OKLAHOMA
LAW REVIEW

VOLUME 66 WINTER 2014 NUMBER 2

FOREIGN LAW IN AMERICAN COURTS

EUGENE VOLOKH*

I. Introduction

Should American states bar the use of foreign law in American courts? This question has arisen throughout the country, most prominently in Oklahoma, which in 2010 enacted an unusually broad ban on such use of foreign law.[1] This ban was later struck down by the Tenth Circuit on the grounds that part of the ban singled out Islamic law for special restriction.[2] That, though, was a narrow objection, which the legislature could easily deal with by just banning foreign law without mentioning Islamic law. Indeed, after the Tenth Circuit decision, Oklahoma enacted just such a narrower restraint on the use of foreign law by Oklahoma courts, as have other states.[3] Still more state legislatures have considered the issue, and it remains under consideration in some.[4]

I'm particularly interested in discussing the question because the initiatives that restrict the use of foreign law have mostly come from the political right, and I generally come from there, too. I'm a conservative. I support free markets. I support gun rights. I vote Republican. And I'm skeptical of some of the internationalist impulses that often come from the left.

* Gary T. Schwartz Professor of Law, UCLA School of Law (volokh@law.ucla.edu). Many thanks to the University of Oklahoma College of Law for inviting me to give the Henry Lecture in March 2013, and to Judge Robert Henry for his help and hospitality; this article is based on that lecture.

1. *See* H.R.J. Res. 1056, 52d Leg., 2d Sess. (Okla. 2010).
2. *See* Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012).
3. *See infra* Part III.B.3.
4. *See infra* notes 66 and 67.

But I also think the criticism of the use of foreign law in the American legal system misses some important matters, and the proposed solutions to a real but relatively minor problem may cause much more serious problems instead.[5] And the problems that these proposals would cause should concern most Americans, without regard to ideology. They would be practical problems for American businesses and individuals, affecting the everyday functioning of our legal and economic systems.

We shouldn't embrace every attempt to introduce foreign law into the American legal system, but neither should we rush to reject foreign law generally. There are times when American law does, and rightly should, call for reference to foreign law, and there are times when it should not. (In an article in the following issue of this law review, I say something similar about the use of religious law in the American legal system.)

II. The Controversy over Using Foreign Law in Determining the Meaning of U.S. Constitutional Provisions

The controversy over the use of foreign law to interpret the U.S. Constitution has appeared at various times in American history, but it most recently sprung up about ten years ago, in a trio of constitutional cases: *Atkins v. Virginia*,[6] *Lawrence v. Texas*,[7] and *Roper v. Simmons*.[8]

Atkins interpreted the Eighth Amendment's Cruel and Unusual Punishment Clause as barring execution of mentally retarded murderers.[9] The *Atkins* majority's analysis discussed many reasons why the majority viewed punishment of the mentally retarded as "cruel and unusual," but a footnote mentioned foreign law in passing: "Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Brief for European Union as *Amicus Curiae* 4."[10] This wasn't much by way of reliance: foreign law was cited as the third of the four sources of authority that the footnote mentioned (the others being the views of associations of psychologists, the views of various religious groups, and survey results).

---

5. See generally Stephen C. Yeazell, *When and How U.S. Courts Should Cite Foreign Law*, 26 CONST. COMMENT. 59 (2009), for an excellent analysis of this issue.

6. 536 U.S. 304 (2002).

7. 539 U.S. 558 (2003).

8. 543 U.S. 551 (2005).

9. *Atkins*, 536 U.S. at 321.

10. *Id.* at 316 n.21 (citations omitted).

Nonetheless, it understandably drew criticism, especially from Justice Scalia's dissent.[11]

The following year, in *Lawrence v. Texas*, the Court struck down a ban on homosexual sex, overruling the 1986 *Bowers v. Hardwick* decision.[12] In the process, the Court included this passage to explain why it was rejecting *Bowers*:

> To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.[13]

Chief Justice Burger's concurrence in *Bowers*, it turns out, had itself mentioned foreign law in the course of rejecting a right to sexual autonomy, arguing that such a rejection had been the general view of western legal systems since time immemorial.[14] *Lawrence* then, in passing, responded to Chief Justice Burger by saying that, to the extent his *Bowers* opinion relied on values we shared with our wider civilization, we should recognize that in recent decades this wider civilization has rejected those values.[15] So again the reference was relatively fleeting, though again it understandably drew criticism from the dissent.[16]

Two years later, the Court once more looked to foreign law in interpreting our Constitution. In *Roper v. Simmons*, the Court interpreted the Cruel and Unusual Punishments Clause as barring the execution of murderers who had committed their crimes before they turned eighteen.[17] Here, though, the analysis was considerably more detailed:

---

11. *Id.* at 347-48 (Scalia, J., dissenting).
12. *Lawrence*, 539 U.S. at 578.
13. *Id.* at 576-77 (citations omitted).
14. Bowers v. Hardwick, 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring).
15. *Lawrence*, 539 U.S. at 576-77.
16. *Id.* at 598 (Scalia, J., dissenting).
17. 543 U.S. 551, 575 (2005).

> Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop [v. Dulles]*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments."
>
> As respondent and a number of *amici* emphasize, Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18. No ratifying country has entered a reservation to the provision prohibiting the execution of juvenile offenders. Parallel prohibitions are contained in other significant international covenants.
>
> Respondent and his *amici* have submitted, and petitioner does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.
>
> Though the international covenants prohibiting the juvenile death penalty are of more recent date, it is instructive to note that the United Kingdom abolished the juvenile death penalty before these covenants came into being. The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. The Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689, which provided: "[E]xcessive Bail ought not to be required nor excessive Fines imposed; nor cruel and unusual Punishments

> inflicted." As of now, the United Kingdom has abolished the death penalty in its entirety; but, decades before it took this step, it recognized the disproportionate nature of the juvenile death penalty . . . .
>
> It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions. . . .
>
> It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.[18]

Even with this extended discussion in *Roper*, it is not quite clear how much the three decisions were actually affected by foreign law. The majority in each case gave many reasons for its decision, so it seems quite likely that each of the Justices would have reached the same conclusion even without considering foreign law. And there is a longstanding tradition of relying on foreign law in determining the scope of American constitutional law;[19] whatever is going on here is not some sharp break with traditional American practice.

