Louisiana Law Review

Volume 73
Number 2 *Winter 2013*

Article 9

2-1-2013

Bad Moon Rising: The Sharia Law Bans

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I see the bad moon arising. I see trouble on the way.[1]

INTRODUCTION

Against the backdrop of the ten-year anniversary of the 9/11 terrorist attacks, a heightened interest in the role of Islam in American society and the subsequent clash of civilizations remains. Specifically, public concern continues to grow across the country about the use of Sharia Law, or Islamic Law, within American courts.[2] As a result, well over a dozen state legislatures have introduced or passed legislation that prohibits or limits the use of Sharia Law or foreign law in state courts.[3] These bills have taken two distinct forms: Sharia-specific and facially-neutral bills.

Regardless of classification, these legislative efforts have triggered a number of constitutional concerns, with critics arguing that the bills violate the Establishment and Free Exercise Clauses of the First Amendment.[4] Critics argue that the laws have a sectarian purpose and an effect of advancing one religion at the expense of another and thus fail the Supreme Court's jurisprudential test.[5] Moreover, these critics argue that the laws burden the practice of religious faith.[6] Indeed, this debate has undeniably opened a Pandora's Box of constitutional concerns.

Meanwhile, the bills' proponents vigorously reject the accusation that the bills are hostile to Muslims or religious freedoms.[7] They argue that the bills are designed to proactively safeguard the secular constitutional role of government by

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1. CREEDENCE CLEARWATER REVIVAL, *Bad Moon Rising*, *on* GREEN RIVER (Fantasy Records 1969).

2. *See* discussion *infra* Part I. Sharia Law is the Islamic legal code based primarily on the Quran and the *Sunna*.

3. *See* discussion *infra* Part III; *see also* Bill Raftery, *Bans on Court Use of Sharia/International Law: Introduced in Mississippi and Kentucky, Advancing in Florida & South Dakota, Dying in Virginia*, GAVEL TO GAVEL (Feb. 13, 2012), http://gaveltogavel.us/site/2012/02/13/bans-on-court-use-of-shariainternational-law-introduced-in-mississippi-and-kentucky-advancing-in-florida-south-dakota-dying-in-virginia/ (listing legislation in 22 states).

4. *See* discussion *infra* Part IV.

5. *See* discussion *infra* Part II, IV. For a bill to pass muster, the law must have a legitimate secular purpose, must not have the primary effect of advancing or inhibiting religion, and must not further an excessive entanglement of government and religion. Lemon v. Kurtzman, 403 U.S. 602, 612–14 (1971).

6. *See* discussion *infra* Part V.A.

7. *See* discussion *infra* Part V.B.

prohibiting religious influence, specifically that of Sharia Law.[8] The proponents, moreover, argue that the bills are aimed at reinforcing the supremacy of state and federal law. The central argument for combating the rising influence of Sharia Law and foreign law is that Americans have a fundamental interest in deciding what laws American courts should enforce.[9] Furthermore, the case law shows that existing law and judicial procedures are inadequate in dealing with the growing problem of foreign law, particularly Sharia Law, in state courts.

Because Muslims represent an increasingly large segment of the American population, this debate will surely grow in the coming years.[10] This Comment's purpose is to provide a survey on the Sharia Law bill debate, including the Sharia-specific and facially-neutral bills. This Comment seeks to facilitate future discussions about this increasingly important topic that lies at the dynamic intersection of religious liberty, equal protection, legal pluralism, secularism, globalization, and nationalism. Part I explores the threshold issue underlying the Sharia Law bill debate: Whether Sharia Law can be defined to allow for a categorical limitation or prohibition. Part II then explores the growing influence that Sharia Law has on the world stage, including its spread to Western countries such as Great Britain and the United States. Additionally, Part II looks at specific uses of Sharia Law within American courts. Part III reviews the specific state legislative efforts to prohibit or limit Sharia Law, including the neutral legislation. Part IV examines the Religion Clauses of the First Amendment, including their historical interpretation and relevant case law. Part V then explores how the Sharia-specific bills fare under judicial scrutiny in light of the Religion Clauses' jurisprudential tests. Part V further contends that the Sharia bills can survive despite judicial hurdles. Part VI then argues that the superior solution to the Sharia problem is the facially-neutral foreign law bills, which are sufficiently flexible. This Comment argues that the facially-neutral legislation does not violate any constitutional guarantees and is necessary in the absence of proper judicial procedural safeguards and existing law. Finally, Part VI readdresses and reinforces the overall argument of this Comment that remedial and preemptive legislative action should be taken to address the growing influence of Sharia Law.

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8. *Id.*

9. *See* discussion *infra* Part III.A.

10. *See* Cathy Lynn Grossman, *Number of U.S. Muslims to Double*, USA TODAY, Jan. 27, 2011, at 1A (discussing a study showing that the U.S. population of Muslims is expected to grow substantially in the next 20 years).

I. DEFINING SHARIA LAW

Defining *Sharia Law* is one of the most vexing and difficult challenges posed by the Sharia Law bill debate. Perhaps this is why a number of bills that specifically identify Sharia Law make no attempt to provide a definition.[11] Ultimately, this definitional debate over Sharia Law sets the necessary framework for any constitutional issues involving state legislative measures. As such, any legislative efforts to prohibit or limit the use of Sharia Law in state courts have a much better chance of passing constitutional muster if the state legislatures are explicit in defining Sharia Law rather than leaving it to the courts' devices. Some preliminary questions, therefore, are whether Sharia Law can be clearly defined and whether it has a legal character.

A. Sharia Law: A Brief Overview

In Arabic, *Sharia* means "path" and is commonly believed to mean the path that Muslims must follow.[12] Generally speaking, Sharia Law directs a wide array of legal areas such as family law, including marriage and divorce, financial dealings, and other areas of personal life.[13] Sharia Law consists of four sources: the Quran, the *Sunna*, analogical reasoning, and scholarly consensus.[14]

The first source of Sharia Law is the Quran, the Islamic holy book, which Muslims consider the primary and direct revelation of Allah's will.[15] The second source of Sharia Law is the *Sunna*, which provides a detailed account of Mohammad's life and behavior collected from oral reports known as *Hadith*.[16] Because the *Sunna* is indirect and seen as an expression of Mohammad's teachings, it is considered less important than the Quran.[17] However, Muslims regard both the Quran and the *Hadith* as authoritative and immutable.[18] Muslims consider the Quran and the

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11. *See* discussion *infra* Part III.

12. Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origins and Elements*, *in* UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY 1–3 (Hirsham M. Ramadan ed., 2006).

13. Liaquat Ali Khan, *Jurodynamics of Islamic Law*, 61 RUTGERS L. REV. 231, 274 (2009).

14. *See* Wael B. Hallaq, AN INTRODUCTION TO ISLAMIC LAW 21–22 (2009).

15. Abdal-Haqq, *supra* note 12, at 11.

16. Frank Griffel, *Introduction*, *in* SHARI'A: ISLAMIC LAW IN THE CONTEMPORARY CONTEXT 3 (Abbas Amanat & Frank Griffel eds., 2007).

