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OKLAHOMA'S SAVE OUR STATE AMENDMENT AND THE CONFLICT OF LAWS

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Oklahoma sits on the edge of a conflict of laws convulsion.

In November 2010, Oklahoma voters adopted the "Save Our State Amendment," which would add the following language to Article VII, section 1 of the Oklahoma Constitution:

> 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.[1]

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1. Save Our State Amendment, H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010), *invalidated by* Awad v. Ziriax, 670 P.3d 1111 (10th Cir. 2012) [hereinafter Save Our State Amendment]; *see also Summary Results: General Election – November 2, 2010*, OKLA. STATE ELECTION BD., http://www.ok.gov/elections/support/10gen.html (last visited Sept. 19, 2011).

Within weeks, a federal district court entered a preliminary injunction against certification of the election results for the amendment.[2] The only substantive issue before the court was whether the amendment's references to "Sharia Law" violate the Establishment and Free Exercise Clauses of the First Amendment to the U.S. Constitution. The district court held that the plaintiffs had established a strong likelihood of success on both claims.[3] The Tenth Circuit affirmed the district court's finding with respect to the Establishment Clause and upheld the preliminary injunction on the same basis, without considering the Free Exercise Clause claim.[4]

As this article goes to press, the case is back in district court. An amended complaint has brought in new plaintiffs and added two new claims.[5] The first new claim contends that the Save Our State Amendment violates due process and equal protection principles—specifically the fundamental right to marry—by creating a difference in status between persons married in another country and persons "who are married ceremonially in another state or in Oklahoma."[6] The second new claim asserts a violation of the Supremacy Clause because people who are married in another country will not be able to invoke international conventions or customary international law to gain recognition of their marriages.[7] The amended complaint also asserts that the "Sharia Law" provisions of the Save Our State Amendment are not severable from the rest of the amendment.[8] Defendants have filed an answer that denies all claims for relief, and they have specifically asserted that the amendment is severable.[9]

Most of the reaction to the Save Our State Amendment mirrors the federal litigation. It focuses on the amendment's references to "Sharia Law" and the constitutional issues relating to those references.[10] The international law aspects of the amendment also receive attention, albeit a

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

3. *Id.* at 1306-07.

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

5. First Amended Complaint for Declaratory and Injunctive Relief, Awad v. Ziriaz, No. CIV-10-1186-M (W.D. Okla. July 29, 2012).

6. *Id*. at 30-31.

7. *Id*. at 31.

8. *Id*.

9. *See* Answer to First Amended Complaint of Defendants, *Awad*, No. CIV-10-1186-M (W.D. Okla. Aug. 16, 2012); Joint Status Report and Discovery Plan at 4, *Awad*, No. CIV-10-1186-M (W.D. Okla., Oct. 29, 2012).

10. For discussion of this reaction, see John T. Parry, *Oklahoma's Save Our State Amendment: Two Issues for the Appeal*, 64 OKLA. L. REV. 161, 162 (2012).

lesser amount. Commentators have also noted the overlaps between the Save Our State Amendment and legislation proposed or adopted in other states.[11] This essay takes a different perspective. It approaches the Save Our State Amendment from a conflict of laws perspective and treats it primarily as a choice of law statute.[12]

One reason for this approach to the amendment is that, notwithstanding the results of the federal litigation so far, portions of it may end up going into effect. In the preliminary injunction proceedings, both the District Court and the Tenth Circuit concluded that First Amendment doctrine prevents implementation of the Save Our State Amendment's references to "Sharia Law." That conclusion is likely to stand, but it does not apply to the rest of the amendment. Neither the District Court nor the Tenth Circuit considered whether the amendment is severable,[13] but the parties have now joined issue on that point. On the one hand, the "Sharia Law" law provisions appear to have been central to the adoption of the amendment. On the other hand, the remaining portions of the amendment can operate without those references, with the possible exception of the reference to "other . . . cultures."[14] Whether the District Court certifies the issue of severability to the Oklahoma Supreme Court, or whether it conducts that analysis on its own,[15] there is at least a fair chance that portions of the amendment ultimately will go into effect. Those provisions will raise a host of questions, some of them difficult, that could take years to work their way through the Oklahoma judicial system.

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11. *E.g.*, Aaron Fellmuth, *U.S. State Legislation to Limit Use of International and Foreign Law*, 106 AM. J. INT'L L. 107 (2012); John T. Parry, *International Law in State Courts: Sovereignty, Resistance, Contagion, and Inevitability*, WILL. J. INT'L L & DISPUTE RES. (forthcoming 2013).

12. Symeon Symeonides and Penny Venetis also approach the amendment from a conflict of laws perspective, but they focus on the constitutional issues that this perspective raises. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMP. L. 303, 320-21 (2011); Penny M. Venetis, *The Unconstitutionality of Oklahoma's SQ 755 and Other Provisions Like It, Which Bar State Courts from Considering International Law*, 59 CLEV. ST. L. REV. 189 (2011). This essay addresses some of those issues but also considers specific issues of choice of law doctrine.

13. The Tenth Circuit noted the severability issue but did not address it. *See* Awad v. Ziriax, 670 F.3d 1111, 1132 n.16 (10th Cir. 2012).

14. *See* Parry, *supra* note 10, at 164. For the Tenth Circuit's analysis of "other . . . cultures," see *Awad*, 670 F.3d at 1129. For an overview of Oklahoma law on severability and an assessment of how severability analysis applies to the Save Our State Amendment, see Parry, *supra* note 10, at 163-65.

15. *See* Parry, *supra* note 10, at 165-66 (advocating certification).

A further reason for this essay's approach to the amendment is that, whether or not it ever goes into effect, it is a useful vehicle for teaching and thinking about at least three sets of issues: (1) the many conflict of laws doctrines that the amendment implicates, (2) the ways in which methods of statutory interpretation apply to voter initiatives and referenda, and (3) the unintended consequences of bad drafting and ideological motivations.

The first section of this essay addresses the scope of the amendment—the entities to and the situations in which it applies. The second section considers the amendment's impact on Oklahoma choice of law doctrine and Oklahoma jurisprudence more generally through its list of approved and forbidden legal sources for Oklahoma courts. By extension, this section also addresses the amendment's impact on federal district courts hearing diversity cases in which Oklahoma law applies. The final section is a brief conclusion that contemplates the larger impact of the issues that this essay identifies.

This essay does not claim to have identified or fully addressed every issue that the amendment raises or every problem that it creates and largely leaves discussion of the religion clauses to the federal courts and other writers. Hopefully, this essay says enough to convince even those who support the amendment's political goals that it is poorly drafted and creates more problems than it purports to solve.

I. The Scope of the Save Our State Amendment

A. To What Entities Does the Amendment Apply?

The Save Our State Amendment adds subsection C to section 1 of Article 7 of the Oklahoma Constitution and its provisions apply to "[t]he Courts provided for in subsection A of this section." Subsection A, in turn, provides a list of the entities that are entitled to exercise "[t]he judicial power of this State":

> the Senate, sitting as a Court of Impeachment, a Supreme Court, the Court of Criminal Appeals, the Court on the Judiciary, the Workers' Compensation Court, the Court of Bank Review, the Court of Tax Review, and such intermediate appellate courts as may be provided by statute, District Courts, and such Boards, Agencies and Commissions created by the Constitution or

> established by statute as exercise adjudicative authority or render decisions in individual proceedings.[16]

Note that this list includes courts but also includes "Boards, Agencies and Commissions." That is to say, a textual distinction exists between, on the one hand, the "courts" of Oklahoma and, on the other hand, the "Boards, Agencies and Commissions" of Oklahoma, which also exercise the judicial power of the state when they "exercise adjudicative authority or render decisions in individual proceedings."

Read literally, new subsection C applies only to the courts, and not to these other entities that exercise judicial power. Of course, one easily could argue that the purpose of subsection C is to redefine the scope of judicial power and that any entity that applies judicial power—that is, anything that, in the words of subsection A, "exercise[s] adjudicative authority or render[s] decisions in individual proceedings"—is a "court," regardless of that entity's formal title. The issue of how this language should be interpreted will have to be resolved by Oklahoma courts and commentators in the future, but, at least initially, it is unclear whether subsection C applies to all entities that exercise the judicial power of Oklahoma or only to those with the formal title of "court."

Nor is this the only uncertainty about the amendment's scope. Subsection A also refers to "Municipal Courts in cities or incorporated towns," and it provides that they

> shall continue in effect and shall be subject to creation, abolition or alteration by the Legislature by general laws, but shall be limited in jurisdiction to criminal and traffic proceedings arising out of infractions of the provisions of ordinances of cities and towns or of duly adopted regulations authorized by such ordinances.[17]

In light of their limited jurisdiction—especially including the fact that they do not apply state law—are municipal courts properly included in subsection C's list of "[t]he courts provided for in subsection A"?

One might argue that subsection A merely recognizes these courts but does not "provide" for them. But there are good textual and structural arguments to the contrary. Before 1967, section 1 of Article VII included municipal courts in the list of entities that exercise the judicial power of the

16. OKLA. CONST. art. VII, § 1.
17. *Id.*

state[18]—which suggests that it is fair to conclude that the earlier version of subsection A "provided for" municipal courts in the sense that subsection C uses the phrase. A 1967 amendment established the current text of subsection A, which states that municipal courts shall "continue in effect." Perhaps this is enough to show that subsection A also "provides for" municipal courts and that they are therefore subject to the restrictions of the amendment.

There are at least two responses to this argument. First, before 1967, municipal courts could exercise the judicial power of Oklahoma, but the text of subsection A indicates that they no longer do so and instead exercise only municipal power, with the result that they belong in an entirely different category. Of course, one might point out in rebuttal that municipalities are mere creatures of the state—and subsection A demonstrates this by allowing municipal courts to "continue in effect"—such that any exercise of municipal power is necessarily an exercise of state power.[19] From there, one might draw the conclusion that applying municipal ordinances and regulations is ultimately the same thing as adjudicating questions of state law.