Nonetheless, it is understandable that using the views of foreign governments as authority for determining the constitutional rights of Americans has aroused much opposition. American traditions related to constitutional rights differ considerably from those of foreign nations, even the nations of Europe and the Anglosphere.

American views about the right to bear arms are one example.[20] American views about broad protection for free speech, including racist and

---

18. *Id.* at 575-78 (citations omitted).

19. Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 752-53 (2005); *see also, e.g.*, United States v. Reynolds, 345 U.S. 1 (1953); Ker v. Illinois, 119 U.S. 436 (1886); Hurtado v. California, 110 U.S. 516 (1884); Knox v. Lee, 79 U.S. (12 Wall.) 457 (1870).

20. Stephen G. Calabresi, *"A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1391 (2006).

antidemocratic speech, are another.[21] The same is true of constitutional doctrines that have generally appealed more to liberals than conservatives: American views on abortion rights, the separation of church and state, and the exclusionary rule are considerably more constraining of the government than are European views.[22]

Of course, courts routinely rely on many sources, including law review articles or professional groups (as in the *Atkins* footnote). The authors of those works likewise weren't elected or appointed by Americans to make law for Americans.

But foreign law is *law*, and seemingly an expression of public sentiment in allied and respected countries, not just the views of a few academics or even of a professional association. Judges therefore may well be more likely to view foreign law as having moral authority. Judges may find the arguments of law professors to be persuasive, and they may find the factual claims of professors who have studied certain fields to be credible. But they will rarely view the opinions of law professors as having significant normative authority, especially in deciding whether to strike down a statute. Yet the material quoted above, especially the quote from *Roper*, suggests that the Court viewed international practice as normatively authoritative.

And it's quite sensible to worry that the Court's attention to international law could lead to a reduction in individual rights and not just a broadening of those rights. Consider, for instance, the prediction of Professor Peter Spiro, a *supporter* of the greater use of international law in the American legal system:

> [T]his analysis [supporting the use of international law in American courts] supplies a normative basis for national decisionmakers to rebalance rights. To take the concrete case, *an international norm against hate speech would supply a basis for prohibiting it, the First Amendment notwithstanding*.
>
> C. Insinuating International Law
>
> It is unlikely in the extreme that the treatymakers would undertake such a frontal assault against the supremacy of constitutional rights given the clear current lack of constitutional authorization to constrain rights on international law grounds . . . .

21. *Id.* at 1405.
22. *Id.* at 1405-10.

> The analysis is not, however, irrelevant to current constitutional practice, for it also justifies putting international regimes to work in the context of constitutional interpretation. This use of international regimes has been engaged. In U.S. courts, those asserting rights are no longer embarrassed to deploy international law arguments, as they once were. The United States Supreme Court is regularly subjected to such arguments, especially from amici (including foreign government amici). International law is becoming part of the vocabulary of American constitutional law. Although its doctrinal place remains unsettled, *international law appears poised to make unprecedented inroads in the making of American constitutional law* [giving *Atkins v. Virginia* as an example]. . . .
>
> This battle is now being fully engaged, on academic, judicial, and policy fronts. Deploying international law as an interpretive tool reflects a defensive strategy, ostensibly a process of domestication rather than one of submission. This may mask what is, in fact, a partial displacement of constitutional hegemony. International law may be a process in which the United States and U.S. entities participate, but it is not a creature of the Constitution. On the other hand, resistance and insulation may no longer be viable options. One can expect more frequent deployment of international norms as part of the domestic rights discourse. *In the long run, international norms may be played, not merely as persuasive agents, but as trumps*.
>
> Constitutional rights have presented a discursive bulwark against the encroachment of international law. The continuing refusal to contemplate the international determination of rights betrays the embedded nationalist orientation of constitutional theory, and the field of foreign relations law proves to be no exception. These nationalist assumptions may be conceptually vulnerable in the face of the changing architecture of international law and community. *Constitutional rights have bowed to the treaty power and the exigencies of foreign relations as a matter of historical practice*, even as the inviolability of domestic rights interpretation has been set as a matter of constitutional faith. Accompanying doctrines of constitutional hegemony, deviations notwithstanding, were justified in a world in which law offered no protection of individual rights. As the

> regime of international human rights grows thick, however, that justification should no longer stand unchallenged. As transnational society develops a common rights culture, one in which the disaggregated United States enjoys a voice, *the supremacy of international rights may be normatively sustainable*. In the short term, this argues for the relevance of international norms in domestic constitutional interpretation. *In the long run, it may point to the Constitution's more complete subordination.*[23]

Professor Spiro's reasoning suggests that there is cause to be concerned, I think, about the use of foreign law in defining American constitutional rules.

At the same time, even Justice Scalia, who has sharply criticized reliance on foreign law in this context, has concluded that it is proper to use foreign law in some contexts. One example is *Schriro v. Summerlin*,[24] which dealt with whether certain expansions of the right to a jury trial (expansions that Justice Scalia endorsed[25]) should be applied retroactively on habeas review. Under the Court's retroactivity jurisprudence, such retroactive application of a procedural rule would be justified only if it is a "'watershed rule[] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[26] And the expansion of the jury trial right, Justice Scalia held (in an opinion joined by the four other conservative Justices), was not such a watershed rule, partly because

> for every argument why juries are more accurate factfinders, there is another why they are less accurate. The [dissent below] noted several, including juries' tendency to become confused over legal standards and to be influenced by emotion or philosophical predisposition. Members of this Court have opined that judicial sentencing may yield more consistent results because of judges' greater experience. Finally, the mixed reception that the right to jury trial has been given in other countries, though irrelevant to the meaning and continued existence of that right under our Constitution, surely makes it implausible that judicial factfinding so "*seriously* diminishe[s]"

---

23. Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999, 2025-28 (2003) (emphasis added).

24. 542 U.S. 348 (2004).

