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**THE ONLY THING WE HAVE TO FEAR IS FEAR ITSELF:
ISLAMOPHOBIA AND THE RECENTLY PROPOSED
UNCONSTITUTIONAL AND UNNECESSARY
ANTI-RELIGION LAWS**

Lee Tankle*

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.¹

INTRODUCTION

On September 11, 2001, nineteen al-Qaeda terrorists hijacked four passenger airplanes with the intent to destroy American landmarks and inflict massive loss of life.² All nineteen terrorists were adherents of the Muslim faith and members of the Islamist extremist group, al-Qaeda.³ In the aftermath of the attacks, popular evangelist Franklin Graham referred to Islam as “a very evil and wicked religion.”⁴ Graham’s comments were just the beginning of a slew of anti-Islamic sentiment in America following the 9/11 attacks.⁵ Hate crimes against Arabs and Muslims rose dramatically

* J.D., William & Mary School of Law, 2013; B.A., Dickinson College, 2010. Thank you to my parents, Gail Lashner and Paul Tankle, family, and friends for providing me with love and support throughout my entire academic career. A special thanks to Meg McEvoy, Emilie Whitehurst, Michelle Sudano, Kacie Inman, and Steve Torok for their thoughtful comments and editing of this Note. I also thank Razi Hashmi, former Executive Director of The Oklahoma Chapter of the Council on American-Islamic Relations (CAIR-OK) and current CAIR-OK Executive Director and Plaintiff in *Awad v. Ziriax*, Muneer Awad, for their invaluable assistance.

¹ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

² LORI PEEK, BEHIND THE BACKLASH: MUSLIM AMERICANS AFTER 9/11 at 18 (2011). The 9/11 attacks killed 2,973 people (not including the hijackers). Nat’l Sept. 11 Mem’l & Museum, *FAQ About 9/11*, 9/11 MEMORIAL, <http://www.911memorial.org/faq-about-911> (last visited Oct. 14, 2012).

³ Nat’l Sept. 11 Mem’l & Museum, *supra* note 2; *see also* MICHAEL A. SMERCONISH, FLYING BLIND 137 (2004).

⁴ PEEK, *supra* note 2, at 5.

⁵ Then Congressman, now Senator, Saxby Chambliss of Georgia commented in 2001 that Georgia sheriffs should be able to arrest any Muslim that crossed state lines. Jason Vest, *Exit*

in the wake of the attacks.⁶ Fear and hatred of Islam in the United States reached a symbolic precipice when the mere belief that, then presidential candidate, Barack Obama, was a “secret Muslim” threatened his viability as a candidate.⁷ The election of President Obama spawned the birth of the Tea Party movement, a group of often angry, sometimes rude, ultra-conservatives distrustful of the Obama administration that has only contributed to the unusually scornful (even by American standards) modern political climate.⁸ In fact, former Republican presidential candidate and Speaker of the House Newt Gingrich recently stated that he believes “[Islamic law] is a mortal threat to the survival of freedom in the United States and in the world as we know it” and that he would only support a Muslim-American Presidential candidate if he or she renounced Islamic law.⁹ Former Senator and presidential candidate Rick Santorum has made similar statements.¹⁰

Jesse, Enter Saxby, THE NATION (Nov. 10, 2002), <http://www.thenation.com/article/exit-jesse-enter-saxby>. The day after the 9/11 attacks, a group of angry protestors marched on a predominantly Arab mosque in Chicago shouting “Kill the Arabs.” PEEK, *supra* note 2, at 29.

⁶ Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2011: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 296 (2002).

⁷ See Jim Rutenberg, *The Man Behind the Whispers About Obama*, N.Y. TIMES, Oct. 13, 2008, at A1 (discussing the source of the theories concerning Obama’s religious heritage). See also Nicholas D. Kristof, Op-Ed., *Obama and the Bigots*, N.Y. TIMES, Mar. 9, 2008, at WK13 (noting that “whispering campaigns allege that Mr. Obama is a secret Muslim planning to impose Islamic law on the country.”). To this day, nearly one in five Americans believe President Obama is a Muslim. Pew Research Center, *Growing Number of Americans Say Obama Is a Muslim*, PEW F. ON RELIGION & PUB. LIFE (Aug. 18, 2010), <http://pewforum.org/Politics-and-Elections/Growing-Number-of-Americans-Say-Obama-is-a-Muslim.aspx>.

⁸ See Peter Katel, *Tea Party Movement: Will Angry Conservatives Reshape the Republican Party?*, 20 CONG. Q. RESEARCHER 241, 241, 243 (2010). Anti-Sharia sentiment has been expressed at many Tea Party rallies. Matt Sedensky, *Bids to Ban Foreign Laws Being Pushed in 24 States*, BOS. GLOBE, Mar. 3, 2012, <http://www.bostonglobe.com/news/nation/2012/03/03/florida-mulls-outlawing-sharia-other-foreign-law/ho7VoVGal2rFySII7N9MyN/story.html>. In response to the Council on American-Islamic Relations fight against the anti-Sharia Amendment, one anonymous hate-mailer wrote to the Council, “[t]ake your Islamic laws, shove them up your ass and go back to where you came from. You lice infested bastards are not welcome and that goes[] for that Black Bastard that sits in the White House.” Leah Nelson, *Oklahoma’s Shariah Law Ban Creates Controversy*, S. POVERTY L. CENTER (Spring 2011), <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2011/spring/oklahoma-shariah-law-ban-creates-controversy>. This type of blatant bigotry and racism has been all too common in recent years.

⁹ Ashby Jones & Joe Palazzolo, *States Target Foreign Law*, WALL ST. J., Feb. 7, 2012, at A3; Scott Shane, *In Islamic Law, Gingrich Sees a Mortal Threat to U.S.*, N.Y. TIMES, Dec. 21, 2011, at A22.

¹⁰ Jones & Palazzolo, *supra* note 9. Just recently, an Illinois Congressman stated that radical Muslims are “trying to kill Americans every week.” Sabrina Siddiqui, *Joe Walsh Meeting with Muslims in Illinois After ‘Radical Islam’ Remarks*, HUFFINGTON POST (Aug. 23, 2012), http://www.huffingtonpost.com/2012/08/23/joe-walsh-muslims-radical-islam_n_1825815.html.

Religious phobia is not a new phenomenon in America. Discrimination against newcomers and their religious beliefs has been common throughout history.¹¹ As recently as the early twentieth century, the Catholic Church was considered a “foreign menace” and dangerous to the United States.¹² It was not until John F. Kennedy, a Catholic, was elected President in 1960 that irrational fears were quelled about the Pope taking over the nation if a Catholic were to become President.¹³ Catholics “went from the ‘pilloried pariahs’ of mid-19th century America to the leaders of the nation and its Supreme Court—150 years later.”¹⁴ Most recently, Republican presidential candidate Mitt Romney has faced an increasing number of questions and concerns over his Mormon faith, a religion “persecuted for much of the nineteenth century.”¹⁵ On the Islam front, Muslim scholars fear that America is now suffering from Islamophobia—an “unfounded and irrational fear of Islam as a religion and Muslims as a people.”¹⁶

Despite the fact that Muslims make up only 0.6% of the American population,¹⁷ fear of Islam has inspired multiple states to consider anti-Sharia (Islamic law) provisions.¹⁸ While Sharia law has no specific definition, it is essentially Islamic law—an

¹¹ See, e.g., Feisal Abdul Rauf, *In This Election Year, Let There Be Tolerance*, STAR TRIB., Feb. 7, 2012, <http://www.startribune.com/opinion/otherviews/138816299.html>.

¹² See, e.g., Eric Kniffin, *Are American Muslims Entitled to the Same Free Exercise Rights as Other Americans?*, BECKET FUND FOR RELIGIOUS LIBERTY (May 19, 2011), <http://www.becketfund.org/are-american-muslims-entitled-to-the-same-free-exercise-rights-as-other-americans/>.

¹³ See Rauf, *supra* note 11.

¹⁴ Mary J. Loftus, *Advocates of Sharia Can Learn from Catholics and Jews*, HUFFINGTON POST (Feb. 6, 2012, 4:00 PM), http://www.huffingtonpost.com/mary-j-loftus/sharia-advocates-can-learn-from-catholics-and-jews_b_1249917.html.

¹⁵ Randall Balmer, Op-Ed., *Why Mitt Romney Should Open Up on Mormonism*, CBS NEWS (Feb. 6, 2012), http://www.cbsnews.com/8301-215_162-57371934/why-mitt-romney-should-open-up-on-mormonism/.

¹⁶ Abdullah Antepli, *Islamophobia: America Becoming Europe*, HUFFINGTON POST (Feb. 8, 2012, 10:29 AM), http://www.huffingtonpost.com/imam-abdullah-antepli/islamophobia-america-becoming-europe_b_1247167.html. In December 2011, bowing to conservative family organizations, national home improvement store, Lowe’s, pulled its advertisements from a TLC reality television show called “All-American Muslim” that follows Muslim families in suburban Michigan. *Lowe’s Pulls Advertising from TLC’s ‘All-American Muslim,’* CNN (Dec. 12, 2011), <http://www.cnn.com/2011/12/11/showbiz/all-american-muslim-lowes/index.html>.

¹⁷ *The World Factbook: United States*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited Oct. 14, 2012).

¹⁸ As of July 2012, more than twenty-four states had considered forty different measures that would prevent state court judges from considering Sharia law. See Andrea Elliot, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES, July 31, 2011, at A1; Sedensky, *supra* note 8. Besides Oklahoma, Tennessee, Arizona, and Louisiana have also adopted laws banning the consideration of Sharia and foreign law. *Id.* For a more detailed summary of anti-Sharia proposals, see Intisar A. Rabb, *The Islamic Rule of Lenity: Judicial Discretion and Legal Canons*, 44 VAND. J. TRANSNAT’LL. 1299, 1301–02 n.3 (2011). See also Jones & Palazzolo, *supra* note 9. In May 2012, Kansas Governor Sam Brownback signed a bill into law preventing state courts from considering or using international and Islamic law. Kevin Murphy,

ever-evolving set of interpretations on how to practice the Islamic faith.¹⁹ While Islam has many proponents who point out that Islam is a peace-loving religion,²⁰ a number of Americans only identify Islam with the smoldering ruins of the Twin Towers, and view the religion as inherently violent and un-American, leading many to support laws damaging to the Muslim community.²¹ Recognizing that laws specifically targeting Sharia are unlikely to survive judicial scrutiny, some anti-Muslim proponents and state legislators have proposed laws that ban court consideration of *all* religious law.²²

On November 2, 2010, 70% of Oklahoma voters approved a measure, State Question 755, also known as the “Save our State Amendment,” banning state courts from considering or using Islamic Sharia law.²³ If the “Save our State Amendment” had gone into effect, Oklahoma Muslims would have faced difficulties in, among other important areas of life, marrying, entering into business contracts, and executing last wills and testaments in accordance with their religious principles.²⁴ CAIR-OK serves as the primary opponent of State Question 755.²⁵ Sadly, throughout

Kansas Governor, Sam Brownback, Signs Anti-Sharia Bill, Effectively Banning Islamic Law, HUFFINGTON POST (May 26, 2012), http://www.huffingtonpost.com/2012/05/25/kansas-governor-signs-bil_n_1547145.html.

