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JUSTICE FOR ALL: AMERICAN MUSLIMS, SHARIA LAW, AND MAINTAINING COMITY WITHIN AMERICAN JURISPRUDENCE

SARAH M. FALLON*

Abstract: The U.S. Muslim population, although currently only comprising one percent of all Americans, is on the rise. Muslim Americans are largely assimilated, happy with their lives, moderate with respect to divisive issues, and opposed to violence. Nonetheless, in recent years, a growing misunderstanding and fear of Muslims has led some activists to seek to ban the application of Islamic law, or Sharia, in American courts, despite the lack of evidence of an increase in the use of Sharia in U.S. courts. These attempted bans have seen varying degrees of success. This Note argues that these bans violate the voluntary, but longstanding, principle of comity and are unnecessary. When properly applied, comity prevents Sharia from pre-empting the Constitution while encouraging mutual acceptance and understanding between Muslim and non-Muslim Americans.

[M]any [American Muslims] live in a psychological ghetto caused by the lack of acceptance they feel from their neighbors and colleagues, especially in the post-Sept. 11 era. This psychological ghetto may prove the largest challenge in the war on terrorism.

—Salam Al-Marayati¹

INTRODUCTION

In November 2010, Oklahoma voters overwhelmingly approved an amendment to the state constitution that would prevent state judges from considering Islamic law—known as Sharia—or other international law in their decisions.² A federal district court granted a preliminary injunction barring the State Board of Elections from certifying the elec-

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¹ Salam Al-Marayati, Op-Ed., *America's Muslim Ghettos*, WASH. POST, Aug. 15, 2005, at A15, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/14/AR2005081401038.html>.

² See H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010) (State Question No. 755), available at <https://www.sos.ok.gov/documents/questions/755.pdf>.

tion results and implementing the amendment.³ On review, the U.S. Court of Appeals for the Tenth Circuit upheld the injunction, thereby preventing the amendment from taking effect.⁴ Although initially more successful than most, Oklahoma was not the first state to seriously consider such a ban.⁵

Initiatives like Oklahoma's arise from misconceptions about Sharia and its application in the United States, as well as widespread Judeo-Christian wariness of Muslims, both within and outside the United States.⁶ A number of factors have led to this pervasive fear and distrust of Muslims and Islamic law, including military conflicts (particularly those regarding oil), sour diplomatic relations with several predominantly Muslim countries, and a misunderstanding of differences between belief structures.⁷ Although Muslims make up less than one percent of the U.S. population, the terrorist attacks of September 11, 2001 led some Americans to associate Muslims and Islamic law with terrorism, encouraging many non-Muslims to fear the unknown.⁸

Although many Americans have reacted to this fear of Muslims by shunning them, such a response is likely to exacerbate tensions; at worst, it could lead to a greater level of Muslim extremism.⁹ Shunning any group tends to create a feeling within that group of exclusion from the broader society.¹⁰ The more excluded a group feels, the more likely

³ See *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1308 (W.D. Okla. 2010) (order granting preliminary injunction), *aff'd*, 670 F.3d 1111 (10th Cir. 2012); James C. McKinley Jr., *U.S. Judge Blocks a Ban on Islamic Law*, N.Y. TIMES, Nov. 30, 2011, at A22.

⁴ *Awad v. Ziriax*, 670 F.3d 1111, 1132–33 (10th Cir. 2012).

⁵ See Penny M. Venetis, *The Unconstitutionality of Oklahoma's SQ 755 and Other Provisions Like It That Bar State Courts from Considering International Law*, 59 CLEV. ST. L. REV. 189, 194–97 (2011) (discussing “copy-cat bills” and constitutional amendments to ban the use of Sharia or foreign law that have been proposed in Arizona, Arkansas, Georgia, Idaho, Indiana, Iowa, Louisiana, Missouri, Nebraska, New Jersey, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and Wyoming); Andrea Elliott, *Behind an Anti-Shariah Push*, N.Y. TIMES, July 31, 2011, at A1 (discussing legal and policy movements to ban Sharia in Tennessee, Oklahoma, and Louisiana, as well as nationwide strategies to further these movements).

⁶ See Edward E. Curtis, IV, *United States, Islam in*, in 2 ENCYCLOPEDIA OF ISLAM AND THE MUSLIM WORLD 707, 710 (Richard C. Martin ed., 2004).

⁷ See *id.*

⁸ See *id.* at 710; Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231, 277–78 (2012); Peter Skerry, *The Muslim-American Muddle*, NAT'L AFF., Fall 2011, at 14, 16; Jeffrey Winters, *Why We Fear the Unknown*, PSYCHOL. TODAY (May 1, 2002), <http://www.psychologytoday.com/articles/200305/why-we-fear-the-unknown>.

⁹ Cf. Sisk & Heise, *supra* note 8, at 279 (arguing that Muslims' lack of assimilation in European society as compared to American society has resulted in more widespread extremism among European Muslims than among American Muslims).

¹⁰ See *id.*

some members are to tend toward extremist views.¹¹ Therefore, an inclusive approach should lead to greater mutual understanding and serve to reduce tensions with the Muslim community domestically and abroad.¹²

Reversing the trend of attempting to ban the consideration of Sharia in American courts would be a strong step in the direction of eliminating anti-Muslim bias.¹³ Attempts to ban Sharia likely violate the U.S. Constitution and are particularly offensive in light of the absence of parallel bans on the consideration of other religious codes in American courts.¹⁴ Moreover, Sharia bans violate the voluntary but long-standing principle of comity, which encourages courts to defer to foreign laws where such laws do not prejudice the power or rights of the U.S. government or its citizens.¹⁵

This Note focuses on this violation of comity and its implications. Part I discusses the history of Muslims in the United States and explains Sharia's origins. Additionally, it describes the basis for anti-Muslim and anti-Sharia sentiments and outlines the most successful attempts to ban Sharia to date. Part II examines the history and current role of comity in American law. Part III argues that when properly applied, comity prevents Sharia from pre-empting the Constitution while encouraging mutual acceptance and understanding between Muslim and non-Muslim Americans.

I. BACKGROUND

A. *Muslims in the United States: A Brief History*

According to a Pew Research Center estimate, as of 2011, approximately 2.75 million Muslims were living in the United States.¹⁶ Muslims

¹¹ *See id.*

¹² *See id.*

¹³ Bruce Warshal, *Sharia Law and Anti-Islam Animus*, AM. MUSLIM (Jan. 26, 2012), <http://theamericanmuslim.org/tam.php/features/articles/sharia-law-and-anti-islam-animus>.

¹⁴ *See Awad*, 754 F. Supp. 2d at 1306–07; John Ingold, *10th Circuit Upholds Ruling Blocking Sharia Law Ban*, DENV. POST, Jan. 10, 2012, http://www.denverpost.com/commented/ci_19712265.

¹⁵ *See Venetis*, *supra* note 5, at 213.

¹⁶ PEW RESEARCH CTR., MUSLIM AMERICANS: NO SIGNS OF GROWTH IN ALIENATION OR SUPPORT FOR EXTREMISM 20 (2011) [hereinafter NO SIGNS OF GROWTH], *available at* <http://www.people-press.org/files/legacy-pdf/Muslim-American-Report.pdf>. Although the Pew Research Center is highly respected, note that estimates on the number of Muslims living in the United States vary widely. *See* MARK E. HANSHAW, MUSLIM AND AMERICAN? STRADDLING ISLAMIC LAW AND U.S. JUSTICE 11 n.17 (2010); Warshal, *supra* note 13. Since 1990, various researchers have estimated the number of Muslims in the United States from

therefore make up less than one percent of the population of the United States.¹⁷ Nevertheless, the Muslim population is growing: each year, approximately eighty to ninety thousand Muslims immigrate to the United States.¹⁸ Eighty-one percent of Muslim Americans have become U.S. citizens.¹⁹ This includes seventy percent of Muslim Americans who were born outside of the United States.²⁰ The Muslim population residing within the United States is unique in its high level of foreign-born immigrants who have attained citizenship, as only forty-seven percent of all foreign-born immigrants to the United States are citizens.²¹

The United States contains the most diverse group of Muslims of any country in the world.²² Much like the U.S. population as a whole, Muslim Americans differ from each other in a variety of ways, including religious belief, race and ethnicity, history, language, country of origin, and legal tradition.²³ Sixty-five percent of Muslims in the United States are affiliated with Sunni Islam, which follows the traditions and character of the Prophet Muhammad.²⁴ Eleven percent are affiliated with Shia Islam (and are called Shiites), which mandates that the leader of the faith be chosen from among Muhammad's descendants.²⁵ The remaining Muslims are divided among those who identify with Sufism, which entails striving for closeness to God through mysticism, and those who claim no specific branch affiliation.²⁶ U.S. Muslims come from at least seventy-seven countries: forty-one percent from Middle Eastern or North African countries, twenty-six percent from South Asian countries including India, Pakistan, and Bangladesh, eleven per-

slightly more than one million to approximately eight million. HANSHAW, *supra*, at 11 n.17. Muslims themselves tend to estimate higher numbers. See Skerry, *supra* note 8, at 16. One researcher reports that years of conducting interviews yielded "only one Muslim who did not confidently assert that there are [six] to [ten] million of his brothers and sisters in the United States, and that their number is growing all the time." *Id.*

¹⁷ Skerry, *supra* note 8, at 16.

¹⁸ NO SIGNS OF GROWTH, *supra* note 16, at 20.

¹⁹ *Id.* at 8.