25. Ring v. Arizona, 536 U.S. 584, 610-14 (2002) (Scalia, J., concurring).

26. *Schriro*, 542 U.S. at 352 (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)).

> accuracy as to produce an "'impermissibly large risk'" of injustice. When so many presumably reasonable minds continue to disagree over whether juries are better factfinders *at all*, we cannot confidently say that judicial factfinding *seriously* diminishes accuracy.[27]

So even Justice Scalia is sometimes willing to consult foreign law in crafting American legal rules. He reasons that such consultation is improper when determining the "meaning and continued existence" of a constitutional right. But it is just fine, he concludes, when a court is considering other questions, such as the nonconstitutionally mandated rules of habeas corpus.

I tentatively agree with Justice Scalia's view that it's not sound to define the meaning of American constitutional rights with reference to foreign views of such rights. The problem, though, is that there is little that state legislatures can do about this. State law cannot directly bind the U.S. Supreme Court in its interpretation of the U.S. Constitution. And while state law might at times indirectly influence the Court, by sending a message that some American institutions disapprove of the use of foreign law, such effects are likely to be slight.

III. Choice of Law Rules in Nonconstitutional Adjudication

On the other hand, while the benefits of bans on the use of foreign law are likely to be small, the costs could be grave. Foreign law is routinely used in American courts, not just in esoteric contexts like the one in Justice Scalia's *Schriro* opinion, but in routine matters applying existing American legal rules related to family law, contract law, tort law, evidence law, and the like.[28] Those American legal rules (such as "choice of law" rules) often expressly call for the consideration of foreign law. Let me offer a few such examples.

A. Family Law

Consider, for instance, *Ghassemi v. Ghassemi*, a 2008 Louisiana case.[29] The Ghassemis were first cousins born in Iran.[30] They married in Iran in 1976 and had a son born in Iran in 1977.[31] The husband then came to the

27. *Id.* at 356 (citations omitted).
28. *See* Yeazell, *supra* note 5, at 61-62.
29. 2207-1927 (La. App. 1 Cir. 10/15/08); 998 So.2d 731.
30. *Id.* p. 4, 998 So.2d at 734.
31. *Id.* p. 2, 998 So.2d at 733.

United States to study, while the wife and son stayed behind.[32] The husband remained in America, and in 1995 arranged for the son to join him in America.[33] The wife also eventually came to America, and in 2006 she petitioned for divorce from the husband.[34]

To rule on the divorce petition, Louisiana courts first had to determine whether the Ghassemis were validly married. It turns out that Louisiana, like about half the other states, bars marriage between first cousins.[35] If the Ghassemis had tried to get married in Louisiana, their marriage would not have been valid.[36]

But the Ghassemis had married in Iran, not in Louisiana. And in such a situation, Louisiana law expressly provides that Louisiana must look to the law of the place where the marriage was entered into: "A marriage that is valid in the state [defined to include foreign countries] where contracted . . . shall be treated as a valid marriage unless to do so would violate a strong public policy of [Louisiana] . . . ."[37] This is a common legal rule in American states, stemming from longstanding principles favoring the validity of marriages:

> Based on the universally espoused policy of favoring the validity of marriages if there is any reasonable basis for doing so (favor matrimonii), this Article authorizes the validation of marriages that are valid either in the state where contracted or in the state where the spouses were first domiciled as husband and wife. . . . This ancient policy of favor matrimonii and favor validatis is well entrenched in the substantive law of every state of the United States.[38]

The Louisiana court therefore looked at Iranian law to determine if the Ghassemis were validly married. The court concluded that first cousin marriages were valid under Iranian law, and therefore the Ghassemis were validly married for purposes of Louisiana law.[39] The court did not refuse to

32. *Id.*
33. *Id.*
34. *Id.* p. 3, 998 So.2d at 734.
35. *Id.* p. 16, 998 So.2d at 742.
36. *Id.* p. 16, 998 So.2d at 742-43.
37. *Id.* p. 9, 998 So.2d at 738.
38. *Id.* (quoting LA. CIV. CODE ANN. art. 3520, cmt. (b) (2013)).
39. *Id.* p. 26, 998 So.2d at 749-50.

follow Louisiana law by applying Iranian law. Rather, it applied Iranian law *because Louisiana law so required*.[40]

Moreover, the Louisiana court also looked to European law, Mexican law, and Canadian law:

> Furthermore, we note that marriages between first cousins are widely permitted within the western world. "Such marriages were not forbidden at common law." Additionally, no European country prohibits marriages between first cousins. Marriages between first cousins are also legal in Mexico and Canada, in addition to many other countries.
>
> Actually, the U.S. is unique among western countries in restricting first cousin marriages. Even so, such marriages may be legally contracted in [nineteen states] . . . . An additional six states . . . also allow first cousin marriages subject to certain restrictions.[41]

Yet this too is just the *application* of Louisiana law, rather than the replacement of Louisiana law with foreign law. Recall that the Louisiana statute provides that foreign marriages are recognized "unless to do so would violate a strong public policy of the state."[42] A "strong public policy" must be something more than just a policy against entering into a certain kind of marriage in Louisiana—the whole point of the statute, after all, is to validate some marriages that could not have been validly entered into in Louisiana.

Rather, a "strong public policy" must be something stronger. In the words of the *Ghassemi* court, the question is whether, "although Louisiana law expressly prohibits the marriages of first cousins, such marriages are . . . so 'odious' as to violate a strong public policy of this state."[43] Looking at how such marriages are treated by sister states within the United States and by other countries within our Western culture, can help tell us how "odious" our culture generally sees such marriages as being. And the uniform recognition of such marriages in Europe and among our North American neighbors, coupled with the recognition of such marriages in half

40. *Id.* p. 11, 998 So.2d at 739-40.
41. *Id.* p. 25, 998 So.2d at 748-49 (citations omitted).
42. LA. CIV. CODE ANN. art. 3520(A) (2013).
43. *Ghassemi*, p. 26, 998 So.2d at 749-50.

the states, suggests that the marriages are indeed not contrary to a "strong public policy" in Louisiana.[44]

But what about polygamous marriages? What about same-sex marriages? Well, that's where the "strong public policy" exception might come in. American courts that have considered the question have indeed concluded that polygamous marriages are contrary to American public policy.[45] (Note that one basis for so deciding is that polygamous marriages are not recognized in the United States or in most European countries.) And Louisiana law expressly provides that same-sex marriages are against Louisiana public policy and thus invalid, even if entered into elsewhere.[46] So if a foreign marriage is seen as sufficiently improper by state courts or the state legislature, it need not be recognized; but many other foreign marriages are recognized by states even if they could not be lawfully entered into in those states.

