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A FIRST AMENDMENT ANALYSIS OF ANTI-SHARIA INITIATIVES

ASMA T. UDDIN* & DAVE PANTZER**

INTRODUCTION

Ten years after September 11, 2001, the American Muslim community continues to be surrounded by a climate of fear and distrust, largely created and promoted by a small group of anti-Muslim organizations and individuals who, while small in number, are highly influential in shaping the national and international perception of Muslims. A recent report by the Center for American Progress, *Fear, Inc.: The Roots of the Islamophobia Network in America*, examines these groups in detail, describing their sources of funding and the media enablers who help amplify their message.¹

The individuals highlighted in the report include, among others, the co-founders of the Stop Islamization of America organization, which is entirely devoted to publicizing a supposed Islamic conspiracy to take over America and deprive Americans of the fundamental rights granted them by the United States Constitution.²

This theme of an overpowering Islamic threat is also described by another Islamophobia-promoting organization, the Center for Security Policy (CSP), run by a well-known anti-Muslim activist.³ CSP's report,

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1. Wajahat Ali, Eli Clifton, Matthew Duss, Lee Fang, Scott Keyes & Faiz Shakir, *Fear, Inc.: The Roots of the Islamophobia Network in America*, CENTER FOR AMERICAN PROGRESS, 9 (Aug., 2011), <http://www.americanprogress.org/issues/2011/08/pdf/islamophobia.pdf>.

2. *See id.* at 2.

3. *See id.* at 3.

Shariah: The Threat to America,⁴ is used to promote the sort of fear that has led several state legislatures to consider anti-Sharia bills and ballot measures, which seek to block the consideration of Sharia—defined here as “Islamic law”⁵—by American judges.

The anti-Muslim rhetoric and fear-mongering is thus not without on-the-ground ramifications, several of them manifesting in the legal or policy arena in the form of not just anti-Sharia initiatives, but also in widespread resistance to the building or expansion of mosques.⁶ In some cases, such as the resistance facing the Islamic Center of Murfreesboro in Murfreesboro, Tennessee, the hatred has resulted in serious cases of arson and vandalism.⁷

In Part I, this article will describe the broader climate of anti-Muslim sentiment, as promoted by the Islamophobia cottage industry. In Part II, this article will examine the manifestations of this fear-

4. *Shariah: The Threat to America, An Exercise in Competitive Analysis: Report of Team 'B' II*, THE CENTER FOR SECURITY POLICY (2010), http://familysecuritymatters.org/publications/id.7376/pub_detail.asp.

5. The term “Sharia” in fact refers to much more than Islamic law, but it is limited to that definition here because that is how anti-Sharia proponents define it. See Sally Steenland, *Setting the Record Straight on Sharia An Interview with Intisar Rabb*, CENTER FOR AMERICAN PROGRESS (Mar. 8, 2011), http://www.americanprogress.org/issues/2011/03/rabb_interview.html. As Intisar Rabb has maintained:

Sharia is the ideal law of God according to Islam. Muslims believe that the Islamic legal system is one that aims toward ideals of justice, fairness, and the good life. Sharia has tremendous diversity, as jurists and learned scholars figure out and articulate what that law is. Historically, Sharia served as a means for political dissent against arbitrary rule. It is not a monolithic doctrine of violence, as has been characterized in the recently introduced Tennessee bill that would criminalize practices of Sharia.

Id.

6. See Ali et al., *supra* note 1, at 29.

7. See *Murfreesboro Islamic Center Vandalized*, NEWS CHANNEL 5 (Jan. 18, 2010, 11:37 AM), <http://www.newschannel5.com/story/11839442/murfreesboro-islamic-center-vandalized?redirected=true>; *Fire at Tenn. Mosque Building Site Ruled Arson*, CBS NEWS (Aug. 30, 2010 10:15 AM), <http://www.cbsnews.com/stories/2010/08/28/national/main6814690.shtml>; Robbie Brown, *Incidents at Mosque in Tennessee Spread Fear*, N.Y. TIMES, Aug. 30, 2010, A10, available at <http://www.nytimes.com/2010/08/31/us/31mosque.html>.

mongering through the lens of the First Amendment. More specifically, Part II will take a close look at the anti-Sharia bills and ballot measures proposed by numerous states and determine the extent to which they comply with free exercise and establishment principles and jurisprudence.

I. THE INDIVIDUALS AND ORGANIZATIONS PERPETUATING ISLAMOPHOBIA

The Center for American Progress defines the term “Islamophobia” as an “exaggerated fear, hatred, and hostility toward Islam and Muslims that is perpetuated by negative stereotypes resulting in bias, discrimination, and the marginalization and exclusion of Muslims from America’s social, political, and civic life.”⁸ Primarily five key individuals and their organizations lead the Islamophobia campaign.⁹ While the names of these “misinformation experts” may be unknown to many Americans, their collective efforts have afforded them great influence in shaping the national and international political debate surrounding Islam, its teachings, and its followers.¹⁰

These misinformation experts are advancing a notion of Islam as an intrinsically violent ideology, the goal of which is to achieve dominance over the United States and over all non-Muslims worldwide. They seek to define Sharia as a “totalitarian ideology” and “legal-political-military doctrine” committed to annihilating Western civilization as we know it today.¹¹

The network of experts is not a fledgling one whose ideas are beginning to take root; rather, the group has exhibited a remarkable ability to organize, coordinate, and propagate its message through grassroots organizations that have increased in strength considerably over the past ten years.¹² Such organizations include ACT! For America, Stop Islamization of America, and a variety of more general organizations that have echoed their messages.¹³ Stop Islamization of

8. Ali et al., *supra* note 1, at 9.

9. *See id.* at vi.

10. *Id.*

11. *Id.* at 27–28.

12. *Id.* at vi.

13. *Id.*

America in particular seeks to incite the public's fears by constantly maligning Islam and avowing the existence of an Islamic conspiracy bent on destroying "American values."¹⁴ Collectively, the groups have spread their message in twenty-three states through various communication vehicles; they have used "books, reports, websites, blogs and carefully crafted talking points" that have, in turn, been utilized by other anti-Islam grassroots organizations and some right-wing religious groups as "propaganda for their constituency."¹⁵ Moreover, the Islamophobia movement's ability to influence politicians' talking points and ancillary issues for the upcoming 2012 elections has made mainstream what was once considered marginal, "extremist rhetoric."¹⁶

As strong as the grassroots organizations have become, the Islamophobia campaign is not being waged solely on a grassroots level.¹⁷ There are other organizations working to promote misinformation about Islam and Muslims; many of these organizations' leaders are well-versed in the art of capturing the press' attention and have accessed a platform in the media.¹⁸

The Impact of Islamophobia

The group galvanizing the Islamophobia movement has had, and continues to have, a visible impact upon America's national discourse regarding Islam and what it teaches. The misinformation experts' writings on Islam and multiculturalism seem to have assisted in the creation of a worldview that paints "Islam as being at war with the West and the West needing to be defended."¹⁹ The group's players are steering the national and global debates regarding Islam, and the ideas they put forth have real consequences on the public dialogue about Muslims in America.²⁰

14. *Id.* at 2.

15. *Id.*

16. *Id.*

17. *See id.* at 4–5.

18. *Id.* at 3, 6.

19. *Id.* at 2.

20. Andrea Elliot, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES, July 31, 2011, <http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all>.

The influential reach of Islamophobia's proponents into the legal and policy sphere can be seen in their campaign against what they allege to be a threat of the infiltration of Sharia into American law. The movement against Sharia had its first seeds planted in January of 2006 when an attorney started a group called the Society of Americans for National Existence.²¹ On the group's website, he "proposed a law that would make observing Sharia, which he [compared] to sedition, a felony punishable by 20 years in prison."²² "He also began raising money to study whether there is a link between 'Shariah-adherent behavior' in American mosques and support for violent jihad."²³ The project, called "Mapping Shariah," connected the founder of the Society to the founder of the Center for Security Policy, referenced above, who in turn linked him to a network of "former and current government officials, security analysts and grassroots political organizations."²⁴ In the summer of 2009, the Society's founder "began writing 'American Laws for American Courts,' a model statute that would [prohibit] state judges from considering foreign laws or rulings that violate constitutional rights in the United States."²⁵ Since then, his "model legislation" banning Sharia law has been virtually "cut and pasted" into bills in South Carolina, Texas and Alaska.²⁶

To date, "approximately seventeen states have either proposed or passed legislation aimed at banning Sharia, or in a less direct fashion, 'foreign law.'"²⁷ Oklahoma State Representative, Rex Duncan, authored State Question 755, a constitutional amendment that appeared on the Oklahoma ballot in November 2, 2010 and was passed by Oklahoma voters.²⁸ The bill required courts to only look to federal and state laws to

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Ali et al., *supra* note 1, at vi.

27. Anver Emon, *Banning Shari'a*, THE IMMANENT FRAME (Sept. 6, 2011, 11:26 AM), <http://blogs.ssrc.org/tif/2011/09/06/banning-shari%E2%80%98a/>.

28. H.R. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010), *available at* <https://www.sos.ok.gov/documents/questions/755.pdf>. The final text of the State Question that appeared on the ballot read as follows:

STATE QUESTION NO. 755

LEGISLATIVE REFERENDUM NO. 355

decide cases, explicitly prohibiting the use of international and Sharia law.²⁹ Duncan, in advertising his amendment, frequently referred to it as part of “a war for the survival of America” and “a pre-emptive strike”—words voters likely recognized as part of the war on terror.³⁰ In support of State Question 755, Florida, Act! For America, a non-profit organization, paid for over 600,000 telephone calls to voters, featuring the voice of a former C.I.A. Director endorsing the amendment.³¹

Duncan was not the only politician endorsing Islamophobic rhetoric and proposing anti-Sharia bills.³² Bill Ketron, Tennessee Senator from the 13th District, is another well-known congressman advocating the “war on Sharia.”³³ It is no secret that the 13th District has been struggling with a heated debate regarding the building of the mosque in

This measure amends the State Constitution. It changes a section that deals with the courts of this state. It would amend Article 7, Section 1. It makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. It forbids courts from considering or using Sharia Law.

International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons.

The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties.

Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed.

SHALL THE PROPOSAL BE APPROVED?

FOR THE PROPOSAL—YES

AGAINST THE PROPOSAL—NO

Id.

29. *Id.*

30. James C. McKinley, *Judge Blocks Oklahoma's Ban on Using Shariah Law in Court*, N.Y. TIMES, Nov. 29, 2010, <http://www.nytimes.com/2010/11/30/us/30oklahoma.html>.

31. *Id.*

32. John Esposito & Shelia Lalwani, *Fear of Sharia in Tennessee*, THE GUARDIAN (Mar. 25, 2011, 1:24 PM), <http://www.guardian.co.uk/commentisfree/belief/2011/mar/25/islam-religion>.

33. *Id.*

Murfreesboro.³⁴ To many, Ketron's bill represented complete ignorance of Sharia and Islam, primarily because "it uncritically condemns Sharia and asserts that it represents a major threat to Tennessee,"³⁵ a statement that is baseless and unfounded. The bill equated Sharia with terrorism, without any evidence to corroborate the accusation.³⁶

The impact of the Islamophobia campaign upon the American public's perception of Islam and Muslims is evident as well. A Washington Post-ABC News poll taken in September of 2010 showed that 49% of Americans held an unfavorable view of Islam, a substantial increase from 39% in October of 2002.³⁷ In a survey conducted as part of a report by the Public Religion Research Institute and the Brookings Institution entitled, "What it Means to Be American: Attitudes in an Increasingly Diverse America 10 Years after 9/11," "[f]orty-seven percent of survey respondents said the values of Islam are at odds with American values."³⁸ When it came to Sharia law, the respondents appeared divided. On the whole, 61% of those polled "disagreed that Muslims want to establish Sharia law in the U.S."³⁹ Regarding the question of whether Americans believe that Muslims want to establish Sharia law in America, the report quotes the CEO of the Public Religion Research Institute, who states, "2011 has been an enormously active year for this question."⁴⁰ He went on to say,

Forty-nine bills have been introduced in twenty-nine states to ban Sharia law. We asked the same question back in February, and only 23% of Americans agreed Muslims want to establish [S]haria as the law of the land. That number has gone up to 30%, so still a minority, but the minority has grown.⁴¹

34. *Id.*

35. *Id.*

36. *Id.*

37. Ali et al., *supra* note 1, at vi.

38. Eric Marrapodi, *Poll: Many Americans uncomfortable with Muslims*, CNN BELIEF BLOG (Sept. 6, 2011, 3:29 PM), <http://religion.blogs.cnn.com/2011/09/06/poll-many-americans-uncomfortable-with-muslims/>.