²⁰ *Id.*

²¹ *Id.*

²² Skerry, *supra* note 8, at 16.

²³ *Id.* at 17.

²⁴ Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, in UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY 1, 41 n.213 (Hisham M. Ramadan ed., 2006); NO SIGNS OF GROWTH, *supra* note 16, at 23; Curtis, *supra* note 6, at 707.

²⁵ NO SIGNS OF GROWTH, *supra* note 16, at 23; Abdal-Haqq, *supra* note 24, at 41 n.213; Curtis, *supra* note 6, at 707.

²⁶ NO SIGNS OF GROWTH, *supra* note 16, at 23; Curtis, *supra* note 6, at 707.

cent from sub-Saharan Africa, seven percent from Europe, five percent from Iran, and nine percent from other countries.²⁷

The first significant group of Muslims to enter the United States consisted of slaves from West Africa.²⁸ Approximately ten percent of slaves in the Americas were Muslim.²⁹ After their arrival, most slaves converted to Christianity outright or adapted their Muslim traditions to Christianity.³⁰ Because of these conversions, few practicing Muslims remained in the United States by the end of the Civil War.³¹ The Muslim population grew again between 1875 and World War II, when tens of thousands of Muslims, mostly Arabs, migrated to the United States in search of economic fortune.³² In addition, African-American conversions to Islam throughout the 1920s and 1930s contributed to a growth in the Muslim population.³³ In 1965, a new immigration law resulted in another wave of Muslim immigration, this time from Asia, Africa, Europe, and Central and South America.³⁴

The number of U.S. Muslims who see religion as “very important” is comparable to that of U.S. Christians—sixty-nine percent and seventy percent, respectively.³⁵ U.S. Muslims and Christians are also similar in the frequency with which they attend religious services; forty-seven percent of Muslims and forty-five percent of Christians report attending worship services at least weekly.³⁶ A Pew Research Center Poll found that among the major religious groups in the United States, Muslims demonstrate the greatest amount of integration and exhibit higher levels of acceptance toward members of other religions than do Protestants, Catholics, or Jews.³⁷ After conducting an extensive survey of mosque leaders, one scholar reports that ninety-six percent of mosque leaders believe that Muslims ought to be “involve[d] in American society”; that is, “they do not envision a community isolated from the American society.”³⁸

²⁷ NO SIGNS OF GROWTH, *supra* note 16, at 8; Skerry, *supra* note 8, at 17.

²⁸ Curtis, *supra* note 6, at 707.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 708.

³⁴ Curtis, *supra* note 6, at 709.

³⁵ NO SIGNS OF GROWTH, *supra* note 16, at 25.

³⁶ *Id.* at 26.

³⁷ See Warshal, *supra* note 13.

³⁸ Ihsan Bagby, *The Mosque and the American Public Square*, in MUSLIMS' PLACE IN THE AMERICAN PUBLIC SQUARE 323, 325 (Zahid H. Bukhari et al. eds., 2004).

Another recent Pew Research Center survey determined that “Muslim Americans . . . [are] largely assimilated, happy with their lives, and moderate with respect to many of the issues that have divided Muslims and Westerners around the world. . . . [T]hey are decidedly American in their outlook, values, and attitudes.”³⁹ The study also found that Muslim Americans’ income and education levels are similar to those of other Americans, and that the majority of Muslim Americans believe that hard work pays off in American society.⁴⁰ Additionally, most Muslims do not support violence against civilians.⁴¹ Indeed, a 2011 Gallup poll found that among major religious groups in the United States, Muslim Americans are “the least likely . . . to say there is ever a justification for individuals or small groups to attack civilians.”⁴²

B. *What Is Sharia Law?*

Sharia, the primary source of Islamic law, literally means “the pathway,” and has been interpreted to mean “the path upon which the believer has to tread.”⁴³ In essence, Sharia represents the path of proper action that Allah, the Supreme Being, has shown through his messengers, primarily the Prophet Muhammad.⁴⁴ Muslims must follow this path to achieve the goals of becoming closer to Allah and producing a just society in which individuals are able to achieve their potential and society as a whole prospers.⁴⁵ Sharia is made up of varying schools of thought, known as *madhhabs*, and has two main sources: the Quran and the Sunna.⁴⁶ The Quran contains the revelations given by Allah to the Prophet Muhammad, and requires believers to create law and stan-

³⁹ PEW RESEARCH CTR., MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 1 (2007), available at <http://pewresearch.org/assets/pdf/muslim-americans.pdf>.

⁴⁰ *Id.*

⁴¹ See ABU DHABI GALLUP CTR., MUSLIM AMERICANS: FAITH, FREEDOM, AND THE FUTURE 6 (2011).

⁴² *Id.*

⁴³ Abdal-Haqq, *supra* note 24, at 4. Spellings of Sharia vary and include Sharia, Shari’a, Shariah, Shari’ah, and Al-Shari’ah. See, e.g., *id.*; Jonathan E. Brockopp, *Shari’a*, in 2 ENCYCLOPEDIA OF ISLAM AND THE MUSLIM WORLD, *supra* note 6, at 618, 618; Venetis, *supra* note 5, at 191; Elliott, *supra* note 5.

⁴⁴ Abdal-Haqq, *supra* note 24, at 7; Brockopp, *supra* note 43, at 618.

⁴⁵ See LOUAY SAFI, TENSIONS AND TRANSITIONS IN THE MUSLIM WORLD 93 (2003).

⁴⁶ Abdal-Haqq, *supra* note 24, at 4; Emily L. Thompson & F. Soniya Yunus, *Choice of Laws or Choice of Culture: How Western Nations Treat the Islamic Marriage Contract in Domestic Courts*, 25 WIS. INT’L L.J. 361, 370 (2007).

dards of behavior on the basis of Muhammad's conduct.⁴⁷ The Sunna contains Muhammad's practices, sayings, and teachings.⁴⁸

Although some Shiites have gradually come to follow structures of authority regarding Islamic law, Sunnis recognize no central legal authority.⁴⁹ Sunnis may therefore consult with a variety of authorities, or *muftis*, before determining what action to take.⁵⁰ Actions may fall into one of five "[Sharia] values," or *ahkam*, ranging between required, recommended, indifferent, disapproved, and forbidden.⁵¹ Sharia seeks to regulate all human actions, not just those with clear legal ramifications.⁵² Thus, Sharia is more than a mere legal system; it is a system of both law and morality.⁵³

Family law is a particularly important aspect of Sharia, as Muslims believe that the family is the "nucleus of Islamic society."⁵⁴ Marriage is viewed not as a sacrament, as it is in Christianity, but as a contract.⁵⁵ Because marriage and family are of the utmost importance to Islam, they are often the basis of disputes involving Sharia.⁵⁶ Due to this importance, it is helpful to understand the basic concepts underlying Muslim marriage and divorce.⁵⁷

A *mahr*, or dower, is an important part of an Islamic marriage contract.⁵⁸ The *mahr*, which may include money, property, valuables, or stock, is paid by the husband and is held in trust for the wife, who receives it upon divorce or the husband's death.⁵⁹ It is intended to serve as a form of insurance so that, should a wife no longer be able to rely

⁴⁷ Abdal-Haqq, *supra* note 24, at 4, 11.

⁴⁸ Toni Johnson & Lauren Vriens, *Islam: Governing Under Sharia*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/religion/islam-governing-under-sharia/p8034> (last updated Jan. 9, 2013).

⁴⁹ Brockopp, *supra* note 43, at 618.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² SAFL, *supra* note 45, at 91.

⁵³ *Id.*

⁵⁴ Thompson & Yunus, *supra* note 46, at 361, 363.

⁵⁵ Nathan B. Oman, *How to Judge Shari'a Contracts: A Guide to Islamic Marriage Agreements in American Courts*, 2011 UTAH L. REV. 287, 291; Thompson & Yunus, *supra* note 46, at 363.

⁵⁶ *Cf.* Elliott, *supra* note 5 (noting that Sharia frequently surfaces in U.S. cases involving divorce and custody proceedings); *Cases in U.S. Courts*, SHARIA AM., <http://shariainamerica.com/by-subject/> (last visited Mar. 12, 2013) (listing U.S. cases involving Sharia by subject, many of which relate to marriage and family law).

⁵⁷ *See* Thompson & Yunus, *supra* note 46, at 363–64.

⁵⁸ *Id.* at 364.

⁵⁹ *Id.* at 364–65.

on her husband for financial support, she is able to support herself.⁶⁰ The husband may neither reduce the amount of his wife's *mahr* without her consent nor tell her how she must spend it.⁶¹ While the *mahr* survives today, many Western Muslims place little emphasis on its importance, and some modern marriage contracts contain only a negligible *mahr* in order to meet the requirements of Muslim law.⁶² American courts vary on their treatment of *mahrs* but typically interpret them as contracts or pre-nuptial agreements.⁶³

Divorce under Islamic law is possible in one of three ways: (1) by an act of the husband alone (*talaq*), (2) by mutual agreement (*khula* or *mabarat*), or (3) by judicial separation order resulting from a request by either the husband or the wife.⁶⁴ The first method, *talaq*, is particularly controversial because it allows the husband to divorce his wife based on his action alone.⁶⁵ In one form of *talaq*, called *talaq al-bida* or "triple *talaq*," the husband need only say the word "*talaq*" three times in order to notify his wife that he is divorcing her.⁶⁶ Although this method is seen as highly undesirable from a religious standpoint, it is nonetheless allowed under Sharia and is still occasionally used.⁶⁷

C. Anti-Muslim Sentiment in the United States

Muslims have long faced fear and distrust by North Americans.⁶⁸ Such fear originated with a long-held European Christian bias against Islam, and worsened in the nineteenth century as Americans became increasingly racist and xenophobic.⁶⁹ Anti-Muslim bias has grown rapidly since the middle of the twentieth century.⁷⁰ The first triggering event was the Cold War, in which the United States backed Israel in conflicts with its Arab Muslim neighbors, who were backed by the Soviets.⁷¹ The United States' position in these conflicts led many Americans

⁶⁰ *Id.* at 365.

