

THE SPIRIT OF OUR TIMES: STATE CONSTITUTIONS AND INTERNATIONAL HUMAN RIGHTS

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INTRODUCTION

State courts have a responsibility to consider international human rights norms and other transnational law in rendering state constitutional decisions.¹ This responsibility is drawn from several sources: the nature of federalism, the nature of the international system, and individual states' laws and legal history.

Where the United States has a formal obligation to comply with international law, the United States Constitution's Supremacy Clause requires state courts to consider transnational authority. Indeed, without subnational attention to human rights norms, the international legal system fails under the weight of the "implementation gap" between national obligations and their implementation on the state level.

Even absent a formal mandate, however, state courts should consider transnational sources when interpreting their constitutions. State court judges may find direct support for considering transnational sources in the constitutional and social history of the provisions being construed, bringing this approach inside the fold of traditional methodologies of constitutional interpretation.²

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1. In this article, I use the term "transnational" to denote both international and foreign law. As Harold Hongju Koh has observed, courts no longer make a sharp distinction between international and comparative law. Rather, "one prominent feature of the globalizing world is the emergence of a transnational law, particularly in the area of human rights, that merges the national and the international." Harold Hongju Koh, *The United States Constitution and International Law: International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 53 (2004).

2. See Vicki Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 21–27 (2004) (describing the influence of transnational law—especially the Universal Declaration of Human Rights—on the text of Montana Constitution).

Furthermore, transnational law can inform the meaning of state constitutional grants that have no federal analogues but that are similar to international human rights law and to provisions of modern constitutions around the world.³ The United States Constitution, which textually focuses on limiting government action, may yield no guidance to state courts asked to interpret, for example, the substantive meaning of positive rights to “health,” “education,” or “welfare.”⁴ In such an instance, international norms articulated in transnational law may be a singularly important guide to the substantive content of the provisions. Though courts and scholars have paid significant attention to state constitutional provisions that have no obvious federal analogues in their efforts to establish the outlines of an independent state jurisprudence, they have seldom considered the role that transnational law might play in judicial review of these provisions.⁵

While federal judicial citation of transnational authority has sparked considerable debate in recent years,⁶ state court consideration of transnational sources should be much less controversial. First, the relatively populist structure of state governmental institutions, including state courts, undermines concerns that one branch might foist improper “foreign” views on the others unchecked. Second, institutional infighting between the federal branches—for example, over what constitutes an exercise of the foreign affairs power—has no parallel at the state level.

To illustrate how state courts should proceed in light of their obligations to

3. See, e.g., Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE H.R. & DEV. L.J. 1, 9 (2004) (noting “central place” of positive rights in South Africa’s constitution); Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 668 (1991) (noting the existence of positive rights in India’s constitution, but also noting that they are not judicially enforceable). See also Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, art. 23, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR] (like many state constitutions, providing that “[e]veryone has the right to work[,]” “[e]veryone who works has the right to just and favourable remuneration[,]” and “[e]veryone has the right to form and to join trade unions for the protection of his interests.”).

4. Isaiah Berlin is widely credited with identifying and explicating the distinction between so-called “negative rights” and “positive rights.” ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 118–72 (1969). Briefly, positive rights are associated with an obligation to undertake affirmative action while negative rights are associated with an obligation to refrain from acting. While the substance of the distinction has been criticized, see, e.g., Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990), the distinction does at least delineate textual differences relevant for the purposes of this discussion.

5. For discussions of state constitutional provisions granting a right to welfare, see Daan Braveman, *Children, Poverty and State Constitutions*, 38 EMORY L.J. 577 (1989); Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 FORDHAM L. REV. 1403 (1999); William C. Rava, *State Constitutional Protections for the Poor*, 71 TEMPLE L. REV. 543 (1998). For a discussion of state constitutional provisions guaranteeing an education, see Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 B.Y.U. EDUC. & L.J. 1.

6. For a description of the controversy in the U.S. Supreme Court, see Koh, *International Law as Part of Our Law*, *supra* note 1, and *infra* notes 77–84 and accompanying text. The issue was most recently flagged in the majority and dissenting opinions in *Roper v. Simmons*, 543 U.S. 551 (2005), but it has been an ongoing debate for years. See *infra* note 77.

implement transnational law, I set out a case study of article XVII, section 3 of the New York State Constitution, which mandates that the state legislature provide for the public health.⁷ In examining whether state-supported abstinence-only-until-marriage programs violate this constitutional provision, I demonstrate the concrete ways in which the United States' treaty obligations and more general concepts of international public health law should inform state courts' consideration of this issue.⁸

I conclude that in dealing with the range of transnational law—from ratified treaties to the persuasive decisions of foreign courts—constituent states should, and in some cases must, implement international human rights norms. In so doing, I argue that subnational implementation of international human rights is fully consistent with the United States' federal system, and that state constitutional construction is a particularly useful vehicle for achieving such implementation.

I.

SOURCES OF STATE COURT RESPONSIBILITY TO IMPLEMENT INTERNATIONAL HUMAN RIGHTS LAW

A. *The Structure of the Federal System*

1. *The Federal Supremacy Clause*

In large part, state courts' obligations to implement international human rights law derive directly from the federal system. The United States Constitution reserves the treaty power and responsibility for foreign relations to the

7. Section 3 of article XVII states that the health of the state's inhabitants is a matter of "public concern" which "shall" be provided for by the legislature. N.Y. CONST. art. XVII, § 3.

8. In her important work on state constitutions, Helen Hershkoff postulated that an independent approach to state constitutional adjudication might stimulate an international dialogue, and urged state courts to examine model practices from abroad "to the extent that they inform the situation at hand." Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1193 (1999). But she did not go further to articulate a methodology for international and comparative law analysis in state law adjudication. Interestingly, the framework that Hershkoff proposes for evaluating state compliance with state constitutions' affirmative rights is very similar to the approach employed to evaluate States Parties' compliance with certain sections of the International Covenant on Economic, Social and Cultural Rights. In both Hershkoff's domestically focused proposal and in the international context, a government's efforts are measured directly against the stated constitutional (or treaty) goals. See *id.* at 1184 (calling this approach a "consequentialist" analysis); International Covenant on Economic, Social and Cultural Rights art. 2, *opened for signature* Dec. 16, 1966, S. EXEC. DOC. D, 95-2 (1978), 993 U.N.T.S. 3 [hereinafter ICESCR] ("Each State Party to the present Covenant undertakes to take steps . . ."); U.N. Comm. on Econ., Soc. and Cultural Rights, [CESCR], *General Comment No. 3: The Nature of States Parties Obligations (Art. 2 Para. 1)*, ¶ 9, U.N. Doc. E/1991/23 (Dec. 15, 1990) (explaining that article 2 of the ICESCR imposes on states parties the obligation to "move as expeditiously and effectively as possible" toward the goal of fully realizing rights).

federal government.⁹ However, the United States' federal system reserves significant regulation of entire substantive categories such as criminal, family, and social welfare law to subnational governments.¹⁰ It follows that when the United States assents to a treaty or other international agreement, the federal system often demands that implementation occur on the state as well as the federal level.¹¹ If states fail to implement international treaty provisions that address areas traditionally reserved to them, the United States cannot, as a practical matter, achieve compliance with the treaty provisions to which it is party.

Notably, the United States' treaty obligations may go beyond treaties' substantive focus and may also incorporate their enforcement procedures.¹² For example, both the International Covenant on Civil and Political Rights (ICCPR) and the Convention for the Elimination of All Forms of Racial Discrimination (CERD) require the availability of judicial remedies for violations.¹³ Under federal jurisdictional constraints, however, judicial remedies will sometimes be available only in state courts. This might be true, for example, of cases shielded from federal judicial review under the *Pennhurst* doctrine, which bars federal court adjudication of state law claims for injunctive relief against the state.¹⁴ Likewise, even if plaintiffs are pressing human rights claims that implicate federal obligations under international law, the federal courts may eschew cases arising in the family law or criminal law contexts, at least in the first instance.¹⁵ In such situations, unless there is state court participation in the procedural as well as substantive implementation of human rights standards, the United States will fall short of fulfilling its treaty obligations.¹⁶

9. U.S. CONST. art. I, § 10; art. II, § 2, cl. 2.

10. U.S. CONST. amend. X.

11. In *United States v. Morrison*, 529 U.S. 598, 618 (2000), for example, the Court reiterated "the principle that 'the Constitution created a Federal Government of limited powers,' while reserving a generalized police power to the States," and struck down a federal civil rights remedy addressing violence against women. *Id.* at 618 n.8 (internal citations omitted). At least one *amicus* brief submitted to the Court had argued that the federal remedy was in furtherance of U.S. obligations under international law, including the International Covenant on Civil and Political Rights. See Brief *Amici Curiae* on Behalf of International Scholars and Human Rights Experts in Support of Petitioners, *United States v. Morrison*, 529 U.S. 598 (Nov. 12, 1999) (Nos. 99-0005, 99-0029).

12. I am indebted to Cathy Albisa and Rhonda Copelon for this observation.

13. International Covenant on Civil and Political Rights art. 2, ¶ 3, *opened for signature* Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171, [hereinafter ICCPR]; International Convention on the Elimination of All Forms of Racial Discrimination art. 6, *opened for signature* Mar. 7, 1966, S. EXEC. DOC. C, 95-2 (1978), 660 U.N.T.S. 195 [hereinafter CERD]

14. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). *But see* Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409 (1999) (arguing that federal courts should play a greater role in interpreting state constitutions).

15. *See, e.g., United States v. Morrison*, 529 U.S. 598, 615-16 (2000) (noting that family law is an area of traditional state regulation).

16. Louis Henkin has argued that the substantive areas beyond the reach of federal regulations are narrow. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost*

The United States Constitution's Supremacy Clause provides some protection from such implementation failures, for it clarifies that ratified treaties are the "Supreme Law of the Land," binding on the "Judges in every State."¹⁷ As the United States government puts it, this gives duly ratified treaties "a legal status equivalent to enacted federal statutes. As such, they prevail over previously enacted federal law (to the extent of any conflict) and over any inconsistent state or local law."¹⁸

Furthermore, the federal government has repeatedly acknowledged constituent states' obligations to implement international human rights law. For example, each time the Senate has given its advice and consent to ratify a major human rights treaty, it has done so with the following understanding:

That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.¹⁹

of Senator Bricker, 89 AM. J. INT'L L. 341, 345-46 (1995). However, particularly in the past decade, the federal courts have delineated an expanding arena in which states have primary regulatory authority. See, e.g., *Bd. of Trs. of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (holding that the rights and remedies created by Title I of the Americans with Disabilities Act did not validly abrogate the states' immunity); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that the Age Discrimination in Employment Act of 1967 did not validly abrogate states' immunity from employment suit). But see *United States v. Georgia*, 126 S.Ct. 877 (2006) (holding that Title II of the Americans with Disabilities Act validly abrogated state sovereign immunity).

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

18. United States, Initial Report to Comm. on Elim. of Racial Discrim. (CERD), Addendum, ¶ 50, U.N. Doc. CERD/C/351/Add.1 (Sept. 21, 2000) [hereinafter U.S. Initial CERD Report]. The United States' ratifications of major human rights treaties have all included a declaration providing that the treaty is "non-self-executing." See, e.g., *id.* ¶ 169 ("[T]he United States declares that the provisions of the Convention are not self-executing."). See generally David N. Cinotti, *The New Isolationism: Non-Self-Execution Declarations and Treaties as the Supreme Law of the Land*, 91 GEO. L.J. 1277, 1278 (2003) (noting that the U.S. Senate has attached a similar declaration to "every major human rights treaty to which it has given its advice and consent since World War II"). This controversial declaration does not mean that the United States is absolved from implementation of these treaties. Instead, it simply precludes individuals from directly asserting the provisions of international law in litigation, absent implementing legislation. See *id.* at 1281. For a critique of such declarations, see Louis Henkin, *U.S. Ratification of Human Rights Conventions*, *supra* note 16, at 89 AM. J. INT'L L. 341, 346-48.

19. 138 Cong. Rec. 8068, 8071 (1992) (understanding for International Covenant on Civil and Political Rights). See also 140 Cong. Rec. 14326, 14326 (1994) (same understanding for International Convention on the Elimination of All Forms of Racial Discrimination); 136 Cong. Rec. S17486, S17486 (daily ed. Oct. 27, 1990) (same understanding for Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); 140 Cong. Rec. 14326 (1994) (U.S. reservations, declarations, and understandings, CERD).

Similarly, when the United States issued its first report to the United Nations Human Rights Committee regarding its compliance with the ICCPR, the federal government averred that it was

a government of limited authority and responsibility. . . . [and that] state and local governments exercise[d] significant responsibilities in many areas, including matters such as education, public health, business organization, work conditions, marriage and divorce, the care of children and exercise of the ordinary police power. . . . Some areas covered by the Covenant fall into this category.²⁰

The report then explained that the United States had, through its ratification process, put other governments worldwide on notice that the “United States will implement its obligations under the Covenant by appropriate legislative, executive and judicial means, federal or state, and that the federal government will remove any federal inhibition to the abilities of the constituent states to meet their obligations in this regard.”²¹ In short, while the United States has generally taken a passive role in encouraging states to implement human rights law, it has accepted the basic proposition that states are responsible for implementing some aspects of the United States’ international treaty obligations.

Under the Supremacy Clause, states may also have obligations to implement customary international law at the state level. Customary international law arises from nations’ “general and consistent practice” that is “followed by them from a sense of legal obligation.”²² Thus, while nation-states do not specifically assent to customary international law as they do with treaties, it is nevertheless binding on the United States—and therefore on the several states—as the law of nations.²³

It is clear that, based on principles of federalism as well as practical realities, state courts will at times be in a position to implement customary international law in the first instance. Whether or not the federal Supremacy Clause requires states to apply customary international law depends on whether such

20. United States, Initial Report of the United States of America, delivered to the U.N. Human Rights Comm. (HRC), Addendum, ¶ 3, U.N. Doc. CCPR/C/81/Add.4 (Aug. 24, 1994) (reporting steps taken toward compliance with the ICCPR).

21. *Id.* ¶ 4. According to one commentator, the Senate’s approach to human rights treaties “merely displaces the primary implementation burden from the national government to each of the states. . . . encourag[ing] unique enforcement solutions tailored to each state’s specific situation.” Margaret Thomas, “Rogue States” Within American Borders: Remedying State Noncompliance with the International Covenant on Civil and Political Rights, 90 CAL. L. REV. 165, 173 (2002).

22. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1986).

23. *The Paquete Habana*, 175 U.S. 677 (1900), is generally cited for the proposition that international law, including customary law, is “part of our law.” *Id.* at 700. See also Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1566, 1569 (1984) (“That international law is part of the law of the United States is asserted and accepted today as it was at our national beginnings.”); Stewart Jay, *The Status of Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 830–33 (1989) (examining the Framers’ consideration of the laws of nations as laws of the United States).

customary law constitutes state or federal common law. The ultimate hierarchical status of customary international law is beyond the scope of this article, however, and remains an open question (at least in part). The issue has recently received considerable attention from scholars. On the one hand, international law scholars such as Harold Hongju Koh and Gerald Neuman argue that because implementation of international law is primarily a federal matter under the United States Constitution, customary international law is a type of federal common law and therefore supreme over the law of the several states.²⁴ On the other hand, so-called “revisionist” scholars such as Curtis Bradley and Jack Goldsmith argue that because the federal system leaves implementation of certain aspects of international law to the states, at least some areas of customary international law must be matters of common law to be construed and administered by state courts.²⁵

The United States Supreme Court’s recent decision in *Sosa v. Alvarez-Machain*²⁶ makes clear that federal courts can recognize elements of the law of nations as federal common law for purposes of the Alien Tort Statute (“ATS”).²⁷ However, that decision also cautions against aggressive federal judicial exercise of the jurisdiction granted by the ATS.²⁸ After *Sosa*, there remains room for future federal-state interplay in defining the formal status of customary law in areas beyond the ATS’s reach.

The formal legal status of international customary law may become an issue of practical concern in areas outside of the ATS context if state courts begin to view themselves as obligated to implement transnational law, as I argue they should. At this point, however, the first principle—that state courts have a

24. LOUIS HENKIN, GERALD L. NEUMAN, DIANE F. ORENTLICHER & DAVID W. LEEBRON, *HUMAN RIGHTS* 809 (1999). See also Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1861 (1998) (“History, doctrine, the Constitution and ‘democracy’ all fail to support . . . [a] claim that . . . customary international law should be ousted from federal law.”); Gerald L. Neuman, *Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 376 n.31 (1997) (“I would be content to label [the rules of customary international law] as rules of federal common law.”).

25. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997). See also Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457 (2004). Ku argues that “state-controlled implementation [of international law] could actually bolster the development of international law.” *Id.* at 815. The point of view espoused by these “revisionists” suggests that state court interpretations of customary international law might bind federal courts sitting in diversity jurisdiction. See Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT’L L. 265, 267–68 (2001) (noting that some commentators have dismissed this idea as “bizarre” and “absurd”).

26. 542 U.S. 692 (2004).

27. The ATS is codified at 28 U.S.C. § 1350 (2000) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

28. *Sosa*, 542 U.S. at 725 (“[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”).

responsibility to implement the United States' international legal obligations—has not yet been fully accepted or reflected in state court jurisprudence.

