives to Franklin Roosevelt’s New Deal, which sought to alleviate the economic devastation of the Great Depression.”).

8. See *Party Divisions: House of Representatives*, *supra* note 4.

9. See *id.* (highlighting that in 2010, during President Obama’s first term, the Democrats lost control of the House of Representatives); see also John Woolley and Gerhard Peters, *Election of 2012*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=2012> (last visited Mar. 8, 2016); *Party Division: Senate*, *supra* note 4.

10. See *Senate Election Results*, N.Y. TIMES (Dec. 17, 2014, 12:28 PM), <http://elections.nytimes.com/2014/results/senate>; see also Jon Gregory, *The Impact of U.S. Political Change is More than Domestic*, DIPLOMATIC COURIER (Nov. 6, 2014), <http://www.diplomaticcourier.com/the-impact-of-u-s-political-change-is-more-than-domestic/>.

11. See, e.g., Dawson Church, *Gridlockcracy* • [grid-lok-ruh-see] • noun, HUFFINGTON POST (Dec. 8, 2014, 2:47 PM), http://www.huffingtonpost.com/dawson-church/gridlockcracy-gridlokrhse_b_6281362.html.

12. See *infra* notes 13–17 and accompanying text.

13. Ben Armbruster, *Sharia Hysteria Comes to Oklahoma: Voters Approve Sharia Law Ban*, THINK PROGRESS (Nov. 3, 2010, 5:00 PM), <http://thinkprogress.org/politics/2010/11/03/128074/oklahoma-sharia-law/>; see OKLA. CONST. art. IV, § 1. Many states in the United States authorize the amendment of state constitutions through a process of electoral referendum. See David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 13 (1995). The author discusses the initiative and referendum process:

The initiative and popular referendum permit citizens to set the political agenda by placing statutes and constitutional amendments on the ballot . . . Using the initiative, voters may write statutes, and in some states constitutional amendments, which will go to the ballot if sufficient valid petition signatures are gathered. Initiative sponsors in states that provide both the constitutional and statutory initiative will often submit their measure as a constitutional initiative because of its “more secure” legal standing, a trend that is growing in at least one state. Constitutional initiatives can typically be changed only by a subsequent vote of the people, although statutory initiatives in most states may be amended by the legislature.

Id.

international or foreign law, except where required to do so by federal statutes or treaties.¹⁴ The measure specifically prohibited any reliance on Sharia, the term popularly applied to Islamic law derived from the Quran and the law of predominantly Muslim nations.¹⁵ This specific limitation enabled the SOS Amendment supporters to tap into the anti-Muslim sentiment that has been an undercurrent in U.S. society since the attacks of September 11, 2001,¹⁶ but the anti-Muslim stance of the SOS Amendment also opened it to constitutional challenge in federal court under the Establishment Clause.¹⁷

The Amendment did not respond to any particular developments in the Oklahoma courts. Rather, supporters described the Amendment as a preemptive measure intended to forestall trouble.¹⁸ Prior to the vote, the preemptive measure attracted little media attention and failed to spark significant

14. H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010). The Oklahoma state constitutional amendment read as follows:

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

Id.

15. *Id.* (“The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law.”).

16. See Roger Cohen, *Shariah at the Kumbuck Café*, N.Y. TIMES (Dec. 6, 2010), <http://www.nytimes.com/2010/12/07/opinion/07iht-edcohen.html> (characterizing Sharia as “the new hot-button wedge issue, as radicalizing as abortion or gay marriage, seized on by Republicans to mobilize conservative Americans against the supposed ‘stealth jihad’ of Muslims in the United States and against a Democratic president portrayed as oblivious to — or complicit with — the threat”); Carey Gillam, *Oklahoma Judge Blocks Anti-Islam Amendment*, REUTERS (Nov. 30, 2010, 8:21 AM), <http://www.reuters.com/article/2010/11/30/us-oklahoma-ruling-idUSTRE6AT2CK20101130> (stating opponents of the law argued “it clearly was a discriminatory measure” against Muslims); Newt Gingrich, *No Mosque at Ground Zero*, HUMAN EVENTS (July 28, 2010, 3:01 AM), <http://www.humanevents.com/article.php?id=38282> (“[T]he radical Islamist effort to impose sharia worldwide is a direct threat to all those who believe in the freedoms maintained by our constitutional system.”).

17. *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1302 (W.D. Okla. 2010) (challenging the constitutionality of the Oklahoma statute).

18. See Joel Siegel, *Islamic Sharia Law to Be Banned in, ah, Oklahoma*, ABC NEWS (June 14, 2010), <http://abcnews.go.com/US/Media/oklahoma-pass-laws-prohibiting-islamic-sharia-laws-apply/story?id=10908521> (quoting State Representative Rex Duncan, a “chief architect of the measure,” as describing the amendment as “a necessary ‘preemptive strike’ against Islamic law coming to the state” and adding that he “see[s] this in the future somewhere in America . . . [i]t’s not an imminent threat in Oklahoma yet, but it’s a storm on the horizon in other states.”).

local controversy.¹⁹ Instead of addressing pressing state government issues, the amendment appeared to have been advanced in part as a means of generating conservative voter turnout in what otherwise could have been a dull midterm election.²⁰ No matter what the political calculus may have been, the Amendment passed with over 70% of voter support.²¹ The Amendment would not have affected the outcome in any pending litigation.²² Yet, had the Amendment survived scrutiny in federal court, it could have fundamentally altered the structural fabric of judicial decision-making in the Sooner State.

The SOS Amendment failed to take effect because it was immediately challenged in federal court on the grounds that, by singling out Sharia for specific prohibition, it violated the Establishment Clause of the First Amendment.²³ In *Awad v. Ziriax*,²⁴ the U.S. District Court for the Western District of Oklahoma preliminarily enjoined enforcement of the SOS Amendment, concluding that there was a substantial likelihood the challengers could prove it violated the Establishment Clause.²⁵ On appeal, the U.S. Court of Appeals for the Tenth Circuit upheld the injunction, and the matter was remanded to the district court for further proceedings.²⁶ In August 2013, the district court entered a final injunction permanently enjoining the Amendment.²⁷ In anticipation that the Amendment might be enjoined, the Oklahoma Legislature passed a bill that re-enacted the limitations by statute without the specific reference to Sharia.²⁸ The constitutionality of that backup measure remains unchallenged.²⁹

Even if the SOS Amendment had survived the constitutional challenge, it likely would have had minimal immediate impact on legal decisions in Oklahoma courts. There was no evidence that Oklahoma judges frequently, or even occasionally, turned to foreign or international law in their judgments before the Amendment was adopted, and the Amendment was unlikely to alter

19. See Armbruster, *supra* note 13; but cf. Dick Polman, *From Paranoia to Patdowns*, NEWSWORKS (Dec. 5, 2010), http://www.newsworks.org/index.php?option=com_flexicontent&view=items&id=8547:from-paranoia-to-patdowns.

20. See Polman, *supra* note 19 (stating that the Oklahoma “Save Our State” Amendment “did what it was supposed to do” in “boost[ing] conservative turnout” with such success that “Republicans are thinking of pushing similar ballot measures in other states.”).

21. *Summary Results: General Election–November 2, 2010*, OKLA. STATE ELECTION BD. (Nov. 2, 2010), <http://www.ok.gov/elections/support/10gen.html>.

22. See, e.g., Siegel, *supra* note 18 (noting that experts in the legal field were not aware of a United States judge invoking Sharia law to render a decision).

23. See *Awad*, 754 F. Supp. at 1301–02.

24. *Id.*

25. *Id.* at 1306, 1308.

26. *Awad v. Ziriax*, 670 F.3d 1111, 1133 (10th Cir. 2012).

27. *Awad v. Ziriax*, 966 F. Supp. 2d 1198, 1207 (W.D. Okla. 2013).

28. See H.B. 1060, 2013 Leg., 54th Sess. (Okla. 2013).

29. See *Bill Information for HB 1060*, OKLAHOMA STATE LEGISLATURE, <http://www.oklegislature.gov/BillInfo.aspx?Bill=hb1060&Session=1300> (last visited Mar. 8, 2016).

judicial behavior or outcomes in any existing cases.³⁰ Moreover, the Amendment specifically permitted reference to foreign and international materials in the application of federal law. It can be inferred that this exception was an attempt to avoid federal preemption.³¹ Consequently, the Oklahoma Amendment was more symbolic than substantive at the time of its enactment, although that probably would have changed over time.³²

To regard the pre-emptive measure as either a simple political maneuver or a symbolic swipe at Islam would miss its deeper significance. The measure reflects a substantial wave of antipathy in the United States to foreign and international law, particularly in the nation's politically and socially conservative jurisdictions.³³ The SOS Amendment tapped into a widely held public sentiment that there is something fundamentally, and perhaps even dangerously, wrong in allowing U.S. courts to consider the laws of other nations, utilize the work of other courts around the world, or incorporate principles of international law into the reasoning and judgments of courts in the United States.³⁴

Subsequent events have demonstrated that what happened in Oklahoma in 2010 was not an isolated phenomenon. Similar measures (usually without specific references to Sharia) have been proposed or adopted elsewhere.³⁵ The

30. See, e.g., Michael Gerson, *Baiting a Faith in Oklahoma*, WASH. POST (Nov. 16, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/11/15/AR2010111506766_pf.html.

31. H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010). Under the Supremacy Clause of the U.S. Constitution, the laws of states, including state constitutions, are preempted if they conflict with national law. U.S. CONST. art. VI, cl. 2; see also *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 551 (2001) (holding that the Federal Cigarette Labeling and Advertising Act preempted Massachusetts' regulations restricting tobacco companies' outdoor and point-of-sale advertising); *Hines v. Davidowitz*, 312 U.S. 52, 72–74 (1941) (holding that the Alien Registration Act of the Commonwealth of Pennsylvania was preempted by the federal Alien Registration Act enacted by Congress). To avoid this fate, the “SOS Amendment” effectively permits an exception for instances in which state judges must apply federal law. See Okla. H.R.J. Res. 1056.

32. See Gerson, *supra* note 30 (characterizing the “SOS Amendment” as “a novel use of American law — not to actually address a public problem but to taunt a religious minority.”).

33. See, e.g., Editorial, *A Respect for World Opinion*, N.Y. TIMES (Aug. 3, 2010), http://www.nytimes.com/2010/08/03/opinion/03tue3.html?_r=0®ister=facebook.

34. See *id.* (endorsing Supreme Court Justice Ruth Bader Ginsburg's defense of the value of foreign law, despite the rampant “[n]ativism in American politics[,]” as “add[ing] to the store of knowledge relevant to the solution of trying questions”); see Richard Geldard, *The Rise of American Exceptionalism*, HUFFINGTON POST (Jan. 22, 2012, 5:12 AM), http://www.huffingtonpost.com/richard-geldard/the-rise-of-United-States-exce_b_1103875.html; see also Stephen M. Walt, *The Myth of American Exceptionalism*, FOREIGN POL'Y (Oct. 11, 2011), http://www.foreignpolicy.com/articles/2011/10/11/the_myth_of_american_exceptionalism. See generally Robert R. Tomes, *United States Exceptionalism in the Twenty-First Century*, 56 SURVIVAL: GLOBAL POL. & STRATEGY 27 (2014).

35. See, e.g., H.R.J. Res. 8, 61st Leg., Gen. Sess. (Wyo. 2011); H.R.J. Res. 57, 82d Leg., Reg. Sess. (Tex. 2011); S. Con. Res. 1010, 50th Leg., 1st Reg. Sess. (Ariz. 2011); H.R.J. Res. 1004, 2011 Leg. Assemb., 86th Sess. (S.D. 2011); see also Sara Prasatik, *Assessing the Viability of State International Law Prohibitions*, 35 HOUS. J. INT'L L. 465, 465–66 (2013); Jeremy Grunert,

constitutional amendment in Oklahoma has been followed by the enactment or consideration of similar measures in other states, including Arizona, Florida, Kansas, Louisiana, North Carolina, and Wyoming.³⁶ Several public interest groups are actively pressing Congress³⁷ for comparable legislative proposals directed at the federal courts.³⁸ This article will refer to these measures as “Anti-Foreign-or-International-Law” (“AFIL”) statutes and proposals.³⁹ In the new era of conservative political backlash against what many voters see as liberal excess on all fronts, the claim that “liberal” courts are endangering cherished U.S. legal values by indulging a recently discovered penchant for reliance on

Comment, *How Do You Solve a Problem Like Sharia? Awad v. Ziriax and the Question of Sharia Law in America*, 40 PEPP. L. REV. 695, 698–99 (2013).

36. Other states have dropped the specific reference to Sharia. They have also generalized the AFIL disability to apply to laws from any nation that lacks U.S. federal and state commitments to fundamental rights. Because there are few nations in the world, however, that have precisely the array and extent of rights that exist in the United States, this formula actually invites wholesale prescription of the vast majority of foreign law. *See* S. Con. Res. 1010, 50th Leg., 1st Reg. Sess. (Ariz. 2011); S.B. 58, 2013 Leg., 155th Reg. Sess. (Fla. 2013); S.B. 79, 84th Leg., Reg. Sess. (Kan. 2012); H.B. 785, 2010 Leg., Reg. Sess. (La. 2010); H.B. 695, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013); H.R.J. Res. 8, 61st Leg., Gen. Sess. (Wyo. 2011); *see generally* FAIZA PATEL ET AL., CTR. FOR AM. PROGRESS & BRENNAN CTR. FOR JUST., FOREIGN LAW BANS: LEGAL UNCERTAINTIES AND PRACTICAL PROBLEMS 1–4 (2013), <https://www.brennancenter.org/sites/default/files/publications/ForeignLawBans.pdf> (discussing AFIL statutes in various jurisdictions and identifying differences in statutory and constitutional language).

37. *See, e.g.*, Press Release, Am. Freedom L. Ctr., “American Laws for American Courts” Public Policy Initiative Advances in State Legislatures as AFLC Leads Citizens Awareness Drive (Jun. 26, 2013), <http://www.americanfreedomlawcenter.org/press-release/american-laws-for-american-courts-public-policy-initiative-advances-in-state-legislatures-as-aflc-leads-citizens-awareness-drive/>; *see also* *American Laws for American Courts*, AM. PUB. POL’Y ALLIANCE, <http://publicpolicyalliance.org/legislation/american-laws-for-american-courts/> (last visited Mar. 8, 2016); *e.g.*, *American Laws for American Courts Protects Constitutional Rights Against Foreign Laws—Including Shariah*, ACT! FOR AM. (May 29, 2014, 3:36 PM), <https://web.archive.org/web/20140828191627/http://www.actforamerica.org/index.php/learn/email-archives/3081-american-laws-for-american-courts-protects-constitutional-rights-against-foreign-laws-including-shariah>; *Confronting the Threat of Radical Islam*, THOMAS MORE L. CTR., https://www.thomasmore.org/key_issue/confronting-the-threat-islam/ (last visited Mar. 8, 2016); *SANE Special Update: Material Support of Jihad Statute in Tennessee*, SOC’Y OF AM. FOR NAT’L EXISTENCE (Mar. 1, 2011, 9:04 AM), <http://www.saneworks.us/indexnew.php>; CTR. FOR SEC. POL’Y, SHARIAH LAW AND AMERICAN STATE COURTS: AN ASSESSMENT OF STATE APPELLATE CASES 1 (Aug. 30, 2012), <http://www.centerforsecuritypolicy.org/2012/08/30/shariah-law-and-american-state-courts/>.

38. *See, e.g.*, H.R. 973, 112th Cong. (2011).

Part VI of title 28, United States Code, is amended by adding at the end the following: ‘In any court created by or under article III of the Constitution of the United States, no justice, judge, or other judicial official shall decide any issue in a case before that court in whole or in part on the authority of foreign law, except to the extent the Constitution or an Act of Congress requires the consideration of that foreign law.’

Id. at § 1.

39. Note also that the Islamic law of Sharia has several appropriate spellings, including “shariah” “shari’ah” or “shari’a”. For the purposes of consistency, this article will uniformly use the spelling “sharia.”

foreign law has struck a responsive chord with the U.S. public.⁴⁰ Antipathy to foreign law on the political front has, no doubt, been further aggravated by recent Supreme Court decisions that have looked beyond the borders of the United States in either limiting the scope of the death penalty⁴¹ or expanding gay rights.⁴² The AFIL proposals and measures tap into that antipathy as well.

Antipathy to foreign law has had a noteworthy effect on the federal judicial appointment process.⁴³ The last four Supreme Court nominees were closely interrogated by Republican members of the Senate Judiciary Committee regarding their personal views on the use of foreign and international law in the adjudication of domestic legal questions.⁴⁴ Four Supreme Court Justices have

40. See, e.g., *American Laws for American Courts*, *supra* note 37; see also CTR. FOR SEC. POL'Y, *supra* note 37, at 1.

41. *Graham v. Florida*, 560 U.S. 48, 81–82 (2010) (holding that the Eighth Amendment prohibits a life sentence without parole for juvenile offenders who did not commit homicide, observing that, although international law is not dispositive for interpretations of the Eighth Amendment, “the overwhelming weight of international opinion against life without parole for non[-]homicide offenses committed by juveniles ‘provide[s] respected and significant confirmation for our own conclusions’”); *Roper v. Simmons*, 543 U.S. 551, 554 (2005) (stating that “[t]he overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court’s determination that the penalty is disproportionate punishment for offenders under 18[.]” to support the Court’s holding that execution of individuals under 18 at the time of their crimes is constitutionally prohibited).

42. *Lawrence v. Texas*, 539 U.S. 558, 572–73, 576–77 (2003) (citing decisions by the European Court of Human Rights and other nations as evidence that the right of homosexuals to engage in consensual intimate activities is “an integral part of human freedom in many other countries[.]” in support of its decision to declare a Texas statute unconstitutional that made it a crime for two people of the same sex to engage in consensual sexual acts).

43. See Thomas C. Goldstein & Cody S. Harris, *Outsourcing American Law: Foreign Law and Constitutional Interpretation: The Debate Behind Diatribes* 8, 24 (Am. Enter. Inst. For Pub. Pol’y Res., Working Paper No. 157, 2011), <https://www.aei.org/wp-content/uploads/2011/11/20090820-Chapter7.pdf>; see also David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1038 (2008) (highlighting that Justice Kennedy was a disappointment for conservatives because he “cite[d] foreign law when it supported his views”).

44. Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 AM. U. L. REV. 553, 557–58 (2007).

Bush’s eventual nominees, Judges John Roberts and Samuel Alito, both faced close questioning from the Senate Judiciary Committee regarding their views on the Court’s use of foreign constitutional precedent. Both nominees registered opposition to the use of such precedent, although they stopped short of saying that other members of the Court should be prevented from doing so.

Id. at 558.

During their confirmation hearings, Supreme Court nominees John Roberts and Samuel Alito expressed their firm opposition to the interpretive approach. Original leaders of the movement now sound more defensive than ever, as demonstrated by Justice John Paul Stevens’s statement from the bench conceding that, ‘I know it is not popular to refer to international commentary on issues like this’

Roger P. Alford, *Lower Courts and Constitutional Comparativism*, 77 FORDHAM L. REV. 647, 649 (2008); see also *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 125–27 (2010) (statement of Sen. Chuck Grassley); Adam Liptak, *Analysis: Sotomayor on Foreign Law*, N.Y.

openly opposed the use of foreign or international precedent in U.S. constitutional decisions.⁴⁵ Chief Justice John Roberts and Justice Samuel Alito both spoke against the practice,⁴⁶ and Justice Clarence Thomas and former Justice Antonin Scalia registered their opposition in various Supreme Court opinions.⁴⁷ Prior to taking her seat on the Supreme Court, Justice Sonia Sotomayor, then a federal circuit court judge, wrote and spoke in favor of a more active judicial consideration of foreign and international sources.⁴⁸ However, Justice Sotomayor backtracked somewhat in her confirmation hearings by re-characterizing her position and offering assurances that decisions in foreign courts would not influence her legal decisions.⁴⁹ Justice Elena Kagan, whose

TIMES (Jul. 17, 2009, 10:56 AM), <http://thecaucus.blogs.nytimes.com/2009/07/17/analysis-sotomayor-on-foreign-law/>.

45. *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting).

More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law—including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself.

Id.; *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (“The Court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since ‘this Court . . . should not impose foreign moods, fads, or fashions on Americans.’” (quoting *Foster v. Fla.*, 537 U.S. 990, n.* (2002) (Thomas, J., concurring in the denial of cert.))); Rahdert, *supra* note 44, at 558.

46. Rahdert, *supra* note 44, at 558. (“Both nominees probably needed to oppose the use of foreign precedent in order to win the support of some of the Judiciary Committee’s more conservative members, including Senators John Cornyn and Jon Kyl.”).

47. See *Roper*, 543 U.S. at 624 (Scalia, J., dissenting); *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting); *Foster*, 537 U.S. at 990 n.* (Thomas, J., concurring in the denial of cert.).

48. Sonia Sotomayor, Judge, United States Court of Appeals for the Second Circuit, How Federal Judges Look to International and Foreign Law Under Article VI of the U.S. Constitution, Speech Before the American Civil Liberties Union of Puerto Rico (Apr. 28, 2009), Speech to the A.C.L.U. of Puerto Rico, N.Y. TIMES (June 11, 2009), <http://www.nytimes.com/video/us/politics/1194840839480/speech-to-the-a-c-l-u-of-puertorico.html>.

To the extent that we as a country remain committed to the concept that we have freedom of speech, we must have freedom of ideas. And to the extent that we have freedom of ideas, international law and foreign law will be very important in the discussion of how to think about the unsettled issues in our own legal system. It is my hope that judges everywhere will continue to do this, because I personally believe that it is part of our obligation to think about things not outside of the American legal system, but that within the American legal system we’re commanded to interpret our law in the best way we can, and that means looking to what anyone has said to see if it has persuasive value.

Id.

49. See *The Nomination of Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 132–33, 348–49 (2009) (statements of Sen. Thomas Coburn, Sen. Charles Schumer, and Judge Sonia Sotomayor); see also Liptak, *supra* note 44 (“Judge Sotomayor, judging by her statements at her confirmation hearings this week, is not willing to let foreign courts play a dispositive role in her decision-making. Nor is she prepared, as her two predecessors seemed to be, to close her ears entirely.”).

career path involved a long stint as a legal scholar and educator,⁵⁰ was able to describe her interest in foreign law as motivated primarily by intellectual curiosity.⁵¹ Neither Justice Sotomayor's nor Justice Kagan's confirmation was placed at risk by their testimony, but many Senators who voted against confirmation cited the Justices' interest in foreign law (and the Senators' suspicions about what role it might play in their decisions) as one reason for their negative vote.⁵² It will be interesting to observe what role attitudes toward foreign and international law may play in confirmation hearings for Justice Antonin Scalia's successor.

The Supreme Court nominations are the tip of a much larger judicial appointment and electoral iceberg. For other federal court nominations, state court nominations, and judicial elections in states where judges are elected,⁵³

50. Most notably, Justice Kagan served as Dean of Harvard Law School from 2003-2009. *Deans of Harvard Law School*, HARV. LAW SCHOOL, <http://hls.harvard.edu/library/historical-special-collections/research-assistance/deans-of-harvard-law-school/> (last visited Mar. 8, 2016).