⁶¹ *Id.* at 364–65.

⁶² *Id.* at 366.

⁶³ Thompson & Yunus, *supra* note 46, at 374.

⁶⁴ *Id.* at 367.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See *Tarikonda v. Pinjari*, No. 287403, 2009 WL 930007, at *1 (Mich. Ct. App. Apr. 7, 2009); Thompson & Yunus, *supra* note 46, at 367.

⁶⁸ See Curtis, *supra* note 6, at 710.

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ *Id.*

to treat both Arabs and Muslims as enemies.⁷² In 1973, tensions with Muslims worsened as the Organization of the Petroleum Exporting Countries engaged in an oil embargo to protest the United States' support of Israel.⁷³ American suspicion—and even hatred—of Muslims worsened throughout the 1970s and beyond, exacerbated by events such as the 1979 Iran hostage crisis, the 1982 Lebanese Civil War, the 1991 Persian Gulf War, and the 2003 War in Iraq.⁷⁴

Most recently, the September 11, 2001 terrorist attacks on the United States resulted in increased discrimination against, and fear of, Muslims.⁷⁵ Anti-Muslim and anti-Sharia sentiment was further aggravated by post-September 11 debate over the proposal to build an Islamic center near the site of Ground Zero in New York City.⁷⁶ The events of September 11 also led to increased fear of terrorists working from within the United States.⁷⁷ In essence, September 11 may have brought Islam to the forefront of many Americans' minds while simultaneously creating negative associations with Islam.⁷⁸

Popular fear and distrust of Muslims has culminated in the last several years in a movement to ban the practice of Sharia in the United States.⁷⁹ One of the most outspoken advocates of the anti-Sharia movement is David Yerushalmi, a lawyer from Brooklyn, New York who views Sharia as a “great threat” to freedom in the United States.⁸⁰ In 2009, Yerushalmi began drafting a model statute, “American Laws for American Courts,” which “would prevent state judges from considering foreign laws . . . that violate constitutional rights.”⁸¹ His statute became the archetype of anti-Sharia legislation in the United States.⁸²

Yerushalmi's message has gained popularity as activists, elected officials, several presidential candidates, and other public figures have joined the anti-Sharia movement.⁸³ In a July 2010 speech to the American Enterprise Institute in Washington, D.C., presidential candidate Newt Gingrich freely espoused his anti-Sharia views: “I believe Shariah

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Curtis, *supra* note 6, at 710.

⁷⁵ *Id.*

⁷⁶ See Elliott, *supra* note 5.

⁷⁷ *Id.*

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See Elliott, *supra* note 5.

⁸³ *Id.*

is a mortal threat to the survival of freedom in the United States and in the world as we know it. . . . I think it's that straightforward and that real."⁸⁴ While perhaps less outspoken, other candidates have expressed a similar desire to distance themselves from support of Sharia.⁸⁵ In a June 2011 debate, Mitt Romney stated, "[w]e're not going to have Shariah law applied in U.S. courts. That's never going to happen."⁸⁶

Over the last few years, anti-Sharia sentiment in the United States has become increasingly real as over two dozen state legislatures have considered statutes to prohibit courts from consulting foreign and religious laws—and in some instances, specifically Sharia.⁸⁷ Many of these proposals are based on Yerushalmi's model legislation.⁸⁸ The necessity of the proposed bans may be questioned because it is unclear how many state cases have taken some aspect of Sharia into account.⁸⁹ But much like cases that involve Jewish law, cases that involve Sharia typically relate to divorce and custody proceedings or commercial litigation.⁹⁰ Indeed, the vast majority of cases in American courts that involve Sharia are contract disputes.⁹¹ Courts also occasionally consider Sharia in cases associated with foreign laws—for example, in tort suits against companies located in Muslim countries.⁹²

Principles of Sharia may affect arbitration, in addition to litigation.⁹³ Commercial parties often submit to arbitration hoping to avoid notoriously costly and time-intensive litigation.⁹⁴ For example, two Muslims involved in a business dispute may choose to ask an arbitrator to apply Sharia business standards.⁹⁵ In such a case, the arbitrator's decision is binding under the American legal system.⁹⁶

⁸⁴ Scott Shane, *In Islamic Law, Gingrich Sees a Mortal Threat to U.S.*, N.Y. TIMES, Dec. 21, 2011, at A22 (internal quotation marks omitted).

⁸⁵ *See id.*

⁸⁶ *Id.*

⁸⁷ *See Elliott, supra note 5; see also Venetis, supra note 5, at 194–97 & nn.21–44 (discussing and citing various states' bills and referenda attempting to ban the use of foreign, international, or religious law in state courts).*

⁸⁸ Elliott, *supra note 5*.

⁸⁹ *See id.*

⁹⁰ *Cases in U.S. Courts, supra note 56*.

⁹¹ Oman, *supra note 55*, at 290.

⁹² Elliott, *supra note 5*.

⁹³ *See Warshal, supra note 13*.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*; *see* 9 U.S.C. § 9 (2006) (requiring courts to enter judgment pursuant to valid commercial arbitration awards where the parties have agreed that judgment shall be entered on the award).

Anti-Sharia advocates argue that a Sharia ban would protect the United States and its Constitution from a Sharia takeover.⁹⁷ These advocates continue to promote bans on Sharia by introducing new legislation and attempting to revive similar measures that have previously been tabled.⁹⁸ The attempted bans have met varying degrees of success, depending largely on the terminology used in the proposed legislation.⁹⁹

D. *Banning Sharia: Successes and Failures*

Yerushalmi's first two major successes came from Tennessee and Louisiana, which passed early versions of his proposed law.¹⁰⁰ These versions did not directly mention Sharia, but instead referred more generally to "foreign law."¹⁰¹ Yerushalmi recognized that this distinction was necessary for the laws in question to avoid annulment for lack of constitutionality.¹⁰² Arizona initially considered a bill to explicitly ban the implementation of Sharia law, as well as "canon law, halacha and karma."¹⁰³ When the bill failed, Arizona introduced and successfully passed a more general ban on foreign law, directly modeled after Yerushalmi's proposed legislation.¹⁰⁴

Measures that explicitly seek to ban Sharia have been proposed in a number of states and, as in Arizona, have generally found little success.¹⁰⁵ One exception, at least initially, is Oklahoma.¹⁰⁶ In November 2010, seventy percent of Oklahoma voters approved a proposed amendment to the state constitution that would prohibit judges from considering Sharia or other foreign law in their decisions.¹⁰⁷ Shortly thereafter, however, the Council on American-Islamic Relations (CAIR)

⁹⁷ See Elliott, *supra* note 5.

⁹⁸ *Id.*

⁹⁹ See *id.*

¹⁰⁰ *Id.*

¹⁰¹ See Application of Foreign Law, LA. REV. STAT. ANN. § 9:6001 (2010); Policy on Granting Comity to Foreign Law, Legal Code or System, TENN. CODE ANN. § 20-15-101 (West 2010).

¹⁰² See Elliott, *supra* note 5. The constitutional concerns arise out of the First Amendment Establishment Clause, which requires the government to refrain from sanctioning one religion over another. See *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 747 (1976) ("The State must confine itself to secular objectives, and neither advance nor impede religious activity."); Elliott, *supra* note 5.

¹⁰³ See H.R. 2582, 50th Leg., 1st Reg. Sess., art. 5(F)(3) (Ariz. 2011), available at <http://www.azleg.gov/legtext/50leg/1r/bills/hb2582p.pdf>.

¹⁰⁴ See Application of Foreign Laws, ARIZ. REV. STAT. ANN. § 12-3101 (2011); Elliott, *supra* note 5; *American Laws for American Courts*, AM. PUB. POL'Y ALLIANCE, http://publicpolicyalliance.org/?page_id=38 (last visited Mar. 8, 2013).

¹⁰⁵ See Elliott, *supra* note 5.

¹⁰⁶ See McKinley, *supra* note 3.

¹⁰⁷ *Id.*

filed a complaint in federal court alleging that the Oklahoma amendment violated the First Amendment.¹⁰⁸ Plaintiff Muneer Awad, Executive Director of the Oklahoma chapter of CAIR, charged that the amendment both stigmatizes Islam and denies rights to Muslims that are granted to members of other religions.¹⁰⁹ As an example, Awad explained that his will asks that a judge look to Islamic maxims in any instance in which his wishes are not explicit.¹¹⁰ While a judge could consult religious codes of other religions under similar circumstances, the judge could not consult Islamic maxims if the Oklahoma amendment were allowed to stand.¹¹¹

The court granted a preliminary injunction barring Oklahoma's Board of Elections from certifying the referendum results and implementing the amendment.¹¹² On January 10, 2012, the U.S. Court of Appeals for the Tenth Circuit affirmed the injunction, reasoning that the state had failed to present a compelling reason to discriminate against a specific religion.¹¹³ As a result, despite its initial success, Oklahoma's amendment ultimately failed.¹¹⁴

II. DISCUSSION

A. *Banning Sharia and Its Conflict with Comity*

The proposed Oklahoma amendment and similar movements in other states have drawn many critics arguing that they constitute bad policy and violate several provisions of the U.S. Constitution.¹¹⁵ These provisions include the Supremacy Clause, the Full Faith and Credit

¹⁰⁸ See Complaint at 6, *Awad*, 754 F. Supp. 2d 1298 (No. CIV-10-1186-M); McKinley, *supra* note 3.