Regardless of how the customary international law/common law debate is resolved, states may still lead the way in implementing customary international law. For example, as I describe below, state courts may rely on customary international-law principles, as well as on international human rights principles from treaties that have not attained the status of customary international law, to interpret state law, regardless of the extent to which such norms are binding.²⁹ Julian Ku notes that states have been engaged in such activities for decades, particularly in areas such as trusts and estates and family law where federal involvement is limited.³⁰ Given courts' ability to sidestep the debate entirely by simply looking to international customary law for inspiration instead of binding authority or by using it to construe state constitutions with little federal oversight, the customary international law/common law debate is, as Mark Tushnet has suggested, a classic "tempest in a teapot," with little practical impact.³¹

2. *States' Own Laws*

a. *State Supremacy Provisions*

In one form or another, states adopt the federal framework articulated by the federal Supremacy Clause in their own laws and constitutions. Their laws and constitutions almost always explicitly or implicitly acknowledge the binding nature of ratified treaties.

Some state constitutions specify that the state must give precedence to ratified treaties. For example, Maryland's Declaration of Rights provides in article 2 that treaties are the "Supreme Law of the State."³² Similarly, West Virginia's constitution states in article I that treaties are the "supreme law of the land."³³ Many other state constitutions indirectly acknowledge the force of treaties by adopting the United States Constitution, which defines ratified trea-

29. See T. Alexander Aleinikoff, *The United States Constitution and International Law: International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L. L. 91, 97–100 (2004) (noting that even though the author concludes that customary international law should be understood as nonpreemptive nonfederal law, state courts would still be able to refer to it). See also discussion *infra* part I.A.2.b.ii.

30. Ku, *The State of New York Does Exist*, *supra* note 25, at 463.

31. Mark Tushnet, *Transnational/Domestic Customary Law*, 37 LOY. L.A. L. REV. 239, 248 (2003). See also Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. (forthcoming 2006) (discussing federalism issues raised by state court construction of international treaty provisions, but noting that it is unclear whether state courts are willing to rely on such transnational commitments).

32. MD. CONST. Declaration of Rights art. 2.

33. W. VA. CONST. art. I.

ties as “the supreme Law of the Land.” For example, the preamble to the Hawaii Constitution adopts the federal constitution³⁴ and the Wyoming Constitution states in article 1 that the Constitution of the United States is the “supreme law of the land.”³⁵

While specific language in state constitutions supporting international treaty implementation at the state level is significant, its absence does not give a green light to rogue states to circumvent their international obligations. In fact, acceptance of the federal constitution and its provisions regarding treaties is an obligatory undertaking upon acquiring statehood, regardless of the text of the state’s own constitution.³⁶ This undertaking requires states to honor the federal government’s treaty responsibilities.³⁷ Nevertheless, some state actors seem oblivious to their constitutional obligations.³⁸

34. HAW. CONST. pmbl. (“The Constitution of the United States of America is adopted on behalf of the people of the State of Hawaii.”).

35. WYO. CONST. art. 1, § 1. Similarly, The constitution of New Mexico states that the Constitution of the United States is the “supreme law of the land.” N.M. CONST. art. II, § 1. The Nevada Constitution holds that the federal constitution is “paramount,” NEV. CONST. art. I, § 2, while the North Carolina Constitution mandates consistency with the federal constitution. N.C. CONST. art. I, § 3. New York’s state constitution incorporates the federal constitution through its requirement that all public officers take an oath to support the Constitution of the United States. N.Y. CONST. art. XIII, § 1.

36. *See, e.g.*, An Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. No. 86-3 § 3, 73 Stat. 4 (1959) (“The constitution of the State of Hawaii shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.”).

37. The United States Supreme Court has also repeatedly recognized that international law is applicable to the states. *See, e.g.*, *Skiriotes v. Florida*, 313 U.S. 69, 72–73 (1941) (“International law is a part of our law and as such is the law of all States of the Union.”) (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)). *See also* Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT’L L. 301, 311 & n.52 (1999) (citing *Skiriotes* and other cases to support the assertion that state court citation of international law refutes any argument that international law does not bind American courts).

38. In Texas, for example, Governor Rick Perry was faced in 2002 with a clemency petition filed by a Mexican national, Javier Medina, who had been denied his consular rights under the Vienna Convention. Susana Hayward, *Fox Calls Off Visit to Lone Star State*, SAN ANTONIO EXPRESS-NEWS, Aug. 15, 2002, at 1A. Governor Perry denied clemency without referencing the international law violation, instead appealing to the “sovereignty” of Texas and U.S. law. *Id.* *See generally* Reynaldo Anaya Valencia, Craig L. Jackson, Leticia Van de Putte, & Rodney Ellis, *Avena and the World Court’s Death Penalty Jurisdiction in Texas: Addressing the Odd Notion of Texas’s Independence from the World*, 23 YALE L. & POL’Y REV. 455 (2005) (criticizing Texas officials’ failure to follow the dictates of the Vienna Convention). This view of Texas’s obligations under international law directly contravenes the Texas Constitution, which provides that Texas is subject to the U.S. Constitution. TEX. CONST. art. I, § 1. The U.S. Constitution specifically provides in Article VI that ratified treaties are the “supreme Law of the Land.” U.S. CONST. art. VI.

b. Rights-Granting State Constitutional Provisions

i. State Constitutions and International Obligations

Because state constitutions have legal force independent of federal law,³⁹ state courts can interpret provisions of their own constitutions to grant broader protections than their federal counterparts.⁴⁰ As a result, state courts may have the opportunity to implement the federal government's international obligations when construing the rights-granting provisions of their constitutions.

I will illustrate the approach that a state court might take in implementing international obligations within this domestic federal framework, even in the face of contradictory federal law, by discussing a recent Oklahoma case addressing state compliance with federal obligations under the Vienna Convention on Consular Affairs. In *Valdez v. Oklahoma*,⁴¹ a Mexican national sought to have his state law criminal conviction overturned based on the state's failure to inform him of the available consular resources, in violation of the

39. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." (citation omitted)). See also *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("[U]nder our federal system, the states possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.").

40. See *California v. Greenwood*, 486 U.S. 35, 43 (1988) ("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."); *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 293 (1982) ("[A] state court is entirely free to read its own State's constitution more broadly than this court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee."); *People v. Norman*, 538 P.2d 237, 244 (Cal. 1975) (reaffirming California's power to impose a higher constitutional standard for searches and seizures despite textual similarities between state and federal constitutional provisions); *People v. Young*, 814 P.2d 834, 842-43 (Colo. 1991) (noting several cases in which Colorado's highest court had found "that the Colorado Constitution provides more protection for our citizens than do similar or identically worded provisions of the U.S. Constitution"); *State v. Thompson*, 760 P.2d 1162, 1164 (Idaho 1988) (holding use of pen register—permitted under the federal constitution—to be an illegal search under Idaho state constitution); *Horsemen's Benevolent & Protective Ass'n v. State Racing Comm'n*, 532 N.E.2d 644, 650 (Mass. 1989) (holding that Massachusetts Constitution may provide greater substantive protections against unreasonable search and seizure than the Fourth Amendment of the U.S. Constitution); *Right to Choose v. Byrne*, 450 A.2d 925, 931-33 (N.J. 1982) (holding that state constitution prohibits state from restricting Medicaid funds for abortions to protect women's life or health, though federal constitution would so permit). See also *Robison v. Francis*, 713 P.2d 259, 271 (Alaska 1986) (Burke, J. concurring) (analyzing Alaska's "local hire" law under independent and adequate state-constitution grounds); Margaret H. Marshall, "Wise Parents Do Not Hesitate to Learn from their Children": *Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633, 1634 n.4 (2004) (citing *Horseman's Benevolent & Protective Ass'n* and other cases); Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893 (1989) (explaining that the "prognosis" for positive rights at the state level is better than at the federal level); Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 189-91 (2002) (giving overview of the differences between federal and state constitutions).

41. 46 P.3d 703 (Okla. Crim. App. 2002).

Vienna Convention on Consular Relations. While the state acknowledged its failure to comply with the Convention, the highest court reviewing the case, the Oklahoma Appellate Court, held that the United States Supreme Court's 1998 decision in *Breard v. Greene* permitted use of the procedural default rule, which holds that a procedural issue that is not raised at trial has been waived on appeal, to bar the accused from raising the violation on appeal.⁴² In applying *Breard*, the Oklahoma court rejected the argument that a more recent International Court of Justice (ICJ) ruling decrying use of the procedural default rule in such circumstances superseded the United States Supreme Court's decision.⁴³

In implementing its obligations under the Vienna Convention, however, the state court should have approached the issue differently. In the realm of state constitutional law, the Supreme Court's ruling in *Breard* serves as, at most, a floor: *Breard* did not require that the state procedural default rule be applied, but simply *permitted* such an application. The rights-granting provisions of the Oklahoma state constitution could have been construed to provide broader protections than the standards mandated by the federal constitution.⁴⁴ As a result, the Oklahoma court could have interpreted its state constitution to find that the application of its procedural default in this circumstance violated its constitution's due process clause.

Such an interpretation would be consistent with the state's obligation to implement transnational law according to its supremacy clause. The Oklahoma Constitution specifically provides that the state is an "inseparable part of the Federal Union and the Constitution of the United States is the Supreme Law of the Land."⁴⁵ This provision incorporates the United States Constitution's

42. *Id.* at 709. In its *per curiam* opinion in *Breard v. Greene*, the Supreme Court opined that the operation of the procedural default rule did not violate U.S. obligations under the Vienna Convention. 523 U.S. 371, 375–76 (1998). The Court noted that "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Id.* at 375.

43. *Valdez*, 46 P.3d at 707–09 (citing *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 497–98 (June 27)) (ruling that application of the procedural default rule had violated the Vienna Convention by precluding conviction challenges based on Vienna Convention violations). However, the practical effect of *Breard*—relied upon in *Valdez*—has recently been undermined. In February 2005, President Bush issued a directive mandating that state courts implement the recent ruling of the International Court of Justice in *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31). See Brief for the United States as Amicus Curiae Supporting Respondent at app. 2, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005), (No. 04-5928) (Memorandum from President George W. Bush regarding *Avena* judgment and state courts). The *Avena* judgment stated specifically that usage of the procedural default rule violates U.S. obligations under the Vienna Convention if it "prevent[s] courts from attaching legal significance" to violations of the rights set forth in the Convention. *Avena*, 2004 I.C.J., at 57. Thus to comply with the *Avena* judgment, state courts would have to bar the operation of the procedural default rule to preclude defendants from raising consular treaty violations. Had the state court (and other state courts) taken the approach suggested here, this presidential directive—arguably a presidential intrusion on state judicial autonomy—would have been unnecessary.

44. See *supra* note 40 (examples of state courts construing state rights to be broader than federal rights).

45. OKLA. CONST. art. I, § 1.

recognition of ratified treaties as the nation's "Supreme Law," binding on state courts. As a result, the Oklahoma court was obligated by virtue of its own constitution as well as its participation in the federal system to interpret, if possible, its state constitution to maintain harmony with both the Vienna Convention on Consular Relations and the Supreme Court ruling in *Breard*. An interpretation of the state due process clause to create an exception to the procedural default rule in such circumstances would fulfill this obligation, while providing an effective enforcement mechanism for the treaty that was otherwise wholly lacking.⁴⁶

At first blush, this enforcement role for state courts might appear to make an end-run around the non-self-executing status ascribed to many of the treaties ratified by the United States.⁴⁷ However, the concepts involved in state-level enforcement versus federal self-execution are quite distinct. Even if a treaty is deemed non-self-executing,⁴⁸ the United States and its constituent states are still bound by it.⁴⁹ As such, a court considering the legality of government action must take such treaty obligations into account. Even on the federal level, the non-self-executing nature of a treaty simply precludes private enforcement action and use of the treaty to secure jurisdiction.⁵⁰ It does not bar judicial

46. See Jeffrey L. Green, *International Law: Valdez v. State of Oklahoma and the Application of International Law in Oklahoma*, 56 OKLA. L. REV. 499, 532–33 (2003) (arguing that the state court could have incorporated provisions of the Vienna Convention on Consular Relations into the state constitution). In the subsequent case of *Torres v. Oklahoma*, the same court issued a remand to determine whether the defendant was prejudiced by the state's violation of his Vienna Convention rights. See *Torres v. State*, 120 P.3d 1184, 1186 (Okla. Crim. App. 2005) (describing procedural posture). See also Valencia, Jackson, Van de Putte, & Ellis, *supra* note 38, at 490–91 (describing background of the case). An unpublished concurrence by Judge Chapel accepted the binding nature of the Vienna Convention on the state. See Janet Levit, *A Tale of International Law in the Heartland: Torres and the Role of State Courts in Transnational Legal Conversation*, 12 TULSA J. COMP. & INT'L L. 163, 172–73 (2004) (describing Chapel concurrence).

47. For a description of the U.S. policy to ratify all treaties only if they are deemed non-self-executing, see *supra* note 18.

48. The Vienna Convention has been held by some lower courts to be self-executing, in contrast to many of the other human rights treaties ratified by the United States. See, e.g., *United States v. Torres-Del Muro*, 58 F. Supp. 2d 931, 932 (C.D. Ill. 1999) (noting that "the treaty is 'self-executing' in the sense that there is no need for enabling legislation for the Convention to have the force of law"). See also S. EXEC. REP. NO. 91-9, at app. at 5 (1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration) (noting treaty is "entirely self-executive [sic]"). The extent to which the Vienna Convention creates rights enforceable in state courts is before the U.S. Supreme Court in *Bustillo v. Johnson*, No. 05-51, and *Sanchez-Llamas v. Oregon*, No. 04-10566, both of which were argued on March 29, 2006. The briefs submitted to the Supreme Court and other information about the cases are available at <http://www.debevoise.com/newseventspubs/news/detail.aspx?id=75fd921a-0e77-4096-845b-00b68ccf74f4>. The Supreme Court's calendar, showing oral argument on March 29, 2006, is available at http://www.supremecourtus.gov/oral_arguments/argument_calendars/monthlyargumentcalmarch2006.pdf.

49. For example, in its initial report to the CERD Committee, the United States stated that "[t]his declaration has no effect on the international obligations of the United States or on its relations with States parties." U.S. Initial CERD Report, *supra* note 18, ¶ 170.

50. According to the United States, the non-self-execution declaration has "the effect of precluding the assertion of rights by private parties based on the Convention in litigation in U.S. courts. . . . However, this declaration does not affect the authority of the Federal Government to enforce the obligations that the United States has assumed under the Convention through

consideration and enforcement of the treaty's terms once a cause of action and jurisdiction is secured on some other basis. On the state level, because states can take independent action to implement treaties directly as state law, the federal non-self-executing reservation—whatever its legality on the international stage—has even less practical weight.⁵¹ Because of this, state courts can enforce treaty obligations even when the ratified treaties are deemed non-self-executing.

ii. Using Transnational Law Persuasively to Illuminate State Constitutional Provisions

Even where no binding transnational law is at issue, state courts can appropriately reference transnational law. For example, some state laws have been crafted in the shadow of, and were thus influenced by, international agreements such as the Universal Declaration of Human Rights.⁵² As a result, many state constitutions reject federal constitutional constructions in favor of transnational formulations of rights.⁵³ In some instances, the origins of the language and the genesis of concerns expressed are the same.⁵⁴ But even when such direct connections are not apparent, the similarities between international law provisions and state constitutional provisions granting affirmative rights support

administrative or judicial action." *Id.*

51. There are several examples of such state implementation of transnational law. California has implemented the Vienna Convention directly. CAL. PENAL CODE § 834c(b) (West 2005). Massachusetts charges its Commission on the Status of Women with promoting the tenets of the Beijing Platform for Action. MASS. GEN. LAWS ch. 3, § 66(3) (2006) (stating that the Commission "shall be guided by the tenets of the Platform for Action of the United Nations Fourth World Conference on Women held in Beijing in September, 1995"). San Francisco has adopted the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] and CERD, and similar efforts are being made in New York City. See Stacy Laira Lozner, *Diffusion of Local Regulatory Innovations: The San Francisco CEDAW Ordinance and the New York City Human Rights Initiative*, 104 COLUM. L. REV. 768 (2004) (discussing especially San Francisco's adoption of CEDAW and efforts in New York City to adopt CEDAW).

52. While legislative histories are hard to come by at the state level, there is evidence that twentieth-century framers of state constitutional provisions were influenced by international legal precedents. See, e.g., Jackson, *supra* note 2, at 21–27 (describing international influence on the constitutions of Puerto Rico and Montana); Lee Cooper, *WPA Makes Study of Housing Work Abroad for Guidance of Constitutional Convention*, N.Y. TIMES, July 7, 1938, at 35 (describing examination of international approaches to housing problems at the New York's Constitutional Convention). Indeed, by 1963 the question of international influences in state constitution-making was so pervasive that it was addressed directly in the 1963 "Model Constitution" promulgated by the National Municipal League. In circular logic, the League cited the Universal Declaration of Human Rights, but urged that legislators reject incorporation of social and economic rights in state constitutions "[u]ntil such time as such 'rights' are enforceable." NAT'L MUN. LEAGUE, MODEL STATE CONSTITUTION 27–28 (6th ed. 1963).

53. See, e.g., Marshall, *Wise Parents*, *supra* note 40, at 1643 (suggesting that state judges should look to Canada's constitutional provisions when interpreting constitutional claims for bilingual education, and whenever another country's experience may prove a useful comparison).

54. See generally Jackson, *supra* note 2, at 24–27 (arguing that Puerto Rico's constitution includes text taken verbatim from, and addressing the same concerns as, international human rights documents, and that Montana's constitution was inspired by these ideals as well).

using transnational human rights norms to interpret state law.