And the Louisiana statute makes sense. I think it makes sense as to the definitions of *which* marriages are recognized: Whatever one might think of the merits of first cousin marriages, if those cousins have married—whether in Iran or Tennessee—it seems wrong to render them unmarried when they come to Louisiana, whether to live or to visit.

But beyond this, surely the determination of *what is needed* to be married must turn on the law of the place of marriage and not on the law of Louisiana. Louisiana law, for instance, requires a Louisiana marriage license, plus a 72-hour waiting period.[47] Unsurprisingly, people who marry in Iran or Canada or England won't comply with Louisiana formalities. Why would they even have thought to comply with them?

Then, when they come to Louisiana—perhaps many years later—and there is a question of whether they are married for Louisiana law purposes, Louisiana courts shouldn't just say, "You didn't get a Louisiana license and wait 72 hours when you thought you got married, so therefore you aren't married." Louisiana courts instead need to inquire into whether the couple

---

44. *Id.*

45. *See, e.g.*, Elia-Warnken v. Elia, 972 N.E.2d 17, 20 (Mass. 2012).

46. LA. CIV. CODE ANN. art. 3520(B) (2013). Of course, if the Supreme Court eventually concludes that the Constitution mandates equal recognition of same-sex marriages, then this provision of the Louisiana Civil Code would be invalidated, and Louisiana would have to recognize foreign same-sex marriages. But Louisiana would then also have to allow same-sex marriages within Louisiana itself; it wouldn't be foreign law that requires recognition of out-of-state same-sex marriages, but federal constitutional law that requires recognition of all same-sex marriages.

47. LA. REV. STAT. ANN. § 9:241 (2013).

was properly married under the laws of the place where they married, just as the Louisiana statute provides.[48]

B. Evidence Law and Family Status

The same is true when other bodies of law, such as evidence law, turn on people's marital status. For example, suppose Heinz and Wilhelmina are a couple, and Heinz is accused of a crime in Oklahoma. May Wilhelmina be compelled to testify about what Heinz told her? Well, Oklahoma law provides that, if the two are married, then Heinz may prevent Wilhelmina from testifying about any confidential communications that the two shared.[49]

Say, though, that Heinz had been married before, to his ex-wife Erica. So, to figure out if Heinz and Wilhelmina are married, a court must decide whether Heinz and Erica were properly divorced. And say the purported divorce and marriage happened in Austria, and Heinz and Wilhelmina are visiting Oklahoma (whether for business or pleasure).

To determine whether the marriage and the divorce were proper, Oklahoma courts can't ask whether the couple complied with American marriage law or divorce law. Of course the divorce didn't comply with American divorce law. Why should it have? It stemmed from an Austrian proceeding, which followed Austrian rules. When Heinz divorced and remarried, he never expected to be in America many years later.

So Oklahoma courts would turn, as in *Ghassemi*, to the standard rule of family law, which is to determine the validity of a marriage or a divorce by applying the law of the jurisdiction where either took place.[50] There is nothing particularly radical about such rules. But if Oklahoma courts cannot consider foreign law, how can they possibly make these marital status decisions that are needed to apply American law?

Again, it is American law that says a spouse may not testify about confidential communications. And it is American law that says whether a person is married or divorced is to be determined under the law of the jurisdiction where the marriage or divorce took place. But applying this American law requires courts to consider Austrian law.

---

48. LA. CIV. CODE ANN. art. 3250 (2013).
49. 12 OKLA. STAT. § 2504(B) (2011).
50. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 283(2).

C. Contract Law

Consider also contract law—to be concrete, consider *Campbell v. American International Group, Inc.*, a 1999 Oklahoma case.[51] Christopher Campbell (a Louisiana resident) was injured in an accident while riding in a car driven by Michael Muller (an Oklahoma resident).[52] Both men were American soldiers, and the accident happened in Germany, where they were stationed.[53] Muller's auto insurance was issued in Germany by a French corporation.[54]

After the men returned to the United States, Campbell sued Muller and Muller's insurance company in Oklahoma court.[55] Insurance cases are primarily contract cases, so the court had to decide which law to use in interpreting the contract.[56] And the court concluded, reading the insurance policy, that the policy incorporated German law—unsurprising for a policy sold in Germany.[57]

I don't think there should be anything controversial about such use of foreign law. We Americans are part of the big world and we go all over it, whether as soldiers, businesspeople, or tourists. When we travel we might enter into a contract. Then, after we come back, and a dispute arises, we may want the benefit of suing in American courts, which are more convenient for us.[58]

American courts give us this benefit of suing locally, but that doesn't mean those courts should apply local state law to a contract the parties never anticipated would be governed by that state law—a contract that was entered into and largely performed in a foreign country. Among other things, it would be bad for American business if Germans knew that a contract signed in Germany, which they would normally expect to be governed by German law, would be interpreted using American law regardless of any choice-of-law contract provision. Any such always-use-

51. 1999 OK CIV APP 37, 976 P.2d 1102.
52. *Id.* ¶ 2, 976 P.2d at 1103.
53. *Id.*
54. *Id.*
55. *Id.* ¶ 3, 976 P.2d at 1103.
56. *Id.* ¶ 19, 976 P.2d at 1107.
57. *Id.*
58. Of course, this assumes that those courts have jurisdiction over the defendants. *See, e.g.*, *id.* ¶¶ 13-18, 976 P.2d at 1106-07 (finding there was such personal jurisdiction for various reasons, including that the insurance company had deliberately marketed its policies to an international clientele).