¹⁰⁹ See Complaint, *supra* note 108, at 6.

¹¹⁰ See *id.* at 7; Ingold, *supra* note 14.

¹¹¹ See Complaint, *supra* note 108, at 7–8; Ingold, *supra* note 14.

¹¹² *Awad*, 754 F. Supp. 2d at 1308.

¹¹³ *Awad*, 670 F.3d at 1132–33 (10th Cir. 2012).

¹¹⁴ See *id.*

¹¹⁵ See, e.g., Venetis, *supra* note 5, at 192, 201, 206, 213 (arguing that the Oklahoma amendment violates the Full Faith and Credit and Supremacy Clauses of the U.S. Constitution, demonstrates a lack of understanding and mistrust of the judiciary, violates principles of comity, and may destabilize legal and business communities); Nathan B. Oman, *Sharia Law Poses No Threat to American Courts*, DESERET NEWS (Dec. 19, 2010), http://www.deseretnews.com/article/700092695/Sharia-law-poses-no-threat-to-american-courts.html?s_cid=s10 (“The reality of sharia in America is more humdrum than [the] hysterical rhetoric [of ban proponents] suggests.”); Warshal, *supra* note 13 (discussing ways in which American courts can appropriately implement Sharia, and arguing that Sharia bans harm not only American Muslims, but also America more broadly).

Clause, and the First Amendment's Free Exercise and Establishment Clauses.¹¹⁶ Beyond the constitutional arguments, critics have also urged that the proposed bans conflict with the principle of comity.¹¹⁷

Comity is the principle of voluntary recognition that the courts of one nation give to the executive, legislative, and judicial acts of another nation.¹¹⁸ Scholars differ on whether comity comprises a singular doctrine, or whether it is best divided into categories.¹¹⁹ Among those who view comity as a set of related doctrines, the most widely recognized forms of comity are deference to foreign laws (sometimes called "prescriptive comity" or "comity of nations")¹²⁰ and deference to foreign courts (sometimes called "adjudicatory comity,"¹²¹ "judicial comity," or "comity of courts").¹²² At least one scholar has also recognized deference to foreign sovereigns as litigants as a separate form of comity.¹²³ This Note focuses on the two most-frequently recognized forms of comity: deference to Sharia as foreign law and deference to the judgments of foreign courts—specifically, when their decisions involve the application of Sharia.¹²⁴ Because those who seek to ban the application of Sharia in the United States do not distinguish between deference to foreign laws and deference to foreign courts, this Note will address comity as a single concept comprising both forms.¹²⁵

¹¹⁶ Venetis, *supra* note 5, at 191, 201, 206.

¹¹⁷ *See id.* at 213; Warshal, *supra* note 13.

¹¹⁸ *See* Hilton v. Guyot, 159 U.S. 113, 143–44 (1895).

¹¹⁹ *See* William S. Dodge, International Comity in American Courts 4 n.21 (unpublished manuscript), available at <http://www.asil.org/files/dodge.pdf>.

¹²⁰ Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting). In distinguishing "prescriptive comity" from comity of courts, in which judges abstain from exercising jurisdiction over conflicts that ought to be decided elsewhere, Justice Scalia defined prescriptive comity as "the respect sovereign nations afford each other by limiting the reach of their laws." *Id.* As Scalia noted, Justice Joseph Story, whose 1834 treatise solidified the use of comity in America, also recognized this form of comity. *See id.*; *infra* text accompanying note 146. Story used the term "comity of nations," which he defined as "the true foundation and extent of the obligation of the laws of one nation within the territories of another." JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC § 38 (1834).

¹²¹ N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT'L ECON. L. 601, 615 (2006); *see* Dodge, *supra* note 119, at 23. The term "adjudicatory comity" references American courts' "recognition and enforcement of previously rendered foreign judgments" and "defer[ence] to a foreign court as the appropriate forum in the first instance, i.e., before a foreign action had even been filed." Calamita, *supra*, at 615.

¹²² *See* Dodge, *supra* note 119, at 4 nn.21–22.

¹²³ *See id.* at 2.

¹²⁴ *See infra* Part III.

¹²⁵ *See supra* notes 101–107 and accompanying text; *infra* Part III.

Sharia is a form of foreign law because it wholly constitutes or plays a role in the law of a number of Muslim countries.¹²⁶ In Saudi Arabia, Yemen, the United Arab Emirates, Kuwait, and Bahrain, Islam is recognized as the official state religion, and Sharia is either the primary source, or one of the sources, of law.¹²⁷ In Iran, Iraq, Pakistan, and Egypt, no law may be enacted that contradicts Islam.¹²⁸ In all, twenty-two countries have Sharia written into their constitutions in some form.¹²⁹ Several other countries have secular governments, and thus do not mention Sharia in their constitutions, but allow Muslims to resolve family and financial disputes in Sharia courts.¹³⁰ For instance, Kenya and Nigeria have Sharia family courts.¹³¹ In Tanzania, civil courts have discretion to apply secular or Sharia law, depending on the defendant's religion.¹³² Lebanon and Indonesia have mixed-jurisdiction courts that apply Sharia in certain instances.¹³³ Thus, Sharia plays a role in the law of a relatively large number of nations.¹³⁴

B. Comity: A Brief History

Although voluntary, comity as the principle of deference to foreign law has a long-standing tradition in America.¹³⁵ Indeed, American courts have considered comity in their decisions for more than 200 years.¹³⁶ The principle of comity began in the Netherlands in the seventeenth century.¹³⁷ In 1648, the Peace of Westphalia established the territorial sovereignty of separate states.¹³⁸ Recognizing the need to establish a method of dealing with foreign rights in the era of sovereign

¹²⁶ See Johnson & Vriens, *supra* note 48.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ HANSHAW, *supra* note 16, at 8. The twenty-two countries are Afghanistan, Algeria, Bahrain, Comoros, Egypt, Gambia, Iraq, Iran, Jordan, Kuwait, Libya, Malaysia, Maldives, Mauritania, Oman, Pakistan, Qatar, Saudi Arabia, Sudan, Syria, the United Arab Emirates, and Yemen. *Id.* at 8 n.14.

¹³⁰ Johnson & Vriens, *supra* note 48.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See HANSHAW, *supra* note 16, at 8–9; Johnson & Vriens, *supra* note 48.

¹³⁵ See Dodge, *supra* note 119, at 1.

¹³⁶ *Id.*

¹³⁷ *Id.* at 7.

¹³⁸ *Id.* The Peace of Westphalia was a group of peace treaties that ended the Thirty Years' War and the Eighty Years' War. *Peace of Westphalia*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/human-rights/peace-westphalia/p26091> (last visited Mar. 8, 2013). In addition to establishing territorial sovereignty, the Peace of Westphalia addressed territorial changes and religious tolerance. *Id.*

states, Dutch jurist Ulrich Huber introduced the principle of comity in his work *De Conflictu Legum Diversarum in Diversis Imperiis*.¹³⁹ Huber established three maxims, intended in part to demonstrate how rights granted by the government of one state could be extended to apply in another state.¹⁴⁰

(1) The laws of each state have force within the limits of that government and bind all subject to it, but not beyond.

(2) All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.

(3) Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects.¹⁴¹

Huber cited convenience as the purpose of the principle of comity.¹⁴² He explained that “nothing could be more inconvenient to . . . international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law.”¹⁴³ Huber felt that comity was necessary in areas such as contract and property rights, so that such rights would not disappear when parties moved between countries.¹⁴⁴ His ideas flourished in the Netherlands and were brought to Britain, and then to America as part of British common law.¹⁴⁵

In 1834, U.S. Supreme Court Justice Joseph Story wrote *Commentaries on the Conflict of Laws*, which solidified comity’s role in American law.¹⁴⁶ Story included three maxims, which mirrored the maxims that Huber had established nearly two centuries earlier.¹⁴⁷ First, that “every nation possesses an exclusive sovereignty and jurisdiction within its own territory.”¹⁴⁸ Second, that “no state or nation can, by its laws, directly

¹³⁹ Ulrich Huber, *De Conflictu Legum Diversarum in Diversis Imperiis* § 2 (1689), reprinted in ERNEST G. LORENZEN, *SELECTED ARTICLES ON THE CONFLICT OF LAWS* 162, 164 (1947); see Dodge, *supra* note 119, at 7.

¹⁴⁰ Huber, *supra* note 139, § 2; see Dodge, *supra* note 119, at 7.

¹⁴¹ Huber, *supra* note 139, § 2 (citations omitted), quoted in Dodge, *supra* note 119, at 7.

¹⁴² See Huber, *supra* note 139, § 2; Dodge, *supra* note 119, at 7–8.

¹⁴³ Huber, *supra* note 139, § 2; Dodge, *supra* note 119, at 7–8.

¹⁴⁴ Dodge, *supra* note 119, at 28.

¹⁴⁵ See *id.* at 8.

¹⁴⁶ See Dodge, *supra* note 119, at 8 (arguing that Story’s work “cemented comity into the foundations of American conflicts law”). See generally STORY, *supra* note 120.