17. M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E. L. 135, 152 (2002).

18. Khan, *supra* note 13, at 277.

Sunna as the two primary sources, which technically make up the Sharia.[19]

The last two sources of Sharia Law fall under *fiqh*, or Islamic juristic interpretation.[20] As a result of competing juristic interpretations, Islamic scholars debate Sharia's proper application.[21] The third source is analogical reasoning, which developed as a result of ambiguous and equivocal language found in the Quran and *Hadith*.[22] To produce specific meanings, Islamic jurists developed rules to resolve conflicts, thereby establishing a system of legal norms.[23] The fourth source of Sharia Law is scholarly consensus.[24] Like analogical reasoning, Islamic scholars use consensus to aid in interpreting the Quran and *Hadith*.[25]

Sharia Law developed following Mohammad's death in 632 A.D. as the Islamic Empire was expanding.[26] Islamic leaders in different localities had to reconcile local customs and traditions that conflicted with Islam.[27] As a result, distinct schools of Islamic legal thought developed, including the five major schools of thought that survive today.[28] These schools of thought mainly differ regarding the relative weight each school applies to the four sources of Sharia Law.[29]

B. The Legal Character of Sharia Law

Sharia Law has a legal character just like the Civil Law and Common Law traditions. At its core, "Islamic law, no different from the common law, is a complex mechanism, with a centuries-long history of evolution and application."[30] Indeed, Professor

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19. Jason Morgan-Foster, *Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement*, 8 YALE HUM. RTS. & DEV. L.J. 67 (2005).

20. *Id.*

21. *See* Maria Reiss, *The Materialization of Legal Pluralism in Britain: Why Shari'a Council Decisions Should Be Non-Binding*, 26 ARIZ. J. INT'L & COMP. L. 739, 743 (2009).

22. Hallaq, *supra* note 14, at 19.

23. *Id.*

24. *Id.*

25. *Id.* at 21.

26. Bassiouni & Badr, *supra* note 17, at 136.

27. *Id.*

28. Abdal-Haqq, *supra* note 12, at 24–25. Four of these schools fall within the Sunni tradition and include *Hanafi*, *Maliki*, *Shafii*, and *Hanbal*; the fifth school, *Jafari*, falls within the Shiite tradition. *Id.*

29. *Id.*

30. Peter W. Beauchamp, *Misinterpreted Justice: Problems with the Use of Islamic Legal Experts in U.S. Trial Courts*, 55 N.Y.L. SCH. L. REV. 1097, 1102

Scheherazade Rehman explains that Islamic Law can be properly understood as a mixture of the Civil Law and Common Law traditions.[31] Sharia Law is similar to the Civil Law because it is based on a code, the Quran; Sharia Law is simultaneously similar to the Common Law tradition because Sharia Law is also based on the opinions of judges.[32] Like Common Law judges, Sharia Law judges rely on precedents stemming from both opinion and interpretation to decide whether a particular activity is permissible.[33] The most acute difference between Islamic Law and the Civil and Common Laws, however, is that Islamic Law is considered to be "divinely inspired and revealed, and therefore not given to changes by man, as are the laws in the other two traditions."[34] Reflecting this view is Rehman's statement that "[t]he laws in both a Civil Law society and a Common Law society are made by human beings, and therefore changeable by them. Not so in divinely revealed Shari'ah, the revelation of which has been interpreted to some extent, but not changed."[35] Other Islamic legal scholars have similarly argued that Sharia Law is unmoving and unchanging over time.[36]

Some foreign courts have determined that Sharia Law is static and definable. In *Refah Partisi v. Turkey*, for instance, the European Court of Human Rights concluded that Sharia, "which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable."[37] The court explained:

> It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia [sic], which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of

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(2011). *See also* Donald L. Horowitz, *The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change*, 42 AM. J. COMP. L. 543, 544 (1994).

31. Scheherazade S. Rehman, *Globalization of Islamic Finance Law*, 25 WIS. INT'L L.J. 625, 628 (2008).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *See, e.g.*, Frederick V. Perry, *Shari'ah, Islamic Law and Arab Business Ethics*, 22 CONN. J. INT'L L. 357, 368 (2007). Perry contends that "Shari'ah, because of its Divine provenance, cannot be changed by man." *Id.*

37. Refah Partisi v. Turkey [GC], nos. 41340/98, 41342/98, 41343/98, 41344/98, § 15, Eur. Ct. H.R. 2003-II.

> women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.[38]

One of the most problematic features of the Sharia legislative debate is that no central authority or hierarchy exists for Sharia Law as in the Catholic faith, which has a codified Canon Law and key leaders.[39] Due to the absence of a single authoritative interpretation of Sharia Law and doctrine, judges have difficulty finding the proper interpretation.[40] Even though various schools of thought have competing interpretations of Sharia Law, the assertion that Sharia lacks a legal character is fundamentally flawed and is akin to arguing that American Common Law lacks a legal character because it is interpreted somewhat differently in 49 states. One commentator points out that "despite the differing characteristics of Islamic and U.S. legal systems, they are really quite similar in function."[41]

C. The Application of Sharia Law

The clearest manifestation of Sharia Law is ultimately the way that it is practiced within a particular legal system.[42] Some of the most common criticisms of Sharia Law's application in foreign countries are that it oppresses women, denies religious freedom, prevents the modernization of finances, imposes severe punishment, and creates a hostile environment to non-Muslims.[43] Conservative Muslim countries, such as Saudi Arabia, Pakistan, and Iran, have declared Islam as the official religion and have made Sharia the primary source of law.[44] Professor Dominic McGoldrick summarizes some of the most problematic features of Sharia as applied in Islamic countries as follows:

> severe punishments for crimes—death penalty executions or limb amputations; stoning or imprisoning women for adultery; the criminalisation of sexual activities outside of marriage and for homosexual or lesbian activities; non-recognition of the transgendered; certain rules concerning

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38. *Id.*
39. *See* Sadiq Reza, *Torture and Islamic Law*, 8 CHI. J. INT'L L. 21, 38 (2007).
40. *See* Charles P. Trumbull, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 632–34 (2006).
41. Beauchamp, *supra* note 30, at 1105.
42. *Id.* at 1104.
43. Khan, *supra* note 13, at 233–34.
44. *See* L. Ali Khan, *The Qur'an and the Constitution*, 85 TUL. L. REV. 161, 168 (2010).

> marriage and polygamy, even with more modern legislative and administrative limitations and restrictions on it that make polygamy difficult; honour killings or attacks; Talaq, i.e., unilateral divorce by men, without the consent of the wife, even with more modern legislative and administrative limitations and restrictions on it; allowing women divorce with their husband's consent but only upon the basis of foregoing financial benefits; child custody only for fathers; lack of succession rights for women, illegitimate children and female children; penalties for apostasy; and the absence [of] adoption.[45]

The application of these discordant features of Sharia Law is wholly inconsistent with U.S. and state constitutional rights and state public policy. These discordant features are the true impetus for legislative efforts to combat the use or application of Sharia Law in state courts.