Many state constitutions articulate rights that are not mentioned in the federal constitution, such as positive rights to welfare, health, education, and the right to work. Positive rights to welfare—wholly lacking at the federal level—are “among the most common positive rights in state constitutions.”⁵⁵ One of the most specific of these provisions, article XVII of the New York State Constitution, states that “the aid, care and support of the needy are public concerns and shall be provided by the state . . . in such manner and by such means” as the legislature shall determine.⁵⁶ Explicit rights to education, also absent from the federal constitution, are also found in many state constitutions. For example, the Constitution of North Dakota states that “the legislative assembly shall provide for a uniform system of free public schools throughout the state.”⁵⁷ Though health is less often directly addressed in discrete provisions of state constitutions, there are a number of pertinent state constitutional sections. For example, Alaska’s constitution, adopted at the time of statehood in 1959, provides for the public health of state inhabitants.⁵⁸ Hawaii’s constitution also states that “the State shall provide for the protection and promotion of the public health.”⁵⁹ Finally, many state constitutions also address the affirmative right to work and the right to organize as members of trade unions. For example, the New York State Constitution states “employees shall have the right to organize and to bargain collectively through representatives of their own choosing.”⁶⁰ Several state constitutions also specifically address working

55. Martha F. Davis, *Remarks on Poverty and Welfare, in WOMEN’S RIGHTS IN THEORY AND PRACTICE* 77 & app. 1 (Woodrow Wilson International Center For Scholars ed. 2002).

56. N.Y. CONST. art. XVII, § 1. The preamble to Illinois’s constitution contains a more general statement, asserting that among its purposes are “to provide for the health, safety and welfare of the people; . . . eliminate poverty and inequality; [and] assure legal, social and economic justice.” ILL. CONST. pmb1.

57. N.D. CONST. art. VIII, § 2. Similarly, Maryland’s constitution states that “[t]he General Assembly . . . shall . . . establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide . . . for their maintenance.” MD. CONST. art. VIII, § 1.

58. ALASKA CONST. art. VII, § 4 (“The legislature shall provide for the promotion and protection of public health.”).

59. HAW. CONST. art. IX, § 1. Louisiana’s 1974 constitution likewise speaks directly to the issue of public health, as does Michigan’s, adopted in 1963, and New York’s, adopted in 1938. LA. CONST. art. XII, § 8 (“The legislature may establish a system of economic and social welfare, unemployment compensation, and public health.”); MICH. CONST. art. IV, § 51 (“The legislature shall pass suitable laws for the protection and promotion of the public health.”); N.Y. CONST. art. XVII, § 3 (“The protection and promotion of the health . . . are matters of public concern and provision therefor shall be made by the state.”). See also S.C. CONST. art. XII, § 1 (“The health, welfare, and safety of the lives and property of the people of this State . . . are matters of public concern.”).

60. N.Y. CONST. art. I, § 17. New Jersey’s constitution provides that “[p]ersons in private employment shall have the right to organize and bargain collectively,” and that public employees also have rights to organize. N.J. CONST. art. I, § 19. See also HAW. CONST. art. XIII, § 1 (“Persons in private employment shall have the right to organize for the purpose of collective bargaining[.]”).

hours⁶¹ and working conditions.⁶²

These state constitutional provisions and the laws that implement them are direct analogues to international law approaches that encourage or mandate affirmative attention to areas of economic and social well-being.⁶³ Like the state constitutional provisions set out above, the International Covenant on Economic, Social and Cultural Rights (ICESCR) addresses education, stating that “[t]he States Parties to the present Covenant recognize the right of everyone to education.”⁶⁴ The ICESCR also specifies the requisite steps for ensuring the public health, including reduction of infant mortality, improvement of industrial hygiene, prevention of disease, and provision of medical services.⁶⁵ Labor rights are directly addressed in article 22 of the ICCPR, which states “[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”⁶⁶ The ICESCR addresses work conditions in greater detail than the ICCPR, mandating that States Parties provide “[f]air wages,” “[a] decent living,” “[s]afe and healthy working conditions,” “[e]qual opportunities for everyone to be promoted,” and “[r]est, leisure and reasonable limitation of working hours.”⁶⁷

There are often dramatic similarities between the language and content of state constitutions and international human rights instruments. For example, in the area of welfare, the ICESCR provides that States Parties “recognize the right of everyone to social security, including social insurance,” and “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”⁶⁸ Hawaii’s constitution tracks these sentiments, providing for financial assistance, medical assistance, and social services for persons in

61. For example, the Montana state constitution limits a regular workday to eight hours “in all industries and employment except agriculture and stock raising.” MONT. CONST. art. XII, § 2. See also COLO. CONST. art. V, § 25a (limiting workday to eight hours in “dangerous” industries); IDAHO CONST. art. XIII, § 2 (limiting public employees’ workday to eight hours).

62. The Utah Constitution, for instance, states that “[t]he rights of labor shall have just protection through laws calculated to promote the industrial welfare of the state.” UTAH CONST. art. XVI, § 1. Similarly, Alaska’s constitution states that “[a]ll persons have a natural right to . . . the enjoyment of the rewards of their own industry.” ALASKA CONST. art. I, § 1.

63. Many of these rights were also articulated at the federal level by President Franklin Roosevelt in his so-called “Second Bill of Rights,” offered in his State of the Union speech in 1944. See Cass R. Sunstein, *Economic Security: A Human Right*, AM. PROSPECT, Oct. 2004, at A24 (discussing import of speech). Not incidentally, President Roosevelt hailed from New York and, as New York’s Governor from 1928–32, must have been familiar with the broader, more affirmative scope of state constitutional law.

64. ICESCR, *supra* note 8, art. 13(1).

65. *Id.* art. 12.

66. ICCPR, *supra* note 13, art. 22. Because the United States is a party to the ICCPR, the ICCPR’s status is not merely informational. Rather, states have an obligation to construe relevant state constitutional provisions in light of the ICCPR.

67. ICESCR, *supra* note 8, art. 7. Article 8 of the ICESCR addresses trade unions in greater detail. *Id.* art. 8.

68. *Id.* arts. 9, 11.

need, as well as economic security for the elderly.⁶⁹ It also grants the state power to provide housing, slum clearance, and development and rehabilitation of substandard areas.⁷⁰ Kentucky's constitution, amended in 1985, also specifically addresses social insurance, directing the general assembly to "prescribe such laws as may be necessary for the granting and paying of old persons an annuity or pension."⁷¹ Barbara Stark has written extensively on the similarities between the ideas in the ICESCR and those expressed in state constitutions.⁷² These provisions' meanings on the international stage cannot easily be differentiated from the meaning of similar provisions in state constitutions. It is therefore appropriate for state courts to look to transnational law for guidance when construing state constitutions.

In contrast to the debate at the federal level, discussed below, state courts have not typically viewed the relevance of transnational law to domestic policy as controversial. As one among fifty, each state is accustomed to looking to sister states for jurisprudential and policy ideas.⁷³ Their comparative perspective is matched on the international plane: high courts of other nations have also long credited transnational law as persuasive authority. For example, members of South Africa's Constitutional Court addressing the constitutionality of the death penalty have examined decisions from other states (Botswana, Canada, Germany, Hong Kong, Hungary, India, Jamaica, Tanzania, the United States, and Zimbabwe) and transnational bodies (the European Court of Human Rights and the United Nations Committee on Human Rights).⁷⁴ The Israeli, Canadian, and Indian Supreme Courts also have traditions of looking for wisdom from sister jurisdictions in other nations.⁷⁵ Not surprisingly, therefore, as Reem Bahdi has pointed out, American state courts invoke international law for similar reasons as their sister courts in other nations: "(1) concern for the rule of law; (2) desire to promote universal values; (3) reliance on international law to help uncover values inherent within the domestic regime; (4) willingness to invoke

69. HAW. CONST. art. IX, §§ 3-4.

70. *Id.* art. IX, § 5.

71. KY. CONST. § 244a.

72. See Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy,"* 44 HASTINGS L.J. 79 (1992).

73. See Marshall, *Wise Parents*, *supra* note 40, at 1641-42 (noting that "[a]s a state court judge, I have frequent occasion to look to the constitutional law of fifty other American jurisdictions, even though other states' interpretations of their constitutions have no precedential weight [in my state's courts]").

74. Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 21-22 (1998).

75. See Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 281 (1999) (India); L'Heureux-Dubé, *supra* note 74, at 17 (Canada). See also H CJ 721/94 *El-Al Israel Airlines v. Danielowitz* [1994] IsrLR 478 ¶21 (finding persuasive U.S. case law wherein otherwise unconstitutional statutes were interpreted broadly to avoid constitutional issues and to satisfy the legislators' intent, rather than simply nullifying the suspect statute); H CJ 453/94 *Israel Women's Network v. Gov't* [1994] IsrLR 425 ¶¶ 17-18 (examining U.S. affirmative action jurisprudence).

the logic of judges in other jurisdictions; and (5) concern to avoid negative assessments from the international community.”⁷⁶

Furthermore, despite some controversy, a majority of the United States Supreme Court has repeatedly accepted the relevance of transnational law in federal constitutional decisions. For example, in *Roper v. Simmons*, a case striking down Missouri’s juvenile death penalty under the Eighth Amendment to the United States Constitution, the majority of the Court acknowledged worldwide opinion against imposing the death penalty under such circumstances.⁷⁷ Similarly, in *Lawrence v. Texas*, a case striking down Texas’s state-level antisodomy law on grounds of privacy under the Fourteenth Amendment to the United States Constitution, the majority noted cases from other nations and transnational policies recognizing the rights of people in same-sex relationships.⁷⁸

76. Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. INT’L L. REV. 555, 556–57 (2002). See also *Ex Parte Marcus Pressley*, 770 So.2d 143, 151 (Ala. 2000) (Houston, J., concurring) (citing international law to respond to negative assessments within the international community); *Moore v. Ganim*, 660 A.2d 742, 781 (Conn. 1995) (Peters, C.J., concurring) (citing international law to support universal values and to elucidate values in Connecticut Constitution); *In re Adoption of Peggy*, 767 N.E.2d 29, 37–38 (Mass. 2002) (citing international law to demonstrate concern for rule of law and interest in international standards); *In re Julie Anne*, 780 N.E.2d 635, 651–52 (Ohio 2002) (citing global attention to issue of secondhand smoke, including activities of World Health Organization and United Nations, in ascertaining universal values encompassed within the “best interests of the child” test); *Pauley v. Kelly*, 255 S.E.2d 859, 863 n.5 (W.Va. 1979) (citing the Universal Declaration of Human Rights to construe state constitution’s protection of the right to an education).

77. *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005). Justice Kennedy’s majority opinion referred extensively to “instructive” international authorities. *Id.* at 575. In dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, argued that the Court’s reliance on “alien law” was unprincipled. *Id.* at 622–28. Concurring with the dissenters, Justice O’Connor nevertheless carved out a place for foreign and international law as indicative of the “evolving understanding of human dignity.” *Id.* at 604–05. This debate among the Justices echoed similar debates from the past decade. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the majority struck down the death penalty for mentally retarded defendants, and referenced an *amicus curiae* brief from the European Union arguing that the imposition of the death penalty on mentally retarded offenders is overwhelmingly disapproved by the world community. *Id.* at 316 n.21. In his *Atkins* dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dismissed the views of the “world community” as “irrelevant.” *Id.* at 347–48. In a 1997 decision, *Printz v. United States*, the Court struck down provisions of the Brady Act, which would have involved state actors in performing background checks on gun-buyers. 521 U.S. 898 (1997). Justice Scalia, writing for the majority, noted that “[w]e think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.” *Id.* at 921 n.11. Justice Breyer dissented, joined by Justices Souter, Ginsburg, and Breyer, arguing that other nations have grappled with similar problems—such as the death penalty, affirmative action, and federalism itself—and that the Court can learn from the approaches that they have taken. *Id.* at 976–77. For an analysis of the philosophical debates underlying the Court’s use of international law in these cases, see Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. (forthcoming 2006).

78. *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003).

3. Arguments Against State Court Reliance on Transnational Law

Despite reference to transnational law in cases such as *Roper* and *Lawrence*, federal judicial reliance on transnational law has been the topic of highly publicized debate in recent years. U.S. Supreme Court Justices have argued regarding the merits of such reliance both in the pages of their opinions and in public speeches. Whereas a majority of the Rehnquist Court ascribed to the practice, members of Congress have introduced a series of proposals—none of which have been endorsed by the full body—designed to discourage United States judges from looking abroad for relevant support or authority.⁷⁹ Some of these proposals would go so far as to bar citation to international and foreign law in constitutional construction, to strip domestic cases relying on foreign decisions of precedential value, and to threaten impeachment of federal judges who rely on such foreign law.⁸⁰ However, as discussed below, the arguments offered to support this position on the federal level have much less traction in the state arena.

Opponents of international citation have articulated four rationales for limiting judicial reliance on transnational law:

- Reliance on international and comparative law impinges on the executive's foreign relations and foreign policy role;⁸¹
- Citation to international and comparative law violates rules of constitutional construction that limit the sources on which judges can rely to domestic sources contemporary to the Constitution's framing;⁸²
- Reliance on transnational law undermines democratic participation by giving undue authority over American law to foreign courts;⁸³ and
- Given the differences in legal systems and cultures, United States judges may not be competent to properly interpret and construe

79. See, e.g., H.R. Res. 568, 108th Cong. (2004); H.R. Res. 468, 108th Cong. (2003); Constitutional Preservation Resolution, H.R. Res. 446, 108th Cong. (2003).

80. American Justice for Americans [sic] Citizens Act, H.R. 4118, 108th Cong. (2004) (barring citation to transnational law in constitutional construction); Constitution Restoration Act of 2004, S. 2323, 108th Cong. (2004) (barring citation of transnational law in constitutional construction, making federal decisions citing transnational law nonbinding on the states, imposing sanctions on judges who cite transnational law); Constitution Restoration Act of 2004, S. 2082, 108th Cong. (2004) (same); Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. (2004) (same).

81. J. Harvie Wilkinson III, *The Use of International Law in Judicial Decisions*, 27 HARV. J.L. & PUB. POL'Y 423, 425 (2004). See Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 946 (2004) (explaining the rationale underlying federal court abstention on matters implicating the foreign affairs power).

82. See, e.g., Wilkinson, *supra* note 81, at 427.

83. See, e.g., *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 12–13 (2004) (statement of Jeremy Rabkin, Professor of Government, Cornell University) [hereinafter Rabkin Testimony].

international authority, with the result that judges will “cherry-pick” transnational citations that support their own views, giving those decisions distorted significance.⁸⁴

Whatever persuasive value these points might have on the federal level, they fail to take into account the differences between the federal and state constitutional contexts.

a. Impinging on the Executive’s Role

The federal constitution grants the executive branch authority over foreign relations.⁸⁵ This delegation of authority ensures that the United States speaks with one voice when addressing foreign policy issues.⁸⁶ Given the fact that the American system includes three coordinate branches of government, granting Congress or the Supreme Court the power to independently develop foreign relations principles, to negotiate treaties, or to participate in international fora alongside the executive could have a disastrous impact on foreign relations.

For similar reasons, foreign affairs are the province of the national government, as opposed to the fifty states. The Supreme Court has vigorously policed state legislative efforts to engage in foreign policy. For example, the Court struck down the Massachusetts state legislature’s attempt to shape the state’s policy on Burma, concluding that the state law was preempted by the federal statute governing foreign trade with that country.⁸⁷ Similarly, the Supreme Court disapproved of California’s effort to vindicate Holocaust victims and survivors by requiring that insurance companies doing business in the state disclose information about policies sold in Europe from 1920 to 1945.⁸⁸ According to the Court, this was a traditional foreign policy matter in which national interests overrode state interests.⁸⁹

In contrast to legislative actions at the federal or state levels, judicial opinions that cite transnational law have not typically been viewed as transgressing the primacy of the national executive branch in foreign affairs. Perhaps this is because those domestic courts and judges that have ventured into the international law arena have generally done so in areas involving individual rights that are far from the central concerns of foreign relations, and therefore less likely to overtly interfere with the prerogatives of the political branches.⁹⁰

84. *See, e.g., id.* at 13; Wilkinson, *supra* note 81, at 428. *See also* Bradley & Goldsmith, *supra* note 25, at 874–75 (noting that many judges are unfamiliar with international law and thus may be inclined to rely on scholarly opinion in construing transnational precedent).

85. U.S. CONST. art. II, § 2, cl. 2.

86. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 213–15 (1972).

87. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000).

88. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003).

89. *Id.* at 421.

90. *See* Resnik, *supra* note 77 (suggesting that the “specific and concrete effects on national capacities to resolve wars or to undertake foreign affairs initiatives,” not the vindication of human rights claims, should drive foreign affairs preemption).

Such decisions stretch back to the beginning of the nation, both in federal and state courts.⁹¹ As a result, barring judges from examining transnational sources for inspiration, guidance, or even legal authority would mean a departure from longstanding practice, not a return to originalism. Furthermore, any concerns that may be raised by federal court citation of transnational authority are diminished on the state level since the possibility that a single state court's pronouncement would be mistaken for national policy is remote.