¹⁴⁷ See Dodge, *supra* note 119, at 8–9.

¹⁴⁸ STORY, *supra* note 120, § 18.

affect or bind property out of its own territory, or bind persons not resident therein.”¹⁴⁹ And third, “whatever force and obligation the laws of one country have in another, depend solely upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent.”¹⁵⁰ Like Huber, Story acknowledged comity as the foundation of deference to foreign law.¹⁵¹

Story’s reasoning for the acceptance of comity was similar to that of Huber; he felt that comity was appropriate for reasons of “mutual convenience and utility.”¹⁵² Story also echoed Huber’s emphasis on the voluntary nature of comity: “No nation can . . . be required to sacrifice its own interests in favour of another; or to enforce doctrines which, in a moral or political view, are incompatible with its own safety or happiness, or conscientious regard to justice and duty.”¹⁵³

Comity took a strong hold in America and was used repeatedly in the nineteenth century as a rationale for enforcing foreign laws, including laws relating to contracts, the ownership of chattels, and the organization of corporations.¹⁵⁴ By the twentieth century, the rationale for the invocation of comity began to shift from the private interest in convenience to the public interest in encouraging strong relationships with foreign countries by respecting their sovereignty.¹⁵⁵ By 1918, the Supreme Court readily espoused this new view, explaining that, “[t]o permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations.”¹⁵⁶

C. *Comity in the Present-Day United States*

In the twenty-first century, demonstrating courtesy toward the sovereignty of other nations—by recognizing the interests embedded in the laws of foreign nations and respecting foreign tribunals as adjudica-

¹⁴⁹ *Id.* § 20.

¹⁵⁰ *Id.* § 23.

¹⁵¹ Dodge, *supra* note 119, at 9.

¹⁵² *Id.*

¹⁵³ STORY, *supra* note 120, § 25.

¹⁵⁴ Dodge, *supra* note 119, at 9.

¹⁵⁵ *Id.* at 18.

¹⁵⁶ *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 304 (1918) (internal quotation marks omitted).

tors—remains the primary reason for applying comity.¹⁵⁷ The Supreme Court has reaffirmed its twentieth-century views, explaining that it interprets ambiguous U.S. laws “to avoid unreasonable interference with the sovereign authority of other nations.”¹⁵⁸

Although reciprocity is, of course, desired among nations that engage in comity with respect to the laws of other nations, it has been very infrequently a requirement.¹⁵⁹ The *Restatement (Second) of Conflict of Laws* emphasizes that “[p]rivate parties . . . should not be made to suffer for the fact that the courts of the state from which they come give insufficient consideration to the interests of the state of the forum.”¹⁶⁰

Scholars disagree on whether comity is a rule of customary international law.¹⁶¹ The *Restatement (Third) of Foreign Relations Law* suggests that it is, but some scholars have argued that the Restatement approach is not in line with state practice.¹⁶² Whether or not comity in fact constitutes a part of customary international law, it still plays a significant role in U.S. domestic law.¹⁶³ In the United States, it is generally not considered law itself, but rather a principle on which laws may be founded.¹⁶⁴ Laws based on comity may result from judicial decisions or from state or federal legislation.¹⁶⁵

As both Huber and Story intended, the principle of comity is frequently used in the United States today to assist in the resolution of contract and testamentary disputes.¹⁶⁶ For example, in *Apenyo v. Apenyo*, the Maryland Court of Appeals affirmed a lower-court decision on the basis of comity.¹⁶⁷ The case involved a husband and wife who were natives of Ghana but lived in Maryland.¹⁶⁸ The husband served the wife

¹⁵⁷ See Dodge, *supra* note 119, at 26.

¹⁵⁸ *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).

¹⁵⁹ See Dodge, *supra* note 119, at 47. In *Hilton v. Guyot*, the Supreme Court *did* require reciprocity for the enforcement of foreign judgments (adjudicatory comity). *Id.* at 46–47; see *Hilton*, 159 U.S. at 228. The Court explained “that international law is founded upon mutuality and reciprocity.” *Hilton*, 159 U.S. at 228. *Hilton* had little impact, however, and even after *Hilton*, state courts applied comity regardless of the presence of reciprocity. Dodge, *supra* note 119, at 47.

¹⁶⁰ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. k (1971); Dodge, *supra* note 119, at 47.

¹⁶¹ Dodge, *supra* note 119, at 39.

¹⁶² *Id.*; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 cmt. a (1987).

¹⁶³ Dodge, *supra* note 119, at 40.

¹⁶⁴ *Id.* at 41.

¹⁶⁵ *Id.*

¹⁶⁶ See, e.g., *Apenyo v. Apenyo*, 32 A.3d 511, 520 (Md. 2011); *Kaur v. Bharmota*, 914 N.E.2d 1087, 1090 (Ohio Ct. App. 2009).

¹⁶⁷ *Apenyo*, 32 A.3d at 520.

¹⁶⁸ *Id.* at 513.

with divorce papers in Ghana.¹⁶⁹ Resting its decision on the principle of comity, the court dismissed the wife's subsequent attempt to file for divorce in Maryland.¹⁷⁰

In a similar application of comity, the Ohio Court of Appeals, in *Kaur v. Bharmota*, deferred to a 1961 Indian divorce decree.¹⁷¹ In *Kaur*, a deceased husband's first wife filed suit in Ohio against the husband's second wife, alleging that she was the husband's surviving spouse.¹⁷² The appellate court upheld the lower court's finding that there was sufficient evidence that the first marriage had been dissolved in India.¹⁷³ The dissolution had occurred pursuant to the Hindu Marriage Act, which applied to divorces between Hindus.¹⁷⁴ The court explained that "in the interest of comity, an Ohio court will recognize a foreign decree as a matter of courtesy."¹⁷⁵ Other recent examples of deference to foreign laws and judicial decisions abound.¹⁷⁶

Oklahoma, no less than other states, has long recognized comity.¹⁷⁷ A 1903 Supreme Court of the Territory of Oklahoma decision defined comity as "the courtesy by which nations recognize within their own territory, or in their own courts, the peculiar institutions of another nation, or the rights and privileges acquired by its citizens in their own land."¹⁷⁸ The same definition is recognized by the state of Oklahoma today.¹⁷⁹

Notwithstanding the recent attempt to ban the use of Sharia in Oklahoma, there is no indication that there has been a surge of cases in Oklahoma involving Sharia, recently or otherwise.¹⁸⁰ A search of Oklahoma state court decisions demonstrates that the courts have never

¹⁶⁹ *Id.*

¹⁷⁰ *See id.* at 516–20.

¹⁷¹ *Kaur*, 914 N.E.2d at 1096.

¹⁷² *Id.* at 1088–89.

¹⁷³ *Id.* at 1096.

¹⁷⁴ *Id.* at 1090–91.

¹⁷⁵ *Id.* at 1090.

¹⁷⁶ *See, e.g.*, *J.P. Morgan Chase Bank v. Altos Hornos de Mexico*, 412 F.3d 418, 423–24, 426 (2d Cir. 2005) (abstaining from assuming jurisdiction over proceedings on the basis of comity to the Mexican court); *Leitch v. Leitch*, 382 N.W.2d 448, 448–50 (Iowa 1986) (enforcing Canadian child support decree, where couple married and divorced in Canada and spouse who moved to Iowa fell behind on payments).

¹⁷⁷ *See Myatt v. Ponca City Land & Improvement Co.*, 78 P. 185, 188 (Okla. 1903).

¹⁷⁸ *Id.*

¹⁷⁹ *See Burrell v. Burrell*, 192 P.3d 286, 288 n.4 (Okla. 2007).

¹⁸⁰ *See Venetis, supra* note 5, at 3; *cf.* WESTLAW, <http://www.westlaw.com> (last visited Mar. 17, 2013) (select "OK-CS" database, then enter search terms: Sharia Shari'a Shariah Shari'ah "Islamic law") (returning no results).

once used any variation on the word Sharia or the phrase “Islamic law” in a published case.¹⁸¹

III. ANALYSIS

A. *The Application of Comity Is Not Blind*

Although American courts readily exercise comity by applying foreign law to cases involving events that occur abroad, comity does not entail applying such law where it conflicts with American notions of fairness and due process.¹⁸² This limited application is consistent with comity as it has been defined since the seventeenth century.¹⁸³ Huber’s concept of comity specified that rights granted by a foreign power were to be maintained *only* “so far as they do not cause prejudice to the power or rights of [the enforcing country’s] government or of its subjects.”¹⁸⁴ Courts may therefore exercise comity, by definition, only where its application does not defy domestic constitutional rights.¹⁸⁵