The second argument asserts that municipal courts cannot be included in the list of courts "provided for by subsection A," because such a result would put subsection A and subsection C in contradiction. Subsection C does not include municipal ordinances and regulations in the category of laws that "[t]he Courts provided for in subsection A" may apply, while subsection A does not allow municipal courts to apply anything other than municipal ordinances and regulations. It may be that municipal law is ultimately a creature of state law, but the Oklahoma constitution appears to draw a meaningful distinction between the two, and this distinction limits the scope of subsection C. If this last argument is correct, then municipal courts fall outside the amendment, which means that, among other things, they may "look to the legal precepts of other nations or cultures" and "consider international law and Sharia Law" in the extremely unlikely event

18. OKLA. CONST. art. VII, § 1 (1951) (repealed 1967).

19. *See* Office of the Attorney General of the State of Okla., Attorney General Opinion No. 04-22, § 2 (2004) ("Under the legal principle known as 'Dillon's Rule,' a county or municipality possesses and can exercise only those powers granted by the State in express words, or those necessarily or fairly implied or incidental to the powers expressly granted and essential to the declared objects and purposes of the public entity.") (citing Morland Dev. Co., Inc. v. City of Tulsa, 596 P.2d 1255, 1258 (Okla. 1979) (Barnes, J., concurring); Dev. Indus, Inc. v. City of Norman, 412 P.2d 953, 956 (Okla. 1966)).

that those sources could help them resolve "criminal and traffic proceedings" under municipal ordinances and regulations.

B. When Does the Save Our State Amendment Apply?

The amendment states that it applies when "[t]he Courts provided for in subsection A" are "exercising their judicial authority," "making judicial decisions," and in "all cases before the respective courts including, but not limited to, cases of first impression." One of these phrases comes at the beginning of the amendment, another in the middle, and the third at the end. Based on the assumption that it is appropriate to interpret the various parts of the amendment to produce a harmonious whole, one could read these three phrases together rather than as separate concepts. If that is the correct approach, and subject to the ambiguities about "courts" that I addressed in the previous section, the amendment applies when courts are "exercising their judicial authority and making judicial decisions in all cases before [them]."

Oklahoma case law does not provide a great deal of insight into the definition of "judicial authority" beyond distinguishing it from political authority and stating that it is the power of a court to decide cases over which it has jurisdiction.[20] In addition, Oklahoma has adopted the bulk of federal case-or-controversy doctrine (despite the absence of any such language in the state constitution).[21] In short, the best interpretation of "judicial authority" in Oklahoma is probably the power to resolve cases or controversies. If that is true, then weaving these three phrases together makes sense.

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20. McAlister v. State, 221 P. 779, 782-83 (Okla. 1923) (distinguished from politics); State *ex rel.* Attorney General v. Higgins, 137 P.2d 273, 280 (Okla. Crim. App. 1943).

21. *See* Stasha D. McBride, Note, *Time to Stand Back: Unnecessary Gate-Keeping to Oklahoma Courts*, 56 OKLA. L. REV. 177 (2003). Oklahoma case or controversy doctrine includes a rule against advisory opinions. *See* Dank v. Benson, 5 P.3d 1088, 1091 (Okla. 2000). Oklahoma does have a rarely-used advisory opinion statute that allows the Governor to "require the opinion of the Judges of the Criminal Court of Appeals, or any of them," concerning a case in which a death sentence has been imposed. 22 OKLA. STAT. § 1003 (2011). The Oklahoma Court of Criminal Appeals has held that these advisory opinions are available

> when an appeal has not been taken in a capital case from a judgment and sentence of death. The sole proposition then presented would be: Has there been an observance of all the formalities of law essential to the taking of human life, and has the trial, conviction and sentence of death been in accordance with the law of the land?

Opinion of the Judges v. Gould, 197 P.2d 629, 634 (Okla. Crim. App. 1948).

Some commentators have suggested that the amendment raises serious full faith and credit concerns because it could prevent the recognition and enforcement of judgments in other states under certain circumstances.[22] Because this issue overlaps with the question of when the amendment applies, it merits consideration here, beginning with the extent to which the recognition and enforcement of foreign judgments in Oklahoma require the exercise of "judicial authority."

The Oklahoma legislature has adopted the Uniform Enforcement of Foreign Judgments Act ("UEFJA"), which governs the manner in which the judgments of courts in other states become enforceable in Oklahoma.[23] Although a party retains the option of filing an action in court to obtain recognition of an out-of-state judgment,[24] the ordinary process for obtaining recognition of foreign judgments is essentially a clerical task: the party seeking recognition simply files an authenticated copy of the out-of-state judgment with the clerk of the court.[25] At this stage, no judges are involved, and there is no case or controversy over which a court would exercise "judicial authority." Thus, the Save Our State Amendment has no impact on this process. Out-of-state judgments—even judgments that rely on "international law or Sharia Law" or on the laws of "other nations or cultures"—are entitled to recognition under the non-judicial process established by Oklahoma law (although the amendment will apply if a party chooses to seek recognition of a judgment by filing an action in court).

Of course, judicial proceedings may take place when a party seeks not just recognition but also enforcement of an out-of-state judgment. Typically, the kinds of judicial proceedings that arise are motions to stay enforcement pending appeal,[26] challenges to the validity of the judgment on the few grounds allowed by the Full Faith and Credit Clause, and further proceedings to enforce the judgment. As to the last type of proceeding, Oklahoma law follows the UEFJA and states, "A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a district court of this state and may be enforced or satisfied in like manner."[27]

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22. *See* Symeonides, *supra* note 12, at 322 (noting that it is not clear whether the amendment applies to judgments); Venetis, *supra* note 12, at 206-07, 209-10.

23. 12 OKLA. STAT. §§ 719-726 (2011).

24. *Id.* § 725.

25. *See id.* §§ 721, 722.

26. *See id.* § 723.

27. *See id.* § 721.

Further, Oklahoma courts have made clear that they do not review the correctness of the foreign judgment.[28]

This last point brings in the issue of whether the amendment seeks to change Oklahoma jurisprudence and require Oklahoma courts to look behind out-of-state judgments when overseeing enforcement of that judgment. Arguably, enforcing an out-of-state judgment will result in "upholding" the law of that state. If that judgment is based on one of the sources of law that the amendment proscribes, then the amendment would prevent enforcement. Further, if a party was successful at reopening such a judgment, then the amendment would also apply. But all of this is ultimately beside the point, because if the amendment were to have the effects outlined above, then it would almost certainly conflict with and be overridden by the Full Faith and Credit Clause. The Supreme Court has held that there is "no roving 'public policy exception' to the full faith and credit due judgments."[29] Dislike of another state's law or policies is not a basis for refusing to recognize a judgment.

With respect to judgments of the courts of other countries, the Oklahoma legislature has adopted the Uniform Foreign-Country Money Judgments Recognition Act ("UFCMJRA").[30] In contrast to the clerical process for recognizing judgments of other states, Oklahoma follows the UFCMJRA procedures requiring the party seeking recognition of a foreign judgment to file an action in court.[31] Again following the UFCMJRA, Oklahoma law specifically provides that a court "need not recognize a foreign-country judgment if . . . the judgment or the cause of action on which the judgment is based is repugnant to the public policy of this state or of the United States."[32]

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28. Crockett v. Prudential Ins. Co. of Am., 789 P.2d 1 (Okla. Civ. App. 1990); Aetna Finance Co. v. Bowler, 622 P.2d 292 (Okla. Civ. App. 1980).

29. Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998); *see also id.* at 234 ("We are 'aware of [no] considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to [a money] judgment outside the state of its rendition.'") (quoting Magnolia Petroleum v. Hunt, 320 U.S. 430, 438 (1943)); Fauntleroy v. Lum, 210 U.S. 230 (1908). Note that equitable decrees are also entitled to full faith and credit with respect to their preclusive effects, although state courts have some leeway in enforcing them. *See Baker*, 522 U.S. at 234-36. The judgments of federal courts are also entitled to full faith and credit. *See* 28 U.S.C. § 1738 (2006).

30. 12 OKLA. STAT. §§ 718.1-718.12.

31. *See id.* § 718.6.

32. 12 OKLA. STAT. § 718.4(c)(3). The National Commissioners on Uniform Laws added the following comment to this subsection:

Oklahoma courts presumably would conclude that the Save Our State Amendment declares the public policy of Oklahoma. Thus, Oklahoma courts would probably apply the amendment to cases seeking recognition of foreign country judgments.[33] Under a straightforward textual reading, the amendment appears to ban recognition of judgments rendered by the courts of other countries if those judgments also rely on the law of another country (or on one of the other proscribed sources of law).

There is no specific federal constitutional provision, federal statute, or international convention that would override this portion of the amendment.[34] The background approach to recognition of foreign country judgments is comity, with a general view that foreign judgments deserve recognition but also with some disagreement about the circumstances in which it is appropriate to refuse recognition.[35] Oklahoma is therefore generally free to adopt its own views, as it has done. Note, however, that

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> Although subsection 4(c)(3) of this Act rejects the narrow focus on the cause of action under the 1962 Act, it retains the stringent test for finding a public policy violation applied by courts interpreting the 1962 Act. Under that test, a difference in law, even a marked one, is not sufficient to raise a public policy issue. Nor is it relevant that the foreign law allows a recovery that the forum state would not allow. Public policy is violated only if recognition or enforcement of the foreign-country judgment would tend clearly to injure the public health, the public morals, or the public confidence in the administration of law, or would undermine "that sense of security for individual rights, whether if personal liberty or of private property, which any citizen ought to feel.

UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4, cmt. 8 ¶ 2 (Elec. Part Supp. 2011) (quoting Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 901 (N.D. Tex. 1980)). If the Oklahoma legislature intended this comment to control Oklahoma courts' application of the Uniform Act, that unexpressed legislative intention is vulnerable to plain meaning/textualist arguments about the meaning of "public policy." In any event, the constitutional language of the amendment presumably overrides the unexpressed legislative intent.

33. Presumably, the amendment would also trump the statutory requirement that, "[i]n applying and construing the Uniform Foreign-Country Money Judgments Recognition Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it." 12 OKLA. STAT. § 718.10.

34. From time to time, the federal government has considered entering into treaties or conventions for the recognition of foreign country judgments but those efforts have failed to date. *See* PETER HAY ET AL., CONFLICT OF LAWS 1504-08 (5th ed. 2010).