¹⁹ See, e.g., Telephone Interview with Muneer Awad, Exec. Dir., Council on American-Islamic Relations Oklahoma (Oct. 18, 2011) (interview notes on file with author) [hereinafter Telephone Interview with Muneer Awad]; see also H.R.J. Res. 1056, 52d Leg., 2d Sess. (Okla. 2010) (describing Sharia as the law of Islam).

²⁰ During his presidency, George W. Bush frequently noted that Islam is a peaceful and loving religion. Just six days after the 9/11 attacks, President Bush spoke at the Islamic Center of Washington D.C. where he stated, “[V]iolence against innocents violate[s] the fundamental tenets of the Islamic faith” and “Islam is peace.” Presidential Statement at the Islamic Center of Washington, 37 WEEKLY COMP. PRES. DOC. 38 (Sept. 24, 2001).

²¹ Author Sam Harris believes that “[w]e are at war with Islam” and that “Islam, more than any other religion human beings have devised, has all the makings of a thoroughgoing cult of death.” SAM HARRIS, *THE END OF FAITH* 109, 123 (2004). Some commentators, however, are more reasonable. For instance, Devin Springer, James Regens and David Edger wrote that there is a “lack of convincing evidence that the religion [Islam] itself makes its adherents violent.” DEVIN R. SPRINGER ET AL., *ISLAMIC RADICALISM AND GLOBAL JIHAD* 1 (2009).

²² See *infra* notes 136–46 and accompanying text. Additionally, according to The Oklahoma Chapter of the Council on Islamic Relations (CAIR-OK) Executive Director Muneer Awad, “[r]emoving [the word] ‘Sharia’ [from proposed laws] was purely a political move” and “[t]he goals [of the movement] are all the same: to target Islam.” Jones & Palazzolo, *supra* note 9.

²³ CAIR-OKLAHOMA, *SHARIA & INTERNATIONAL LAW BAN TIMELINE IN OKLAHOMA* (2011); see also H.R.J. Res. 1056, 52d Leg., 2d Sess. (Okla. 2010) (defining Sharia law as Islamic law “based on two principal sources, the Koran and the teaching of Mohammed”).

²⁴ See, e.g., *Our Faith on Trial*, CAIR-OKLAHOMA, <http://ok.cair.com/index.php/resources/islamophobia/our-faith-on-trial> (last visited Oct. 14, 2012).

²⁵ *Mapping Islamophobia in Oklahoma*, CAIR-OKLAHOMA, http://ok.cair.com/index.php/?option=com_content&view=article&id=353:755&catid=79:755-main-page&Itemid=186 (last visited Oct. 14, 2012).

CAIR-OK's fight against the Amendment, CAIR has been the victim of vandalism and hate mail.²⁶

This Note will examine the use of religious law, specifically Sharia law, in American courts, the passage of State Question 755, and then discuss the Tenth Circuit Court of Appeals' analysis of the constitutionality of the Oklahoma amendment.²⁷ Furthermore, this Note will argue that, not only is it abundantly clear that State Question 755 is unconstitutional, but other similar proposed laws that seek to ban state court judges from considering *any* type of religious law are unnecessary and unconstitutional.²⁸

I. BACKGROUND

A. Religious Law in American Courts

The First Amendment states in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."²⁹ While the First Amendment prohibits the government from enacting an official state religion, it does not prevent religions from adopting their own religious rules and prescriptions for their followers. Various religions have created their own "laws" to be followed by adherents.³⁰ Halakah law governs Jews and canon law applies to select branches of Christianity; however, no members of these religions are legally obligated by the government (at least in the United States) to follow the law prescribed by their chosen faith.³¹ Religious law often governs major life events and daily activities, such as

²⁶ One piece of hate mail read, "you are not welcome in The United States. Go fuck camels and whatever else you do like worshipping devils in some other country that will have you. Get out of America. You are not welcome here!!!" Nelson, *supra* note 8. Another wrote, "[W]e will work together in this country Jews and Gentiles to destroy those mosques built here, and cover them with the blood of swine, because you're [sic] religion is nothing more than a superstition." *Id.*

²⁷ While various spellings have been used for "Sharia," "Koran," and "Mohammed," like the Tenth Circuit Court of Appeals, I have used the spellings utilized in State Question 755 to avoid confusion. See *Awad v. Ziriox*, 754 F. Supp. 2d 1298, 1301 (W.D. Okla. 2010), *aff'd*, 670 F.3d 1111 (10th Cir. 2012).

²⁸ For a discussion on State Question 755 as it relates to international law and an argument that the "Save our State Amendment" is a violation of the Supremacy and Full Faith and Credit Clauses of the United States Constitution, 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 (2011).

²⁹ U.S. CONST. amend. I.

³⁰ See, e.g., CYNTHIA BROUGHER, CONG. RESEARCH SERV., R41824, APPLICATION OF RELIGIOUS LAW IN U.S. COURTS: SELECTED LEGAL ISSUES 1 (2011).

³¹ *Id.* at 1–2. Courts around the country have recognized Jewish law. For example, an Illinois judge recognized *In re Marriage of Goldman* that "Jewish law contains both religious

when adherents to a particular religion should attend religious services, how a person should dress, what a person should eat, and how a person should be buried.³² To the casual observer, it may seem that an American court would never have reason to consider any type of religious law, but it is a relatively common occurrence.

In particular, Jewish law has permeated itself within American society. Jewish law recognizes marriage as a private contract and many Jewish couples choose to sign marriage contracts called “ketubahs.”³³ The ketubah is an agreement between a husband and wife regulating how the marriage will operate and what will happen to the marriage in the event of divorce or death.³⁴ Early Judaic scholars thought ketubahs would prevent the haphazard conclusion of marriages because the ketubah often requires the husband to pay money to the wife in the event of divorce.³⁵ According to traditional Jewish law, in order to complete a divorce, a woman must obtain a “get” from a three-rabbi panel called the “beth din” (or Jewish Court).³⁶

As a matter of pure contract law, when two parties enter into a contract, they may designate an arbitrator to resolve any disputes that may come about as a result of the contract.³⁷ Multiple American jurisdictions have ruled that arbitration provisions within ketubahs requiring that divorce proceedings take place before a beth din can be enforceable in civil court.³⁸ For example, in *Avitzur v. Avitzur*, the plaintiff wife sought to bring her defendant husband before a beth din pursuant to their ketubah so that the plaintiff could obtain a religious divorce pursuant to Jewish law.³⁹ There was no doubt that the defendant had signed a ketubah stating that he would engage in such a process.⁴⁰ The Court ruled in favor of the plaintiff, finding that the ketubah was just like any other antenuptial agreement that would refer the issue to

rules and secular laws, including such matters as contracts, torts, property and family law.” 554 N.E.2d 1016, 1020 (Ill. App. Ct. 1990).

³² Nelson, *supra* note 8.

³³ MICHAEL J. BROYDE, MARRIAGE, DIVORCE, AND THE ABANDONED WIFE IN JEWISH LAW 2 (2001).

³⁴ *Id.*

³⁵ Jodi M. Solovy, *Civil Enforcement of Jewish Marriage and Divorce: Constitutional Accommodation of a Religious Mandate*, 45 DEPAUL L. REV. 493, 495 (1996).

³⁶ *Id.* at 493, 499–500.

³⁷ *Layman’s Guide to Dinei Torah (Beth Din Arbitration Proceedings)*, BETH DIN OF AMERICA 2, available at http://www.bethdin.org/docs/PDF1-Layman’s_Guide.pdf (last visited Oct. 14, 2012).

³⁸ See, e.g., *Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. 1983); see also *In re Marriage of Goldman*, 554 N.E.2d 1016, 1023 (Ill. App. Ct. 1990) (ordering a husband to appear before a beth din, noting that the Court “merely applied well-established principles of contract law to enforce the agreement made by the parties” because “[t]he terms of the order were carefully limited to avoid interference with religious doctrine”). But see *Aflalo v. Aflalo*, 685 A.2d 523, 530–31 (N.J. Ch. 1996) (refusing to order ex-husband to appear before a beth din as it would violate his First Amendment rights).

³⁹ *Avitzur*, 446 N.E.2d at 137.

⁴⁰ *Id.* at 138.

a non-judicial forum and citing precedent that “an agreement to refer a matter concerning marriage to arbitration suffers no inherent invalidity.”⁴¹

B. Sharia

In today’s political climate, Muslim scholars and leaders often find themselves explaining what is not Sharia as opposed to what is Sharia.⁴² Sharia is the moral and legal code of Islam.⁴³ It has no binding authority in the American court system.⁴⁴ Sharia comes from the Koran, the teachings of the prophet Mohammed, universal agreement among Islamic scholars, and individual analogical reasoning (if a specific matter is not addressed by the preceding sources).⁴⁵ Like with any type of religious legal system, Muslims differ as to how Sharia should be interpreted and how Islamic law should apply in everyday life.⁴⁶ One professor describes Sharia as “living a pious life devoted to realizing God’s justice in the world.”⁴⁷ As Sharia law is so diffuse, scholars frequently express concerns that if Sharia law, similar to other religious law, is applied in American courts, judges (and their clerks) might find themselves attempting to interpret centuries of religious law without the benefit of any real standards or definitive authority.⁴⁸ Furthermore, the U.S. Supreme Court has repeatedly emphasized that “courts should refrain from trolling through a person’s or institution’s religious beliefs.”⁴⁹

With these concerns in mind, it is important to once again reemphasize that Sharia “law” is not law in the traditional sense that is commonly understood in the American legal system; rather, it is an amalgamation of religious principles that govern the daily activities of Muslims.⁵⁰ Sharia law is fluid and adaptable to different circumstances, including the laws of the country where a Muslim resides.⁵¹ In

⁴¹ *Id.*

⁴² *See, e.g.*, Nathan B. Oman, *How to Judge Shari’a Contracts: A Guide to Islamic Marriage Agreements in American Courts*, 2011 UTAH L. REV. 287, 287 (noting that “[f]or many in the West, the term *shari’a* conjures images of brutal punishments such as cutting off the hands of thieves or stoning adulterers to death”); Dan Merica, *Muslim Campaign Looks to Repair Sharia’s Reputation*, CNN BELIEF BLOG (Mar. 2, 2012, 5:00 AM), <http://religion.blogs.cnn.com/2012/03/02/muslim-campaign-looks-to-repair-sharias-reputation/>; Telephone Interview with Muneer Awad, *supra* note 19.