II. THE RISE OF SHARIA LAW: A GLOBAL AND AMERICAN REVIEW

One of the most critical concerns about legislative efforts to combat Sharia Law is whether the growing influence of Sharia Law in state courts is even a problem that should be addressed. Thus, this Part explicates the specific reasons why particular and direct steps need to be taken to address the widespread influence of Sharia Law across the globe.

A. The Global Rise of Sharia Law

Sharia Law's significance will likely continue to be a rising force on the global stage as the Muslim population worldwide is expected to significantly increase.[46] An example of this global rising force is that a growing number of Muslim countries have renewed their commitments to Sharia Law, including the introduction of a supremacy clause in their national constitutions that effectively abrogates laws that conflict with Sharia.[47] In addition, recent world events indicate that there is global

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45. Dominic McGoldrick, *Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws*, 9 HUM. RTS. L. REV. 603, 621–22 (2009) (citations omitted).

46. *See* Grossman, *supra* note 10 (noting that the worldwide Muslim population is expected to grow by over 30%).

47. Khan, *supra* note 13, at 235. Khan explains that Afghanistan, Pakistan, and Egypt each have included within their constitutions a supremacy clause providing that Sharia law trumps any other source. *Id.*

movement toward Sharia Law's expanded use. In Libya, for instance, the overthrow and subsequent killing of Moammar Gadhafi has set the stage for Sharia Law's declaration as the basic source of law; if this happens, all laws that conflict with Sharia will be nullified.[48]

This global wave of Sharia Law has also impacted the legal systems of several Western European countries.[49] The most notable example is the United Kingdom, where Sharia courts have become increasingly influential.[50] In February 2008, Archbishop of Canterbury Rowan Williams started a political firestorm when he argued that the rise of Sharia Law "seem[s] unavoidable."[51] Indeed, the United Kingdom has used Sharia courts since 2008 in Muslim civil cases.[52] A report by Civitas, an independent British think tank, claims that these courts have the potential to hand down rulings that are incompatible with British law "because they are linked to elements in Islamic law that are seriously out of step with trends in Western legislation that derive from the values of the Enlightenment and are inherent in modern codes of human rights."[53] The study further asserts that "Sharia rulings contain great potential for controversy and may involve acts contrary to UK legal norms and human rights legislation."[54]

The British Sharia model has consequently served as a rallying cry for radical Muslims in Australia to demand a similar separate legal framework that recognizes Sharia Law.[55] Alas, other Western countries have seen a similar increase in the demand for and use of

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48. *See* Mary Beth Sheridan, *Libya Declares Liberation Days After Gaddafi Death*, WASH. POST, Oct. 24, 2011, at A10.

49. *See generally* Almas Khan, *The Interaction Between Shariah and International Law in Arbitration*, 6 CHI. J. INT'L L. 791, 795 (2006). Khan explains that Muslims have increasingly settled in secular countries and have sought to establish a modified legal framework rather than to complete assimilation. *Id. See also* Mathias Rohe, *Shari'a in a European Context*, *in* LEGAL PRACTICE AND CULTURAL DIVERSITY 93 (Ralph Grillo et al. eds., 2009) (recognizing that "Shari'a has entered European parliaments, administrations, and courts").

50. *See* Civitas: The Institute for the Study of Civil Society, *Sharia Courts Should Not Be Recognised Under the Arbitration Act*, CIVITAS.ORG.UK (June 29, 2009), http://www.civitas.org.uk/press/prcs91.php.

51. *See* Mark L. Movsesian, *Fiqh and Canons: Reflections on Islamic and Christian Jurisprudence*, 40 SETON HALL L. REV. 861, 881 (2010).

52. Abul Taher, *Revealed: UK's First Official Sharia Courts*, SUNDAY TIMES (Sept. 14, 2008), *available at* http://www.ctwilcox.com/articles/uksharia courts.pdf.

53. Civitas, *supra* note 50.

54. *Id.*

55. *See* Chris Merritt, *Local Islamists Draw on British Success in Bid for Sharia Law*, THE AUSTRALIAN, Oct. 7, 2011, at 29.

Sharia Law in their countries. A recent report by the French intellectual think tank L'Institut Montaigne warns that Sharia Law is rapidly displacing French Civil Law in many parts of suburban Paris.[56] Additionally, the Center for Islamic Pluralism (CIP) issued a report indicating that Sharia Law is also a growing issue in Germany, The Netherlands, France, and Spain.[57]

B. The Growing Influence of Sharia Law in the United States

The global Sharia wave has reached the shores of the United States. In 2011, an adjunct professor of law at Rutgers Law School and Pace Law School created a website that actively promotes the use of Sharia Law in American courts.[58] Furthermore, Islamic Law has undoubtedly had an increased role in American courts.[59] A recent study by the Center for Security Policy found that Sharia Law has been applied or recognized in 23 states across the country.[60] This comprehensive study identified 150 cases involving Sharia Law's use in state courts.[61] Twenty-nine of these cases were designated as "highly relevant," meaning that the use or consideration of Sharia Law conflicted with constitutional protections or state public policy at either the trial court or appellate court level.[62] In addition, the study identified 21 cases

56. *See* Soeren Kern, *French Suburbs Becoming 'Separate Islamic Societies'*, GATESTONE INSTITUTE (Oct. 10, 2011, 4:45 AM), http://www.gatestoneinstitute.org/2487/french-suburbs-islamic-societies (discussing the report).

57. IRFAN AL-ALAWI, STEPHEN SULEYMAN SCHWARTZ, KAMAL HASANI, VELI SIRIN, DAUT DAUTI & QANTA AHMED, CTR. FOR ISLAMIC PLURALISM, A GUIDE TO SHARIAH LAW AND ISLAMIST IDEOLOGY IN WESTERN EUROPE 2007–2009 (2009), *available at* http://www.islamicpluralism.org/documents/shariah-law-islamist-ideology-western-europe.pdf. *See also* Rohe, *supra* note 49, at 93.

58. *See* SHARIA IN AMERICA, http://shariainamerica.com (last visited Feb. 23, 2012).

59. *See, e.g.*, Karson v. Soleimani, Nos. B216360, B219698, 2010 WL 2992071 (Cal. Ct. App. Aug. 2, 2010) (Appellate court reversed the trial court's finding that Iran was a more appropriate forum under the doctrine of *forum non conveniens* because Iran lacked due process protections.); *see also* Tarikonda v. Pinjari, No. 287403, 2009 WL 930007 (Mich. Ct. App. Apr. 7, 2009) (Appellate court reversed a decision that enforced a unilateral divorce decree from India under the judicial doctrine of comity.).

60. CTR. FOR SEC. POLICY, SHARIAH LAW AND AMERICAN STATE COURTS: AN ASSESSMENT OF STATE APPELLATE COURT CASES (2011), *available at* http://shariahinamericancourts.com/wp-content/uploads/2011/06/Sharia_Law_And_American_State_Courts_1.4_06212011.pdf.