¹⁸¹ See *supra* note 181. A similar search for Oklahoma federal court decisions reveals only eleven cases containing any variation of the word Sharia or the phrase “Islamic law.” Cf. WESTLAW, <http://www.westlaw.com> (last visited Feb. 21, 2013) (Select “OK-CS-ALL” database, then enter search terms: Sharia Shari’a Shariah Shari’ah “Islamic law”) (returning eleven results). Several of these cases address aliens’ petitions for asylum. See, e.g., *Sidabutar v. Gonzales*, 503 F.3d 1116, 1117 (10th Cir. 2007) (denying a Christian Indonesian citizen’s petition for asylum and explaining in part that Indonesia does not impose Sharia on Christians); *Bastian v. Gonzales*, 187 F. App’x 891, 892 (10th Cir. 2006); *Haimour v. Gonzales*, 165 F. App’x 594, 595 (10th Cir. 2006) (denying asylum petition of a Muslim Jordanian citizen who had committed adultery, and explaining that adulterous men are not necessarily sentenced to death under Sharia). Several more cases address state prisoners’ grievances. See, e.g., *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1305 (10th Cir. 2010) (reproducing prisoner’s grievance, which stated that he required his diet include meat raised and slaughtered according to Islamic law); *Williams v. Franklin*, 302 F. App’x 830, 830–31 (10th Cir. 2008) (reciting prisoner’s complaints regarding who should lead the weekly prayer under Islamic law); *Ciempa v. Jones*, 745 F. Supp. 2d 1171, 1176 (N.D. Okla. 2010) (noting prisoner’s complaint that prison staff are not qualified to determine which food products are allowable under Islamic law); *Alamiin v. Miller*, No. CIV-08-1371-F, 2010 WL 3603150, at *1 (W.D. Okla. June 28, 2010) (citing prisoner’s allegation that the prison diet did not meet the requirements of Islamic law). The remaining cases involve the ongoing challenge to the proposed ban on Sharia law. See *Awad v. Ziriax*, No. CIV-10-1186-M, 2010 WL 4676996, at *5 (W.D. Okla. Nov. 9, 2010). The final case cites to *Awad* for the proposition that upholding constitutional rights is in the public interest and mentions that *Awad* involves Sharia. See *Planned Parenthood of Ark. & Eastern Okla. v. Cline*, No. CIV-12-1245-F, 2012 WL 6700364, at *6 (W.D. Okla. Dec. 24, 2012).

¹⁸² See *Venetis*, *supra* note 5, at 213; *Oman*, *supra* note 115; *Warshal*, *supra* note 13.

¹⁸³ See *Huber*, *supra* note 139, § 2; *Dodge*, *supra* note 119, at 7.

¹⁸⁴ See *Huber*, *supra* note 139, § 2.

¹⁸⁵ See *id.*

It is therefore unsurprising and appropriate that American state courts frequently refuse to apply portions of foreign law that do not comport with American notions of fairness or due process.¹⁸⁶ For instance, state courts frequently refuse to enforce foreign divorce decrees based on the pro-husband Sharia principle of *talaq*, particularly where the husband attempts to use *talaq* in a Muslim country to avoid complying with American divorce law.¹⁸⁷ In 2009, the Michigan Court of Appeals held in *Tarikonda v. Pinjari* that a lower court erred in recognizing the parties' divorce because the requirements for comity were not satisfied.¹⁸⁸ The parties were married in India under Sharia and subsequently moved to Michigan.¹⁸⁹ Thereafter, the husband went to India, performed the triple *talaq*, and was granted a divorce.¹⁹⁰ When the wife subsequently filed for divorce in Michigan, the husband invoked his Indian divorce decree, arguing that he and his wife were already divorced.¹⁹¹

In its decision to withhold comity, the court explained that "a judgment should be accorded comity if: 1) the basic rudiments of due process were followed, 2) the parties were present in court, and 3) a hearing on the merits was held."¹⁹² In *Tarikonda*, none of the three requirements were present: the wife did not have the right to prior notice of the triple *talaq*, she was not present when the divorce was granted in India, and there was no hearing on the merits before the Indian divorce was granted.¹⁹³ Notably, the court saw comity as inappropriate not on account of a general refusal to consider Sharia in this or any decision, but because the particular application of Sharia in this case did not comport with the American requirement of due process.¹⁹⁴

In a similar refusal to defer to Sharia where doing so would conflict with American legal standards, the Washington Court of Appeals in *In re Marriage of Altayar & Muhyaddin* exercised its discretion not to recognize the parties' Islamic marriage contract as a valid pre-nuptial

¹⁸⁶ See *id.*; Oman, *supra* note 115.

¹⁸⁷ Oman, *supra* note 115.

¹⁸⁸ *Tarikonda v. Pinjari*, No. 287403, 2009 WL 930007, at *2 (Mich. Ct. App. Apr. 7, 2009).

¹⁸⁹ *Id.* at *1.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at *2 (quoting *Dart v. Dart*, 568 N.W.2d 353, 358 (Mich. Ct. App. 1997), *aff'd*, 597 N.W.2d 82 (Mich. 1999)) (internal quotation marks omitted).

¹⁹³ *Id.*

¹⁹⁴ See *Tarikonda*, 2009 WL 930007, at *2.

agreement.¹⁹⁵ The contract was signed in Jordan at the time of the marriage and provided that the wife would receive a *mahr* of one Quran and nineteen grams of gold if the parties divorced or the husband died.¹⁹⁶ After filing for divorce, the husband argued that the contract served as a pre-nuptial agreement and that, under such, his wife should receive the Quran and gold pieces, but nothing more.¹⁹⁷ The court, in rejecting the husband's argument, noted that a pre-nuptial agreement must be fair in order to be valid, and "the exchange of [nineteen] pieces of gold for equitable property rights under Washington law is not fair."¹⁹⁸ The court also noted that even if the agreement was fair, there was no evidence that the husband notified his wife of his assets or that she received independent advice at the time of the marriage.¹⁹⁹ Because the court found that the marriage contract did not serve as a valid pre-nuptial agreement, it upheld the trial court's dissolution order of assets.²⁰⁰

While state courts have refused to apply foreign law where doing so would violate constitutional values, courts have willingly applied foreign legal principles where no such violation would occur, particularly when the parties willingly bind themselves to the application of the relevant foreign principles.²⁰¹ For instance, in *Odatalla v. Odatalla*, the New Jersey Superior Court found that the parties' *mahr* agreement was enforceable under New Jersey contract law because the husband voluntarily bound himself to it at the time of signing.²⁰² The couple had been married in an Islamic ceremony in New Jersey and signed a con-

¹⁹⁵ *In re Marriage of Altayar & Muhyaddin*, No. 57475-2-I, 2007 WL 2084346, at *3 (Wash. Ct. App. July 23, 2007).

¹⁹⁶ *Id.* at *1.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at *3.

¹⁹⁹ *Id.*

²⁰⁰ *See id.* at *2. For additional examples of cases in which state courts have refused to extend comity to principles of Sharia, see, e.g., *Rahawangi v. Alsamman*, No. 83643, 2004 WL 1752957, at *6 (Ohio Ct. App. Aug. 5, 2004) (refusing to extend comity to a Syrian divorce decree because it was issued ex parte and without notice to the wife); *Ahmad v. Ahmad*, No. L-00-1391, 2001 WL 1518116, at *4 (Ohio Ct. App. Nov. 30, 2001) (holding that the parties' *sadaq*—equivalent of *mahr*—obtained in Jordan was unenforceable because at the time of the agreement, the wife was unrepresented by counsel, the husband did not disclose his assets, and the agreement did not consider the assets that the couple had obtained during their eight years in Ohio); *Farah v. Farah*, 429 S.E.2d 626, 629 (Va. Ct. App. 1993) (refusing to grant comity to Pakistan's recognition of the parties' marriage because the marriage, which occurred in England, did not follow the statutory formalities required by English law).

²⁰¹ *See, e.g., Odatalla v. Odatalla*, 810 A.2d 93, 98 (N.J. Super. Ct. Ch. Div. 2002).

²⁰² *Id.* at 97–98.

tract that included a ten thousand dollar *mahr*.²⁰³ The wife subsequently filed for divorce due to “extreme cruelty” and sought enforcement of the *mahr*.²⁰⁴ After reviewing a videotape that showed that both husband and wife had reviewed the *mahr* and signed voluntarily, the court ordered specific performance of the designated payment based on “neutral principles of law.”²⁰⁵ In its decision, the court cited New York and New Jersey decisions in which courts had specifically enforced *ketubahs*—Jewish marriage contracts.²⁰⁶ Because the *Odatalla* parties’ *mahr* was enforceable without unconstitutional implications, the court freely upheld it.²⁰⁷

Similarly, in 1996 the Maryland Court of Special Appeals in *Hosain v. Malik* upheld the circuit court’s grant of comity to a Pakistani court’s custody decision.²⁰⁸ The Pakistani court awarded custody of the parties’ child to the father.²⁰⁹ According to the court, the circuit court should have refused to exercise comity only if (1) “the Pakistani court did not apply the best interest of the child test”—the test that applies under Maryland state law—and (2) “the Pakistani law applied was contrary to Maryland public policy.”²¹⁰ Because the circuit court could have reasonably concluded that the Pakistani court did apply the best interest of the child standard, and because “the principles of Pakistani law which were applied were not repugnant to Maryland law,” the court held that comity was appropriate.²¹¹

These cases indicate that state courts generally consider foreign law carefully and prioritize domestic constitutional rights over adherence to foreign or religious laws.²¹² Where the application of Sharia threatens a constitutional right, most courts will properly refuse to grant comity.²¹³

²⁰³ *Id.* at 95.

²⁰⁴ *Id.* at 94.

²⁰⁵ *Id.* at 95, 98.

²⁰⁶ *Id.* at 97.

²⁰⁷ *See Odatalla*, 810 A.2d at 98.

²⁰⁸ *Hosain v. Malik*, 671 A.2d 988, 1006 (Md. Ct. Spec. App. 1996).

²⁰⁹ *Id.* at 990.

²¹⁰ *Id.* at 1006.

²¹¹ *Id.* at 1003, 1005–06.

²¹² *See supra* text accompanying notes 187–201.

²¹³ *See supra* text accompanying notes 187–201.