In addition, any concern that a state court's citation of transnational law would impinge on the *state's* own executive branch of government is mitigated by several factors. First, certainly no branch of state government has principal constitutional or institutional responsibility for foreign relations. Second, because most state constitutions do not draw strict lines between state governmental branches, a state court citing transnational law does not impinge on the core responsibilities of the other branches.⁹² Finally, the ease with which state constitutions may be revised, and the role of popular participation in their amendment, enables the political process to limit any perceived misuse of judicial power.⁹³

State constitutions are amended frequently and often with popular participation. For example, the Iowa Constitution has been amended an average of once every three years since its adoption.⁹⁴ Alabama's constitution has been amended at least 618 times since 1819, and California's has been amended at least 493 times.⁹⁵ By 1995, the nation had seen 230 state constitutional conventions, in which 146 constitutions and some 6000 amendments were

91. See, e.g., *Miller v. Resolution*, 2 U.S. (2 Dall.) 1, 2 (1781) (relying on the law of nations to allocate seized property); *Scheible v. Bacho*, 41 Ala. 423, 434 (1868) (citing the law of nations to resolve a question of legality of contract); *Brinley v. Avery*, 1 Kirby 25, 26 (Conn. Super. Ct. 1786) (citing law of nations to support conclusion that alien could not sue on foreign contract in state courts). Daniel Meltzer has also noted that the subject matter dealt with by state courts tends not to relate to classic foreign policy concerns, but rather to issues of environment, culture, and economics. Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L L. 513, 547 (2002).

92. See, e.g., Christine M. Durham, *The Judicial Branch in State Government: Parables of Law, Politics, and Power*, 76 N.Y.U. L. REV. 1601 (2001) (asserting that state court judges are not as independent of their states' legislative and executive functions as federal judges); Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1886-98 (2001) (describing institutional differences between federal and state courts arising from, among other things, positive rights in state constitutions and the fact that state judges are elected in many jurisdictions).

93. See Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269, 277 (1944) (noting ease and frequency of state constitutional amendment); Williams, *supra* note 40, at 192 (same).

94. Jonathan Roos, *Constitutional Change is Common in Iowa*, DES MOINES REGISTER, June 7, 1999, at 1M.

95. ROBERT L. MADDEX, STATE CONSTITUTIONS OF THE UNITED STATES xxx-xxxiv (1998) (state-by-state chart).

adopted.⁹⁶ Even when they are generated by the legislature or a constitutional convention, state constitutions and constitutional amendments are often ultimately passed by popular referendum.⁹⁷ For example, the New York State Constitution provides that a constitutional convention must be considered by the “electors of the state” every twenty years.⁹⁸ Any amendments proposed by the convention must then be approved by a majority of voters.⁹⁹

Where state constitutions are easily revised, and where the revision process encourages popular participation, give-and-take among the branches and with the electorate is a real possibility.¹⁰⁰ Thus, while federal courts might arguably be required to tread lightly in areas that are reserved to the executive branch, such as foreign relations, state courts have more flexibility because the state’s executive branch, its legislature, and the state’s citizens are in a position to respond relatively rapidly to any court decisions they think are misguided.

b. Improper Sources

Opponents of the use of international law in federal adjudication have also asserted that such sources are simply improper, as they undermine the determinative role that the domestic sources relied upon by the Constitution’s “framers” should play in constitutional interpretation.¹⁰¹ Both jurists and scholars have written extensively about the role of originalism in construing constitutions, and I will not repeat those arguments here.¹⁰² However, that heated debate has taken place primarily on the federal level. This is because, again, state constitutions differ from their federal counterpart in both history and text. A state constitution that is adopted by popular referendum does not have “framers” in the same sense as does the federal constitution. While relying on the framers in the federal context limits the relevant sources a court may examine when interpreting the federal constitution, the analogous approach in the state context has the potential to widen the inquiry to any factor that might

96. *Id.* at vii. At least eighteen states allow proposals for constitutional amendments by popular initiative, while fourteen states require constitutional conventions (or at least, consideration thereof) at regular intervals. *Id.* at xiii.

97. *Id.* at xxii (in forty-nine states amendment is by popular vote). See also *Raven v. Deukmejian*, 801 P.2d 1077, 1083–90 (Cal. 1997) (discussing permissible changes to the California state constitution by voter initiative); Williams, *supra* note 40, at 194 (“State constitutions, ratified by the electorate, are therefore characterized by state courts as the ‘voice of the people.’”).

98. N.Y. CONST. art. XIX, § 2.

99. *Id.*

100. Hershkoff, *Positive Rights*, *supra* note 8, at 1169 (noting tendency for state courts to open a dialogue with other political branches that leads to “shared solutions to important public problems”).

101. See, e.g., American Justice for Americans [sic] Citizens Act, H.R. 4118, 108th Cong. § 3 (2004) (barring use of foreign law by U.S. judges, but permitting consideration of “English constitutional and common law or other sources of law relied upon by the Framers”).

102. For a bibliography of articles on originalism, see U.S. DEP’T OF JUSTICE, OFFICE OF LEGAL POLICY, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 73 (1987).

have influenced the electorate to approve the constitution and to open the process to a wide range of interpretive approaches. The significant role of a state's citizens in its constitution's framing means that constitutional history cannot be strictly limited to statements of amendment sponsors or other official actors. Rather, relevant interpretive material may be wide-ranging, reflecting social trends, economic concerns, and other factors that motivate individual members of the electorate.¹⁰³

Further, many states have amended their constitutions and adopted state constitutional provisions relatively recently, at a time when state legislators certainly knew of the international precedents and trends that inform contemporary lawmaking. As a result, the transnational sources relevant to state constitutional construction may be quite contemporary. For example, Iowa and Florida added prohibitions of sex discrimination to their state constitutions in 1998, eighteen years after the United States signed the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and three years after the Beijing Conference at which then-First Lady Hillary Clinton spoke about the importance of global women's rights.¹⁰⁴ Hawaii's state constitutional provision extending financial assistance and medical and social services to persons in need was added in 1978, the year after President Carter signed the ICESCR.¹⁰⁵ Even those state constitutional provisions adopted decades earlier may reflect not only a reaction against the passivity of the United States Constitution in the face of persistent poverty, racism, or sexism, but an appreciation of the international and transnational alternatives to the status quo.¹⁰⁶

Importantly, the framers of the federal constitution and those responsible for drafting state constitutions possessed a similar interest in transnational law. There is ample evidence that both sets of drafters surveyed other constitutional approaches and made choices based on information about their success or failure, taking national or state values into account. Even originalist Justices Thomas and Scalia have indicated that such international precedents may be relevant to the process of drafting a constitution, though they deny the relevance of international and comparative law to later interpretations of the provisions that

103. See Williams, *supra* note 40, at 196 ("Often state courts will examine . . . evidence of the voters' intent derived from official ballot pamphlets and other materials presented to voters prior to the referendum.").

104. FLA CONST. art. I, § 2; IOWA CONST. art. I § 1; CEDAW, *supra* note 51. See Feminist Daily News Wire, *Florida and Iowa to Vote on Equal Rights Measures* (Oct. 5, 1998), <http://www.feminist.org/news/newsbyte/printnews.asp?id=487> (discussing pending Florida and Iowa votes on the amendments); Ellen Chesler, *Introduction to WHERE HUMAN RIGHTS BEGIN: HEALTH, SEXUALITY, AND WOMEN IN THE NEW MILLENNIUM* 1, 23 (Wendy Chavkin & Ellen Chesler eds. 2005) (describing Hillary Clinton's famous statement at Beijing Conference that "Human rights are women's rights and women's rights are human rights").

105. HAW. CONST. art. IX, § 3; ICESCR, *supra* note 8.

106. See Jackson, *supra* note 2; Cooper, *supra* note 52.

were crafted with such precedents in mind.¹⁰⁷ Harold Hongju Koh has likened this distinction to “operating a building by examining the blueprints of others on which it was modeled, while ignoring all subsequent progress reports on how well those other buildings actually functioned over time.”¹⁰⁸ Moreover, it is difficult to square originalist interpretation with the notion that constitutional architects who engaged in a broad-based comparative inquiry intended the transnational dialogue to end on the date that the constitution was adopted.

Further, the framers’ “intent,” however broadly defined in the state context, is not the sole criterion for assessing the propriety of a particular constitutional interpretation. At bottom, the interpretation must also have legitimacy, a necessary touchstone of judicial decisionmaking. Even if it is otherwise within the parameters set by precedent and other legal constraints, a decision too out of step with popular opinion will undermine the power of the institution—whether executive, legislative, or judicial—that renders it.

In a global age, where international travel and worldwide communication are commonplace in many people’s lives, reference to transnational law strengthens the legitimacy of domestic judicial decisions.¹⁰⁹ Given citizens’ awareness of other nations’ policies and approaches, such analysis may even be *necessary* to secure the legitimacy of a domestic decision.¹¹⁰ Just as the United States Supreme Court responded to changing perspectives on decisionmaking in the Progressive Era by expanding its purview to recognize the relevance of social science data,¹¹¹ so judges in the twenty-first century may have no choice but to frame their decisions in a more global context. Indeed, a majority of the Court used transnational law in exactly this way in *Lawrence v. Texas*.¹¹² Similarly, Justice Ginsburg invoked transnational law in her concurrence in *Grutter v. Bollinger*¹¹³—which was joined by Justice Breyer—to bolster the court’s legitimacy. She noted that the majority’s decision conformed to international

107. *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (“We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.”).

108. Koh, *International Law as Part of Our Law*, *supra* note 1, at 54.

109. See generally Martha F. Davis, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 ALB. L. REV. 417 (discussing role of international law in establishing legitimacy of domestic decisions).

110. The relevance of international travel to domestic policy was tellingly demonstrated during the second Presidential debate in 2004. One of the questioners, Nikki Washington, related that her mother and sister had been challenged to defend the U.S. policy in Iraq while they were traveling abroad, and asked President Bush how he would repair the poor relations with other countries that gave rise to such challenges. Commission on Presidential Debates, *Debate Transcript October 8, 2004: The Second Bush-Kerry Presidential Debate*, http://www.debates.org/pages/trans2004c_p.html (last visited Apr. 6, 2006).

111. Davis, *Predictions of a Courtwatcher*, *supra* note 109, at 422–24 (discussing the “Brandeis brief” and its influence on Supreme Court jurisprudence).

112. 539 U.S. 558, 572–73, 576–77 (2003).

113. 539 U.S. 306 (2003) (Ginsburg, J., concurring) (upholding the University of Michigan Law School’s race-conscious admissions process under the Fourteenth Amendment).

practices of affirmative action, including those referenced in CEDAW and CERD,¹¹⁴ and her references to those treaties underscored the role of international dialogue in addressing human rights issues such as race and sex discrimination. Her references to transnational law gave legal legitimacy to a judicial decision that otherwise might have been criticized as judicial policymaking. International law may play an even more important role in legitimizing state court decisions in those instances where there is no federal guidance for interpreting state constitutional provisions.

c. Lack of Democratic Participation

Those opposed to domestic citation of transnational precedent also argue that reliance on foreign law undermines the democratic will by extending undue authority over domestic law to foreign courts.¹¹⁵ There are at least two counterarguments to this assertion. First, the relative populism of state constitutions weakens accusations of countermajoritarianism in the state context. At that level, the degree of interplay between voters, legislative drafters, and judges renders the likelihood of any foreign court “capturing” the state legal structure extremely remote.¹¹⁶ Second, the countermajoritarian objection misunderstands the potential role of transnational law. Such law is only binding when the United States affirmatively acknowledges its force by ratifying a treaty or enacting a statute, or in the case of customary international law where the principle is so overwhelmingly accepted and respected that it rises to the level of binding law.¹¹⁷ Otherwise, judges may look to transnational law for guidance, but they are not bound by it, and a judge might as easily reject a foreign court’s approach as accept it.

At bottom, this objection, as well as the judicial competence objection discussed next, evidences a deep mistrust of the judicial branch. However, the remedy for that mistrust is not to limit judges’ tools for decisionmaking—more tools may actually improve judges’ opinions. Instead, those who seek to limit judicial power would do better to enact jurisdictional limits or other restrictions on basic justiciability.

d. Lack of Competence

Finally, opponents of the role of transnational law question judges’ competence to interpret transnational law sources. Specifically, they suggest that judges may erroneously give such sources undue weight, unreasonably preferring them to domestic interpretive sources. The answer to such a challenge is

114. *Id.* at 344.

115. *See, e.g.,* Rabkin Testimony, *supra* note 83, at 12–13.

116. *See supra* notes 93–100 and accompanying text (discussing the ease with which state constitutions can be amended).

117. *See supra* notes 18, 22–23, and accompanying text (discussing the binding domestic effect of international treaties and customary international law).

not to place some relevant sources of ideas and interpretation “out of bounds,” but to provide sufficient judicial education so that judges can properly evaluate the full range of sources relevant to their interpretive task.

By suggesting that judges are not competent to evaluate and apply transnational law to domestic cases, some critics distinguish legislative drafters or framers from courts. They maintain that international law may properly be consulted in the course of drafting legislation, but not while interpreting the law.¹¹⁸ This argument, however, mistakes the task in which the court is engaged when it relies on transnational law to aid its interpretation of constitutional provisions. Certainly, courts do not approach fact-gathering in the same way as legislatures. When resolving a case or controversy, a court is focused on elucidating the facts particular to the parties before it, while a legislature is looking to uncover facts that will contribute to broader policy development.

But legislatures and courts also use law differently. Legislatures or constitutional framers may gather information about international and comparative law much the same way that they compile statistics or individual testimony—as an aid to development of broad-based policy. In contrast, courts survey transnational laws as an aid to legal interpretation and proper resolution of a particular case. Further, the ways in which federal or state courts might use transnational law when adjudicating a particular case—to shed empirical “light” on how a common standard might be applied, to construe a “parallel rule,” and to explicate a “community standard”—are consistent with traditional methods of constitutional analysis and interpretation.¹¹⁹

While these uses of transnational law are traditional and widely accepted, it may be the case that some judges avoid using transnational law because they are not sufficiently familiar with its sources—a problem that is already being remedied through judicial education. Indeed, the question of judicial competence in the transnational law arena is increasingly a relic of an earlier time. In law schools today, international law, including human rights law, is one of the fastest growing areas of the curriculum. In addition to burgeoning lecture courses focusing on these topics, international and comparative law concepts are now commonly introduced in nearly every law school course—required and elective courses alike.¹²⁰ Furthermore, law schools are increasingly offering international human rights clinics, exposing students to the practical application of human rights law.¹²¹ In short, a majority of contemporary law students leave

118. See, e.g., *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997).

119. Koh, *International Law as Part of Our Law*, *supra* note 1, at 45–46.

120. See M.C. Mirow, *Globalizing Property: Incorporating Comparative and International Law into First-Year Property Classes*, 54 J. LEGAL EDUC. 183 (2004); Catherine Valcke, *Global Law Teaching*, 54 J. LEGAL EDUC. 160 (2004). See also Am. Ass'n of Law Schools, *Educating Lawyers for Transnational Challenges* (May 26–29, 2004) (conference including session on the role of transnational law in the law school curriculum).

121. See Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505 (2003) (applauding the new prevalence of

law school with repeated exposure to transnational law principles. Indeed, some argue that they need such exposure to practice in almost any area of law today.¹²²

For those judges educated before the “globalization” of law school, or those whose law school education did not provide a solid grounding in transnational law, continuing judicial education courses on these topics are also becoming far more common.¹²³ Such education can contextualize transnational law for judges, and provides a forum where they may discuss different approaches with others who are engaged in similar endeavors.

This is not to say that judges will never go astray in resolving legal issues, whether they are looking to transnational law or limiting their inquiry to domestic sources. But in the event that high court judges make an irreversible interpretive mistake and give undue weight or distorted meaning to transnational law, state constitutions can be amended to remedy the mistake with relative ease. As discussed above, state constitutions are not beyond the reach of voters to the degree that the United States Constitution is, and citizens operating at the state level have a meaningful opportunity to debate and amend their governing documents to reflect their evolving intentions.¹²⁴

B. *The Structure of the International System*

Not only the U.S. federal system, but the international system demands that subnational governments implement international law. The U.S. government retains ultimate responsibility for treaty compliance and thus may be held responsible under international law if its constituent states fail to implement international human rights obligations. Correspondingly, it is in the federal government’s best interest to ensure that international violations do not occur on the state level.¹²⁵

international human rights clinics at U.S. law schools).

122. *Id.* at 506.

123. See generally Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103, 1120–22 (2000) (describing instances of judicial education through international meetings between judges).

124. One could argue that given the relative ease of state constitutional amendment, the onus is on states’ citizens to amend state constitutions so they clearly state that transnational law is relevant. However, since many state constitutions already reference the federal constitution and its incorporation of treaties, and that longstanding judicial practice has been to look to relevant transnational authority, the better argument is that the default rule should be that transnational law is always relevant unless the text makes clear that it is not. This is essentially the rationale adopted by the U.S. Supreme Court in *Sosa v. Alvarez-Machain*, when it acknowledged that Congress was free to “shut the door to the law of nations entirely” at any time. 542 U.S. 692, 731 (2004).

125. This principle seems to indicate that the U.S. government cannot avoid ultimate responsibility for treaty compliance by offloading implementation responsibility to the states. Peter Spiro has argued, however, that this is what typically occurs, due to the concerns underpinning American federalism. See Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 572–78 (1997) (describing how federal government has refused to accept responsibility for state violations of international human rights standards).

It is a widely accepted fundamental principle of international law that “[a] state is responsible for any violation of its obligations under international law resulting from action or inaction by . . . the government or authorities of any political subdivision of the state[.]”¹²⁶ As the comments to the *Third Restatement* note, “[t]he United States has consistently accepted international responsibility for actions or omissions of its constituent states and has insisted upon similar responsibility on the part of national governments of other federal states.”¹²⁷ Because the United States remains ultimately responsible for compliance with the nation’s international legal obligations, state-level failures to implement international law should be of particular concern.