American-law rule would lead many foreigners to avoid doing business with Americans or to charge more for doing business with Americans.

So as a result, it makes perfect sense for a court in a case such as *Campbell* to use German law. And, again, that is simply the application of *American* choice of law rules, which in this instance call for reference to German law.

D. Tort Law

Or consider tort law.[59] Let us say a Canadian (Don) injures an Oklahoman (Paul) in Canada, and then Don moves to Oklahoma before a lawsuit is filed, perhaps because he works at Devon Energy Corporation and was transferred to its Oklahoma office.[60] Paul sues Don in Oklahoma, where the plaintiff and defendant both now live and where defendant's assets are now located. Generally speaking, in such a case Oklahoma courts would apply Canadian law.[61]

For example, let us say the injury happened in an automobile accident, and Paul claims that Don was driving unreasonably. We would naturally want to see if Don was violating traffic laws. Which traffic laws? Canadian traffic laws. We wouldn't ask if Don was driving in violation of an Oklahoma traffic law while driving in Canada.

The same would be true for other types of tort law, or if an Oklahoman injured a Canadian in Canada, rather than vice versa. There are complicated choice of law questions as to which laws should apply in certain situations.[62] But in many situations it's clear that the proper application of choice of law rules requires foreign law to be applied.

---

59. *See also* Yeazell, *supra* note 5, at 62.

60. Devon is a very large company in Oklahoma and in Canada.

61. *See, e.g.*, Edwards v. McKee, 2003 OK CIV APP 59, 76 P.3d 73 (Okla. Civ. App. 2003). *Edwards* involved the law of another state (Kansas), not another country, but the choice of law analysis is much the same in either situation. The court applied the Restatement (Second) of Conflicts of Laws, which provides that "[t]he rules in the Restatement of this Subject apply to cases with elements in one or more States of the United States and are generally applicable to cases with elements in one or more foreign nations." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 10. The Restatement also notes that "[t]here may, however, be factors in a particular international case which call for a result different from that which would be reached in an interstate case," but that would generally not arise in a typical accident case. *Id.*

62. *See, e.g.*, Pate v. MFA Mut. Ins. Co., 1982 OK CIV APP 36, 649 P.2d 809 (determining whether Oklahoma law would apply to an Arkansas auto insurance contract's subrogation clause when the accident occurred in Oklahoma).

If the option of applying Canadian law were eliminated, Oklahoma courts would have two alternatives. First, they could apply Oklahoma law, even though the accident happened in Canada. For the reasons mentioned above, that would be unwise. It would be unfair to the litigants, who were understandably expecting that they should follow Canadian rules of the road and not Oklahoma rules of the road. And it would likely produce tension with foreign countries, which would be bad for businesses that employ many Americans.

Second, Oklahoma courts could just refuse to decide the case and insist that the case instead be decided by Canadian courts. "We cannot apply Oklahoma law," these hypothetical courts would say, "because this case involves a Canadian accident. And we cannot apply Canadian law because that would be considering foreign law and that would be bad."

But is this what Oklahomans really want? Oklahomans should, I think, prefer that they have an opportunity to litigate in their own state, rather than having to travel to another country to sue. So instead of just refusing to decide cases that are based on out-of-state events, or applying Oklahoma law where it would clearly be inapt, Oklahoma courts apply choice of law principles—principles that are not the invention of some liberal law professor, but have existed throughout American history.[63]

E. The Law of Judgments

Let me offer a final example: the law of judgments. Imagine that an English corporation tries to enforce an English judgment in Oklahoma against an Oklahoma corporation.

American businesspeople wouldn't want foreign judgments to be unenforceable against their businesses. If that were to happen, nobody would deal with American businesses in the first place. Why would Englishmen do business with Oklahomans if they know they can't effectively sue and collect judgments if the deal goes sour? Because businesses would suffer if foreign money judgments could not be collected, Oklahoma law (like the law of American states more generally) provides that foreign money judgments can be enforced in Oklahoma courts.[64] But

63. *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC (1834). Joseph Story was one of the most prominent legal scholars and Supreme Court Justices of the early 1800s, likely second only to Chief Justice John Marshall in stature.

64. 12 OKLA. STAT. § 718.3 (2011).

Oklahoma law also requires, understandably, that the judgment be final and enforceable "[u]nder the law of the foreign country where rendered."[65]

So, to determine whether our hypothetical English judgment can be enforced in Oklahoma courts, a court would need to look to the law of England, the foreign country where it was rendered—the court would need to determine whether the judgment is final and enforceable under English law. This, then, is yet one more example where American law rightly requires American courts to consider foreign law.

IV. Attempts to Restrict the Application of Foreign Law

A. The Oklahoma "Save Our State" Amendment

The examples in Part III help show why the Oklahoma "Save Our State" Amendment was misguided. That amendment provided, in relevant part:

> [Oklahoma courts], when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. *The courts shall not look to the legal precepts of other nations or cultures.* Specifically, the courts shall not consider international law or Sharia Law.[66]

The Amendment would thus have forbidden Oklahoma courts from considering foreign marriage law, foreign contract law, foreign tort law, and foreign judgments law. Oklahoma courts would have been unable to effectively tell whether foreigners were married or whether foreign judgments were enforceable, and would have been forbidden from applying foreign contract law or foreign tort law. (Similar bills were proposed but not enacted in Alabama, Arizona, Missouri, New Mexico, South Carolina, Texas, and Wyoming.[67])

---

65. *Id.*

66. OKLA. CONST. art. VII, § 1(C) (emphasis added), *permanently enjoined by* Awad v. Ziriax, No. CIV-10-1186-M (W.D. Okla. Aug. 15, 2013).

67. S.B. 44, 2013 Leg., Reg. Sess. (Ala. 2013); H.B. 2379, 49th Leg., 2d Reg. Sess. (Ariz. 2010); S.B. 308, 96th Gen. Assemb., Reg. Sess. (Mo. 2011); S.J. Res. 14, 50th Leg., 2d Reg. Sess. (N.M. 2012); S.B. 444, 119th Gen. Assemb., 2d Reg. Sess. (S.C. 2011); S.B.