51. *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 126 (2010) (statements of Sen. Charles Grassley and Elena Kagan, Solicitor General, nominated to be an Associate Justice of the U.S. Supreme Court) In an exchange, Senator Grassley asked "Should judges ever look to foreign law for 'good ideas?' Should they get inspiration for their decisions from foreign law?" Solicitor General Kagan responded:

Well, Senator Grassley, I guess I'm in favor of good ideas coming from wherever you can get them, so in that sense I think for a judge to read a law review article or to read a book about legal issues or to read the decision of a state court, even though there's no binding effect of that state court, or to read the decision of a foreign court, to the extent that you learn about how different people might approach and have thought about approaching legal issues.

Id.

52. See Press Release, Ga. Sen. Saxby Chambliss, Chambliss Statement on Judge Sotomayor (Jul. 30, 2009), <http://votesmart.org/public-statement/446021/chambliss-statement-on-judge-sotomayor#.Vui5Rcc-CT>- ("I am concerned about her apparent leaning to use foreign law to interpret America's own laws and Constitution."); see also Press Release, Idaho Sen. James E. Risch, Statement on Opposition to Supreme Court Nominee Sonia Sotomayor (Jul. 27, 2009), <http://www.risch.senate.gov/public/index.cfm/pressreleases?ID=eeb421d2-91ac-4f1c-b483-51da546a0bf2> ("Her answers to questions on the use of foreign law to interpret our Constitution did nothing to ease my concern that she would not look to the laws of other countries when interpreting the Constitution. That should not happen under any circumstance."); Press Release, Iowa Sen. Chuck Grassley, Senator Grassley's Statement for Judiciary Committee Exec. on Elena Kagan to be an Associate Justice on the U.S. Supreme Court (Jul. 20, 2010), <http://www.grassley.senate.gov/news/news-releases/senator-grassleys-statement-judiciary-committee-exec-elena-kagan-be-associate>.

Solicitor General Kagan also stated that a Justice could look to international law to find "good ideas" when interpreting the Constitution and U.S. laws. I'm unaware how international law can help us better understand the Constitution. When we begin to look to international law to interpret our own Constitution, we are at a point where the meaning of the United States Constitution is no longer determined by the American people.

Id.

53. See Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 181 (2004).

any hint of affinity for foreign or international law could lead to disaster for a potential judicial nominee or candidate.⁵⁴ As the world of U.S. judicial politics becomes increasingly divided and contested, with state election costs now running in the millions of dollars, the opposition will exploit the issue as an opportunity to create resistance to any candidate who even hints at an interest in foreign or international law.⁵⁵

Collectively, these developments reflect a vigorous new strain of a deep-seated tendency in the political, legal, and cultural thought of the United States: a commitment to U.S. national “exceptionalism.”⁵⁶ There are several theoretical arguments that have been advanced in academic circles against the use of foreign and international law by U.S. courts. These arguments include claims that resorting to foreign law conflicts with the Framers’ original intentions in constitutional matters, delegates judicial authority to foreign powers, compounds the democratic deficit of judicial decision-making, creates selectively result-oriented decisions, and is impracticable.⁵⁷ Some of the voters who passed the

The vast majority of judicial offices in the United States are subject to election. The votes of the people select or retain at least some judges in thirty-nine states, and all judges are elected in twenty-one states. By one count, 87% of the state and local judges in the United States have to face the voters at some point if they want to win or remain in office.

Id.; Joanna M. Shepherd, *Money, Politics and Impartial Justice*, 58 DUKE L.J. 623, 623 (2009) (“[M]ore than 90 percent of the United States’ judicial business is handled by state courts, and approximately nine in ten of all state court judges face the voters in some type of election.”).

54. See generally Martha F. Davis, *Shadow and Substance: The Impacts of the Anti-International Law Debate on State Court Judges*, 47 NEW ENG. L. REV. 631, 644–45 (2013) (discussing tendency of state judges to avoid discussion or application of foreign law even when permitted to do so as a result of AFIL movement).

55. See Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077, 1081 (2007) (“Judicial elections have become nastier, noisier, and costlier. Indeed, the rise in cost and heat is so well-known that it has become a stuck record.”); see also Davis, *supra* note 54, at 646; Shepherd, *supra* note 53, at 642.

The cost of [state] supreme court campaigns, especially in partisan elections, has risen so dramatically that it is often difficult, if not impossible, for candidates to win elections without substantial funding. In 1997–1998, the top campaign fundraiser prevailed in approximately 75 percent of contested state supreme court races, and in 2001–2002, the top fundraiser won in 80 percent of the elections. Thus, with few exceptions, more money is a prelude to victory.

Id. (citation omitted).

56. See generally JACK P. GREENE, *THE INTELLECTUAL CONSTRUCTION OF AMERICA: EXCEPTIONALISM AND IDENTITY FROM 1492 TO 1800* 4–7 (1993); SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* 33–35 (1996); DEBORAH L. MADSEN, *AMERICAN EXCEPTIONALISM* 35–38 (1998); Dorothy Ross, *American Exceptionalism, in A COMPANION TO AMERICAN THOUGHT* 22–23 (Richard Wightman Fox & James T. Kloppenberg eds., 1995); Michael Kammen, *The Problem of American Exceptionalism: A Reconsideration*, 45 AM. Q. 1, 6–11 (1993).

57. See, e.g., Richard A. Posner, *The Supreme Court 2004 Term, Foreword: A Political Court*, 119 HARV. L. REV. 31, 89 (2005) (“Yet the judicial systems of the United States are relatively uniform and their product readily accessible, while the judicial systems of the world are immensely varied and most of their decisions inaccessible as a practical matter to our mostly monolingual judges and law clerks.”); see also Rahdert, *supra* note 44, at 584, 635–55.

Oklahoma referendum and some of the legislators voting for similar laws in other states may have entertained some or all of these views.⁵⁸ But aside from specific antipathy to Islamic law, the single argument that strongly resonates with public sentiment is the idea that U.S. law is so vitally different from law elsewhere in the world that any use of foreign or international sources in legal adjudication risks corrupting U.S. justice and is a betrayal of fundamental U.S. legal values.⁵⁹

In the United States, exceptionalist thinking is very much a part of the prevailing national narrative, and it has been since the nation's founding.⁶⁰ Exceptionalists view the U.S. national experience as unique and superior in ways that have translated directly into U.S. legal culture. Citizens of the U.S. recognize the Declaration of Independence, and the American Revolution it sought to justify, as formidable embodiments of our national uniqueness.⁶¹ These citizens also believe that unique character is expressed in our national Constitution,⁶² which many exceptionalists treat as a sacred text that encompasses a national political faith and hallowed political institutions infused with national culture.⁶³ This attitude carries over to several facets of the U.S.

58. See James C. McKinley, *Oklahoma Surprise: Islam as an Election Issue*, N.Y. TIMES (Nov. 14, 2010), http://www.nytimes.com/2010/11/15/us/15oklahoma.html?_r=0 (highlighting that the Oklahoma amendment passed with an overwhelming voter approval by seventy percent and State Representative Rex Duncan “predicted that Muslims would come to America to take away ‘the liberties and freedom from our children’”); see also Steve Benen, *Oklahoma Bar Imaginary Sharia Threat*, WASH. MONTHLY (Nov. 3, 2010), http://www.washingtonmonthly.com/archives/individual/2010_11/026460.php (noting that legislators intended the amendment “to prevent ‘liberal judges’ who want to ‘undermine those founding principles’ of America”).

59. See Rahdert, *supra* note 44, at 592 (finding that exceptionalists regard the “Constitution as unique among world organs of government[,]” and thus believe that foreign law should be irrelevant because the Constitution was designed to be different).

60. *Id.* at 590, 592.

Accompanying that physical isolation was the national sentiment of uniqueness. For example, American cultural tradition is closely associated with such icons as the pioneer spirit, manifest destiny, and the metaphor of the United States as a moral and political ‘beacon on a hill,’ committed to the development of a transformed society fundamentally different in character from its European forebears.

Id. at 590 (citation omitted); Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1481 n.4 (2003) (“The term ‘American Exceptionalism,’ said to have been coined by Alexis de Tocqueville in 1831, has historically referred to the perception that the United States differs qualitatively from other developed nations, because of its unique origins, national credo, historical evolution, and distinctive political and religious institutions.”).

61. THE DECLARATION OF INDEPENDENCE (U.S. 1776); *Constitutional Supremacy and American Exceptionalism*, SELOUS FOUND. FOR PUB. POL’Y RES., <http://sfppr.org/constitutional-supremacy-and-american-exceptionalism/> (last visited Mar. 10, 2016).

62. See, e.g., *Constitutional Supremacy and American Exceptionalism*, *supra* note 61 (providing an argument linking the Constitution with American exceptionalism and using the linkage to argue against use of foreign law in American courts).

63. See MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 200–01 (1913).

legal system. We see ourselves as a nation apart from European culture and history—which we broke away from over 225 years ago by declaring and achieving independence—and from other nations that are legally, culturally, and politically separate.⁶⁴ Citizens of the United States regard the U.S. Constitution and laws as potent reflections of our fundamental difference from all foreign nations.⁶⁵ Consequently, average voters in the U.S., and no doubt typical state legislators as well, have an immediate, obvious, intuitive, and almost reflexive answer to the question of whether U.S. courts should look to foreign or international law when rendering their judgments. The answer is a resounding “No,” across the board, with no exceptions.

This article examines the idea of U.S. legal exceptionalism in the context of the recent wave of state AFIL laws. Part I begins with Oklahoma’s law and a discussion of the constitutional litigation in *Awad*. This case primarily concerns federal constitutional principles on the separation of church and state. However, in applying those principles, *Awad* addresses a broader question: whether religiously motivated strains of exceptionalist beliefs are constitutionally permissible.⁶⁶ The courts have thus far held that such selective religious legal exceptionalism is constitutionally prohibited.⁶⁷ This Article agrees. It maintains that Oklahoma’s attempt to single out Islamic law for particular disapprobation represents a rare example of a constitutionally forbidden explicit governmental religious preference. Although the constitutional question is considerably closer, the Article also argues that evidence of an underlying anti-religious sentiment ought to defeat the constitutionality of any AFIL proposal that is directed at the particular exclusion of Islamic law, even if the state statute or constitutional amendment uses neutral wording.

Part II turns attention to religiously neutral and thoroughly secular state laws that broadly prohibit judicial consideration of foreign or international principles of law without regard to their origin. It is possible that such a studiously neutral law, which is not directed against Islam or any other religious faith, would survive constitutional review. Yet although such wholesale exceptionalism may

The document which the convention presented to congress and to the country as the proposed new constitution for the United States was a surprise to everybody. No one could have foreseen the processes by which it had been constructed, and no one could have foretold the compromises by which the differences of opinion had been reconciled, and accordingly no one could have forecast the result.

Id.; see CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787* 278-81 (1966).

64. See Rahdert, *supra* note 44, at 592–95 (arguing that the world watched the experiment of the U.S. Constitution as it “broke new ground in world political history” and departed from European influence).

65. *Id.* at 592 (stressing that the “Americans regard the United States as fundamentally different from all other nations; they also regard the Constitution as unique among world organs of government.”).

66. See *Awad v. Ziriax*, 670 F.3d 1111, 1128–29 (10th Cir. 2012).

67. See *infra* Part I.

avoid the restrictions of the Establishment Clause of the U.S. Constitution, it is nonetheless unwise and contrary to long-established U.S. legal tradition. Because existing legal doctrines carefully regulate the operation of foreign or international law in domestic adjudication, U.S. exceptionalism is unnecessary. It is also unworkable, undesirable, and probably unenforceable in an increasingly globalized legal world.

Wholesale exceptionalism contradicts the longstanding tradition that state courts are afforded the general authority to decide all legal issues within the courts' jurisdiction, regardless of the law's source.⁶⁸ It is unworkable because globalization has increasingly intertwined foreign and domestic legal issues, leaving the lines between nations progressively more indistinct. It is unenforceable because courts and counsel can find ways to informally bring foreign or international law into the courtroom. It is unwise because it contravenes important strains of comparative thinking in U.S. jurisprudence, and risks cutting off access to potentially valuable and essential foreign or international sources. Exceptionalism invites attitudes of isolationism and nationalism that can lead to pernicious consequences. Finally, it is unnecessary because U.S. courts are fully capable on their own to sift out the rare circumstances in which foreign law is properly relevant to a judicial dispute in the U.S. For all these reasons, courts should have the authority to properly decide the relevance of foreign and international law in domestic legal disputes without interference from the state legislatures.

Although wholesale exceptionalism embodied in the current wave of state AFIL laws should be rejected, foreign or international law should not always be applied as equally relevant to all legal questions. To the contrary, there are some areas of U.S. law where exceptional legal experience suffices to warrant *selective* exceptionalism that is not based on religious preferences or values. Part III explores this idea. Comparing and contrasting wholesale and selective exceptionalism explains why and how selective exceptionalism differs in both its premises and operation from wholesale exceptionalism. A noteworthy difference is that selective exceptionalism requires active engagement with foreign law, while wholesale exceptionalism promotes ignorance of foreign legal developments.⁶⁹ There are additional practical and theoretical differences, which will be identified and explained.

This Article offers preliminary thoughts on the types of U.S. laws that might support such a selective exceptional approach and establishes some preliminary criteria that can be used to discern when selective exceptionalist reasoning should apply. In addition, the Article argues that the proper application of selective exceptionalism should be left to the courts. The judicial system possesses reliable means for assessing the applicability of foreign and international law, which it utilizes with commendable caution. Ironically, one candidate for

68. See Rahdert, *supra* note 44, at 641.

69. See *infra* Section III.A.

selective exceptionalism is the U.S. legal tradition of separation between church and state—the very constitutional issue that defeated the Oklahoma SOS Amendment in *Awad*.⁷⁰

The Article ultimately concludes that the states should resist the temptation to legislate wholesale exclusion of foreign law from the court system. However politically attractive it may be, the attempt to ban consideration of all foreign and international law from U.S. courts serves no useful purpose. It portends pernicious long-term consequences that undermine the traditional authority of the courts and the development of justice in the United States.

I. BANNING SHARIA: CONSTITUTIONAL LIMITS ON RELIGIOUS EXCEPTIONALISM

One curious aspect of Oklahoma’s SOS Amendment was that it involved both wholesale and selective exceptionalism. The selective portion of the Amendment specifically prohibited consideration of “Sharia,” a term used to identify the legal tradition that emanates from Islamic religion.⁷¹ The Oklahoma Amendment commanded: “the courts [of Oklahoma] shall not look to the legal precepts of other nations or cultures.”⁷² It added: “Specifically, the courts shall not consider international law or Sharia [l]aw.”⁷³

While the Amendment permitted the courts, “if necessary,” to adhere to “the law of another state of the United States,” the courts could do so only if “the law of the other state does not include Sharia [l]aw.”⁷⁴ The Amendment did not provide a precise definition of Sharia.⁷⁵ However, a “ballot title” that accompanied the proposed amendment on the ballot explained to voters that the Amendment “forbid[s] courts from looking at international law or Sharia law,” by defining it as “Islamic law” emanating from “two principal sources, the Koran and the teaching of Mohammed.”⁷⁶

70. *Awad*, 670 F.3d at 1116 (noting that an amicus curiae brief was filed on behalf of the advocacy group Americans United for Separation of Church and State in opposition to the Oklahoma Amendment).

71. H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010). See also Carlo A. Pedrioli, *Constructing the Other: U.S. Muslims, Anti-Sharia Law, and the Constitutional Consequences of Volatile Intercultural Rhetoric*, 22 S. CAL. INTERDISC. L.J. 65, 66 (2012); Frank Vogel, *An Introduction to Law of the Islamic World*, 31 INT’L J. LEGAL INFO. 353, 356–57 (2003) (defining broadly Islamic law, including the differentiation between “shariah” and “fiqh” law, as the governing bodies of the Muslim faith).

72. Okla. H.R.J. Res. 1056.

73. *Id.*

74. *Id.*

75. See generally *id.* (noting that in the Amendment there is no definition of “Sharia”).

76. *Id.* For a discussion of the many complex components that enter into the legal tradition of Sharia, see Samir Islam, Comment, *The Negative Effects of Ill-Advised Legislation: The Curious Case of the Evolution of Anti-Sharia Law Legislation into Anti-Foreign Law Legislation and the Impact on the CISG*, 57 HOW. L.J. 979, 985–89 (2014).

The proceedings in the district court revealed uncertainty regarding what would be encompassed within the term “Sharia.” Testimony in district court established that Sharia is neither a specific set of legal commands, nor a formal legal code, but instead a flexible legal tradition that connects Muslim religious teaching to a variety of secular legal practices and obligations. The precise content can vary from time to time, nation to nation, and culture to culture.⁷⁷ Nevertheless, the primary goal of the SOS Amendment was fairly clear: if a particular legal right or duty could be traced to sources of Islamic religious or legal culture, it must be excluded from consideration in any Oklahoma court adjudication.⁷⁸

Since the Amendment did not respond to any particular case or development in Oklahoma law, it was unclear how a Sharia principle might play a role in an Oklahoma judicial decision. However, proponents of state AFIL laws have pointed to decisions in other states that supposedly apply Sharia principles.⁷⁹ For example, the Center for Security Policy has assembled an “occasional paper” which identifies approximately 50 cases from various jurisdictions, not including Oklahoma, that the Center claims involve the application of Sharia law.⁸⁰ A majority of the cases concern divorce, custody, or other family law disputes;⁸¹ a few involve property disputes;⁸² and a handful involve questions of arbitration or contracts.⁸³ The source for “Sharia” in a small number of cases is

77. *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1306 (W.D. Okla. 2010).

78. *See* Grunert, *supra* note 35, at 701.

79. *See* CTR. FOR SEC. POL’Y, *supra* note 37, at 2.

80. *Id.* at 1–25.

81. *See, e.g., In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 865 (Cal. Ct. App. 2001); *In re the Marriage of Vryonis*, 248 Cal. Rptr. 807, 810–11 (Cal. Ct. App. 1988); *In re Marriage of Malak*, 227 Cal. Rptr. 841, 843–44 (Cal. Ct. App. 1986); *Akileh v. Elchahal*, 666 So. 2d 246, 247–48 (Fla. Dist. Ct. App. 1996); *Aleem v. Aleem*, 947 A.2d 489, 490–91 (Md. 2008); *Hosain v. Malik*, 671 A.2d 988, 989–90 (Md. Ct. Spec. App. 1996); *Tazziz v. Tazziz*, 533 N.E.2d 202, 203–04 (Mass. App. Ct. 1988); *Tarikonda v. Pinjari*, No. 287403, 2009 WL 930007, at *1 (Mich. Ct. App. Apr. 7, 2009); *S.D. v. M.J.R.*, 2 A.3d 412, 413 (N.J. Super. Ct. App. Div. 2010); *Chaudry v. Chaudry*, 388 A.2d 1000, 1002–03 (N.J. Super. Ct. App. Div. 1978); *Farah v. Farah*, 429 S.E.2d 626, 627 (Va. Ct. App. 1993); *In re Marriage of Obaidi and Qayoum*, 226 P.3d 787, 788 (Wash. Ct. App. 2010); *In re Marriage of Donboli*, No. 53861-6-I, 2005 WL 1772328, at *1 (Wash. Ct. App. Jul. 18, 2005); *In re Custody of R.*, 947 P.2d 745, 747 (Wash. Ct. App. 1997). For discussion of the potential uses of Sharia in the family law context, and why they do not threaten basic American legal principles, *see* Asifa Quraishi-Landes, *Rumors of the Sharia Threat Are Greatly Exaggerated: What American Judges Really Do with Islamic Family Law in their Courtrooms*, 57 N.Y.L. SCH. L. REV. 245, 246–51 (2013).

82. *See, e.g., Nationwide Res. Corp. v. Massabni*, 694 P.2d 290, 292–94 (Ariz. Ct. App. 1984); *Karson v. Soleimani*, Nos. B216360, B219698, 2010 WL 2992071, at *1–2 (Cal. Ct. App. Aug. 2, 2010).

83. *See, e.g., El-Farra v. Sayyed*, 226 S.W.3d 792, 793 (Ark. 2006); *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochem. Co., Inc.*, 866 A.2d 1, 6–7 (Del. 2005); *Abd Alla v. Mourssi*, 680 N.W.2d 569, 570–72 (Minn. Ct. App. 2004); *In re Aramco Services Co.*, No. 01-09-00624-CV, 2010 WL 1241525, at *1 (Tex. App. Mar. 19, 2010); *CPS Int’l, Inc. v. Dresser Indus., Inc.*, 911 S.W.2d 18, 19 (Tex. App. 1995).

the law of an Islamic nation that has some contact to the party or dispute.⁸⁴ However, in a majority of the cases, one party disputed the applicability or content the opposing party offered to support a claim based on Islamic law or religion.⁸⁵

In the overwhelming majority of these cases, the courts found the claim based on Sharia to be unfounded, inapplicable, or irrelevant.⁸⁶ In a few instances, a trial court was temporarily persuaded by the legitimacy of the claim, but its decision was reversed on appeal in nearly every case.⁸⁷ If these cases are the leading evidence of a national trend toward incorporation of Sharia into U.S. judicial decisions, the Center's claim of steady infiltration of Islamic law into U.S. judicial decisions is hardly very compelling. Nevertheless, the mere assertion of claims based on Islamic law in this small set of recent judicial cases has been sufficient in some political circles to support of the argument that Muslim principles are creeping into the fabric of U.S. law.⁸⁸

Within days after the election in Oklahoma, before the Amendment could be certified or take effect, the SOS Amendment was challenged in *Awad* on

84. See, e.g., *Amin v. Bakhaty*, 798 So.2d 75, 77–78 (La. 2001) (involving Egyptian nationals in child custody proceedings); *Charara v. Yatim*, 937 N.E.2d 490, 492 (Mass. App. Ct. 2010) (dealing with the legitimacy of Lebanese divorce proceedings in an American court).

85. See, e.g., *Charara*, 937 N.E.2d at 493–94.

86. See, e.g., *Aleem*, 947 A.2d at 502 (finding that Pakistani *talaq* divorce proceedings under Sharia law are not sufficient to constitute a divorce in Maryland); *Tazziz*, 533 N.E.2d at 205–06 (remanding the case to probate court, not to uphold Sharia law, but to determine if the Sharia law applied by an Israeli court is substantially similar and consistent with Massachusetts law); *Abd Alla*, 680 N.W.2d at 572 (separating an arbitration claim from Islamic law and limiting the matter to where jurisdiction is statutorily granted); *Farah*, 429 S.E.2d at 629–30 (deciding that a common law marriage was not valid under English law and inconsistent with Virginia law, therefore refusing to recognize the marriage simply because it took place under Pakistani Sharia law); *Donboli*, 2005 WL 1772328, at *18 (upholding a trial court decision that the Iranian Civil Code for child custody is inconsistent with the state of Washington's public policy).

87. See, e.g., *In re Marriage of Malak*, 227 Cal. Rptr. 841, 842–43 (Cal. Ct. App. 1986) (reversing a trial court's non-enforcement of a custody agreement from Lebanon based on Sharia law); *El-Farra*, 226 S.W.3d at 794–96 (holding that the trial court lacked subject-matter jurisdiction in reviewing an Islamic minister's contract claim and declining to apply Islamic ecclesiastical law); *Tarikonda v. Pinjari*, No. 287403, 2009 WL 930007, at *1, *3 (Mich. Ct. App. Apr. 7, 2009) (reversing a trial court decision to uphold an Indian *talaq* divorce); *S.D. v. M.J.R.*, 2 A.3d 412, 426–28 (N.J. Super. Ct. App. Div. 2010) (reversing a trial court's denial of a restraining order to a wife based on the fact that marital rape is not a crime under Moroccan Sharia law); *In re Marriage of Obaidi and Qayoum*, 226 P.3d 787, 790 (Wash. Ct. App. 2010) (reversing the trial's court's application of Sharia law in deciding the validity of a *mahr* contract agreement, in favor of domestic Washington law).