39. *Id.*

40. *Id.*

41. *Id.*

If the American public is divided as to whether Muslims are trying to introduce Sharia law in the United States, they may not be split for long as the Islamophobia campaign continues to spread the fear of Sharia contagion. Part II of this paper will look at how the movement has infiltrated not only the media but also the institutions by which our laws are made and enforced. The language used by anti-Sharia campaigners in bills and ballot measures will be discussed, as will the degree to which these measures are in accordance with free exercise and establishment principles and jurisprudence.

II. ISLAMOPHOBIA AND THE LAW: ANTI-SHARIA BILLS

As of June, 2011, there were forty-seven bills in twenty-one states that were seeking to ban the use of Sharia and/or any category of international law.⁴² Louisiana and Tennessee were among the first states to propose such bills.⁴³ When the Tennessee bill was first introduced to the floor, it was overly broad, allowing the state's attorney general to outlaw any "Shariah organization, if the organization knowingly adheres to Shariah" going on to define Sharia as "any rule, precept, instruction, or edict arising directly from the extant rulings of any of the authoritative schools of Islamic jurisprudence of Hanafi, Maliki, Shafi'i, Hanbali, Ja'afariya, or Salafi" and stating that these terms constitute "prima facie Shariah without any further evidentiary showing."⁴⁴ In essence, this bill would outlaw any organization that adhered to any Islamic school of thought. As expected, there was pushback from the Muslim community, specifically because even the regulations on how to wash before prayer

42. Bill Raftery, *Bans on Court Use of Sharia/International Law: 38 of 47 Bills Died or Rejected This Session; Only 1 Enacted Into Law*, GAVEL TO GAVEL (June 3, 2011), <http://gaveltogavel.us/site/2011/06/03/bans-on-court-use-of-shariainternational-law-38-of-47-bills-died-or-rejected-this-session-only-1-enacted-into-law/>.

43. Abraham H. Foxman, Op-Ed., *Shout down the Sharia Myth Makers*, JEWISH TELEGRAPH AGENCY (Aug. 10, 2011), <http://www.jta.org/news/article/2011/08/10/3088943/op-ed-shout-down-the-sharia-myth-makers>.

44. See Joshua Rhett Miller, *Tennessee Lawmaker Renews Fight to Make Supporting Sharia law a Felony in the U.S.*, FOX NEWS (Mar. 2, 2011), <http://www.foxnews.com/politics/2011/03/02/tennessee-lawmaker-continue-push-make-following-shariah-felony/>; S. 1028, 107th Gen. Assemb., 1st Reg. Sess. (Tenn. 2011).

or how much money to give to the poor emanate from these same schools of thought.⁴⁵ Since the introduction of the bill, and its subsequent failure to pass, it has now been amended into an anti-terrorist bill,⁴⁶ prosecuting those who offer material or financial support to terrorist entities, with no mention of the words Sharia or Islam.⁴⁷

Unfortunately, as many as twenty other states have followed the growing trend of considering anti-Sharia legislation, taking cues from the Tennessee legislature.⁴⁸ Nationwide, of the forty-four such bills proposed in the United States, Arizona, and Oklahoma passed such bills into law.⁴⁹ While the Arizona law has not been challenged, a federal district judge suspended Oklahoma's law shortly after it went into effect.⁵⁰ The Tenth Circuit heard an appeal and upheld the Oklahoma Sharia law.⁵¹ The law prohibits the consideration of Sharia and international law by Oklahoma judges.⁵² Meanwhile, in June of 2011, the Michigan legislature

45. See Miller, *supra* note 44.

46. See Richard Yeakley, *Tennessee Amends Anti-Sharia Bill*, HUFFINGTON POST (Mar. 24, 2011, 7:40 PM), http://www.huffingtonpost.com/2011/03/25/tennessee-amends-antishar_n_840787.html.

47. See Material Support to Designated Entities Act of 2011, 2011 Tenn. Pub. Acts 497 (codified as amended in scattered sections of TENN. CODE ANN. §§ 39-13-802-807 (2011)).

48. See Raftery, *supra* note 42.

49. See *id.*; H.R. 2582, 50th Leg., 1st Reg. Sess. (Ariz. 2011), available at <http://www.azleg.gov/legtext/50leg/1r/bills/hb2582p.pdf>; H.R. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010), available at <https://www.sos.ok.gov/documents/questions/755.pdf>.

50. See *Awad v. Zirriax*, 754 F. Supp. 2d 1298, 1308 (W.D. Okla. 2010), *aff'd*, No. 10-6273, 2012 WL 50636 (10th Cir. 2012).; Ian Millhiser, *Federal Appeals Court to Hear Challenge to Oklahoma Anti-Sharia Amendment*, THINK PROGRESS (Sept. 12, 2011, 12:20 PM), <http://thinkprogress.org/justice/2011/09/12/316430/federal-appeals-court-to-hear-challenge-to-oklahoma-anti-sharia-amendment/>.

51. *Awad*, 2012 WL 50636.

52. See Okla. H.R. 1056.

introduced an anti-Sharia bill that is still pending.⁵³ All others bills have died in either the House or Senate of each state's respective congress.⁵⁴

There are three general categories into which the proposed legislation fits. The first category is the set of bills that single out Sharia law from all other legal traditions and describe it as treasonous and anti-American; a category similar to the first Tennessee bill introduced. A prime example of this type of legislation is Alabama's proposed (but now dead) bill, which stated, "The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression."⁵⁵ Iowa, Missouri, and New Mexico's bills incorporated almost the exact same language in their text, stating, "The courts shall not use the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia law. The provisions of this section shall apply to all cases before the respective courts including but not limited to cases of first impression."⁵⁶ A proposed bill in Wyoming not only seeks to outlaw Sharia law, but also aims to prohibit the judiciary from citing other states that may permit the use of Sharia law.⁵⁷ This specific bill states:

When exercising their judicial authority the courts
of this state shall uphold and adhere to the law as

53. Bill Raftery, *Bans on Court Use of Sharia/International Law: Michigan Becomes 22nd State to Consider, Texas House Tries Again to Get Senate to Adopt*, GAVEL TO GAVEL (July 5, 2011), <http://gaveltogavel.us/site/2011/07/05/bans-on-court-use-of-shariainternational-law-michigan-becomes-22nd-state-to-consider-texas-house-tries-again-to-get-senate-to-adopt/>.

54. *See id.*

55. H.R. 597, 2011 Leg., 1st Reg. Sess. (Ala. 2011) (Constitutional Amendment), available at <http://e-lobbyist.com/gaits/text/282975>.

56. H.R. 14, 84th Gen. Assemb., Reg. Sess. (Iowa 2011) (Constitutional Amendment), available at <http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=billinfo&Service=Billbook&menu=false&hbill=hjr14>; H.R. 31, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011) (Constitutional Amendment), available at <http://www.house.mo.gov/billtracking/bills111/billpdf/intro/HJR00311.PDF>; S. 18, 50th Leg., 1st Sess. (N.M. 2011) (Constitutional Amendment), available at <http://www.nmlegis.gov/Sessions/11%20Regular/resolutions/senate/SJR18.pdf>.

57. H.R. 8, 61st Leg., Gen. Sess. (Wyo. 2011) (Constitutional Amendment), available at <http://legisweb.state.wy.us/2011/Introduced/HJ0008.pdf>.

provided in the constitution of the United States, the Wyoming constitution, the United States Code and federal regulations promulgated pursuant thereto, laws of this state, established common law as specified by legislative enactment, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia law. The courts shall not consider the legal precepts of other nations or cultures including, without limitation, international law and Sharia law.⁵⁸

The second category of anti-Sharia bills are those that list Sharia as only one of several other traditions they are outlawing—traditions the legislature believes are at odds with the American legal system.⁵⁹ One such bill was proposed in Arizona, where it stated that in Arizona, “[a] court shall not use, implement, refer to or incorporate [a] tenant of any body of religious sectarian law into any decision, finding or opinion as controlling or influential authority.”⁶⁰ In defining religious sectarian law, the bill states that the term means “a tenet or body of law evolving within and binding a specific religious sect or tribe. Religious sectarian law

58. *Id.* The Wyoming legislation affects not only Muslim Americans, but also other minority groups in the United States, namely the Native American population. See Gale Courey Toensing, *Campaign Against Sharia Law a Threat to Indian Country*, INDIAN COUNTRY (Sept. 6, 2011), <http://indiancountrytodaymedianetwork.com/2011/09/06/the-racists-are-coming-campaign-against-sharia-law-a-threat-to-indian-country-49166>. Gabriel Galanda, a member of the Round Valley Indian Tribes and partner in the law firm Galanda Broadman of Seattle, argues that anti-Sharia legislation “threatens American Indian sovereignty, law and the government-to-government relationship between indigenous nations and state and federal governments.” *Id.* He goes on to add that, “[t]he various state laws being passed or proposed would quite literally prevent any state court judge from ever considering the laws of sovereign Indian nations, including tribal common law,” and that “[a]nti-Sharia laws also fly in the face of the United States’ recent adoption of the [U.N. Declaration on the Rights of Indigenous Peoples], especially insofar as such laws could disallow state courts from ever considering the declaration and its import domestically.” *Id.*

59. This version eventually died in Congress when the legislature adjourned. See Raftery, *supra* note 53.

60. H.R. 2582, 15th Leg., 1st Reg. Sess. (Ariz. 2011), available at <http://www.azleg.gov/legtext/50leg/1r/bills/hb2582p.pdf>.

includes sharia law, canon law, halacha and karma”⁶¹ but exempts decisions based on Anglo-American legal tradition, laws or case law from Great Britain prior to the enactment of the statute, or the definition of marriage as between one man and one woman, “and the principles on which the United States was founded.”⁶² This bill goes on to prohibit Arizona courts from looking to any church, mosque, or synagogue governance standards to resolve any issues regarding ownership of the house of worship and selection of ministers and congregation leaders.⁶³

The last category of bills is the most frequently proposed type—the “foreign or international law bill,” which refers to foreign laws broadly and does not mention Sharia specifically. This type of legislation is under consideration in Michigan and has passed in Arizona.⁶⁴ Arizona’s bill defines “foreign law” as “any law, rule or legal code or system other than the constitution, laws and ratified treaties of the United States and the territories of the United States, or the constitution and laws of this state.”⁶⁵ The bill goes on to maintain that:

a court, arbitrator, administrative agency or other adjudicative, mediation or enforcement authority shall not enforce a foreign law if doing so would violate a right guaranteed by the constitution of this state or of the United States or conflict with the laws of the United States or of this State.⁶⁶

61. *Id.*

62. *Id.* This particular piece of legislation hit a roadblock with another concerned community: namely the Orthodox Jewish community. The Jewish community uses the *beit din* system to resolve issues arising under halacha, the body of law supplementing the scripture and forming the legal part of the Talmud. Ron Kampeas, *Anti-Sharia Laws Stir Concerns that Halachah Could Be Next*, THE JEWISH WEEK (May 1, 2011), http://www.thejewishweek.com/news/national/anti_sharia_laws_stir_concerns_halachah_could_be_next.

63. *See* Ariz. H.R. 2582.

64. H.R. 2064, 50th Leg., 1st Reg. Sess. (Ariz. 2011), *available at* <http://www.azleg.gov/legtext/50leg/1r/bills/hb2064s.pdf>; H.R. 1056, 52d Leg., 2d Reg Sess. (Okla. 2010), *available at* <https://www.sos.ok.gov/documents/questions/755.pdf>; H.R. 4769, 96th Leg., Reg. Sess. (Mich. 2011), *available at* <http://www.legislature.mi.gov/documents/2011-2012/billintroduced/House/pdf/2011-HIB-4769.pdf>.

65. Ariz. H.R. 2064.

66. *Id.*

In addition to its implied impact on the use of Sharia law, this law raises a concern regarding international treaties the United States may have signed or any agreements it has executed with Native American tribes.⁶⁷

Florida's proposed (but now dead) bill that also fell into this specific category was similarly vague and overly broad in nature, blatantly prohibiting any decisions "rendered under" a "foreign law, legal code, or system."⁶⁸ Additionally, a bill in Iowa defined foreign law as including "a religious law, legal code, accord, or ruling promulgated or made by an international organization, tribunal, or formal or informal administrative body."⁶⁹ Michigan's proposed version of this bill includes language virtually identical to Iowa's legislation.⁷⁰ South Carolina, South Dakota, Texas, and Missouri also had proposed bills with very similar wording.⁷¹

Oklahoma's "Save Our State Amendment"

The Oklahoma constitutional amendment, upon which this paper primarily focuses, falls into the first category, singling out Sharia law (and Islam) for disfavor.