61. *See id.*

62. *Id.*

that were deemed "relevant," meaning that Sharia Law was a significant factor in a judicial decision.[63]

Many of the cases analyzed in the Center for Security Policy study show that state court judges have allowed Sharia and foreign law sources to trump constitutionally protected rights, most notably in child custody and divorce cases.[64] In *Hosain v. Malik*, for instance, a Maryland appellate court affirmed a decision that directly conflicted with the interests of a mother and her child.[65] The mother, along with her daughter, fled Pakistan to the United States after the mother was accused of adultery and subject to death by stoning.[66] In response, the father, a Pakistani citizen, obtained a Pakistani custody order at a hearing in which the mother did not attend out of fear of arrest and a possible death sentence.[67] Several years later, the mother filed for custody in Maryland, but the state court denied her custody after applying relevant Pakistani customs, cultures, and mores, rather than a decision "based on Maryland law, i.e., American cultures and mores."[68] The appellate court noted that the well-being and interests of the family were "to be facilitated by adherence to Islamic teachings, [and] one would expect that a Pakistani court would weigh heavily the removal of the child from that influence as detrimental."[69] The court further explained: "It certainly is not our task on this appeal to attempt to reorder the priorities of the Pakistani court . . . ."[70] After that decision, one commentator argued that "[b]ecause such rules do not remotely parallel the best interests criteria of Maryland, the Court of Special Appeals failed in its duty as parens patriae [sic] to protect the Malik child."[71]

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63. *Id.*

64. *See In re* Marriage of Malak, 227 Cal. Rptr. 841 (Cal. Ct. App. 1986) (Appellate court enforced a Lebanese custody order giving custody to the husband even though the trial court found that the Islamic court denied due process and did not base its ruling on the best interests of the child.); *see also In re* Makhlouf, 695 N.W.2d 503 (Iowa Ct. App. 2005) (Appellate court enforced a Jordanian Sharia court decision that granted custody to the father because the mother had remarried.).

65. 671 A.2d 988 (Md. Ct. Spec. App. 1996).

66. *Id.* at 1006.

67. *Id.* at 1021.

68. *Id.* at 1000.

69. *Id.* at 1001.

70. *Id.*

71. Monica E. Henderson, *U.S. State Court Review of Islamic Law Custody Decrees—When Are Islamic Custody Decrees in the Child's Best Interest?*, 36 BRANDEIS J. FAM. L. 423, 443 (1998). Henderson advises that "state courts should be circumspect of foreign custody decrees based on Islamic law." *Id.* at 424.

Although courts should categorically reject claims based on Islamic Law when it conflicts with public policy, the Center for Security Policy report and relevant jurisprudence show that this is certainly not always the case.[72] The precise number of cases involving Sharia Law or other foreign legal doctrines is very difficult to determine because most trial court judgments are not widely available.[73] One commentator contends that "even if the majority of demands for sharia [sic] are denied, women and children should not be forced to play legal Russian roulette."[74]

Furthermore, the use of Sharia Law in American courts has not been confined to family law matters, as evidenced in *Saudi Basic Industry Corporation v. Mobil Yanbu Petrochemical Company*.[75] In that case, the Delaware Supreme Court determined that the trial court properly analyzed a tort counterclaim based on Sharia and Saudi Arabian law.[76] The court noted that the "trial judge went to extraordinary lengths to understand the applicable Saudi law and to make rulings that were consistent with the numerous Saudi law sources presented to her."[77] The court then described how the trial court properly applied Sharia legal analysis.[78] Consequently, both the trial court and appellate decisions "are perhaps the clearest examples of how U.S. courts' misguided reliance on Islamic legal experts to adjudicate issues involving Islamic law is creating bad law."[79]

Additional non-family law cases exist in which courts have become entangled in Islamic Law.[80] For example, in *National Group for Communications & Computers Limited v. Lucent Technologies International Inc*., a U.S. district court looked to both Saudi Arabian legal principles and Islamic Law in evaluating a telecommunications contract.[81] The court specifically cited several of the Prophet Mohammad's statements to support its decision.[82] The growing problem of courts getting involved in matters

72. *See* CTR. FOR SEC. POLICY, *supra* note 60.

73. *See* Stephen Gelé, *Southern Poverty Law Center on Sharia in U.S. Courts: Move On, Nothing to See Here*, BREITBART (Jun. 20, 2011), http://www.breitbart.com/Big-Peace/2011/06/20/Southern-Poverty-Law-Center-on-Shariah-in-American-Courts--Move-On--Nothing-To-See-Here.

74. *Id.*

75. 866 A.2d 1 (Del. 2005).

76. *See id.*

77. *Id.* at 30. In this case, the issue involved circumstances under which *ghasb* (usurpation) applied.

78. *Id.*

79. Beauchamp, *supra* note 30, at 1113.

80. *See* Trumbull, *supra* note 40, at 633–34.

81. 331 F. Supp. 2d 290 (D.N.J. Mar. 1, 2004).

82. *See id.*

regarding Sharia Law has led to "court decisions that put U.S. judges and juries in roles that they are ill-equipped to fulfill, and which are inaccurate portrayals of how Islamic law functions."[83]

The debate over the Sharia bills in the United States reached a fever pitch when a New Jersey judge refused to issue a restraining order against a Muslim husband who physically abused his pregnant wife and forced her to engage in sexual intercourse over several weeks.[84] The judge held that the husband did not have the necessary criminal intent to rape his wife because he believed that his Islamic faith permitted him to have sex with her whenever he desired.[85] The judge relied on testimony from the husband's imam, an Islamic religious leader, that a wife must comply with her husband's sexual demands.[86] The court record graphically illustrated the severe bruises that the wife experienced from the systematic beatings and forced sex.[87] In 2010, a state appeals court overturned this decision and explained that the case "presents a conflict between the criminal law and religious precepts."[88] The appellate court reasoned: "In resolving this conflict, the judge determined to except defendant from the operation of the State's statutes *as the result of his religious beliefs*. In doing so, the judge was mistaken."[89] The movement to ban Sharia Law from consideration in state courts spread rapidly as a result of this case.[90]

III. THE STATE LEGISLATIVE BILLS AGAINST SHARIA LAW AND FOREIGN LAW

The legislation designed to combat the rising influence of Sharia and foreign law in American courts can be broken down into two distinct categories: Sharia-specific bills and facially neutral foreign-law bills. This Part explains and deconstructs these legislative efforts.

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83. Beauchamp, *supra* note 30, at 1119.
84. *See* S.D. v. M.J.R., 2 A.3d 412 (N.J. Super. Ct. App. Div. 2010).
85. *Id.* at 428.
86. *Id.* at 426–27.
87. *See id.* at 421–24. The wife vividly described how her husband forced her to undress, pinched her private areas, pulled her pubic hair, and caused her vagina to become severely swollen.
88. *Id.* at 432–33.
89. *Id.* at 433 (emphasis added).
90. *See* Maxim Lott, *Advocates of Anti-Shariah Measures Alarmed by Judge's Ruling*, FOXNEWS.COM (Aug. 5, 2010), http://www.foxnews.com/us/2010/08/05/advocates-anti-shariah-measures-alarmed-judges-ruling.