88. See *American Laws for American Courts Protects Constitutional Rights Against Foreign Laws—Including Shariah*, *supra* note 37 (advocating for the American Laws in American Courts models in response to the “infiltration and insinuation” of Sharia law in American courts); see also *American Laws for American Courts Public Policy Initiative Advances in State Legislatures as AFLC Leads Citizens Awareness Drive*, *supra* note 37 (citing Center for Security Policy paper to argue that Sharia law is encroaching into American courts).

constitutional grounds.⁸⁹ The plaintiff claimed the Amendment denigrated his Muslim religion.⁹⁰ He also claimed that the SOS Amendment would interfere with probation of his will, because his will made specific reference to Islamic commands regarding charitable bequests to be implemented by his estate.⁹¹ The key question *Awad* presented was whether the Amendment violated the Establishment or Free Exercise Clauses of the First Amendment by specifically implementing legal restrictions on Sharia and Islamic law.⁹² The parties also vigorously litigated the question of *Awad*'s standing to raise these claims and whether the claims satisfied the criteria to grant a preliminary injunction.⁹³

After considering and rejecting challenges to the plaintiff's standing,⁹⁴ the district and circuit courts focused their analysis on the Establishment Clause. The two courts disagreed, however, on the controlling legal standards to apply for the potential Establishment Clause violation.⁹⁵ The district court utilized the general establishment test,⁹⁶ set by *Lemon v. Kurtzman*.⁹⁷ *Lemon* determined that in order for a statute to meet the requirements of the Establishment Clause it must: (1) have "a secular legislative purpose"; (2) have a "primary effect" that "neither advances nor inhibits religion"; and (3) in operation will "not foster . . . 'excessive . . . entanglement'" between religion and government.⁹⁸ Applying this test, the district court concluded the plaintiff made a "strong showing" that he would likely succeed in proving that the Oklahoma Amendment violated the "primary effect" and "entanglement" standards.⁹⁹

With respect to the primary effect standard, the district court emphasized the law singled out one particular religion, Islam, and its associated legal tradition, Sharia, for particular disapprobation:¹⁰⁰

While defendants contend that the amendment is merely a choice of law provision that bans state courts from applying the law of other nations and cultures, regardless of what faith they may be based on, if any, the actual language of the amendment reasonably, and perhaps

89. *Awad v. Ziriak*, 754 F. Supp. 2d 1298, 1302 (W.D. Okla. 2010).

90. *Id.* at 1303.

91. *Id.* at 1304.

92. *Id.* at 1305, 1307.

93. *Id.* at 1302–05.

94. *Id.* at 1302–06 (Defendants argued that the plaintiff had not suffered "injury in fact" sufficient to claim standing, maintaining that the plaintiff suffered no actual harm from the "Save Our State" Amendment. The court rejected this argument and stated the "plaintiff has shown that he will suffer an injury in fact, specifically, an invasion of his First Amendment rights which is concrete, particularized and imminent."); *accord* *Awad v. Ziriak*, 670 F.3d 1111, 1120, 1123–28 (10th Cir. 2012).

95. *Compare* *Awad*, 754 F. Supp. 2d at 1305–06, *with* *Awad*, 670 F.3d at 1126–29.

96. *Awad*, 754 F. Supp. 2d at 1305–06.

97. 403 U.S. 602 (1971).

98. *Id.* at 612–13.

99. *Awad*, 754 F. Supp. 2d at 1306.

100. *Id.*

more reasonably, may be viewed as specifically singling out Sharia Law, conveying a message of disapproval of plaintiff's faith.¹⁰¹

The court reasoned that the Amendment subjected Sharia law to two specific prohibitions.¹⁰² First, the Amendment prohibited any direct consideration of Sharia by Oklahoma courts.¹⁰³ Second, the Amendment prohibited any incorporation of Sharia through application of law from other states.¹⁰⁴ The court determined that no other religion or religious law was disabled in a similar manner by the SOS Amendment.¹⁰⁵ The consequence was a primary effect of inhibiting Islam within Oklahoma, and thus a violation of religious neutrality that the Establishment Clause safeguards.¹⁰⁶

The court also found the potential for unconstitutional entanglement.¹⁰⁷ Noting that Sharia is more a flexible and variable tradition than an explicit set of laws, the court concluded that enforcement of the statute would entail judicial investigation to determine "the content of Sharia law, and, thus, the content of [Muslim] religious doctrines."¹⁰⁸ Such an inquiry would "entangle" the courts by requiring them first to identify, and then specifically to reject, the offending principles of Islamic law.¹⁰⁹ This judicial action would in turn send a negative message regarding the content of Islam, placing its adherents in a disfavored position in Oklahoma law and society.¹¹⁰ As a result, the district court concluded the plaintiff made a "strong showing" that he could prevail on his claim that he would suffer "irreparable injury" from the Oklahoma Amendment that violated his constitutional right to freedom of religion. Therefore, his request for a preliminary injunction was granted.¹¹¹

The Court of Appeals took a different approach. Although the parties briefed the case on appeal under the *Lemon* standard, the court requested supplemental briefing on whether the strict-scrutiny standard under *Larson v. Valente*¹¹² should apply.¹¹³ *Larson* is a fairly unusual Establishment Clause decision. It concerned a Minnesota charitable solicitation statute that required select religious groups to register with the Minnesota Department of Commerce. Registration was based on whether or not the group received more than half of

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 1306–07.

109. *Id.*

110. *Id.* at 1306.

111. *Id.* at 1307.

112. 456 U.S. 228, 246 (1982).

113. *Awad v. Ziriax*, 670 F.3d 1111, 1128 (10th Cir. 2012).

its funds “from members or affiliated organizations.”¹¹⁴ Religious groups whose contributions fell below this “fifty per cent rule” were required to register.¹¹⁵ The U.S. Supreme Court concluded the law effectively exercised a “denominational preference[.]” among religious groups based on their sources of funding.¹¹⁶ In such a case of denominational discrimination, the Court held, “our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.”¹¹⁷ The Court struck the statute down because although Minnesota could show that protecting against “abusive practices in the solicitation of funds for charity” was a potentially compelling secular purpose, the law in question was not “closely fitted” to achieving the state’s interest.¹¹⁸

In *Awad*, the Tenth Circuit determined that the *Larson* standard applied because the Oklahoma law explicitly singled out Muslim religious beliefs for negative treatment, thus imposing denominational discrimination.¹¹⁹ The court rejected Oklahoma’s argument that Sharia was mentioned in the Amendment merely by way of example, and that *all* laws from foreign sources, regardless of religion, would be equally prohibited.¹²⁰ To the contrary, the court observed that the Amendment permitted consideration of law from other states, even if that law included foreign or international principles, *unless* it relied on Sharia.¹²¹ Thus, Islam was singled out because the law did not apply with the same force to laws derived from any other religious source.¹²² The court further observed that *domestic* sources of law were not excluded from consideration unless they included principles traceable to Sharia.¹²³ Domestic law drawn from any other religious source would be permissible.¹²⁴ As a result, the Oklahoma Amendment engaged in a discriminatory denominational preference that was even more explicit and obvious than the one applied by Minnesota in *Larson*.¹²⁵

Since the Court of Appeals applied strict scrutiny, it held that Oklahoma must demonstrate that the Amendment was “closely fitted” to achieve a “compelling” government interest.¹²⁶ On this issue, Oklahoma asserted that the law served the general interest of “determining what law is applied in Oklahoma courts.”¹²⁷

114. 456 U.S. at 228.

115. *Id.* at 231–32.

116. *Id.* at 246–47.

117. *Id.* at 246.

118. *Id.* at 248.

119. *Awad v. Ziriya*, 670 F.3d 1111, 1129 (10th Cir. 2012).

120. *Id.* at 1128–29.

121. *Id.* at 1129.

122. *Id.*

123. *Id.* at 1128–29.

124. *Id.*

125. *Id.* at 1128.

126. *Id.* at 1129.

127. Supplemental Brief for Appellants at 16, *Awad v. Ziriya*, 670 F.3d 1111 (10th Cir. 2012).

While acknowledging this interest as a “valid state concern,” the court determined that it was too “general . . . to establish a compelling interest for purposes of this case.”¹²⁸ The court stressed that the compelling interest standard, at a minimum, required the state to identify an “*actual problem*” the statute seeks to address.¹²⁹ In this situation, no such problem existed, because there was no evidence that Oklahoma courts were applying Sharia law.¹³⁰ Appellants “admitted . . . that they did not know of even a single instance where an Oklahoma court had applied Sharia law or used the legal precepts of other nations or cultures, let alone that such applications or uses had resulted in concrete problems in Oklahoma.”¹³¹ Consequently, any harm that the law might address was “speculative at best and cannot support a compelling interest.”¹³² Additionally, in the absence of a real problem, it was impossible to determine whether the measure bore a “close fit” to Oklahoma’s interest, because “[o]ne cannot try on a glove to see if it fits when the glove is missing.”¹³³

Although the absence of a compelling interest was sufficient to defeat the Amendment, the Tenth Circuit offered “observation[s]” regarding the law’s tailoring.¹³⁴ The court observed that the law forbade “‘considering’” foreign law or principles when the state’s asserted interest would presumably be satisfied by a narrower provision confined to “‘applying’ Sharia law.”¹³⁵ Accordingly, “[e]ven if the state could identify and support a reason to single out and restrict Sharia law in its courts, the amendment’s complete ban of Sharia law is hardly an exercise of narrow tailoring.”¹³⁶ Although the court found it unnecessary, indeed impossible, to rule on this issue given the lack of concrete examples, it strongly suggested that a total ban on Sharia was likely to be unconstitutionally over-inclusive.¹³⁷

The Court of Appeals’ conclusion that Oklahoma’s SOS Amendment violated the Establishment Clause was eminently justified. An underlying assumption of the Amendment was that Islamic law is “foreign,” and therefore not

128. *Awad*, 670 F.3d at 1130.

129. *Id.* (emphasis added).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 1130–31.

134. *Id.*

135. *Id.* at 1131.

136. *Id.*

137. *Id.* On remand from the Tenth Circuit, the district court addressed one further issue: whether the portion of the provision banning Sharia could be severed from the remainder of the law forbidding consideration of law from all other nations or cultures. Applying Oklahoma law on severability, the district court held that the aim to ban Sharia was the electorate’s overwhelming purpose in approving the ballot measure, and that there was insufficient evidence of an independent electoral purpose to ban all foreign law regardless of content or origin. Accordingly, the court held that the entire measure should be permanently enjoined. *Awad v. Zirriax*, 966 F. Supp. 2d 1198, 1206 (W.D. Okla. 2013).

appropriately part of the U.S. legal terrain.¹³⁸ The law made this assumption despite the fact that millions of U.S. citizens are Muslim.¹³⁹ Further, the law made no comparable assumption of alien foreignness with respect to law derived from any other faith. By labeling Islamic beliefs as a foreign corruption of “proper” U.S. legal principles, the law conveyed the implicit message that followers of Islam have a lower status than others, and that their legal traditions are less worthy of judicial consideration than those of the non-Muslim majority.¹⁴⁰

Of course, the non-Muslim majority in the United States, and in Oklahoma, is overwhelmingly Christian.¹⁴¹ As many have argued, there are significant Judeo-Christian overtones and undertones throughout domestic U.S. law.¹⁴² For example, several courts, including the Supreme Court of the United States, have relied on U.S. law’s biblical legal roots as a basis for upholding government displays of the Ten Commandments.¹⁴³ While excluding “foreign” Sharia law, the Oklahoma Amendment effectively *permitted* consideration of domestic law that derives from underlying Judeo-Christian legal principles, at least to the extent such consideration is permitted under the Establishment and Free Exercise Clauses.¹⁴⁴ By identifying and excluding Sharia as “foreign,” the Oklahoma Amendment carried an implicit message that at least one other legal-religious tradition—the Judeo-Christian legal tradition—is *not* “foreign.”¹⁴⁵

138. See *Awad*, 754 F. Supp. 2d at 1306.

139. See Joshua Holland, *The Truth About American Muslims*, THE NATION (Dec. 8, 2015), <http://www.thenation.com/article/heres-why-we-should-all-praise-allah-for-american-muslims/>.

140. See Gerson, *supra* note 30.

141. *Adults in Oklahoma: Religious composition of adults in Oklahoma*, PEW RES. CTR., <http://www.pewforum.org/religious-landscape-study/state/oklahoma/> (last visited Mar. 10, 2016) (Seventy-nine percent of Oklahoma residents are Christian, while less than one percent are Muslim); *Religions: Explore religious groups in the U.S. by tradition, family, and denomination*, PEW RES. CTR., <http://www.pewforum.org/religious-landscape-study/> (last visited Mar. 10, 2016) (Approximately seventy percent of people who reside in the United States are Christian, while less than one-tenth of one percent are Muslim).

142. See Sanja Zgonjanin, *Quoting the Bible: The Use of Religious References in Judicial Decision-Making*, 9 N.Y. CITY L. REV. 31, 63–65 (2005). See generally John W. Welch, *Biblical Law in America: Historical Perspectives and Potentials for Reform*, 2002 BYU L. REV. 611 (2002) (discussing the Biblical foundations of U.S. law, including Judeo-Christian colonial law).

143. See, e.g., Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J.L. & RELIGION 525, 528–30, 549–58 (2000) (broad examination of the relationship between the Biblical Ten Commandments and American jurisprudence).

144. See *Awad v. Ziriax*, 670 F.3d 1111, 1129 (10th Cir. 2012) (noting that the Amendment “implies that whatever religions the legislature considered to be part of domestic or Oklahoma culture would not have their legal precepts prohibited from consideration”). See generally Eugene Volokh, *Religious Law (Especially Islamic Law) in American Courts*, 66 OKLA. L. REV. 431 (2014) (cataloguing the many situations in which American law typically accommodates religious concerns and arguing that the same accommodations available for Jewish or Christian matters ought to apply for other religions as well, including Islam).

145. See, e.g., Volokh, *supra* note 144, at 446, 448, 458; see also Siegel, *supra* note 18.

Arguably, the Sharia exclusion thus indirectly reflects the viewpoint advanced by some commentators that the United States is a “Christian nation.”¹⁴⁶ As the Court of Appeals observed, a system that allows consideration of the legal traditions of Judaism or Christianity, but prohibits consideration of the legal traditions of Islam, is one that obviously entails denominational religious preferences.¹⁴⁷ For a brief legal moment in Oklahoma that preference became overt, and the federal courts properly struck it down.¹⁴⁸ The court sent a constitutional message that *religious* exceptionalism which privileges Christianity over Islam is not appropriate, even if other forms of national legal exceptionalism may be acceptable.¹⁴⁹ Religious exceptionalism directly offends our federal constitutional commitment to “official religious neutrality.”¹⁵⁰

Whether the back-up statute in Oklahoma,¹⁵¹ and the statutes adopted in other states that omit the specific reference to Sharia also violate the Establishment Clause is a more challenging constitutional question.¹⁵² Without the specific reference to Sharia, there is a stronger claim that the law does *not* single out a particular religious belief for disapprobation.¹⁵³ Consequently, there is a stronger argument that the *Larson* strict scrutiny standard should not apply.¹⁵⁴ A specific reference to a particular religion on the face of the statute, however, is not the only way of accomplishing a denominational preference.¹⁵⁵ For example, in *Larson* the statutory denominational preference stemmed from discrimination based on sources of funding.¹⁵⁶ Additionally, if the *Larson* analysis in cases involving religious discrimination resembles the treatment of race discrimination under the Equal Protection Clause, a formally neutral statute could be based on an unconstitutional legislative purpose to accomplish religious discrimination.¹⁵⁷ In the context of state AFIL statutes, there is considerable

146. See, e.g., LibertyPatriot, *John McCain: Constitution Established a Christian Nation?*, YOUTUBE (Oct. 22, 2008), <https://www.youtube.com/watch?v=Kw5KqxefKgw> (Interview with Senator John McCain, the 2008 Republican Presidential candidate, commented that “the Constitution established the United States of America as a Christian nation”).

147. See *Larson v. Valente*, 456 U.S. 228, 244–45 (1982).

148. Compare *Awad v. Ziriax*, 966 F. Supp. 2d 1198, 1206 (W.D. Okla. 2010) (district court upheld the Oklahoma Amendment as constitutional), with *Awad*, 670 F.3d at 1130–31 (the Oklahoma Amendment failed to satisfy strict scrutiny).

149. See *infra* Part I.

150. *McCreary Cty. v. ACLU*, 545 U.S. 844, 860 (2005).

151. See H.B. 1060, 2013 Leg., 54th Sess. (Okla. 2013).

152. H.R. Con. Res. 44, 60th Leg., 2d Reg. Sess. (Idaho 2010); H.F. 575, 84th Gen. Assemb., Reg. Sess. (Iowa 2011); H.B. 785, 2010 Leg., 36th Reg. Sess. (La. 2010); S.B. 267, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013).

153. See *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1306 (W.D. Okla. 2010).

154. See *Larson v. Valente*, 456 U.S. 228, 246 (1982).

155. See, e.g., *id.* at 253, 255.

156. *Id.* at 230.

157. Take for example the Supreme Court’s reasoning in *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, where the Court concluded that when a statute appears to be facially neutral, disproportionate impact on a racial minority is not sufficient to prove that the statute violates the

evidence that the chief political force behind the laws is antipathy to Islam, even when specific reference to Sharia is omitted.¹⁵⁸ Under equal protection principles, however, proving discriminatory purpose is quite difficult. Courts rarely find a race-discriminatory purpose unless there is a formal race classification. Thus it is possible that courts considering the *Larson* standard would similarly find it inapplicable to a formally religious neutral measure.¹⁵⁹ This would be a particularly likely outcome if legislators avoided any direct or explicit references to Islam or Sharia not only in statutory language, but also in their legislative deliberations.

That still leaves the general Establishment Clause standard—whatever that standard presently is.¹⁶⁰ While the district court in *Awad* applied the *Lemon* test, supplemented with an endorsement analysis, there are reasons to believe that the Supreme Court may depart from the *Lemon* approach. Should that happen it remains unclear what standard, if any, will replace *Lemon*.¹⁶¹ In the absence of definitive guidance from the Supreme Court, the best approach is to glean a few basic precepts from Establishment Clause jurisprudence.

Equal Protection Clause. 429 U.S. 252, 265–66 (1977). Instead, it reasoned that the petitioner must show some discriminatory purpose by the legislature. *Id.* It need not be proven that discrimination was the sole purpose of the legislation, but if discrimination against any racial group was a “motivating factor,” the statute is suspect. *Id.* *Larson* could conceivably be applied similarly for religious cases, thereby throwing into question any statute where the legislature may have aimed for discrimination on religious grounds, even if the statute’s language is ostensibly neutral. See 456 U.S. at 230.

158. See, e.g., PATEL ET AL., *supra* note 36, at 1–2, 7–8 (arguing that many of the recent foreign law ban proposals are rewritten versions of anti-Sharia statutes aimed at discriminating against Muslims).

159. See K.G. Jan Pillai, *Shrinking Domain of Invidious Intent*, 9 WM. & MARY BILL OF RTS. J. 525, 526–27 (2001) (exploring the decision in *Washington v. Davis*, which indicates that “invidious intent” is the keystone for violation of the Equal Protection Clause, and arguing that this reading creates substantial difficulty in proving purposeful discrimination); see also Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1830–43 (2000).

160. See David W. Cook, *The Un-Established Establishment Clause: A Circumstantial Approach to Establishment Clause Jurisprudence*, 11 TEX. WESLEYAN L. REV. 71, 86–90 (2004) (outlining the various problems with modern tests for determining violation of the Establishment Clause, including the *Lemon* test); Mark C. Rahdert, *Court Reform and Breathing Space Under the Establishment Clause*, 87 CHI.-KENT L. REV. 835, 852–53 (2012) [hereinafter Rahdert, *Establishment Clause*] (discussing the uncertainty about the applicability of the *Lemon* standard); see also *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1821 (2014) (adding a “traditional practice[s]” test to the range of Establishment Clause standards). See generally Daniel R. Ray, *The Establishment Clause in 2009: A Baseline for Measuring Change*, 26 T.M. COOLEY L. REV. 493 (2009) (providing an overview of the current tests for Establishment Clause violation, including the *Lemon* test, and the strengths and inadequacies of these tests).

161. See *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1305–06 (W.D. Okla. 2010) (using a combination of *Lemon*-style Establishment Clause reasoning and Justice O’Connor’s “Endorsement Test”); see also Rahdert, *Establishment Clause*, *supra* note 160, at 852–59 (discussing the Supreme Court’s apparent readiness to move away from *Lemon* analysis for issues under the Establishment Clause).

To begin that inquiry, it seems reasonably safe to conclude that regardless of whatever else the Establishment Clause does or does not do, it should prohibit the government from pursuing deliberately preferential religious policies.¹⁶² Thus, an enactment that favors one set of religious principles over others, treats one set as true and others as false, or treats one set of religious principles as more consonant with U.S. law than others, should be prohibited.¹⁶³ Conversely, an enactment that selectively excludes one set of religious principles because it is not consonant with U.S. law should also be prohibited.¹⁶⁴ Such an enactment operates either as an endorsement of a particular religious-legal tradition, or as its opposite, a denigration of a particular religious-legal tradition.¹⁶⁵ This type of disparate treatment places followers of the favored religious-legal tradition in a legally preferred position, while adherents to the disfavored religious-legal tradition are distinctly disadvantaged.¹⁶⁶ Neither legislative approach should be constitutionally acceptable.¹⁶⁷

Evaluating the legislative intent behind a formally neutral prohibition on the application of “foreign” law depends on two criteria: (1) whether those enacting the law intended to treat one set of religious-legal principles as “foreign” and another as “domestic”; and (2) whether a prohibition on foreign law would function that way.¹⁶⁸ If a jurisdiction adopts the view that “Christian” or “Judeo-Christian” values are “domestic,” and thus superior, while “non-Judeo-Christian” values are “foreign” and impermissible, thus casting them inferior, the foreign/domestic distinction takes on a preferential religious coloration that offends the separation of church and state.¹⁶⁹ On the other hand, if a jurisdiction takes the view that *all* religious traditions are equally excluded as “foreign,” or that there is no distinction between foreign and domestic religious legal traditions, then the law would be functionally neutral with respect to religious beliefs. This approach would be constitutional under the Establishment Clause.¹⁷⁰

162. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947).

163. *See, e.g., Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973); *see also Everson*, 330 U.S. at 15–16.

164. *See Everson*, 330 U.S. at 15–16.

165. *See Awad*, 754 F. Supp. 2d at 1306.

166. *Id.*; *see also supra* text accompanying note 140.

167. In *Town of Greece v. Galloway*, the Supreme Court held that Greece’s practice of beginning legislative sessions with a prayer does not violate the Establishment Clause. 134 S. Ct. 1811, 1825, 1827–28 (2014). The prayers in question in the case were generally explicitly Christian in their orientation. *Id.* at 1824. However, Justice Kennedy emphasized in his majority opinion that these prayers could not be used to coerce or condemn non-believers. *Id.* at 1827. While the future effects of the decision remain unclear, the general proposition that specific governmental religion preferences are prohibited under the Establishment Clause remains intact.