On May 25, 2010, the Oklahoma legislature adopted a resolution to place before the voters a proposed amendment to Article VII of the Oklahoma Constitution.⁷² Article VII is entitled "Judicial Department" and creates and governs Oklahoma's court system.⁷³ Earlier in May of 2010, the resolution passed in both Oklahoma's House and Senate.⁷⁴ If approved by the voters, the resolution would add two new subsections to

67. See Toensing, *supra* note 58.

68. H.R. 1273, 113th Leg., Reg. Sess. (Fla. 2011), available at <http://www.flsenate.gov/Session/Bill/2011/1273>.

69. H.R. 575, 84th Gen. Assemb., Reg. Sess. (Iowa 2011), available at <http://e-lobbyist.com/gaits/text/348560>.

70. Compare *id.*, with H.R. 4769, 96th Leg., Reg. Sess. (Mich. 2011), available at <http://www.legislature.mi.gov/documents/2011-2012/billintroduced/House/pdf/2011-HIB-4769.pdf>, with Iowa H.R. 575.

71. See Raftery, *supra* note 42.

72. H.R. 1056, 52nd Leg., 2nd Reg. Sess. (Okla. 2010), available at <https://www.sos.ok.gov/documents/questions/755.pdf>.

73. Okla. CONST. art. VII.

74. Okla. H.R. 1056.

Article VII, Section 1 of the Oklahoma Constitution.⁷⁵ The effect of these changes would be to enumerate and restrict the sources of law which Oklahoma courts are permitted to consider in deciding cases.⁷⁶ Specifically, Oklahoma courts would be forbidden from “consider[ing] international law or Sharia Law.”⁷⁷ The resolution laid out the text of the proposed constitutional amendment as well as a Ballot Title, a proposed official description of the amendment to appear on the ballot.⁷⁸ The resolution was filed with the Secretary of State on May 25, 2010.⁷⁹

The final text of the State Question that appeared on the ballot is as follows:

STATE QUESTION NO. 755

LEGISLATIVE REFERENDUM NO. 355

This measure amends the State Constitution. It changes a section that deals with the courts of this state. It would amend Article 7, Section 1. It makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. It forbids courts from considering or using Sharia Law.

International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons.

The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Letter from M. Susan Savage, Sec’y of State, Okla., to The Honorable Drew Edmondson, Att’y Gen., Okla. (May 25, 2010) available at <https://www.sos.ok.gov/documents/questions/755.pdf>.

Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed.

SHALL THE PROPOSAL BE APPROVED?

FOR THE PROPOSAL—YES

AGAINST THE PROPOSAL—NO⁸⁰

The two subsections sought to be added to the Oklahoma Constitution provide as follows:

B. Subsection C of this section shall be known as the “Save Our State Amendment”.

C. The Courts provided for in subsection A of this section when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.⁸¹

The house and senate bills creating Question 755 passed in those bodies by overwhelming and bipartisan margins.⁸² A July, 2010 poll found that nearly half of likely voters favored the measure, and that over a quarter

80. Letter from The Honorable Drew Edmondson, Att’y Gen., Okla. to M. Susan Savage, Sec’y of State, Okla. (June 24, 2010), *available at* <https://www.sos.ok.gov/documents/questions/755.pdf>.

81. Okla. H.R. 1056.

82. *Id.*

were undecided.⁸³ However, when presented on the ballot, the State Question passed by a wide margin.⁸⁴ Nearly seven hundred thousand Oklahomans voted yes, while fewer than half that number voted no.⁸⁵

The Constitutional Context: The Religious Liberty Protections of the First Amendment

The First Amendment to the United States Constitution provides “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁸⁶ The very first words of the Amendment create what are known as the Establishment Clause and the Free Exercise Clause.⁸⁷ These two clauses set up the guidelines for the relationship between the state and religion in the United States.⁸⁸

The guidelines these provisions create work as follows: the Establishment Clause maintains that the government may not officially choose between religions—and in some interpretations, between religion and non-religion—in creating law.⁸⁹ The Free Exercise Clause says that the government may not generally prevent a person from believing and advocating a religious message; nor may the government prevent

83. Patrick B. McGuigan, *State Question 755 would ban use of foreign judicial rulings*, CAPITOLBEATOK (Sept. 2, 2010) http://www.capitolbeatok.com/_webapp_3337864/State_Question_755_would_ban_use_of_foreign_judicial_rulings.

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

85. *Id.*

86. U.S. CONST. amend. I.

87. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963).

88. *Id.* at 305 (Goldberg, J., concurring) (“The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.”).

89. *Id.* at 216 (majority opinion); *see also id.* at 306 (Goldberg, concurring); *Wallace v. Jaffree*, 472 U.S. 38, 94–95 (1985) (Rehnquist, C.J., dissenting).

behavior simply because it is religious in nature.⁹⁰ Both of these provisions, originally binding only on the federal government, now bind state governments as well by operation of the Fourteenth Amendment.

The Establishment Clause

The Establishment Clause acts to prevent the spheres of civil government and religion from exerting improper influence on each other. The effect of this clause was famously referred to by Thomas Jefferson as erecting “‘a wall of separation between church and State.’”⁹¹ The metaphor of a wall suggests symmetry—the barrier that keeps religion from unduly interfering with the state likewise keeps the state from meddling in religious matters.

Professor Michael McConnell has defined an establishment as “the promotion and inculcation of a common set of beliefs through governmental authority.”⁹² At this point in time, “[m]odern constitutional doctrine stresses the ‘advancement of religion’ as the key element of establishment.”⁹³ Historically, however, religious groups experienced a great deal of government control, largely through the legislation of religious doctrine and the government’s power to appoint religious leaders.⁹⁴

Thus, a significant purpose of the Establishment Clause is to protect religious groups from the overreaching of the state. In various ways, the Establishment Clause protects both minorities and majorities.

90. *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990) (citing *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)) (holding that government may not regulate religious beliefs); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) (“A state may not wholly deny the right to . . . disseminate religious views.”); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (“[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.”).

91. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

92. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131 (2003).

93. *Id.*

94. *Id.* at 2132.

It protects minority religions from state interference, which could arise where a religious (or secular) majority uses the democratic process to punish a minority. And it protects all religions, popular or unpopular, from state encroachment into purely religious matters.

The Supreme Court has explained that even laws that do not “establish” a state religion may offend the First Amendment by “being a step that could lead to such establishment.”⁹⁵ Three factors, advanced in what is commonly known as the *Lemon* test, have been used to determine whether a law passes muster under the Establishment Clause.⁹⁶ “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”⁹⁷

In *Larson v. Valente*,⁹⁸ the Supreme Court drew a further distinction between laws benefitting all religions in general, and laws that create distinctions among religions. *Larson* sets forth a simplified strict scrutiny test for the latter class of laws: “[W]hen we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.”⁹⁹ The Court further explained that the *Lemon* test is “intended to apply to laws affording a uniform benefit to

95. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

96. More recent Establishment Clause cases have used other related tests, including the Endorsement Test (a test comprising the “primary effect” and “secular legislative purpose” prongs, but excluding the “excessive government entanglement” prong, of the *Lemon* test), *id.*, and the Coercion Test (which proscribes “an attempt to employ the machinery of the State to enforce a religious orthodoxy”), *Lee v. Weisman*, 505 U.S. 577, 592 (1992). Asma T. Uddin points out that “the concern motivating each [of the tests] is whether a given government act has the purpose and/or effect of favoring or disfavoring religion.” Asma T. Uddin, *Evolution Toward Neutrality: Evolution Disclaimers, Establishment Jurisprudence Confusions, and a Proposal of Untainted Fruits of a Poisonous Tree*, 8 RUTGERS J. L. & RELIGION 12 (2007).

97. *Lemon*, 403 U.S. at 612–13 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)) (internal citations omitted).

98. 456 U.S. 228 (1982).

99. *Id.* at 246.

all religions, and not to provisions . . . that discriminate *among* religions.”¹⁰⁰

The Free Exercise Clause

The Free Exercise Clause also protects important rights of members of religious groups. While free exercise protections protect individuals, they also operate on the basis of the association of the individual with a religious group. As one commentator has maintained:

[T]he right to the free exercise of religion is held by individuals rather than groups, just as particular people assert violations of their equal protection rights. In bringing free exercise claims, however, just as in pursuing equal protection ones, the challenger is obliged to describe the collectivity to which she belongs, persuasively alleging its religious character and the nature of the accompanying religious beliefs. Whether or not the Court considers this religious group as the backdrop for an individual’s claim may make the difference in whether it accepts the validity of her free exercise argument.¹⁰¹

Thus, in challenging a law on the basis of the Free Exercise Clause, it is important to show that the improper burden imposed by the law is related to the religious status of the challenger.

The Free Exercise Clause provides different levels of protection to different religious rights. It provides absolute protection from governmental regulation of religious beliefs.¹⁰² “The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment

100. *Id.* at 252.

101. Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and their History*, 47 B.C. L. REV. 275, 285 (2006).

102. “The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all ‘governmental regulation of religious *beliefs* as such.’” *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990) (quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)).

obviously excludes all ‘governmental regulation of religious *beliefs* as such.’”¹⁰³ The right to advocate religious beliefs, while not absolute, is also strongly protected, in much the same way as speech in general is protected. As the United States Supreme Court has underscored:

No one would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon¹⁰⁴

While the right to believe as one chooses and to seek to persuade others of one’s beliefs are important religious rights, the greatest tension arises in the question of the extent to which religiously motivated *actions* are protected from government intrusion. One way the government may seek to reconcile its general laws with the religious convictions of its citizens is through the provision of religious exemptions to certain legal requirements.¹⁰⁵ As discussed below, the Free Exercise Clause provides certain guidance regarding the protection of religiously motivated actions.

At one extreme, the Supreme Court has made it clear that the Free Exercise Clause does not give religiously motivated individuals *carte blanche* to break the law.¹⁰⁶ “[T]he right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”¹⁰⁷ However, it does protect individuals from government discrimination on the basis of religion by allowing for religious exemptions provided on an

103. *Id.*

104. *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).

105. *See* REV. CODE WASH. § 28A.210.090(1)(b) (2011) (providing an example of a religious exemption to a state law requiring school children to receive a certain immunization).

106. *See Smith*, 494 U.S. at 879.

107. *Id.* (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

individualized basis, “in circumstances in which individualized exemptions from a general requirement are available, the government ‘may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.’”¹⁰⁸

Further, in determining whose interests are sufficient to warrant a departure from a common legal scheme, “when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government’s actions must survive heightened scrutiny.”¹⁰⁹ “[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.”¹¹⁰ Notably, one significant interpretation of the First Amendment that has been advanced gives a higher level of protection to individual behavior motivated by religious belief.¹¹¹ This interpretation would demand strict scrutiny of any law burdening religious practice.¹¹²

Thematically, the Free Exercise Clause evidences recognition by the state that, to the extent that government allows citizens discretion in

108. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993) (quoting *Smith*, 494 U.S. at 884).

109. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3rd Cir. 1999). The Third Circuit stated its assumption “that an intermediate level of scrutiny applies since this case arose in the public employment context and since the Department’s actions cannot survive even that level of scrutiny.” *Id.* at 366 n.7.

110. *Church of the Lukumi Babalu Aye*, 508 U.S. at 533 (internal citations omitted).

111. See *Smith*, 494 U.S. at 891–907 (O’Connor, J., concurring).

112. *Id.* at 903 (“The compelling interest test reflects the First Amendment’s mandate of preserving religious liberty to the fullest extent possible in a pluralistic society.”). In 1993, Congress passed the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb–1 (1994). The Act restores the pre-*Smith* strict scrutiny standard, stating, *inter alia*, “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except [where the government can demonstrate that the law passes strict scrutiny].” 42 U.S.C. § 2000bb–1(a). In the case of *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court declared the Act unconstitutional as against the states (but not the federal government). However, several states have since enacted their own versions of the Act. See Eugene Volokh, *Symposium: Intermediate Questions of Religious Exemptions - A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 662 n.2 (1999).

ordering their lives, and absent a compelling government interest to the contrary, such individual ordering should be allowed by the state and done according to one's own religious beliefs.

The Religious Question Doctrine

The First Amendment can be thought of as recognizing two distinct "spheres" in which the separate demands of government and religion operate. "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."¹¹³ There are, however, limits to this separation. At one end of the spectrum, "courts routinely undertake extensive fact-finding into the content of religious doctrines and practices in determining whether a practice or doctrine is 'religious' and therefore subject to the protections of the Religion Clauses and statutes addressing religion."¹¹⁴ Professor Jared Goldstein points out that "[f]actual inquiry into the meaning and content of religious doctrines and practices thus cannot plausibly be prohibited as long as courts are called upon to construe and apply the Religion Clauses and myriads of statutes giving special treatment to religion."¹¹⁵ At the other extreme, courts may not decide the validity of religious truth.¹¹⁶ For example, *United States v. Ballard* involved charges of mail fraud against Guy Ballard, the founder of the "I Am" movement.¹¹⁷ The indictment stated that members of the I Am movement mailed literature claiming that Ballard had supernatural abilities allowing him, among other things, to heal the sick.¹¹⁸ According to the indictment, the followers knew these claims to be false and made them only to swindle people of their money.¹¹⁹ The court of appeals stated that the defendants could be found

113. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).