Recent international litigation concerning the United States’ compliance with the Vienna Convention on Consular Relations provides an example of how subnational implementation failures may expose the United States to liability for a treaty violation. In 2003, the United States appeared before the ICJ in *Mexico v. United States (Avena)* to defend—unsuccessfully—Texas’s, Oklahoma’s, and eight other states’ treatment of Mexican nationals accused of capital crimes in the United States.¹²⁸ Mexico asserted that the United States violated its obligations under the Vienna Convention on Consular Relations, causing harm to Mexican nationals.¹²⁹ In each instance documented by the Mexican government

126. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 207(b) (1986) (emphasis added). See also U.S. Initial CERD Report, *supra* note 18, ¶ 167 (noting that principles of federalism do not “condition or limit the international obligations of the United States”); HENKIN, NEUMAN, ORENTLICHER & LEEBRON, *supra* note 24, at 315 (“Where a state is obligated . . . to respect the human rights of an individual, the state is responsible for acts or omissions by any of its officials or by others acting ‘under color of law’; in a federal system the state is responsible as well for acts or omissions of the constituent units, their officials and others acting ‘under color of their law.’”).

127. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 207, reporters’ note 3 (1986). The reporters’ note cites as the “best known episode” of this practice a 1906 case in which the United States paid an indemnity to the Italian government in 1906 because New Orleans officials failed to protect a group of Italians from being lynched while they were awaiting trial. *Id.* (citing 6 MOORE, DIGEST OF INTERNATIONAL LAW § 1026 at 837–49 (1906)).

128. Case Concerning *Avena* and Other Mexican Nationals (*Mex. v. U.S.*), 2004 I.C.J. 12 (Mar. 31). See also *LaGrand Case* (*F.R.G. v. U.S.*) 2001 I.C.J. 466 (June 27) (raising similar claims of violations of Vienna Convention with respect to German nationals). Mexico’s Application cited defendants held in ten states: Arizona, Arkansas, California, Florida, Illinois, Nevada, Ohio, Oklahoma, Oregon, and Texas. Application of Mexico to Institute Proceedings, ¶ 1, *Avena*, 2004 I.C.J. 12 (Jan. 9, 2003), available at http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iapplication_20030109.PDF. While both cases involved inmates convicted of capital crimes, those in *LaGrand* had already been executed; those in *Avena* were awaiting execution.

129. Application of Mexico, ¶¶ 1–5, *Avena*, 2004 I.C.J. 12. The United States was an original signatory to the Vienna Convention and ratified it in December 1969. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter “Vienna Convention”]. See also *Too Sovereign But Not Sovereign Enough: Are U.S. States Beyond the Reach of the Law of Nations?*, 116 HARV. L. REV. 2654, 2656 (2003) [hereinafter *Too Sovereign*]. The U.S. had also consented to the ICJ’s compulsory jurisdiction over Convention-related disputes. Vienna Convention on Consular Relations: Optional Protocol Concerning the Compulsory Settlement of Disputes art. 1, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487. However, that consent was revoked on March 7, 2005. Frederic L. Kirgis, *Addendum to ISIL*

before the ICJ, the Mexican national accused of a crime under state law and held in state custody had not been timely informed of the consular resources to which he or she was entitled. Thereafter, procedural default rules barred efforts to re-open the cases to assert violations of the accused criminals' rights.¹³⁰

In response to Mexico's claim, the United States accepted that its constituent states were bound by international consular law and instead addressed the merits of the states' procedures. Among other things, the United States argued that state-level clemency proceedings, which permit commutation of a sentence at the Governor's discretion, are sufficient under the applicable international law.¹³¹ The ICJ rejected this argument and ruled against the United States, holding that the federal government must remedy the situation "by means of its own choosing."¹³² The United States had urged this open-ended remedy in light of domestic law constraints on the federal government's intervention in state criminal concerns.¹³³ Nevertheless, in the wake of the ICJ's decision, President Bush issued a directive mandating that state courts "give effect to the [ICJ's *Avena* decision] in accordance with general principles of comity."¹³⁴

The legality of the President's directive may yet be challenged.¹³⁵ However, the directive and the events leading up to it clearly demonstrate the ways in which the structure of the international legal system reinforces and contributes to states' obligations to implement international norms to which the national government has acceded. Had the states taken the appropriate steps to implement the Vienna Convention's requirements, the federal government might have avoided the Mexican litigation. Instead, the implementation gap that

Insight: President Bush's Determination Regarding Mexican Nationals and Consular Convention Rights, ASIL INSIGHT, Mar. 2005, <http://www.asil.org/insights/2005/03/insights050309a.html>.

130. Justice Breyer provides background on this issue in his dissent to denial of certiorari in *Torres v. Mullin*, 540 U.S. 1035, 1037-41 (2003), a direct challenge to the application of the procedural default rule to bar Torres' Vienna Convention claims. Torres also participated as an individual complainant in the *Avena* case before the ICJ. See *id.* at 1040.

131. Counter-Memorial of the United States, ¶¶ 6.67-78, *Avena*, 2004 I.C.J. 12 (Nov. 3, 2003), available at http://www.icj-cij.org/icjwww/idocket/imus/imuspleadings/imus_ipleadings_toc.htm. The United States also, *inter alia*, challenged the jurisdiction of the ICJ over the dispute, and argued that the Mexican government's petition was flawed. *Id.* ¶¶ 3.1-11.

132. *Avena*, 2004 I.C.J., at 72 (ordering U.S. to provide review and reconsideration of convictions and sentences "by means of its own choosing"). See also *LaGrand*, 2001 I.C.J., at 516 (ordering United States to allow for review and reconsideration of conviction and sentence "by means of its own choosing").

133. Counter-Memorial of the United States, ¶ 8.58, *Avena*, 2004 I.C.J. 12.

134. Memorandum from George W. Bush for the Attorney General (Office of the Press Sec'y, Feb. 28, 2005), at <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>. The U.S. Supreme Court considered this directive when dismissing the case of *Medellin v. Dretke*, 125 S.Ct. 2088, 2090 (2005), which would have raised the question of whether the ICJ's *Avena* decision was binding on federal courts.

135. One author has noted a potential separation-of-powers question of whether "the President's foreign affairs authority under the Constitution extends to determining the direct legal effect of ICJ judgments on domestic judicial proceedings in the United States." Frederic L. Kirgis, *President Bush's Determination Regarding Mexican National and Consular Convention Rights*, ASIL INSIGHT, Mar. 2005, <http://www.asil.org/insights/2005/03/insights050309.html>.

resulted was clearly identified by the ICJ in *Avena*, and informed its ultimate decision.¹³⁶

Other international bodies have also taken notice of the implementation gap that occurs when constituent states do not implement international human rights norms. For example, commenting on the United States' ICCPR Report, the Human Rights Committee specifically noted "with satisfaction the assurances of the Government that its declaration regarding the federal system is not a reservation and is not intended to affect the international obligations of the United States."¹³⁷ The Committee observed, however, that this system of federalism "coupled with the absence of formal mechanisms between the federal and state levels to ensure appropriate implementation of the Covenant rights by legislative or other measures may lead to a somewhat unsatisfactory application of the Covenant throughout the country."¹³⁸

Individual Committee members have gone further. For example, during the 1995 review of United States' implementation of the ICCPR, the Australian representative was not satisfied by indications of the federal government's passive efforts to "remove inhibitions" on the states. Instead, she recommended that in its next State Party report, the United States further "indicate what action the federal authorities had taken to *encourage* the implementation of the Covenant at the state level."¹³⁹ In particular, she suggested that the United States establish "a process of regular consultation with the states" and that it create a federal agency to review states' implementation of international human rights obligations.¹⁴⁰ This is not a new idea. Other federal governments, such as Canada, routinely confer with their constituent parts in preparing the State Party reports submitted to the Human Rights Committee.¹⁴¹

The United States' 2001 report to the Committee on the Elimination of All Forms of Racial Discrimination paid lip service to some of these earlier recommendations regarding state implementation. In testimony before the

136. *Avena*, 2004 I.C.J., at 68 (noting "substantial" number of cases where Vienna Convention obligations had been ignored).

137. U.N. Human Rights Comm. (HRC), *Report of the Human Rights Committee*, ¶ 277, U.N. Doc. A/50/40 (Oct. 3, 1995).

138. *Id.* ¶ 271.

139. U.N. HRC, 53d Sess., 1401st mtg., ¶ 36, U.N. Doc. CCPR/C/SR.1401 (Apr. 17, 1995) (emphasis added) (statement of Ms. Elizabeth Evatt).

140. *Id.*

141. See Canada, Fifth Periodic Report to U.N. Comm. on Elim. of Discrim. Against Women, at 1, 83-233 U.N. Doc. CEDAW/C/CAN/5 (Apr. 9, 2002) (recognizing a need for "commitment and partnerships among all levels of government," and providing reports from each of its ten provinces). See also Stark, *supra* note 72, at 114, 114 n.142 (1992) (suggesting that states take on primary implementation responsibility and file individual reports in compliance with the ICESCR). Louis Henkin recounts that at various times federal governments have placed pressure on international institutions to provide more autonomy for those governments' constituent states. Henkin, *The Ghost of Senator Bricker*, *supra* note 16, at 345. In general, however, these proposals were rejected. Indeed, the ICCPR includes a clause that expressly rejects exceptions for federalist states. See ICCPR, *supra* note 13, art. 50.

Committee, United States Assistant Attorney General for Civil Rights Ralph Boyd cited a governmental working group “entrusted with the task of developing proposals and mechanisms for improving the monitoring of actions at the state level.”¹⁴² According to Boyd, in preparing the State Party Report of the United States, the Government had requested that local and state officials provide all information necessary to determine the extent of the Convention’s implementation on the local level.¹⁴³ But despite Boyd’s assertion, Freedom of Information Act (FOIA) requests to the Department of Justice and the State Department yielded no communications between the states and federal officials addressing state compliance with CERD.¹⁴⁴

Commentators have identified several approaches by which the federal government may ensure treaty implementation at the state level. Their suggestions include issuing Presidential directives similar to the one issued in the wake of *Avena*,¹⁴⁵ taking executive action to wrest discretion from state governors, and enacting legislation that would tie federal funds to treaty compliance.¹⁴⁶

142. U.N. CERD, 59th Sess., 1476th mtg., ¶ 22, U.N. Doc. CERD/C/SR.1476 (May 22, 2003) [hereinafter CERD Summary Record]. See also Ralph F. Boyd, Jr. & Lorne Craner, Reply of the United States to Questions from the U.N. Comm. on the Elimination of Racial Discrimination (Aug. 6, 2001) available at <http://www.state.gov/g/drl/rls/rm/2001/4486.htm> [hereinafter Boyd Testimony] (answer to first question from Mr. Rodriguez). While it is not entirely clear, it appears that the group to which Boyd referred in his reply to the U.N.’s questions is the “Interagency Working Group on Human Rights Treaties.” The group, created by Executive Order 13,107, issued by President Clinton on Dec. 10, 1998, was active during Clinton’s Presidential Administration, but has apparently become moribund during the Bush Administrations. Letter from Nelson D. Hermilla, Chief, Freedom of Info./Privacy Acts Branch, U.S. Dep’t of Justice, Civil Rights Div., to Martha Davis, Assoc. Prof., Northeastern Univ. Sch. of Law (Dec. 4, 2003) (on file with author) [hereinafter DOJ FOIA Response] (responding to a FOIA request for requests to the states for information on CERD compliance and responses from the states to those requests, by providing nothing but the Boyd Testimony, *supra*, and a copy of a speech delivered by Mr. Boyd in Geneva, Switzerland). See also Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 15, 1998).

143. CERD Summary Record, *supra* note 142, ¶ 22; Boyd Testimony, *supra* note 142. The text of the United States’ initial report also promises more information on state implementation in subsequent reports to the Committee. U.S. Initial CERD Report, *supra* note 18, ¶ 144.

144. DOJ FOIA Response, *supra* note 142; Letter from Margaret P. Grafeld, Dir., Office of Programs and Servs., U.S. Dep’t of State, to Martha Davis, Assoc. Prof., Northeastern Univ. Sch. of Law (April 13, 2005) (on file with author) [hereinafter Dep’t of State FOIA Response] (“After a thorough search of [all relevant record systems] conducted by professional employees familiar with their contents and organization, no records responsive to your request were located.”).

145. See, e.g., *Too Sovereign*, *supra* note 129, at 2672.

146. Joshua A. Brook, *Federalism and Foreign Affairs: How to Remedy Violations of the Vienna Convention and Obey the U.S. Constitution, Too*, 37 U. MICH. J.L. REFORM 573, 590 (2004). Securing state compliance with the Vienna Convention on Consular Affairs provides a good example of the utility of the Spending Clause in this area. *Id.* at 595. For example, federal funds to aid state prisons and criminal administration could include the specific requirement that states comply with applicable provisions of the Vienna Convention. While the federal government would remain responsible to the international community, the federal government would gain an internal enforcement mechanism that would at the same time provide an incentive for states to ensure compliance with their international obligations. This mechanism is perhaps most appropriate in areas where states’ failure to comply with international obligations has become

However, the executive branch has generally been reluctant to pursue such measures, invoking concerns about state sovereignty.¹⁴⁷

There are also less intrusive ways to encourage state-level implementation of international human rights norms. One alternative, proposed by Peter Spiro, is to allow direct state participation in treaty review.¹⁴⁸ However, such participation could potentially undermine the federal government's primacy over international relations under the foreign affairs power.

Alternatively, the federal government could simply make state compliance efforts more visible to domestic and international communities. For example, State Party Reports of the United States filed with the relevant United Nations Committees could include appendices that specify the status of implementation in each of the fifty states. This information could serve as a tool for international bodies and for nongovernmental human rights organizations to monitor international treaty implementation at all relevant levels of government, enabling them to place pressure on states to correct any implementation failures.

Currently, where states' roles in implementation are obscured, there is no possibility of manipulating one of the profound advantages of the federal system—state-to-state competition—to promote human rights implementation. Increased transparency would at least create the possibility of competition for the most effective program of human rights implementation on the state level. Further, it would facilitate controlled, constructive dialogue, both with the federal government and with international monitoring authorities. Nevertheless, regardless of the options available to the federal government to improve subnational compliance with international obligations, states have their own obligations as part of the federal system to comply with international law.

costly to the federal government, both in terms of actual resources and in terms of diplomatic status. The Vienna Convention lends itself to such an approach—the U.S. has been repeatedly required to defend states' activities before the ICJ, and the consequences of individual states' actions have implications for the treatment of all U.S. citizens abroad, not only the citizens of Oklahoma or Texas.

147. See, e.g., *Too Sovereign*, *supra* note 129, at 2664 (describing federal government's arguments before ICJ concerning its limited authority over state matters). Even in the wake of the President's memorandum to the state attorneys general directing them to give effect to the ICJ's judgment in *Avena*—see *supra* note 134 and accompanying text—the executive reiterated its professed concerns about state sovereignty. Indeed, shortly after the President's memorandum, the U.S. Department of State notified the United Nations that the United States was withdrawing from the Optional Protocol to the Vienna Convention on Consular Relations that formed the basis for ICJ jurisdiction in *Avena*. At a press briefing on the action, a State Department spokesperson explained that the Department withdrew from the Protocol because of concerns about interference with state court decisionmaking. John R. Crook, *Contemporary Practice of the United States Relating to International Law: International Human Rights and Humanitarian Law*, 99 AM. J. INT'L L. 479, 490 (2005).

148. Spiro, *supra* note 125, at 590–95.

II.

HOW STATE COURTS SHOULD APPROACH INTERNATIONAL HUMAN RIGHTS
LAW ON THE GROUND: A CASE STUDY

The preceding discussion sets out rationales for state court examination of international law in a number of circumstances. However, these rationales may not provide sufficient guidance to influence state court judges' approaches "on the ground." To demonstrate more concretely how state court judges might use international human rights law to guide state constitutional interpretations, I turn now to a case study of article XVII, section 3 of the New York State Constitution and how it might be applied to a hypothetical challenge to abstinence-only-until-marriage programs that combine state and federal funding. In discussing this provision, I draw on Helen Hershkoff's elegant case study of article XVII, section 1, in which she examined the level of judicial scrutiny appropriate to state constitutional welfare provisions.¹⁴⁹

The New York State Constitution in general, and article XVII in particular, serve as persuasive exemplars for other state constitutions,¹⁵⁰ and are therefore appropriate subjects for this discussion. Further, as Hershkoff argues, traditional federal standards of judicial review do not do justice to the special, affirmative requirements embodied in article XVII and many other state constitutional provisions.¹⁵¹ Because such provisions articulate their framers' intent to impose positive obligations upon state government, it makes no sense to measure compliance with them under a "rational basis" test borrowed from federal constitutional jurisprudence, which is primarily used to elaborate negative rights. Federal constitutional law's low standard would permit state governments to default upon their obligations whenever they could offer an economic justification or some other "merely rational" defense for doing so. Rather than applying federal rational-basis review, Hershkoff argues, courts should closely examine whether a challenged state law furthers the ends articulated in the state constitution.¹⁵²

In this part, I build on Hershkoff's observations regarding domestic law by exploring the ways in which international human rights law can be properly used to inform state court approaches to state constitutional construction. First, I provide background information both on the New York State Constitution and on abstinence-only-until-marriage initiatives. I then examine the relevance of transnational law to the interpretation of New York's article XVII, section 3, which establishes a right to legislative provision for the public health. Finally, I apply that analysis to state-level abstinence-only-until-marriage initiatives.

149. Hershkoff, *Positive Rights*, *supra* note 8. See also Hershkoff, *Welfare Devolution*, *supra* note 5.

150. Hershkoff, *Positive Rights*, *supra* note 8, at 1139–43 (noting New York high court's "historic role as a 'jurisprudential entrepreneur'").