168. *See PATEL ET AL.*, *supra* note 36, at 18 tbl. 1; *see also James A. Sonne, Domestic Applications of Sharia and the Exercise of Ordered Liberty*, 45 SETON HALL L. REV. 717, 748 (2015).

169. *See supra* text accompanying notes 142–52.

170. *Cf. McCreary City v. ACLU*, 545 U.S. 844, 860 (2005).

Given the fairly deliberate stirrings of anti-Muslim sentiment underlying Oklahoma's SOS Amendment and comparable legislative debates in other states, it is difficult to avoid the inference that AFIL proposals are specifically aimed against Muslims.¹⁷¹ Nevertheless, it is certainly possible that a state could carefully stick to a secular version of wholesale exceptionalism that did not rely on antipathy to Islam as a basis for prohibiting judicial access to foreign or international law.¹⁷² Some of the post-Oklahoma AFIL state statutes are at least ostensibly motivated by this concept.¹⁷³ Some AFIL state statutes attempt to establish a state policy against the application of foreign law or prohibit its use in circumstances where a foreign legal system does not provide "fundamental rights" equivalent to those provided under U.S. law.¹⁷⁴ By incorporating this type of statutory language, a state may be able to sustain the argument that the statute has nothing to do with religion, and therefore does not implicate the Establishment Clause in any way.¹⁷⁵ Such a carefully drafted and justified statute would likely survive an Establishment Clause challenge.¹⁷⁶

II. WHOLESALE EXCEPTIONALISM

While the Constitution forbids preferential treatment of Christianity over Islam, it does not prohibit preferring U.S. law over foreign law.¹⁷⁷ Indeed, constitutional democracy is founded on the notion that the people will be represented by their elected legislators to determine the laws that apply within their political community.¹⁷⁸ The very act of legislating entails an assertion of domestic law's presumptive precedence over external legal sources.¹⁷⁹ Consequently, it should not offend constitutional values for a jurisdiction formally to prefer domestic over "foreign" law.

In the U.S. federal system, there are some inherent structural limits on a state's capacity to effectuate a thoroughgoing domestic law preference. Federal law must control over state or local law, and individual states must, to some degree, respect and apply each other's laws.¹⁸⁰ Thus, under the Supremacy Clause,

171. PATEL ET AL., *supra* note 36, at 1–2, 7–8.

172. *Id.* at 1–2.

173. *Id.* at 7–8, 18.

174. *Id.* at 10.

175. *Id.* at 13 (noting that "courts have developed a carefully calibrated system that ensures respect for [foreign] law and at the same time prevents enforcement of laws contrary to our nation's public policy.>").

176. *Id.*; see also *supra* notes 151–72 and accompanying text.

177. U.S. CONST. art. VI cl. 2 (the Supremacy Clause does not include foreign law as "the supreme Law of the Land" and thus allows domestic law to be preferred over other sources of law).

178. See *Democracy*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/democracies> (last visited Mar. 11, 2016).

179. See Peter Hay, *The Use and Determination of Foreign Law in Civil Litigation in the United States*, 62 AM. J. COMP. L. 213, 215–16 (2014).

180. See U.S. CONST. art. VI, cl. 2; *id.* art. IV, § 1.

states must apply federal law and give it priority over conflicting state law.¹⁸¹ As the Supreme Court recognized in *Martin v. Hunter's Lessee*,¹⁸² this requirement is essential to the formation of a national legal system.¹⁸³ Similarly, under the Full Faith and Credit Clause, states must give force to the laws and judgments of other states.¹⁸⁴ Additionally, where national law incorporates “the [l]aw of [n]ations,” states must follow and honor relevant international principles that national law has absorbed.¹⁸⁵ However, these are exceptions that prove the rule.¹⁸⁶ These concepts operate within a national sovereign legal system. In situations in which federal law does not apply, and where states are not obliged to give full faith and credit to each other’s laws and judgments, states have a presumptive constitutional prerogative to create domestic law and to prefer it to all other sources of law.¹⁸⁷

While states have generally enforced the precedence of domestic law, they have never completely excluded foreign or international legal sources.¹⁸⁸ To the contrary, state courts historically operated as courts of “general jurisdiction.”¹⁸⁹ As long as the state courts possess proper jurisdiction over the parties before them and satisfy the due process “minimum contacts” requirement, they have been able to apply *any* legal principle relevant to resolve the dispute, regardless

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

182. 14 U.S. (1 Wheat.) 304 (1816).

183. *Id.* at 340–41 (1816); *cf.* *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch) 603, 618–19, 627–28 (1813).

184. U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State.”).

185. U.S. CONST. art. I, § 8, cl. 10. It has long been held that international customary law can be incorporated into federal law. *See* *The Paquete Habana*, 175 U.S. 677, 700, 708 (1900). The Supremacy Clause prohibits state laws that contradict federal law, and when law is in conflict with international customs that have been incorporated into federal law, the states are bound to follow this law. U.S. CONST. art. VI, cl. 2.

186. *Cf.* U.S. CONST. art. VI, cl. 2 (the Supremacy Clause dictates the general rule that when federal law exists, it will be held superior to any other type of law).

187. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595–96 (2015). There may be some rare circumstances in which a state’s refusal to honor the law of another jurisdiction would entail a violation of the Fourteenth Amendment’s Due Process or Equal Protection Clauses. Thus, for example, in *Obergefell v. Hodges*, the Supreme Court held that the states are constitutionally required to recognize same-sex marriages legally occurring in other jurisdictions. *Id.* at 2607–08. While the Court did not deal directly with same-sex marriages occurring in international forums, the reasoning of the case would likely extend to include similar constitutional protection for such a marriage. *See, e.g., id.*

188. Eugene Volokh, *Foreign Law in American Courts*, 66 OKLA. L. REV. 219, 227 (2014) [hereinafter Volokh, *Foreign Law*].

189. *See, e.g., Tafflin v. Levitt*, 439 U.S. 455, 458–59 (1990); *see also* *Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.*, 156 F.3d 432, 435 (2d Cir. 1998) (citing *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850) (highlighting that “state courts are courts of general jurisdiction”).

of its source.¹⁹⁰ This is what courts of general jurisdiction do.¹⁹¹ This is what courts in the United Kingdom have done under the common law judicial system that the United States inherited.¹⁹² This is what U.S. state courts have done for more than two centuries.¹⁹³ As Alexander Hamilton recognized in *The Federalist*, this distinctive feature of state courts is what enabled the drafters of the Constitution to leave the structure and content of the lower federal courts undetermined.¹⁹⁴ It is part of the bedrock of the U.S. judicial system.¹⁹⁵

Oklahoma's SOS Amendment and other AFIL state measures attempt to alter this bedrock proposition of general state judicial authority.¹⁹⁶ In effect, they command that state courts should become courts of limited subject matter jurisdiction that should consider and decide only matters of domestic U.S. federal and state law.¹⁹⁷ The key question posed by this new and historically remarkable step is whether the imposition of such a domestically limited jurisdiction is desirable.

A. Four Levels of AFIL

To evaluate this question, it is helpful to recognize the four different levels at which AFIL statutes potentially operate: jurisdiction; rules of decision; matters of interpretation; and questions of evidence.¹⁹⁸ The AFIL state statutes that have been enacted do not typically differentiate the four different levels. It is important to note that the different levels may affect judicial decision-making.¹⁹⁹

190. See *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

191. See *supra* notes 188-90 and accompanying text; see also *infra* note 192 and accompanying text.

192. *Court of Queen's Bench: British Law*, BRITANNICA ONLINE ENCYCLOPEDIA, <http://www.britannica.com/topic/Court-of-Queens-Bench> (last visited Mar. 11, 2016).

193. THE FEDERALIST NO. 82, at 450, 453 (Alexander Hamilton) (E.H. Scott ed., 1898) (demonstrating that state courts have been courts of general jurisdiction since the founding of the United States).

194. *Id.* at 450, 452-53.

195. *Id.* at 451.

The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases, lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts.

Id.

196. H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010); see PATEL ET AL., *supra* note 36, at 15-18.

197. See *supra* note 196 and accompanying text.

198. See *infra* Sections II.A.1-4.

199. See S. Con. Res. 1010, 50th Leg., 1st Reg. Sess. (Ariz. 2011); see also S.B. 58, 2013 Leg., 155th Reg. Sess. (Fla. 2013); S.B. 79, 84th Leg., Reg. Sess. (Kan. 2012); H.B. 785, 2010 Leg., Reg. Sess. (La. 2010); H.B. 695, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013); H.R.J. Res. 8, 61st Leg., Gen. Sess. (Wyo. 2011); PATEL ET AL., *supra* note 36, at 1-4.

1. Jurisdiction

The broadest possible effect of an AFIL statute is to deprive state courts of *jurisdiction* in a dispute where an issue of foreign or international law may arise.²⁰⁰ Under an AFIL statute, if a plaintiff's claim or a defendant's defense arises from foreign or international law, the state court may not consider that aspect of the case.²⁰¹ Unless that issue is completely severable from the rest of the dispute, the court's inability to consider the issue may affect its competence to decide other matters that are integrally related to the foreign or international law question.²⁰² As a result, the AFIL statute imposes a direct limitation on the scope of state court's judicial power by refusing to grant the state court the authority to decide the entire matter.²⁰³

The proponents of AFIL statutes may not intend such an extensive curtailment of state judicial power. Rather, they likely expect that courts will simply excise any foreign or international legal issue from the case, leaving the remainder of the dispute intact for the state court to decide.²⁰⁴ Yet, that may not be the outcome in practice.²⁰⁵ A responsible court may conclude that its inability to address an embedded foreign or international law question deprives the court of jurisdiction to decide the entire matter.²⁰⁶ Where the foreign or international matter is an integral component of the case, it may be impossible or entail a gross miscarriage of justice for the court to decide the remaining legal issues.²⁰⁷ The court may decide that its inability to consider international or foreign law issues warrants abstention.²⁰⁸ In that event, dismissal of the entire matter for want of jurisdiction would be proper.²⁰⁹

200. See Hay, *supra* note 179, at 215–19.

201. See, e.g., Ariz. S. Con. Res. 1010; see also Fla. S.B. 58; Kan. S.B. 79; La. H.B. 785; N.C. H.B. 695; Wyo. H.R.J. Res. 8; Volokh, *Foreign Law*, *supra* note 188 at 235.

202. See *infra* note 203 and accompanying text.

203. See Peter Hay, Ole Lando & Ronald D. Rotunda, *Conflict of Laws as a Technique for Legal Integration*, in 1 INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE Book 2, 170 (Mauro Cappelletti, et al. eds., 1986) [hereinafter Hay, *Integration*] (addressing the limitations on jurisdiction under uniform choice-of-law rules); see also Aaron Fellmeth, *U.S. State Legislation to Limit Use of International and Foreign Law*, 106 AM. J. INT'L L. 107, 115 (2012).

204. See, e.g., Ariz. S. Con. Res. 1010; see also Fla. S.B. 58, 2013 Leg.; Kan. S.B. 79; La. H.B. 785; N.C. H.B. 695; Wyo. H.R.J. Res. 8; Volokh, *Foreign Law*, *supra* note 188, at 235.

205. See PATEL ET AL., *supra* note 36, at 37; see also Volokh, *Foreign Law*, *supra* note 188, at 227–35.

206. See Hay, *Integration*, *supra* note 203, at 173–74 (highlighting judicial reluctance “to apply foreign law without reservation.”).

207. *Id.*

208. *Id.*

209. *Id.*

2. Rules of Decision

A second possible effect of an AFIL statute is that it dictates a rule of decision: in any circumstance in which a court might face a choice between domestic and foreign law, the court must choose domestic law.²¹⁰ This interpretation treats the AFIL statute as a choice of law provision, which is how Oklahoma attempted to characterize the SOS Amendment in its Tenth Circuit briefing.²¹¹ This interpretation of the AFIL statute's effect is considerably more modest.²¹² It is largely in line with the general tenor of U.S. choice of law principles.²¹³ Those principles command a strong preference to apply state law unless there is a compelling reason to look elsewhere.²¹⁴ With respect to foreign or international legal sources, the courts are expected to determine that the foreign rule is consonant with the public policy of the home state.²¹⁵ Under this current choice of law approach, cases where a court might prefer to apply foreign or international law rather than domestic law are likely to be quite rare.²¹⁶ The effect of the AFIL statute choice of law principle is to eliminate the option of looking to foreign or international sources, even in circumstances where traditional choice of law principles would dictate otherwise.²¹⁷

Whether such a command is wise or not will be discussed below, but at this point it bears noting that even if such a command makes sense, there are some matters that simply cannot be decided without resort to foreign law. Thus, for

210. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. LAW INST. 1971). The rule of decision concept refers to any statute, law, or precedent that provides the basis for deciding or adjudicating a case. *See Collopy v. Newark Eye & Ear Infirmary*, 141 A.2d 276, 289 (N.J. 1958) (identifying the concept of rule of decision as a “foundation of our jurisprudence” used to “determine the rights of, and prescribe rules of conduct for, all persons, and . . . to be followed and applied by our courts in all cases to which they are applicable.”).

211. Reply Brief of the Defendants-Appellants at 9–10, *Awad v. Zirriax*, 670 F.3d 1111, 1133 (10th Cir. 2012) (No. 10-6273), 2011 WL 2309239 (arguing that the petitioner, Awad, was not denied constitutional religious rights by the “Save our State” amendment, because an Oklahoma court may still choose to consider personal preferences without specific reference to Sharia).

212. *Contra Awad*, 670 F.3d at 1128 (holding that the Oklahoma statute “present[ed] even stronger ‘explicit and deliberate distinctions’ among religions” than other cases the court had previously encountered).

213. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6.

214. *See id.* (“A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law”). *See generally* JOSEPH H. BEALE, § 42.1. *Jurisdiction: How Determined*, in A TREATISE OF THE CONFLICT OF LAWS 274–75 (1935).

215. *See* PATEL ET AL., *supra* note 36, at 3–4; *see also* Hay, *supra* note 179, at 231.

216. *See* Hay, *supra* note 179, at 231 (noting that choice-of-law principles will allow “court[s] (state or federal) to conclude that forum law applies, even where foreign law has been properly put in issue”); Peter Hay, *European Conflict Law After the American “Revolution—Comparative Notes*, 1-2015 EUROPEAN L. FORUM 6 (discussing role of value judgments in conflicts law and noting tendency of American courts to favor the law of the forum as the “better” law).

217. *See, e.g.*, S. Con. Res. 1010, 50th Leg., 1st Reg. Sess. (Ariz. 2011); *see also* S.B. 58, 2013 Leg., 155th Reg. Sess. (Fla. 2013); S.B. 79, 84th Leg., Reg. Sess. (Kan. 2012); H.B. 785, 2010 Leg., Reg. Sess. (La. 2010); H.B. 695, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013); H.R.J. Res. 8, 61st Leg., Gen. Sess. (Wyo. 2011); Volokh, *Foreign Law*, *supra* note 188, at 235.

example, imagine a state court dispute that raises an issue over whether one of the parties owns property in foreign nation X. The question of legal ownership can be decided only by reference to X's law. There is simply no way to substitute the law of the home state, or of any other jurisdiction, in place of X's law on that disputed issue. If the issue is central to the case, there will be no way for the state court to render a just decision without addressing and determining that question of foreign law. Thus, even at the rule of decision level, the effect of an AFIL provision may be to prevent the state court from deciding some important and potentially dispositive legal issues.

In such a circumstance, there might be a way around an AFIL statute if the parties were able to stipulate as to the effect of X's law.²¹⁸ The court might avoid the strictures of an AFIL statute simply by accepting the stipulation without itself "considering" X's law.²¹⁹ But it is also possible that an AFIL statute could be read to command that, even in the absence of dispute, the court would be precluded from *applying* X's law.²²⁰ A court that accepted the stipulation about the result of foreign law and then used it to reach its decision would be effectively applying the foreign law in question.²²¹ If doing so is prohibited by the AFIL statute, a responsible court still might have no choice but to dismiss the action.²²² Additionally, there could be cases where the parties agreed about the content of the foreign law, but still disputed its application to the facts of the case.²²³ If the domestic court were to attempt to resolve that dispute over application, it would be impossible to avoid the conclusion that it would be "considering," as well as applying, the foreign law in deciding the case.²²⁴

3. Matters of Interpretation

A third potential effect of an AFIL statute is to prevent the local state courts from using foreign or international law as an interpretive resource for deciding a disputed domestic-law question.²²⁵ When one looks about for a possible religiously neutral trigger for the AFIL movement, this aspect of the law comes most immediately to mind. Recently, the U.S. Supreme Court has been roundly

218. See *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 430 (10th Cir. 2006) (stating that U.S. and foreign actors may explicitly stipulate to the use of foreign law and by doing so prevent *forum non conveniens* dismissal from U.S. courts). See generally, Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, 46 WAKE FOREST L. REV. 887, 888–90 (2011) (addressing the ability of U.S. and foreign actors to enter stipulations regarding the application of foreign law in relevant matters).

219. See *Yavuz*, 465 F.3d at 430.

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

221. See Wilson, *supra* note 218, at 890.

222. See *supra* notes 205–12 and accompanying text.

223. See, e.g., *infra* note 238.

224. E.g., Davis, *supra* note 54, at 643 (discussing the implications of a case in which parties agreed to the content of the applicable international law, forcing the court to apply international law).

225. See Fellmeth, *supra* note 203, at 114.

criticized in politically conservative quarters for occasionally looking to foreign and international sources in the course of deciding domestic constitutional questions, such as what constitutes cruel and unusual punishment or what liberties the due process clause guarantees.²²⁶

AFIL statute advocates probably want to ensure that their state court judges do not behave in a similar fashion when deciding domestic state law questions.²²⁷ This aspect of an AFIL provision does not have the same sort of structural impact as a limit on jurisdiction or on rules of decision.²²⁸ Courts are rarely, if ever, *obliged* to use foreign or international resources in reaching a decision on a contested domestic legal question.²²⁹ Unless a domestic law itself directly refers to or incorporates a foreign or international legal matter—in which case it is open to debate whether the foreign or international matter is still “foreign”²³⁰—reference to law beyond the domestic jurisdiction is unlikely to be necessary to render a just and complete legal decision.

The impact at this stage is not so much on the authority of the court as it is on the discretion of the judge.²³¹ The legislature is not directing what type of matter the court can decide, but rather how the judge should go about making his or her decision.²³² While this leaves the jurisdiction and decisional power of the court largely intact, it raises questions about the wisdom of legislative intervention on judicial independence.²³³ Whether or not this goal makes sense will be discussed at greater length below.

226. See, e.g., Ilya Shapiro, *The Use and Misuse of Foreign Law in U.S. Courts*, CATO AT LIBERTY (May 19, 2010, 8:51 AM), <http://www.cato.org/blog/use-misuse-foreign-law-us-courts> (arguing against the Supreme Court’s approach of looking to foreign laws in interpreting the U.S. Constitution).

227. *American Laws for American Courts Protects Constitutional Rights Against Foreign Laws—Including Shariah*, *supra* note 37.

228. See *supra* Sections II.A.1–2.

229. Cf. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 53–54 (2004) [hereinafter Koh, *International Law*] (highlighting that “domestic courts must play a key role in coordinating U.S. domestic constitutional rules with rules of foreign and international law”).

230. See, e.g., *supra* notes 143–49 and accompanying text.

231. *American Laws for American Courts Protects Constitutional Rights Against Foreign Laws—Including Shariah*, *supra* note 37.

232. See H.B. 1060, 2013 Leg., 54th Sess. (Okla. 2013) (specifying what the court cannot base its rulings on, but not specifying what type of matter the judge should decide).

233. See, e.g., Devera B. Scott et al., *The Assault on Judicial Independence and the Uniquely Delaware Response*, 114 PENN. ST. L. REV. 217, 238–40 (2009); Hon. Randall T. Shepard, *Electing Judges and the Impact of Judicial Independence*, 11 N.C. ST. B.J. 26, 26 (2006); Janet Stidman Eveleth, *Preserving Our Judicial Independence*, 37 MD. B.J. 58, 60 (2004); Justice Peter T. Zarella & Judge Thomas A. Bishop, *Judicial Independence at a Crossroads*, 77 CONN. B.J. 21, 22–23 (2003) (all discussing the difficulty of establishing judicial independence in state courts).

4. Questions of Evidence

The final possible impact of an AFIL statute concerns the use of foreign or international law as “evidence” in the course of determining a domestic dispute.²³⁴ Especially in light of the proliferation of cross-border business and personal activities in the twenty-first century, there are many situations in which the determination of a domestic legal issue requires a court to make certain findings about a legal matter abroad.²³⁵ For example, a suit seeking payments under a license agreement might depend on whether the licensor held a valid patent under the laws of a foreign country,²³⁶ or an action for divorce and accompanying alimony might depend on whether the parties were legally married in a foreign country.²³⁷ In these circumstances, courts have sometimes treated the foreign legal issue not as one to be decided as a matter of law, but rather as a question of fact.²³⁸ Parties have been obliged to offer testimony or documentary evidence on the law of the foreign nation and its significance for the disputed facts in the domestic action.²³⁹ Under this scenario, local courts arguably do not “decide” the law of the foreign nation; rather, they “find” it as a determination of fact.²⁴⁰

Whether the AFIL statutes forbid this practice is an open question, but there are reasons to think that such a fact-finding approach to foreign law might also be forbidden. Even where the court is “finding” the law of nation X, it is still “considering” the law of X by determining its factual relevance, and it may well be “applying” the law of X if that law represents a significant component of the judgment of the domestic court. To the extent a court is forbidden from even accounting for the law as a matter of fact, its capacity to render fair judgment in disputes before it may well be even further impaired.

B. The Wisdom of Wholesale Exceptionalism

Is it wise for a state to forbid the judges of its courts from considering and applying foreign law? Although most voters and legislators might reflexively think the answer should be “yes,” careful examination should lead to the

234. See, e.g., *infra* notes 236–40 and accompanying text.

235. See *Fellmeth*, *supra* note 203, at 114.

236. See *In re Kathawala*, 9 F.3d 942, 944–45 (Fed. Cir. 1993) (regarding the validity of a patent under Greek law); *Minn. Mining & Mfg. Co. v. Norton Co.*, 366 F.2d 238, 239 (6th Cir. 1966) (dealing with the validity of foreign patent applications).

237. See, e.g., *Ghassemi v. Ghassemi*, 998 So.2d 731, 733–34, 736–37, 742 (La. Ct. App. 2008) (a divorce case involving first cousins, who were married in Iran, requiring a Louisiana court to decide if the marriage was valid under U.S. law); *Siddiqui v. Siddiqui*, 968 N.Y.S.2d 145, 146–47 (N.Y. App. Div. 2013) (dealing with the validity of a foreign divorce).

238. For example, in *Ghassemi*, the court looked to Iranian law to determine, as a matter of fact, that the parties were legally married, even though Louisiana law itself prohibited the marriage of first cousins. 998 So.2d at 738–39.