114. Jared A. Goldstein, *Is There A "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 538 (2005).

115. *Id.* at 528.

116. *See United States v. Ballard*, 322 U.S. 78 (1944).

117. *Id.* at 79.

118. *Id.* at 79-80.

119. *Id.* at 80.

guilty only if a jury determined that the claims were false.¹²⁰ The Supreme Court, however, disagreed, stating that the Religion Clauses prohibited any inquiry into the truth or falsity of religious beliefs.¹²¹ In a dissent, Chief Justice Stone wrote that defendants could be found guilty only if it was found that they did not sincerely believe their religious beliefs.¹²²

The intermediate case of the competence of a court to adjudicate the content of a religious doctrine is more complex. Early on, the Supreme Court stated that “[i]t is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own.”¹²³

More recently a class of cases has arisen in which courts have been asked to decide between competing views of orthodoxy. When a local church and its denomination disagree over matters of doctrine, a local church will sometimes break away from its denomination.¹²⁴ Such a withdrawal can produce a property dispute between the local church and the denomination.¹²⁵ A Georgia case that came before the United States Supreme Court involved such an instance.¹²⁶

In *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, the dispute went to the jury on the theory that “Georgia law implies a trust of local church property for the benefit of the general church on the sole condition that the general church adhere to its tenets of faith and practice existing at the time of affiliation by the local churches.”¹²⁷ Thus the jury was required to decide “whether the actions of the general church ‘amount to a fundamental or substantial abandonment of the original tenets and doctrines of the [general church], so that the new tenets and doctrines are utterly variant from the purposes

120. *Id.* at 83.

121. *Id.* at 88.

122. *Id.* at 89–90 (Stone, C.J., dissenting).

123. *Watson v. Jones*, 80 U.S. 679, 729 (1871).

124. *See Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 442–43 (1969).

125. *Id.*

126. *See Blue Hull Mem’l*, 393 U.S. 440 (1969).

127. *Id.* at 443.

for which the [general church] was founded.”¹²⁸ Though the jury found for the local churches,¹²⁹ the Supreme Court held that the First Amendment allows “the civil courts *no* role in determining ecclesiastical questions in the process of resolving property disputes.”¹³⁰ Civil courts cannot “determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion.”¹³¹

What allows the court to look into the content of a religion in the context of assessing a free exercise claim on the one hand, but prohibits it from deciding a property dispute on the other hand? Professor Kent Greenawalt argues that the difference is in the selection among competing religious claims. Greenawalt maintains:

Were the courts to delve into religious doctrines to resolve intrachurch property disputes, they would be choosing the understanding of one group of sincere worshippers over the understanding of another such group. These disputes arise just because practitioners understand the requisites of their faith in sharply opposed ways. To decide in favor of one side promotes the exercise of religion of that side at the expense of the exercise of religion of the other side. By contrast, if the courts make some inquiry into the content of the religious belief of an individual who seeks an exemption from some standard requirement (say, to be willing to work on Saturday in order to receive unemployment compensation), it may fail to keep its hands off; but it does something that is necessary to facilitate certain forms of free exercise, it does not need to resolve any competing religious claims, and it does not frustrate the

128. *Id.* at 443–44 (reviewing jury instructions).

129. *Id.* at 444.

130. *Id.* at 447.

131. *Id.* at 450.

religious exercise of one of two competing groups.¹³²

This analysis makes sense in light of the conceptualization of free exercise rights as individual rights enjoyed on the basis of membership in a religious group. The court needs to test the claim of the individual against the backdrop of the group, but may not prefer the understanding of one group to that of another.

However, Professor Goldstein has argued that a court should be free to examine the existence and content of doctrines in a manner that does not pass judgment on the actual truth of those doctrines.¹³³ As Goldstein states:

[J]udicial examination of positive questions about religion is *not* akin to judicial examination of normative religious questions. To describe is not to judge, and the determination of what beliefs people hold does not require a determination of whether those beliefs are correct. Judicial examination of the content of religious doctrine is more akin to judicial determinations of the content of foreign law: when a court determines what the law of England or Italy is, it does not judge the validity of those countries' laws or endorse the policies behind those laws. Courts are just as capable of determining what Judaism or Hinduism have to say as they are at determining what the laws of Israel or India are.¹³⁴

The question of what religious determinations a court may make presents a challenge. As the Supreme Court indicated, religious experts are presumably more competent in religious questions than civil judges.¹³⁵ Goldstein, however, argues that judges are intellectually as competent to

132. Kent Greenawalt, *Hands Off: When and About What*, 84 NOTRE DAME L. REV. 913, 913–14 (2009).

133. See Goldstein, *supra* note 114, at 538.

134. *Id.*

135. See *Blue Hull Mem'l*, 393 U.S. at 447.

ascertain the content of religious doctrine as they are any other kind of law.¹³⁶

Questions of competence aside, however, the very intrusion of civil authorities into matters of religious doctrine can lead to an imposition of one interpretation or version of the religion on members of the faith who may disagree with that interpretation.¹³⁷ As such, while courts routinely make certain basic determinations regarding the religious status of doctrines, courts are hesitant to settle disputes internal to a religion.

Awad v. Ziriaux: The Lawsuit Challenging Oklahoma's "Save Our State Amendment"

On Tuesday, November 2, 2010, Oklahoma held its statewide general election.¹³⁸ State Question 755, the ballot initiative presenting the "Save Our State Amendment," passed by a wide margin.¹³⁹ On Thursday, November 4, Mr. Muneer Awad, the executive director of the Oklahoma chapter of the Council on American Islamic Relations, and an Oklahoma City resident, filed suit against members of the State Board of Elections to prevent them from certifying the election results for that question.¹⁴⁰ On November 22, Oklahoma attorney Michael Salem entered his

136. Goldstein, *supra* note 114, at 538.

137. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717–18 (1981). Stating:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Id.

138. OKLA. STATE ELECTION BD., *supra* note 84.

139. *Id.*

140. Complaint Seeking a Temporary Restraining Order and Preliminary Injunction at 1–4, *Awad v. Ziriaux*, 754 F. Supp.2d 1298 (W.D. Okla. 2010) (No. CIV–10–1186–M), *aff'd*, No. 10–6273, 2012 WL 50636 (10th Cir. Jan. 10, 2012).

appearance for Mr. Awad, as a cooperating attorney for the American Civil Liberties Union Foundation of Oklahoma.¹⁴¹

On November 29, Judge Vicki Miles-LaGrange granted Mr. Awad's request for a preliminary injunction.¹⁴² Thereafter, Defendants appealed to the Tenth Circuit Court of Appeals.¹⁴³ In the appeal, Salem, as well as Daniel Mach and Heather Weaver of the American Civil Liberties Union, represented Awad.¹⁴⁴

In his case against the Save Our State Amendment ("SOS Amendment"), Mr. Awad argued that the SOS Amendment violates his rights under both the Establishment Clause and the Free Exercise Clause.¹⁴⁵

1. The Establishment Clause Claim: The Amendment Sends an Official State Message of Disfavor for Mr. Awad's Faith

As stated above, the SOS Amendment provides that Oklahoma courts "shall not consider international law or Sharia Law," and that the courts may not look to the laws of other states if those laws "include Sharia Law."¹⁴⁶ The State Question described Sharia Law in definite religious terms, as "Islamic Law," based on "the Koran and the teaching of Mohammed."¹⁴⁷ Thus, Sharia Law is the only particular body of law specifically proscribed by the amendment.

Awad argued that the SOS Amendment labels him as a political and social outsider because of his Islamic practice and belief; characterizes his Islamic religious beliefs as a threat from which Oklahoma must be saved; and conveys "the unmistakable message that [his Muslim] faith is officially disfavored by the State generally, and the judicial system, in particular."¹⁴⁸ As such, Awad argued, the State has

141. Entry of Appearance at 1, *Awad*, 754 F. Supp.2d 1298 (No. CIV-10-1186-M).

142. *Awad*, 754 F. Supp.2d at 1299.

143. *Awad*, 2012 WL 50636, at *3.

144. See Brief for Plaintiff, at 1, *Awad*, 2012 WL 50636 (No. 10-6273).

145. See *id.*

146. See *supra* note 81 and accompanying text.

147. See *supra* note 80 and accompanying text.

148. Brief for Plaintiff, *supra* note 144, at 44.

made an official choice of a religion to treat with special disfavor.¹⁴⁹ Since the Establishment Clause prohibits the state from favoring any particular religion, it follows logically that the state may not disfavor a particular religion.

2. The Free Exercise Clause Claim: The Amendment Makes Mr. Awad Uniquely Unable to Draft a Reliable Will Without “Scrubbing” It of Religious Terms

Awad’s last will and testament provides for certain charitable allotments to be made “in a manner that does not exceed the proscribed limitations found in Sahih Bukhari, Volume 4, Book 51, Number 7.”¹⁵⁰ Sahih Bukhari is a highly respected collection of the “sayings and deeds of Prophet Muhammed,”¹⁵¹ and the cited provision appears to set a cap on the amount of property that a decedent may give to charity by will.¹⁵² It also provides for the preparation of Awad’s body in a manner that “comports precisely with the hadith enumerated in Sahih Bukhari, Volume 2, Book 23, Number 345,”¹⁵³ and for “a burial plot that allows my body to be interned [sic] with my head pointed in the direction of Mecca.”¹⁵⁴ These deeply significant instructions flow from “what [the SOS Amendment] defines as Sharia law.”¹⁵⁵

Awad argued that the SOS Amendment interferes with the operation of his last will and testament.¹⁵⁶ Because his will “refers to and incorporates his Islamic religious beliefs,” the amendment “will render those will provisions unenforceable.”¹⁵⁷ Even though it is not possible to know, before his will is probated, how a court will handle the portions of

149. *Id.*

150. *Id.* at 70 (Attachment 2, Redacted Last Will and Testament of Muneer Awad).

151. See SAHIH-BUKHARI, <http://www.sahih-bukhari.com/> (last visited Jan. 31, 2012).

152. See *Wills and Testaments (Wasayaa)*, ISLAMICITY.COM, <http://www.islamicity.com/mosque/sunnah/bukhari/051.sbt.html> (last visited Jan. 31, 2012).

153. Brief for Plaintiff, *supra* note 144, at 69.

154. *Id.* at 69–70.

155. *Id.* at 12.

156. *Id.* at 22.

157. *Id.*

the will that incorporate these religious beliefs, the presence of the amendment creates a “cloud of uncertainty over the will’s full enforceability because of its religious references.”¹⁵⁸

As such, Awad argued, the SOS Amendment “imposes a special disability on Mr. Awad and other Muslims seeking relief in the state courts in a variety of contexts. While citizens of other faiths need not scrub religious expression and terms from their legal documents to protect their enforceability, Muslims must.”¹⁵⁹ This disability represents a burden placed on Awad by the state, in contravention of the Free Exercise Clause, simply because of the particular religious nature of his activities.

First Amendment Analysis of Ballot Measures: Additional Considerations

The First Amendment analysis of Oklahoma’s anti-Sharia initiative raises a few issues unique to voter-approved ballot measures. Unlike anti-Sharia bills proposed and passed by the legislature, the intent behind ballot measures is more difficult to ascertain, as it is thousands of voters who are ultimately responsible for enacting a ballot referendum. As a general rule, voter animus is difficult to prove and the law discourages any such probing. As the Ninth Circuit has noted in such cases, “[i]f the true motive is to be ascertained not through speculation but through a probing of the private attitudes of the voters, the inquiry would entail an intolerable invasion of the privacy that must protect an exercise of the franchise.”¹⁶⁰

There are, however, cases where the legislative intent behind ballot referendums can be appropriately assessed.¹⁶¹ *Southern Alameda*¹⁶² is distinguishable from *Reitman v. Mulkey*, where the Supreme Court held that inquiry into voter intent is permissible if a state law significantly encourages and involves the state in private

158. *Id.* at 23.

159. *Id.* at 32.

160. *Southern Alameda Spanish Speaking Org. v. City of Union City, Cal.*, 424 F.2d 291, 295 (9th Cir. 1970) (citing *Spaulding v. Blair*, 403 F.2d 862 (4th Cir. 1968)).

161. *See generally id.*

162. 387 U.S. 369 (1967).

discrimination.”¹⁶³ Beyond voters, the Supreme Court in *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*¹⁶⁴ clarified that “statements made by decision-makers or referendum sponsors during deliberation over a referendum may constitute relevant evidence of discriminatory intent in a challenge to an *ultimately enacted* initiative.”¹⁶⁵ The Oklahoma anti-Sharia initiative is an enacted referendum, and it is thus entirely appropriate to inquire into the intent of referendum sponsors.