35. For comity, see *Hilton v. Guyot*, 159 U.S. 113 (1895). For the trend toward recognition and possible reasons for withholding recognition, see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481-482 (1986); HAY ET AL., *supra* note 34, at 1491-96.

the broad textual reading advanced above is not the only possible reading of the amendment. Oklahoma courts could adopt a different reading that partially reconciles the amendment with the general trend in favor of recognition. This narrower interpretation would only prevent recognition of foreign country judgments that are based on foreign country law if the rule of decision conflicts with the rule that would be applied under Oklahoma law. This narrower interpretation would also allow Oklahoma courts to lessen the potential foreign relations impact (and possible federal preemption) of a blanket ban on enforcement.[36]

With respect to arbitrations, Oklahoma has adopted the Uniform Arbitration Act, which provides that arbitration awards must be confirmed and reduced to judgment by a district court of the state.[37] The same is true under the Federal Arbitration Act.[38] Neither statute contains any provision that allows courts to consider public policy as a ground for refusing to confirm an award.[39] Thus, if the amendment applies to cases in which a party asks an Oklahoma court to confirm a judgment, it does so only though an implied amendment to the state statute. And if it does apply, then Oklahoma courts would have to determine whether the arbitrator impermissibly applied a forbidden source of law. But the amendment does not apply to the effort to obtain recognition of an out-of-state judgment that itself confirmed an arbitration award and reduced it to judgment. Such an award falls generally within the above discussion of state judgments, including the discussion of full faith and credit.[40]

For foreign arbitrations, federal law provides that any awards that fall within the Convention on the Recognition and Enforcement of Foreign

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36. For discussion of foreign affairs preemption, see *infra* notes 103, 126 and accompanying text.

37. *See* 12 OKLA. STAT. §§ 1873, 1876 (Supp. 2012).

38. *See* 9 U.S.C. §§ 9-13 (2012).

39. *See* 9 U.S.C. § 10(a); 12 OKLA. STAT. § 1874. Federal courts have developed doctrines that permit vacatur of an arbitration award in some circumstances, including public policy, but the scope and propriety of these doctrines is unclear. *See* Sean C. Wagner, Note, *Unchecked: How* Frazier v. CitiFinancial *Eliminated Judicially Created Grounds for Vacatur Under the Federal Arbitration Act*, 64 OKLA. L. REV. 235 (2012). In any event, it seems unlikely that a court acting under the Federal Arbitration Act would vacate an arbitration award on public policy grounds as inconsistent with the Save Our State Amendment. *Cf.* Nitro-Lift Technologies v. Howard, No. 11-1377, slip op. (U.S. Nov. 26, 2012) (per curiam), *available at* 2012 U.S. LEXIS 8897 (holding the Federal Arbitration Act prevented Oklahoma courts from using state law on enforcement of non-compete agreements to review the validity of a contract that contained an arbitration clause).

40. *See infra* notes 53-57 and accompanying text.

Arbitral Awards are entitled to confirmation and enforcement by state and federal courts.[41] Thus, federal law specifically requires Oklahoma courts to apply the standards of the Convention, even though the Convention is an example of international law.[42] With respect to recognition, the Convention provides that courts can refuse to recognize and enforce an award that is "contrary to the public policy of that country."[43] But this public policy exception does not make room for the Save Our State Amendment, because that amendment states the public policy only of Oklahoma, not of the United States. Thus, Oklahoma courts are bound by federal law to recognize foreign arbitral awards, even if those awards are based in legal sources that the amendment purports to ban from Oklahoma courts.[44]

II. The Save Our State Amendment as a Choice of Law Catalogue

The Save Our State Amendment contains two lists of laws. The first is the approved sources of law for Oklahoma courts, and the second is the sources that Oklahoma courts "shall not look to" or "consider."[45] This section considers the items on these lists, beginning with the approved sources. It also assesses the impact of these lists on federal courts that apply Oklahoma law in diversity cases.

A. Approved Sources of Law

The amendment provides that Oklahoma courts

> 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

41. *See* 9 U.S.C. § 207. Federal law provides that, to the extent consistent, the Federal Arbitration Act also applies to foreign awards. *See id.* § 208.

42. The federal statute makes it unnecessary to consider any Supremacy Clause argument with respect to the Convention itself. *See infra* note 89 and accompanying text.

43. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, § 2(b) (June 10, 1958)), 21 U.S.T. 2517. Note that if Oklahoma courts refused to apply the standards of the Convention, they would have to decide whether to fall back on existing federal and state standards for domestic arbitrations, which do not include public policy exceptions.

44. Still, anyone seeking to uphold the validity of a foreign arbitral award in Oklahoma would be well advised to file in federal court or remove the case to federal court. *See* 9 U.S.C. §§ 203, 205.

45. Save Our State Amendment, *supra* note 1.

> another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions.[46]

The inclusion and description of several of these sources—the two constitutions, the U.S. Code, and Oklahoma statutes—are uncontroversial. The way in which the amendment describes the other sources of law, however, raises some questions.

1. Federal Regulations

The amendment refers to "federal regulations promulgated pursuant" to the U.S. Code.[47] Read in one way, this is also an uncontroversial phrase. Federal regulations have preemptive force under the supremacy clause and state courts must apply them so long as they are valid regulations.[48] Federal regulations that stray beyond the authority of the agency, however, are invalid—for example, if they are in some sense not "promulgated pursuant" to the authorizing statutes—and neither federal nor state courts should apply them.[49] Further, in the event that an Oklahoma court confronts a federal regulation, it is entitled to assess the validity of that regulation (unless the relevant federal statute provides federal courts with exclusive jurisdiction over challenges to the regulation).

But this part of the amendment arguably conveys a slightly different message, to the effect that it is the independent duty of Oklahoma courts to assess the validity of federal regulations and to make sure that federal agencies are staying within their proper bounds. Read in this second way, this language gives the sense of challenging or at least seeking to define federal authority. It is also a specific example of the overall tone of the amendment, a tone that suggests a formal and restrictive idea of federal authority and of judicial authority, whether state or federal.

Whether or not this is a correct understanding of the tone of the amendment, its ultimate impact is more political than doctrinal. At least as a formal matter, Oklahoma voters, legislators, and courts can use whatever tone they wish when talking about federal law, but they lack the power to alter the doctrinal test for the validity of federal regulations. Although

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46. *Id.*

47. *Id.*

48. *E.g.*, Fid. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes. . . . A preemptive regulation's force does not depend on express congressional authorization to displace state law . . . ."); *see also* City of New York v. FCC, 486 U.S. 57, 64 (1988).

49. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984) (discussing the standards for federal court review of agency regulations).

Oklahoma courts have independent power to apply that test, they are bound by the supremacy clause to apply and give preemptive effect to all federal regulations that are valid under federal doctrine. A state court cannot, for example, depart from the *Chevron* doctrine when assessing the validity of a federal regulation, even if it would use a different test to assess the validity of state regulations. Further, once the U.S. Supreme Court has determined the scope of a federal regulation, Oklahoma courts must follow that ruling.[50]

Could Oklahoma courts apply these federal doctrinal tests grudgingly or in bad faith? Of course they could, but that is true of any court. Can a state constitution instruct state courts to interpret federal doctrine grudgingly or in bad faith? Here, again, the answer is yes as a formal matter. Federal courts cannot strike that language out of a state constitution. But, the fact remains that under preemption doctrine, such language can have no proper force.

2. Established Common Law

The amendment includes an unadorned reference to "established common law."[51] This is the only one of the approved sources of law that is not designated as specifically state or federal. This lack of specificity raises at least three interpretive issues.

The first issue is whether the term "common law" means Oklahoma common law, or whether it refers instead to the general common law in roughly the sense that the Supreme Court used it in *Swift v. Tyson*?[52] Michael Green has recently asserted that "Georgia state courts still conceive of the common law in *Swift*ian terms."[53] Perhaps the same is true in Oklahoma.

The drafters of the amendment may have used the phrase "established common law" to reflect the language of the Oklahoma reception statute, enacted in 1910, which carries the title "Force of Common Law" and provides,

> The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma;

50. *Cf.* Cooper v. Aaron, 358 U.S. 1 (1958) (discussing this issue in the context of constitutional litigation over school desegregation).

51. Save Our State Amendment, *supra* note 1.

52. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

53. Michael Steven Green, *Erie's Suppressed Premise*, 95 MINN. L. REV. 1111, 1126 (2011).

> but the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed to promote their object.[54]

This statute's use of "[t]he common law"—which is similar to the language of reception statutes from the *Swift* era and earlier—suggests that the common law in Oklahoma was once the general common law. It does not settle, however, the questions whether the statute's use of "the common law" reflects a deeper, and fixed, jurisprudential stance, or whether "established common law" in the Save Our State Amendment is merely a matter of phrasing or instead confirms the meaning of the statute, whatever that may be.

For its part, the Oklahoma Supreme Court frequently refers to "Oklahoma's common law,"[55] which suggests a more positivist conception of the common law as something bound up in Oklahoma's status as a sovereign, law-dispensing state. Earlier in the twentieth century, however, the court sometimes used phrases such as "the general common law."[56] Then, in its 1980 decision in *McCormack v. Oklahoma Publishing Company*, the court said the following:

> Although there was no distinctive tort of invasion of privacy in early common law, it has evolved in most jurisdictions based on common law principles sometimes compared to trespass. It is unnecessary for the Legislature to enact a law to create this tort in abrogation of the common law. The common law, followed in Oklahoma, refers not only to the ancient unwritten law of England, but also to that body of law created and preserved by decisions of courts.[57]

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54. 12 OKLA. STAT. § 2 (Supp. 2012).

55. *E.g.*, Kruchowski v. The Weyerhaeuser Co., 202 P.3d 144, 148 n.8 (Okla. 2008); Bittle v. Bahe, 192 P.3d 810, 815 (Okla. 2008); Lierly v. Tidewater Petroleum Corp., 139 P.3d 897, 905 n.8 (Okla. 2006); Delk v. Markel Am. Ins. Co., 81 P.3d 629, 633 (Okla. 2003); Camps v. Taylor, 892 P.2d 633, 635 (Okla. 1995); *see also* Pribram v. Fouts, 736 P.2d 513, 515 (Okla. 1987) ("the common law of Oklahoma").

56. *See* Merveldt & Son v. Biggs, 147 P.2d 146, 148 (Okla. 1944) (discussing a garnishment statute and stating that it "is a declaration of the general or common law as it exists in the absence of specific statutory provision"); McGee v. Kirby, 118 P.2d 199, 201 (Okla. 1941) (distinguishing between "the general common law" and "our general statutes").

57. McCormack v. Okla. Pub. Co., 613 P.2d 737, 739 (Okla. 1980).

Most recently, Justice Marian Opala repeatedly and perhaps idiosyncratically insisted that Oklahoma courts apply something broader than a specifically Oklahoma common law: "The common law is drawn from three sources—the common law of England, of other states and of Oklahoma."[58]

In short, there is some support for the idea that, in Oklahoma, the common law has a close relationship to the general common law. Does the amendment constitutionalize this view? Perhaps one could reasonably conclude that the language of the amendment comes closer to Justice Opala's views or the views that the court expressed in *McCormack* than it does to a more positivist view. But turning this conclusion into doctrine is another thing altogether. An Oklahoma judge might easily conclude that the amendment is not specific enough to change the nature of the common law in Oklahoma, whatever that may be.