239. See *Id.* at 740–41; see also *Siddiqui*, 938 N.Y.S.2d at 146.

240. See, e.g., *Ghassemi*, 998 So.2d at 740; *Siddiqui*, 938 N.Y.S.2d at 146.

conclusion that the answer is “no.” Previous scholarship on this topic has identified a range of reasons for thinking this kind of U.S. exceptionalism is misguided and undesirable in the context of federal constitutional adjudication.²⁴¹ Similar considerations apply in the context of state court adjudication.²⁴²

1. False Premises

At the outset, exceptionalist claims rest on flawed premises about the views of the founding generation of the U.S. regarding foreign and international law. The Framers of U.S. constitutional government were well versed in foreign and international law, and they actively attempted to incorporate what they understood as its best elements into the U.S. constitutional structure.²⁴³ Early U.S. courts relied extensively on British common law, and they continued to do so long after U.S. independence formally separated the two legal systems, making British statutes and precedents “foreign” law.²⁴⁴ U.S. courts also frequently appealed to continental legal sources, and in appropriate cases they relied on what they understood to be the “law of nations,” often citing eminent continental international legal authorities, such as Grotius and Vattel.²⁴⁵ Prominent legal scholars, including Justice Joseph Story and Chancellor James Kent, advocated the idea of legal “science,” whereby the decisional law of distinct jurisdictions labored toward elucidation of common “universal” legal

241. Rahdert, *supra* note 44, at 648 (arguing that exceptionalism “ignores all the common constitutional ground that invites comparative constitutional analysis in the first place” and “overvalues the role of American history in defining constitutional powers and liberties.”).

242. See *supra* note 68 and accompanying text.

243. See, e.g., THE FEDERALIST NO. 63, at 345 (Alexander Hamilton) (E.H. Scott ed., 1898).

[A]n attention to the judgment of other nations, is important to every Government . . . independently of the merits of any particular plan or measure, it is desirable . . . that it should appear to other nations as the offspring of a wise and honorable policy . . . [and] in doubtful cases, particularly where the national councils may be warped by some strong passion, or momentary interest, the presumed or known opinion of the impartial world, may be the best guide that can be followed.

Id. (quoted in Vicki Jackson, *Yes Please, I'd Love to Talk with You*, LEGAL AFF. (July–Aug. 2004), http://www.legalaffairs.org/issues/July-August-2004/feature_jackson_julaug04.msp); see also Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 464 (1997) (“[The Framers] recognized the international legal significance of U.S. independence: As new members in the community of nations, the Founders felt bound, both ethically and pragmatically, to inherit and abide by the law of nations. The Constitution reflected this disposition in both text and structure.”).

244. See, e.g., WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 52–53 (4th ed. 2006); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 67–69 (3d ed. 2005).

245. See, e.g., *The Venus*, 12 U.S. (8 Cranch) 253, 278 (1814) (referring to “the law of nations” and Vattel in deciding what factors bear on a person’s “domicil[e]”); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 134 (1814) (citing the work of Grotius in a discussion of lawful self-defense).

principles.²⁴⁶ In short, the judges, lawyers, and legal theorists of the early republic did not regard U.S. law as separate and apart from European sources, but instead as indelibly intertwined with them.²⁴⁷

This attitude permeated the U.S. constitutional order.²⁴⁸ As Justice Ruth Bader Ginsberg has observed, the Declaration of Independence, which put forward a legal justification for American independence, appealed directly to collective reason and expressed “respect” for the “opinions of [human]kind.”²⁴⁹ Far from being an exceptionalist document, it attempted to justify the American Revolution by reference to principles of “natural law” that would apply to all nations.²⁵⁰ The U.S. Constitution even more specifically refers to the “law of nations” as a source of law that becomes, in appropriate circumstances, part of the “supreme [l]aw of the [l]and.”²⁵¹ It also lists treaties with foreign governments, then the principal source of international law, as a variety of national supreme law, and it gives courts, including state courts, the power and obligation both to interpret and to enforce them.²⁵² In the context of the late

246. See Hon. Diarmuid F. O’Scannlain, Heritage Foundation Lecture No. 1239, *Joseph Story, the Natural Law, and Modern Jurisprudence 2* (Oct. 23, 2013), http://thf_media.s3.amazonaws.com/2014/pdf/HL1239.pdf (exploring Justice Story’s opinion on the existence of natural law and the universality of legal doctrines); John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 567–69 (1993) (explaining Chancellor Kent’s view of law as a science, as well as his views on universal/ natural laws).

247. Langbein, *supra* note 246, at 566–67.

248. See *infra* notes 249–55 and accompanying text.

249. Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication, Keynote Address at the Ninety-Ninth Annual Meeting of the American Society of International Law (Apr. 1, 2005, in 99 AM. SOC’Y INT’L L. PROC. 351, 352 (2005).

The drafters and signers of the Declaration of Independence cared about the opinions of other peoples; they placed before the world the reasons why the States, joining together to become the United States of America, were impelled to separate from Great Britain. The Declarants stated their reasons out of ‘a decent Respect to the Opinions of Mankind.’ To that end, they presented a long list of grievances, submitting the ‘Facts’ - the ‘long Train of [the British Crown’s] Abuses and Usurpations’ - to the scrutiny of ‘a candid World.’

Id.

250. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (maintaining that “the Laws of Nature and of Nature’s God” are the source of natural rights); see also *Natural Law: The Ultimate Source of Constitutional Law*, NAT’L CTR. FOR CONST. STUD., <https://www.nccs.net/natural-law-the-ultimate-source-of-constitutional-law.php> (last visited Mar. 15, 2016) (noting that that Founders alluded to a higher law as the ultimate source “to protect . . . natural rights for all of mankind.”).

251. U.S. CONST. art. I, § 8, cl. 10 (“To define and punish . . . [o]ffen[s]es against the [l]aw of [n]ations”); *id.* art. VI, cl. 2; see also *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (declaring that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (stating that, absent a contrary statute, “the Court is bound by the law of nations which is a part of the law of the land.”).

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

eighteenth century, these deliberate efforts to draw explicit connections between domestic and international law were remarkable legal innovations that reflected a strong internationalist perspective shared by the Framers of the Constitution.²⁵³

Early Supreme Court jurists also shared Enlightenment beliefs about natural law and justice that led them both to seek and demonstrate alignment between the reasoning in their judicial opinions and foreign or international sources.²⁵⁴ Indeed, international and foreign law formed a recurring component of Supreme Court reasoning and adjudication during the first several decades of the existence of the United States.²⁵⁵ If original constitutional intention, and the early practices of our courts, have any notable bearing on the question of whether U.S. courts should consider and, when appropriate, apply foreign or international law, they should count in favor of, not against, the practice.²⁵⁶

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.

Id.

253. See Ginsburg, *supra* note 249 (“In writing the Constitution, the Framers looked to other systems and to thinkers from other lands for inspiration, and they understood that the new nation would be bound by ‘the Law of Nations,’ today called international law.”).

254. See, e.g., *The Venus*, 12 U.S. (8 Cranch) 253, 278 (1814); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 134 (1814); see also MARK DAVID HALL, JUSTICE, LAW, AND THE CREATION OF THE AMERICAN REPUBLIC: THE FORGOTTEN LEGACY OF JAMES WILSON, FIRST PRINCIPLE SERIES REPORT NO. 26 3–5 (June 1, 2009), <http://www.heritage.org/research/reports/2009/06/justice-law-and-the-creation-of-the-american-republic-the-forgotten-legacy-of-james-wilson> (describing Justice James Wilson’s views on natural and divine law and their application to American law); Walter H. E. Jaeger, *John Marshall: The Man, The Judge and The Law of Nations*, 8 AM. U. L. REV. 28, 31–33 (1959) (overview of Chief Justice John Marshall’s views on natural law and the law of nations, and his application of these ideas to American jurisprudence).

255. See Daniel A. Farber, *The Supreme Court, The Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CAL. L. REV. 1335, 1336 (2007).

Citation of foreign law did not merely reflect the paucity of relevant domestic precedent. Rather, it reflected a deeply held understanding of law, in which background legal principles did not derive from any particular jurisdiction. Such background principles percolated through specific legal systems, filling gaps and providing context for positive enactments such as statutes and written constitutions. Given this understanding of law, frequent citation of foreign legal authority inevitably resulted from the implementation of transnational legal principles.

Id. See generally Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 753, 760, 782 (2005) (documenting the Court’s historical practice of citing foreign law in decisions).

256. Calabresi and Zimdahl have argued, in terms of federal constitutional adjudication, that utilization of foreign and international legal sources has a stronger historical pedigree and may be more appropriate in some contexts (for example determinations of reasonableness under the Fourth Amendment or determinations of cruel and unusual punishment under the Eighth Amendment) than it is in others (such as substantive due process). See Calabresi & Zimdahl, *supra* note 255, at 755–56. While the author might not personally agree on the precise specifics of this observation

2. Overbreadth.

In addition to being based on false premises about the Founders' views of foreign law, wholesale exceptionalism, as it is usually argued in the U.S., entails a variety of difficulties that arise from its reflexive and indiscriminating invocation.²⁵⁷ Those who rely on U.S. exceptionalism typically paint their position with unusually broad and sweeping strokes.²⁵⁸ They rarely make any effort to substantiate the claim that exceptional circumstances have influenced *particular* legal developments, and they almost never draw explicit legal connections between purportedly unique aspects of U.S. law, culture, or society, and the specific legal issues that they maintain are unique.²⁵⁹ They also typically ignore any questions of degree,²⁶⁰ and they dismiss as irrelevant any influence that U.S. law has or should exercise on foreign sources or foreign adjudication.²⁶¹

This indiscriminating treatment of all foreign and international law adjudication as equally suspect, and presumptively prohibited, seems massively overbroad, even in regard to the probable intentions of the voters and legislators who support it.²⁶² As the Tenth Circuit observed in *Awad*, AFIL laws typically prohibit *consideration* of foreign or international law when the legislature's choice of law interests are concerned not with which law will be *considered*, but with which law will be *applied*.²⁶³ Even with respect to application, there are probably many instances in which the specific application of foreign law called for in a particular case poses no discernible threat to the domestic legal edifice,

regarding constitutional law, their position is roughly consistent with the distinction drawn in this article between wholesale and selective exceptionalism.

257. See, e.g., Rahdert, *supra* note 44, at 589.

258. This is especially prevalent among some highly conservative political groups that advocate for AFIL statutes, where Islam is portrayed as inherently contrary to fundamental American values and beliefs. See generally Press Release, Am. Freedom L. Ctr., *supra* note 37; *American Laws for American Courts*, *supra* note 37; *American Laws for American Courts Protects Constitutional Rights Against Foreign Laws—Including Shariah*, *supra* note 37; *Confronting the Threat of Radical Islam*, *supra* note 37; *SANE Special Update: Material Support of Jihad Statute in Tennessee*, *supra* note 37.

259. Cf. Andrew Kohut & Bruce Stokes, *The Problem of American Exceptionalism*, PEW RES. CTR. (May 9, 2006), <http://www.pewresearch.org/2006/05/09/the-problem-of-american-exceptionalism/>.

260. To the typical exceptionalist, for example, English law and Islamic law, both being “foreign,” are equally irrelevant to U.S. law, even though much U.S. law is based on English sources, and the U.S. and U.K. share hundreds of years of common law development.

261. See generally *American Laws for American Courts Protects Constitutional Rights Against Foreign Laws—Including Shariah*, *supra* note 37; Press Release, Am. Freedom L. Ctr., *supra* note 37; *American Laws for American Courts*, *supra* note 37; CTR. FOR SEC. POL'Y, *supra* note 37; *SANE Special Update: Material Support of Jihad Statute in Tennessee*, *supra* note 37; *Confronting the Threat of Radical Islam*, *supra* note 37 (all lacking any discussion of American influence on foreign sources, instead focusing exclusively on the negative effects they believe foreign law would have on American jurisprudence).

262. See *Islam*, *supra* note 76, at 981–82.

263. *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012).

yet may well be necessary to the resolution of an otherwise domestic legal matter.

Consider, for example, a probate case in which a testator purports to distribute a property he or she claims to have owned in Morocco. Whether or not the testator owns the property is a matter of Moroccan law which simply cannot be determined any other way. Yet a state probate court, in a jurisdiction with an AFIL statute, might be unable to determine ownership if it were prohibited from considering the Moroccan law needed to do so, and hence it would also be unable to enforce the relevant provisions of the testator's will. It is doubtful that voters or legislators supporting an AFIL statute would intend to deprive state courts the authority to act in such a situation, yet that is the potential impact of such a law.

3. *Non-necessity and Inefficiency*

Rather than eliminating all consideration, or even all application of foreign law, the more immediate concern of voters and legislators likely has to do with an entirely different sort of situation—one in which state courts face a legitimate choice between applying a domestic or a competing foreign legal principle.²⁶⁴ The cases of alleged state court judicial abuse almost always involve situations in which the court supposedly failed to apply a domestic legal principle, deferring instead to a foreign legal principle.²⁶⁵ Supporters of AFIL provisions want state courts *always* to choose the domestic alternative.²⁶⁶

How necessary or wise that command may be should depend on one's views regarding the content and operation of existing choice of law principles and the doctrine of *forum non conveniens*.²⁶⁷ Choice of law principles already have a strong built-in bias for domestic law in most situations.²⁶⁸ Initially, choice of law principles only raise the possibility of resorting to foreign or international law in circumstances involving “true conflict,” in which the competing

264. See *supra* notes 210–14 and accompanying text.

265. The most prominent example of this is in the much-contested case, *S.D. v. M.J.R.*, involving a Moroccan couple living in New Jersey. 2 A.3d 412, 413 (N.J. Super. Ct. App. 2010). Though her husband had repeatedly raped his wife, the district judge refused to grant the wife a restraining order, based at least in part on the ground that marital rape is not a crime under Moroccan Sharia law. *Id.* at 417–18. Even though the district court decision was promptly overturned on appeal, the case became the center of a media firestorm, with AFIL statute supporters citing the decision as wrongly applying foreign law over domestic statutes and public policy. See, e.g., Abed Awad, *The True Story of Sharia in American Courts*, THE NATION (Jun. 14, 2012), <http://www.thenation.com/article/true-story-sharia-american-courts/>.

266. Hay, *supra* note 179, at 234.

267. See Fellmeth, *supra* note 203, at 116–17 (discussing the contradictory relationship among choice-of-law clauses, the concept of *forum non conveniens*, and recent AFIL statutes); Walter W. Heiser, *Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV. 1161, 1180–82 (2005) (providing a broad overview of *forum non conveniens* and its relationship to the application of foreign law in U.S. courts); Wilson, *supra* note 218, at 897–99 (discussing a court's ability to hear issues relating to international/foreign law in light of *forum non conveniens* principles).

268. See *supra* notes 215–19 and accompanying text.

principles would lead to different standards and results.²⁶⁹ In circumstances in which a true conflict exists, the proponent of the foreign law provision must make a strong showing both that it has a closer connection than the local law to the underlying dispute, and that it is consistent with domestic public policy.²⁷⁰ Moreover, in many circumstances in which foreign law might potentially apply, the doctrine of *forum non conveniens* might also apply, causing the U.S. court to defer to adjudication by a foreign tribunal that is better situated to resolve the dispute.²⁷¹ In the rare circumstance where the U.S. court retains jurisdiction, foreign law applies under these principles, and the domestic court is a proper and convenient forum, the court will apply foreign law only if it has a compelling reason.²⁷² Usually this reason will be the type that, if the situation was reversed and a foreign court was asked to apply the law of the particular state, the state would want the foreign jurisdiction to do so.²⁷³

In these limited circumstances, U.S. courts have long embraced principles of international “comity,” which they share with foreign courts, thus enabling the domestic court to respect and apply the foreign law when it is just and necessary to do so.²⁷⁴ Comity principles function on an international level in a manner that is loosely analogous to the principles of interstate comity required by the Full Faith and Credit Clause.²⁷⁵ However, except where these international comity principles form a part of federal law, are enforceable under the Supremacy Clause, or are necessary to due process, they are not constitutionally

269. See generally James A.R. Nafziger, *Resolving International Conflict of Laws by Federal and State Law*, 2 PACE Y.B INT’L L 67, 73–74 (1990).

270. See, e.g., *id.*; see also RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 6 (AM. LAW. INST. 1971).

271. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 259–61 (1981) (upholding a district court decision to enforce the doctrine of *forum non conveniens* removing a case to be tried in Scotland); see also Fellmeth, *supra* note 203, at 116–17; Heiser, *supra* note 267, at 1178; Wilson, *supra* note 218, at 898.

272. See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 108 (2d Cir. 2000) (holding that the district court should not have dismissed the case on *forum non conveniens* grounds).

273. See Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 33 (2010).

274. See Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1, 3–4 (1991) (defining comity as “a rule of choice of law, courtesy, politeness, convenience or goodwill between sovereigns, a moral necessity, expediency, reciprocity or ‘considerations of high international politics concerned with maintaining amicable and workable relationships between nations.’”); Childress, *supra* note 273, at 13–14 (providing a broad overview of international judicial comity); Arif S. Haq, *Kaepa Inc. v. Achilles Corp.: Comity in International Judicial Relations*, 22 N.C. J. INT’L L. & COM. REG. 365, 366–67 (1996) (providing an overview of judicial comity and the domestic case law surrounding this concept).

275. U.S. CONST. art. IV, § 1 provides that “[f]ull [f]aith and [c]redit shall be given in each state to the public [a]cts, [r]ecords, and judicial [p]roceedings of every other [s]tate.” Judicial comity is defined as the “[p]rinciple in accordance with which courts of one state or jurisdiction give effect to laws and judicial decisions of another state out of deference and respect, not obligation.” BLACK’S LAW DICTIONARY 847 (6th ed. 1990).

mandatory.²⁷⁶ Nevertheless, as courts throughout the nation have long recognized, they make good sense and contribute to the fair, smooth, and efficient administration of justice.²⁷⁷

While the principles of judicial comity and reciprocity toward foreign law mentioned above have long been a part of the U.S. choice of law framework, they are rarely invoked, and even more rarely applied in ways that lead a domestic court to interpret and apply a foreign law provision.²⁷⁸ Instead, for good reason, courts typically do their best to find ways to minimize the necessity of having to decide or implement foreign law.²⁷⁹ Foreign law is, by nature, unfamiliar and uncertain.²⁸⁰ It may also be difficult for U.S. courts to identify and access.²⁸¹ Even where foreign legal rules or principles can be successfully identified and articulated, proper contextualization of foreign law can be challenging and highly contestable.²⁸² For these reasons, among others, U.S. courts are customarily leery of delving deeply into foreign law, so their applications of state choice of law principles naturally gravitate toward domestic law in most situations.²⁸³

276. See *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 441 (3d Cir. 1971) (“Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation.”); Molly Warner Lien, *The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and Breard Scenarios*, 50 CATH. U. L. REV. 591, 600–01 (discussing the non-mandatory nature of international judicial comity).

277. See, e.g., *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473, 476–77 (7th Cir. 2000) (using judicial comity in balancing a foreign judgment in light of an international notion of due process); *Omron Healthcare, Inc. v. Maclaren Exps. Ltd.*, 28 F.3d 600, 601–04 (7th Cir. 1994) (applying the principle of judicial comity in the matter of a forum selection clause).

278. Cf. Childress, *supra* note 273, at 44.

279. See Sarah M. Fallon, *Justice for All: American Muslims, Sharia Law, and Maintaining Comity Within American Jurisprudence*, 36 B.C. INT’L & COMP. L. REV. 153, 164–66, 176 (2013) (discussing inconsistency between AFIL statutes and principles of international comity). Indeed, the Supreme Court has shown historical hesitancy to engage in contested interpretation of foreign law on matters that might potentially affect U.S. foreign affairs. See, e.g., *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 552 (1987) (Blackmun, J., dissenting) (“[C]ourts are generally ill equipped to assume the role of balancing the interests of foreign nations with that of our own. Although transnational litigation is increasing, relatively few judges are experienced in the area and the procedures of foreign legal systems are often poorly understood.”); cf. *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) (deferring to the federal executive branch on application of the “act of state” doctrine because of its “primary responsibility for the conduct of foreign affairs”); *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (courts need to be cautious in adjudicating matters impacting foreign affairs because they involve “decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power”).

280. See, e.g., Fallon, *supra* note 279, at 176 (specifically highlighting that several judges are unfamiliar with Islamic law).

281. See, e.g., *id.* at 176–77.

282. See S.D. v. M.J.R., 2 A.3d 412, 413 (N.J. Super. Ct. App. Div. 2010).

283. See Hay, *Integration*, *supra* note 203, at 170–71 (discussing the difficulty in ascertaining foreign law under uniform conflict-of-law rules).

Even where they admit foreign principles, the rules for choice of law retain a filter that allows the domestic court to reject the application of any foreign principle or rule if applying it produce results inconsistent with the policies of the home jurisdiction, or that would contravene fundamental justice.²⁸⁴ This caveat ensures that state courts in the United States are rarely, if ever, put in the position of applying a specific foreign legal command that is substantially at odds with a basic premise of U.S. legal culture.²⁸⁵

Because of these built-in safeguards, broad proscription of consideration of foreign law by way of an AFIL statute is inefficient and unnecessary. It is inefficient because, in those rare situations when courts resort to a foreign legal rule, prohibition of using that rule will complicate litigation, thus forcing courts and parties to develop elaborate ways to subtly incorporate the foreign law rules, or to litigate in multiple forums, or to avoid litigation in a U.S. court entirely, even when it is otherwise the most appropriate forum for the case.²⁸⁶ The parties may, for example, find it necessary to litigate the foreign law issue in a foreign court, then try to bring the outcome into the domestic litigation by way of *res judicata*, issue preclusion, or a joint stipulation regarding the result.²⁸⁷ The parties might also try to convert the foreign legal issue into a putative question of “fact” by employing expert testimony.²⁸⁸ There may be other alternatives as well.²⁸⁹

Forcing litigants to engage in these sorts of measures seems unnecessary. The existing domestic filters that inhibit truly inappropriate use of foreign laws are, by long historic demonstration, adequate to preventing the miscarriage of justice through ill-considered or unwarranted reliance on foreign law.²⁹⁰ These filters permit the introduction of foreign law when it is truly discernible, relevant, and potentially significant or determinative.²⁹¹ Conversely, these filters exclude

284. See *Pravis Banker Assocs., Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854–56 (2d Cir. 1997) (outlining both the concept of international comity and its limitations); *Allied Bank Int’l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 522 (2d Cir. 1985) (refusing to extend the doctrine of international comity when doing so would go against U.S. policies); see also *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) (“[T]he obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act.”); *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971) (stating that “comity does not achieve the force of an imperative or obligation” and refusing to apply this doctrine when it would contradict the interest of the applying nation).

285. See *Laker Airways Ltd.*, 731 F.2d at 937.

286. See, e.g., Volokh, *Foreign Law*, *supra* 188, at 234.

287. See *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 430 (10th Cir. 2006); see also *In re Int’l Bechtel Co. Ltd. v. Dep’t of Civil Aviation of the Gov’t of Dubai*, 300 F. Supp. 2d 112, 117 (D.D.C. 2004).

288. Wilson, *supra* note 218, at 901.

289. See, e.g., Heiser, *supra* note 267, at 1190.

290. See *Pravis Banker Assocs., Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854–56 (2d Cir. 1997); *Allied Bank Int’l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 522 (2d Cir. 1985); see also *Laker Airways*, 731 F.2d at 937; *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971).

291. See *supra* note 274 and accompanying text.

foreign law when it is indecipherable or unnecessary, is difficult to contextualize, leads to absurd or pernicious consequences, or is unjust.²⁹²

4. Uncertainty

An additional objection to AFIL measures is their uncertain application. Short of overt reliance on specific unadorned foreign or international legal “rules of decision,” or explicit treatment of foreign legal adjudications, both of which seem unquestionably to be forbidden, what exactly does such a measure prohibit? Does the measure, for example, prohibit relying on a legal rule that is domestic but has its origins in foreign law? Does it prohibit reference to a foreign decision discussing a legal principle that is shared with or overlaps domestic law? To put the matter somewhat differently, at what point does a principle that has its origins, or that finds expression in international or foreign law, get sufficiently “domesticated” so that it is no longer “foreign?”