Moreover, as described above, a law is subject to attack under the Establishment Clause not only if it fails to have a secular purpose, but also if its primary effect is to advance or inhibit religion.¹⁶⁶ And, if the law encourages excessive entanglement between the state and religion, it is equally open to attack.¹⁶⁷ As such, regardless of whether legislative animus can be proven, the Oklahoma measure remains vulnerable to First Amendment critique if it fails to satisfy the remaining two prongs of the *Lemon* test.¹⁶⁸

Threshold Inquiries: Standing, Ripeness, and Irreparable Harm

Some of the primary issues on appeal to the 10th Circuit were whether Awad had standing to bring his First Amendment claims,¹⁶⁹ whether his claims were ripe for adjudication,¹⁷⁰ and whether the harms he claims were irreparable.¹⁷¹

163. See *City of Union City*, 424 F. 2d at 295 (discussing *Reitman v. Mulkey*, 387 U.S. 369 (1967)).

164. 538 U.S. 188 (2003).

165. *Id.* at 196–97 (emphasis added).

166. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

167. *Id.* at 612–13.

168. *Id.*

169. See Reply Brief of Defendants/Appellants at 12, *Awad v. Zinax*, No. 10-6273, 2012 WL 50636 (10th Cir. Jan. 10, 2012).

170. *Id.* at 2.

171. *Id.* at 9–10.

1. The District Court Holding

In considering his request for a temporary restraining order on the certification of the election results, the Western District of Oklahoma found that Awad satisfied the three requirements necessary to demonstrate standing: (1) the party suffers from an “injury in fact,” which is a “concrete and particularized,” not hypothetical; (2) a party’s injury is “traceable to the challenged action” of the defendant before the court; and (3) “that injury is likely to be redressed by a favorable decision.”¹⁷² In applying the first factor, the District Court found that Mr. Awad will suffer an injury in fact, namely a violation of his First Amendment freedoms.¹⁷³ The court reasoned that, by singling out Muslims and Sharia law, Awad would be stigmatized in the political community because of the specific condemnation of his religion.¹⁷⁴ The court also held that the law would have a chilling effect on Awad’s practice of his religion,¹⁷⁵ and that he would suffer a particular injury when his last will and testament would be unenforceable under the Amendment.¹⁷⁶

On the question of whether Awad’s claims were ripe for adjudication, the court found in favor of Awad.¹⁷⁷ It noted that, for a claim to be justiciable under Article III, the question of ripeness must not focus on “whether the plaintiff was in fact harmed, but rather whether the harm asserted [by the plaintiff] has matured sufficiently to warrant judicial intervention.”¹⁷⁸ Moreover, a court should consider whether or not a case involves assertions that are contingent or “may not occur at all,” while deeming those that will likely or most definitely occur as ripe for consideration.¹⁷⁹ In so considering, the court expressed unequivocal

172. *Awad v. Zirrax*, 754 F. Supp.2d 1298, 1302 (W.D. Okla. 2010), *aff’d*, No. 10-6273, 2012 WL 50636 (10th Cir. Jan. 10, 2012) (quoting *Hydro Res., Inc. v. U.S. Envtl. Prot. Agency*, 608 F.3d 1131, 1144 (10th Cir. 2010)).

173. *Id.* at 1303.

174. *Id.* at 1303–04.

175. *Id.*

176. *Id.* at 1304.

177. *Id.*

178. *Id.* (quoting *Kan. Judicial Review v. Stout*, 519 F.3d 1107, 1116 (10th Cir. 2008)).

179. *Id.* (quoting *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1097 (10th Cir. 2006)).

support for Awad, finding that he clearly satisfied the ripeness test; it stated that the “plaintiff’s alleged injury does not depend on any uncertain, contingent future events; all that is remaining is the ministerial task of defendants certifying the election results.”¹⁸⁰ Furthermore, the court points out that there is “no need . . . to wait for . . . Oklahoma court[s] to interpret said Amendment”; the Plaintiff is only asserting a facial challenge, and so only a facial reading of the Amendment is necessary.¹⁸¹

The court also ruled that Awad would suffer irreparable harm to his First Amendment rights as a result of the enactment of the anti-Sharia bill; according to the court, as a rule, “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”¹⁸² In addressing the Defendant’s claim that the harm to voters in delaying their will outweighed the harm suffered by Awad, the court emphasized the rights enshrined in the Bill of Rights, noting that individual rights cannot be taken away by the will of the majority.¹⁸³

The court also stressed that the anti-Sharia bill was enacted as a “preventative measure” to disable Sharia law from being applied in Oklahoma courts.¹⁸⁴ In other words, Oklahoma voters were not addressing a current problem; when questioned by judges, Defendants’ could not confirm that Oklahoma courts had ever applied Sharia law. The court held that the harm to Awad outweighed the majority’s right to vote on an issue that was not even a current threat to Oklahomans.¹⁸⁵

2. Tenth Circuit Appeal¹⁸⁶

In their briefing at the appellate level, Defendants countered each of the above holdings by the District Court.¹⁸⁷ They argued that a

180. *Id.* at 1305.

181. *Id.*

182. *Id.* at 1307 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

183. *Id.* at 1308.

184. *Id.*

185. *See id.*

186. This article was written before the 10th Circuit issued its decision affirming the District Court on January 10, 2012. *See Awad v. Ziriach*, 2012 WL 50636 (10th Cir. Jan. 10, 2012).

187. *See generally* Reply Brief of Defendants/Appellants, *supra* note 169.

conjectural or hypothetical injury is not enough for a plaintiff to assert a claim; Article III requires that a plaintiff must suffer an “injury in fact.”¹⁸⁸ An “injury in fact” is “an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, i.e., not conjectural or hypothetical.”¹⁸⁹ In other words, to show standing, a plaintiff must suffer a “present or imminent injury, as opposed to a mere possibility, or even probability of future injury.”¹⁹⁰

Standing is determined as of the date the complaint is originally filed, in this case, November 4, 2010.¹⁹¹ Defendants argued that, as of this date, Awad had not suffered an immediate injury.¹⁹² Rather, Awad’s claim that the anti-Sharia amendment condemned his religion was, according to Defendants, merely a personal opinion and did not establish imminent injury.¹⁹³

The District Court found that Mr. Awad had standing because the anti-Sharia amendment conveyed “an official government message of disapproval and hostility toward [Awad’s] religious beliefs . . . forcing him to curtail his political and religious activities.”¹⁹⁴ Defendants argued that feelings of offense and alienation do not constitute injuries in fact, and thus cannot confer standing.¹⁹⁵ Furthermore, on Awad’s Establishment claim, Defendants contend that, until Oklahoma courts interpret the amendment, any assertion that it leads to excessive entanglement between religion and state is mere speculation.¹⁹⁶

Defendants also argued that Awad’s claim was not ripe for judicial consideration.¹⁹⁷ To determine ripeness, a court should look to (1) “the fitness of the issues for judicial decision”; and (2) any “hardship

188. *See id.* at 12–13.

189. Opening Brief of Defendants/Appellants at 12, *Awad v. Zinax*, 2012 WL 50636 (No. 10-6273) (citing *Essence, Inc. v. City of Fed. Heights*, 285 F.3d 1272, 1280 (10th Cir. 2002)).

190. *Id.* (quoting *Rector v. City & Cnty. Of Denver*, 348 F.3d 935, 942–43 (10th Cir. 2003)).

191. *See id.* at 14.

192. *Id.*

193. *Id.*

194. *Awad v. Ziriya*, 754 F.Supp. 2d 1298, 1303 (W.D. Okla. 2010), *aff’d*, 2012 WL 50636 (No. 10-6273).

195. Reply Brief of Defendants/Appellants, *supra* note 169, at, 8–9.

196. *Id.* at 2, 11–12.

197. *See id.* at 2.

[imposed on the parties by] withholding court consideration.”¹⁹⁸ Defendants pointed out that courts are very careful to abide by these factors, especially when the electorate has voted on a proposition and there is no showing of direct harm.¹⁹⁹ Defendants cited *Diaz v. Board of County Commissioners of Dade County*,²⁰⁰ which emphasized that, where a proposition is passed by voters and is then challenged for its constitutional validity, it is imperative that it is first interpreted as constitutionally repugnant before a court halts the people’s right to enact ordinances.²⁰¹ The case should otherwise be deemed unripe for judicial consideration and a preliminary injunction should not be granted.²⁰² Defendants asserted that Awad and the District Court speculated as to the judicial interpretation of the anti-Sharia bill, construing its meaning in only one way, that is, as a limitation on the practice of Islam.²⁰³ Defendant argued that this was neither the meaning nor the intent of the law, and that Oklahoma courts could feasibly interpret the bill in a manner that would not violate any citizen’s First Amendment freedoms.²⁰⁴

Finally, Defendants maintained that Awad failed to make a showing that he would suffer irreparable harm by virtue of the bill being enacted into law.²⁰⁵ Defendants agreed with the District Court that, “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”²⁰⁶ However, they argued that the court failed to find that the plaintiff would suffer a clear and definite injury, aside from the bill’s potential to “villainize and demonize the Muslim community of Oklahoma.”²⁰⁷ Defendants argued that such demonization does not amount to an injury because “[m]ere

198. Opening Brief of Defendants/Appellants, *supra* note 189, at 15 (quoting *Weber v. Lockyer*, 365 F. Supp. 2d 1119, 1124 (N.D. Cal. 2005)).

199. *See id.*

200. 502 F. Supp. 190 (S.D. Fla. 1980).

201. *See id.* at 194.

202. *See id.*

203. *See* Reply Brief of Defendants/Appellants, *supra* note 169, at 7–9.

204. *Id.* at 9–10.

205. *See* Opening Brief of Defendants/Appellants, *supra* note 189, at 12–14.

206. *Id.* (quoting *Elrod v. Burns*, 472 U.S. 347, 373 (1976)).

207. *Id.*

personal offense to governmental action does not give rise to standing to sue.”²⁰⁸

Defendants also disagreed with the District Court that Awad’s injury outweighed the injury suffered by the voters, whose will was subverted by the ruling in favor of Awad.²⁰⁹ The fundamental right of citizens to vote for particular propositions should be overruled only by a showing of clear and direct harm to protected freedoms.

In his reply, Awad reiterated his initial positions.²¹⁰ On the issue of standing, he asserted that the anti-Sharia bill, once enacted, would prevent him from executing his last will and testament;²¹¹ he argued that the only way reasonable application of the Amendment would be one that prevented the probating of wills that incorporate “elements of the Islamic prophetic traditions.”²¹² Under the amendment, Awad argued, he would be forced to either rewrite his will, or be left with a cloud of doubt over whether or not his last will and testament will be upheld according to the dictates of his faith.²¹³ More broadly, he emphasized that the amendment violated the core Establishment Clause principle of official neutrality among religions because it singled out Sharia law as the only enumerated prohibited religious law.²¹⁴

Awad further argued that his claim was ripe for the same reasons that he had standing to bring suit:²¹⁵ the bill, once enacted into law, would render his last will and testament void, or at the very least cast serious doubt on its enforceability.²¹⁶ Because this harm was enough to create a case or controversy, it was ripe for adjudication.²¹⁷

Finally, he contended that there existed a clear and direct harm to him, because the amendment was detailed in the absolute prohibition of any reference to Sharia law in the state of Oklahoma; state courts are

208. *Id.* at 18–19.

209. *See* Reply Brief of Defendants/Appellants, *supra* note 169, at 12–14.

210. *See generally* Plaintiff-Appellee Awad’s Response Brief, *Awad v. Zirioux*, No. 10-6273, 2012 WL 50636 (10th Cir. Jan. 10, 2012).

211. *Id.* at 22.

212. *Id.* at 22–23.

213. *Id.* at 23.

214. *Id.*

215. *Id.* at 27.

216. *Id.* at 27–28.

217. *Id.* at 27.

prohibited from looking to, considering, or using Sharia law for any purpose.²¹⁸ Awad would be forced to rewrite his will, “eliminating all religious expression and Islamic references”—a burden that the Jewish or Christian citizens of Oklahoma would not similarly face.²¹⁹ He added that the harm left “Muslims without judicial recourse unless they can closet their faith by devising a way to assert free exercise rights without reference to their religion.”²²⁰ This, he argued, violates the Free Exercise Clause and presents a harm addressable by a court of law.²²¹

The Tenth Circuit heard oral arguments in the case on September 13, 2011, and has not yet issued its opinion.²²² During arguments, the judges focused on one primary question to the Defendants: does this law not single out Muslims and disfavor Islam as a religion?²²³ Defendants argued that it would not because the law was not intended to be discriminatory and seeks to address only those portions of Sharia that would trump U.S. law.²²⁴

On October 12, 2011, the Tenth Circuit issued an order requesting parties to submit supplemental briefing on two issues:

1. Should the test set forth in *Larson v. Valente*, 456 U.S. 228 (1982), govern the Establishment Clause issue in this case? See also *Hernandez v. Commissioner*, 490 U.S. 680 (1989); *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). Why or why not?
2. How should the Establishment Clause issue be analyzed and decided under the Larson test, assuming it does apply?²²⁵

218. *Id.* at 31.