⁴³ ENCYC. BRITANNICA, BRITANNICA ENCYCLOPEDIA OF WORLD RELIGIONS 991 (2006).

⁴⁴ *See, e.g.*, BROUGHER, *supra* note 30, at 8.

⁴⁵ ENCYC. BRITANNICA, *supra* note 43, at 991.

⁴⁶ BROUGHER, note 30, at 5.

⁴⁷ Oman, *supra* note 42, at 288.

⁴⁸ *See, e.g.*, BROUGHER, *supra* note 30, at 8–9.

⁴⁹ *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

⁵⁰ *See, e.g.*, *Awad v. Ziriox*, 754 F. Supp. 2d 1298, 1306 (W.D. Okla. 2010), *aff’d*, 670 F.3d 1111 (10th Cir. 2012).

⁵¹ *Id.*

fact, Sharia mandates that Muslims accept the law of the land and specifically requires American Muslims to follow the United States Constitution.⁵²

C. *The Use of Islam in American Courts*

Islamic law is considered in American court rooms for multiple reasons. “Sharia principles can be used to guide Muslims in marriage contracts, business contracts, child custody agreements, dietary customs, non-interest-based financial agreements, wills and testaments, charitable giving, and more.”⁵³ Furthermore, a judge might need to consider Islamic law if Sharia forms the basis of a foreign law governing a dispute in the United States.⁵⁴ Islamic law can also be used to clarify an issue for a judge or to explain an ambiguity.⁵⁵ Contract law is another area in which judges are asked to enforce Islamic law, and courts have regularly stated that “‘biblically based mediation[s]’ . . . are enforceable.”⁵⁶ In 2003, a Texas court ruled that a signed arbitration agreement providing for mediation in a Texas Islamic court was enforceable.⁵⁷ In 2004, a Minnesota court approved an award from an Islamic Arbitration Committee applying Sharia law, pursuant to a partnership agreement.⁵⁸ Additionally, according to University of Pittsburgh law professor and Islamic law expert, Haider Ala Hamoudi, judges must sometimes use religious law in order to determine marital status in immigration cases.⁵⁹ Islamic law also regularly intersects with family law. For example, in *Aziz v. Aziz*,⁶⁰ a New York trial court upheld that an Islamic “mahr” (a payment on a marriage and subsequent payment upon divorce) could be enforced as a secular contract even though it was created during a religious ceremony.⁶¹

In the New Jersey case of *S.D. v. M.J.R.*,⁶² a Moroccan Muslim woman appealed from a trial court denial of a restraining order sought against her Moroccan Muslim

⁵² Telephone Interview with Muneer Awad, *supra* note 19; *see also Ziriax*, 754 F. Supp. 2d at 1306.

⁵³ *Understanding Sharia*, CAIR-OKLAHOMA, <http://ok.cair.com/index.php/resources/islamophobia/sharia> (last visited Oct. 14, 2012).

⁵⁴ Elliot, *supra* note 18. It is important to note that American courts will only enforce a foreign law if the law comports with the United States Constitution. *See, e.g., Nelson, supra* note 8.

⁵⁵ Elliot, *supra* note 18.

⁵⁶ BROUGHER, *supra* note 30, at 3 (citing *Woodlands Christian Academy v. Weibust*, No. 09-10-00010-CV (Tex. App. October 7, 2010); *Easterly v. Heritage Christian Schools*, 107 Fair Empl. Prac. Cas. (BNA) 173 (S.D. Ind. 2009)).

⁵⁷ *Id.* (citing *Jabri v. Qaddura*, 108 S.W.3d 404 (Tex. App. 2003)).

⁵⁸ *Id.* (citing *Abd Alla v. Mourssi*, 680 N.W.2d 569 (Minn. Ct. App. 2004)).

⁵⁹ Ann Rodgers, *Proposed State Law Draws Religious Criticism*, PITTSBURGH POST-GAZETTE, Mar. 12, 2012, <http://post-gazette.com/pg/11346/1196328-454-0.stm>.

⁶⁰ 488 N.Y.S.2d 123 (N.Y. Sup. Ct. 1985).

⁶¹ *Id.* at 124. For a discussion on “mahr,” *see Oman, supra* note 42, at 291–92.

⁶² 2 A.3d 412 (N.J. Super. Ct. App. Div. 2010).

husband.⁶³ The couple did not know each other before their arranged marriage (when the woman was seventeen years old), and they came to the United States for an employment opportunity.⁶⁴ S.D. sought a restraining order from her husband because of multiple instances of physical abuse leading up to repeated unwanted and abusive, non-consensual sexual intercourse.⁶⁵ Throughout this multi-month ordeal that included food deprivation and being left alone for many hours, S.D. testified that M.J.R. told her “this is according to our religion. You are my wife, I c[an] do anything to you. The woman, she should submit and do anything I ask her to do.”⁶⁶

While M.J.R. presented reasonably believable facts at the trial level denying S.D.’s allegations, the trial court judge found that the husband had engaged in harassment and assault but neither sexual assault nor criminal sexual conduct.⁶⁷ The judge explained his ruling on the sex-related charges, noting that he believed the defendant husband did not have the necessary criminal intent to commit a sexual crime as the husband believed his actions were consistent with his religious beliefs about the role of women in society.⁶⁸ The judge then refused to order a final restraining order, noting that the defendant had filed for divorce and that there was no reason for the couple to be together at all.⁶⁹

The New Jersey Superior Court, Appellate Division, reversed the trial court decision because the lower decision was based on the husband’s intent, whereas the state’s sexual assault and criminal sexual contact statutes “do not designate a specific culpability requirement.”⁷⁰ Furthermore, the court noted that the husband’s “conduct in engaging in non-consensual sexual intercourse was unquestionably knowing, regardless of his view that his religion permitted him to act as he did.”⁷¹ Recognizing the clear conflict between state and Islamic law, the appellate court chastised the trial court judge for forgiving the defendant for his clear violations of state law due to his religious beliefs.⁷²

The appellate court cited U. S. Supreme Court precedent that while the First Amendment allows for freedom of religious practice, it does not prevent the government from upholding relevant criminal and civil statutes if there is a compelling

⁶³ *Id.* at 412–13.

⁶⁴ *Id.* at 413.

⁶⁵ *Id.* at 413–15.

⁶⁶ *Id.* at 416. The couple’s Imam also testified at trial. *Id.* at 417. He stated that Islamic law requires a wife to acquiesce to her husband’s demands for sex because the husband is forbidden from seeking sexual gratification elsewhere. *Id.* at 417–18. However, the Imam stated that Muslim men are prohibited from treating their women like animals. *Id.* at 418.

⁶⁷ *Id.* at 418.

⁶⁸ *Id.*

⁶⁹ *Id.* at 418–19.

⁷⁰ *Id.* at 421.

⁷¹ *Id.* at 422.

⁷² *Id.*

government interest to do so.⁷³ The appellate division concluded that the trial court judge erred by not issuing a final restraining order, and flatly rejected the view that the husband's acts were excused because they were "culturally acceptable."⁷⁴ In sum, the appellate court expressed its view that adherents to Sharia law must follow the laws of the state; but, Sharia law can be enforceable in American courts when it does not conflict with existing state law.⁷⁵

D. "Save Our State Amendment"

In order to frame the discussion about the constitutionality of a law banning state courts from considering *all* religious law, I first examine the controversial Oklahoma law that bans state court consideration of Sharia law. Oklahoma's constitutional amendment states that Oklahoma courts:

when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States *provided the law of the other state does not include Sharia Law*, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. *Specifically, the courts shall not consider international law or Sharia Law.* The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.⁷⁶

When Oklahoma voters entered the polling booth on Election Day 2010, they saw the following statement explaining the constitutional amendment:

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

⁷³ *Id.* (citing *Reynolds v. United States*, 98 U.S. 145, 166 (1878)).

⁷⁴ *Id.* at 426–27.

⁷⁵ *See id.* at 422–23.

⁷⁶ OKLA. CONST. art. VII § 1 (emphasis added).

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.⁷⁷

Oklahoma is home to a population of approximately thirty thousand Muslims.⁷⁸ According to CAIR-OK, while there was some initial finger-pointing at the Muslim community following the 1995 bombing of the Alfred P. Murrah Federal building in Oklahoma City,⁷⁹ Muslims have lived relatively peacefully in the state for close to half a century.⁸⁰ In fact, Oklahoma was one of a very small group of states that saw no hate crimes against Muslims in the wake of the 9/11 attacks.⁸¹

The idea to ban Sharia law in state courts did not come out of thin air. According to CAIR-OK, the premise did not come forward until Muslim-bashing became a politically popular and acceptable practice.⁸² David Yerushalmi, a New York lawyer who is leading a well-organized and well-funded “campaign of misinformation” against Islam,⁸³ drafted much of the model legislation—called “American Laws for American Courts”—to ban Sharia law.⁸⁴ Furthermore, the anti-Islam organization ACT! for America has been a primary proponent of the model law.⁸⁵

⁷⁷ H.R.J. Res. 1056, 52d Leg., 2d Sess. (Okla. 2010).

⁷⁸ Joel Siegel, *Islamic Sharia Law to Be Banned in, ah, Oklahoma*, ABC NEWS (June 14, 2010), <http://abcnews.go.com/US/Media/oklahoma-pass-laws-prohibiting-islamic-Sharia-laws-apply/story?id=10908521>.

⁷⁹ Following the bombing, a former Oklahoma Congressman stated on national television that there was “very clear evidence” that “fundamentalist Islamic terrorist groups” were responsible for the bombing. MARK S. HAMM, *APOCALYPSE IN OKLAHOMA* 54 (1997). In actuality, Timothy McVeigh, a non-Muslim, was ultimately sentenced to death for the brutal murder of 168 people. Jo Thomas, *McVeigh Jury Decides on Sentence of Death in Oklahoma Bombing*, N.Y. TIMES June 14, 1997, at A1.

⁸⁰ See, e.g., Telephone Interview with Muneer Awad, *supra* note 19.

⁸¹ *Id.* Mr. Awad described the Oklahoma Muslim community as tight-knit and “pretty successfully integrated.” *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Elliot, *supra* note 18.