The second issue is the doctrinal impact of the word "established," especially when combined with the last sentence of the amendment, which states that its provisions apply to all cases, "including . . . cases of first impression."[59] The Oklahoma reception statute declares that the common

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58. Gomes v. Hameed, 184 P.3d 479, 494 n.14 (Okla. 2008) (Opala, J., dissenting). Justice Opala went on to say,

> Had the norm chosen for today's adoption been one of English common law, which lawyers are presumed to know, it could have been implanted without added study. When we are dealing with a norm of common law in the state, its pre-existence (existence antecedent to today's pronouncement) could be established either by extant state jurisprudence or, in its absence, by expert testimonial proof of the norm's general acceptance in the state by long-established and widespread use. But if the rule to be adopted today is one of American common law but found neither in Oklahoma jurisprudence nor in the common law of England, litigants and their lawyers should not be bound to notice its existence sans proof.

Id. at 493-94; *see also* Watson v. Gibson Capital, 187 P.3d 735, 740 (Okla. 2008) ("Our pronouncement restates the centuries-old rules of legal practice embodied in Oklahoma's common law that stands unaltered by statute."); McGehee v. Arvest Trust Co. (*In re* Estate of Bleeker), 168 P.3d 774, 781 (Okla. 2007) ("The common law, which stands legislatively declared to be a constituent part of this State's body of law, need not be drawn exclusively from English precedent, but may also be fashioned by utilizing other sources, including legal norms taken from common-law jurisprudence of sister states."); Camps v. Taylor, 892 P.2d 633, 636 (Okla. 1995) (Opala, J., concurring) ("Because the unwritten component of Oklahoma's legal tradition retains its efficacy and vigor with undiminished force . . . the general common law must be universally enforced unless a different construction is mandated by a governing statute.").

59. Save Our State Amendment, *supra* note 1.

law can be "modified by . . . the condition and wants of the people."[60] In *McCormack*, the Oklahoma Supreme Court made clear that courts are not limited to applying existing law: "The common law is not static, but is a dynamic and growing thing and its rules arise from the application of reason to the changing conditions of society. Flexibility and capacity for growth and adaptation is its peculiar boast and excellence."[61] For his part, Justice Opala also stated that the common law can and should change over time and he referred to the American Law Institute's Restatements as an example of how to "carefully and deliberatively monitor and track the development and growth of American common law."[62] All of this indicates that the common law in Oklahoma has not existed only as a body of relatively fixed rules but has also remained open to change in response to circumstances and the broader currents of American law.

The Save Our State Amendment arguably overrides the reception statute and the Oklahoma jurisprudence that I have cited by requiring the application of "established common law . . . [i]n cases of first impression." The insistence on "established" law suggests a distrust of judges' efforts to grow, adapt, or develop the common law, presumably because the exercise of discretion to shape the law risks being a license for "judicial activism"—and the scare quotes indicate that this term tends to be as much or more a slogan than a demonstrable phenomenon. Here again, the amendment is more significant for its tone than for its doctrinal impact. Perhaps one can interpret the text of the amendment to freeze the common law in Oklahoma as of November 2010. But judges easily could, and probably would, avoid the potential strictures of this provision by simply declaring—as common law courts frequently do—that they are not making new law but are merely applying existing common law principles to new facts. One would expect, in turn, that judges who dissented from such rulings would use the language of the amendment to bolster their own arguments in the other direction.[63]

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60. 12 OKLA. STAT. § 2 (Supp. 2012).

61. *McCormack*, 613 P.2d at 739.

62. *Gomes*, 184 P.3d at 491 (Opala, J., dissenting); *see also* Bouziden v. Alfalfa Elec. Coop., Inc., 16 P.3d 450, 464 (Okla. 2000) (Opala, J., dissenting); Greenberg v. Wolfberg, 890 P.2d 895, 901 (Okla. 1994) (appearing to describe the Restatements as "the national body of common law").

63. The potential parallels on this issue between the Save Our State Amendment and the nineteenth century "codification movement" are worth exploring but are also beyond the scope of this essay. For a useful and short introduction to the idea and study of codification, see Robert W. Gordon, *Book Review*, 36 VAND. L. REV. 431 (1983) (reviewing Charles M. Cook, *The American Codification Movement, A Study of Antebellum Legal Reform* (1981)).

The third issue is whether "established common law" includes federal common law. If this language is simply a broad reference to the validity of common law rules, then it could include federal common law. If the point is to refer only to Oklahoma common law, then it would exclude federal law. And if this language refers to the general common law in the *Swift v. Tyson* sense, then the answer is less clear, although the Supreme Court has made clear that although federal common law exists, "there is no federal general common law."[64]

Whatever the meaning of the amendment on this point, Oklahoma courts remain bound by the supremacy clause to apply federal common law and to give it preemptive force over state law.[65] That is to say, one could interpret "established common law" to include federal common law and thereby avoid the constitutional question or one could interpret it to exclude federal common law and then declare that the supremacy clause overrides this effort at exclusion.

3. The Law of Other States, "If Necessary"

The amendment further provides that, "if necessary," Oklahoma courts must also "uphold and adhere to . . . the law of another state of the United States provided the law of the other state does not include Sharia Law."[66] As was true for the other provisions of the amendment, this one also raises a host of issues. This section focuses on the most basic issue: when is it "necessary" to apply the law of another state? There is little Oklahoma case law on the meaning of "necessary,"[67] but there are several options for interpreting this part of the amendment, depending on whether "if necessary" comes closer to meaning something like "indispensable" or "absolutely necessary," or whether it means something more like "convenient" or "appropriate."[68]

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64. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

65. *E.g.*, Boyle v. United Tech. Corp., 487 U.S. 500, 504 (1988).

66. Save Our State Amendment, *supra* note 1.

67. *Cf.* Pub. Serv. Co. of Okla. v. State, 645 P.2d 465, 467-68 (Okla. 1982) (discussing the meaning of "necessary" in an Oklahoma constitutional provision relating to the powers and duties of the Oklahoma Corporation Commission).

68. *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420 (1819) (holding the word "necessary" in the federal Constitution's necessary and proper clause is essentially synonymous with the exercise of discretion and good judgment). Note, however, that Chief Justice Marshall justified this interpretation in part because the question was the scope of one of the enumerated powers of Congress, and he stated that Congress needed flexibility to confront "the various crises of human affairs." *Id.* at 415. One could easily argue that the issues implicated by this aspect of the Save Our State Amendment do not rise to this level.

First, as a matter of federal full faith and credit and due process doctrine, it is necessary for Oklahoma courts to apply the law of another state when Oklahoma has no legitimate interest in applying its law to a case over which its courts have jurisdiction and which they intend to decide.[69] Whatever else "if necessary" means, it must mean at least this much. But the due process requirement of "state interests" is not a very powerful constraint.[70] The upshot is that, if the amendment goes into effect, Oklahoma courts will rarely have to apply the law of another state if due process defines the full scope of "if necessary."

The issue would get a bit more complicated if the "Sharia Law" provision were enforceable.[71] Consider a situation in which Oklahoma had no interest, but in which one party argued that Oklahoma courts could not apply the law of the state or states that had legitimate interests, because the law of every such state included "Sharia Law." Would the "Sharia Law" portions of the amendment have required Oklahoma courts to apply Oklahoma law in such a case, or could they simply have dismissed the case—perhaps for lack of jurisdiction or on forum non conveniens grounds—and thereby allow the plaintiff to refile in a jurisdiction that would apply the appropriate law?[72] What does it mean for the law of another state to "include Sharia Law"? The amendment seems easily to apply to a circumstance (a circumstance that may be a null set) in which the laws of another U.S. state incorporate "Sharia Law" as the rule of decision. It is possible—although perhaps not likely—that a court would have interpreted the amendment as a rule of contagion, such that the law of any

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69. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981) (plurality opinion) ("For a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that its choice of law is neither arbitrary nor fundamentally unfair.").

70. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818-23 (1985) (summarizing the agreement of the justices in *Allstate* that "the Due Process Clause and the Full Faith and Credit Clause provided modest restrictions on the application of forum law" but also overturning the Kansas Supreme Court's application of Kansas law to the claims of thousands of class action plaintiffs who had no connection to Kansas).

71. I put quotation marks around "Sharia Law" simply to indicate that it is a term of art within the amendment and does not correspond to typical understandings of Islamic law. *See infra* note 135 and accompanying text; Parry, *supra* note 10, at 167-68.

72. The question then would be whether such a dismissal would run afoul of the limited obligation to provide a forum. *See* Hughes v. Vetter, 341 U.S. 609 (1951). On the one hand, the refusal to apply another state's law would plainly be discriminatory based in antipathy to the "Sharia Law" that is part of that state's law. On the other hand, if the case could be brought elsewhere and the litigants had little connection to Oklahoma, then it is not clear that *Hughes* would apply. *See id.* at 613.

state that includes even a single rule drawn from "Sharia Law" would have been automatically off limits for Oklahoma courts, whether or not that rule had any application to the case at hand. Also unclear is whether the amendment would have applied when the courts of a state allowed parties to select or refer to "Sharia Law" in a contract or will.

Had the "Sharia Law" provision survived the federal litigation, Oklahoma courts might have opted for the narrower view that the amendment barred application of another state's law only if the law that might or would be applied included rules drawn from "Sharia Law."[73] But what if, in the hypothetical, Oklahoma courts had determined, first, that they could not apply the law of another state because of some concern about "Sharia Law," and, second, that the amendment required them to apply Oklahoma law (rather than dismiss the case) even without any legitimate state interest? The answer is that the amendment would be unconstitutional as applied to such a case because due process doctrine would require Oklahoma courts to apply the law of the other state (or at least to dismiss so that the case could be refiled in another forum).[74]

The remaining definitions of "if necessary" would allow Oklahoma courts to apply the law of other states in circumstances that go beyond the federal constitutional mandate. Thus, a second and somewhat broader definition would allow Oklahoma courts to apply the law of another state if an Oklahoma statute requires Oklahoma courts to apply the law of that state. For example, Oklahoma has adopted several choice of law statutes relating to commercial transactions. The general choice of law statute for contracts provides, "A contract is to be interpreted according to the law and usage of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law and usage of the place where it is made."[75] Oklahoma has also adopted the Uniform Commercial Code

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73. It is perhaps worth noting that one scholar has argued that some of the fundamental qualities of English common law are drawn from Islamic law and practice. *See* John A. Makdisi, *The Islamic Origins of the Common Law*, 77 N.C. L. REV. 1635 (1999). If Makdisi's arguments are correct, and if Oklahoma courts would have read the amendment to bar the application of any law from a state if any part of that state's law includes Islamic law, then there would also have been an interesting argument that Oklahoma courts would never be able to apply the common law of another state.