219. *Id.*

220. *Id.* at 32.

221. *Id.*

222. *See supra* note 186.

223. John Ingold, *Denver's 10th Circuit Court in Spotlight as it Considers Oklahoma's Shariah-law Case*, DENVER POST, Sept. 13, 2011 at B2, available at http://www.denverpost.com/news/ci_18881457.

224. *Id.*

225. *See Order*, *Awad v. Zirriax*, No. 10-6723, 2012 WL 50636 (10th Cir. Jan., 2012).

The parties filed briefs on November 2, 2011. Defendants argued that the *Larson* test²²⁶ is inapplicable because “[a] ‘denominational preference’ exists only when a law’s *primary* effect is to intentionally discriminate among religions,”²²⁷ and the SOS Amendment’s “*primary effect* is to regulate Oklahoma judges, not to advance preferred religions at the expense of others.”²²⁸ Defendants argued that the 10th Circuit should apply the *Lemon* test, but that even if they applied the *Larson* test, the SOS Amendment would pass muster,²²⁹ because it is “narrowly tailored to further Oklahoma’s compelling interest in regulating what law is applied in its courts.”²³⁰

Awad argued that the *Larson* test does apply, as the SOS Amendment “imposes precisely the sort of denominational preference forbidden by *Larson*.”²³¹ Awad argued that the Amendment “facially targets one religious tradition for disfavored treatment, and therefore triggers strict scrutiny review that it cannot possibly survive.”²³²

First Amendment Analysis of the Save Our State (“SOS”) Amendment

Assuming Mr. Awad is found to have standing to bring the suit, the court will evaluate his claims in light of the First Amendment’s Establishment Clause and Free Exercise Clause. Further, in addition to the specific claims set forth by Awad, the SOS Amendment raises several other issues requiring First Amendment analysis.

226. “[W]hen we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.” *Larson v. Valente*, 456 U.S. 228, 246 (1982).

227. Supplemental Brief of Appellants at 4, *Awad*, 2012 WL 50636 (No. 10-6273).

228. *Id.* at 6.

229. *Id.* at 9.

230. *Id.* at 16.

231. Plaintiff-Appellee Awad’s Supplemental Brief at 2, 5, *Awad*, 2012 WL 50636 (No. 10-6273).

232. *Id.* at 11.

Awad's Establishment Clause Claim: State Disfavor of Islam

As explained above, Awad's Establishment Clause argument is that the SOS Amendment sends an official state message of disfavor for Awad's faith. As discussed below, more important than any claims of stigmatization is the effect this unique disfavoring has on Muslims selecting desirable arbitration options and seeking to enforce legal documents based on Sharia principles.

Moreover, to pass Establishment Clause muster, a law must pass each prong of the *Lemon* test.²³³ First, it "must have a secular legislative purpose."²³⁴ While the provisions of the SOS Amendment relating to international law may be entirely motivated by secular considerations, it is implausible that the repeated references to Sharia law are so motivated. In defining Sharia law for voters, the ballot language stated simply: "Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed."²³⁵ Indeed, the bill's legislative sponsor believed the effect of the bill was that it would close a "backdoor way to get Sharia law into courts" by preventing parties from "say[ing] we want to be bound by Islamic law and then ask[ing] the courts to enforce those agreements."²³⁶ In fact, dispute resolution based on the principles of a variety of religions is common in the United States.²³⁷ Seeking to prevent parties from using Islamic principles in particular—but not those of any other faith—demonstrates a sectarian, not a secular, purpose.²³⁸

233. See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

234. *Id.* at 612.

235. See *supra* note 80.

236. Michael A. Helfand, Op-Ed., *A Law We Don't Need*, L.A. TIMES, Nov. 10, 2010, <http://articles.latimes.com/2010/nov/10/opinion/la-oe-helfand-oklahoma-20101110>.

237. See *id.* "In reality, such arbitration is well established. For nearly half a century, Jewish, Christian and Muslim tribunals have operated in the United States in concert with government courts." *Id.*

238. In contrast, see *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043 (9th Cir. 2009), where the court held that the City of San Francisco did not violate the Establishment Clause in passing a non-binding resolution opposing a Vatican directive that the Catholic archdiocese stop placing children in need of adoption with homosexual households. See *id.* Although the resolution on its face opposed a Catholic measure, the court held that the primary

Awad's Free Exercise Clause Claim: Enforcement of Islamically-Based Will

Awad's Free Exercise Clause argument is that the amendment makes Mr. Awad uniquely unable to draft a reliable will without "scrubbing" it of religious terms.²³⁹ The reason for this is that his will makes reference to religious instructions contained in sources that, under the SOS Amendment, would be classified as Sharia law.²⁴⁰ These instructions involve, among other things, the distribution of Awad's assets and the preparation and interment of his body.²⁴¹ The instructions flow from specific sources within the corpus of Sharia law, and verifying the proper execution of the instructions could require a court to make a basic analysis of the sources.²⁴²

The Defendants in Awad's case disagree, stating:

The measure is merely a choice of law provision, applicable to the courts of Oklahoma. It neither favors nor discriminates against any religion. The

purpose of the resolution was not to express disapproval of Catholic beliefs, instead, the

'objective observer' who is . . . 'familiar with the history of the government's actions and competent to learn what history has to show' would conclude that the defendants acted with a predominantly secular purpose, i.e., to promote equal rights for same-sex couples in adoption and to place the greatest number of children possible with qualified families. Moreover, San Francisco has a well-known and lengthy history of promoting gay rights A reasonable observer would consider the resolution in the context of both this history and the Catholic Church's unabashed efforts to frustrate same-sex adoption in San Francisco, the defendants' political bailiwick. In light of this context, such an observer would conclude that the primary purpose behind the resolution was secular—to promote same-sex adoption.

Id. at 1060–61 (Silverman, J., concurring) (internal citations and quotation marks omitted). A similarly secular purpose is unavailable in the case of the Oklahoma State Question 755, and the objective outsider could not conclude otherwise.

239. See Plaintiff-Appellee Awad's Response Brief, *supra* note 240, at 31.

240. See *supra* notes 146–59 and accompanying text.

241. *Id.*

242. *Id.*

measure bans Oklahoma courts from considering the laws of other nations and cultures, regardless of the religious origins of such laws, if any. It is therefore a neutral law of general applicability and does not raise free exercise concerns.²⁴³

However, as the lower court pointed out, “the actual language of the amendment reasonably, and perhaps more reasonably, may be viewed as specifically singling out Sharia Law (plaintiff’s faith) and, thus, is not facially neutral.”²⁴⁴ Indeed, Defendants’ argument that the amendment merely bans consideration of “the laws of other nations and cultures, regardless of the religious origins of such laws, if any” does not make sense.²⁴⁵ By its own terms, the SOS Amendment takes aim at exactly two sources of law, “international law” and “Sharia law.”²⁴⁶ Sharia law is defined, in the language of the ballot initiative, in purely religious terms.²⁴⁷ Far from being the law of another nation or culture, Sharia represents the religious convictions of many Americans, including Awad.

Under current First Amendment jurisprudence, “if the object of a law is to infringe upon or restrict practices because of their religious motivation,” the government will have the last word only in cases where it can show a compelling interest in its desired purpose and where it narrowly tailors a legal requirement to that interest.²⁴⁸ And because the amendment’s plain language and legislative history show that the object of the Sharia provision is to create a restriction based solely upon religious (Islamic) consideration, the compelling interest/narrowly tailored test is appropriate to the SOS Amendment.

Significantly, the District Court found that the defendants “presented no evidence which would show that the amendment is justified by any compelling interest or is narrowly tailored.”²⁴⁹ It would, of course, be possible for Sharia law, in certain situations, to require

243. Reply Brief of Defendants/Appellants, *supra* note 169, at 33.

244. *Awad v. Zirriax*, 754 F. Supp. 2d 1298, 1307 (W.D. Okla. 2010), *aff’d* No. 10-6273, 2012 WL 50636 (10th Cir. Jan. 10, 2012).

245. Opening Brief of Defendants/Appellants, *supra* note 189 at 27–29.

246. *See supra* note 80.

247. *See supra* note 80.

248. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (citations omitted).

249. *Awad*, 754 F.Supp.2d at 1307.

results that the government has a compelling interest in preventing. A hypothetical conflict between the laws of Oklahoma and Sharia law posited by the Defendants gives an example: “if Sharia law so provided, Mr. Awad could not provide in his will for his wife to receive none of the property they acquired during their marriage.”²⁵⁰ However, even in the face of a compelling interest, a state may not infringe the Free Exercise rights of its citizens by a law that is not narrowly tailored to protecting that interest.²⁵¹ Considering the wide range of application of Sharia principles in the lives of Muslims, a blanket ban of all Islamic law is plainly not narrowly tailored.

To the extent that the enforcement of Awad’s will would require the court to decide a contest between two interpretations of Islam, the religious question doctrine, described above, already acts to prevent that. However, where a court simply looks for guidance to clear principles of law or religion referenced in a will, nothing should prevent the implementation of Awad’s desires. To deny Awad the ability to make these important decisions with reference to the principles of his religion flies in the face of the religious freedom the First Amendment guarantees.

Further Issues Requiring First Amendment Analysis

The SOS Amendment, if implemented, would have a wide range of effects. Awad identified two, discussed above.²⁵² Beyond these two effects is a host of other effects that remain to be considered. These include preventing judges from properly considering factors relevant to the background of a dispute, limiting judges’ ability to craft equitable remedies, and providing unequal protection for persons who make use of private Islamic arbitration.

Because of the “wall of separation”²⁵³ created by the Establishment Clause, the only way in which U.S. citizens may become

250. Opening Brief of Defendants/Appellants, *supra* note 189, at 35.

251. See *Church of Lukumi Babalu Aye*, 508 U.S. at 546 (“To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance ‘interests of the highest order’ and must be narrowly tailored in pursuit of those interests.” (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978))).

252. Brief for Plaintiff, *supra* note 144, at 32, 44.

253. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1946).

bound by religious law, or by any non-U.S. law, is by their own choice. The submitting of parties to private or religious law happens constantly in our society. Every valid contract entered into by two parties becomes, as between them, a source of private law. The law embodied in private contracts is neither federal nor state law—rather, it is a binding agreement freely entered by the parties. Similarly, when Awad made his will and incorporated specific provisions motivated by his Islamic faith, he made a free choice as to the disposition of his assets and the manner of his burial. That Americans have the freedom to make such choices, where the choices themselves do not conflict with society's greater interests, is beyond debate.

The Relevance of Sharia Law to the Background of a Dispute

If two Muslims enter into a contract that requires one to do something that makes reference to an Islamic concept, a court might need to examine what each party believed the import of the contract to be. Examples could include an employment contract under which an employer agrees to allow an employee to perform daily prayers, to make a Hajj pilgrimage, or to come to work at a different time on the days of Ramadan. If the Muslim party seeks to enforce this contract, there may not be a dispute about the appropriate interpretation of the religious doctrines implicated. Rather, the dispute may be about whether the two parties ever formed a meeting of the minds with regard to the contract. In order to ascertain what was in the mind of the parties, the court might find it necessary to examine basic Sharia law concepts.

Alternatively, if one party contracted to provide for the other party to make the Hajj pilgrimage and defaulted on the contract, the court might order the defaulting party to pay to the other party an amount of money that would allow him or her to make such a pilgrimage. Such a calculation would not entail the decision of a religious dispute, but would require the court to have a basic understanding of what a Hajj pilgrimage is within the context of Islam. In these cases, in order to understand what the parties meant to contract for, and to give effect to such a contract, even in the absence of any dispute as to the religious doctrines or definitions implicated, the court would need to make minimal findings of

fact about Sharia principles. Under the Oklahoma law, such findings of fact would be prohibited if, and only if, they relied upon Sharia.²⁵⁴ By contrast, if a company violated a contract provision relating to an employee's non-Sharia-based religious obligation, the amendment, by its own terms, would not prevent the court from making similar findings regarding the nature of the religious obligation.²⁵⁵

With regard to this effect of the legislation, it is not clear that the legislators or people of Oklahoma intended to disfavor Islam with the absurd consequences that flow from the amendment. Rather, the disability imposed on courts to make factual inquiries into basic cultural ideas underlying Sharia law is likely an unforeseen consequence of the law. However, this effect does place an unreasonable strain on the religious liberty values underscored by the Establishment Clause and Free Exercise Clause by failing to reasonably accommodate the desire of individuals to order their lives according to their religious beliefs.