⁸⁵ *Id.* ACT! for America’s stated mission is to combat radical Islam. *About Act! for America*, ACT! FOR AMERICA, <http://www.actforamerica.org/index.php/learn/about-act-for-america> (last visited Oct. 14, 2012). The group has taken credit for the passage of anti-Sharia laws in three states. *Id.*

Republican State Representative Rex Duncan was the leader, author, and co-sponsor of the bill that put a referendum banning Sharia law in front of Oklahoma voters.⁸⁶ In proposing the bill, Representative Duncan told a reporter that “this is a war for the survival of America. It’s a cultural war, it’s a social war, it’s a war for the survival of our country.”⁸⁷ Duncan said he was first inspired to propose the law after hearing of the domestic violence case in New Jersey.⁸⁸ The decision of the New Jersey trial court judge in *S.D. v. M.J.R.* is presumably the type of scenario that State Question 755 and laws banning the consideration of *all* religious law seek to prevent. However, University of Oklahoma Law Professor Joseph Thai says that the New Jersey case shows exactly why a law like State Question 755 is unnecessary.⁸⁹ He argues that the strong reprimand of the trial court judge’s decision by the Appeals Court proves that the American justice system works because “American courts will not enforce foreign laws that are contrary to public policy.”⁹⁰

In addition to Mr. Duncan’s concerns about the New Jersey domestic violence case, the Representative’s past actions have shown that he is avowedly anti-Muslim.⁹¹ If keeping foreign and religious law out of the courtroom was so important to Mr. Duncan, why not adopt a law with the goal of banning all religious law from consideration, as other states have done? Representative Duncan seems to believe it would be proper for courts to use Christian and Jewish law in the decision-making process because:

Oklahomans recognize that America was founded on Judeo-Christian principles . . . [a]nd State Question 755, the Save Our State Amendment, is just a simple effort to ensure that our courts are not used to undermine those founding principles and turn Oklahoma into something that our founding fathers and our great-grandparents wouldn’t recognize.⁹²

⁸⁶ Nelson, *supra* note 8.

⁸⁷ *Id.* Additionally, Representative Duncan has called Islam “the face of the enemy.” *Id.* Representative Duncan has also called Islam a “cancer” and “dangerous.” Interview by Sean Hannity with Rex Duncan, Okla. State Rep., *Oklahoma Lawmaker Wants Shariah Law Banned*, FOX NEWS (June 18, 2010) (transcript available at <http://www.foxnews.com/story/0,2933,595026,00.html>).

⁸⁸ Nelson, *supra* note 8.

⁸⁹ *Id.*

⁹⁰ *Id.* Mr. Thai is one of Mr. Awad’s attorneys. CAIR-OKLAHOMA, *supra* note 23.

⁹¹ See, e.g., Am. Constitution Soc’y, *Okla. Lawmaker Pushes Ban on Religious Headwear in Driver’s License Photos*, ACSBLOG (Mar. 4, 2009), <http://www.acslaw.org/acsblog/node/12993>; Mick Hinton, *Official Refuses Copy of Quran*, TULSA WORLD, Feb. 15, 2008, http://www.tulsaworld.com/news/article.aspx?articleID=071023_1_a1_spnc46170.

⁹² CAIRtv, *CAIR Video: SQ 755 Sponsor Explains Purpose of Amendment on MSNBC*, YOUTUBE (Nov. 4, 2010), http://www.youtube.com/watch?v=Ybvivrs_MH0.

Additionally, Mr. Duncan was the driving force behind a 2009 proposed law to ban all religious headwear from appearing in driver's license photographs and very publicly refused to accept a copy of the Koran from the Governor's Ethnic American Advisory Council in celebration of Oklahoma's 100th anniversary.⁹³

Ironically, no Oklahoma state court opinion has even mentioned the word "Sharia."⁹⁴ While Representative Duncan claimed that State Question 755 is "a pre-emptive strike,"⁹⁵ outside of irrational and prejudiced fears about the Muslim population, it appears that there was little to no factual evidence that Oklahoma needed or needs "saving" from Sharia law.⁹⁶

II. *AWAD V. ZIRIAX*

On November 4, 2010, Mr. Muneer Awad, Executive Director of CAIR-OK filed a complaint in the United States District Court for the Western District of Oklahoma seeking a temporary restraining order and preliminary injunction to block the enactment of State Question 755.⁹⁷ The complaint asserted that implementation of the constitutional amendment would force courts to unconstitutionally "take positions with respect to . . . religious doctrines."⁹⁸ Furthermore, Awad asserted that implementation of the law would interfere with the court's ability, as the executor of his estate, to properly probate his last will and testament.⁹⁹

Finding that Mr. Awad was likely to win on the merits and suffer irreparable injury, Chief District Court Judge Vicki Miles-La Grange granted a temporary restraining order and enjoined the Agency Head of the Oklahoma State Board of Elections "from certifying the election results for State Question 755."¹⁰⁰ Less than three weeks later, the court heard arguments for a preliminary injunction to enjoin the certification of the election results.¹⁰¹

⁹³ Am. Constitution Soc'y, *supra* note 91. *See also* Hinton, *supra* note 91. In rejecting the copy of the Koran, Representative Duncan wrote his fellow legislators that "[m]ost Oklahomans do not endorse the idea of killing innocent women and children in the name of ideology." *Id.* (internal quotation marks omitted).

⁹⁴ Venetis, *supra* note 28, at 191.

⁹⁵ James C. McKinley, Jr., *U.S. Judge Blocks a Ban on Islamic Law*, N.Y. TIMES, Nov. 29, 2010, at A22.

⁹⁶ *See* Venetis, *supra* note 28, at 191.

⁹⁷ Complaint Seeking a Temporary Restraining Order & Preliminary Injunction at 1–2, *Awad v. Ziriaux*, No. CIV-10-1186-M (W.D. Okla. Nov. 4, 2010). Mr. Awad filed his complaint against Paul Ziriaux, the head of the Oklahoma State Board of Elections. *Id.* ¶ 5, at 2.

⁹⁸ *Id.* ¶ 22, at 6.

⁹⁹ *Id.* ¶¶ 24–26, at 7. Mr. Awad argued that the court's failure to accept his will would prevent him from being buried in accordance with Islamic principles. Nelson, *supra* note 8.

¹⁰⁰ *Awad v. Ziriaux*, No. CIV-10-1186-M, 2010 U.S. Dist. LEXIS 119660, at *9,*12–13 (W.D. Okla., Nov. 9, 2010).

¹⁰¹ *Awad v. Ziriaux*, 754 F. Supp. 2d 1298, 1301 (W.D. Okla. 2010), *aff'd*, 670 F.3d 1111 (10th Cir. 2012).

On November 29, 2010, Judge Miles-La Grange found the anti-Sharia law to be in violation of both the Establishment and Free Exercise Clauses of the First Amendment.¹⁰² In congruence with her findings, she granted a preliminary injunction barring the state election agency chief from certifying the results of State Question 755.¹⁰³ In making her decision, Judge Miles-La Grange fully recognized that she was addressing issues “that go to the very foundation of our country” and that an adverse decision had the potential to harm the constitutional rights of Oklahoma’s minority Muslim community.¹⁰⁴

The State of Oklahoma appealed the decision to the Tenth Circuit Court of Appeals.¹⁰⁵ Oral argument on State Question 755 was heard on September 12, 2011, one day after the tenth anniversary of the September 11 terrorist attacks.¹⁰⁶ The court released its opinion,¹⁰⁷ written by Judge Scott Matheson, upholding the trial court’s decision on January 10, 2012.¹⁰⁸

After providing a brief overview of the constitutional amendment process in Oklahoma and examining the passage of State Question 755, the court considered the justiciability of Mr. Awad’s claim.¹⁰⁹ The Tenth Circuit found “that the district court did not abuse its discretion” in finding that Mr. Awad’s claim was justiciable.¹¹⁰ In agreement with the district court, Judge Matheson found that standing can be “conferred by non-economic religious values”¹¹¹ because Awad’s injury went “beyond a ‘psychological consequence’ from disagreement with . . . government conduct”¹¹² and because he suffered multiple injuries in fact: the official state condemnation of his religion and the inability for his last will and testament to be executed by the court.¹¹³

Judge Matheson next analyzed whether the district court properly granted a preliminary injunction to the plaintiffs.¹¹⁴ In order to obtain a preliminary injunction, Awad had to show that “(1) [he] is substantially likely to succeed on the merits; (2) [he] will

¹⁰² *Id.* at 1306–07.

¹⁰³ *Id.* at 1308.

¹⁰⁴ *Id.* at 1301, 1303.

¹⁰⁵ *Awad v. Ziriaux*, 670 F.3d 1111 (10th Cir. 2012).

¹⁰⁶ See John Ingold, *Denver’s 10th Circuit Court in Spotlight as It Considers Oklahoma’s Shariah-Law Case*, DENVER POST, Sept. 13, 2011, http://www.denverpost.com/news/ci_18881457.

¹⁰⁷ *Awad*, 670 F.3d 1111.

¹⁰⁸ *Id.* at 1116.

¹⁰⁹ *Id.* at 1116–19. Finding that Awad had sufficient grounds to obtain a preliminary injunction for his Establishment Clause claim, the Court did not address his Free Exercise Clause Claim. *Id.* at 1119.

¹¹⁰ *Id.* at 1119.

¹¹¹ *Id.* at 1122 (citing *O’Connor v. Washburn Univ.*, 416 F.3d 1216, 1222 (10th Cir. 2005)).

¹¹² *Id.* at 1123 (citing *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 485 (1982)).

¹¹³ *Id.* at 1120, 1123. The Court also found that Mr. Awad’s complaint was ripe for review because the threatened harm was sufficiently imminent. *Id.* at 1123.

¹¹⁴ *Id.* at 1125.

suffer irreparable injury if the injunction is denied; (3) [his] threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest.”¹¹⁵

The court applied the *Larson* test to determine whether Mr. Awad was likely to succeed on the merits.¹¹⁶ According to the Tenth Circuit, “[t]he *Larson* test provides that if a law discriminates among religions, it can survive only if it is ‘closely fitted to the furtherance of any compelling interest asserted.’”¹¹⁷ Furthermore, “[s]trict scrutiny is required when laws discriminate among religions because [n]eutral treatment of religions [is] the clearest command of the Establishment Clause.”¹¹⁸ The court wrote that *Larson* strict scrutiny was applicable because State Question 755 so clearly targets Islam.¹¹⁹ “To survive strict scrutiny under *Larson*,” the court noted that the suspect statute would need to advance “a compelling government interest, and . . . [be] ‘closely fitted’ to that compelling interest.”¹²⁰ Citing past Supreme Court precedent, Judge Matheson wrote that any compelling interest would need to be based on “an actual, concrete problem”—not an assumption ungrounded in fact—and that the proposed government regulation must actually address that problem.¹²¹ The State’s less-than-robust comment on the matter was, “Oklahoma certainly has a compelling interest in determining what law is applied in Oklahoma courts.”¹²² Noting that the State had failed to identify any actual problems with consideration of Islamic law in Oklahoma courts (as the State was unable to identify a “single instance where an Oklahoma court had applied Sharia law or used legal precepts of other nations or cultures, let alone that such applications or uses had resulted in concrete problems in Oklahoma”), the State failed to meet the “compelling interest” prong of *Larson* and thus failed strict scrutiny analysis.¹²³

The court also easily found that Awad met the second, third, and fourth prongs for a preliminary injunction.¹²⁴ The Tenth Circuit found that Mr. Awad was likely to face irreparable injury if the anti-Sharia amendment took effect.¹²⁵ It also agreed with the district court that Awad had shown that his threatened injury outweighed the potential injury to the State.¹²⁶ As summed up by the district court judge, the plaintiff’s

¹¹⁵ *Id.* (citing *Beltronics USA, Inc. v. Midwest Inventory Distrib., L.L.C.*, 562 F.3d 1067, 1070 (10th Cir. 2009)).