A. Sharia-Specific Bills

A number of states have either considered or enacted laws that specifically mention Sharia Law. In 2010, the Arizona House of Representatives considered House Bill 2379, known as the Arizona Foreign Decisions Act, which provided that state courts could not use, implement, or refer to any body of religious sectarian law in any decision, finding or opinion.[91] The bill defined religious sectarian law to include "Sharia law, Canon law, Halacha and Karma."[92] In 2011, the Iowa Legislature considered a bill designed to ensure that "courts [do not] consider international law or Sharia law."[93] Several other states have also proposed similar bills that specifically identify Sharia Law.[94]

The most decisive battles over Sharia-specific legislation have taken place in Oklahoma. On November 2, 2010, State Question 755 (SQ 755), which aimed to amend the Oklahoma Constitution, passed with more than 70% of the vote.[95] SQ 755 "forbids state courts from considering international law or Sharia law when deciding cases."[96] Shortly after its passage, Muneer Awad, executive director of the Oklahoma Chapter of the Council on American–Islamic Relations, filed suit in a federal district court in Oklahoma to prevent the State Election Board from certifying the election results.[97] On November 29, 2010, the district court held that SQ 755 violated the United States Constitution's Religion Clauses and issued a preliminary injunction.[98] Furthermore, the district court found that Sharia Law is not actually law because it lacks a legal character. Instead, the court viewed Sharia Law as a set of religious traditions that differ among Muslims and that merely give guidance to Muslims.[99] The district court reasoned that any state effort to prohibit Sharia Law's use or consideration would require courts to determine its content; this in turn would

91. H.R. 2582, 50th Leg., 1st Reg. Sess. (Ariz. 2011).
92. *Id.*
93. H.R.J. Res. 14, 84th Gen. Assemb. (Iowa 2011).
94. *See, e.g.*, H.R. 597, Reg. Sess. (Ala. 2011); S. 62, Reg. Sess. (Ala. 2011); H.R.J. Res. 31, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011); S.J. Res. 18, 50th Leg. Sess., 1st Sess. (N.M. 2011); H.R.J. Res. 8, 61st Leg., Gen. Sess. (Wyo. 2011); H.R. 301, 126th Leg. (Miss. 2011).
95. Barbara Hoberock, *Suit Filed over Shariah Law Question*, TULSA WORLD (Nov. 4, 2010, 8:16 AM), http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20101104_11_0_OKLAHO957185.
96. *Id.*
97. *Id.*
98. Awad v. Ziriax, 754 F. Supp. 2d 1298, 1308 (W.D. Okla. Nov. 29, 2010).
99. *Id.* at 1306.

cause unnecessary intrusion into an adherent's religious beliefs and doctrines.[100] The Tenth Circuit later affirmed this decision.[101]

B. Facially-Neutral Bills: The American Laws for American Courts (ALAC) Act

Several states have considered or introduced bills that do not specifically mention Sharia Law but instead seek to prevent or limit the use of foreign law in state courts.[102] The American Public Policy Alliance (APPA), a nonpartisan advocacy organization, has spearheaded the effort to combat the use of foreign law in American courts by drafting model legislation called the American Laws for American Courts (ALAC).[103] In a nutshell, ALAC is designed to prevent judicial enforcement of foreign law when the enforcement violates constitutional protections and public policy.[104] ALAC defines foreign law as "any law, legal code, or system of a jurisdiction outside of any state or territory of the United States, including, but not limited to, international organizations and tribunals, and applied by that jurisdiction's courts, administrative bodies, or other formal or informal tribunals."[105] The APPA notes that the bills do not just address Sharia and foreign sources of law, but they also target transnationalism, which the APPA defines as "the documented creep of foreign and anti-public policy laws being recognized by state and federal courts."[106]

In 2010, the Louisiana legislature passed Louisiana Revised Statutes section 9:6001, which is essentially a carbon copy of ALAC.[107] A similar bill was passed that same year in Tennessee.[108] In 2011, Arizona passed House Bill 2064, which is based in part on ALAC but is less comprehensive than the bills passed in Louisiana

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100. *Id.*
101. *See* Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012).
102. *See infra* notes 107–09 and accompanying text.
103. Am. Pub. Policy Alliance, *Legislation > American Laws for American Courts Model Act*, http://publicpolicyalliance.org/legislation/model-alac-bill/ (last visited Nov. 7, 2011).
104. *See id.*
105. *Id.*
106. Am. Pub. Policy Alliance, *Legislation > American Laws for American Courts Frequently Asked Questions, Issues and Objections*, http://public policyalliance.org/legislation/alac-faq/ (last visited Feb. 23, 2012).
107. *See* LA. REV. STAT. ANN. § 9:6001 (2010).
108. H.R. 3768, Reg. Sess. (Tenn. 2010) (signed into law as TENN. CODE ANN. § 20-15-101 to -106 (Westlaw 2012)).

and Tennessee.[109] The trajectory of recent state legislative actions shows the high likelihood that the ALAC bills are becoming increasingly popular in state legislatures.[110] Although several ALAC bills have passed, they have not yet been challenged in the courts.

A number of states have introduced or considered variations of ALAC. In 2010, the Utah House considered House Bill 296, which sought to prohibit any arbitrator, administrative agency, or other adjudicative, mediation, or enforcement authority from enforcing a "decision rendered by any legislative, judicial, or other governmental authority of a foreign nation or power if the . . . decision rendered violated or would violate a right."[111] In 2011, the Alaskan House considered House Bill 88, which sought to prohibit "a court, arbitrator, mediator, administrative agency, or enforcement authority from applying a law, rule, or provision of an agreement that violates an individual's right under the Constitution of the State of Alaska or the United States Constitution."[112] A nearly identical bill was considered in Arkansas.[113]

IV. THE RELIGION CLAUSES AND THE SHARIA BILLS: THE JURISPRUDENCE

To properly understand the Sharia Law debate, exploring the Religion Clauses' current understandings and scope is crucial. The First Amendment to the Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[114] The Sharia Law bill debate has generated concerns that the bills violate First Amendment guarantees regarding the establishment of religion and the free exercise of religion.

A. Establishment Clause Overview

The First Amendment's Establishment Clause has been seen as a safeguard to ensure that the government is neutral toward

109. H.R. 2064, 50th Leg., 1st Reg. Sess. (Ariz. 2011). Unlike the bills passed in Louisiana and Tennessee, the Arizona bill goes into much less detail regarding specific enforcement and application.

110. Jill Schachner Chanen, *The Law of the Land*, A.B.A. J., Apr. 2011, at 14, 14. *See also* H.R. 4769, 96th Leg., Reg. Sess. (Mich. 2011); S. 1294, 113th Reg. Sess. (Fla. 2011); H.R. 45, 151st Gen. Assemb., Reg. Sess. (Ga. 2011).

111. H.R. 296, 95th Leg., Gen. Sess. (Utah 2010).

112. H.R. 88, 27th Leg., 1st Sess. (Alaska 2011).

113. *See* S. 97, 88th Gen. Assemb. (Ark. 2011).