One area where these types of questions can arise is tort law, a subject the author has taught throughout his academic career. Most principles of tort law derive from common law, and they are embraced not only in the United States, but also by other common law nations, including Canada, Australia, and the United Kingdom.²⁹³ When law students in the United States learn tort law, some of the decisions that they study come from these other nations because they adhere to the same basic tort law followed in the United States, and the decisions of foreign courts often effectively illustrate shared guiding tort principles.²⁹⁴ When this happens, is foreign law being taught, or is it just being used to illustrate and better understand well-established U.S. legal standards? What if a particular decision from a foreign jurisdiction happens to have been cited and relied upon by a U.S. court, or formed the basis for the enactment of an U.S. statute, or influenced the development of a home-grown “blackletter” principle in one of the American Law Institute’s Restatements of Torts? If that decision

292. See *Pravin*, 109 F.3d at 854–56; *Allied Bank*, 757 F.2d at 522; see also *Laker Airways*, 731 F.2d at 937; *Somportex*, 453 F.2d at 440; Hay, *supra* note 179, at 231–33.

293. See Lewis N. Klar, *The Impact of U.S. Tort Law in Canada*, 38 PEPP. L. REV. 359, 359 (2011).

294. See, e.g., *Vaughan v. Menlove*, (1837) 132 Eng. Rep. 490, 493 (C.P.) (English case first introducing the concept of the reasonable person in tort law); *Davies v. Mann*, [1842] 10 M. & W. 546, 152 Eng. Rep. 588, 589 (Exch.) (English case establishing what would later become known as the “last clear chance” doctrine of negligence law); *Blyth v. Birmingham Waterworks Co.*, (1856) 156 Eng. Rep. 1047, 1049 (Ex.) (English case holding that a party can only be held liable for negligence when failing to exercise the care a reasonable person would be expected to use); *In re Polemis & Furniss, Withy & Co.*, [1921] 3 KB 560, 577 (C.A.) (U.K. admiralty case holding that a defendant can be held liable for all consequences flowing from a wrongful act regardless of foreseeability); *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng’g Co. (Wagon Mound No. 1)*, [1961] App. Cas. 388, 422 (P.C.) (U.K. Privy Council case holding that a party can only be held liable for reasonably foreseeable damages); *Overseas Tankship (U.K.) Ltd. v. Miller S.S. Co. (Wagon Mound No. 2)*, [1967] 1 App. Cas. 617, 643 (Privy Council case holding that loss is recoverable where the magnitude of possible harm is so great that a reasonable man would guard against it, even if the likelihood of the harm occurring is very small).

is taught in the classroom, is it U.S. law that the professor is teaching, or has the professor ventured onto potentially “dangerous” foreign ground?

The challenge of sorting foreign from domestic law in adjudication is likely to raise comparable difficulties. It will be necessary for courts attempting to implement an AFIL statute to determine how prominent foreign legal sources must be to turn an otherwise permissible domestic legal principle or rule into an impermissible foreign one, and conversely how far in the background foreign legal sources can be without “polluting” an otherwise domestic legal principle with impermissible foreign content.²⁹⁵ The prospects for confusion about what may and may not be considered by state courts under such an AFIL regime seem substantial.²⁹⁶

5. Unenforceability

There may well be another circumstance motivating AFIL provisions. Voters and legislators likely do not want state courts, when considering an unresolved issue of domestic law, to be *influenced* by decisions of comparable questions by foreign courts.²⁹⁷ This has been the chief objection to the use of foreign law in the U.S. constitutional sphere.²⁹⁸ For example, when U.S. exceptionalists object to references to foreign and international law in U.S. Supreme Court decisions regarding the Eighth Amendment’s prohibition on cruel and unusual punishment,²⁹⁹ they typically argue that the Supreme Court should pay no regard to what forms of punishment foreign nations allow and disallow.³⁰⁰ They also claim that foreign decisions on matters such as gay rights, marriage equality, affirmative action, or other human rights questions ought to be irrelevant to U.S. constitutional adjudication on similar issues.³⁰¹ Supporters of AFIL provisions may want to forestall any risk that state courts will be similarly influenced by foreign law principles on similar questions.³⁰²

295. See PATEL ET AL., *supra* note 36, at 1 (noting that AFIL statutes “are so broadly phrased” which “could result in years of litigation as state courts struggle to construe what these laws actually mean . . .”).

296. This problem will be particularly acute with laws emanating from other common law jurisdictions, but it will exist with respect to law from other non-common-law nations as well, particularly as overlaps in areas of public law, business law, environmental law, and administrative regulation converge through globalization.

297. Steven G. Calabresi, “A Shining City on a Hill”: *American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1410–11 (2006).

298. See *id.* (noting that “the popular culture of the United States is extremely hostile to the idea that the meaning of our Constitution should be based in any way on foreign law.”).

299. See *id.* at 1413; see also Eugene Volokh, *Foreign Law in American Courts: Could it Jeopardize American Constitutional Rights?*, WASH. POST (Jan. 23, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/23/foreign-law-in-american-courts-can-it-jeopardize-american-constitutional-rights/>.

300. See Calabresi, *supra* note 297, at 1413.

301. *E.g., id.* at 1398, 1411. (arguing that the exceptional nature of the U.S. legal system makes comparison to other legal system frequently irrelevant).

302. See *supra* note 18 and accompanying text.

As to federal questions that come before the state courts, any state law that attempts to proscribe reference to all such foreign or international legal resources is probably unenforceable. In the arenas in which federal law—whether by statute, treaty, constitutional principle, or authoritative federal court decision—incorporates, requires, or encourages the consideration or application of foreign law, state legislatures should be powerless to prohibit it.³⁰³ In these circumstances, if foreign law bears on the interpretation and application of federal law, the Supremacy Clause requires state courts to use it.³⁰⁴ As *Testa v. Katt*³⁰⁵ held, where a state court is competent to hear a claim or defense involving federal law, it is obligated to treat that claim in the same way and with the same force as any federal court would.³⁰⁶ What federal law requires is binding on the state court and cannot be ignored.³⁰⁷ If federal law is based on, or calls for application of, foreign or international legal rules or principles, state courts that otherwise possess capacity to decide the matter in question should be obliged to apply those rules or principles in their adjudication.³⁰⁸

Additionally, where federal statutes or treaties incorporate and apply international law, those principles become part of the national legal edifice that binds state courts.³⁰⁹ State law prohibiting reliance on foreign or international principles with respect to that portion of federal law would be unenforceable under the doctrine of federal preemption.³¹⁰

As to purely state law questions, formal proscription of resort to foreign law is permissible but is subject to dilution or evasion through legal interpretation.³¹¹ While it may be possible to prohibit courts from citing foreign law for state law purposes, it seems virtually impossible, without kinds of surveillance that would seriously threaten judicial independence, to prevent a judge from consulting foreign sources.³¹² Where a foreign rule has a U.S. cognate or overlaps with existing U.S. law, it should be relatively easy for courts to avoid the appearance of reliance on foreign law by simply reading the same content into U.S. law

303. See Fellmeth, *supra* note 203, at 113.

304. *Id.*

305. 330 U.S. 386 (1947).

306. *Id.* at 392–93.

307. See *id.*

308. See Fellmeth, *supra* note 203, at 113.

309. See *id.*

310. See U.S. CONST. art. VI, cl. 2 (the basis for federal preemption stems from the Supremacy Clause of the Constitution); see also *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)) (“Consistent with [the Supremacy Clause], we have long recognized that state laws that conflict with federal law are ‘without effect.’”).

311. Cf. Volokh, *Foreign Law*, *supra* note 188, at 243 (noting that AFIL state statutes are “not harmful . . . but neither are they particularly useful” because they will not prevent a court from constitutional violations).

312. See Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court’s Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 675 (2007).

counterparts.³¹³ A judge who was persuaded by foreign law might, without ever admitting the true source of his or her thinking, “convert” the foreign rule or principle into an ostensibly domestic one by simply “interpreting” an existing, and sufficiently general, domestic legal rule or principle to include the same content as the foreign source.³¹⁴ Even the late Justice Antonin Scalia, who was the most ardent exceptionalist on the Supreme Court prior to this death, acknowledged that his colleagues must be left free to “look” at foreign law, although he preferred that they refrain from “citing” or relying on it directly.³¹⁵

Such a “don’t ask, don’t tell” approach to foreign law, however, invites a kind of judicial subterfuge that is inconsistent with U.S. concepts of judicial power.³¹⁶ Part of what we expect from the courts is that they will openly and transparently acknowledge the sources and grounds for their decisions.³¹⁷ The public expects the courts to give the real reasons for their decisions, and to put those reasons on a public record that opens them to evaluation and criticism by higher courts, legislators, the legal profession, and the public at large.³¹⁸ Legal rules that invite the judiciary to hide or disguise what they are actually doing are inconsistent with this tradition.³¹⁹

313. *Id.* at 651 (highlighting that Chief Justice Roberts encouraged judges that utilized foreign law “to incorporate his or her own personal preferences, [and] cloak them with the authority of precedent.”).

314. *Id.* at 655–56, 658.

315. *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519, 541 (2005).

316. See Parrish, *supra* note 312, at 650 (highlighting that applying foreign law “invites ‘judges to ‘troll deeply . . . in the world’s corpus juris’ to reach a politically preferred outcome” which is inconsistent with the proper role of the judiciary system).

317. See *Id.* at 674–75.

The U.S. Supreme Court should cautiously continue to cite to foreign law because an essential part of judging is citing to authority that the justices use to arrive at their decisions. Our legal system is imbued with the tradition that judges must justify their holdings. In doing so, they must be candid and honest in revealing the sources, and stating the reasons, for their decisions. Transparency is important. The public is entitled to know why the Court ruled a particular way and to be provided the opportunity to subject the reasoning to scrutiny.

Id.; *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, *supra* note 315, at 540 (quoting Justice Breyer as saying, “If the foreign materials have had a significant impact on my thinking, they may belong in the opinion because an opinion should be transparent. It should reflect my actual thinking.”). See generally Edward H. Levi, *The Nature of Judicial Reasoning*, 32 U. CHI. L. REV. 395 (1965).

318. See David A. Hoffman, Alan J. Izenman, & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 727 (2007) (discussing the importance of written opinions in ascertaining judicial reasoning); see also Levi, *supra* note 317, at 406–07. See generally William Domnarski, *Judges Should Write Their Own Opinions*, N.Y. TIMES (May 31, 2012), <http://www.nytimes.com/2012/06/01/opinion/judges-should-write-their-own-opinions.html> (arguing for the importance of the written, published judicial opinions in U.S. jurisprudence).

319. See Parrish, *supra* note 312, at 674–75.

6. *The Effects of Globalization.*

Presumably, if judges are commanded by statute not to look at foreign law in the state law cases before them, most responsible judges will attempt in good faith to abide by the command, rather than try to evade it.³²⁰ But as time goes on the pressures on courts to find ways of incorporating foreign legal matters into their judicial decisions will inevitably increase.³²¹ The reason is the rapidly accelerating pace of legal globalization.³²²

Consider Oklahoma, the state where the AFIL movement began.³²³ There may have been a time in the not too distant past when states such as Oklahoma were sufficiently commercially and socially isolated so that foreign law had minimal impact on the legal lives of their citizens. The beginning of this article quoted some famous lyrics from the Broadway musical, *Oklahoma!*, which was set at about the time of Oklahoma's statehood in 1907.³²⁴ One of the songs in the musical whimsically treated nearby Kansas City, Missouri as far-away and culturally foreign to the denizens of the soon-to-be Sooner state,³²⁵ though intriguingly for the present discussion the musical also featured energetic local commercial enterprise by a Middle Eastern immigrant.³²⁶ Perhaps Oklahoma was pretty isolated back then. But today, with the global networks of communication, transportation, and trade that are presently enjoyed, even a landlocked heartland state, such as Oklahoma, is rife with international and foreign contacts.³²⁷ With global contact comes global legal interaction and cross-fertilization.³²⁸ With interaction and cross-fertilization come transnational legal disputes.³²⁹

On the commercial side, even modest local businesses in Oklahoma are likely in the twenty-first century to have foreign partners, investors, suppliers,

320. *See id.* at 664–65.

321. *See id.* at 679–80.

322. *See* Leonard Bierman & Michael A. Hitt, *The Globalization of Legal Practice in the Internet Age*, 14 *IND. J. GLOB. LEG. STUD.* 29, 34 (2007); *see also* Hannah L. Buxbaum, *National Jurisdiction and Global Business Networks*, *Earl A. Snyder Lecture in International Law*, 17 *IND. J. GLOB. LEG. STUD.* 165, 166 (2010); Laurel S. Terry, *The Legal World is Flat: Globalization and Its Effect on Lawyers Practicing in Non-Global Law Firms*, 28 *NW. J. INT'L L. & BUS.* 527, 532 (2008); William D. Henderson, *The Globalization of the Legal Profession*, 14 *IND. J. GLOB. LEGAL STUD.* 1, 2 (2007); D. Daniel Sokol, *Globalization of Law Firms: A Survey of the Literature and a Research Agenda for Future Study*, 14 *IND. J. GLOB. LEG. STUD.* 5, 21 (2007); Laurel S. Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives*, 4 *WASH. U. GLOB. STUD. L. REV.* 463, 484 (2005).

323. *See* PATEL ET AL., *supra* note 36, at 1.

324. *See supra* note 1 and accompanying text; OSCAR HAMMERSTEIN & RICHARD RODGERS, *Oklahoma!* (1943).

325. Oscar Hammerstein & Richard Roger, *Oklahoma!* 8–9, Act 1, Scene 1 (1943).

326. *Id.* at “Cast of Characters.”

327. *E.g.*, Wilson, *supra* note 218, at 887.

328. *See id.* at 888.

329. Martin Shapiro, *The Globalization of Law*, 1 *IND. J. GLOB. LEGAL STUD.* 37, 38 (1993).

customers, competitors, and employees.³³⁰ These businesses are likely to enter into contracts with foreign entities, buy or sell property or services with foreign entities, advertise in foreign markets, ship goods to foreign destinations, import goods from foreign sources, engage in business activities that subject them to foreign regulations and legal duties, pay foreign taxes, communicate throughout the world, and otherwise engage in global business activities.³³¹

On the social side, the state is likely to have citizens who travel extensively to foreign destinations, enter into various domestic legal relations abroad, buy or sell or own or dispose of foreign property, have foreign tax and other legal obligations, engage in transnational consumer transactions, commit foreign crimes, and communicate internationally.³³² There will also be numerous foreign individuals who come to Oklahoma as tourists, on visas for various business purposes, as students at universities in Oklahoma, and as legal residents living and working in Oklahoma.³³³ Other people will “enter” the state virtually through various internet communications and transactions.³³⁴

These kinds of foreign interactions have no doubt increased exponentially over the past two or three decades. These interactions will increase even more rapidly in the next several decades. Unlike its portrayal in the musical, modern Oklahoma is not simply about cowboys and farmers anymore, although today even cowboys and farmers have extensive webs of global contact.³³⁵

In the face of such rampant global activity, legal disputes that contain one or more components of foreign or international law are sure to occur, to increase in number and potential complexity, and to do so rapidly.³³⁶ When they do, the

330. *E.g.*, Buxbaum, *supra* note 322, at 165–66.

331. Indeed, the University of Oklahoma’s business school, Price College of Business, pays particular attention to the area of international business. *See About Price*, THE UNIV. OF OKLA.: PRICE C. OF BUS., http://www.ou.edu/content/price/about_price.html (last visited Nov. 17, 2014). The school proudly announces on its website that the school is in its 11th consecutive year in the top 30 international business programs nationwide. *Id.*

332. *E.g.*, Bierman & Hitt, *supra* note 322, at 30; *Passports*, OKLA. CTY., <http://www.oklahomacounty.org/courtclerk/PassportOffice.aspx> (last visited Mar. 21, 2016).

333. A 2010 survey identified 5.5% of the Oklahoman population (roughly 206,000 people) as foreignborn. *Selected Characteristics of the Foreign-Born Population by Period of Entry into the United States: 2010 American Community Survey 1–Year Estimates*, U.S. CENSUS BUREAU, <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF> (last visited Jan. 20, 2016). In 2011, 8,722 international students enrolled in Oklahoma colleges and universities, and that number continues to increase annually. Silas Allen, *International Student Enrollment Increases in Oklahoma, Nationwide*, NEWS OK (Nov. 13, 2012), <http://newsok.com/international-student-enrollment-increases-in-oklahoma-nationwide/article/3728545>. Additionally, as of 2012, Oklahoma ranked 25th in the nation in terms of the number of international university students. *Id.*

334. *E.g.*, Bierman & Hitt, *supra* note 322, at 30.

335. As evidence of this, even small cattle farmer publications now include news on international affairs. *See On the Global Ag Front*, THE CATTLE BUS. WKLY (Apr. 9, 2014), <http://www.cattlebusinessweekly.com/Content/Headlines/-Headlines/Article/On-the-Global-Ag-Front/1/1/6061>.

336. *E.g.*, Shapiro, *supra* note 329, at 38.

people and businesses of the state, or foreign individuals working and living in the state, will naturally seek recourse to the state's courts for adjudication of at least some of these legal disputes.³³⁷ If the state courts are prohibited from considering relevant foreign and international law, local litigants will find themselves at a significant disadvantage.³³⁸ They will be forced either to navigate around the limits on the local courts' capacity to take foreign law into account, or to go elsewhere to litigate their foreign-law-containing disputes.³³⁹ Either option is likely to be costly and cumbersome to the litigants, particularly the ones who are denizens of Oklahoma.³⁴⁰ Either option will also undermine the power and capacity of the state court system to serve the community's legal interests and needs.³⁴¹

Collectively, these pernicious consequences of the AFIL statutes significantly outweigh their supposed anticipatory, prophylactic benefits. Even where wholesale exceptionalism is constitutional, it is unwise and should be rejected as an unnecessary and potentially harmful interference with state judicial power.

III. SELECTIVE EXCEPTIONALISM

Although wholesale U.S. legal exceptionalism of the type embodied in the current round of AFIL statutes and proposals is misguided, the concept of U.S. legal exceptionalism should not be dismissed in its entirety. To the contrary, U.S. law and the U.S. legal experience are indeed exceptional in many important respects. There are important places in U.S. law where one should be able to rely at least partly on exceptionalist reasoning as a basis for deliberate differentiation between U.S. legal principles and those of other nations with which we share common legal ground.

Ironically, one prominent example is the matter of separation between church and state, the very issue on which Oklahoma's AFIL provision foundered.³⁴²

337. See Davis, *supra* note 54, at 651.

338. *Id.* at 643–44.

339. *Id.* at 648.

340. Walter Jenny Jr., *State Question is Xenophobic*, THE EDMOND SUN (Sept. 15, 2010), http://www.edmondsun.com/opinion/state-question-is-xenophobic/article_3b12d6ae-886b-5341-a9cc-a0b2c500ebaa.html?mode=print.

341. See, e.g., *id.*

342. See, e.g., Dr. Sophie C. van Bijsterveld, *Church and State in Western Europe and the United States: Principles and Perspectives*, 2000 BYU L. REV. 989, at 993–94 (2000) (observing that the “Jeffersonian” approach to religious freedom embodied in the idea of a “Wall of Separation” between church and state has no real equivalent in western Europe, even in countries with a separation of church and state. The Netherlands, France, Ireland, and Portugal could not be qualified in such rigorous terms. Even if the actual situation may be more complex and differentiated, in the United States the phrase ‘Wall of Separation’ seems to have a strong and positive ideological charge); Elisabeth Zoller, *Laïcité in the United States or the Separation of Church and State in a Pluralist Society*, 13 IND. J. GLOB. LEGAL STUD. 561, 592 (2006).

Understood as the principle of the separation of church and state, laïcité operates in the United States in an infinitely harder and more rigid manner than in France. The American

Although many world constitutional orders purport to protect religious freedom,³⁴³ few, if any, include the kind of strong restrictions on the legal relations between government and religion that have developed in U.S. Establishment Clause jurisprudence. The long United States historical and social experience of wide diversity in faith, coupled with legal traditions and cultural attitudes forged in reaction to Europe's disastrous Sixteenth and Seventeenth Century wars of religion, plus the United States' firm commitment to individual freedom of thought and belief, collectively have produced an historically strong strain of commitment to secular government in the United States.³⁴⁴ That tradition began before nationhood, is embodied in the language of the Constitution,³⁴⁵ is reflected in every state constitution,³⁴⁶ and has been developed and applied through two centuries of energetic constitutional jurisprudence.³⁴⁷ Efforts to soften those commitments based on foreign law ought to be opposed, even though other constitutional democracies which share our general commitment to religious freedom often tolerate far more intersection

conception of the separation of church and state requires that the federal government be a federal state of neutrality without concessions, without privileges, and without amenities.

Id.

343. See, e.g., AUSTL. CONST. s. 116 ("The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth"); Art. 7 Costituzione [Cost.] (It.) ("The State and the Catholic Church are independent and sovereign, each within its own sphere."); CONST. (1987), art. III, sec. 5 (Phil.) ("No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights"); TÜRKIYE CUMHURİYETİ ANAYASASI MADDE 10 (Turkey) (the founding principles of the Republic of Turkey are secularism, social equality, and equality before law).

344. See generally Edwin Scott Gaustad, *The Emergence of Religious Freedom in the Early Republic*, in RELIGION AND STATE: ESSAYS IN HONOR OF LEO PFEFFER 25–27 (James E. Wood, ed., Baylor Univ. Press, 1985); Leonard Levy, *The Original Meaning of the Establishment Clause of the First Amendment*, in RELIGION AND STATE: ESSAYS IN HONOR OF LEO PFEFFER 44–53 (James E. Wood, ed., Baylor Univ. Press, 1985); LEO PFEFFER, CHURCH, STATE, AND FREEDOM 131–35 (Beacon Press, 1953).

345. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."); *id.* art. VI, cl. 3 ("no religious test shall ever be required as a qualification to any office or public trust under the United States.").

346. See *State Constitution*, THE RELIGIOUS LIBERTY ARCHIVE, <http://churchstatelaw.com/stateconstitutions/index.asp> (last visited Nov. 17, 2014) (providing a complete database of the religious freedom clauses of every state constitution).

347. See, e.g., E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 PENN. ST. L. REV. 485, 494 (2009).

[T]he rationales for religious toleration that emerged from sixteenth and seventeenth century England and Europe . . . formed the historical context and theoretical foundation for the American achievement of religious freedom. That achievement is the offspring of the bitter struggle against persecution and the fierce intellectual controversies that arose out of the divisions created by the Protestant Reformation.

Id.

between church and state than U.S. legal principles typically permit.³⁴⁸ While the *consideration* of other nations' religious freedom precedent and legal practice should not be banned, much of it is likely to be inapplicable to U.S. law as a consequence of the unique character of U.S. church-state relations.

If wholesale exceptionalism is unwise, but it is still *sometimes* appropriate to claim that exceptional characteristics set our laws apart, it follows that a principled basis is necessary for exercising subject-specific exceptionalist limitations on resort to foreign law. To establish such a principled framework, objective criteria for *selective* exceptionalism need to be developed. Where and how is it right and proper for U.S. exceptionalism to be invoked as a principle barring use of foreign law? Where and when should exceptionalist claims be contested? And how is a system of selective exceptionalism to be squared with a constitutional commitment to the rule of law?