B. *Anti-Sharia Activists' Concerns Are Based on Overgeneralizations and Improperly Deny Judges Their Discretion*

Despite the limits on the application of Sharia law, anti-Sharia activists insist on feeding the growing public paranoia about Sharia.²¹⁴ Their claims are frequently based on broad generalizations that fail to address the nuances and specific facts of individual cases.²¹⁵ In making their arguments, activists have fixated on the few cases in which judges have improperly applied Sharia.²¹⁶ In particular, they frequently invoke a 2010 New Jersey case in which a family court judge denied a Moroccan woman's request for a restraining order against her husband, who had assaulted and raped her.²¹⁷ The judge found that the defendant did not have the requisite criminal intent because he believed that, under Islamic law, his wife must acquiesce with his demand for sexual relations.²¹⁸

Although the family court decision is, of course, troubling, it should be recognized as a case of judicial mistake, rather than a problem with the law itself.²¹⁹ The judge failed to follow both New Jersey law *and* Islamic law, which forbids spousal abuse, including nonconsensual sexual intercourse.²²⁰ Further, even if the judge had been correct in his interpretation of Islamic law, he would have been incorrect to apply it in this case.²²¹ As the court clarified on appeal, the defendant's religious beliefs did not excuse him from complying with the state's criminal law statutes.²²² Notably, the appellate court, recognizing the inappropriate application of Islamic law, remanded the case and ordered that the family court grant the requested restraining order.²²³ The family court decision demonstrates that, like other principles of law, comity with respect to Sharia law may have problematic implications if improperly applied.²²⁴ When properly applied, however, as in most cases,

²¹⁴ See Abed Awad, *Negative Connotations Surrounding Sharia Must Be Dispelled*, JURIST (Feb. 2, 2012), <http://jurist.org/sidebar/2012/02/abed-awad-sharia-law.php>.

²¹⁵ See *id.*

²¹⁶ See Elliott, *supra* note 5.

²¹⁷ S.D. v. M.J.R., 2 A.3d 412, 418 (N.J. Super. Ct. App. Div. 2010); Elliott, *supra* note 5.

²¹⁸ S.D., 2 A.3d at 418.

²¹⁹ See Justin Elliott, *What Sharia Law Actually Means*, SALON (Feb. 26, 2011), http://politics.salon.com/2011/02/26/sharia_the_real_story/.

²²⁰ See *id.*; cf. HANSHAW, *supra* note 16, at 123 (explaining that physical injury to the wife provides potential grounds for divorce).

²²¹ See S.D., 2 A.3d at 422.

²²² *Id.*

²²³ See *id.* at 428.

²²⁴ See Elliott, *supra* note 5.

it is never allowed to override the constitutional principles.²²⁵ Moreover, comity applies only in civil cases; Sharia is never used in the United States in a criminal context.²²⁶

Given that by the very definition of comity, principles of foreign law do not override the U.S. Constitution, efforts to ban Sharia are simply unnecessary.²²⁷ While Sharia's application is undoubtedly not always appropriate, the question of its application ought to remain a case-by-case determination.²²⁸ As demonstrated by the many cases in which judges have examined the facts and declined to apply Sharia, judges hold and frequently exercise the discretion to abstain from applying foreign or religious law in a particular case.²²⁹ Indeed, where the religious or foreign law in question conflicts with the Constitution, the judge *must* refuse to apply such law.²³⁰ Thus, allowing comity with respect to Sharia law allows the principles of Sharia to be applied where such application is fair, and denies the application of Sharia where the result would not comport with American principles of justice.²³¹ Broad bans are unnecessary and suggest a distrust of judges' ability to properly analyze facts and exercise their discretion.²³² Attempts to ban Sharia in Oklahoma and other states are thus an insult to the integrity of the judicial system.²³³

C. *Acknowledging the Challenges Associated with Comity*

To be sure, asking state courts to consider and—where appropriate—apply Sharia is not a burden-free proposition.²³⁴ Many state judges know little about Islamic law, and there are no modern authoritative treatises on Islamic law to consult.²³⁵ Exacerbating the issue, some judges may start in a position *worse* than zero prior knowledge, given that

²²⁵ See Ihsan Alkhatib, *Shari'a Law and American Courts: Interview with Attorney and Adjunct Professor Abed Awad*, FORUM & LINK, Jan. 26, 2012, at 9, 9; Oman, *supra* note 115.

²²⁶ See *S.D.*, 2 A.3d at 422; Marco Simons, *What's at Stake in Oklahoma's "Sharia Law" Ban?*, EARTHRIGHTS INT'L (Nov. 17, 2010), <http://www.earthrights.org/blog/whats-stake-oklahomas-sharia-law-ban>.

²²⁷ See Huber, *supra* note 139, § 2; Alkhatib, *supra* note 225, at 9.

²²⁸ See Alkhatib, *supra* note 225, at 9.

²²⁹ See *id.*

²³⁰ See U.S. CONST. art. VI, cl. 2.

²³¹ See Venetis, *supra* note 5, at 213.

²³² See *id.* at 197.

²³³ See *id.*

²³⁴ See *infra* text accompanying notes 235–249.

²³⁵ See Mohammed Fadel, *German Judge and Legal Orientalism*, SHANFARAA, <http://shanfaraa.com/2011/07/german-judge-and-legal-orientalism-originally-posted-march-29-2007/> (last visited Mar. 18, 2013).

judges are not unsusceptible to exposure to the misinformation that is spread about Islamic law.²³⁶ Judges may therefore have to set aside what they have heard about Islamic law in their personal lives, which is undoubtedly challenging.²³⁷ They sometimes fail to do so and issue judgments based on assumptions, rather than the reality of Sharia.²³⁸ When this occurs, they may even exacerbate the negative stereotypes associated with Islam and with Sharia.²³⁹

The diversity of the American Muslim population provides an additional challenge to judges who are asked to consider Sharia in their decisions.²⁴⁰ Because American Muslims come from a wide range of countries and backgrounds, opinions on a single point of law are often as diverse as the people themselves.²⁴¹ In addition, because Islamic law is made up of varying schools of thought, known as *madhhabs*, it is pluralistic by nature.²⁴² The interpretation of a legal issue may diverge significantly among *madhhabs*.²⁴³ As a result of the diversity inherent both in the law and the people, understandings of a single legal issue often vary widely.²⁴⁴ This provides a challenge for Western courts, including those in the United States, as they tend to value predictability and ease of application of the law, and therefore are inclined to seek a unitary understanding of legal issues.²⁴⁵

The religion-based origin of some Western laws provides another obstacle in asking courts to grant comity to Sharia.²⁴⁶ Western marriage laws, for example, originated as tenets under Christianity.²⁴⁷ Although

²³⁶ See Sisk & Heise, *supra* note 8, at 236–37, 281–86.

²³⁷ *Cf. id.* (explaining that judges are not immune to influence from the general public's negative attitudes and suspicions regarding Muslims).

²³⁸ See Fadel, *supra* note 235. One commentator provides the example of *National Group for Communications & Computers Ltd. v. Lucent Technologies International Inc.*, in which the district court, applying what it considered to be Sharia law, held a commercial contract unenforceable while claiming that Islamic law is “fundamentally different from that of the United States.” 331 F. Supp. 2d 290, 294 (D.N.J. 2004); Fadel, *supra* note 235. This commentator argues that the court “obviously decided that the ‘right’ result in this case must be the ‘wrong’ result in the US, as though Islamic law and US law exist in alternate universes, with Islamic law representing all the alternatives rejected by US law.” Fadel, *supra* note 235.

²³⁹ See Sisk & Heise, *supra* note 8, at 259.

²⁴⁰ See Thompson & Yunus, *supra* note 46, at 369–70.

²⁴¹ *Id.* at 369.

²⁴² *Id.* at 370.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ See *id.* at 369–70.

²⁴⁶ See Thompson & Yunus, *supra* note 46, at 370.

²⁴⁷ *Id.*

these laws are now considered secular, their origins in Christianity largely resulted in the codification of Christian ideals, which frequently diverge from Islamic ideals.²⁴⁸ Because many of the cases brought in the United States involving Sharia relate to marriage, the Christian roots of Western marriage law are highly relevant and bound to cause tension in these cases.²⁴⁹

D. *Difficulties in Applying Sharia Do Not Warrant a Ban:
Lessons from the Jewish Experience*

Although not insignificant, these challenges are not insurmountable and do not excuse an outright ban on the use of comity with respect to Sharia law.²⁵⁰ The consideration of Jewish religious law, or Halacha, by U.S. courts draws several similar issues, and yet Halacha is not met with a similar sense of hysteria.²⁵¹ If those hoping to deny comity to Sharia are not concerned about a Halacha takeover, they should also not be concerned about a Sharia takeover.²⁵² Several states have enacted laws codifying Jewish dietary regulations, and while some have been struck down, others stand.²⁵³ A number of national corporations process foods to meet Jewish dietary laws.²⁵⁴ One New York town, Kiryas Joel, is comprised exclusively of Hasidic Jews.²⁵⁵ Road signs in the jurisdiction are written in both English and Yiddish, written in the Hebrew script.²⁵⁶ The local rabbi approves all political candidates before they run for office.²⁵⁷ Several local practices in the jurisdiction have been adjusted to fit with the requirements of Judaism.²⁵⁸

In addition, numerous American cities have one or more Jewish religious courts, called rabbinical courts, where Jews can arbitrate various matters based on Halacha.²⁵⁹ One to three rabbis typically oversee each arbitration.²⁶⁰ The arbitrations from the Jewish religious courts

²⁴⁸ *See id.*

²⁴⁹ *See id.* at 371; Elliott, *supra* note 5; *Cases in U.S. Courts*, *supra* note 56.