114. U.S. CONST. amend. I.

religion by not favoring one particular religion or favoring religion over nonreligion.[115] The Supreme Court has stressed that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[116] In *Everson v. Board of Education of Ewing Township*, the Court upheld a New Jersey law that funded student transportation to both parochial and secular schools.[117] Justice Hugo Black, writing for the majority, stated, "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"[118]

In 1971, the Court established a three-part test for Establishment Clause challenges in *Lemon v. Kurtzman*.[119] First, the statute under scrutiny must have a secular or legislative purpose.[120] Second, the law's principal effect must neither advance nor inhibit religion.[121] Third, the law must not foster an excessive government entanglement with religion.[122] Any government action must pass all three prongs of the *Lemon* test to be consistent with the Establishment Clause.[123]

The Court has stressed caution when walking the fine line between religious and secular issues. In *Hernandez v. Commissioner of Internal Revenue*, for example, the Court underscored the danger of forcing courts to differentiate between religious and secular issues.[124] The Court warned that judicial involvement in the religious–secular divide raises a "central danger against [what] we have held the Establishment Clause guards."[125] Furthermore, in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* and its

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115. *See* McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 859 (2005) (explaining that "[t]he touchstone for our [Establishment Clause] analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion'"(quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968))).

116. Larson v. Valente, 456 U.S. 228, 244 (1982).

117. 330 U.S. 1 (1947).

118. *Id.* at 16.

119. 403 U.S. 602 (1971). In this case, the Court struck down a Pennsylvania educational act that allowed the state superintendent to reimburse nonpublic schools, including religious schools, for the teachers' salaries and materials.

120. *Id.* at 612.

121. *Id.*

122. *Id.* at 613.

123. *Id.* at 612–13.

124. 490 U.S. 680 (1989). *See also* Watson v. Jones, 80 U.S. 679, 728–31 (1871) (holding that secular courts cannot decide issues of religious law).

125. *Hernandez*, 490 U.S. at 694 (noting that such inquiries into the secular–religious issues could possibly constitute "pervasive monitoring").

progeny, the Court has regularly held that deciding disputes over religious doctrine violates the Establishment Clause.[126]

Despite the jurisprudential popularity of the *Lemon* test, the Court has not always employed the test when evaluating Establishment Clause challenges but sometimes uses an endorsement test or a coercion test.[127] The endorsement test requires examination of whether a reasonable and informed observer would view governmental action or practices as endorsing religion.[128] The coercion test requires courts to evaluate whether the government has coerced "anyone to support or participate in religion or its exercise."[129]

Ultimately, there is still a great deal of confusion and frustration regarding the proper judicial handling of Establishment Clause challenges, with Justice Thomas noting that the "jurisprudence is in hopeless disarray."[130] Similarly, Justice Scalia has argued that the *Lemon* test has led to "seemingly simple mandates [that] have been manipulated to fit whatever result the Court aimed to achieve."[131]

B. Free Exercise Clause Overview

Courts remained relatively silent regarding the Free Exercise Clause in early American constitutional history. The first time the Court closely examined the clause's nature and scope involved the prosecution of a Mormon polygamist in the 1868 case of *Reynolds v. United States*.[132] In *Reynolds*, the Court affirmed the defendant's conviction by flatly rejecting his assertion that he was exempted from the anti-polygamy statute based on his religious beliefs. The Court explained: "Laws are made for the government of actions, and

126. 393 U.S. 440 (1969) (holding that courts do not have jurisdiction to determine a matter of church doctrine). *See also* Gelé, *infra* note 179 and accompanying text.

127. *See* B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning over Time*, 59 DUKE L.J. 705, 728 (2010). Hill argues that it is a guessing game to determine which test will apply.

128. *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 575–76 (1989) (noting that the endorsement test can be used to evaluate claims under the Establishment Clause in conjunction with the purpose prong of the *Lemon* test).

129. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 592 (1992) (holding prayer at a secondary school graduation ceremony unconstitutional after using the coercion test).

130. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring).

131. McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 900 (2005) (Scalia, J., dissenting).

132. 98 U.S. 145 (1878).

while they *cannot interfere with mere religious beliefs and opinions, they may with practices*."[133] The Court warned that any effort to allow exemptions from the law based on religious beliefs would make these beliefs impermissibly superior to the law of the land.[134]

The Court later rejected government censorship of religion in *Cantwell v. Connecticut*.[135] In *Cantwell*, the Court reversed the conviction of a Jehovah's Witness charged with soliciting donations without proper local approval.[136] The Court determined that any law granting a public body the function of determining whether a cause is "religious" violates the Free Exercise Clause.[137] The Court underscored, however, that "[c]onduct remains subject to regulation for the protection of society."[138]

Free Exercise Clause jurisprudence underwent a marked change in the 1960s, when the Warren Court took a more expansive view of religious protections in *Sherbert v. Verner*.[139] In *Sherbert*, the Court reversed a denial of unemployment benefits to a Seventh Day Adventist based on her unwillingness to work on Saturdays, which was against her religious beliefs.[140] The Court explained that the government's action substantially burdened the appellant's free exercise of religion because the availability of benefits hinged upon her unwillingness to violate her central religious beliefs, thus effectively creating an impermissible penalty.[141] In reversing, the Court established a strict scrutiny standard in Free Exercise Clause analysis requiring the state to show a compelling government interest if the government's action substantially burdened the free exercise of religion.[142]

Decades later, the Court moved in a new jurisprudential direction and limited the Warren Court's expansive protections of the Free Exercise Clause in *Employment Division v. Smith*.[143] In *Smith*, the Court held that the Free Exercise Clause did not require Oregon to exempt the sacramental ingestion of peyote by members

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133. *Id.* at 166 (emphasis added).

134. *Id. See also* Cleveland v. United States, 329 U.S. 14 (1946). In *Cleveland*, the Court again rejected the religious beliefs defense by affirming the conviction of polygamists under the Mann Act.

135. 310 U.S. 296 (1940).

136. *Id.* at 311.

137. *Id.* at 305.

138. *Id.* at 304. *See also* Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) (stressing that "[t]he right to practice religion freely does not include liberty to expose the community [to danger]").

139. 374 U.S. 398 (1963).

140. *See id.*

141. *Id.* at 412–13.

142. *Id.* at 403.