These issues are not unique to the United States. Most nations with durable and stable constitutional democratic governments can make their own exceptionalist claims.³⁴⁹ Consider, for example, the constitutional democracies around the world that share elements of the U.K. common law tradition.³⁵⁰ Besides the United Kingdom, they include the United States, Canada, Australia, India, Ireland, and South Africa.³⁵¹ Thanks to their common legal heritage, these nations share many common legal structures and adhere to many common legal principles, both constitutionally and in terms of their public and private law.³⁵² They are among the nations whose laws U.S. courts would be most likely to find practically useful and needed resources.³⁵³ Yet the social, cultural, demographic, geographical, religious, and political histories of these nations are

348. Leszek Lech Garlicki, *Perspectives on Freedom of Conscience and Religion in the Jurisprudence of Constitutional Courts*, 2001 BYU L. REV. 467, 468–69 (2001) (noting that while “almost all countries formerly had a state church” in Europe, over time “the official relationship between church and state eventually broke down” although this change “does not foreclose the existence of some churches remaining closer to the state than other religious organizations or groups”).

349. Specific forms of national exceptionalism can be observed in many nations. For example, in France agencies such as the “L’Académie française” have been instituted to protect the purity of French language and culture. See ACADÉMIE FRANÇAISE, <http://www.academie-francaise.fr> (last visited Aug. 10, 2014). Germany identifies with a form of exceptionalism known as “Sonderweg” (the “special path” of the German nation See John R. Hinde, *Sonderweg (Special Path)*, in MODERN GERMANY: AN ENCYCLOPEDIA OF HISTORY, PEOPLE AND CULTURE 1871–1990 934–35 (Dieter K. Buse and Juergen Doerr 1998). Japan exhibits a form of national exceptionalism called “Nihonjinron,” which is essentially a comprehensive view on Japanese cultural identity. Suzanne M. Sable, *Pride Prejudice, and Japan’s Unified State*, 11 UDC L. REV. 71, 71 (2008).

350. See, e.g., *The Common Law and Civil Traditions*, UNIV. OF CAL., BERKELEY, SCH. OF LAW (BOALT HALL), <https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html>.

351. *The World Factbook: Field Listing: Legal System*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html>.

352. See *id.*

353. E.g., *The Common Law and Civil Traditions*, *supra* note 350; *The World Factbook: Field Listing: Legal System*, *supra* note 351.

vitaly different.³⁵⁴ In each instance, those differences have contributed to specific differences in law that set each nation apart from the others in legally important ways.³⁵⁵ While the courts of many of these nations seem less troubled than the U.S. Supreme Court about the propriety of consulting outside legal sources,³⁵⁶ they still must decide whether, when, where, and how to set appropriate limits on the use and influence of foreign or international judgments, in the name of preserving essential elements of domestic law that are grounded on exceptional national experience.³⁵⁷

354. Cf. *The World Factbook: Field Listing: Legal System*, *supra* note 351.

355. Cf. *id.*

356. The Hon. Michael Kirby AC CMG, *Constitutional Law and International Law: National Exceptionalism and the Democratic Deficit?*, 98 GEO. L.J. 433, 435–36 (2010).

In some countries with constitutional documents more recent than those of the United States or Australia, provisions have been incorporated that expressly enjoin the local courts, with constitutional authority, to pay regard to international law in discharging their municipal functions. Thus the Indian Constitution in Article 51(c) requires the State to endeavour to ‘foster respect for international law.’ The South African Constitution uses somewhat stronger terms. Both in its interim form of 1993 and in its post-apartheid provisions of 1996, it adopts an internationalist methodology. Section 39(1) specifically requires the Constitutional Court of South Africa to have regard for international law when giving meaning to the South African Bill of Rights. Moreover, in other matters, the same subsection provides that the court ‘may consider foreign law.’

Id.; Adam Liptak, *U.S. Supreme Court’s Global Influence is Waning*, N.Y. TIMES (Sept. 17, 2008), <http://www.nytimes.com/2008/09/17/world/americas/17iht-18legal.16249317.html?pagewanted=all>

(“American constitutional law has been cited and discussed in countless decisions of courts in Australia, Canada, Germany, India, Israel, Japan, New Zealand, South Africa and elsewhere.”); D. M. Davis, *Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience*, 1 INT’L J. CONST. L. 181, 186–88 (2003) (noting that the recently developed South African Constitution contains numerous provisions and rights modeled after or copied from the constitutions of the United States, Canada, Germany, and Malaysia).

357. Because they are less resistant to consideration and discussion of foreign precedent, decisions of constitutional courts outside the United States have some experience in weighing the relevance of foreign precedent. For this reason, they are a potential source for developing principles guiding selective exceptionalism. See *Truth About Motorways Pty. Ltd. v. Macquarie Infrastructure Inv. Mgmt. Ltd.* (2000) HCA 11, para. 32–33 (Austl.) (looking to U.S. Supreme Court cases to resolve a question of standing under the Australian Constitution); *Austl. Conservation Found. v. The Commonwealth* (1980) 146 C.L.R. 493, para. 20 (Austl.) (discussing and analyzing major U.S. Supreme Court cases on standing); *Amalgamated Soc’y of Eng’rs v. Adelaide S.S. Co. Ltd.* (1920) 28 C.L.R. 129, 146–48 (Austl.) (noting that the differences between the foundations and history of Australia and the United States make reliance on U.S. federalism cases futile); *State v. Makwanyane*, 1995 (3) SA 391 (CC) at para. 56 (S. Afr.).

The United States jurisprudence has not resolved the dilemma arising from the fact that the Constitution prohibits cruel and unusual punishments, but . . . contemplates that there will be capital punishment . . . The difficulties that have been experienced in following this path . . . persuade me that we should not follow this route.

Id.; H CJ 201/09 *Physicians for Human Rights v. Prime Minister of Isr.* [2009] para. 27–29 (Isr.) (holding, after examining the steps taken by the Israeli Defense Forces during a large-scale military operation in the Gaza Strip, that the IDF had complied with international law); *R. v. Hape*, [2007]

This Article does not pretend to offer a thoroughly worked out set of answers to these questions. What it does present are some working hypotheses that are intended to suggest the direction that development of a mature theory of selective exceptionalism ought to take.

A. The Contrast between Wholesale and Selective Exceptionalism

The chief flaw in the current round of AFIL statutes and proposals is the attempt many of them make to block *all*, or nearly all, access to foreign or international law within the legal domain of state adjudication, without regard to degrees of potential relevance. But rejection of such wholesale exceptionalism does not require rejection of a more selective approach. Legal exception is not always justified, but it is appropriate in some, perhaps even many, cases. Instead of a broad proscription on consideration of any foreign or international law, what is needed is a process to determine on an issue-by-issue level what foreign and international law is relevant, and what is not.

Indeed, wholesale and selective exceptionalism are based on diametrically different perspectives toward foreign and international law.³⁵⁸ By categorically denying the relevance of all foreign and international material from particular jurisdictions, the wholesale approach actively precludes *any* consideration of foreign sources.³⁵⁹ In contrast, the selective version actively invites and even potentially necessitates consideration of foreign and international law. This difference in perspective arises because under a selective approach, it is not possible to decide whether or not foreign or international legal sources are relevant without first determining what it is they say, whether what they say bears on the issues in the legal proceeding or dispute, and if so in what ways.³⁶⁰

2 S.C.R. 292, 313–16 (Can.) (reaffirming that rules of international law have force of law in Canada).

358. See *supra* text accompanying notes 1-70..

359. *Id.*

360. A selective approach is visible in many foreign judicial systems. See, e.g., H CJ 7957/04 Mara'abe v. Prime Minister of Isr., 106(2) PD 201, 20-21 [2005] (Isr.) (stating, in a decision considering the legitimacy of the separation wall between Israel and the West Bank:

[W]e need not, in the framework of the petition before us, take a position regarding the force of the international conventions on human rights in the *area*. Nor shall we examine the interrelationship between international humanitarian law and international law on human rights . . . However, we shall assume – without deciding the matter – that the international conventions on human rights apply in the area.

Id.; Al Kateb v. Goodwin, (2004) HCA 37, para. 62–70 (Austl.) (featuring debate about role of international law in Australian constitutional interpretation); Khumalo v. Holomisa 2002 (5) S.A. 401 (CC), at para. 35–40 (S. Afr.) (exploring conflicts between defamation cases in Canada, Germany, Australia, and the United States to analyze whether an action for defamation requires a showing that the statement was false); State v. Makwanyane, 1995 (3) S.A. 391 (CC) para. 38, 40, 60, 151 (S. Afr.) (declaring the death penalty unconstitutional in South Africa after considering the laws of numerous nations in its rationale); State v. Williams, 1995 (3) S.A. 362 (CC) para. 32–33, 96 (S. Afr.) (holding that juvenile whipping has been characterized throughout the world as a degrading and violent form of punishment and therefore abolishing the practice to fall in line with

Consequently, while wholesale exceptionalism promotes denial of foreign and international sources, selective exceptionalism promotes interaction.³⁶¹

In order to decide selectively whether foreign or international law is relevant to a legal question, one must first consider what the foreign law is, how it relates to domestic law, how it relates to the facts and issues in the case, and whether there are grounds for either bringing foreign and domestic law together or keeping them apart. One must, in other words, actively *engage* with foreign or international law, taking it into account *before* deciding whether or not it has a bearing on the domestic legal question.³⁶² In contrast, categorical across-the-board rejection of an entire body of foreign or international law prohibits even preliminary assessment of its relevance.³⁶³ In other words, wholesale exceptionalism denies the applicability of outside legal sources *ex ante*, while selective exceptionalism, when it does deny the relevance of outside sources, does so only *ex post*.³⁶⁴

The wholesale and *ex ante* character of categorical exceptionalism makes it subject to special dangers that are less salient in the selective model. Wholesale exceptionalism risks collapse into either nativist insularity or legal nationalism, or both.³⁶⁵ These dangers arise in part because a claim of national

international consensus). See generally James Allan, Grant Huscroft & Nessa Lynch, *The Citation of Overseas Authority in Rights Litigation in New Zealand: How Much Bark? How Much Bite?*, 11 OTAGO L. REV. 433, 434, 437–38 (2007); Shannon Ishiyama Smithey, *A Tool, Not a Master: The Use of Foreign Case Law in Canada and South Africa*, 34 COMP. POL. STUD. 1188, 1208–09 (2001); Lyonette Louis-Jacques, *New Rights-New Laws: Legal Information In A Changing World Wide Web*, 32 INT'L J. LEGAL INFO. 474, 474–75 (2004).

361. See *supra* text accompanying notes 1-70.

362. See Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 128 (2005) [hereinafter Jackson, *Constitutional Comparisons*] (advocating an “engagement” model of comparative constitutional law which consists of “issue-by-issue analysis and does not necessarily mean adoption, but thoughtful, well-informed consideration” of foreign law); Koh, *International Law*, *supra* note 229, at 53 (urging the development of a “transnationalist jurisprudence,” which includes “understanding and making reference to foreign constitutional precedents” as an aid to constitutional interpretation); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 195 (2003) (arguing that international dialogue proceeds through “increasingly direct interactions[,]” which “both contribute to a nascent global jurisprudence on particular issues and improve the quality of particular national decisions, sometimes by importing ideas and sometimes by insisting on an idiosyncratic national approach for specific cultural, historical, or political reasons”); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1228 (1999) (suggesting that “U.S. courts can sometimes gain insights into the appropriate interpretation of the U.S. Constitution by a cautious and careful analysis of constitutional experience elsewhere.”).

363. See *supra* note 360 and accompanying text.

364. See *supra* Section III.A. through *infra* note 369.

365. See Andrew Kohut & Bruce Stokes, *supra* note 259 (exploring the link between American exceptionalist attitudes and U.S. nationalism, as well as the negative effects these attitudes can have on an international level); Minxin Pei, *The Paradoxes of American Nationalism*, FOREIGN POL'Y (Nov. 2, 2009), <http://foreignpolicy.com/2009/11/02/the-paradoxes-of-american-nationalism/> (broadly discussing the backlash against American nationalism); Daniel R. Williams, *After the Gold Rush-Part I: Hamdi, 9/11 and the Dark Side of American Enlightenment*, 112 PENN. ST. L. REV.

exceptionalism is so easily invoked.³⁶⁶ Every nation has a unique political and cultural history.³⁶⁷ Thus, any nation, at any juncture, can assert unique historical and political experiences that allegedly distinguish it from the rest of the world.³⁶⁸ Exclusively stressing these differences tends to reinforce domestic nationalist strains of thought.³⁶⁹ Claims that “we’re different” or “our law is different” all too easily metamorphose into claims that “we’re better” or “our law is better,” which in turn reinforce nativist identity politics and a nationalist political agenda.³⁷⁰ The stress of difference also tends to promote isolation—a “do-it-ourselves” attitude about the law.³⁷¹ In the United States, this strain correlates with a national conviction of the virtues of rugged and self-reliant independence that is also deeply woven into the fabric of our national narrative.³⁷²

Yet to stress only national differences, without recognizing potential similarities with other nations, is to do justice to only one part of one’s national story. Just as there are differences with other nations that find their expression in law, there are also significant commonalities, shared legal commitments, and shared legal traditions.

Consider, for example, the United States and Australia.³⁷³ Both are constitutional democracies.³⁷⁴ Both follow a federal constitutional structure.³⁷⁵

341, 345–46 n.14 (2007) (arguing that exceptionalist attitudes have led to fevered American nationalism in the form of military aggression and disregard for the human rights of enemy combatants).

366. See, e.g., Kohut & Stokes, *supra* note 259.

367. See generally *The World Factbook: Field Listing: Legal System*, *supra* note 351.

368. See *supra* note 356.

369. See, e.g., Pei, *supra* note 365.

370. See *supra* note 365.

371. See Kohut & Stokes, *supra* note 259.

372. The first use of the term “rugged individualism” has been attributed to President Herbert Hoover in a 1928 presidential campaign speech and refers to a belief that individuals can succeed with minimal governmental aid. Herbert Hoover, Presidential Campaign Speech (Oct. 22, 1928) (transcript available at <http://www.pinzler.com/ushistory/ruggedsupp.html>); see also Roger Rosenblatt, *Essay: The Rugged Individual Rides Again*, TIME (Oct. 15, 1984), <http://www.time.com/time/magazine/article/0,9171,923739-1,00.html> (“Everyone always says that rugged individualism is the backbone, and the jawbone, of America; that a country as grand and sturdy as this could only have been built by the self-propelled and self-interested strivings of wild-eyed nonconformists, each fur-laden Daniel Boone pursuing his independent errand into the wilderness.”); Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 377 (2002) (“Unionization, of course, is a matter of collective action. The dominant American self-image, in contrast, is squarely grounded in the cult of the individual.”).

373. See generally Cheryl Saunders, *The Use and Misuse of Comparative Constitutional Law*, 13 IND. J. GLOB. LEGAL STUD. 37, 41–43 (2006) (providing a broad comparison and contrast of the American and Australian common law systems).

374. See *The World Factbook: Field Listing: Legal System*, *supra* note 351; see also Saunders, *supra* note 373, at 44–45.

375. See Saunders, *supra* note 373, at 44–45.

Both share the U.K. common law tradition, producing substantial commonality in such areas of law as torts, contracts, and property, as well as judicial process.³⁷⁶ The two nations make similar commitments to the rights of the accused, and their civil and criminal courts function in procedurally similar ways.³⁷⁷ They share many national and international human rights commitments.³⁷⁸ Yet there are also key differences.³⁷⁹ Australia is part of the British Commonwealth and recognizes the British Monarchy.³⁸⁰ Its national constitution lacks a bill of rights.³⁸¹ It follows a parliamentary governmental structure.³⁸² Its courts are much more aggressive about incorporating international law principles into domestic adjudication.³⁸³ Both nations have struggled with race relations, but in different social and historical contexts.³⁸⁴ The United States has struggled with the profound social and legal issues surrounding enslavement and racial segregation, while in Australia problems of race have been deeply intertwined with issues of aboriginal rights and culture.³⁸⁵ These are just a few of the many important legal differences between the two nations. Doubtless, those differences are reflected in important ways in their respective laws. But so are the similarities.

In comparable fashion, insisting on isolated self-sufficiency denies the emerging realities of a global economy and society that are rapidly breaking down national barriers, producing substantially increased legal interaction and legal convergence, especially in areas of corporate and commercial law.³⁸⁶

376. See *The World Factbook: Field Listing: Legal System*, *supra* note 351.

377. E.g., Saunders, *supra* note 373, at 44–45.

378. See, e.g., Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 368 (1967); International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

379. See Saunders, *supra* note 373, at 44–45.

380. *Queen and Australia*, THE BRITISH MONARCHY, <http://www.royal.gov.uk/monarchandcommonwealth/australia/australia.aspx>.

381. Saunders, *supra* note 373, at 44.

382. E.g., *id.* at 45.

383. See Saunders, *supra* note 373, at 41–42 (arguing that Australia’s common law courts more openly observe comparative law than U.S. courts); Nicholas Aroney, *Comparative Law in Australian Constitutional Jurisprudence*, 26 U. OF QUEENSL. L.J. 317, 319 (2007) (finding that the High Court of Australia is more open to looking to comparative law in its constitutional rulings than the U.S. Supreme Court).

384. *Brown v. Board of Fifty: “With an Even Hand”: A Century of Racial Segregation, 1849–1950*, LIBRARY OF CONGRESS, <https://www.loc.gov/exhibits/brown/brown-segregation.html> (hereinafter “*Brown v. Board at Fifty*”); David Hollinsworth, *Racism and Indigenous People in Australia*, 12 GLOBAL DIALOGUE (2010), <http://www.worlddialogue.org/content.php?id=484>.

385. *Brown v. Board at Fifty*, *supra* note 384; Hollinsworth, *supra* note 384.

386. See Emanuela Carbonara & Francesco Parisi, *The Paradox of Legal Harmonization*, 132 PUB. CHOICE 367, 368–69 (2007) (discussing the various manners in which nations can harmonize

Wholesale *ex ante* exceptionalism exaggerates the differences without adequately valuing the similarities, intersections, and convergences.³⁸⁷ By doing so, it artificially distorts the collective national legal narrative.³⁸⁸ It does so, moreover, in ways that press toward legal isolation from the rest of the world, or support an impulse to dominate it by imposing domestic legal rules on all actors and transactions.³⁸⁹ As worldwide political and military lessons from the last century demonstrate, if carried to extremes either tendency risks profound negative consequences.³⁹⁰

Wholesale exceptionalism also fails to account for the increasingly wide turf of legal common ground that most modern constitutional democracies share,³⁹¹ as well as the breadth of legal internationalization that has occurred in U.S. domestic law as a necessary consequence of economic globalization.³⁹² As a functional matter, due to globalization of business and economic behavior, it is

their laws with other nations in order to better accommodate international commerce); Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. & POL'Y 1, 9–10 (1993).

Such recent developments as . . . the increasing integration of national economies into a global economy have dramatically increased the pressure on international law to respond to the expansion of international legal issues and actors. These developments challenge international law to either adapt its key principles, such as sovereignty, to these new realities, or to develop new principles that more adequately reflect the world in which international law must operate.

Id.

387. See, e.g., MICHAEL BURLEIGH, *THE THIRD REICH: A NEW HISTORY* 12 (Hill & Wang 2000).

388. E.g., *id.*

389. E.g., *id.*

390. See, e.g., *id.* (discussing the role of isolationism and nationalism in contributing to WWI and WWII, specifically in Germany).

391. See generally KONRAD ZWEIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 39 (Tony Weir trans., 3d rev. ed. 1998) (noting the basic rule of comparativism is that “different legal systems give the same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure, and style of operation”); Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 254 (2001) (“A number of constitutional systems around the world now have judicially enforceable protections of freedom of expression, equality of treatment, human liberty, and freedom from inhuman punishments.”).

392. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Apr. 15, 1994, Marrakesh Declaration, Annex 1C, 1869 U.N.T.S. 299 (providing basic protections for intellectual property in an international context); Convention on Nuclear Safety, June 17, 1994, 1963 U.N.T.S. 293, 317; Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol, Dec. 10, 1997, 37 I.L.M. 22 (1998) (committing to the reduction of greenhouse gases); North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 8, 1993, 107 Stat. 2057 (creating a trilateral trade bloc in North America); Marrakesh Declaration: Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 (regulating the rules of international trade); United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 59.

increasingly difficult to discern where international or foreign law ends and domestic law begins.

For example, imagine a legal dispute in Oklahoma over a contract between a U.S. firm and an Australian firm that contains a choice of law clause electing Australian contract law. Are the interpretation and enforcement of that clause by a U.S. court expressions of the U.S. legal principle favoring contractual choice of law,³⁹³ or do they involve the sort of resort to foreign law that an AFIL statute renders impermissible? Does the answer depend on whether the Australian law in question has a similar content to U.S. law because it derives from a similar common law source? What about a contract that refers to industrial or labor standards set by an international body, or that contains promises to adhere to the requirements of an international environmental treaty? Can local courts interpret and enforce these contract provisions? What about a tort action between an Oklahoma resident and an Australian party in which, because of the location of the tort, Oklahoma choice of law principles would ordinarily lead to the application of Australian tort law? Is following such a choice of law rule forbidden? Courts in states with AFIL statutes will face the unenviable task of finding answers to such perplexing questions.³⁹⁴ Depending on what those answers are, moreover, business entities and potential litigants may find it prudent to find ways of avoiding, prohibiting, or circumventing access to those courts. One possible result could be the diminution of transnational business and commerce in Oklahoma, to the economic detriment of the people in that state.

While the challenge of drawing the line between domestic and foreign or international law may be less severe in the constitutional realm, blocking access to foreign sources partly misapprehends the character of constitutional inquiry.³⁹⁵ The challenge of constitutional interpretation often involves determining how a generally shared and fairly uniformly articulated constitutional norm, such as equality, freedom of expression, or fair process, should apply to an emergent and previously unfamiliar or unexamined situation.³⁹⁶ Where the underlying constitutional norm is shared and has been

393. See generally RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6 (AM. LAW. INST. 1971).

394. E.g., Volokh, *Foreign Law*, *supra* note 188, at 235. A related issue is whether U.S. federal courts, hearing cases under federal diversity jurisdiction, must also refrain from any reliance on foreign law in cases to which the law of Oklahoma applies. Although an Oklahoma AFIL statute clearly would not bind federal courts directly, the federal courts' obligation to conform the substantive rules of decision under federal diversity jurisdiction to those of applicable state law might require a federal court to observe the state's dictates regarding foreign law when sitting in diversity.

395. See generally Taavi Annus, *Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments*, 14 DUKE J. OF COMP. & INT'L L. 301, 303–04 (2004); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 820–21 (1999).