²⁵⁰ *See infra* text accompanying notes 262–280.

²⁵¹ *See* Warshal, *supra* note 13. Halacha is also spelled Halakhah. *Halacha*, ENCYCLOPEDIA MIDDLE E., <http://www.mideastweb.org/Middle-East-Encyclopedia/halacha.htm> (last visited Mar. 8, 2013).

²⁵² *See* Warshal, *supra* note 13.

²⁵³ *See id.*

²⁵⁴ *See id.*

²⁵⁵ *See id.*

²⁵⁶ *See id.*

²⁵⁷ *See id.*

²⁵⁸ *See* Warshal, *supra* note 13.

²⁵⁹ *See* HANSHAW, *supra* note 16, at 188; Warshal, *supra* note 13.

²⁶⁰ HANSHAW, *supra* note 16, at 188.

are, like any other arbitration, binding against the parties and enforceable in secular U.S. courts.²⁶¹

The Jewish experience is instructive for two primary reasons.²⁶² First, the success of Jewish courts in creating binding law without dire consequences for secular law suggests that the same is possible for Sharia.²⁶³ This is particularly true given the similarity of issues that implicate Halacha and Sharia.²⁶⁴ Despite the prevalence of rabbinical courts, the existence of a Jewish town, and the enactment of state legislation codifying Jewish dietary laws, most Americans do not feel the threat of an imminent Jewish takeover.²⁶⁵ Comity is thus freely granted with respect to Jewish law.²⁶⁶ Few care if two Jews who have contracted based on Jewish law and agreed that Jewish law will preside over any disputes want to resolve a dispute by applying Jewish law.²⁶⁷ Swapping “Jews” for “Muslims” and “Jewish law” for “Sharia” leads to an entirely different result, however.²⁶⁸ Instead of apathy, it brings a sense of hysteria.²⁶⁹ The American public would do well to consider the similarities between groups and understand that, like Jews, most Muslims are not trying to overtake the United States or its Constitution; they simply seek the same opportunity as other religious groups to resolve disputes among themselves.²⁷⁰

Second, Jewish success with arbitration suggests that the use of arbitration among Muslims may lessen or eliminate some of the concerns surrounding the extension of comity to Sharia.²⁷¹ One major advantage in using special courts to arbitrate disputes involving Halacha or Sharia lies in the courts’ expertise in the applicable religious law.²⁷² As previ-

²⁶¹ *See id.*

²⁶² *See id.*

²⁶³ *See id.*

²⁶⁴ Compare HANSHAW, *supra* note 16, at 188–89 (explaining that Beth Din of America is one of the country’s most-well known rabbinical courts), and *Arbitration and Mediation*, BETH DIN AMER., <http://www.bethdin.org/arbitration-mediation.asp> (last visited Mar. 8, 2013) (noting that Beth Din arbitrates cases involving a wide range of issues in three broad categories: commercial, communal [e.g., rabbinic contract disputes and other congregational disputes], and familial [e.g., family business, inheritance, and matrimonial disputes]), with *supra* text accompanying notes 54–56, 91–93 (observing that cases involving Sharia typically relate to commercial or familial disputes).

²⁶⁵ *See* Warshal, *supra* note 13.

²⁶⁶ *See* HANSHAW, *supra* note 16, at 187.

²⁶⁷ *See* Warshal, *supra* note 13.

²⁶⁸ *See id.*

²⁶⁹ *See id.*

²⁷⁰ *See id.*

²⁷¹ *See* HANSHAW, *supra* note 16, at 187–89.

²⁷² *See id.* at 189.

ously discussed, one of the primary obstacles to state court litigation involving Sharia is judges' lack of knowledge of Sharia.²⁷³ Arbitration helps to avoid that obstacle and ensure that the religious law is applied correctly.²⁷⁴ Fortunately, a gain in expertise regarding religious law does not come at the price of a loss in expertise regarding secular law.²⁷⁵ Jewish arbitrations use lay experts to supervise the proceedings and ensure that they comply with state law.²⁷⁶

Moreover, allowing arbitration of disputes involving Sharia obviates anti-Sharia activists' fear that Sharia will be applied against the unwilling.²⁷⁷ Absent a contract or agreement between both parties that disputes may be resolved using religious law, parties may not force one another to accept the application of religious law in dispute resolution or request that a dispute be arbitrated in a religion-based court.²⁷⁸ The First Amendment's Free Exercise and Establishment Clauses protect against the application of religious law to a party who has not agreed to such application.²⁷⁹ In sum, the Jewish experience, and in particular the ability of arbitration to address some of the problems and fears associated with extending comity to religious law, suggests that the concerns related to Sharia may and should be addressed without banning Sharia altogether.²⁸⁰

E. *Harm to Muslim Americans and Harm to America: Policy Implications of the Refusal to Extend Comity to Sharia*

State courts regularly and uniformly apply the principle of comity when Sharia is not the extrinsic law to be applied.²⁸¹ The attempts to prevent the same extension of comity when Sharia is the applicable extrinsic law demonstrate widespread misunderstanding and ignorance of both Sharia and the principle of comity.²⁸² When properly applied, comity with respect to Sharia will never beget a result that conflicts with

²⁷³ See Sisk & Heise, *supra* note 8, at 236–37, 281–86.

²⁷⁴ See HANSHAW, *supra* note 16, at 187.

²⁷⁵ See *id.* at 189.

²⁷⁶ See *id.*

²⁷⁷ See *id.* at 191.

²⁷⁸ See *id.*

²⁷⁹ *Id.* at 191–92 (“For a body to be empowered to compel [the application of religious law] is considered a violation of the First Amendment’s protections of religious activity contained in the Free Exercise and Establishment Clauses.”).

²⁸⁰ See HANSHAW, *supra* note 16, at 189–92; Warshal, *supra* note 13.

²⁸¹ Venetis, *supra* note 5, at 214.

²⁸² See Eliyahu Stern, Op-Ed., *Don’t Fear Islamic Law in America*, N.Y. TIMES, Sept. 3, 2011, at A21.

American constitutional principles.²⁸³ Thus, the threat to America that some associate with the application of Sharia is more imagined than real.²⁸⁴

As some scholars have suggested, the refusal to extend comity only to Sharia harms not just American Muslims, who are unable to resolve their contractual and commercial disputes as they intended, but all Americans.²⁸⁵ Intolerance for a single religion threatens America's tradition of religious diversity, tolerance, and assimilation.²⁸⁶ Moreover, the lack of acceptance of Islam and Sharia likely creates a sense of hostility among Muslims.²⁸⁷ The possibility of creating such hostility is particularly regrettable given that the majority of Muslims consider themselves assimilated, do not want to be isolated from American society, are accepting of other religions, and are unlikely to justify an attack on civilians.²⁸⁸ Refusing to extend comity to Islamic law, yet extending it to the laws of other religions, may reverse some of these desirable trends and make Muslim Americans feel unwelcome.²⁸⁹ At worst, the breeding of hostility among Muslim Americans may even serve to spur religious extremism both at home and abroad.²⁹⁰ Thus, in order to avoid creating a cycle of misunderstanding and intolerance, American non-Muslims would be well-advised to extend the same rights to their Muslim counterparts that they themselves enjoy.²⁹¹ These rights include allowing for the application of principles of religious law by way of comity.²⁹²

CONCLUSION

Although voluntary, the principle of comity has a long history of recognition in the United States. When used properly, comity allows judges the necessary discretion to determine where the application of Sharia is appropriate and comports with the Constitution. Thus, even if bans on the use of Sharia in state courts were not unconstitutional, they

²⁸³ See Oman, *supra* note 55, at 312–13.

²⁸⁴ See *id.*

²⁸⁵ See Stern, *supra* note 282; Warshal, *supra* note 13.

²⁸⁶ Stern, *supra* note 282; Warshal, *supra* note 13.

²⁸⁷ Stern, *supra* note 282; Warshal, *supra* note 13.

²⁸⁸ See *supra* text accompanying notes 37–42.

²⁸⁹ See Stern, *supra* note 282; Warshal, *supra* note 13.

²⁹⁰ Stern, *supra* note 282; Warshal, *supra* note 13; see also Sisk & Heise, *supra* note 8, at 279 (explaining that American Muslims are much more likely than European Muslims to reject Islamic extremism, and contending this is so in part because of American Muslims' "greater social and economic integration").

²⁹¹ See Stern, *supra* note 282; Warshal, *supra* note 13.

²⁹² See Warshal, *supra* note 13.

ought to not be enacted for reasons of comity. History has shown that Sharia is most frequently invoked in the United States in contract disputes among parties who have voluntarily formed contracts based on Sharia. Consequently, anti-Sharia activists' fear that Sharia will be imposed against the unwilling and will take over the United States demonstrates a lack of understanding of both history and comity.

Refusing to extend comity to Sharia, while granting comity to other religious laws, has dismaying policy implications. It undermines judicial integrity by suggesting that judges cannot be trusted to properly exercise their discretion in determining whether comity is appropriate. In addition, it demonstrates intolerance for a single religion, which threatens America's tradition of religious tolerance, diversity, and assimilation. Finally, it likely alienates American Muslims, which may serve to breed hostility among them. These policy concerns may be avoided if Sharia is granted the same respect with regard to comity that has been granted to the laws of other religions, already embraced by American jurisprudence.