151. *Id.* at 1153–69.

152. *Id.* at 1184.

A. Background

1. Legislative History

Article XVII, section 3 of the New York State Constitution provides as follows:

The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner and by such means as the legislature shall from time to time determine.

Along with section 1 of article XVII, this provision was adopted at the Constitutional Convention of 1938, and was subsequently approved by a popular vote in November 1938.¹⁵³

Also like section 1, section 3 is phrased as a mandate on the legislature, which “shall” provide for the “protection and promotion of the health” of New York’s inhabitants.¹⁵⁴ In construing section 1, the New York Court of Appeals has found that this mandatory language has meaning, and that claims brought under this section are justiciable. That is, while section 1 leaves it to the legislature to determine how the “needy” may be provided for, the legislature must at least provide “aid and care” under the terms of the Constitution, and must provide it in a rational way.¹⁵⁵ Though section 3 has never been directly addressed by state courts, section 3’s parallel language should be construed identically absent any indication that such a parallel interpretation was not intended.¹⁵⁶ This would require that the legislature provide for the protection and promotion state inhabitants’ health, but at the same time allows to the legislature to determine by what means that constitutional goal might be accomplished. As in the case of section 1, under current law the legislature would not be permitted simply to do nothing, or to provide patently inadequate protection or promotion of health and claim that so doing is a valid exercise of its discretion.

153. Hershkoff, *Welfare Devolution*, *supra* note 5, at 1418.

154. In this respect, both sections 1 and 3 are similar to affirmative grants in international human rights conventions. *See, e.g.*, ICESCR, *supra* note 8, art. 12 (“The steps to be taken by the States parties . . . to achieve the full realization of this right *shall* include those necessary for . . .”).

155. *Aliessa v. Novello*, 754 N.E.2d 1085, 1092–93 (N.Y. 2001) (holding that provision of emergency medical care did not satisfy legislature’s obligation to provide “aid and care” to the needy); *Tucker v. Toia*, 371 N.E.2d 449, 451–52, (N.Y. 1977) (holding that Social Services Law provision determining eligibility for home relief did not satisfy legislature’s obligation to provide aid to the needy). *But see* *Guatam v. Perales*, 579 N.Y.S.2d 26, 27 (App. Div. 1992) (“Although a duty of assistance to the needy is recognized by New York State’s Constitution[,] there is no provision in the state Constitution or Social Services Law requiring that current shelter allowances be set at a particular level for recipients of home relief.”) (citations omitted).

156. *See, e.g.*, Akhil Reed Amar, *The Document and the Doctrine*, 114 HARV. L. REV. 26, 30 (2000) (noting that parallel language in several constitutional provisions invites interpretation of the provisions as “an ensemble”).

The history of section 3 indicates that the provision's framers—including the public who approved the provision in November 1938—devised it to respond to what they perceived to be the specific health needs of the state and nation. At the same time, as discussed below, this constitutional amendment arose against the backdrop of an international dialogue on public health and state responsibility in which many New Yorkers were key participants.

Article XVII, section 3's legislative history reveals the concerns that motivated the measure's introduction. Edward Corsi, Chairman of the Committee on Social Welfare, served as the primary spokesperson for article XVII. In describing section 3, Corsi observed that the concept of public health in the state had expanded beyond the limited "police power" model of the federal constitution to include broader individual and community health concerns such as personal hygiene and prenatal health.¹⁵⁷ Further, Corsi listed a number of components of the "modern" concept of public health in 1938:

- prevention and control of diseases, including tuberculosis, syphilis and gonorrhea;
- procedures for administering immunizations;
- programs to discover physical defects in children;
- helping school-age children achieve maximum "health and efficiency"; and
- measures for prevention and control of noncommunicable diseases such as cancer, diabetes, and heart disease.¹⁵⁸

Corsi further argued that the State should broaden its view of the police power and assume primary, affirmative responsibility for promoting public health.¹⁵⁹

Corsi's views were expansive by the standards of transnational law in 1938, and there is no specific indication in the legislative history of article XVII, section 3 that international law was a reference point for the framers. However, the notion of government responsibility for public health was by no means new, and public-minded New Yorkers were well-aware of the growing international public health movement.¹⁶⁰ The international community's focus on sanitation was longstanding—the first International Sanitary Conference was held in Paris in 1851, and the last such conference convened in 1938, also in Paris.¹⁶¹ Among

157. III REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 2125, 2131–32 (1938).

158. *Id.* at 2132.

159. *Id.* at 2133.

160. *See, e.g.*, William Atherton Du Puy, *All Countries in Health League to Banish Plagues from Earth*, N.Y. TIMES, July 1, 1923, at 12 (describing League of Nations' public health initiative); *Health Parley Delegates Named*, N.Y. TIMES, July 27, 1938, at 18 (listing President Roosevelt's schedule for the tenth Pan-American Sanitary Conference at Bogota); *World Move to Fight Epidemics Is Started*, N.Y. TIMES, Oct. 20, 1936, at 27 (reporting discussion of plans to set up international health service to deal with epidemics at the twenty-third Hygiene Congress).

161. WHO Centre for Health Development, History of WHO and International Cooperation in Public Health, http://www.who.or.jp/GENERAL/history_wkc.html (last visited Apr. 7, 2006).

other things, these conferences led to adoption of several international sanitary conventions designed to prevent the spread of disease and facilitate open trade.¹⁶²

After 1938, other international bodies assumed the convention delegates' work. In particular, the League of Nations established a health organization—Organisation d'Hygiene (the "League Health Organization")—headquartered in Geneva. This organization remained active until 1946, when it was officially dissolved to make way for the World Health Organization.¹⁶³ The League Health Organization's task was to "endeavour to take . . . steps in matters of international concern for the prevention and control of disease."¹⁶⁴ Reflecting the origins of the public health movement, the Health Organization initially focused on controlling infectious diseases, but as it developed, its studies began to address issues such as nutrition, children's health, rural health, and the promotion of public health and medical education.¹⁶⁵

As characterized by David Fidler, a leading historian and legal analyst of public health issues, the development of international public health law from 1851 through 1951 reflected a new era of international cooperation to minimize the global risks of disease.¹⁶⁶ However, the recognition of the international character of health is far more venerable. As early as the fourteenth century, European states established quarantine practices to restrict the spread of disease, explicitly linking such risks to human migration.¹⁶⁷ According to Fidler, "[t]he history of public health is, in fact, that of the processes of increasing interconnectedness between societies such that events in one part of the world have health effects on peoples and countries far away."¹⁶⁸

By 1938, when article XVII was enacted, a global understanding of public health was well established, and government representatives had developed a shared vocabulary for discussing public health issues.¹⁶⁹ Thus, the development and enactment of article XVII, section 3 took place not only in the domestic context, where many called for more government social protections to respond to the misery of the Great Depression, but in an international context in which

162. David Fidler, *The Future of the World Health Organization: What Role for International Law?*, 31 VAND. J. TRANSNAT'L. L. 1079, 1084–85 (1998). In 1881, the conference was held in Washington, D.C., with a focus on yellow fever, a particular concern of the U.S. delegation. Alexandra M. Stern & Howard Markel, *International Efforts to Control Infectious Diseases, 1851 to the Present*, 292 J. AM. MED. ASS'N 1474, 1476 (2004).

163. Elisabetta Minelli, *World Health Organization: The Mandate of a Specialized Agency of the United Nations*, ch. 1 (2003), http://www.gfmer.ch/TMCAM/WHO_Minelli/P1-1.htm.

164. *Id.*

165. *Id.*

166. David P. Fidler, *The Globalization of Public Health: The First 100 Years of International Health Diplomacy*, 79 BULL. WORLD HEALTH ORG. 842 (2001).

167. *Id.* at 842; Stern & Markel, *supra* note 162, at 1474–75.

168. Fidler, *supra* note 166, at 842. *See also* Stern & Markel, *supra* note 162, at 1474.

169. *See* Fidler, *supra* note 166, at 843. *See also* DAVID P. FIDLER, INTERNATIONAL LAW AND PUBLIC HEALTH 8–11 (2000) (describing history of U.S. public health movement).

governments were increasingly called upon to affirmatively address the public health in a range of areas including infectious disease, children's health, and public health education. Indeed, for more than eighty years prior to New York's 1938 Constitutional Convention, governments had been cooperating to address health issues that transcend national boundaries.

Given this context, New York's state constitutional reference to health can only be properly understood with reference to the international law of public health. In this sense, the state's incorporation of health protections into its constitution is comparable to developments in immigration law on the federal level. For example, the political asylum law of the United States was enacted in the context of transnational efforts to facilitate the appropriate flow of immigrants, refugees and asylum seekers across national borders.¹⁷⁰ Accordingly, courts construing domestic asylum laws routinely look to international conventions and practice for guidance.¹⁷¹ Because of the interrelationships between other nations' immigration policies and United States' domestic immigration issues, immigration law has long been viewed as inherently connected to transnational laws and policies.¹⁷²

Like immigration law, from its very inception the law related to public health has responded to transnational events—including both the travel of individuals and the transmission of diseases across national boundaries. Because considerations of transnational law and policy are inherent to the concept of public health, a court construing the meaning of a public right to "health" in a state constitution cannot legitimately complete its task without acknowledging and analyzing transnational legal sources.

2. *Interpretive History*

Since its enactment in 1938, article XVII, section 1 of the New York State Constitution has been repeatedly revisited by the New York State Court of Appeals. As described above, the court has unequivocally found that the provision creates enforceable rights, despite the specific grant of discretion to the legislature.¹⁷³

170. See *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1575 (9th Cir. 1986) (noting that the statutory definition of "refugee" under U.S. law derives from an international protocol).

171. *Id.* at 1575–76 ("[W]e have often looked to sources of international law for guidance in applying the asylum and prohibition of deportation provisions of the Refugee Act."). See, e.g., *Matter of Acosta*, 19 I. & N. Dec. 211, 219–20 (BIA 1985) (citing the U.N. Protocol on Refugees to assist in interpreting domestic immigration law).

172. A number of the federal cases which cite international conventions and customary international law arise in the immigration context. See, e.g., *Beharry v. Reno*, 183 F. Supp. 2d 584, 586 (E.D.N.Y. 2002) (holding that international law requires a hearing to assess the effect of deportation on alien and alien's family), *rev'd on other grounds sub nom. Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003); *Taveras-Lopez v. Reno*, 127 F. Supp. 2d 598, 608–09 (M.D. Pa. 2000) (holding that neither the ICCPR nor customary international law mandated that petitioner, convicted of aggravated felony, be accorded the opportunity to seek cancellation of removal).

173. See *Aliessa v. Novello*, 754 N.E.2d 1085, 1092–93 (N.Y. 2001) (holding that provision

In contrast, New York courts have seldom construed the parallel provision of section 3, even when it has been raised before the court as an independent ground of decision. For example, in *Hope v. Perales*, the plaintiffs challenged the constitutionality of the New York Prenatal Care Assistance Program (PCAP), claiming that because the program excluded abortion from otherwise comprehensive medical services, it violated both sections 1 and 3 of article XVII.¹⁷⁴ The court addressed section 1 only briefly, concluding that it must defer to the legislative determination that PCAP-eligible women “are not indigent or in need of public assistance to meet their medical needs,” and therefore outside the scope of section 1.¹⁷⁵ As to section 3, the court simply averred that the PCAP program was not aimed at the protection of public health, and therefore not actionable.¹⁷⁶

Section 3 was also raised as a separate cause of action by the plaintiffs in *Aliessa v. Novello*.¹⁷⁷ The plaintiffs there challenged the state’s denial of Medicaid to permanent resident immigrants who were otherwise financially eligible. Because the New York Court of Appeals held that the challenged policy violated section 1, it did not reach the claim under section 3.¹⁷⁸ Likewise, the federal district court in *Henrietta D. v. Giuliani*—a challenge to New York City’s HIV/AIDS policies—focused on section 1, devoting only a brief mention in a single footnote to the plaintiffs’ section 3 claims.¹⁷⁹ Earlier cases had captured section 3’s overlap with the state’s police power. For example, in *Paduano v. New York*, the New York Supreme Court stressed that the intent of section 3 was “to validate the police power” and upheld fluoridation of the city’s water supply.¹⁸⁰ Likewise, in a 1945 case, the New York Supreme Court used article XVII, section 3 to uphold a Board of Health regulation requiring teachers and other school employees to provide documentation that they do not have tuberculosis.¹⁸¹ However, while one of the purposes of section 3 was to reinforce the state’s police power in the area of health, the provision’s legislative history discussed above makes explicit that that was not the only purpose. The broader goals of section 3—including public

of emergency medical care did not satisfy legislature’s obligation to provide “aid and care” to the needy). See also *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 217–19 (E.D.N.Y. 2000) (upholding article XVII claims of individuals with HIV/AIDS arising from New York City’s failure to provide meaningful access to public assistance programs), *aff’d sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003).

174. 634 N.E.2d 183 (N.Y. 1994). PCAP is a means-tested program available only to low-income individuals, though recipients need not be eligible for welfare. See *id.* at 184–85.

175. *Id.* at 188.

176. *Id.*

177. 754 N.E.2d 1085 (N.Y. 2001).

178. *Id.* at 1093 n.12.

179. *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 217 n.28 (E.D.N.Y. 2000), *aff’d sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003).

180. 257 N.Y.S.2d 531, 535 (Sup. Ct. 1965).

181. *Conlon v. Marshall*, 59 N.Y.S.2d 52, 54 (Sup. Ct. 1945).

education about community health issues—have not yet been addressed by the courts.¹⁸²

New York courts' failure to construe their state constitution's health provisions is not unique. The "public health" provisions of other state constitutions have also received little interpretation from the courts. One of the few cases addressing a state constitutional health provision is *Gray v. State*, in which the Alaska Supreme Court observed that the right to privacy must be balanced against the legislature's constitutional authorization to protect public health and welfare.¹⁸³ A subsequent Alaska Supreme Court case expanded on that principle, defining the public health power as including "the authority of the state to exert control over the individual" to the extent that the individual is engaging in "activities . . . which affect others or the public at large."¹⁸⁴ Based on that analysis, the court concluded that private use of marijuana was protected by the privacy clause of the Alaska Constitution.¹⁸⁵

3. *Relevant Sources of International Law*

Given this dearth of case law, a state court charged with construing a state constitutional provision on health would have little guidance from federal or even state-level sources. But as described above,¹⁸⁶ states have a responsibility—acknowledged by the federal government—to implement international human rights obligations undertaken by the federal government. In the area of health, there are several pertinent provisions in treaties that have been ratified by the United States for which states shoulder some implementation responsibility.

Both CERD and ICCPR, ratified by the United States, speak directly to public health. CERD provides at article 5(e)(iv) that States Parties shall guarantee to everyone, without distinction as to race, "[t]he right to public health, medical care, social security and social services."¹⁸⁷ While the CERD Committee has not issued any General Recommendations or Concluding Observations concerning issues relating to contraception or family planning, as discussed below, such programs are generally considered to be integral to the concept of public health in the international sphere.

Likewise, article 6 of the ICCPR recognizes every person's "right to

182. See *supra* part II.A.1. The Model State Constitution promulgated by the National Municipal League in 1948 includes a model provision based on New York's article XVII, § 3. See NAT'L MUN. LEAGUE, MODEL STATE CONSTITUTION WITH EXPLANATORY ARTICLES, art. X, § 1001, at 18, n.20 (National Municipal League, 5th ed., 1948). The accompanying commentary indicates that the purpose of such provisions is to broaden, not limit, state authority in this area. *Id.* at 48–49.

183. 525 P.2d 524, 528 (Alaska 1974).

184. *Ravin v. State*, 537 P.2d 494, 509 (Alaska 1975).

185. *Id.*

186. See *supra* part I.

187. CERD, *supra* note 13, art. 5(e)(iv).

life,”¹⁸⁸ and article 17 of the ICCPR establishes the right to be free from “arbitrary or unlawful interference” with one’s privacy.¹⁸⁹ The Human Rights Committee (HRC) has related these provisions to contraceptive policy and sex education on several occasions. The HRC has specifically recommended that States Parties increase access to contraception through education and information,¹⁹⁰ and the Committee has also extended this recommendation to adolescents.¹⁹¹ In 2004, for instance, the Committee expressed concern about the availability of family planning information in Poland, urging that “[t]he Ministry of Education . . . ensure that schools include accurate and objective sexual education in their curricula.”¹⁹²

In addition to these ratified treaties, there are several other provisions of international human rights instruments, not ratified by the United States but widely accepted internationally, that address public health issues. While these provisions are not binding on the United States or its constituent states, they are relevant sources of interpretative guidance. In particular, CEDAW specifically addresses women’s equal access to family planning services and advice.¹⁹³ In applying these provisions to adolescents, the CEDAW Committee has urged States Parties to increase the availability of sexual education and family planning services to teenage girls.¹⁹⁴

The Children’s Rights Convention (CRC) also addresses this issue. Article 24 guarantees children’s right to the “highest attainable standard of health,” and article 13 ensures children the right to “receive and impart information and ideas of all kinds.”¹⁹⁵ In its General Comment No. 4, the Committee on the Rights of

188. ICCPR, *supra* note 13, art. 6(1).

189. *Id.* art. 17(1).