143. 494 U.S. 872 (1990).

of the Native American Church from Oregon's criminal drug laws.[144] The Court explained the new limitations by stating, "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."[145] One commentator contends that *Smith* is designed "to make sure the rule of law is not upended in the name of religious freedom."[146]

Three years after *Smith*, the Court revisited the Free Exercise Clause in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[147] In *Church of Lukumi*, the Court struck down an ordinance banning ritual slaughter, a practice central to the Santeria religion.[148] Eleven years later, in *Locke v. Davey*, the Court considered a Free Exercise challenge against a state-funded scholarship program that could not be used to pursue a degree in religion.[149] The Court rejected the argument that the program was presumptively unconstitutional and that it disfavored religion.[150] The Court explained:

> In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to choose between their religious beliefs and receiving a government benefit.[151]

The Court stressed that the law merely reflected the state's decision not to fund a specific area of study.[152]

V. AN APPLICATION OF THE ESTABLISHMENT AND FREE EXERCISE CLAUSE TESTS TO THE SHARIA BILLS

Under current jurisprudence, Sharia-specific legislation can pass constitutional muster for five reasons. First, Sharia Law has a

144. *Id.* at 890.
145. *Id.* at 881.
146. Leslie C. Griffin, Smith *and Women's Equality*, 32 CARDOZO L. REV. 1831, 1855 (2011).
147. 508 U.S. 520 (1993).
148. *Id.* at 547.
149. 540 U.S. 712 (2004).
150. *Id.* at 720.
151. *Id.* at 720–21 (citations omitted).
152. *See id.*

legal character severable from the Islamic faith.[153] In other words, the bills are targeting a legal code, not a religion. Second, the Sharia bills are consistent with the historical and current understanding of the Establishment Clause because the bills prevent judges from becoming excessively entangled with religion. Third, the Court has repeatedly held that legislative efforts will withstand challenges even if the efforts have an incidental impact on religion.[154] Fourth, the specific reference to Sharia is necessary to guarantee that no party or court will conclude that the legislation does not apply to Sharia Law. Fifth, the compelling interests to support efforts against the rising significance of Sharia Law are legion and substantial. These reasons are developed more fully below.

A. Sharia-Specific Legislation and the Establishment Clause

The Sharia-specific bills are consistent with Establishment Clause case law and thus can pass constitutional muster in that regard. The first step of the *Lemon* test requires courts to determine whether the statute has a legislative or secular purpose.[155] Sharia-specific bills can pass *Lemon*'s first prong for a number of reasons. First, the Court has stressed that the primary purpose of the challenged law must be secular even if arguably more than one purpose drives the legislation.[156] Because the primary purpose of the Sharia legislation is to reinforce the supremacy of federal and state laws, the Sharia bills pass the first prong.[157] One commentator contends that amendments that reference Sharia, specifically Oklahoma's SQ 755, "can survive the first prong of the *Lemon* test by arguing that the amendment was intended to define Oklahoma's legal system and had nothing to do with promoting another

153. *See* discussion *supra* Parts I, III.
154. *See* discussion *supra* Part IV.B.
155. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
156. *See* McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 845 (2005) (noting that a statute or government action will be deemed unconstitutional when the action serves the predominant purpose of advancing religion); *see also* Lynch v. Donnelly, 465 U.S. 668, 680 (1984) (noting that the purpose prong can be satisfied as long as the challenged law was not "motivated wholly by religious considerations").
157. *See, e.g.*, *supra* notes 91–99 and accompanying text. SQ 755's stated purpose is to prevent Oklahoma courts from "look[ing] to the legal precepts of other nations or cultures." Awad v. Ziriax, 754 F. Supp. 2d 1298, 1302 (W.D. Okla. Nov. 29, 2010).

religious faith or singling out Islam."[158] Second, *Lemon* grants deference to the government's stated purpose.[159] The purpose of the Sharia legislation is to reaffirm "the Constitution's Article VI Supremacy Clause and the laws that govern the state's legal system, a constitutional use of State sovereignty."[160] Third, the Court is ordinarily reluctant to attribute unconstitutional motives to state laws.[161]

In addition, the Sharia bills can pass the *Lemon* test's second prong, requiring that a law's principal effect neither advance nor inhibit religion. Sharia-specific bills survive this prong because the laws do not seek to advance or inhibit religion but instead are designed simply to prevent judges from looking to Sharia Law.[162] The Court has noted that even if a law happens to coincide or harmonize with tenets of some or all religions, the law will not necessarily fail this prong.[163] Finally, the Sharia bills pass the *Lemon* test's third prong because the overriding purpose of the bills is to *prevent* the courts from becoming excessively entangled in religious matters.[164]

While one can certainly make the case that Sharia-specific laws survive the *Lemon* test, a number of valid counterarguments challenge the constitutionality of such legislation. By specifically referencing Sharia Law in the text, the secular legislative purpose becomes seemingly questionable. This concern similarly applies to the second prong of the test regarding whether the law has the principal or primary effect of advancing or prohibiting religion. By specifically referencing Sharia Law, the bills run the risk of appearing to put Sharia at a disadvantage compared to Jewish or Christian law. The most significant problem, however, is that the absence of an adequate definition of Sharia may force the courts to become excessively entangled with religion. In other words, because judges are not equipped to determine what constitutes Sharia in accordance with the legislation, the bills will possibly fail the third prong. In *Awad*, for instance, the court noted that "Oklahoma courts will be faced with determining the content of

158. Jordan Sekulow, *In Defense of Oklahoma's Sharia Ban*, WASH. POST (Nov. 23, 2010, 12:28 PM), http://onfaith.washingtonpost.com/onfaith/panelists/Jordan_Sekulow/2010/11/in_defense_of_the_sharia_ban.html.

159. *See* Wallace v. Jaffree, 472 U.S. 38, 74–75 (1985) (O'Connor, J., concurring) (noting that the Court's analysis into the state's purposes is by design deferential and limited).

160. Sekulow, *supra* note 158.

161. *See* Mueller v. Allen, 463 U.S. 388, 394–95 (1983).

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

163. Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 694 (1989).

164. *See* discussion *supra* Part III.A.

Sharia law, and, thus, the content of plaintiff's religious doctrines."[165]

Despite the Sharia-specific bills facing a number of substantial hurdles from the outset, the very use of Sharia Law in the courts presents an even more egregious Establishment Clause violation. Because courts will be required to make determinations of religious doctrine in the absence of a Sharia bill, they will be even more likely to enter an Establishment Clause quagmire.[166] As a result, a classic *Catch-22* scenario has developed over the Sharia bill debate. On one hand, the Sharia-specific bills that insufficiently define Sharia may force courts to wade into murky Establishment Clause territory. On the other hand, the very use of Sharia Law in courts will unquestionably require judges to enter a similar judicial minefield without any legislative guidance.[167] A notable example of the latter concern was seen in *National Group for Communications* where the judge applied both Saudi Arabian law and Islamic Law to resolve a contract dispute.[168] One scholar argues that this case demonstrates how the courts often violate the First Amendment by getting involved in disputes involving Sharia or foreign law.[169] The scholar notes: "In applying Saudi law (and thus Islamic law) to determine the parties' rights under the contract, the judge had to . . . make an independent determination of religious doctrine."[170] Cases like *National Group for Communications* demonstrate a pressing need to specifically address Sharia Law's growing influence in a particularized manner because no historical precedent adequately instructs judges how best to deal with Sharia Law in domestic courts. Indeed, the use of Sharia Law is unlike adjudication involving Christian or Jewish disputes, where the courts have generally avoided religious entanglement by deferring interpretive concerns to the hierarchical authorities of the church or synagogue or by referring to corresponding authoritative interpretations.[171]

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165. Awad v. Ziriax, 754 F. Supp. 2d 1298, 1307 (W.D. Okla. Nov. 29, 2010).

166. Trumbull, *supra* note 40, at 631−34. Trumbull is specifically referencing the use of Islamic Law in contract arbitrations.