¹¹⁶ *Id.* at 1128.

¹¹⁷ *Id.* at 1127 (quoting *Larson v. Valente*, 456 U.S. 228, 255 (1982)).

¹¹⁸ *Id.* (citing *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008) (internal quotation marks omitted)).

¹¹⁹ *Id.* at 1128. “The amendment bans only one form of religious law—Sharia law.” *Id.* at 1129.

¹²⁰ *Id.* at 1129 (citing *Larson*, 456 U.S. at 246–47).

¹²¹ *Id.* at 1129–30.

¹²² *Id.* at 1130.

¹²³ *Id.*

¹²⁴ *Id.* at 1131–32.

¹²⁵ *Id.* at 1131.

¹²⁶ *Id.* at 1131–32.

potential loss of his First Amendment rights outweighed the harm of “delaying the will of the voters being carried out by certifying the election results” because the Bill of Rights is the lynchpin of American values.¹²⁷ Finally, the court of appeals found that Awad had shown that an injunction would not be adverse to the public interest because, “[w]hile the public has an interest in the will of the voters being carried out . . . the public has a more profound and long-term interest in upholding an individual’s constitutional rights.”¹²⁸

Mr. Awad, the district court, and the Tenth Circuit Court of Appeals all agreed: the passage of State Question 755 was a violation of Mr. Awad’s First Amendment Rights.¹²⁹ As Oklahoma has not appealed Judge Matheson’s opinion to the Supreme Court, the Tenth Circuit’s opinion is the only appellate decision addressing a state law banning court consideration of a specific religious doctrine.¹³⁰ As legal scholars and judges seem fairly certain that the targeting of a specific religion’s laws and canons would be a First Amendment Violation,¹³¹ the remainder of this Note will focus on the constitutionality of proposed statutes and state constitutional amendments banning courts from considering *any* religious law.¹³²

III. BANNING THE CONSIDERATION OF ALL RELIGIOUS LAW¹³³

Recognizing that laws specifically banning the consideration of Sharia present serious constitutional issues, some anti-Muslim legislators and political operatives have sought to adopt laws that ban the consideration of all religious law by state courts as a means of assuring that Islamic law is unable to infiltrate American courtrooms.¹³⁴ Utilizing some of the same Free Exercise and Establishment Clause tests used in *Awad v. Ziriax*,¹³⁵ I will argue that an outright ban on the consideration of religious doctrine in judicial decisions is also an unconstitutional encroachment on key First Amendment rights.

Examples of proposed laws to ban the consideration of *all* religious law are abundant. In 2011, a Texas legislator proposed amending the Texas Constitution to

¹²⁷ *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1308 (W.D. Okla. 2010), *aff’d*, 670 F.3d 1111 (10th Cir. 2012).

¹²⁸ *Awad*, 670 F.3d at 1132 (quoting *Awad*, 754 F. Supp. 2d at 1308).

¹²⁹ However, the Tenth Circuit only addressed Mr. Awad’s Establishment Clause claims.

¹³⁰ As the unconstitutionality of State Question 755 has never been in serious doubt, it is unlikely that the U.S. Supreme Court will consider this case. *See, e.g.*, Telephone Interview with Muneer Awad, *supra* note 19.

¹³¹ *See, e.g., id.*; *see also* Nelson, *supra* note 8.

¹³² For further discussion of Islamophobia and a First Amendment analysis of anti-sharia initiatives, see Asthma T. Uddin & Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST AMEND. L. REV. 363 (2012).

¹³³ For the remainder of this Note, I will sometimes refer to laws that ban state courts from considering any type of religious law as “anti-religion laws.”

¹³⁴ *See, e.g.*, BROUGHER, *supra* note 30, at 10–11.

¹³⁵ *Awad v. Ziriax*, 670 F.3d 1111, 1126–29 (10th Cir. 2012).

add a clause stating, “[a] court of this state may not enforce, consider, or apply any religious or cultural law.”¹³⁶ A proposed Arizona law reads:

A court shall not use, implement, refer to or incorporate a tenet of any body of religious sectarian law into any decision, finding or opinion as controlling or influential authority. . . . Any decision or ratification of a private agreement that is determined, on the merits, by a judge in this state who relies on any body of religious sectarian law . . . is void, is appealable error and is grounds for impeachment and removal from office.¹³⁷

A Pennsylvania legislator also proposed a law in 2011 that would “ban [state] courts from considering any ‘foreign legal code or system.’”¹³⁸ While the proposed Pennsylvania law does not specifically mention Islam or Sharia law,¹³⁹ supporting documents for the Bill suggest that it was clearly conceived with animus toward Islam and other religious law.¹⁴⁰ In fact, despite the author’s initial comments about the threat of Sharia, many Orthodox Jews are actually worried that the law could complicate *their* divorce cases that sometimes end up in civil court.¹⁴¹ The South Dakota legislature passed a law banning the consideration of “religious code,” and while the law did not specifically mention Islam, one state legislator noted, “I would be less than fully honest with you if I didn’t also say that part of the purpose of [the law] is to deal with what I am going to say generally has been referred to as Shariah law.”¹⁴²

¹³⁶ H.J.R. Res. 57, 82d Leg., Reg. Sess. (Tex. 2011) (referred to State Affairs Committee on Feb. 21, 2011).

¹³⁷ H.B. 2582, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (held in committee on March 14, 2011). The Arizona Bill defines “religious sectarian law” as “any statute, tenet or body of law evolving within and binding a specific religious sect or tribe. Religious sectarian law includes Sharia law, canon law, halacha and karma but does not include any law of the United States or the individual states based on Anglo-American legal tradition and principles on which the United States was founded.” *Id.*

¹³⁸ Rodgers, *supra* note 59.

¹³⁹ *Id.*

¹⁴⁰ Unsurprisingly, the law was drafted by anti-Muslim and anti-Sharia activist David Yerushalmi. Rodgers, *supra* note 59. *See also* Memorandum from State Representative RoseMarie Swanger on American and Pennsylvania Laws for Pennsylvania Courts—Shariah Law to All House Members (June 14, 2011), *available at* <http://www.legis.state.pa.us/WU01/LI/CSM/2011/0/8559.pdf> (warning against Sharia as “inherently hostile to our constitutional liberties . . . a violation of the principles on which our nation was founded” and “finding [its] way into US court cases”) [hereinafter Memorandum from State Representative Rose Marie Swanger].

¹⁴¹ Rodgers, *supra* note 59. As noted above, Orthodox Judaism does not allow for civil divorce. *See supra* notes 33–36 and accompanying text.

¹⁴² Kari Huus, *South Dakota Lawmakers Tackle ‘Shariah Question,’* MSNBC (Mar. 2, 2012), http://usnews.msnbc.msn.com/_news/2012/03/02/10553424-south-dakota-lawmakers-tackle-shariah-question.

While neither the Texas,¹⁴³ Arizona,¹⁴⁴ nor Pennsylvania¹⁴⁵ laws have passed, adoption of these types of laws would present serious constitutional issues. Why even pass these laws? According to one Florida Legislator, his constituents want these laws and they “want to get ahead of the problem before it spreads.”¹⁴⁶

A. *The Free Exercise Clause*

The first clause of the First Amendment can never be repeated too often: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹⁴⁷ The latter part of the clause is commonly referred to as the Free Exercise Clause. The Free Exercise Clause guarantees, as a fundamental constitutional right of all Americans, “the right to believe and profess whatever religious doctrine one desires.”¹⁴⁸ The Clause’s purpose is to prevent state and local governments from discriminating against a particular religion and to “secure religious liberty in the individual by prohibiting any invasions thereof by civil authority.”¹⁴⁹ Prior to 1990, the Supreme Court required a state to show a “compelling interest” to justify the abridgment of a citizen’s free exercise rights.¹⁵⁰ However, in *Employment Division v. Smith (Smith II)*,¹⁵¹ Justice Antonin Scalia overrode decades of precedent by writing, “[t]he First Amendment’s protection of religious liberty does not require [a compelling interest].”¹⁵² Sadly, the current Supreme Court does not support a very strong Free Exercise Clause.¹⁵³

In response to the Court’s denigration of religious freedoms, Congress adopted the Religious Freedom Restoration Act (RFRA) to restore the “compelling interest” test.¹⁵⁴ However, the Supreme Court found the RFRA to be a violation of the separation of powers doctrine when applied to state laws.¹⁵⁵ In response, many states,

¹⁴³ H.J.R. Res. 57, 82d Leg., Reg. Sess. (Tex. 2011).

¹⁴⁴ H.B. 2582, 50th Leg., 1st Reg. Sess. (Ariz. 2011).

¹⁴⁵ Rodgers, *supra* note 59.

¹⁴⁶ Jones & Palazzolo, *supra* note 9. Among other states, Virginia also unsuccessfully attempted to adopt a law “to ban the use of any legal code established outside the United States in U.S. courtrooms” but was primarily targeted at Islamic Sharia law. Robert P. Jones, *The State of Anti-Sharia Bills*, WASH. POST (Feb. 29, 2012, 3:55 PM), http://www.washingtonpost.com/blogs/figuring-faith/post/the-state-of-anti-sharia-bills/2012/02/29/gIQAql5miR_blog.html.

¹⁴⁷ U.S. CONST. amend. I, cl. 1.

¹⁴⁸ *Employment Div. v. Smith (Smith II)*, 494 U.S. 872, 877 (1990).

¹⁴⁹ *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963).

¹⁵⁰ 63 AM. JUR. PROOF OF FACTS 3D *Free Exercise Cases Until 1990* § 2 (2001) [hereinafter *Free Exercise Cases*].