74. Some proposals in other states "provide that state courts may not dismiss a case on the ground of forum non conveniens if it appears likely that another court would take action violating the state or federal constitutional rights of a state citizen." Fellmuth, *supra* note 11, at 116. Exactly what these provisions mean, or how they would be applied, is a mystery. *See id*. at 116-17 (discussing reasons why these provisions are "odd").

75. 15 OKLA. STAT. § 162 (Supp. 2012).

("UCC") which explicitly states that, "[e]xcept as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."[76] Other provisions of the UCC that have been incorporated into Oklahoma law also provide specific choice of law rules.[77]

In addition, the state has adopted the Uniform Interstate Family Support Act, which provides that the law of the state that issues a support decree will govern most issues relating to enforcement of that decree.[78] More obliquely, Oklahoma's uninsured motorist statute applies only to policies "issued, delivered, renewed, or extended in this state with respect to a motor vehicle registered or principally garaged in this state."[79] According to the Oklahoma Supreme Court, the law of another state must govern cases that involve policies that do not fall within the terms of the statute.[80] Extending the definition of "if necessary" to include compliance with these various statutes would avoid needless disruption of Oklahoma law.[81]

Third, Oklahoma courts could rule that it is also necessary to apply the law of another state if the parties contracted to apply the law of that other state. This principle of party autonomy is widely recognized in contemporary choice of law doctrine, and Oklahoma law provides at least some room for it.[82]

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76. 12A OKLA. STAT. § 1-301(a) (Supp. 2012).

77. *See id.* § 1-301(b) (2011) (listing provisions of the UCC that are applicable in Oklahoma and that govern choice of law in specific situations).

78. 43 OKLA. STAT. § 601-604. In addition, a federal statute requires states to adopt the UIFSA as a condition to receiving federal funding for child support enforcement. *See* Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), Pub. L. 104-193, § 321, 110 Stat. 2105, 2221 (1996). Were the amendment to override the ability of Oklahoma courts to comply with the UIFSA, it is at least conceivable that the state's continued eligibility for such funding would be in doubt.

79. 36 OKLA. STAT. § 3636(a) (2011).

80. Bernal v. Charter Cty. Mut. Ins. Co., 209 P.3d 309, 316 (Okla. 2009). Oklahoma also has a borrowing statute that would be overridden if the amendment does not allow choice of law statutes to create the requisite necessity to apply the law of another state. *See* 12 OKLA. STAT. § 105 (2011) ("The period of limitation applicable to a claim accruing outside of this state shall be that prescribed either by the law of the place where the claim accrued or by the law of this state, whichever last bars the claim.").

81. The rest of this section omits further discussion of the impact of the now-unenforceable "Sharia Law" provision.

82. *See* 12A OKLA. STAT. § 1-301 (2011) (allowing party choice of law in many transactions governed by the UCC); Dean Witter Reynolds, Inc. v. Shear, 796 P.2d 296, 298-99 (Okla. 1990) (stating in dicta that the permissive standards of RESTATEMENT (SECOND) OF

Fourth, and broadest, Oklahoma courts could hold that it is also necessary to apply the law of another state when the application of Oklahoma choice of law jurisprudence indicates that the law of that other state is most appropriate for a particular case. Interpreting "if necessary" to include these cases requires some looseness but it also does the least damage to existing Oklahoma choice of law doctrine. Of course, one could argue that the point of the amendment was to change Oklahoma choice of law doctrine—but except for concerns about "Sharia Law" and international law—it is not clear why the drafters of the amendment or the voters would have wanted to effect sweeping changes in this area of law.[83]

It would be easier to reach such a conclusion if the amendment purported to establish a method for choice of law. But it does not. Thus, Oklahoma courts must either look to established choice of law doctrine or create new rules to determine when it might be necessary to choose the law of another state. And unless they flatly hold that ordinary choice of law rules cannot create that necessity, the most obvious method is to use the existing Oklahoma choice of law rules. The best argument against the continued application of existing rules is that the amendment creates a presumption in favor of forum law and against application of out-of-state law. But even if this is the case, the method for determining when a party has overcome this presumption is an issue for the courts to work out, and the sensible option is to work it out through their familiar choice of law rules.

In sum, Oklahoma courts may find a variety of reasons to interpret the amendment in a way that allows them to continue applying the state's choice of law statutes and doctrines, even though this interpretation admittedly stretches the meaning of "if necessary."

CONFLICTS OF LAW § 187 govern the validity of a contractual choice of law). A court conceivably could interpret Oklahoma's statutory choice of law rule for contracts, 15 OKLA. STAT. § 162 (2011), to override party autonomy outside the UCC context, but no reported cases require or suggest such a result.

83. This is not to assert that choice of law doctrine in Oklahoma or anywhere else in the United States is optimal, let alone coherent. Conflicts of law scholars have spent decades criticizing, first, the older vested rights-based models for choice of law, reflected in Oklahoma's choice of law statute for contracts, *see* text at *supra* note 76, and, second, the newer interest-based analyses, reflected in Oklahoma's Restatement-based approach to torts and some UCC issues, *see Bernal* 209 P.3d at 315-16; Ysbrand v. DaimlerChrysler Corp., 81 P.3d 618, 625 (Okla. 2003). The Save Our State Amendment is not even remotely responsive to these various concerns.

B. Forbidden Sources of Law

In addition to the catalog of permissible sources of law, the amendment also includes several sources of law that are off limits. Oklahoma courts "shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law."[84] These two sentences raise a host of questions and difficulties.

1. "Shall Not Look To [or] Consider"

The amendment does not simply ban Oklahoma courts from incorporating "the legal precepts of other nations or cultures," international law, or "Sharia Law" into Oklahoma jurisprudence. It also states that courts cannot "look to" or "consider" these sources of law. In other words, this part of the amendment appears to go beyond cataloging forbidden sources for rules of decision. It also tells Oklahoma judges what they can read in chambers when thinking about a case. Here again, the ideas of distrust and contamination come to the fore. The logic behind this language appears to be that to ensure the purity of Oklahoma law, one must also ensure the purity of the judicial process, which means excluding impure sources of law from judicial consideration, because the judges themselves cannot be trusted to keep themselves pure. Whether this interpretation of the amendment, if it is correct, squares with Oklahoma's separation of powers jurisprudence is a question beyond the scope of this essay,[85] but it certainly raises questions about the continued independence of judges in Oklahoma.

More generally, this broad limitation is a bad idea. Until fairly recently, American judges frequently looked to the judicial decisions or laws of other countries, especially England, as part of an effort to craft the best possible rules. These days, judges are more likely to limit themselves to the jurisprudence of other U.S. states, but from time to time they still find the case law of other countries to be interesting and relevant, with England almost certainly still the most frequent source. Indeed, as noted in the discussion of Oklahoma common law above, and stressed again below,

84. Save Our State Amendment, *supra* note 1.

85. With that said, if Oklahoma judges were to disregard or interpret away the amendment—however understandably—then a different set of separation of powers arguments would arise. As the conclusion to this essay underscores, however, the amendment is not a clear text, and if it goes into effect, Oklahoma courts will have no choice but to use their interpretive discretion, even though the amendment calls into question the legitimacy of their discretion. Note, too, the fact that the Save Our State Amendment changes the Oklahoma constitution perhaps renders any such arguments moot.

Oklahoma courts still consider, cite, and even rely on English common law.[86] The Save Our State Amendment appears to prevent all of this. It not only forbids judges from adopting the rules of other countries but also bars them from discussing those rules in court opinions, even if such a discussion would elucidate an important point. More than that, it bars them from thinking about those rules, even when consideration of those rules would lead to a more just conclusion. Or, if they do, they must do so secretly, with a bad conscience, or as a form of silent resistance against the law they are sworn to uphold, with the result that they will be at odds with themselves, simultaneously performing and undermining their judicial role and the rule of law.[87]

2. "The Legal Precepts Of"

The amendment also uses the term "legal precepts" to define the scope of the forbidden sources of law. There is no obvious reason why the amendment switches from the word "law" to the term "legal precepts" when addressing "other nations or cultures." Dictionaries define "legal precept" as something along the lines of "a command or principle intended especially as a general rule of action."[88] Oklahoma case law does not call out the term "legal precept" as a precise or important term of art. It appears rarely in judicial opinions, usually meaning something like a general doctrinal rule[89] but sometimes also referring to a broader idea of legal constraints.[90]

The term, in short, may have no underlying purpose and may simply be a variation of language. If, however, it is in the amendment for a reason, then

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86. *See supra* notes 61-62 and accompanying text; *infra* note 91 and accompanying text.

87. *See also supra* note 87.

88. *Precept*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/precept (last visited Oct. 23, 2012); *see also Precept*, FREE DICTIONARY, http://thefreedictionary.com/precept (last visited Oct. 23, 2012) ("a rule or principle prescribing a particular course of action or conduct"); *Precept*, OXFORD DICTIONARIES, http://oxforddictionaries.com/definition/precept (last visited Oct. 23, 2012) ("a general rule intended to regulate behaviour or thought").

89. *E.g.*, Cranford v. Bartlett, 25 P.3d 918, 923 (Okla. 2001); Cooper v. State, 924 P.2d 749, 750 (Okla. Crim. App. 1996).

90. *E.g.*, Nesbit v. Home Fed. Sav. & Loan Ass'n, 440 P.2d 738, 743 (Okla. 1968) (suggesting that certain ideas of attorney conduct and responsibility are "legal precepts . . . of which the court takes judicial notice"); Edwards v. Carter, 29 P.2d 605, 605 (Okla. 1933) (stating an argument is "contrary to all legal precepts"). In a dissenting opinion, Justice Opala once quoted Roscoe Pound to suggest a distinction between legal precepts and specific legal rules. *See* Bouziden v. Alfalfa Elec. Corp., 16 P.3d 450, 464 n.20 (Okla. 2000) (Opala, J., dissenting).

the intended meaning is not clear, although the best guess is probably something like "general rules." As for a background purpose, one could argue that the goal of this language is, consistent with the contamination theory, to make sure that nothing about the legal systems of "other nations or cultures" will ever have anything to do with Oklahoma law. In other words, not just the specific doctrines, but also all sources of law, whether judicial, statutory, or constitutional, as well as the broader principles, mindsets, or orientations of these other legal systems are proscribed.