The Tenth Circuit struck down the Oklahoma Amendment on the grounds that it violated the First Amendment by singling out Islamic law (Sharia law) for special prohibition.[68] I'm not sure this was right,[69] but the decision helped Oklahoma dodge a bullet. I don't think the drafters of the "Save Our State" Amendment consciously intended to break the well-established and useful choice of law rules in the kinds of cases I described above, and keeping the Amendment would have been bad for Oklahoma citizens and Oklahoma businesses. In any event, Oklahoma and other states should avoid broad foreign law bans such as those in the "Save Our State" Amendment, whether or not the bans also single out Islamic law.

Of course, critics might ask, "What if the foreign law is horrible? What if it calls for cutting off people's hands?" Fortunately, though, not a single court decision applying foreign law enforces any such foreign regime. Existing choice of law rules contain many tools that ensure American courts do not apply a foreign law that is sufficiently against American public policy.[70]

And in any event, even those tools only need to be invoked in a tiny fraction of all cases. Most of the foreign commercial, family, and tort law applied in American courts is compatible with American public policy. In such cases, we do want American courts to "look to the legal precepts of other nations."

B. The "American Laws for American Courts" Model

1. Generally

After the first wave of proposed foreign law bans—exemplified by the "Save Our State" Amendment—legislatures turned to considerably narrower proposals, mostly based on the American Laws for American Courts (ALAC) framework.

1639, 83d Leg., Reg. Sess. (Tex. 2013); H.J. Res. 0005, 62d Leg., Reg. Sess. (Wyo. 2013); *see also* H.B. 597, 2011 Leg., Reg. Sess. (Ala. 2011); S.B. 62, 2011 Leg., Reg. Sess. (Ala. 2011); S. 1387, 118th Gen. Assemb., Reg. Sess. (S.C. 2010); H.B. 1240, 82d Leg., Reg. Sess. (Tex. 2011).

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

69. *See* Eugene Volokh, *Tenth Circuit Says Oklahoma Anti-Sharia Law Is Likely Unconstitutional*, THE VOLOKH CONSPIRACY (Jan. 10, 2012, 2:40 PM), http://www.volokh.com/2012/01/10/tenth-circuit-says-oklahoma-anti-sharia-law-is-likely-unconstitutional/.

70. *E.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971) ("[T]he factors relevant to the choice of the applicable rule of law include . . . (b) the relevant policies of the forum, [and] (c) the relevant policies of other interested states . . . .").

The ALAC proposal wouldn't bar the use of all foreign law, but focuses instead on barring the use of

> [any] law, legal code or system that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights, and privileges granted under the U.S. and [State] Constitutions, including but not limited to due process, freedom of religion, speech, or press, and any right of privacy or marriage as specifically defined by the constitution of this state.[71]

Any state that implements the ALAC proposal commits its court system to not aiding or participating in litigation under such laws or in such legal systems:

- "Any court, arbitration, tribunal, or administrative agency ruling or decision [based on such a law] shall . . . be void and unenforceable . . . ."[72]
- "A . . . contractual provision . . . which provides for the choice of [such] a law . . . shall . . . be void and unenforceable . . . ."[73]
- "A . . . contractual provision . . . which . . . grant[s] the courts or arbitration panels *in personam* jurisdiction over the parties shall . . . be void and unenforceable if the jurisdiction chosen" would implement such a law.[74]
- "If a resident of this state, subject to personal jurisdiction in this state, seeks to maintain litigation, arbitration, agency or similarly binding proceedings in this state and if the courts of this state find that granting a claim of forum non conveniens or a related claim violates or would likely violate the fundamental liberties, rights, and privileges granted under the U.S. and [State] Constitutions of the non-claimant in the foreign forum with respect to the matter in dispute, then it is the public policy of this state that the claim shall be denied."[75]

The ALAC proposal is also limited in that it excludes claims brought by "a corporation, partnership . . . or other legal entity that contracts to subject

---

71. *Model ALAC Act*, AM. PUB. POL'Y ALLIANCE, http://publicpolicyalliance.org/legislation/model-alac-bill/ (last visited Aug. 2, 2013).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

itself to foreign law in a jurisdiction other than this state or the United States."[76] The proposal has been enacted in Kansas and Oklahoma,[77] and has been proposed in many other states.[78]

In some respects, this proposal is unobjectionable and even valuable. For instance, the proposal bars the enforcement of foreign judgments that are based on what in the United States would be constitutionally protected speech. This fits well with the 2010 federal SPEECH Act, which bars the enforcement in American courts of foreign libel judgments when the foreign law rests on speech that would be protected under the First Amendment.[79] The ALAC proposal would provide similar protection for foreign judgments based on invasion of privacy, insult, and other causes of action involving speech that would be protected by the First Amendment in American courts.

But there are two substantial problems with the proposal.

2. Trial by Jury in Civil Cases

First, the trial by jury in many civil cases has often been labeled as a "fundamental right" under state constitutions.[80] Though it has sometimes not been viewed as "fundamental" under the federal Constitution, which is why the Seventh Amendment has not been incorporated against the states,[81] other federal cases do label it as "fundamental."[82] But the ALAC proposal

---

76. *Id.*

77. S.B. 79, 84th Leg., Reg. Sess. (Kan. 2012); H.B. 1060, 54th Leg., 1st Reg. Sess. (Okla. 2013).

78. S.B. 97, 88th Gen. Assemb., Reg. Sess. (Ark. 2011); H.B. 1037, 2012 Leg., 112th Reg. Sess. (Fla. 2010); S.B. 1962, 2012 Leg., 112th Reg. Sess. (Fla. 2010); S.B. 308, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011); S.B. 201, 2011 Leg., 86th Sess. (S.D. 2011); H.B. 296, 59th Leg., Gen. Sess. (Utah 2010).

79. 28 U.S.C. § 4102 (2012).