¹⁵¹ 494 U.S. 872 (1990).

¹⁵² *Id.* at 889.

¹⁵³ *See, e.g.*, DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES 82 (2d ed. 2009).

¹⁵⁴ *Free Exercise Cases*, *supra* note 150.

¹⁵⁵ *See City of Boerne v. Flores*, 521 U.S. 507 (1997); *see also Free Exercise Cases*, *supra* note 150.

including Oklahoma, adopted their own versions of the RFRA, thus restoring the “compelling interest” test to many American jurisdictions.¹⁵⁶ It is important to note that the *Smith II* decision only removed the “compelling interest” test as it applies to neutral laws but remained in effect for non-neutral and biased laws.¹⁵⁷

1. Non-Neutral Laws

*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*¹⁵⁸ helps to explain why State Question 755 is so clearly unconstitutional and why anti-religion laws could also be found unconstitutional. In *Lukumi Babalu*, the Supreme Court ruled that a city ordinance banning the ritual slaughter of animals was a violation of the Free Exercise Clause, as the ordinance was biased and the city failed to present a compelling government interest for banning the slaughter.¹⁵⁹ In doing so, the Court, in an opinion written by Justice Anthony Kennedy, laid out a test, post-*Smith II*, for analyzing laws that directly conflict with the First Amendment.¹⁶⁰ Justice Kennedy began his opinion by reporting, “[t]he principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions.”¹⁶¹

A brief summary of the facts in *Lukumi Babalu* is necessary to understand the Court’s decision. The religion at issue in the case was Santeria.¹⁶² Practitioners of Santeria express their faith using spirits called “orishas.”¹⁶³ According to Santeria, every person has a destiny with God and the only way to reach that destiny is by seeking the help of the “orishas.”¹⁶⁴ One principle way of showing dedication to the “orishas” is through the sacrifice of animals.¹⁶⁵ In 1987, Santeria adherents began plans to establish a Santeria church in Hialeah, Florida.¹⁶⁶ Frightened by the prospect of animal sacrifices in their backyards, the Hialeah City Council adopted a variety of

¹⁵⁶ *Free Exercise Cases*, *supra* note 150. The Oklahoma Religious Freedom Act states, “[n]o governmental entity shall substantially burden a person’s free exercise of religion unless it demonstrates that application of the burden to the person is: 1. Essential to further a compelling government interest; and 2. The least restrictive means of furthering that compelling governmental interest.” OKLA. STAT. tit. 51, § 253(B) (2000).

¹⁵⁷ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

¹⁵⁸ 508 U.S. 520 (1993).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 531–32.

¹⁶¹ *Id.* at 523.

¹⁶² *Id.* at 524.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* These sacrifices are made during important life events such as births, marriages, and deaths. *Id.* at 525. They are also used to help cure the sick and to initiate new priests into the Santeria religion. *Id.*

¹⁶⁶ *Id.* at 525–26.

resolutions and ordinances expressing fear of certain religions “engag[ing] in practices which are inconsistent with public morals,” banning the needless killing of animals, and “oppos[ing] the ritual sacrifices of animals.”¹⁶⁷ Citing a violation of the Church’s rights under the Free Exercise Clause, the Church sued the City and sought a declaratory judgment and injunctive relief.¹⁶⁸ The district court and the Eleventh Circuit Court of Appeals found for the City but the Supreme Court reversed.¹⁶⁹

In ruling for the Santeria Church, the Court noted that “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”¹⁷⁰ Noting that laws which fail to be neutral or generally applicable are inherently suspect, the Court applied strict scrutiny to the City of Hialeah in requiring that the law “be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”¹⁷¹

Before applying strict scrutiny analysis, the Court needed to determine whether the city ordinance was neutral. “[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral”¹⁷² The Court tells us that “[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.”¹⁷³ Even if a law is not facially invalid, the law can still be biased and harmful to a certain religion.¹⁷⁴ The *Lukumi Babalu* Court determined that the wording of the ordinances adopted by Hialeah was meant to specifically prevent Santeria animal sacrifices because the only conduct impacted by the ordinances was “the religious exercise of Santeria church members.”¹⁷⁵ There was little doubt in the Court’s mind that the sole purpose of the ordinances was to suppress Santeria.¹⁷⁶

Additionally, in finding that the laws violated the Free Exercise Clause, the Court also determined that the ordinances were not generally applicable, but were in fact motivated by pure animus toward the Santeria Church.¹⁷⁷ Finding that the animal slaughter ordinances were neither neutral nor of general applicability, the Court easily applied strict scrutiny and found that the government had no compelling interest and

¹⁶⁷ *Id.* at 526–27.

¹⁶⁸ *Id.* at 528.

¹⁶⁹ *Id.* at 520, 530–32.

¹⁷⁰ *Id.* at 531 (quoting *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981)).

¹⁷¹ *Id.* at 531–32.

¹⁷² *Id.* at 533.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 534.

¹⁷⁵ *Id.* at 535–36. The comments and climate surrounding the passage of the ordinances also suggest that the ordinance’s sole purpose was to harm the Santeria Church. A city councilman was quoted as saying, “What can we do to prevent the Church from opening?” *Id.* at 541. Hialeah’s Police Chaplain said that Santeria was “foolishness” and “an abomination to the Lord.” *Id.*

¹⁷⁶ *Id.* at 542.

¹⁷⁷ *Id.* at 545.

no narrowly tailored solution to the animal slaughter “problem.”¹⁷⁸ In essence, the Court reaffirmed, consistent with past precedent, that the Free Exercise Clause “protect[s] religious observers against unequal treatment.”¹⁷⁹

As Justice Kennedy reminded us in *Lukumi Babalu*, a “law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.”¹⁸⁰ Would a law that banned the consideration of *all* religious law be considered generally applicable? In order to make this determination, we must analyze whether such a law is neutral and of general applicability. This Note argues that the relevant case law and First Amendment principles support the notion that a prohibition on state court judges from considering *any* religious law is biased against, and harmful to, religious people and would prevent the free exercise of one’s faith, thus violating the First Amendment. In the *Lukumi Babalu* decision, Justice Kennedy stated:

The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices.¹⁸¹

Legislative hearings, statements by bill sponsors, and media reports show that proposals to ban the consideration of religion in state courts might meet Justice Kennedy’s “slight suspicion” threshold, as it is quite clear that supporters of these bills have religious intolerance on their minds.¹⁸²

A law banning a state court from considering any type of religious law could easily be found to be biased against religious people and, in particular, Muslims. “[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral”¹⁸³ In order to be neutral, a law cannot discriminate on its face.¹⁸⁴ Both the proposed Texas and Arizona laws specifically

¹⁷⁸ *Id.* at 546–47.

¹⁷⁹ *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring).

¹⁸⁰ *Lukumi Babalu*, 508 U.S. at 531.

¹⁸¹ *Id.* at 547.

¹⁸² *See, e.g., supra* notes 136–46 and accompanying text.

¹⁸³ *Lukumi Babalu*, 508 U.S. at 533.

¹⁸⁴ *Id.*

mention the ban of religious law in state courts.¹⁸⁵ Through their specific textual references to religion, the proposed laws discriminate against religious people (as opposed to the non-religious) on their face.¹⁸⁶ The proposed Pennsylvania law does not specifically mention religion; however, the Court has discussed that “[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.”¹⁸⁷

Because proposed “facially neutral” laws may not seem to be targeting religion in general or Islam specifically, courts must be especially careful in searching for “masked” hostility toward religion.¹⁸⁸ In the case of Pennsylvania, state legislators have made their intent all too well known. In a letter to her fellow Pennsylvania House of Representatives members proposing a ban on “foreign laws and legal systems,” Republican bill sponsor Representative RoseMarie Swanger entitled her memo, “American and Pennsylvania Laws for Pennsylvania Courts—Shariah Law.”¹⁸⁹ By calling Shariah “hostile” in an effort to garner support, the author makes her discriminatory intent fairly obvious.¹⁹⁰ Representative Swanger proclaims, “I don’t mean to discriminate against anybody. I just want to see everybody protected under our law.”¹⁹¹ Nonetheless, while it is possible that Representative Swanger’s intention was to protect people from harm, circumstantial evidence suggests a more nefarious purpose. The specific targeting of Shariah shows that this type of law is not meant to be neutral or generally applicable and is thus subject to strict scrutiny. Even if Representative Swanger can show a compelling government interest (her concern that the consideration of foreign or religious law by courts will result in a lack of legal protection for some citizens), her worries and proposed solution are simply unwarranted, as it is a well-known tenet of American judicial review that “American courts will not enforce foreign laws that are contrary to public policy.”¹⁹²

2. Burdensome Laws

Recognizing that many will characterize the proposed anti-religion laws as neutral laws of general applicability, we must consider how the U.S. Supreme Court views laws that it determines to be neutral and generally applicable.¹⁹³ Unfortunately, the

¹⁸⁵ See *supra* notes 136–37 and accompanying text.

¹⁸⁶ See *supra* notes 136–37 and accompanying text.

¹⁸⁷ *Lukumi Babalu*, 508 U.S. at 534.

¹⁸⁸ See, e.g., *id.*

¹⁸⁹ Memorandum from State Representative RoseMarie Swanger, *supra* note 140.

¹⁹⁰ *Id.*

¹⁹¹ Bryan Schwartzman, *Should Shariah Count in Court?*, JEWISH EXPONENT (Dec. 21, 2011), http://www.jewishexponent.com/article/24991/Should_Shariah_Count_in_Court?.

¹⁹² See Nelson *supra* note 8.

¹⁹³ Any reasonable reading of the district court and Tenth Circuit’s opinions when applied to *Awad v. Ziriax* shows that Question 755 specifically targets Islam and would never pass the *Lukumi Babalu* analysis. See *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012); *Awad v.*

Lukumi Babalu decision does not address what would have happened if the animal sacrifice law was one of general applicability and not adopted with animus toward Santeria practitioners.¹⁹⁴ As noted above, the Supreme Court has stated that neutral laws “of general applicability need not be justified by a compelling governmental interest even if [they] ha[ve] the incidental effect of burdening a particular religious practice.”¹⁹⁵ However, analyzing some of the Court’s direct versus indirect burden cases can show how, even if a law is deemed to be neutral and generally applicable, the law could still be struck down as unconstitutional.