The Relevance of Sharia Law to a Judge's Decision-Making Process

A troubling effect of the legislation would be denying the judge discretion to consider the Sharia-based beliefs of litigants as the judge crafts equitable remedies or sentences. "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."²⁵⁶ A denial of consideration of those private needs, simply because they belong to Muslims, is antithetical to the commitment of the United States to the protection of its religious citizens.

For example, if a judge seeks to impose community service hours on a Muslim, or to craft a visitation order in custody dispute between two Muslims, fairness to the litigants suggests that the timetables of their needs to perform religious duties be given consideration. Yet the amendment, by its own terms, seems to disallow even such basic Sharia-based considerations.²⁵⁷ As in the discussion

254. *See supra* note 80.

255. H.R. 1056, 52nd Leg., 2nd Reg. Sess. (Okla. 2010), *available at* <https://www.sos.ok.gov/documents/questions/755.pdf> ("[T]he courts shall not consider . . . Sharia law.").

256. *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955).

257. Okla. H.R. 1056.

relating to the judge's need to consider background facts to a dispute, so too in crafting equitable remedies, a judge may be called upon to consider the content of a litigant's Sharia law obligations.

Again, it is unlikely that the legislators or people of Oklahoma intended to disfavor Islam with the absurd consequences that flow from the amendment. Rather, these burdens were likely unforeseen. As before, this effect places an unreasonable burden on American religious liberty values, by failing to reasonably accommodate the desire of individuals to order their lives according to their religious beliefs.

Unequal Protection of the Courts for Sharia-Based Arbitration Tribunals

As explained above, one of the stated objectives of the SOS Amendment was to prevent Islamic religious arbitration.²⁵⁸ In fact, as set forth below, the amendment would provide a substantially inferior level of court protection to litigants who use Sharia-based alternative dispute resolution than to litigants who use alternative dispute resolution options based in Christian or Jewish religious principles. As such, it would provide unequal protection of the law, based solely on litigants' choice of religious principles.

Representative Rex Duncan, then chair of the Oklahoma House Judiciary Committee and author of the Resolution,²⁵⁹ discussed the application of Sharia law by foreign courts in a Fox News interview with Sean Hannity.²⁶⁰ Responding to a question from Hannity about Sharia law in Great Britain, Duncan replied:

Well, it's not unprecedented, and that's the problem. People will not open their eyes, or they choose to look the other way. Sharia law has come to Great Britain. I've described it as a cancer upon

258. See *supra* notes 72–85 and accompanying text.

259. Patrick B. McGuigan, *State Question 755 Would Ban Use of Foreign Judicial Rulings*, CAPTIAL BEAT OK (Sept. 2, 2010), http://capitolbeatok.com/_webapp_3337864/State_Question_755_would_ban_use_of_foreign_judicial_rulings.

260. Okiecampaigns, *Oklahoma State Rep Rex Duncan Talking About SQ 755*, YOUTUBE (June 10, 2010), <http://www.youtube.com/watch?v=ummrXxDgFgI>.

Great Britain's survivability. It is that serious. There are dozens of Sharia type courts there²⁶¹

Duncan went on to describe the British situation as follows:

Well, what it would entail is, say, a domestic case, a family, a divorce or child custody, arbitration. These parties would come to the court and say we want to be bound by Islamic law and then ask the courts to enforce those agreements. That is a back-door way to get Sharia law in the courts. Now there will be efforts, have been some efforts, I believe, to explore bringing that to America, and it's dangerous. It would be the same cancer upon American courts it is in Great Britain.²⁶²

The examples Duncan gives are illustrative of the intent of the provision as it relates to Sharia law. It appears that this provision was intended to foreclose parties' ability to invoke Sharia law in agreements in a number of areas. Duncan talks about arbitration and the enforcement of agreements, giving specific examples from the family law context.²⁶³

Duncan's view of the effect of the bill was that it would close a "back door way to get Sharia law into courts" by preventing parties from "say[ing] we want to be bound by Islamic law and then ask[ing] the courts to enforce those agreements."²⁶⁴ Interpreted in light of this background, the amendment would operate to delegitimize agreements made by private parties on the basis of Sharia law principles by refusing those agreements the protection of court enforceability. It is a current practice among some American Muslims to use arbitration clauses providing that Islamic tribunals arbitrate disputes under the contract.²⁶⁵

261. *Id.*

262. *Id.*

263. *See id.*

264. Helfand, *supra* note 236.

265. The following example of such an arbitration clause appears in the facts of the Minnesota Court of Appeals case *Abd Alla v. Mourssi*:

Any dispute, controversy or claim arising out of or in connection with or relating to this Agreement or any breach or alleged breach hereof shall, upon the request of any party involved, be submitted to and settled by arbitration before the Arbitration Court of an Islamic Mosque located in the State of

Examples of disputes submitted to imams at local U.S. mosques include “family disagreements, inheritance, business disputes, marriage, and divorce issues.”²⁶⁶ While nothing in the Oklahoma provision prevents Muslims from contracting with such arbitration provisions, or in fact from making use of Islamic or Sharia-based dispute resolution, the provision apparently seeks to prevent courts from taking any action that requires consideration of the Sharia principles underlying an arbitral decision.

Two examples show how a court might be called upon to enforce an agreement in a way that “considers” Sharia law. In the first, two parties simply write a contract and state that the contract is to be interpreted in light of Sharia law. When seeking to enforce the contract, one party sues the other in an Oklahoma court. Both parties agree that the contract is binding, but present alternative views on their responsibilities under the contract, based on different views of Sharia law. The court is forced to examine Sharia law and to decide which of the litigants’ views represents a more valid interpretation of Sharia law. Such a court decision would certainly necessitate a “consideration” of Sharia law, which would not be permitted by the Oklahoma provision.²⁶⁷ However, such a decision might be disallowed already by the religious question doctrine. If it is, the Oklahoma amendment would be duplicative and without effect in this area.

Minnesota pursuant to the laws of Islam (or at any other place or under any other form of arbitration mutually acceptable to the parties so involved). Any award rendered shall be final and conclusive upon the parties and a judgment thereon may be entered in the highest court of the forum, state or Federal, having jurisdiction. The expenses of the arbitration shall be borne equally by the parties to the arbitration, provided that each party shall pay for and bear the costs of its own experts, evidence, and counsel.

680 N.W.2d 569, 570 (Minn. Ct. App. 2004).

266. Michael C. Grossman, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 179 (2007) (quoting Abdul Wahid Sheikh Osman, *Islamic Arbitration Courts in America & Canada?*, http://www.hiiraan.com/op/eng/2005/dec/Prof_Abdulwahid211205.htm).

267. H.R. 1056, 52nd Leg., 2nd Reg. Sess. (Okla. 2010), available at <https://www.sos.ok.gov/documents/questions/755.pdf> (“[T]he courts shall not consider . . . Sharia law.”).

At the outset, as argued above, a court is *intellectually* competent to decide what is required under any legal system, religious or otherwise.²⁶⁸ However, because courts are not *institutionally* competent to settle disputes internal to a religion, the decision in this example might look no different if the litigants were Christian or Jewish and the contract called for interpretation according to the dictates of those religions. Because under the religious question doctrine the courts would be no more constrained with respect to Sharia law than to any other religious law, it appears that the Oklahoma provision would have no effect in this example beyond expressing the kind of disfavor discussed above.

In a second example, the two parties write a contract and include an arbitration clause that states that Sharia law will govern the arbitration, and that the arbitration will be performed by a specific Islamic arbitration tribunal. Both parties again admit the force of the contract but litigate their separate views of their obligations before the designated tribunal. This time, a religious tribunal to which both parties have submitted themselves chooses the prevailing interpretation and makes its award. The losing party then asks an Oklahoma court to vacate that award.

“Judicial review of an arbitration award is among the narrowest known to the law.”²⁶⁹ There are, however, a limited number of statutory bases upon which a court may vacate an arbitral award (confirming, as opposed to vacating, an award will be considered immediately below).²⁷⁰

268. See *supra* notes 133–36 and accompanying text.

269. 86 AM. JUR. TRIALS 111 § 244 (2002) (quoting *Gupta v. Cisco Systems, Inc.*, 274 F.3d 1, 3 (1st Cir. 2001) (internal quotation marks and citations omitted)).

270. The Oklahoma Uniform Arbitration Act provides as follows:

A. Upon an application and motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

1. The award was procured by corruption, fraud, or other undue means;
2. There was:
 - a. evident partiality by an arbitrator appointed as a neutral arbitrator,
 - b. corruption by an arbitrator, or
 - c. misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

One judicially created basis that has been discussed is “manifest disregard of the law.”²⁷¹ This phrase may or may not carry any meaning independent of the statutory grounds.²⁷² Specifically, it may refer to the statutory provisions implicated when “when the arbitrators were ‘guilty of misconduct’ or ‘exceeded their powers.’”²⁷³ The Second Circuit provided this explanation of manifest disregard of the law:

[I]t clearly means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term ‘disregard’ implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.²⁷⁴

Let us suppose that the arbitrator in the Islamic arbitration tribunal mentioned in the second example makes his decision in a manner that would ordinarily present grounds for vacation of the award. Perhaps the arbitrator “appreciates the existence of a clearly governing

3. An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 6 of this act, so as to prejudice substantially the rights of a party to the arbitration proceeding;

4. An arbitrator exceeded the arbitrator's powers;

5. There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under subsection C of Section 16 of this act not later than the beginning of the arbitration hearing; or

6. The arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 10 of this act so as to prejudice substantially the rights of a party to the arbitration proceeding.

OKLA. STAT. ANN. tit. 12, § 1874 (West 2010).

271. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008).

272. *Id.* at 585.

273. *Id.* at 576 (quoting 9 U.S.C. § 10(a) (2006)).

274. *Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Intern., Ltd.*, 888 F.2d 260, 265 (2d Cir. 1989) (internal citations and quotation marks omitted).

legal principle but decides to ignore or pay no attention to it.”²⁷⁵ Such behavior would surely be grounds for vacation under the Oklahoma provision dealing with “misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding.”²⁷⁶ However, if establishing grounds for vacation in court required establishing a clearly governing legal principle of Sharia, it would be impossible to accomplish without offending the Oklahoma anti-Sharia amendment. In this instance, the unjust decision of the Islamic tribunal would not be subject to vacation, because the court would be prevented from the required review of Sharia.

As with the first example, it is necessary to determine whether the religious question doctrine would prevent such a review no matter which religion was involved. In this instance, it appears that the religious question doctrine would not prevent such a review. As discussed above, courts frequently make evaluations of doctrines and practices to determine which warrant First Amendment protection.²⁷⁷ For instance, a court has decided that it is constitutionally necessary to allow prison inmates access to prohibited literature because of its religious content.²⁷⁸ Such evaluations are necessary in order for the court to provide the religious protections called for by the Constitution. Because of the high hurdle of establishing “manifest disregard for the law,” or, for example, the statutory tests of “misconduct by an arbitrator,” or “exceed[ing] the arbitrator’s powers,” and because the court can vacate an award and order a rehearing before the same arbitrator or a new arbitrator,²⁷⁹ the risk of the state being forced to make decisions that impermissibly affect religious practice would seem to be mitigated. The Second Circuit’s discussion of “manifest disregard” is instructive; the question whether “the arbitrator appreciates the existence of a clearly governing legal

275. *Id.* at 265.

276. OKLA. STAT. ANN. tit. 12, § 1874(2)(c) (West 2010).

277. Jared A. Goldstein, *Is There A "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 538 (2005) (“[C]ourts routinely undertake extensive fact-finding into the content of religious doctrines and practices in determining whether a practice or doctrine is ‘religious’ and therefore subject to the protections of the Religion Clauses and statutes addressing religion.”).

278. *Sutton v. Rasheed*, 323 F.3d 236, 252 (3d Cir. 2003).

279. OKLA. STAT. ANN. tit. 12, § 1874.

principle but decides to ignore or pay no attention to it” is not one of fine doctrinal points.²⁸⁰ The decision whether a principle “clearly governs,” even within a religious context, is more analogous to the decision whether a stated belief is a religion deserving the protection of the Free Exercise Clause, than it is analogous to the decision of which of two competing religious views is the more orthodox. The remedies show the safety. If the court finds that the principle does not clearly govern or that it was not ignored, it defers to the tribunal and does not vacate the award.²⁸¹ If it finds that the principle is crucial and that the tribunal ignored it, the court can vacate the award and order a rehearing.²⁸² In neither case does it arrogate to itself broad religious authority.