80. *See, e.g.*, Morales v. City of Oklahoma City *ex rel.* Oklahoma City Police Dep't, 2010 OK 9, ¶ 7, 230 P.3d 869, 874 ("The use of summary process may not be extended to swallow triable issues of fact. Inclusion of the latter within that process would violate a party's fundamental right either to a trial by jury at common law or due process by orderly trial before a court in equity."); Gard v. Sherwood Constr. Co., 400 P.2d 995, 1002 (Kan. 1965) ("The right of every individual citizen to a trial by jury is of ancient origin . . . . [It] is regarded as a basic and fundamental feature of American jurisprudence, and has since the organization of our government been incorporated in the form of expressed guaranties in the constitutions of both state and federal governments. It is a substantial and valuable right and should never be lightly denied.").

81. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3035 n.13 (2010).

82. *E.g.*, Jacob v. New York City, 315 U.S. 752, 752-53 (1942) ("The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal

applies to legal systems "that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights, and privileges granted under the U.S. *and [State]* Constitutions."[83] Courts may reasonably read this provision as covering any fundamental right granted under state constitutions—which would cover the right to civil jury trial—as well as any fundamental right granted under the federal constitution.[84]

Read literally, then, pretty much all foreign judgments entered against individuals would be unenforceable under the ALAC proposal simply because those judgments were entered without a civil jury trial. (Civil jury trials are virtually never available outside the United States.[85]) After all, such a judgment does "not grant the parties affected by the ruling or decision the same fundamental liberties, rights, and privileges granted under the U.S. and [State] Constitutions [i.e., the civil jury trial]"—and therefore "shall . . . be void and unenforceable."[86]

Such refusal to enforce foreign civil judgments is bad for international commerce. It also seems unnecessary—while the civil jury trial has a long

---

jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."); Lyon v. Mut. Benefit Health & Accident Ass'n, 305 U.S. 484, 492 (1939) ("While litigants in federal courts cannot—by rules of procedure—be deprived of fundamental rights guaranteed by the Constitution and laws of the United States, the local Arkansas rule followed by the District Court does not result in such deprivation. . . . It is essential that the right to trial by jury be scrupulously safeguarded, and a state rule of procedure entrenching upon this right would not require observance by federal courts. However, this Arkansas procedural rule—so closely approximating the federal rule—does not amount to a prohibited invasion of federal rights."); Cont'l Ill. Nat'l Bank & Trust Co. v. Chi., Rock Island & Pac. Ry. Co., 294 U.S. 648, 669 (1935) (discussing "clauses of the Constitution which guarantee and safeguard the fundamental rights and liberties of the individual, the best examples of which, perhaps, are the Sixth and Seventh Amendments, which guarantee the right of trial by jury"); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830) ("The trial by jury is justly dear to the American people. . . . As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by Congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people.").

83. Model ALAC Act, *supra* note 71 (emphasis added).

84. Courts might, I suppose, read it as covering all those rights that are secured by *both* constitutions, but that seems a less likely reading.

85. JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 112 (2d ed. 1985) (noting that "the right to a jury in civil actions . . . has never taken hold in the civil law world," and even in the common law world outside the United States, "the civil jury has been abolished").

86. Model ALAC Act, *supra* note 71.

American history and plausible arguments in its favor, I don't think the absence of a civil jury is especially likely to make a trial unfair.[87] Indeed, American law generally doesn't call for civil juries in injunction cases, restitution cases, family law cases (except in Texas), admiralty cases, and more.[88]

To be sure, ALAC's effect, for good or ill, is limited by the exclusion of cases lost by business organizations that contracted for the application of foreign law in a foreign jurisdiction.[89] Still, the ALAC proposal would render unenforceable foreign judgments against American individuals.[90] And it would render unenforceable foreign judgments against American companies when the judgments rest on foreign tort claims (claims as to which there will generally be no contract providing for decision by the foreign jurisdiction), such as basic negligence claims or intentional physical injury claims.[91] I'm not sure whether this is an intended effect of the proposal. But in any event, it seems to me to be a problem.

3. Foreign Marriages and Divorces from Countries in Which Family Law Discriminates Based on Sex or Religion

The second problem with the ALAC model arises with regard to people who married or divorced overseas and who then to the United States. Say, for instance, that Wanda purportedly married Xavier in Elbonia, then purportedly divorced him in Elbonia. Then she purportedly married Harry in Elbonia, and ten years later came to America. The American legal system now has to figure out whether Wanda is indeed properly married to Harry. Such questions come up all the time in immigration law, divorce law, wills and trusts law, tax law, evidence law, and many other contexts. To figure out the answer, it may be necessary to decide whether Wanda's earlier Elbonian divorce was valid—which can only be determined using Elbonian law—or possibly just to give legal effect to her earlier Elbonian divorce.

But what if the Elbonian legal system doesn't take the same view of various rights, including equality rights, that the United States now takes? What if, for instance, Elbonian law provides husbands more rights than wives in initiating divorces?

---

87. *See, e.g.*, Schriro v. Summerlin, 542 U.S. 348, 355-56 (2004).

88. Gary T. Sacks & Neal W. Settergren, *Juries Should Not Be Trusted to Decide Admiralty Cases*, 34 J. MAR. L. & COM. 163 (2003) ("For over two hundred years in America, admiralty and maritime claims have been tried to judges, not juries.").

89. *See* text accompanying note 60 *supra*.

90. *Id.*

91. *Id.*

Or what if Elbonia—like Israel, Lebanon, India, and other places[92]—provides that family law matters are to be resolved under the religious laws of the religious group to which the parties belong, which necessarily involves a form of religious discrimination that would violate First Amendment principles if done in the United States? Or what if Elbonian rules of evidence give more weight to men's testimony or to the testimony of people who belong to certain religions, and those rules had been applied in the divorce?[93]

This might be bad, but it's the reality under which Elbonian law operates. Wanda has lived her life in Elbonia based on that reality. She may have remarried based on the effect of the divorce, however unfairly her divorce proceedings may have been conducted. She may have gotten certain property in the divorce, perhaps less than she should have gotten, but something that she now views as hers. That was life on the ground in Elbonia for her.