In these “burden” cases, a plaintiff usually sues claiming that “she cannot comply with the law and remain faithful to her religious beliefs.”¹⁹⁶ As previously referenced, in *Smith II*, the Court upheld the constitutionality of a generally applicable Oregon law that denied unemployment benefits to workers who were fired due to their use of illegal narcotics, even though their religious beliefs supported the use of the drug in question (peyote).¹⁹⁷ The Court found that the ban on illegal drug use was a proper, neutral, and generally applicable exercise of the state’s police power.¹⁹⁸ In *United States v. Lee*,¹⁹⁹ the Court ruled that a generally applicable law requiring payment of social security taxes does not interfere with the Free Exercise rights of the Amish who believe that there “is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system.”²⁰⁰ The Court further stated, “[t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.”²⁰¹ While recognizing a burden on the Amish faith, the Court found that the tax was a permissible burden as there was an overriding governmental concern in serving the public interest by having a well-run social security system.²⁰²

Ziriak, 754 F. Supp. 2d 1298, 1307 (W.D. Okla. 2010), *aff’d*, 670 F.3d 1111 (10th Cir. 2012). But what if a state law were to be equally detrimental to all religions? This Note addresses that question but because it is so rare for a government to blatantly target citizens based on their religious beliefs, there is relatively little Supreme Court case law on the subject. 6 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONST. L. § 21.6(a) (4th ed. 2008).

¹⁹⁴ ROTUNDA & NOWAK, *supra* note 193, § 21.6(a).

¹⁹⁵ Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993); *see, e.g., Smith II*, 494 U.S. 872 (1990); *see also* JEROME A. BARRON & C. THOMAS DIENES, FIRST AMENDMENT LAW IN A NUTSHELL 503 (4th ed. 2008).

¹⁹⁶ ROTUNDA & NOWAK, *supra* note 193, § 21.6(b).

¹⁹⁷ *Smith II*, 494 U.S. 872.

¹⁹⁸ *Id.* at 878–82.

¹⁹⁹ 455 U.S. 252 (1982).

²⁰⁰ *Id.* at 252–53, 257.

²⁰¹ *Id.* at 257–58.

²⁰² *Id.* at 257–59. While the Court has stated that laws of general applicability are not entitled to strict scrutiny, it is important to remember that many states have adopted statutes similar to the federal RFRA that requires strict scrutiny for any law that substantially burdens religious freedom. *See supra* notes 154–57 and accompanying text.

A direct burden makes it impossible for a religious person to both follow the law and maintain his or her religious beliefs.²⁰³ For example, in *Wisconsin v. Yoder*,²⁰⁴ a case involving the Amish challenge of a compulsory school attendance law, the Court held that “only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion.”²⁰⁵ In *Yoder*, “[t]he impact of the compulsory-attendance law on respondents’ practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.”²⁰⁶

When considering the value of the *Yoder* decision, it is important to remember that Justice Scalia attempted to differentiate the earlier *Yoder* case from *Smith II* by noting that *Yoder* is a hybrid case involving both the Free Exercise Clause and the constitutional right of parents “to direct the education of their children.”²⁰⁷ Some commentators believe that *Smith II* effectively overruled *Yoder* and have mentioned that *Yoder* may “create only a very limited exemption from compulsory attendance laws for families who can base their claim for an exemption on shared religious beliefs as well as on a general due process–liberty argument.”²⁰⁸ Professor Daniel Conkle and other commentators conclude that post–*Smith II*, free exercise protection is only warranted in cases like *Lukumi Babalu*, where prejudiced burdens deliberately discriminate against religion.²⁰⁹ However, it could easily be argued that anti-religion laws by their very nature discriminate against the religious and are thus entitled to strict scrutiny protection as laid out in *Lukumi Babalu*.²¹⁰

A federal court could conclude that a law directly preventing a court from considering a person’s religious wishes would impose a direct burden on that person’s ability to freely practice his or her religion. A law banning judges from considering religious law could interfere with a Muslim’s right to have his will probated according to his religious desires or an Orthodox Jew’s ability to obtain a required “get” during divorce proceedings.²¹¹ Unlike the governmental goals of keeping drugs out of the workplace²¹² or assuring that the social security system continues to thrive,²¹³ states will be hard-pressed to come up with rational and neutral reasons for not even allowing state court judges to “consider” religious law when making their decisions. Generally applicable laws will not always result in automatic constitutionality, and

²⁰³ See CONKLE, *supra* note 153, at 87.

²⁰⁴ 406 U.S. 205 (1972).

²⁰⁵ *Id.* at 215.

²⁰⁶ *Id.* at 218.

²⁰⁷ *Smith II*, 494 U.S. 872, 881 (1990).

²⁰⁸ ROTUNDA & NOWAK, *supra* note 193, § 21.8(c).

²⁰⁹ See CONKLE, *supra* note 153, at 94.

²¹⁰ See *supra* Part III.A.1.

²¹¹ See *supra* notes 24, 36 and accompanying text.

²¹² *Smith II*, 494 U.S. at 905 (O’Connor, J., concurring).

²¹³ *United States v. Lee*, 455 U.S. 252, 258–59 (1982).

are more likely to be found unconstitutional when they present a direct burden to a religious adherent. There is no question that an anti-religion law would make it difficult for a religious person to ensure that their religious preferences (which do not conflict with public policy) are enforced by a court, suggesting that a court would be required to strike down an anti-religion law in order to comport with the First Amendment.

Using the *Yoder* line of reasoning, a court could easily strike down an anti-religion law. For example, as noted by the plaintiff in *Awad v. Ziriya*,²¹⁴ failure by the court to consider Sharia law when implementing his last will and testament burdens the exercise of his religion because Islam has strict standards for how a deceased person's estate should be divided and distributed to friends and family.²¹⁵ Recognizing that a law prohibiting courts from considering religious doctrine would burden religious people, a court would need to balance this burden against the interests of the state. Taking Pennsylvania as an example, as the interests of the state seem to be based on pure animosity and prejudice toward Islam,²¹⁶ it seems fairly clear-cut that the balancing test would tip in favor of preserving the rights of the religious to have their beliefs (which do not interfere with state policy) enforced by state courts.

3. Secular Laws

Perhaps the most important and obvious holdings that must be examined to determine the legitimacy of anti-religious laws are the Court's limited cases dealing with issues of secularism. The Court has repeatedly reaffirmed that "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'"²¹⁷ In *Zorach v. Clauson*,²¹⁸ the Court ruled that the government could not "prefer[] those who believe in no religion over those who do believe" and that there is "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."²¹⁹ This holding has been reaffirmed over the succeeding decades since the *Zorach* decision.²²⁰

²¹⁴ Complaint Seeking a Temporary Restraining Order & Preliminary Injunction at 6–8, *Awad v. Ziriya*, No. CIV-10-1186-M (W.D. Okla. Nov. 4, 2010).

²¹⁵ See *supra* note 99 and accompanying text.

²¹⁶ Although some state representatives suggest otherwise. See, e.g., Memorandum from State Representative RoseMarie Swanger, *supra* note 140.

²¹⁷ See, e.g., *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963) (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)).

²¹⁸ 374 U.S. 203 (1963).

²¹⁹ *Id.* at 314.

²²⁰ See, e.g., *Larson v. Valente*, 456 U.S. 228, 246 (1982); *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968) (holding that "[t]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion").

Those in support of anti-religion laws will likely say that, because the law bans *all* consideration of religious law,²²¹ the law is inherently neutral and thus a valid exercise of government authority. While it is true that the proposed anti-religious laws harm all religious practitioners equally and the proposed laws do not pose any obvious harm to the non-religious, the anti-religion laws show state favoritism for the non-religious, thus violating the First Amendment. Ironically, many of those who have proposed anti-Sharia and anti-religion laws are among the most religious of American legislators.²²² While it may not have been the intent of anti-Islamist drafters like David Yerushalmi, laws that prohibit state court judges from considering religious law unconstitutionally favor “those who believe in no religion over those who do believe,” creating a classic clear-cut violation of the Free Exercise Clause.²²³

*B. The Establishment Clause*²²⁴

We must also briefly examine anti-religion laws in light of the Establishment Clause. The First Amendment’s Establishment Clause prohibits the government from officially endorsing any particular religion.²²⁵ However, the government is not required to ignore the importance and prevalence of religion in America.²²⁶ In fact, the Supreme Court has said that a state court can apply “neutral principles of law” to religious disputes²²⁷ by using secular law to address issues between parties who invoke religious principles in the courtroom.²²⁸ The Clause has also been interpreted as the basis for the principle that the government may not inhibit or interfere with any particular religion.²²⁹

²²¹ See, e.g., *supra* notes 136–46 and accompanying text.

²²² For example, the chief architect of the Oklahoma bill, State Senator Rex Duncan, repeatedly emphasized the historical importance of Judeo-Christian values during the campaign to adopt State Question 755. See, e.g., CAIRtv, *Cair Video: SQ 755 Sponsor Explains Purpose of Amendment on MSNBC*, *supra* note 92.

²²³ *Schempp*, 374 U.S. at 225 (citing *Zorach*, 343 U.S. at 314) (internal quotation marks omitted).

²²⁴ Unlike the Free Exercise Clause, the Establishment Clause has never been utilized to strike down a law “inhibiting religion” like the anti-religion laws at issue here, despite the fact that the Court has noted that the Establishment Clause prevents the inhibition of religion. *Agostini v. Felton*, 521 U.S. 203, 222–24 (1997); see *CONKLE*, *supra* note 153, at 87.

²²⁵ See, e.g., *Schempp*, 374 U.S. 203 (holding that a public school could not be required to begin the school day by reading Bible passages).

²²⁶ *Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010) (noting that “[t]he Constitution does not oblige government to avoid any public acknowledgment of religion’s role in society.”). For example, “[o]ur coins bear the phrase, ‘In God We Trust.’ The pledge of allegiance to the flag includes the phrase, ‘One Nation Under God.’ The sessions of [Congress] begin with an invocation given by a chaplain.” *BARRON & DIENES*, *supra* note 195, at 477.

²²⁷ *Jones v. Wolf*, 443 U.S. 595, 604 (1979).

²²⁸ Brian Sites, *Religious Documents and the Establishment Clause*, 42 U. MEM. L. REV. 1, 13–14 (2011).