Another possible ground of vacation under Oklahoma law is that an arbitrator “refused to consider evidence material to the controversy.”²⁸³ Michael Grossman points out that “[i]n religious tribunals, rulings on admissibility of evidence are determined by religious law.”²⁸⁴ Thus, it might seem that an examination of the admissibility of evidence by a reviewing court would entail an impermissible religious question. However, again it appears that this situation does not present an impermissible religious question. Presumably, a tribunal’s determination of the admissibility of certain evidence under religious law entails some level of consideration of that evidence, just as a court’s determination of the admissibility of evidence for trial entails consideration of the proffered evidence in light of court rules. Thus, by explaining the basis for the inadmissibility of the evidence, a tribunal arguably shows that it considered the evidence, even if, for reasons of religious law, the tribunal did not allow the evidence to influence the outcome of the its decision.

280. *Carte Blanche*, 888 F.2d at 265 (“Judicial inquiry under the ‘manifest disregard’ standard is . . . extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable. We are not at liberty to set aside an arbitration panel’s award because of an arguable difference regarding the meaning or applicability of laws urged upon it.” (quoting *Merril Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933–34 (2d Cir. 1986))).

281. *Id.*

282. OKLA. STAT. ANN. tit. 12, § 1874.

283. *Id.*

284. Grossman, *supra* 266, at 195.

In cases where neither party asks the court to vacate the arbitral award, the prevailing party in the arbitration can apply to a court to confirm the award.²⁸⁵ Confirmation provides the prevailing party with an enforceable judgment.²⁸⁶ Not surprisingly, confirmation, absent a motion for vacation, does not require the court to make a searching legal analysis of the underlying arbitral award.²⁸⁷ The relevant Oklahoma statute provides:

After a party to an arbitration proceeding receives notice of an award, the party may make an application and motion to the court for an order confirming the award at which time the court *shall issue* a confirming order unless the award is modified or corrected pursuant to Section 21 or 25 of this act or is vacated pursuant to Section 24 of this act.²⁸⁸

The modification contemplated under Section 21 is made by the arbitrator, not the court.²⁸⁹ The correction contemplated under Section 25 is made by the court, but does not implicate fine doctrinal points.²⁹⁰

Section 24 is the section dealing with vacation, previously considered.²⁹¹ Far from giving courts broad powers to second-guess

285. OKLA. STAT. ANN. tit. 12, § 1873 (West 2010).

286. OKLA. STAT. ANN. tit. 12, § 1876 (West 2010).

287. OKLA. STAT. ANN. tit. 12, § 1873.

288. *Id.* (emphasis added).

289. OKLA. STAT. ANN. tit. 12, § 1871 (West 2010).

290. Rather, Section 25 gives the court powers to modify an award in circumstances involving the following situations:

1. There was an *evident mathematical miscalculation* or an *evident mistake in the description* of a person, thing, or property referred to in the award;
2. The arbitrator has made an award on a *claim not submitted to the arbitrator* and the award may be corrected *without affecting the merits of the decision* upon the claims submitted; or
3. The award is imperfect in a *matter of form not affecting the merits of the decision* on the claims submitted.

OKLA. STAT. ANN. tit. 12, § 1875 (West 2010) (quoting a portion of the provision) (emphasis added).

291. OKLA. STAT. ANN. tit. 12, § 1874 (West 2010).

arbitral awards, the Oklahoma statute provides that a court “*shall issue* a confirming order” except when a party has moved for vacation, or in a small number of other narrow, extreme circumstances.²⁹²

In short, it appears that the level of consideration necessary for a court to review the award of a religious arbitral tribunal, whether to confirm or vacate, does not rise to the level of implicating the religious question doctrine. Thus, it would not prevent the full and free use of religious arbitration to Christian, Jewish, or other religious litigants. However, the Oklahoma amendment goes further than the religious question doctrine, and forbids any court consideration of Sharia law.²⁹³ As such, it would disallow a court to vacate even the clearest cases of abuse by a tribunal. However, Islam is not the only religion to offer religious arbitration.²⁹⁴ The fact that court protection in such a scenario would be available to a Christian, a Jew, or any other religious litigant other than a Muslim (or any individual electing arbitration under Sharia law) shows that the effect of the amendment would be to deny Muslims the equal protection of the law in the context of arbitration.

Because the Oklahoma amendment forbids any court consideration of Sharia law, it would disallow Muslim litigants court protection in certain cases of arbitral abuse. It is possible, though not certain, that courts would see this as a due process violation and simply

292. See OKLA. STAT. ANN. tit. 12, § 1873 (emphasis added).

293. See *id.*

294. A Christian conciliation clause providing for Christianity-based arbitration follows:

The parties to this agreement are Christians and believe that the Bible commands them to make every effort to live at peace and to resolve disputes with each other in private or within the Christian church (see Matthew 18:15-20; Corinthians 6:1-8). Therefore the parties agree that any claim or dispute arising from or related to this agreement shall be settled by biblically based mediation and, if necessary, legally binding arbitration in accordance with the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation, a division of Peacemaker Ministries.

Margaret G. Tebo, *Dispute Resolution Clauses Keep the Faith Many Clients Asking for Mediation Under Christian Principles*, PRIVATE DISPUTE RESOLUTION SERVICES, <http://www.private-disputeresolutionservices.com/christianmediation.html> (last visited Jan. 31, 2012).

disallow the confirmation of such arbitral awards. Muslim litigants will, as such, find themselves caught between a rock and a hard place: they will either have access to court-enforceable Islamic arbitration, but no protection in case of an unfair award, given in manifest disregard of the law; or they may be denied any binding Islamic arbitration option.

This dilemma, based as it is on religious status, offends First Amendment religious liberty values. First, part of the purpose of the Oklahoma amendment, as explained by its author, Rex Duncan, was to prevent parties from being able to enter into court-enforced arbitration agreements in order to be bound by Islamic law.²⁹⁵ The law was not designed to prevent any other form of religious arbitration. Christian, Jewish, and Islamic groups all provide for some form of religious arbitration.²⁹⁶ In fact, some Christians and Muslims practice religious arbitration of one kind or another as a tenet of their faith.²⁹⁷ Thus, it

295. See *supra* note 264 and accompanying text.

296. For an example of a contractual agreement to appear before a Jewish religious body, see *Avitzur v. Avitzur*, 58 N.Y.2d 108 (N.Y. 1983).

297. In the Christian context, see the following biblical quotation:

If any of you has a dispute with another, do you dare to take it before the ungodly for judgment instead of before the Lord's people? Or do you not know that the Lord's people will judge the world? And if you are to judge the world, are you not competent to judge trivial cases? Do you not know that we will judge angels? How much more the things of this life! Therefore, if you have disputes about such matters, do you ask for a ruling from those whose way of life is scorned in the church? I say this to shame you. Is it possible that there is nobody among you wise enough to judge a dispute between believers? But instead, one brother takes another to court—and this in front of unbelievers!

1 Corinthians 6:1-6, New International Version.

In the Muslim context, see the following quotation from a Florida trial court order:

Based upon the testimony before the court at this time, under ecclesiastical law, pursuant to the Qur'an, Islamic brothers should attempt to resolve a dispute among themselves. If Islamic brothers are unable to do so, they can agree to present the dispute to the greater community of Islamic brothers within the mosque or the Muslim community for resolution. If that is not done or does not result in a resolution of the dispute, the dispute is to be presented to an Islamic judge for determination, and that is or can be an A'lim.

appears the government of Oklahoma has acted with the purpose of disfavoring one religion, Islam. Even if this purpose was a secondary purpose, the Supreme Court has stated that ““if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.””²⁹⁸ In the case of the Oklahoma amendment, Muslims are forced to choose between religiously mandated behavior and receipt of a government benefit, the court enforcement and procedural protection of Sharia-based arbitration.

It might be argued that Oklahoma’s complete hands-off policy toward Sharia law represents an appropriate deference to religious authorities in religious matters. Certainly, by the terms of the amendment, the state refuses to arrogate to itself any authority on matters of Sharia law as such.²⁹⁹ However, because the amendment strips away the benefit of religious arbitration rights to Muslims, the state cannot be said to defer to religious authorities so much as to decimate the weight of that authority as it pertains to agreements between Muslims. If Muslims are denied the right, afforded to other religious groups, to have fair and court-enforceable Islamic arbitration, one of three results may obtain. Either Muslims must forego civilly binding appeals to religious authority or Muslims must risk submitting to Islamic tribunals without the due process protections given to all other parties to arbitration; or Islamic tribunals must seek to enforce their decisions themselves. If Muslims know that they cannot seek either enforcement or protection from manifest disregard of the law in the context of Islamic tribunals, many may simply stop using them. This result would not represent government deference to religious authority, but rather, government destruction of

Richard A. Nielson, Trial Court Opinion in *Mansour v. Islamic Educ. Ctr. of Tampa, Inc.*, THIRTEENTH JUDICIAL CIRCUIT, (Mar. 22, 2011), *available at* <http://www.fljud13.org/LinkClick.aspx?fileticket=Gou70XZCgII%3d&tabid=667&mid=1031>.

298. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961)).

299. H.R. 1056, 52nd Leg., 2nd Reg. Sess. (Okla. 2010), *available at* <https://www.sos.ok.gov/documents/questions/755.pdf>. By providing that “the courts shall not consider . . . Sharia Law,” the amendment forecloses the possibility of courts attempting to interpret Sharia law. *See id.*

religious authority. Islamic tribunals, like Christian and Jewish tribunals (and arbitration tribunals generally), have very few tools of enforcement.

Another First Amendment argument against destroying Islamic arbitration recognizes the importance of allowing all religions to provide and communicate their distinctive solutions to life's problems. One of the freedoms protected by the Free Exercise Clause is the "right . . . to disseminate religious views."³⁰⁰ If Muslims do not have access to arbitration on the same terms as other religions, they cannot fairly demonstrate in the public square the merits of their distinctive normative solutions to the problems of life. The reason for this is that religious arbitration provides a government sanctioned and protected safe space in which to attempt and demonstrate the effectiveness and attractiveness of a religion's norms. Under the Oklahoma amendment, Islamic norms simply cannot be demonstrated and attempted on equal terms as those that are afforded to other religions.

This, in turn, works against the Establishment Clause value that government should neither adopt nor reject laws solely on the basis of their religious merit or status. When Muslims are denied the ability to demonstrate the appeal of their normative religious solutions, they operate at an explicit and unfair disadvantage in seeking the legislative enactment of their ideas. In short, because Muslims are prevented from demonstrating their best ideas, solely on the basis that the label of Sharia taints those ideas, the government is indirectly rejecting laws solely on the basis of their religious status.

Finally, and perhaps most obviously, the denial to Muslims of equal protection in the context of arbitration tribunals directly impedes their ability to order their lives according to their religious beliefs. When Islamic tribunals are denied the government protection, either of enforcement or of vacation in the face of manifest disregard of the law, they lose legitimacy and adjudicative power. Muslims are then forced to choose between deficient religious tribunals or the legal standards of outsiders to their faith. While not all personal desires for methods of obtaining justice are likely to be met in any governmental system, the emphasis that the United States has traditionally placed on religious liberty demands that religious groups be provided a more effective system.

300. *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).

CONCLUSION

As demonstrated by Part II's extensive discussion of religious arbitration and the ways in which civil courts deal with arbitral decisions, there are numerous safeguards against would-be infringements on constitutional rights embedded in the American legal system. As discussed above, arbitral decisions are vacated when, for example, there is evidence of manifest disregard for the law, or when the arbitrator refused to consider material evidence.

The crucial feature of any kind of arbitration is that an arbitrator, whether religious or not, has no ability to enforce the arbitral decision; only state or federal courts have that power. In deciding whether to enforce arbitral awards, civil courts first review whether the parties agreed to take part in the arbitration of their own free will. Courts also review the arbitral decision to ensure that arbitrators are neutral,³⁰¹ and that the resulting arbitral decisions are neither grossly unfair³⁰² nor undermine public policy.³⁰³ There is thus already an array of carefully crafted safeguards in place to protect individuals.

These built-in protections to the U.S. legal system expose the rhetoric invoked by anti-Sharia campaigners as nothing more than mythical. Such baseless rhetoric is not only creating fear about a largely innocent religious minority, it is also helping translate that fear into problematic laws. These laws in the short term threaten the religious liberty of Muslims, but in their broader implication affect the religious freedom of all Americans.

301. OKLA. STAT. ANN. tit. 12, § 1874 (West 2010).

302. See *Legacy Trading Co. v. Hoffman*, 627 F. Supp. 2d 1260, 1268 (W.D. Okla. 2008) (*rev'd in part on other grounds*) (“[A]n arbitration panel must conduct itself in a manner which does not deny a party fundamental fairness”).

303. See *id.* at 1265 (“The public policy exception is rooted in the common law doctrine of a court's power to refuse to enforce a contract that violates public policy or law. It derives legitimacy from the public's interest in having its views represented in matters to which it is not a party but which could harm the public interest.” (quoting *Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020, 1023 (10th Cir. 1993))).