Now Wanda and Harry come to America, and the question of the validity of their marriage comes up. Maybe Harry brings it up in trying to get his marriage to Wanda annulled (on the theory that the Wanda-Xavier divorce was invalid).[94] Maybe the government brings it up, for instance in arguing that Harry isn't entitled to claim a spousal privilege to refuse to testify against Wanda, or that Wanda isn't entitled to certain state tax benefits offered to married people. Even if we disapprove of the Elbonian legal system, American courts shouldn't just categorically ignore the Elbonian divorce in such situations.

---

92. In the former Ottoman Empire states, this deference to the religious laws of the parties is called the "millet" system. *See, e.g.*, Yüksel Sezgin, *The Israeli Millet System: Examining Legal Pluralism [Through] Lenses of Nation-Building and Human Rights*, 43 ISR. L. REV. 631 (2010); *see also* Mark Galanter & Jayanth Krishnan, *in Personal Law Systems and Religious Conflicts: A Comparison of India and Israel*, RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT 270 (Geral James Larson ed., 2001); Lia Pavlou, *Shariah Abolished for Greek Muslims*, GREEK REP. (Aug. 21, 2011), http://greece.greekreporter.com/2011/08/21/shariah-abolished-for-greek-muslims/ (discussing the recent abolition of a similar system of law in Greece).

93. *See, e.g.*, UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia, 581 F.3d 210, 220 (5th Cir. 2009) ("Experts from both parties agreed that the Board does not give full weight to testimony given by women and non-Muslims . . . ."); *see also* Perry S. Smith, *Silent Witness: Discrimination Against Women in the Pakistani Law of Evidence*, 11 TUL. J. INT'L & COMP. L. 21, 23 (2003) ("In Pakistan, and to varying degrees across the Islamic world, testimony of women is devalued in certain legal matters and barred in others. . . .").

94. *Cf.* Siddiqui v. Siddiqui, 968 N.Y.S.2d 145 (App. Div. 2013) (involving a similar controversy).

Yet that's what the text of the ALAC proposal would do. Our hypothetical divorce decree was entered under a legal system that denied "the same fundamental liberties, rights, and privileges granted under the U.S. . . . Constitution[]," [95] such as equal rights regardless of sex, or the First Amendment right not to be treated differently based on religion. Therefore the divorce decree would be "void," and thus couldn't be considered by American courts. Wanda would thus be treated as still married to Xavier, and not to Harry.

That seems both inefficient and unfair. To be sure, in *some* circumstances, it might be proper for courts to ignore the effect of foreign divorces that are based on procedures that American law views as improper. For instance, American courts might reject application of foreign law that they see as unfair when it affects the rights of people who were U.S. residents at the time of the divorce.[96] Likewise, American courts may want to apply American norms to child custody rights when the children are living in the United States. But outside these special circumstances, courts shouldn't categorically ignore the effect of foreign divorces that involve departures from American equality norms.

Perhaps this effect of ALAC is inadvertent, and maybe courts can avoid it using some sort of creative legal footwork. Maybe, for instance, courts could start more liberally using "putative spouse" doctrines under which (in some states) people can be viewed as married in some situations even if their marriage was technically invalid in some respect.[97] But until that's made clear, the ALAC proposal seems to pose potentially serious problems when it comes to determining the marital status of immigrants.

C. Prohibitions on Actual Violations of State or Federal Laws or Constitutions

Finally, Arizona, Louisiana, and Tennessee have implemented variants of the ALAC model that bar the consideration of foreign law or foreign judgments only when such consideration would actually violate someone's

---

95. *Model ALAC Act*, *supra* note 71.

96. *See, e.g.*, Aleem v. Aleem, 947 A.2d 489 (Md. 2008).

97. "A putative spouse is one thought to be the spouse of another in a marriage, in opposition to which there are impediments. Thus, a putative marriage is one in which at least one of the parties believed themselves to be married, but because of some encumbrance they are not legally married, either by ceremony or common law." Weaver v. State, 855 S.W.2d 116, 120 (Tex. App. 1993) (citation omitted). *But see id.* ("With the exception of equity, putative marriages have never been given the same credence as ceremonial or common law marriages for the very reason that they are putative: there exists some impediment to the marriage. There can be no legal marriage if there is a barrier.").

rights.[98] These statutes omit the language asking whether a foreign legal system "would not grant the parties affected by the ruling or decision the same fundamental liberties, rights, and privileges granted under the U.S. and [State] Constitutions."[99] Instead, they say something like,

> This chapter applies only to actual violations of the constitutional rights of a person or actual conflict with the laws of this state caused by the application of the foreign law. . . .
>
> A court, arbitrator, administrative agency or other adjudicative, mediation or enforcement authority shall not enforce a foreign law if doing so would violate a right guaranteed by the Constitution of this state or of the United States or conflict with the laws of the United States or of this state.[100]

These proposals are not harmful, I think, but neither are they particularly useful. Courts already may not do things that actually violate constitutional rights or conflict with other laws. And while courts sometimes indeed erroneously violate constitutional rights or other laws, the new rules wouldn't prevent such errors.

V. Conclusion

I share some of the skepticism about the Supreme Court's reliance on foreign constitutional norms when deciding American constitutional rules. But the state laws that have been proposed to deal with this problem are unlikely to do much about it because state laws don't control the U.S. Supreme Court.

Instead, many such state laws are likely to interfere with the perfectly proper consideration of, for instance, foreign family law, contract law, tort law, and law of judgments, in those narrow contexts in which American law has long dictated that foreign law be considered. I hope that legislators, regardless of ideological affiliation, recognize the costs of such proposals and make sure that they don't replace one problem with another.

---

98. ARIZ. REV. STAT. ANN. §§ 12-3102 to -3103 (West 2013); LA. REV. STAT. ANN. § 9:6001 (2013); TENN. CODE ANN. §§ 20-15-101 to -106 (West 2013).

99. *Model ALAC Act*, *supra* note 71.

100. ARIZ. REV. STAT. ANN. §§ 12-3102 to -3103. I quote the Arizona language here because it is the simplest among this set of statutes.