As with other parts of the amendment, this is either a (bad) solution in search of a problem or a form of (unnecessary) preemptive cultural defense. Aside from English common law, Oklahoma courts have not shown any signs of "look[ing] to the legal precepts of other nations or cultures." More importantly, there is no indication that looking to these legal precepts would have any negative effect on Oklahoma law.

3. "Other Nations or Cultures"

The phrase "the legal precepts of other nations of cultures" is odd enough that one cannot be sure whether the amendment actually forbids Oklahoma courts from considering the specific legal rules of another country. But it is probably safe to assume that the ban on considering legal precepts in general also includes the more focused ban on considering specific legal doctrines, to the extent there is any meaningful distinction between the two. One could perhaps develop the argument, however, not only that there is a meaningful distinction but also that the amendment is much more concerned with general approaches and mindsets than with specific rules.

Be that as it may, this part of the amendment puts Oklahoma law at odds with itself. Earlier, the amendment makes clear that "established common law" is one of the permissible sources of law. Yet established common law in Oklahoma includes the common law of England.[91] Now, this part of the amendment forbids looking to the law of other nations and thus forbids Oklahoma courts from looking to the English law that is part of Oklahoma law. Even more, while the amendment forbids courts from considering foreign law going forward, it does not tell the courts what to do with the Oklahoma common law jurisprudence that already takes English common law into account. Is all of that case law no longer valid, so that courts no longer can rely on it? Does it remain in effect, but judges must avert their

91. *See* McCormack v. Okla. Pub. Co., 613 P.2d 737, 740 (Okla. 1980); Gomes v. Hameed, 184 P.3d 479, 494 n.14 (Okla. 2008) (Opala, J., dissenting).

eyes from the contaminated passages? Or is there an implicit grandfathering idea that legitimates what has gone before but makes sure that it will not happen in the future? Answers to these questions are not readily apparent, but the grandfathering option is probably the least worst of these choices.

Nor is it a sufficient response, I think, to respond that the amendment does not apply to English law—or at least to English common law—because it is part of what Oklahoma courts have sometimes referred to as a larger "Anglo-American" legal system.[92] Once the amendment sets up a list of approved and forbidden sources of law, which includes categories such as Oklahoma law, federal law, or the law of "other nations," then there is no place for something called "Anglo-American" law because the amendment at least partly embraces a positivist idea of legal authority. Different or larger claims of affiliation become less legitimate and at best rhetorical—not to mention difficult to make in light of the additional bans on "the legal precepts of other . . . cultures," international law, and "Sharia Law."

Also worth noting—although largely beyond the scope of this essay—is that the definition of "nation" is not as clear as it first appears. So far, this essay has assumed that the amendment refers to countries that have achieved sufficient recognition as independent states by the international community. But the word "nation" is not so confined, and it can include "A people who share common customs, origins, history, and frequently language; a nationality," as well as "A federation or tribe, especially one composed of Native Americans."[93] Indeed, to the extent the amendment

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92. A search on July 12, 2011 in LEXIS's Oklahoma State Cases file turned up ninety-eight hits for "(anglo american)," although some of those hits were to the titles of books or articles.

93. According to the American Heritage Dictionary, "nation" means:

> 1. a. A relatively large group of people organized under a single, usually independent government; a country.
>
> b. The territory occupied by such a group of people: All across the nation, people are voting their representatives out.
>
> 2. The government of a sovereign state.
>
> 3. A people who share common customs, origins, history, and frequently language; a nationality: "Historically the Ukrainians are an ancient nation which has persisted and survived through terrible calamity" (Robert Conquest).
>
> 4. a. A federation or tribe, especially one composed of Native Americans.
>
> b. The territory occupied by such a federation or tribe.

Nation, FREE DICTIONARY, http://www.thefreedictionary.com/Nation (last visited Oct. 23, 2012) (quoting the *American Heritage Dictionary of the English Language*, 4th ed., 2000).

takes any account of Native American or Indian law—which it certainly does not do in any express way—the "legal precepts of other nations or cultures" would appear to be the place, and it is an exclusion.

If "nations" turns out to be more ambiguous a term than it first appears, what about "cultures"? The subsequent reference to "Sharia Law" indicates that "cultures" might include law associated with religious traditions, such that "Jewish Halaka or Christian canon law" are also banned.[94] It might also bar so-called "cultural defenses" in criminal cases.[95] Going further, the term "cultures" overlaps with the expansive definition of "nation" that I quoted above. Because the idea of "culture" can be very narrow and very broad, defining and distinguishing among cultures is a difficult task. Indeed, while the amendment refers to "other . . . cultures," it does not provide an express definition of the culture(s) against which others are defined. Perhaps the distinction is between specifically Oklahoma culture and more generally U.S. culture (because federal law and sometimes the laws of other states are permissible) and other cultures.[96] But if that is true, then the game is already lost. It is not possible to define U.S. culture in any way that is both coherent and that allows judges and lawyers to distinguish it meaningfully from a host of "other . . . cultures." For example, does a legal rule derived from civil law represent a legal precept of a different culture or is it consistent with or part of U.S. culture because Louisiana has a strong civilian tradition in its law?[97]

In addition to these broad concerns, the ban on "look[ing] to the legal precepts of other nations or cultures" also generates a series of specific concerns. Section II.A.3 discusses issues of party autonomy, statutes, and general choice of law principles with respect to the phrase "if necessary, the

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94. Roger Alford, *International Law Banned in Oklahoma State Courts*, OPINIO JURIS (Nov. 3, 2010), http://opiniojuris.org/2010/11/03/international-law-banned-in-oklahoma-state-courts/ (response to comment). As the Tenth Circuit pointed out, however, it is not all law associated with any religious tradition that would be banned, but only that of "other" traditions. "The word 'other' implies that whatever religions the legislature considered to be part of domestic or Oklahoma culture would not have their legal precepts prohibited from consideration, while others would." Awad v. Ziriax, 670 F.3d 1111, 1129 (10th Cir. 2012)

95. For a good overview of the cultural defense and the major arguments for and against it, see Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 915-21 (2007).

96. *See Awad*, 670 F.3d at 1129 (suggesting the amendment distinguishes between "domestic or Oklahoma culture" and other cultures).

97. This discussion only begins to scratch the surface of the problems with the word "other" in this context.

law of another state of the United States" in the amendment.[98] Those same topics arise here as well. For example, what if two parties to a contract agree that the law of Spain will apply to any disputes about their agreement (perhaps because one party is from Spain and the other is from Oklahoma)? Does the amendment require Oklahoma courts to override party autonomy and disregard a provision of the contract, and instead apply Oklahoma law, even though the choice of Spanish law may have been important to the final deal? Even more, as discussed above, several Oklahoma statutes allow party autonomy or establish choice of law rules.[99] Does the amendment override them if the law to be applied were that of another nation or culture?[100] And finally, sometimes Oklahoma choice of law jurisprudence will indicate that the law of another country is most appropriate. Are courts barred from following through on such a determination?

The answer to all of these questions may well be yes, because—unlike the provision addressing the law of other states—there is no "if necessary" savings clause for the legal precepts of other nations or cultures. The end result could be substantial unfairness for litigants in Oklahoma courts whose cases have international aspects.[101] David Caron's hypotheticals make the point well:

> Suppose an Oklahoma resident injures a foreign national while driving abroad and that foreign national then files an action in Oklahoma. What law applies to the merits? Suppose that the plaintiff would prevail under Oklahoma law but not under the law of the country in which the incident took place. What law applies to the damages? Suppose that Oklahoma law would award categories of damage not available under the law of the foreign national.[102]

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98. Save Our State Amendment, *supra* note 1.

99. *See supra* note 82 and accompanying text.

100. The UCC, as adopted by Oklahoma, specifically allows the choice of another country's law. *See* 12A OKLA. STAT. § 1-301 (2011) ("[W]hen a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.").

101. As mentioned in the earlier discussion, it may be possible in such cases for Oklahoma courts to decline jurisdiction or dismiss on forum non conveniens grounds.

102. David D. Caron, *The Save Our State Amendment and SCOTUS: Why We Go to Miami*, AM. SOC. OF INT'L LAW NEWSLETTER, July/Sept. 2010, at 1, 7, *available at* http://works.bepress.com/david_caron/116.

As this string of hypotheticals also makes clear, the bad consequences of excluding the laws of other nations would not simply fall on foreigners. Oklahoma litigants could end up being liable or paying more damages under Oklahoma law than they would if the law of another country applied.

One might even conclude, in addition, that the bad consequences of this aspect of the amendment have sufficient foreign relations implications to raise the prospect of foreign affairs preemption. But unless the amendment creates a conflict with federal law or policy, the only available form of preemption is "dormant foreign affairs preemption," which is not only rare but also much criticized.[103]

4. "International Law"

The final, and best known, exclusion in the amendment is the ban on "consider[ing] international law or Sharia Law." For this provision, the words of the amendment are not the only relevant text. The official ballot title for the amendment provides addition information. With respect to international law, it states:

> International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons.
>
> The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties.[104]

This additional language is important because Oklahoma courts consult the text of the official ballot title when interpreting constitutional amendments.[105] Thus, the ban on "consider[ing] international law" includes

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103. *See* Zschernig v. Miller, 389 U.S. 429 (1968) (articulating what has come to be known as dormant foreign affairs preemption); *see also* MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 259-82 (2007) (describing and criticizing dormant foreign affairs preemption); Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L L. 513, 544-46 (2002) (summarizing reasons why dormant foreign affairs preemption is a weak doctrine); *infra* note 126.

104. Okla. Exec. Order (Aug. 9, 2010), http://www.sos.ok.gov/documents/questions/755.pdf.

105. *See* Venetis, *supra* note 6, at 5. The Oklahoma Supreme Court has explained,

> When construing a constitutional amendment that was proposed by the Legislature . . . this Court will read the ballot title together with the text of the measure, even if the text of the measure contains no ambiguities or absurdities.

"international agreements, as well as treaties," and international law formed by the general assent of civilized nations.

Initially, it is worth stressing again that the amendment is a solution in search of a problem. Oklahoma courts rarely discuss, let alone rely on, international law.[106] But this part of the amendment does have several potential consequences.

a) Treaties

Consider, first, the issue of treaties. The amendment (as explained by the ballot title) bars consideration of treaties and international agreements. Standing alone, that exclusion is not particularly problematic because state courts usually have little reason to consult these sources. More specifically, a state court likely would not consult treaties to which the United States is not a party, unless those treaties provided evidence of the content of a rule of customary international law.[107] Such an inquiry is infrequent in most state courts and apparently has never happened in a reported Oklahoma decision.[108]

But the exclusion quickly becomes more problematic when one focuses on treaties and international agreements to which the United States is a party. The Supremacy Clause declares that "all treaties made, or which

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> This Court will do so because those who framed and adopted the amendment considered the text of the measure and its ballot title together. The understanding of the Legislature as the framers and of the electorate as the adopters of the constitutional amendment is the best guide for determining an amendment's meaning and scope, and such understanding is reflected in the language used in the measure and the ballot title.