190. *See, e.g.*, HRC, Concluding Observations: Poland, ¶ 11, U.N. Doc. CCPR/C/79/Add.110 (July 29, 1999). *See generally* CTR. FOR REPROD. LAW AND POLICY & UNIV. OF TORONTO INT’L PROGRAMME ON REPROD. AND SEXUAL HEALTH LAW, BRINGING RIGHTS TO BEAR: AN ANALYSIS OF THE WORK OF UN TREATY MONITORING BODIES ON REPRODUCTIVE AND SEXUAL RIGHTS 129–30 (2002) [hereinafter BRINGING RIGHTS TO BEAR], available at http://www.crlp.org/pdf/pub_bo_tmb_full.pdf (summarizing HRC recommendations on contraception and family planning).

191. *See, e.g.*, HRC, Concluding Observations: Ecuador, ¶ 11, U.N. Doc. CCPR/C/79/Add. 92 (Aug. 18, 1998) (expressing committee’s concern regarding evidence suggesting a high rate of suicide among young women unable to obtain abortions).

192. HRC, Concluding Observations: Poland, ¶ 9, U.N. Doc. CCPR/CO/82/POL (Dec. 2, 2004).

193. CEDAW, *supra* note 51, arts. 12, 10(h). *See also id.* art. 16(e) (providing that women should have access to information and means to decide on the number and spacing of their children). CEDAW has been ratified by 180 countries. The United States is the only industrialized nation that has not ratified the convention.

194. *See, e.g.*, Comm. on the Elimination of Discrim. Against Women [CEDAW Committee], Concluding Observations: Mexico, ¶¶ 394, 399, U.N. Doc. A/53/38 (May 14, 1998); CEDAW Committee, Concluding Observations: Peru, ¶ 341, U.N. Doc. A/54/38/Rev.1 (July 8, 1998); CEDAW Committee, Concluding Observations: Venezuela, ¶ 243, U.N. Doc. A/52/38/Rev.1 (Aug. 12, 1997); CEDAW Committee, Concluding Observations: Zimbabwe, ¶ 148, U.N. Doc. A/53/38 (May 14, 1998). *See also* BRINGING RIGHTS TO BEAR, *supra* note 190, at 125.

195. Convention on the Rights of the Child, arts. 13, 24, *opened for signature* Nov. 20, 1989,

the Child (CRC Committee) sets out children's overall right to information, while also stressing the specific need for family planning, contraceptive and STD information.¹⁹⁶ Further, in responding to particular country reports raising issues concerning teen pregnancy, the CRC Committee has repeatedly recommended that states parties increase adolescents' access to family planning and reproductive health information.¹⁹⁷ For example, in 2004, the CRC Committee reviewed 21 country reports and in 17 of them recommended further action on family planning, contraception or sex education to adolescents.¹⁹⁸

In addition to these specific treaty and convention references to public health, similar references appear in many other documents that make up the fabric of international law. The Universal Declaration of Human Rights provides at article 25 that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . ." ¹⁹⁹ Similarly, the American Declaration of the Rights and Duties of Man states at article 11 that "[e]very person has the right to the preservation of his health through sanitary and social measures . . . to the extent permitted by public and community resources."²⁰⁰

Finally, the United States has played a leadership role in developing several international platforms that speak directly to issues of reproductive health and contraception. While not formally binding on the United States or any of the participating nations, these platforms elaborate the international standard for sex education and reproductive information.²⁰¹ For example, principle 8 of the

1577 U.N.T.S. 3 [hereinafter CRC]. The CRC has been ratified by every nation in the world except the United States and Somalia. Because of its near-universal acceptance, some U.S. judges have held that particular provisions of the CRC constitute customary international law. *See, e.g.,* Beharry v. Reno, 183 F. Supp.2d 584, 601 (E.D.N.Y. 2002), *rev'd on other grounds sub nom.* Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003) ("Given its widespread acceptance, to the extent that it acts to codify longstanding, widely-accepted principles of law, the CRC should be read as customary international law."); Sadeghi v. INS, 40 F.3d 1139, 1147 (10th Cir.1994) (Kane, J., dissenting) ("The Convention on the Rights of the Child has been ratified by 166 nations, including Iran! Moreover, it has attained the status of customary international law."); Batista v. Batista, 6 Conn. L. Rptr. 512, 516 (Super. Ct. 1992) ("It is of great concern and embarrassment that the United States of America is not a signatory to th[e] convention.").

196. Comm. on the Rights of the Child [CRC Committee], *General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, ¶¶ 10, 28, 30, 31, U.N. Doc. CRC/GC/2003/4 (July 1, 2003).

197. *See* BRINGING RIGHTS TO BEAR, *supra* note 190, at 127 n.694 (citing more than fifty such recommendations).

198. The country submissions for 2004 (as well as prior years), along with the Committee's concluding observations, are available at <http://www.unhchr.ch/tbs/doc.nsf>.

199. UDHR, *supra* note 3, art. 25.

200. Org. of Am. States, *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, ch. 1, art. XI, (1948), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OAS/Ser.L/V/II.4 Rev.9, at 21 (2003), *also reprinted in* 43 AM. J. INT'L L. (Supp.) 133 (1949).

201. *See, e.g.,* Fernandez v. Wilkinson, 505 F.Supp. 787, 796 (D. Kan. 1980) ("There are a great number of other international declarations, resolutions, and recommendations. While not

Cairo Accord, concluded in 1994, provides that:

States should take all appropriate measures to ensure, on a basis of equality of men and women, universal access to health-care services, including those related to reproductive health care, which includes family planning and sexual health. Reproductive health-care programmes should provide the widest range of services without any form of coercion. All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so.²⁰²

This Accord was endorsed by 180 nations, including the United States.²⁰³

Likewise, the Beijing Platform for Action, in which the United States also provided a leadership role, squarely recognizes the right to accurate reproductive information:

Reproductive health . . . implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. *Implicit in this last condition are the right of men and women to be informed* and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility[.]²⁰⁴

In short, a state court looking for instructive standards to inform its interpretation of a state constitutional public health clause would find ample sources in international law. Far from being “foreign” and alien to domestic values, many of these sources are either embodied in ratified treaties or were crafted under the United States’ leadership. Thus, while the United States Constitution does not confer a right to health or health information, looking to these international documents provides an alternative window into understanding and interpreting enduring public values that have domestic as well as international origins.

technically binding, these documents establish broadly recognized standards.”). The *Fernandez* court pointed to several international agreements to inform its conclusion that “indeterminate detention of petitioner in a maximum security federal prison under conditions providing less freedom than that granted to ordinary inmates constitutes arbitrary detention and is a violation of customary international law[.]” *Id.* at 800 (emphasis added).

202. Int’l Conf. on Pop. and Dev., Cairo, Egypt, Sept. 5–13, 1994, *Program of Action*, ch. II princ. 8, in *Final Report (Cairo Accord)*, at 12, U.N. Doc. A/CONF.171/13/Rev.1.

203. Int’l Conf. on Pop. and Dev., Cairo, Egypt, Sept. 5–13, 1994, *Final Report (Cairo Accord)*, at 117, 132–48, U.N. Doc. A/CONF.171/13/Rev.1. See also Gail Haldeman, *U.N. Update: Global Women’s Health*, INST. FOR WOMEN’S HEALTH, http://www.womenshealth.med.miami.edu/health_topics/un_update.asp (last visited Apr. 7, 2006). In recent years, the United States has signaled its unease with some of the Cairo Accord’s provisions, but it has not withdrawn from the implementing body. See *id.*

204. Fourth World Conf. on Women, Beijing, China, Sept. 4–15, 1995, *Beijing Declaration and Platform for Action*, ch. IV, ¶94, in *Final Report*, ch. I, at 35, U.N. Doc. A/CONF.177/20/Rev.1 (emphasis added).

4. *The Interpretive Role of International Law*

While some of these sources of international law have been cited as interpretive guides by state courts in New York and elsewhere, no jurisprudential approach has emerged from these occasional citations.²⁰⁵ Instead, state court consideration of transnational law is ad hoc: it depends on individual judges' interests and individual parties' arguments. Moreover, in several notable instances state court judges have been presented with an opportunity to apply international human rights law in the context of their rulings, yet have declined to do so.²⁰⁶

In recent years, New York courts have not used international human rights law when interpreting state constitutional provisions. This reflects a retreat from earlier court citations of international law to support somewhat controversial rulings. A New York State Supreme Court case from this earlier era, *Wilson v. Hacker*, demonstrates the potential for using international human rights law as an interpretive aid.²⁰⁷

In *Wilson*, the court examined the legality of a union's refusal to admit women into its membership under the state's Civil Rights Law. Even though the court found that the Civil Rights Law and other state statutes did not specifically forbid sex discrimination, it cited the Universal Declaration of Human Rights in ruling that the policy violated a "fundamental principle" underlying both "American Democracy" and state law.²⁰⁸ The court opined that the Universal Declaration's statements on sex equality are "[i]ndicative of the spirit of our times,"²⁰⁹ despite the fact that the United States Supreme Court would not uphold such a constitutional construction on the federal level for more than two decades.²¹⁰

Perhaps still recovering from Cold War efforts to minimize international legal dialogue and exchange, the New York courts have rarely, if ever, cited a human rights convention or precedent in the three decades following the *Wilson* decision.²¹¹ However, state court judges around the nation are increasingly

205. See, e.g., *Am. Nat'l Ins. Co. v. Fair Employment & Hous. Comm'n.*, 651 P.2d 1151, 1154 n.4 (Cal. 1982) (upholding claim of disability discrimination, citing UDHR); *Domingues v. State*, 961 P.2d 1279, 1280–81 (Nev. 1998) (Springer, C.J., dissenting) (arguing to uphold challenge to juvenile executions based on ICCPR); *ACLU of N.J. v. Hudson*, 799 A.2d 629, 640 (N.J. Super. Ct. App. Div. 2002) (noting duty to "construe State statutes and such federal laws as may come before us agreeably to any treaties to which the United States may be a party," but holding that international claims had not been properly raised before the trial court).

206. See, e.g., *Sojourner A. v. N.J. Dep't of Human Servs.*, 828 A.2d 306, 317 n.9 (N.J. 2003) (opining that, when properly analyzed, the family benefits cap does not violate international norms related to birth status).

207. 101 N.Y.S.2d 461 (Sup. Ct. 1950).

208. *Id.* at 472–73.

209. *Id.* at 473.

210. *Reed v. Reed*, 404 U.S. 71 (1971) (striking down sex-based law under the Equal Protection Clause).

211. On the effect of Cold War politics on human rights advocacy in the United States, see

interested in the interplay of state law and international law. Wisconsin Chief Justice Shirley Abrahamson expressed her interest in international and comparative law in a frequently cited 1997 article in which she concluded that state court judges are already “comparat[iv]ists.”²¹² Despite her court’s silence on the issue, Chief Judge Judith Kaye of the New York Court of Appeals has spoken at an Association of the Bar of the City of New York program on the relevance of international law to domestic legal issues.²¹³ Former Justice of the Tennessee Supreme Court Penny J. White has encouraged practicing attorneys to use international law in state court arguments.²¹⁴ More recently, Chief Justice Margaret Marshall of the Massachusetts Supreme Judicial Court opined that: “The question today is not whether state court judges should consider the work of foreign constitutional courts when we interpret our state’s constitution. The question is whether we can afford not to.”²¹⁵ Without arguing that international law has controlling weight, Chief Justice Marshall suggested that transnational references are particularly illuminating in cases involving “personal autonomy, regulation of hate speech, and physical detention.”²¹⁶

B. Application: Abstinence-Only-Until-Marriage Education

To look at the role of international human rights law in interpreting the New York Constitution’s article XVII, section 3, I turn next to a particular state policy—abstinence-only-until-marriage educational programs—and see how well they square with the state constitutional and international human rights law requirements.

Abstinence-only-until-marriage programs have been funded by the federal government since 1981.²¹⁷ In 1996, as part of the Personal Responsibility and

generally CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955* (2003).

212. See Shirley S. Abrahamson & Michael J. Fischer, *All the World’s a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273, 285 (1997).

213. Chief Judge Judith Kaye, Introductory Remarks at the Justice Ruth Bader Ginsburg Lecture, Ass’n of the Bar of the City of New York (Dec. 13, 2001) (on file with author). See also Press Release, Ass’n of the Bar of the City of New York, *Former Secretary of State Madeleine K. Albright to Deliver New York City Bar’s Justice Ruth Bader Ginsburg Distinguished Lecture Thursday, Dec. 13, 2001* (Dec. 10, 2001) (advertising that Chief Judge Kaye would introduce a panel discussion on international women’s rights preceding the lecture).

214. Penny J. White, *Legal, Political, and Ethical Hurdles to Applying International Human Rights Law in the State Courts of the United States (and Arguments for Scaling Them)*, 71 U. CIN. L. REV. 937, 937 (2003).

215. *The Brennan Lecture: Marshall Says to Look Abroad for Precedents*, THE LAW SCH., Autumn 2004, at 124, available at http://www.law.nyu.edu/pubs/magazine/autumn2004/p122_139.pdf (describing Chief Justice Margaret Marshall’s comments at N.Y.U. School of Law’s Tenth Annual Brennan Lecture).

216. *Id.* See also Marshall, *Wise Parents*, *supra* note 40.

217. Advocates for Youth, *Abstinence-Only-Until-Marriage Programs: History of Government Funding* (2001), <http://www.advocatesforyouth.org/rrr/history.htm>. Abstinence education programs can be divided into the following categories: “comprehensive,” “abstinence plus,” “abstinence only,” and “abstinence-only-until-marriage.” See Julie Jones, *Money, Sex and*

Work Opportunities Reconciliation Act of 1996 (PRWORA), Congress created section 510(b) of title V of the Social Security Act (SSA), which significantly increased funding for abstinence-only education programs.²¹⁸ That law subjected the content of the programs to more rigorous federal control, setting out a strict eight-point definition of abstinence-only-until-marriage education that must be met by programs funded under the law. It defines abstinence education as an “educational or motivational program which . . . has as its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity.”²¹⁹ Among other things, such programs are required to teach participants that “sexual activity outside of marriage is likely to have harmful psychological and physical effects.”²²⁰ Programs receiving these funds cannot provide comprehensive sex education.

While a portion of abstinence-only-until-marriage funds made available

the Religious Right: A Constitutional Analysis of Federally Funded Abstinence-Only-Until-Marriage Sexuality Education, 35 CREIGHTON L. REV. 1075, 1076 (2002); James McGrath, *Abstinence-Only Adolescent Education: Ineffective, Unpopular, and Unconstitutional*, 38 U.S.F. L. REV. 665 (2004).

218. Personal Responsibility and Work Opportunities Reconciliation Act of 1996, Pub. L. No. 104-193, § 912, 110 Stat. 2105, (1996) (inserting section 510 into the Social Security Act (SSA), and codifying these changes at 42 U.S.C. § 710 (2000)). Annual appropriations of \$50 million per year have conformed to the legislative requirements set out in the SSA. William Smith, *Public Policy Update: More Federal Funds Targeted for Abstinence-Only-Until-Marriage Programs*, SIECUS REPORT, June/July 2000, at 27; U.S. HOUSE OF REP., COMM. ON GOV'T REFORM—MINORITY STAFF, THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS 2 (2004) (prepared for Rep. Henry A. Waxman) [hereinafter Waxman Report] (citing TANF and Related Programs Continuation Act of 2004, Pub. L. No. 108-262, 118 Stat. 696 (2004)). The Deficit Reduction Act of 2005, which reauthorized the 1996 welfare law, also authorized funding for state abstinence-only grants through December 31, 2006. S. 1932, 109th Cong. (2005) (enacted). See also U.S. Dep't of Health and Human Services, Administration for Children & Families, Office of Child Support Enforcement, Child Support Report XXIII, No. 2, Feb. 2006, at p. 7, available at <http://www.acf.hhs.gov/programs/cse/pubs/2006/csr/csr0602.html> (outlining provisions of Act). Significant funding for abstinence-only education is now also available through a more recently enacted program, Special Projects of Regional and National Significance—Community Based Abstinence Education (SPRANS-CBAE)—that makes federal funds available directly to governmental or private entities without requiring state involvement in the grant process. MATERNAL AND CHILD HEALTH BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVS. (USHHS), SPRANS COMMUNITY-BASED ABSTINENCE EDUCATION PROJECT GRANTS, PROGRAM GUIDANCE COMPETING ANNOUNCEMENT FISCAL YEAR 2004 1–2 (2003) [hereinafter SPRANS Guidance]. See generally National Campaign to Prevent Teen Pregnancy, Summary of Teen Pregnancy Prevention-Related Funding, 2/14/06, available at <http://www.teenpregnancy.org/about/pdf/AppropriationsFY2006.pdf> (summarizing funding of abstinence-only programs from FY 2003 through FY 2006).