²²⁹ See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

This latter principle was the issue at hand in *Awad v. Ziriax*; it concerned laws that prevent state court judges from considering *any* religious law.²³⁰ According to the “Endorsement Test” proposed by Justice Sandra Day O’Connor in a 1984 concurring opinion, the Establishment Clause “prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.”²³¹ Justice O’Connor wrote that disapproval of a given religion sends the message to adherents of that religion “that they are outsiders, not full members of the political community.”²³²

The “Endorsement Test” should be considered in conjunction with the *Lemon* test.²³³ According to the *Lemon* test, in order to comport with the Establishment Clause, a government-sponsored message or statute: 1) “must have a secular legislative purpose”; 2) must have as “its principal or primary effect” a goal that “neither advances nor inhibits religion”; and 3) “the statute must not foster ‘an excessive government entanglement with religion.’”²³⁴ Lower courts frequently look to the *Lemon* test when faced with allegations of Establishment Clause violations.²³⁵

What does the *Lemon* test’s first prong, requiring a “secular legislative purpose,” actually mean, and how is it applied? The Supreme Court has ruled on this prong in just a few rare cases.²³⁶ For example, the Court has found that there was no valid non-religious purpose to an Arkansas law that banned the teaching of evolution in public schools²³⁷ and that no “secular legislative purpose” existed for a Kentucky law requiring the posting of the Ten Commandments in school classrooms.²³⁸ To determine the legislative purpose of a given statute, a court must inquire into the state’s goals when adopting a given policy.²³⁹ The second prong of the *Lemon* test, requiring that a law not advance or inhibit religion, is fairly self-explanatory.

Moving to the third prong of the *Lemon* test, the Court described the prevention of “excessive government entanglement with religion” as an effort to ensure that the government does not intrude into the domain of religion, and that religion does not interfere with the operation of the government.²⁴⁰ The Court recognizes that it is not practical to erect an iron fence between Church and State²⁴¹ and that the relationship

²³⁰ See *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1305–06 (W.D. Okla. 2010), *aff’d*, 670 F.3d 1111 (10th Cir. 2012).

²³¹ *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring).

²³² *Id.* at 688.

²³³ See *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (setting out a three-pronged test to detect unconstitutional government action).

²³⁴ *Id.* at 612–13 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

²³⁵ See, e.g., Kristi L. Bowman, *Seeing Government Purpose Through the Objective Observer’s Eyes: The Evolution-Intelligent Design Debates*, 29 HARV. J.L. & PUB. POL’Y 417, 443 (2006).

²³⁶ See, e.g., Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 95 (2002).

²³⁷ *Epperson v. Arkansas*, 393 U.S. 97, 107–09 (1968).

²³⁸ *Stone v. Graham*, 449 U.S. 39, 41 (1980).

²³⁹ See, e.g., *Lemon*, 403 U.S. at 613.

²⁴⁰ See, e.g., *id.* at 613–14.

²⁴¹ *Id.* at 614.

between the two “is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.”²⁴² Furthermore, one of the primary goals of the Establishment Clause is the prevention of “active involvement of the sovereign in religious activity.”²⁴³ The Supreme Court reviewed the “entanglement” prong in *Agostini v. Felton*²⁴⁴ and reiterated that an entanglement can result in both the promotion and inhibition of religious practice.²⁴⁵ Perhaps most importantly to our analysis here, the Court has ruled that “political divisiveness” is a major risk of excessive government entanglement in religion.²⁴⁶

Establishing no consideration of religious law as the preference for state courts seems to be a violation of the Establishment Clause. Firstly, proposed anti-religion laws would likely fail the “Endorsement Test” as the law results in an official government “disapproval of religion.”²⁴⁷ Anti-religion laws would also likely fail the *Lemon* test. In many states, the laws would fail the “secular legislative purpose” prong because the actual goal of many of these laws is to prohibit the practice of religion.²⁴⁸ In states like Pennsylvania, where clear legislative intent exists suggesting that a specific religion (Islam) is the target of legislation,²⁴⁹ the “secular” prong will likely fail. Again, while the states where anti-religious laws have been proposed will proffer reasons such as threats to state sovereignty,²⁵⁰ media reports and public statements make it fairly obvious that this is nothing but smoke and mirrors to detract from the legislation’s real goal of inhibiting religious practice, specifically the practice of Islam.²⁵¹ The proposed laws by their very nature fail the second prong as their goal is to inhibit the passive aid of the courts in freely practicing one’s religion.²⁵²

The third “excessive entanglement” prong of the *Lemon* test suggests that an anti-religion law *is* unconstitutional but state consideration of religious law *is not* unconstitutional. An anti-religion law would likely be viewed as an “active involvement of the sovereign in religious activity”²⁵³ because the state government would serve as a direct impediment to adherents’ religious practice. At the same time, a court would likely find that there is merely passive governmental involvement when a state court ensures that a contract or will is enforced in accordance with a person’s religious principles. Finally, as this Note makes clear, the political divisiveness of the proposed anti-Sharia and anti-religion laws would contribute to a court’s likely finding that anti-religion laws violate the Establishment Clause.

²⁴² *Id.*

²⁴³ *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970).

²⁴⁴ 521 U.S. 203 (1997).

²⁴⁵ *Id.* at 233.

²⁴⁶ *Aguilar v. Felton*, 473 U.S. 402, 416 (1985) (Powell, J., concurring).

²⁴⁷ *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O’Connor, J., concurring).

²⁴⁸ *See supra* notes 136–46 and accompanying text.

²⁴⁹ *See supra* notes 137–40 and accompanying text.

²⁵⁰ *See, e.g.*, Memorandum from State Representative RoseMarie Swanger, *supra* note 140.

²⁵¹ *See supra* note 140 and accompanying text.

²⁵² *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1974).

²⁵³ *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970).

One could argue that the Establishment Clause actually requires that state courts not consider any type of religious law. The Supreme Court has ruled that the government cannot coerce a person into religious participation.²⁵⁴ In *Lee v. Weisman*,²⁵⁵ the Court stated that “the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.”²⁵⁶ In *Weisman*, the Court ruled that non-denominational prayer at a public high school graduation ceremony was a violation of the Establishment Clause because it placed “public pressure” to stand and remain silent while others practiced their religious beliefs.²⁵⁷ The Court was concerned that a non-religious student may have felt that he or she was being forced to participate in a religion, or religion in general, that he or she did not endorse.²⁵⁸

If state courts were required to consider religious laws, one could imagine a scenario during a jury trial where a non-religious juror would be required to consider, and potentially even apply, religious principles during deliberations. For example, if a jury was required to consider a business contract governed by Islamic law, a jury member could be forced to consider Sharia law during deliberations in an attempt to determine the meaning of the contract and the intentions of the parties. The mere inclusion of the juror in the jury and the public reading of a verdict might violate a juror’s right to not embrace any type of religion because his or her participation in the “group exercise . . . [could] signif[y] her own participation or approval of [religion or Islam].”²⁵⁹ These concerns could potentially be belied through jury *voir dire* questions, although these questions in and of themselves could create First Amendment issues.

CONCLUSION

Will Islam ever be fully accepted in America? One law professor, John Witte Jr., suggests that Muslims must essentially wait their turn.²⁶⁰ In a recent speech he noted that, “[t]he current accommodations made to the religious legal systems of Christians, Jews, First Peoples and others in the West were not born overnight. They came only after centuries of sometimes hard and cruel experience, with gradual adjustments and accommodations on both sides.”²⁶¹ He argues that Muslims must fight for their rights, much like Jews who have only recently acquired legal rights for “Sabbath accommodations and access to kosher food” and most relevant to recent anti-Sharia provisions, “the option to have Jewish courts decide certain domestic and financial affairs.”²⁶²

²⁵⁴ See Sites, *supra* note 228, at 10–11.

²⁵⁵ 505 U.S. 577 (1992).

²⁵⁶ *Id.* at 587. For another “coercion” case, see *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that student-led prayer prior to a public high school athletic event violated the Establishment Clause).

²⁵⁷ *Lee*, 505 U.S. at 593.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ See Loftus, *supra* note 14.

²⁶¹ *Id.*

²⁶² *Id.*

If courts are to consider religious law in their decision-making process, how should they do it? One scholar believes that the standards laid out by Supreme Court precedent require that courts not resolve doctrinal disputes; “not inquire . . . into religious doctrine or polity”; defer to religious tribunals; and most importantly “apply traditional neutral principles of law to resolve disputes involving interpretation of religious documents.”²⁶³

I was originally inspired to write this Note due to my mere shock at the existence of Oklahoma’s anti-Sharia provision, a voter-approved law based on fear and bigotry, designed to combat a non-existent problem.²⁶⁴ As the Tenth Circuit made abundantly clear, laws that target specific religions are facial violations of the First Amendment.²⁶⁵ Furthermore, as this Note has shown, more generalized laws designed to prevent state court consideration of *any* religious law will likely be found to be unconstitutional violations of the Free Exercise and Establishment Clauses of the First Amendment.²⁶⁶

Religious persecution is not a new phenomenon in America, and history suggests that the passage of time generally leads to acceptance.²⁶⁷ There is hope that the anti-Islam movement is beginning to ebb. Around the tenth anniversary of the September 11 attacks, polls showed that approximately thirty percent of Americans believed that Muslims intended to make Sharia law the supreme “law of the land,”²⁶⁸ but a more recent poll states that this view is now only held by fourteen percent of Americans, and over two-thirds of Americans disagree with the notion.²⁶⁹ By mid-2012, multiple anti-Sharia bills failed or were pulled by their authors.²⁷⁰ One can only hope that the Muslim community in the United States will one day soon be fully appreciated and welcomed into the American melting pot.²⁷¹

²⁶³ Sites, *supra* note 228, at 19.

²⁶⁴ See *supra* Part I.D.

²⁶⁵ See *supra* Part II.

²⁶⁶ See *supra* Part III.

²⁶⁷ See *supra* notes 11–16 and accompanying text.

²⁶⁸ PUB. RELIGION RESEARCH INST., SURVEY, WHAT IT MEANS TO BE AMERICAN: ATTITUDES TOWARDS INCREASING DIVERSITY IN AMERICA TEN YEARS AFTER 9/11 (2011), <http://publicreligion.org/research/2011/09/what-it-means-to-be-american/>.

²⁶⁹ PUB. RELIGION RESEARCH INST., SURVEY, MAJORITY OF CATHOLICS THINK EMPLOYERS SHOULD BE REQUIRED TO PROVIDE HEALTH CARE PLANS THAT COVER BIRTH CONTROL AT NO COST (2012), <http://publicreligion.org/research/2012/02/january-tracking-poll-2012/>.

²⁷⁰ Omar Sacirbey, *Anti-Shariah Movement Loses Steam in State Legislatures*, WASH. POST, Mar. 22, 2012, http://www.washingtonpost.com/national/on-faith/anti-shariah-movement-loses-steam-in-state-legislatures/2012/03/22/gIQAphNxTS_story.html. Responding to criticism for his appointment of a Muslim Judge, New Jersey Governor Chris Christie noted, “[t]his Sharia law business is crap It’s just crazy. And I’m tired of dealing with the crazies.” *Id.*

²⁷¹ To learn more about Islam and Sharia in an attempt to combat and educate others about American Islamophobia, see DEFENDING RELIGIOUS FREEDOM UNDERSTANDING SHARIAH, <http://www.defendingreligiousfreedom.com/> (last visited Oct. 14, 2012).