Southwestern Bell Tel. Co. v. Okla. State Bd. of Equalization, 231 P.3d 638, 642 (Okla. 2009); *see also* Awad v. Ziriax, 670 F.3d 1111, 1116-17 (10th Cir. 2012).

106. The term "international law" appears in eleven reported Oklahoma decisions, but it is important to only one of those decisions: a case in which the court reached the merits of a claim based on the Vienna Convention on Consular Relations but denied relief with respect to the criminal conviction, although the governor had already commuted the death penalty. Torres v. State, 120 P.3d 1184, 1187-88 (Okla. Crim. App. 2005); *see also infra* note 115. The term "customary international law" appears once in a reported Oklahoma decision, as part of the description of the arguments based on the Vienna Convention made by the Mexican government in an amicus brief concerning a Mexican national who was challenging his death sentence. Valdez v. State, 46 P.3d 703, 708 n.20 (Okla. Crim. App. 2002). The court rejected the Vienna Convention arguments as faulty, but granted relief on other grounds. Both results come from searches on July 13, 2011 in LEXIS's Oklahoma State Cases file.

107. For the debate over the extent to which state courts are able to articulate and apply customary international law rules, see *infra* notes 124-125 and accompanying text.

108. *See supra* note 106.

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, anything in the constitution or laws of any state to the contrary notwithstanding."[109] The Supreme Court has interpreted this language to mean less than what it appears to say: "This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law."[110] A treaty or one of its provisions is self-executing "when it 'operates of itself without the aid of any legislative provision.'"[111] By contrast, if the treaty or its provisions "'can only be enforced pursuant to legislation to carry them into effect,'" then it is not self-executing and does not operate as a rule of decision for courts.[112]

Supremacy Clause doctrine thus generates two different results with respect to the amendment's treatment of treaties. First, Oklahoma courts must apply self-executing treaties and must apply non-self-executing treaties if Congress has implemented them. Sometimes compliance with congressional implementation comes down to following the relevant federal statute (and thus applying federal law) but sometimes the statute will specifically instruct courts to apply international law.[113] The amendment's ban on considering treaties is, therefore, unconstitutional as applied to self-executing treaties or to federal statutes that require consideration of international law, because it conflicts with the Supremacy Clause.

But, second, the Supremacy Clause does not require state courts to apply non-self-executing treaty provisions,[114] although they may do so in at least

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

110. Medellín v. Texas, 552 U.S. 491, 504 (2008).

111. *Id.* at 505 (quoting Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829)).

112. *Id.* (quoting Whitney v. Robertson, 124 U.S. 190, 194 (1888)). For discussion of the doctrine and its history, see John T. Parry, *Congress, the Supremacy Clause, and the Implementation of Treaties*, 32 FORDHAM INT'L L.J. 1209 (2009); Carlos M. Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties,* 122 HARV. L. REV. 599 (2008).

113. *E.g.*, 42 U.S.C. § 11603(a), (d) (2006) (conferring jurisdiction on state and federal courts to enforce the Hague Convention on the Civil Aspects of International Child Abduction and instructing them to "decide the case in accordance with the Convention"); *supra* note 31 (discussing federal statute requiring courts to enforce arbitral awards that comply with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

114. *See Medellín*, 552 U.S. at 504-05, 513-14.

some circumstances.[115] As a result, the amendment's ban on consulting treaties is valid as applied to non-self-executing treaties even though such treaties are still the supreme (but not "binding") law of the land. Critics of the distinction between self-executing and non-self-executing treaties accurately point out that the failure of states to comply with non-self-executing treaty provisions puts the United States in default of its international law obligations. As a matter of Supreme Court doctrine, however, the remedy lies with Congress to execute the treaty.

b) Customary International Law

The ballot title's statement that "[t]he law of nations is formed by the general assent of civilized nations" presumably refers to what is now called customary international law ("CIL"), with the result that the amendment also bans consideration of CIL by Oklahoma courts. One might respond with the argument that Oklahoma has already received English common law, and that English common law includes CIL, with the result that CIL is already incorporated into Oklahoma law. But it is doubtful whether any Oklahoma court has ever suggested this possibility and particularly not with respect to the entirety of contemporary CIL. The most that one can imagine an Oklahoma court (or indeed, nearly any U.S. court) accepting is that such an argument applies only to CIL as it existed in the founding era.

The question whether federal law preempts this aspect of the amendment is trickier because the status of CIL in the United States is less certain than the status of treaties. The Supreme Court has declared that "[i]nternational law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right

115. *Cf.* Commonwealth v. Gautreaux, 941 N.E.2d 616, 625 (Mass. 2011) (adopting the conclusions of the International Court of Justice with respect to obligations under Article 36 of the Vienna Convention on Consular Relations even though the Supreme Court has held that the decisions of that court are not binding on U.S. courts); Gutierrez v. State, No. 53506 (Nev., Sept. 19. 2012) (unpublished decision ordering an evidentiary hearing in a death penalty case based in part on an International Court of Justice opinion). In addition, Oklahoma Governor Brad Henry took the ICJ's Vienna Convention jurisprudence into account when he commuted the death sentence of Osbaldo Torres. *See supra* note 106. That decision was controversial, however, in part because critics claimed that Governor Henry "bow[ed] 'to pressure from the Mexican government,' as well as pressure from 'liberal and international groups that oppose the death penalty.'" Janet Koven Levit, *Sanchez-Llamas v. Oregon: The Glass Is Half Full*, 11 LEWIS & CLARK L. REV. 29, 37 n.34 (2007). Note that constitutional issues conceivably could arise if state courts or officials used their interpretations of non-self-executing treaties in a way that arguably interfered with the federal foreign relations power. *See* Zschernig v. Miller, 389 U.S. 429 (1968) (articulating what has come to be known as dormant foreign affairs preemption).

depending upon it are duly presented for their determination."[116] Based on statements like this, many commentators argue that CIL is not just "part of our law" but is, more specifically, federal law (although opinions differ on whether it is federal common law or some other form of federal law). If CIL is federal law of some kind, then state and federal judges must apply it, and it preempts inconsistent state laws.[117] Some courts have agreed, although one study asserts that they have done so "mostly in jurisdictional contexts and have not generally considered [the] broader substantive implications" of the general claim.[118] The *Restatement (Third) of Foreign Relations Law* also takes the position that CIL is federal law that overrides state law.[119] If these sources are correct—if CIL is automatically federal law—then the amendment's ban on using CIL is preempted by the Supremacy Clause because CIL is supreme federal law.

But the idea that all of CIL is automatically federal law has suffered sustained and effective criticism.[120] For its part, the Supreme Court has

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

117. *E.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 237-39 (2d ed. 1996); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES (2d ed. 2003). For a discussion of the founding era's embrace of international law, see David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010).

118. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 816, 821 (1997). For citations to federal court opinions stating that CIL is federal common law, see *id.* at 817 n.3, 837 n.150.

119. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111 cmt. d & reporters' note 3, 115 cmt. e (1987) (stating CIL is federal law, that it is "like common law," and that it overrides state law).

120. *See, e.g.*, Bradley & Goldsmith, *supra* note 118; Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365 (2002). A prominent defender of CIL's status as federal law has summarized Bradley & Goldsmith's criticisms as follows:

> Bradley and Goldsmith argued that the modern position should now be rejected because it is based on a misinterpretation of pre-*Erie* decisions and is inconsistent with "well-accepted notions of American representative democracy, federal common law, separation of powers, and federalism," and because modern customary international law is problematic in a number of respects. For most of the nation's history, they argued, customary international law was regarded as "general common law," not federal law. After *Erie* rejected the concept of general common law, customary international law could have the status of domestic law only if it was given such status by the federal political branches or by the States.

held that CIL can be federal common law in at least some circumstances,[121] but it has also emphasized the need "for great caution in adapting the law of nations to private rights."[122] These cases can be read to suggest a narrower approach: state courts do not operate under a constitutional mandate to apply CIL unless the relevant CIL norms have been incorporated into federal law in some affirmative fashion.[123] Under this framework, state courts remain free to apply CIL as part of their common law unless the application of CIL is barred either by state law,[124] as will be the case in Oklahoma if the amendment ever takes effect, or by some other federal interest.[125]

In sum, although it is clear that CIL norms sometimes operate as federal law of some kind, it is less clear that they operate as federal law all or most of the time. And if it is the case that CIL is not always preemptive federal law, then the amendment's ban on consulting federal law survives a facial

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Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495, 1498 (2011).

121. Samantar v. Yousef, 130 S. Ct. 2278, 2292 (2010) (holding official immunity claims raised by foreign officials are "properly governed by the common law"); Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004) (holding the Alien Tort Statute, 28 U.S.C. § 1350 allows federal courts to "recognize[e] a claim under the law of nations as an element of common law"); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1964) (indicating CIL can be federal law but also rejecting a CIL rule in favor of an independent federal common law rule); *see also* Vázquez, *supra* note 120, at 1538 ("Although the Court did not specify the nature of this common law, the Court's discussion [in *Samantar*] . . . leaves no doubt that it regarded the relevant law as federal, not State, law."); *id.* at 1546-47 ("The [*Sosa*] Court proceeded to consider whether it was appropriate for the federal courts to create a cause of action as a matter of federal common law.").

122. *Sosa*, 542 U.S. at 728.

123. *See* Meltzer, *supra* note 103, at 536-51 (arguing CIL is not automatically federal common law but can be incorporated into federal common law); Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 93 (2009) (arguing "some aspects of the law of nations . . . have functioned as preemptive federal law because of the Constitution's allocation of foreign relations powers in Articles I and II"). Vázquez avoids the label "federal common law" out of concern that it suggests too restrictive of an approach. *See* Vázquez, *supra* note 120, at 1509-11. Despite the title of their article, Bellia & Clark hedge on whether they are articulating a theory of federal common law, of constitutional common law, or a "constitutional rule of decision," or of some other form of "preemptive federal law." *See* Bellia & Clark, *supra* note 123, at 8-9.

124. *Cf.* Bradley & Goldsmith, *supra* note 118, at 870 (arguing that CIL can only operate within state law).