219. Social Security Act § 510(b)(2)(A), 42 U.S.C. § 710(b)(2)(A) (2000).

220. § 510(b)(2)(E). While federally funded programs are not required to emphasize all eight statutory elements, the programs cannot provide information that is inconsistent with any of these provisions and must comply with the legislative definition under section 510. SIECUS, A BRIEF EXPLANATION OF FEDERAL ABSTINENCE-ONLY-UNTIL-MARRIAGE FUNDING *1, <http://www.SIECUS.org/policy/states/2004/Explanation.pdf> (last visited Apr. 7, 2006). See also SPRANS Guidance, *supra* note 218, at 3; USHHS, Press Release, *HHS Awards Grants Nationwide to Support Abstinence Education, Services to Teens*, July 2, 2002, <http://www.hhs.gov/news/press/2002pres/20020702a.html>.

under section 510(b) are appropriated by the federal government, states that choose to accept these funds (as of this writing, all states except California and Pennsylvania accept them) are required to match every four federal dollars with three state dollars and then disburse them for grant-related activities.²²¹ In fiscal year 2004, New York received \$3.7 million in federal Title V funds. These federal funds were matched with \$2.6 million in state funds.²²²

Abstinence-only-until-marriage curricula have been extremely controversial, and scientific study has generally not supported their effectiveness.²²³ Public health experts argue that the curricula's rigid content requirements, failure to prepare participants for real-world challenges that may require knowledge of contraception,²²⁴ and distorted information on how important condoms are in arresting the spread of Sexually Transmitted Diseases (STDs), including HIV/AIDS,²²⁵ could actually increase teens' and children's health risks.²²⁶ A House of Representatives study commissioned by Representative Henry Waxman (D-CA) also identified pervasive inaccuracies and mischaracterizations in abstinence-only curricula adopted by federal grantees.²²⁷ In the wake of this report, even the Republican Majority Leader of the Senate, Bill Frist, called for

221. See SIECUS, A BRIEF EXPLANATION, *supra* note 220, at *1 (listing states that have refused federal abstinence-only-until-marriage funds). See also USHHS, MATERNAL AND CHILD HEALTH BUREAU, 2000 ANNUAL SUMMARY FOR THE ABSTINENCE EDUCATION PROVISION OF THE 1996 WELFARE LAW P.L. 104-193 1 (July 2002), available at <ftp://ftp.hrsa.gov/mchb/abstinence/annualrpt00.pdf> ("Grant applications are accepted only from the State health agency responsible for the administration . . . of Title V . . . with funds at the discretion of the Governor unless otherwise established under State law or judicial precedent.").

222. SIECUS, STATE PROFILES: NEW YORK *6 (2004), available at http://www.siecus.org/policy/states/2003/New_York.pdf. Not only are these programs funded in part by the state, but grant recipients are often state or municipal government entities. For example, in New York the Addison Central School District, the Monroe County Health Department, the Pioneer Central School District and Harlem Hospital (part of the New York Health and Hospitals Corporation) have all received abstinence-only-until-marriage funds. *Id.* at *6-*10.

223. See, e.g., DOUGLAS KIRBY, NAT'L CAMPAIGN TO PREVENT TEEN PREGNANCY, SUMMARY, EMERGING ANSWERS 18 (2001), available at <http://www.teenpregnancy.org/resources/data/pdf/emerganswsum.pdf>; Waxman Report, *supra* note 218, at 4; James McGrath, *supra* note 217, at 666.

224. John Santelli, Mary A. Ott, Maureen Lyon, Jennifer Rogers and Daniel Summers, *Abstinence-only Education Policies and Programs: A Position Paper of the Society for Adolescent Medicine*, 38 J. OF ADOLESCENT HEALTH 83, 86 (2006) (concluding that the requirements of Section 510 should be repealed and replaced with "funding for programs that offer comprehensive, medically accurate sexuality education").

225. Waxman Report, *supra* note 218, at 8-11.

226. A study conducted at Columbia University concluded that 88 percent of participants in abstinence-only programs still had premarital sex, and that their rates of STDs were not statistically different from nonparticipants. *Teenagers Who Take "Virginity Pledges," Other Teens Have Similar STD Rates, Study Says*, KAISER DAILY WOMEN'S HEALTH POLICY REPORT, Mar. 10, 2004, http://www.kaisernetwork.org/daily_reports/rep_index.cfm?hint=2&DR_ID=22603 (describing research) [hereinafter Columbia Study]. A recent analysis of states' own evaluations of abstinence-only programs found no lasting positive impact on behavior. DEBRA HAUSER, ADVOCATES FOR YOUTH, FIVE YEARS OF ABSTINENCE-ONLY-UNTIL-MARRIAGE EDUCATION: ASSESSING THE IMPACT, 2-3 (2004), <http://www.advocatesforyouth.org/publications/stateevaluations.pdf>.

227. Waxman Report, *supra* note 218.

a review of the curricula.²²⁸ But despite overwhelming scientific opposition and political concern, the few legal challenges that have been mounted against the programs—most of which have focused on the impermissible use of federal funds to support religious activities—have thus far had little impact on the overall policy.²²⁹

How would this state-sponsored and state-administered program be evaluated if it were challenged as a violation of a state constitutional obligation to provide for the public health? Would abstinence-only-until-marriage programs measure up if a challenge were mounted under article XVII, section 3? And how might transnational law figure into a court's assessment of such programs' legality?

As an initial matter, it seems clear that abstinence-only-until-marriage programs involve the public health, and therefore fall within the scope of article XVII, section 3. The thrust of the federal abstinence-only-until-marriage law certainly supports this conclusion, as the law repeatedly links premarital sex to health issues such as depression, STDs, and suicide.²³⁰ Further, the federal funding for the program is funneled through the U.S. Department of Health and Human Services, not the Department of Education or some other agency that might prioritize a non-health agenda. Moreover, the population-based and preventive focus of these programs—in contrast to programs providing individual medical service—is consistent with the common understanding

228. See *Senate Majority Leader Frist Says Government Should Review Federally Funded Abstinence-Only Sex Ed Programs*, KAISER DAILY HIV/AIDS REPORT, Dec. 6, 2004, http://www.kaisernetwork.org/daily_reports/print_report.cfm?DR_ID=27072&dr_cat=1.

229. See, e.g., *ACLU of Louisiana v. Foster*, No. 02-0440, 2002 U.S. Dist. LEXIS 13778, at *23 (E.D.La. July 24, 2002). A court-ordered settlement in November 2002 required that the state take action to remove religious references from its abstinence-only curriculum. In June 2005, the court denied the ACLU's motion to hold the state in contempt for failing to comply with the order. See Press Release, ACLU, *ACLU Troubled by Court's Refusal to Hold Louisiana Governor's Program on Abstinence in Contempt for Continuing to Preach with Taxpayer Dollars* (June 24, 2005), available at <http://aclu.org/reproductiverights/gen/12641prs20050624.html>. A similar challenge in Massachusetts to the Silver Ring Thing (SRT), an HHS grantee, resulted in a settlement barring funding until the SRT complies with federal law. See Press Release, ACLU, *ACLU Announces Settlement in Challenge to Government-Funded Religion in the Abstinence-Only-Until-Marriage Program the "Silver Ring Thing,"* Feb. 23, 2006, available at <http://www.aclu-mass.org/news/02.23.06.silverring.pdf>. In a challenge with broader implications, Advocates for Youth and the Sexuality Information and Education Council of the United States filed an administrative complaint in September 2005 charging that federally funded abstinence-only programs provided false information in violation of the Data Quality Act. See Jon Platner, *Challenging Abstinence-Only Sex Education*, CHOICE! MAGAZINE, Oct. 13, 2005, <http://www.plannedparenthood.org/pp2/portal/files/portal/webzine/newspoliticsactivism/fean-051013-abstinence-lawsuit.xml>.

230. For example, to comply with the federal definition of "abstinence education," a curriculum must: "teach[] that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems" and that "sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects." Social Security Act §§ 510(b)(2)(C), (b)(2)(E), 42 U.S.C. §§ 710(b)(2)(C), (b)(2)(E) (2000).

of public health.²³¹ The legislative history of article XVII, section 3 also indicates that the provision's sponsors were particularly concerned about the spread of disease, one of the purported purposes of abstinence-only education programs.²³²

It is also worth noting that the existence of federal funding will not alter the question of the program's legality under state laws. Because abstinence-only-until-marriage programs are currently federal grant programs rather than legislative mandates on the states, there is no argument that the federal government has preempted state regulation in this area.²³³ One might argue that even absent state matching funds, the state legislature would fail to meet its article XVII mandate if it allowed the federal government to, through a carrot-and-stick approach, introduce programs that could not be implemented by the state itself under its own constitution.²³⁴ But because state funds, and the state legislative process, are directly involved in administering Title V programs, the question is easier here.

Though abstinence-only-until-marriage education clearly falls within the scope of article XVII, section 3, one might argue that the provision affords the legislature the discretion to provide for the public health through abstinence-only programs. While the section's literal text provides some support for this view, prior judicial interpretations of article XVII indicate that the legislature's discretion is not unlimited: its exercise of discretion cannot go so far as to ignore the article XVII mandate, or to irrationally limit its scope.²³⁵ As a result, the

231. See LAWRENCE GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 4–5, fig.2 (2000) (suggesting “five essential characteristics of public health law” including that they “[focus] on the health of populations” and that they exercise “coercive power” over individuals for the benefit of the community).

232. See *supra* text accompanying notes 157–69.

233. According to the leading authority on statutory construction, “[a] strong presumption exists against finding preemption which means that preemption can only be found if the federal law clearly evinces a legislative intent to preempt the state law or there is such direct and positive conflict that the two acts cannot be reconciled or consistently stand together.” 2 NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 36:9, at 93–94 (6th ed. 2001). Furthermore, sex education is an area traditionally regulated by the state and “there is a presumption against finding a federal preemption of state law in areas traditionally regulated by the states.” *Id.* at 94–95. See also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (setting out rule for federal preemption in an area traditionally regulated by the state).

234. A state's constitutional policies could be wholly undermined by such a grant program. The question of whether states can exercise legislative authority to bar acceptance of such grants by non-state entities when the grants undermine the state's public policy will not be explored here, but it is pertinent to the newer phase of abstinence-only-until-marriage funding—the SPRANS program—which does not enlist state apparatus.

235. In construing the parallel provision of section 1 of article XVII, the New York Court of Appeals has stated that the legislature cannot fulfill its obligation by simply failing to execute its mandate—that does not constitute a valid exercise of discretion. See, e.g., *Tucker v. Toia*, 371 N.E.2d 449, 451 (N.Y. 1977) (“In New York State, the provision for assistance to the needy is not a matter of legislative grace.”). An analogous argument should apply to section 3. See, e.g., 2A NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 47:06, at 226–27 (6th ed. 2000) (“[A]ll sections of an act relating to the same subject matter should be considered together unless

first step in determining abstinence-only education's legality under New York's constitution is to define the scope of the legislature's affirmative obligation to provide for New York State's inhabitants health in the area of sexuality education.²³⁶

An examination of the provision's legislative history provides some content to the legislature's obligation. Interestingly, while public health has long been regulated at the state level, the concepts pertinent to defining, regulating, and protecting the public health transcend state and national boundaries.²³⁷ Like nation-states, the economic and social well-being of New Yorkers is dependent on keeping the state's borders open to commerce and ensuring freedom from disease. As the legislative history set out above makes clear, article XVII, section 3 reflects this concern about transmission of disease and public health education. Abstinence-only-until-marriage initiatives do not remedy this concern. By apportioning resources that address the health needs of only abstinent adolescents (and only so long as they are abstinent), abstinence-only-until-marriage programs attempt to exclude both those who are sexually active and those who are unable to marry their sexual partners. These limitations undermine internationally accepted public health goals, and taking partial action in this way may even compound the health risks to the general population by communicating incomplete or misleading information to participants.²³⁸

While an examination of section 3's legislative history provides support to the notion that abstinence-only education programs violate New York's constitution, it is a limited source for determining the content of article XVII. Contemporary understandings of state constitutional terminology must be considered, as well as those that inspired the 1938 framers. The 1938 understanding of public health cannot remain a static constitutional definition, for while the specific public health issues that prompted the provision were resolved long ago, new public health issues have emerged.²³⁹ This is a common phenomenon in the area of public health, in part because disease can spread and adapt quickly to change. In construing article XVII, section 1, the New York Court of Appeals has certainly taken into account the changes in the social security

to do so would be plainly contrary to the legislative intent.”).

236. N.Y. COMP. CODES R. & REGS., tit. 8, § 135.3 (2005) sets out the parameters for health education and education concerning AIDS in New York. Curricula must “stress abstinence,” but must also provide “accurate information.” § 135.3(b)(2), (c)(2).

237. See generally David P. Fidler, *A Globalized Theory of Public Health Law*, 30 J.L. MED. & ETHICS 150 (2002) (arguing that public health cannot be conceptually limited by state or national borders, but that it involves a range of transnational interactions between populations and governments).

238. See Columbia Study, *supra* note 226.

239. The issues raised by abstinence-only-until-marriage programs have become more central to public health concerns since 1938, while women's reproductive health has become much more widely recognized as a central topic of public health. See generally Sofia Gruskin & Daniel Tarantola, *Health and Human Rights*, in THE OXFORD TEXTBOOK OF PUBLIC HEALTH 327 (Roger Detels, James McEwen, Robert Beaglehole, & Heizo Tanaka, eds. 4th ed., 2002) (describing expanded understanding of link between health and women's rights).

system since 1938. By the same token, and particularly given the open-ended text of section 3, the framers did not expect that the utility of this constitutional provision would end as new public challenges arose and old ones were resolved.

Given the inherently international nature of public health, contemporary international public health standards—particularly those standards relating to transmission of disease—are of critical relevance to determining the substantive public health standards that should guide the New York legislature and give content to article XVII. International law can provide guidance where, as in this case, federal constitutional law is silent on the issue. The federal system accords states responsibility for implementing the United States' international obligations—including interpretations of the ICCPR—and many of these require accurate and complete sex education.²⁴⁰ Further, international law directly links individual literacy and education with more general efforts to improve public health. For example, the 1994 Cairo Accord emphasized women's education and empowerment rather than punitive or coercive measures geared toward controlling population.²⁴¹ If these established international standards inform article XVII, section 3's meaning, abstinence-only education programs do not meet New York's constitutional requirements.

In sum, the legislative history of article XVII, venerable understandings of public health, and international legal authority concerning accurate and complete sex education all support a finding that state-sponsored abstinence-only-until-marriage programs conforming to the federal grant program of section 510(b) violate the New York State Constitution. As Helen Hershkoff has argued, even if it might meet a "mere rationality" test imported from the federal system, state action should be deemed to run afoul of positive state constitutional rights if the action does not further the goals articulated in the constitution.²⁴² In the context of abstinence-only-before-marriage education, article XVII, section 3 must be construed in light of the United States' treaty obligations under the ICCPR, CERD, and other transnational law on sex education and public health. Because this state-sponsored program provides skewed educational information and fails to address the range of methods for minimizing the risk of disease, it does not further the public health goals of article XVII as construed in light of international public health standards and the United States' international obligations, in violation of the New York State Constitution.²⁴³

240. See *supra* text accompanying notes 187–204.

241. See UNFPA: ICPD & MDG FOLLOWUP: ICPD+5, <http://www.unfpa.org/icpd/icpd5.htm> (last visited Feb. 19, 2006). This approach was subsequently reiterated in the Beijing Platform of 1995, and was readopted in 2000 at the Beijing + 5 meeting in New York City. See Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action, G.A. Res. 23/10 (special session), U.N. Doc. A/RES/S-23/3 (Nov. 16, 2000); Beijing + 5, Women, 2000: Gender, Equality, Development and Peace for the Twenty-First Century (2000), <http://www.un.org/womenwatch/daw/followup/beijing+5.htm>.

242. See *supra* notes 151–52 and accompanying text.

243. Interestingly, two of the states with explicit public health protections in their state constitutions, Louisiana and South Carolina, also have some of the most restrictive state laws on

CONCLUSION

In a federal system, state courts have a critical role to play in implementing the international human rights obligations of the national government. Indeed, in certain circumstances, state courts have an obligation to take a leadership role in such implementation. State judicial implementation of the U.S.-ratified Vienna Convention on Consular Affairs is one such example. Moreover, because the federal constitution serves merely as a floor rather than a ceiling on human rights, state courts are often in a position to harmonize positive rights in their own state constitutions with both their international and national obligations. Additionally, states may have primary “on-the-ground” implementation responsibility in many areas traditionally reserved to them, such as family law, and health and welfare, which are components of both CERD and ICCPR.

Because of these responsibilities, state courts should routinely look to international human rights law in construing state constitutional provisions. In those instances in which the federal government has not entered into any international obligations—and where, as a result, state courts have no implementation obligation—international models may still be particularly important where the court cannot rely on any federal analogues to the state constitutional provision before it. In such cases, international legal developments in the area can provide important judicial guidance. Further, as was the case for interpretation of New York’s constitutional provisions for the public health, where scant domestic interpretation has developed since passage of the provision, international legal developments can be invaluable aid to courts required to fill in the gaps.

Thus, in construing a provision of a state constitution such as New York’s article XVII, section 3, a principled state court judge should draw on the following:

- the United States’ obligations under relevant international human rights standards, as well as any international instruments that establish commonly accepted human rights standards, taking into consideration whether or not these are binding on the United States and whether state-level implementation is called for under general principles of federalism;
- the textual purposes of the state constitutional law;
- the meaning and scope of the state provision, gleaned from the historical record of the provision; and
- interpretations of similar constitutional provisions in other states.

In some instances, either the United States’ international obligations or the state’s historical record will lead the decisionmaker to examine international

sexuality education in the schools. See *SIECUS Releases New Groundbreaking Publication: “SIECUS State Profiles: A Portrait of Sexuality Education and Abstinence-Only-Until-Marriage Programs in the States”*, U.S. NEWSWIRE, June 22, 2004, <http://releases.usnewswire.com/GetRelease.asp?id=32242>. See also *supra* note 59.

law directly, giving significant, and at times controlling, weight to international interpretations (while complying with minimum federal standards). But even where there is no direct indication of the framers' reliance on international law, principles of federalism as well as the fundamental differences between state and federal constitutions outlined above indicate that domestic sources should be tested against, and harmonized with, relevant developments in international law that reflect the implementation of legal provisions similar to those in state constitutions. This approach serves the principles that animate our federal system, and—in an increasingly globalized world—it also reflects the spirit of our times.