396. See generally Annus, *supra* note 395, at 303–04; Choudhry, *supra* note 395, at 820–21.

articulated in different legal systems through comparable legal standards, differences in national experience that concern the formation or adoption of the norm are relatively unlikely to produce national differences in interpretation.³⁹⁷ The nations that share commitment to the norm all came to the same juncture, even if by different roads.³⁹⁸

Rather, legal differences between nations are more likely to stem from differences in the relative intensity of national commitment to the shared norm, or from differences in contemporary social or cultural context that affect the expression of the norm in action.³⁹⁹ The relevance of exceptionalism depends on its capacity to illuminate these differences in the contemporary political, legal, or cultural settings that distinguish one national experience from another and thus affect the operative scope or application of the shared principle in a particular context.⁴⁰⁰ Where such differences can be demonstrated, an appeal to exceptionalism is available to support an alternative legal outcome.⁴⁰¹ But where the norms are common, the intensity of commitment to them is roughly the same, and the factual and cultural circumstances in which the issues arise are not demonstrably different in ways that matter, a foreign resolution of the issue ought to be relevant as a potential guide for analysis of the common legal problem.⁴⁰²

The *relevance* of the foreign principle, however, does not equate with its actual *application*.⁴⁰³ When a domestic U.S. court considers a foreign principle or decision, finds it relevant, determines that it is at least partly persuasive, and incorporates that insight into the resolution of the legal dispute before it, the result is not an application of foreign law, or the delegation of the outcome to a

397. See generally Annus, *supra* note 395, at 303–04; Choudhry, *supra* note 395, at 820–21.

398. See generally Annus, *supra* note 395; Choudhry, *supra* note 395 (both providing discussions on international legal norms creation).

399. See generally Annus, *supra* note 395, at 348 (“Interpreting broad constitutional principles or balancing constitutional values needs to take into account the particular cultural and social setting of the court more than uncertain notions of ‘international consensus.’”); Choudhry, *supra* note 395, at 825–26 (1999) (asserting that there are three kinds of comparative constitutional interpretation: universalist, which is premised on the assumption that constitutional principles arise from shared universal norms; dialogical, which focuses on assumptions underlying constitutional jurisprudence when determining whether or not to adopt the reasoning of foreign courts; and genealogical, which is concerned with similarities in the historical backgrounds of constitutions).

400. See Annus, *supra* note 395, at 348–49.

401. See, e.g., *id.*

402. Examples of this sort of selective process abound in foreign courts. See, e.g., *Joy v. Fed. Territory Islamic Religious Council*, [2007] 1 L.R.C. 1, 1–2 (Malaysia); *Republic v. Fast Track High Court, Accra, ex parte Comm’n on Human Rts. & Admin. Justice*, [2009] 1 L.R.C. 44, 45 (Ghana) (citing a variety of international legal precedents in a case determining the jurisdiction of the High Court of Ghana, including nine citations from the UK, two from South Africa, two from Canada, and one from the US); see also Kirby, *supra* note 356, at 435–36 (noting the wealth of reference to the law of other nations in cases from national courts engaged in comparative legal analysis).

403. See, e.g., Volokh, *Foreign Law*, *supra* note 188, at 228–29.

foreign legal system.⁴⁰⁴ To the contrary, it is the *U.S.* court that makes the decision, and it implements it as a matter of domestic *U.S.* law.⁴⁰⁵ Foreign law may have played a role in the decisional process, but the control of that process rested at all times with the domestic *U.S.* court, which exercised its own legal discretion and judgment in deciding how to resolve the matter in question.⁴⁰⁶

This is particularly true in situations where nations have joined in common commitments to international treaties or conventions that embody a particular set of legal principles. In those circumstances, typically the popularly elected democratic arms of domestic government have formally acknowledged common legal ground with other nations on the matters that are the subject of the convention or treaty, and have committed their domestic governments to adherence to the common principles.⁴⁰⁷ By doing so, they have given formal domestic legal recognition to the foundations for comparative inquiry.⁴⁰⁸ What those principles mean in the law of one adhering nation-state should, therefore, have relevance for the understanding of what they mean in another.⁴⁰⁹

For these reasons, among others, the objections to wholesale exceptionalism do not apply to a selective approach.⁴¹⁰ Wholesale exceptionalism is neither desirable nor particularly workable, and it risks certain pernicious consequences.⁴¹¹ By setting a conclusive presumption against the use of foreign or international law, it goes way too far. In contrast, selective exceptionalism, through its active engagement with foreign and international sources, provides a cogent and reasoned means for discerning the circumstances in which foreign and international law are appropriately relevant, as well as the circumstances in which they are not.⁴¹²

B. Standards for Selective Exceptionalism

If selective exceptionalism is to comport with the rule of law, we need at least a provisional set of relatively identifiable, objective, and consistently applicable guidelines for determining when it is appropriately invoked. While it may not be possible to offer a comprehensive set of criteria, there are at least four potential sources from which it is possible to generate appropriate guidelines for

404. *See id.*

405. *See, e.g.,* Rahdert *supra* note 44, at 606–07; Volokh, *Foreign Law, supra* note 188, at 228–29 (elaborating on the distinction between looking to foreign law in a decision and applying that foreign law over American law).

406. *See* Volokh, *Foreign Law, supra* note 188, at 228–29.

407. *See supra* note 392.

408. *See id.*

409. *See, e.g.,* Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought?*, 49 *AM. J. COMP. L.* 429, 430 (2001) (suggesting that the changing nature of international intellectual property litigation “may herald a greater role for comparative thought than intellectual property litigation would heretofore have provided”).

410. *See supra* notes 365–72 and accompanying text.

411. *See, e.g., id.*

412. *See, e.g., id.*

selective exception: legal text, governmental structure, political institutions, and legal tradition.

1. Legal Text

The most immediate and obvious guide to selective exceptionalism is constitutional or statutory text. Where a domestic constitutional or statutory text specifically declares its exceptional character, or where by its terms it differs in some substantial and legally significant way from other constitutional or statutory texts elsewhere on a commonly shared legal issue, that textual difference is a potentially potent signal of an exceptionalist position.⁴¹³ This is particularly true if the text directly refers to some specific ground of exceptional national experience, or if its historical milieu shows that its peculiarities of language respond directly to such a national experience.⁴¹⁴ Courts that openly engage in comparative legal analysis typically exercise great care in exploring textual differences in constitutional or statutory language and often rely on those differences as a basis for distinguishing differences in legal interpretation.⁴¹⁵ Particularly where those differences can be tied to deliberate constitutional or legislative choices to diverge from an established international pattern, textual variation of this sort can be a powerful indicator of exceptionalism.

An example in the U.S. system might well be the Second Amendment.⁴¹⁶ In *District of Columbia v. Heller*,⁴¹⁷ each of the two principal competing interpretations of the Second Amendment treated it as deeply rooted in the U.S. historical experience.⁴¹⁸ The majority read the language of the Amendment's operative clause as triggering a distinct historically rooted U.S. right to possess and carry ("keep and bear") arms for purposes of self-defense and defense of one's property.⁴¹⁹ The principal dissent read the language of the Amendment's prefatory clause ("well-regulated militia") as referring to the unique U.S. practice, during the early Republic, of allowing individuals to maintain arms for purposes of military service.⁴²⁰ In both views, the language of the Amendment drew upon U.S. practices and customs regarding personal use of arms that arguably distinguished U.S. constitutional law on the question from the legal rules and practices of other nations.⁴²¹

413. Cf. *State v. Makwanyane*, 1995 (3) SALR 391 (CC) at para. 36.

414. Cf. *id.*

415. See *id.* (examining linguistic differences in foreign constitutional laws to determine potential relevance to constitutionality of death penalty in South Africa).

416. U.S. CONST. amend. II.

417. 554 U.S. 570 (2008).

418. Compare *id.* at 595 (majority opinion), with *id.* at 651–52 (Stevens, J., dissenting).

419. *Id.* at 595 (majority opinion) (concluding "on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms").

420. *Id.* at 651 (Stevens, J., dissenting) (asserting that "[w]hen each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia").

421. See *id.* at 593, 637.

In this regard, the process used in Oklahoma and elsewhere to express the state's exceptionalist sentiments cannot be faulted. The best and most effective way to establish an exceptionalist posture is to signal it directly in the language of the relevant legal text, which is precisely what Oklahoma and other AFIL states have done. The problem with these measures, aside from attempted religious exceptionalism, is the categorical character of foreign law preclusion, not the fact that they use explicit language to establish an exceptionalist norm. If a political community wants to set itself apart on a matter of law, it is best to be overt about it. The clearer the textual difference, the better the case is for conscious legal differentiation in an exceptional direction.

Indeed, the capacity for explicit differentiation through constitutional or statutory text is a strong antidote to the argument that any resort to foreign or international law creates a "democratic deficit."⁴²² The gist of that argument is that reliance on foreign law surrenders decisional authority to the foreign or international source, which is not accountable to the people through democratic processes.⁴²³ As long as judicial determinations that rely on foreign law are subject to explicit textual correction through a democratic legislative or constitutional process, there is no greater deficit in the case of using foreign or international law than there is in any other kind of judicial decision.⁴²⁴

422. See Kirby, *supra* note 356, at 454–55.

There remains, however, the democratic deficit. This is an objection common to the hesitation of U.S. and Australian jurists when analogies to the resolution of a municipal law problem are propounded with reference to the principles of foreign or international law as expressed in courts, tribunals, and other bodies outside the judicature of the nation-state.

Id.

423. See John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1225 (2007).

Federal laws, whether they regulate citizens and states, or constrain the power that our own executive actors would otherwise enjoy, go through an arduous process of bicameralism and presentment that offers some guarantee of democratic control. By contrast, international law has a severe democracy deficit. The more sweeping the claim of authority for international law, the more pronounced the democracy deficit and the more dubious the assertion that customary international law should override domestic law.

Id.

424. See Harold Hongju Koh, *A Community of Reason and Rights*, 77 FORDHAM L. REV. 583, 591 (2008).

[T]he argument goes, if judges place their fundamental values into the Constitution through judicial interpretation, they effectively override the will of elected officials. But there is a democratic deficit that judges face whether they are citing to international or foreign law or whether they are just interpreting the Equal Protection Clause of the Constitution to say that equal treatment does not mean separate but equal.

Id.

2. Legal Structure

A second, more diffuse and hence more contestable, guide for selective exceptionalism is legal structure. Any comparative law survey discloses areas of both similarity and substantial difference in governmental structure among different national governing systems.⁴²⁵ For example, there are many federalist constitutional systems around the world, but examination reveals a fairly wide range of structural differences in the construction of nation-state or nation-province relations.⁴²⁶ Typically, those differences grow out of important differences in culture and history that affect both the way nation and state authorities are defined and how they functionally interact.⁴²⁷ Thus, for example, U.S. federalism reflects the historical fact that the 13 original states had separate existence and possessed distinct sovereign identity before national union under first the Articles of Confederation, and then the U.S. Constitution, occurred; while Canadian federalism reflects, among other things, the distinct legal and cultural traditions of its Anglophone and Francophone provinces.⁴²⁸ Although one should not entirely rule out the possibility of shared ground over the structure and function of federalism, legal decisions that are grounded in federalism should leave considerable room for national divergence that reflects the peculiarities of a particular society's view of the appropriate vertical distribution of governmental powers.⁴²⁹

3. Political Institutions

A third possible source for selective exception is the identification of unique political institutions that perform distinctive governmental functions within a particular governmental system. Where a nation's legal system includes an institution that other governments do not share, the operation of that institution will necessarily take on an exceptional character. An example in the United

425. See Lee Peoples, *Comparative Law Methodology and Sources*, OKLA. CITY UNIV. LAW LIBR. (2005), www2.okcu.edu/law/lib/pdfs/guide_comparative.pdf (listing the several types of comparative studies employed).

426. See generally Craig Volden, *Origin, Operation, and Significance: The Federalism of William H. Riker*, 34 PUBLIUS: J. OF FEDERALISM, 89, 90-91 (2004); Daniel J. Elazar, *Contrasting Unity and Federal Systems*, 18 INT'L POL. SCI. REV. 237, 238-39 (1997).

427. See Volden, *supra* note 426, at 91-95 (describing the different ways that federalist systems originate).

428. Ellis Katz, *American Federalism, Past, Present and Future*, U.S. INFORMATION SERVICE'S ELECTRONIC J. (April 1997), <http://www.ucla.edu/~ras2777/amgov/federalism.html>; Jay Makarenko, *Federalism in Canada: Basic Framework and Operation*, MAPLELEAFWEB (Jan. 11, 2008), <http://mapleleafweb.com/features/federalism-canada-basic-framework-and-operation>.

429. The tendency of federalist structures to reflect unique historical and cultural patterns may lie behind the Supreme Court's refusal, in *Printz v. United States*, to countenance the comparative arguments made by Justice Breyer in his dissent regarding patterns of vertical law enforcement integration followed in other federal systems. 521 U.S. 898, 921 n.11, 976-78 (1997) (Breyer, J., dissenting).

States is the Electoral College, the unusual, and rather arcane, system that is used to select the President.⁴³⁰ It is doubtful that there are any textual or structural cognates in other constitutional democracies that would provide useful grounds for comparative reasoning about the formation and operation of the Electoral College, and it is doubtful that it would be appropriate, or for that matter, particularly helpful, for a U.S. court to look abroad for guidance in interpreting the constitutional rules governing Electoral College procedures. The United States might well look to foreign or international precedent in deciding whether and how to *amend* the Electoral College provisions of our constitution, but as long as they are there, figuring out how they work is necessarily an exclusive domestic undertaking.⁴³¹

4. *Legal Tradition*

Once one presses beyond text, structure, and unique political institutions, the grounds for selective exceptionalism become far more difficult to articulate, and the dangers of arbitrary or result-oriented exceptionalism increase substantially. Yet there is probably a fourth basis for legitimate exceptionalist claims that is grounded in a longstanding distinctive legal tradition and deeply rooted in a unique national culture. This option, however, must be narrowly crafted in order to protect against the dangers of overly easy and overly inclusive assertion. This Article suggests six limiting criteria. At a minimum, the tradition should be one which produces: (1) a clearly articulated exceptional principle; (2) that is reflected in a broad array of legal sources; (3) over a substantial period of national history; (4) showing a demonstrably unique response; (5) to a particular social issue; and (6) one that is deeply rooted in individuating national experience. This should not be an easy standard to satisfy, and the burden should be on the party or court relying on exceptionalism to demonstrate its existence.

One example in the United States would be the tradition of separation of church and state referred to above.⁴³² The concept of religious non-establishment is by no means unique to the United States. Many other constitutional democracies prohibit the state from legislating on religious matters or overtly preferring a particular religious denomination as the established church.⁴³³ Thus there is little that is textually or structurally distinct

430. AFTER THE PEOPLE VOTE: STEPS IN CHOOSING THE PRESIDENT 10–15 (American Enterprise Institute for Public Policy Research, Walter Berns, ed. 1983).

431. *Cf.* *Bush v. Gore*, 531 U.S. 98, 112–14 (2000) (per curiam) (Rehnquist, C.J., concurring) (discussing constitutional and statutory rules governing operation of Electoral College).

432. *See, e.g.,* *McCreary City v. ACLU*, 545 U.S. 844, 860 (2005); *Larson v. Valente*, 456 U.S. 228, 244–45 (1982).

433. *See, e.g.,* AUSTL. CONST. s. 116 (“The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth”); Art. 7 Costituzione [Cost.] (It.) (“The State and the Catholic Church are independent and sovereign, each within its own sphere.”); CONST. (1987), art. III, sec. 5 (Phil.) (“No law shall be made respecting an establishment of religion, or prohibiting the

about the U.S. constitutional command. Nevertheless, for the reasons alluded to above, the U.S. commitment to church-state separation is uniquely strong, and it has produced a jurisprudential tradition that arguably stands apart from law on similar questions in other countries. It readily satisfies the six criteria for exception advanced above.⁴³⁴

Another example might be U.S. attitudes toward personal bodily autonomy, which support a particularly strong notion of the rights of individuals to make basic medical decisions, including refusal of medically necessary forms of treatment.⁴³⁵ The right has an acknowledged constitutional dimension,⁴³⁶ but it also has roots in an exceptionally strong commitment to common-law principles of personal bodily autonomy and self-determination.⁴³⁷ It may also reflect deep-seated U.S. libertarian instincts about the limits of governmental competence to make highly personal health care decisions.⁴³⁸ While some other constitutional democracies might share similar commitments, there are good reasons to believe that U.S. law on this subject has developed, and will continue to develop, a distinctly U.S. trajectory that allows for greater personal bodily autonomy than many other legal systems would be willing to tolerate.⁴³⁹ Here, nations may

free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights"); TÜRKİYE CUMHURİYETİ ANAYASASI MADDE 10 (Turkey) (the founding principles of the Republic of Turkey are secularism, social equality, and equality before law).

434. See *supra* Section III.B.4.

435. Mary Ann Baily, *Futility, Autonomy, and Cost in End-of-Life Care*, 39 J.L. MED. & ETHICS 172, 172 (2011) ("In decisions to forego medical treatment, autonomy is basic. A mentally competent adult patient has a close to absolute moral and legal right to refuse treatment").

436. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (assuming that principles of due process extend to medical patients, an autonomous right to refuse medical treatment exists).

437. *Id.* at 269.

Before the turn of the century, this Court observed that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Id. (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

438. E.g., Baily, *supra* note 435, at 172–73.

439. See Naoki Kanaboshi, *Competent Persons' Constitutional Right to Refuse Medical Treatment in the U.S. and Japan: Application to Japanese Law*, 25 PENN. ST. INT'L L. REV. 5, 6 (2006) (exploring the scope of the right to refuse medical treatment in the United States and arguing that, despite contrary current interpretations of Japanese law, the principles applied in the United States should be incorporated into Japanese law and protected by the Japanese Constitution.). Other nations have pressed further than the United States on some issues; see, e.g., Nurit Lev, *The Legalization of Euthanasia: The Right to Die or the Duty to Die?*, 19 SUFFOLK TRANSNAT'L L. REV. 297, 297 (1995) (comparing "judicial and legislative attempts to define the legal status of euthanasia in the Netherlands, the first nation to sanction euthanasia, with the United States where momentum is growing for the legislation of physician-assisted suicide."); see also Jennifer Fischer, *A Comparative Look at the Right to Refuse Treatment for Involuntarily Hospitalized Persons with a Mental Illness*, 29 HASTINGS INT'L & COMP. L. REV. 153, 154 (comparing "how various countries and regions around the world have come out on the debate").

share common commitments, but in the language of the European courts there must be a fairly wide “margin of appreciation” that allows divergence in the legal expression of a shared norm.⁴⁴⁰ Where a nation finds itself at one end or another of the spectrum, it may conclude with some justice that the laws and legal decisions of other nations are unlikely to be of much use.

Consideration of exceptionalism based on legal tradition, however, highlights one of the key differences between selective and categorical exceptionalism. Under a selective approach, one must make a specific affirmative case for exception, and one must press the exception only as far as that case warrants. Thus, in the example of medical decision-making, the extent to which foreign or international law would be relevant should depend on an assessment of the relative strength or weakness of another legal system’s commitment to autonomous medical decision-making in the context of its own system for providing health care. The same would be true for matters of church-state relations. Some foreign sources might be excluded from consideration, but not necessarily all. Some specific issues might be stronger candidates for exceptional treatment than others. Under this approach, exceptionalism does not rule out consideration of foreign or international sources, but it does potentially limit which sources may be used, the extent to which they can be used, and the purposes for which their use is appropriate.

C. The Values of Dialogue and Engagement

What links all four proposed sources for selective exceptionalism, and distinguishes them all from the wholesale sort of exceptionalism reflected in most AFIL measures, is their collective commitment to dialogic interaction with foreign and international sources. A selective approach does not reject foreign or international sources outright, but rather requires them to be considered, at least at a preliminary level, in order to determine whether they have relevance and, if so, to what degree. Selectivity also requires making an affirmative case for deliberate differentiation between domestic and international or foreign norms, principles, and rules. Selectivity, in other words, invites edifying discourse on the relation between domestic law and potential foreign or international counterparts. It engages with foreign law, without necessarily accepting the relevance of foreign law in all cases. It burdens a domestic adjudicator with the symmetrical responsibility to articulate a basis for either considering foreign and international sources, or excluding them. In either

440. The “margin of appreciation” doctrine, articulated in *Handyside v. U.K.*, 24 Eur. Ct. H. R. (ser. A) para. 48 (1976), allows the European Court of Human Rights to take into account varying interpretations of the European Convention on Human Rights in different member states due to cultural, historic and philosophical differences among member states. See Emily Wada, *A Pretty Picture: The Margin of Appreciation and the Right to Assisted Suicide*, 27 LOY. L.A. INT’L & COMP. L. REV. 275 (discussing implicit use of the margin of appreciation in *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155 which upheld states’ authority to prohibit assisted suicide).

direction, this sort of dialogic engagement can be both edifying and illuminating for the development of domestic law.⁴⁴¹

IV. CONCLUSION

Ultimately, AFIL statutes are unlikely to have much success in stemming the tide of legal globalization. As the twenty-first century unfolds, patterns of economic and social interaction across national boundaries will force progressive internationalization and globalization of law.⁴⁴² If state courts are obliged to remain inhospitable to those developments, the parties whose economic and social needs dictate advancing globalization will find ways to navigate around the shoals of the AFIL restrictions. The current spate of AFIL proposals may well reflect a kind of political nostalgia for a simpler time when sources of law were less complicated and courts did not need to think beyond local boundaries on any but a handful of legal questions. As noted above, that nostalgia may rest partly on a misreading of legal history.⁴⁴³ But even if things were once that way, the AFIL movement is inconsistent with a present and future in which even the most ordinary kinds of legal practice are acquiring globalized character.⁴⁴⁴ In the globalized legal world that is upon us, there is still

441. Jackson, *supra* note 362, at 114.

[C]onstitutional law can be understood as a site of engagement between domestic law and international or foreign legal sources and practices. On this view, the constitution's interpreters do not treat foreign or international material as binding, or as presumptively to be followed. But neither do they put on blinders that exclude foreign legal sources and experience. Transnational sources are seen as interlocutors, offering a way of testing understanding of one's own traditions by examining them in the reflection of others.'

Id.; Koh, *supra* note 229, at 56.

Through a time-honored dialogic process, litigants, activists, publicists, and academic commentators seek to inform, influence, and improve this kind of judicial decision making. . . . it is precisely through this transnational legal process that interlinked rules of domestic and international law develop, and that interlinked processes of domestic and international compliance come about.

Id.; Choudhry *supra* note 395, at 837.

Comprehending a foreign legal system as being organized around a core set of normative and factual assumptions leads to a deeper understanding of that system. But it also furthers legal self-understanding, because it invites the comparative lawyer, or the judge, to compare those assumptions against the assumptions that legal doctrine in her own system both reflects and constitutes.

Id.

442. See Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. INT'L L.J. 985, 988 (2009) (concluding that, "because the globalization of domestic constitutional law is inevitable, notions of separation of powers – or of legislative supremacy qualified by the existence of judicial review – will need to accommodate themselves to that globalization."); David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277 (2008); Martin Shapiro, *The Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37 (1993).

443. See *supra* note 95.

444. Susan L. DeJarnatt & Mark C. Rahdert, *Preparing for the Globalized Law Practice: The Need to Include International and Comparative Law in the Legal Writing Curriculum*, Legal Studies Research Paper Series, Research Paper No. 2010-10, 23–24 (2010) (citing survey of

substantial room for a carefully calibrated and articulated selective legal exceptionalism of the kind this Article has described.⁴⁴⁵ At least there should be some room for selective exceptionalism, because there is value in national legal diversity. But efforts at categorical exceptionalism like the Oklahoma SOS Amendment and its AFIL progeny are ultimately undesirable, artificial barriers to proper selective resort to the teachings of international and foreign law.

Philadelphia Bar Association members in which 67.5% of respondents “reported that they had worked on a legal matter that required them to know something about foreign and/or international law.”).

445. *See generally* Koh, *supra* note 229.