125. *See* Vázquez, *supra* note 120, at 1626-30 (suggesting state court application of CIL could be preempted if it conflicts with federal foreign affairs interests); *see also* Parry, *supra* note 11.

challenge. As applied in specific cases, however, the amendment's ban would be invalid if there is applicable CIL that has the status of federal law.[126]

The amendment's ban on international law raises at least one more important issue. As David Caron and Duncan Hollis have pointed out, once a state or federal court is confronted with a question of treaty interpretation, it frequently will have to look at other sources of international law, as well as the decisions of courts in other countries, to help resolve the issue.[127] The amendment's interaction with federal law creates the potential for a situation in which an Oklahoma court could be required to apply a treaty under federal law, despite the amendment, but would be unable to consult the sources that best elucidate the treaty issues that the court faces, because of the amendment. Perhaps Oklahoma courts would hold that the amendment does not reach such a situation because the federal preemption in the context of treaties includes the sources required to apply the treaty, but neither the amendment nor Supremacy Clause doctrine makes that result clear.

5. "Sharia Law"

The amendment states that Oklahoma courts "shall not consider . . . Sharia Law," and the ballot title states that "Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed."[128] This prohibition, together with the reference to "Sharia

126. Carlos Vázquez suggests that that state court application of CIL could be preempted under the dormant foreign affairs preemption doctrine of *Zschernig v. Miller*, 389 U.S. 429 (1968). *See* Vázquez, *supra* note 120, at 1626-30. One could also argue that *Zschernig* prevents the amendment's prohibitions on consulting international law or the law of other nations or cultures from going into effect. *See supra* note 103. Federal courts likely would reject the argument that this relatively weak doctrine preempts these specific provisions of the amendment, because they do not target particular foreign policy issues and do not target the law of a specific country. *Cf.* RAMSEY, supra note 103, at 259-82 (summarizing reasons why *Zschernig*-style preemption is a weak doctrine); Meltzer, *supra* note 103, at 544-46 (same).

127. *See* Caron, *supra* note 102, at 1, 6; Duncan Hollis, *Suing to Block Oklahoma's Constitutional Amendment*, OPINIO JURIS (Nov. 5, 2010), http://opiniojuris.org/2010/11/05/suing-to-block-oklahomas-constitutional-amendment/. Caron and Hollis both refer to the Supreme Court's recent decision in *Abbott v. Abbott*, 130 S. Ct. 1983 (2010), in which all nine justices signed on to opinions that discussed Chilean law and court decisions of other countries as part of an effort to interpret the Hague Convention on the Civil Aspects of International Child Abduction, although the three dissenters questioned the weight that should be given to such sources.

128. Save Our State Amendment, *supra* note 1.

Law" when discussing the circumstances under which Oklahoma courts can apply the law of other states, is the most controversial part of the amendment. As the plaintiff argued, and the district court found in *Awad v. Ziriax*, the amendment's ban on considering Islamic Law likely violates Free Exercise and Establishment Clause principles by singling out a particular religion for unequal treatment and sending a message that there is something illegitimate about Islam and Islamic law.[129] As a result, under federal constitutional doctrine the two references to "Sharia Law" in the amendment are now unenforceable and are likely to remain so.[130]

Because this essay's focus is on the choice of law aspects of the amendment, however, it is worth considering how the amendment's references to "Sharia Law" would operate if they were to take effect. And, importantly, the ban on "Sharia Law" would have limited effect. No reported Oklahoma cases use the word "Sharia" or the term "Islamic law," and only two cases use the word "Islam," both times in reference to the Nation of Islam.[131] This paucity of references makes sense, because it is hard to see how a choice of law process would result in the selection of "Sharia Law"—rather than, for example, the law of Indonesia (which the amendment already bans as the law of another nation).

"Sharia Law" could come up in certain "child custody, divorce, and other family law matters," however.[132] It could also make its way into Oklahoma courts through the exercise of party autonomy. For example, the original plaintiff in *Awad v. Ziriax* contended that he had standing to challenge the amendment because his will directs that charitable bequests be made according to "the proscribed limitations found in Sahih Bukhari, Volume 4, Book 51, Number 7," and that Oklahoma courts would not be able to

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129. Awad v. Ziriax, 754 F. Supp. 2d 1298, 1305-07 (W.D. Okla. 2010). As noted above, the Tenth Circuit affirmed on Establishment Clause grounds and did not consider Free Exercise. *See supra* note 4 and accompanying text.

130. It is not clear what impact this result would have if the rest of the amendment were to go into effect. The amendment's ban on the legal precepts of "other nations or cultures" could be interpreted to ban all "laws" associated with "other" religious traditions, which would include "Sharia Law." *See supra* note 94 (describing the Tenth Circuit's discussion of this issue). If Oklahoma courts interpreted the amendment in this way, further litigation over the constitutionality of that interpretation would follow.

131. *See* Grant v. State, 205 P.3d 1, 10 n.6 (Okla. Crim. App. 2009); Brooks v. State, 566 P.2d 147, 148 (Okla. Crim. App. 1977). The results reported in the text come from searches in LEXIS's Oklahoma State Cases file on July 14, 2011 for "Sharia," "Islamic Law," and "Islam."

132. Plaintiff-Appellee Awad's Response Brief at 32, Awad v. Ziriax, 670 P.3d 1111 (10th Cir. 2012) (No. 10-6273).

probate his will if the amendment goes into effect.[133] One of the new plaintiffs in that case is an Imam, and he contends that the amendment would force Oklahoma courts and other officials or entities that exercise "adjudicative authority" to reject his credentials to perform marriages, would override the state's statutory priest-penitent privilege, and would erase state tax exemptions commonly available to religious leaders and institutions.[134]

The amendment's definition of "Sharia Law" as "Islamic law . . . based on . . . the Koran and the teaching of Mohammed" is also radically incomplete—so much so that one could attack it as impermissibly vague. As detailed in an earlier essay on the Save Our State Amendment litigation, "[e]ven a schematic summary of standard scholarly accounts" demonstrates that "Islamic law is not limited to these sources, and it is not a static, unitary, or unchanging tradition."[135]

Rather than adopt an accurate view of Islamic law, the Save Our State Amendment propagates the idea that Islamic law derives from original sources and not from a living tradition of interpretation. This is not only a highly selective and misleading definition; it also matches with and supports a popular conception in the United States that Islam is a set of unchanging, pre-modern, and dangerous beliefs. But the amendment does not simply ban this fantasy of Islamic law from Oklahoma courts. It also fights back by insisting on the greater legitimacy of its own list of original sources and, to at least some extent, traditional approaches. The amendment creates an exclusive list of sources of law that Oklahoma courts can apply by category and, arguably, in time; it also constrains judicial discretion, preserves a formal notion of federalism, and keeps American law free of any foreign taint. In this sense, and despite the fact that the amendment's simplistic and inaccurate conception of "Sharia Law" makes it confusing and vague, the ban is also quite precise, for it seems clear that the point was to defend against (by attacking) an image of "Islamic fundamentalism."

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133. Plaintiff-Appellee Awad's Response Brief, attachment 2 at 1-2, *Awad*, 670 P.3d 1111 (No. 10-6273). Sahih Bukhari is one of the important collections of hadith, which are "an account of what the Prophet said or did, or of his tacit approval of something said or done in his presence." 3 THE ENCYCLOPAEDIA OF ISLAM, NEW EDITION 23 (Bernard Lewis et al. eds., 1986).

134. First Amended Complaint, *supra* note 5, ¶¶ 64-82. Remember that the amendment may apply not just to "courts" but also to "Boards, Agencies and Commissions" that exercise "adjudicative authority." *See supra* notes 18-19 and accompanying text.

135. Parry, *supra* note 10, at 167, 168.

C. The Save Our State Amendment and the Erie Doctrine

Under the Rules of Decision Act of 1948[136] and *Erie Railroad v. Tompkins*,[137] a federal court hearing a diversity case must apply state law as the rule of decision, not federal or general law. Further, a federal district court must apply the choice of law rules of the state in which it sits.[138] Thus, Oklahoma federal district courts must apply Oklahoma choice of law rules.

Because the amendment functions in part as a choice of law statute, it will change the way Oklahoma courts approach choice of law issues if it goes into effect. Oklahoma's federal courts will have to follow along. In addition, any state or federal court that decides, under any choice of law rules, that it must apply Oklahoma law will also have to take the amendment into account when trying to decide the content of Oklahoma law. If there is an open question of Oklahoma law, the amendment would appear to constrain the sources to which a court can look in predicting the new rule and perhaps also constrain the way in which courts think about legal rules.

It may be, however, that although they are bound to apply Oklahoma law, including the amendment if it goes into effect, federal courts will interpret the amendment differently from state courts. In particular, they may be more likely to interpret the amendment narrowly or to find that portions of it are preempted by federal law.

Conclusion: Fatal Vagueness or Fundamental Change?

The goal of this essay has been to take the Save Our State Amendment seriously as law and, more specifically, to consider its doctrinal effect as the constitutionalization of a particular approach to choice of law. Seen in this way, the amendment has the potential to reshape dramatically choice of law jurisprudence in Oklahoma.

Yet the exact shape of the resulting jurisprudence is difficult to predict. As this essay acknowledges, it is often difficult to determine a best interpretation of the amendment. Oklahoma courts will have to decide exactly what, among several choices, it means. There is some irony, of course, to the idea that a state constitutional amendment designed in part to reduce judicial discretion will end up enhancing and entrenching it. But it seems there is something more to say as well. So many words and phrases

136. 28 U.S.C. § 1652 (2006).
137. 304 U.S. 64 (1938).
138. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

in the amendment are ambiguous that it is impossible for lawyers and judges, let alone litigants, to know what the amendment means as a statement of doctrine. Thus, it may be that in addition to the specific constitutional challenges that would chip away at the amendment by preventing portions of it from going into full effect, one could also make an overarching challenge to the amendment as irrevocably shot through with vagueness. (Or, one can hope that the federal courts will save the day by determining, whether or not appropriately, that the amendment is not severable.)

If other states follow were to Oklahoma's specific path, the result would be a significant reshaping of American choice of law. Choice of law scholars have often debated the benefits of statutory approaches to choice of law, and they have persuaded some state legislatures to enact a variety of choice of law statutes.[139] What they have not considered or sought are changes in choice of law rules through popular initiative and in the company of political agendas that have little to do with technical legal doctrine, something to do with political conceptions of the judicial role, the nature of law, and the legitimacy of various sources of law, and everything to do with ideas of security, purity, and invented traditions.

139. For a brief summary of these debates and of the ways states have codified choice of law rules, see James A.R. Nafziger, *The Louisiana and Oregon Codifications of Choice-of-Law Rules in Context*, 58 AM. J. COMP. L. SUPP. 165 (2010).