167. *See* Fredrick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 132 (noting that "judicial resolution of theological or ecclesiastical disputes, even when necessary to resolve litigation, would impermissibly entangle the government in the affairs of religion").

168. *See supra* notes 81–83 and accompanying text.

169. Trumbull, *supra* note 40, at 636−37.

170. *Id.* at 636.

171. *Id.* at 626−34. Trumbull notes that there is no preeminent Islamic canonical court in Islamic Law.

The bills that specifically identify Sharia Law prevent judges from entering this debate because the Sharia Law bills effectively prevent judges from identifying and interpreting Quranic understanding and Mohammad's teachings from the start.[172] Common sense and case law suggest that the Sharia bills provide a proactive and preemptive measure that prevents the risk of excessive entanglement. As a result, the bills that mention Sharia are constitutional, based on the historical understanding of the Establishment Clause and case law, but the weighty constitutional hurdles suggest that alternative approaches should be considered. In addition, the bills specifically identifying Sharia Law can be strengthened in a number of ways, such as more adequately defining Sharia Law in order to prevent judges from doing so.

B. Sharia-Specific Bills and the Free Exercise Clause

The threshold question in Free Exercise Clause analysis is whether bills specifically identifying Sharia Law place a substantial burden on Muslims' religious beliefs.[173] The answer is highly debatable because the legislation limits or prohibits consideration of Sharia Law only in the courtroom. Some courts, however, have found that the legislation would likely burden religious freedom. In *Awad*, for example, the court determined that SQ 755 would likely violate the plaintiff's right to free exercise of religion because the amendment prevented Oklahoma courts from probating his Sharia-compliant will.[174] This analysis is extraordinarily flawed, however, because any court involvement in Awad's religious beliefs, including the consideration of his will, if only understood by Sharia Law's application, would cause unnecessary entanglement, thus violating the Establishment Clause.[175] Furthermore, the Court has stressed that laws can survive Free Exercise analysis even if they incidentally burden a particular religious practice or belief.[176] In *Locke*, the Court

172. *See* John R. Bowen, *How Could English Courts Recognize Shariah?,* 7 U. ST. THOMAS L.J. 411, 434 (2010) (noting that "[f]or a civil judge to just 'have a look' at what shariah law [sic] says is a perilous course as long as there is no agreed-upon general set of rules and procedures for all shariah [sic] councils in England").

173. *See* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

174. Awad v. Ziriax, 754 F. Supp. 2d 1298, 1304 (W.D. Okla. Nov. 29, 2010).

175. *See, e.g.*, Trumbull, *supra* note 40; *see also* Gedicks, *supra* note 167 (noting that courts are ill-equipped).

176. *See* Employment Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 879 (1990); *see also* discussion *supra* Part IV.B.

highlighted that a state law can pass constitutional muster even if the action causes an arguable burden on religious free exercise as long as the state's interest is substantial.[177] As such, the bills can pass constitutional muster because the states have a substantial interest and the impact on religious free exercise is (at worst) minimal and incidental.

Another free exercise challenge that these bills may face is that they are not specific enough. Due to the failure to isolate Sharia Law's specific discordant features, courts may find that the bills are categorically overbroad. Perhaps the bills can be strengthened by directly pinpointing the problematic aspects unique to Sharia Law, such as unilateral divorce without the wife's consent; child custody only for fathers; and the lack of succession rights for women, illegitimate children, and female children.[178]

Another important free exercise concern is the criticism that singling out Sharia Law, while not mentioning other denominations, runs the risk of creating a seeming preference for the Judeo–Christian religions instead of the neutral protection of religious free exercise. However, Free Exercise jurisprudence suggests that legislative measures targeting conduct may be permissible even if they conflict with certain religious principles or beliefs.[179] In *Reynolds*, for example, the Court upheld the conviction of a Mormon on polygamy charges even though polygamy was an accepted practice within the Mormon faith.[180] The Court stressed that the anti-polygamy law was not an anti-Mormon measure but was instead aimed at specific conduct that conflicted with public policy.[181] The Court has repeatedly followed this jurisprudential direction established in *Reynolds* by holding that religious freedom does not include the right to violate criminal laws, including polygamy (*Cleveland*) and smoking peyote (*Smith*), even when religious doctrine permits or mandates the prohibited practice.[182]

VI. THE WAY FORWARD: THE ALAC BILLS

Because of the serious constitutional concerns regarding the Sharia-specific bills, state legislatures that are worried about

177. Locke v. Davey, 540 U.S. 712, 720 (2004).
178. *See* discussion *supra* Part I.C.
179. *See* Stephen M. Gelé, *ACLU Turns Blind Eye to Sharia in America*, AM. THINKER (May 26, 2011), http://www.americanthinker.com/2011/05/aclu_turns_blind_eye_to_sharia.html.
180. Reynolds v. United States, 98 U.S. 145, 168 (1878).
181. *Id.*
182. *See* discussion *supra* Part IV.B; *see also* Gelé, *supra* note 179.

growth of foreign law, including Sharia Law, in state courts should pursue the facially-neutral ALAC legislation. The model ALAC legislation and bills based on the model are designed to prevent judicial enforcement of foreign law only when the enforcement violates constitutional protections and public policy.[183] One commentator explains:

> Because of the careful planning and thought behind ALAC's wording, in contrast to SQ 755, from a practical standpoint, it is effective in preventing the enforcement of any foreign law—including in many cases, shariah law [sic]—that would violate U.S. and state constitutional liberties or state public policy.[184]

The ALAC bills are superior to the Sharia-specific bills because they purge the religious concerns from the constitutional calculus by removing any perception of denominational preferences. Moreover, the ALAC model is designed to focus on the root of the problem because the primary threat stems from the use of foreign countries' legal frameworks and cultural modalities.[185] For instance, in *State v. Kargar*, the Supreme Judicial Court of Maine vacated an Afghan immigrant's conviction for two counts of gross sexual assault because his actions were consistent with customary practices in Afghanistan.[186] Specifically, this case involved the defendant licking an infant's penis, yet the court inexplicably determined that there was no evidence of actual harm to the infant.[187] ALAC would prevent such miscarriages of justice.

ALAC forbids judges from looking to foreign legal sources that conflict with American constitutional protections.[188] The version passed in Louisiana, for instance, requires that judges not look to the following:

> the application of a foreign law [that] will result in the violation of a right guaranteed by the constitution of this state or of the United States, including but not limited to

183. *See* Am. Pub. Policy Alliance, *supra* note 103.

184. Christopher Holton, *American Laws for American Courts*, AM. THINKER (Sept. 18, 2011), http://www.americanthinker.com/2011/09/Americanlawsforamericancourts.html.

185. *See* Rohe, *supra* note 49, at 110. Rohe explains that "[t]he legal provisions [of Sharia], being enforceable by a state's sanction system alone, remain territorially connected to the exercising of 'Islamic' state power." *Id.*

186. 679 A.2d 81, 86 (Me. 1996).

187. *Id.* In this case, witnesses claimed that such behavior was consistent with Islamic Law.

188. Am. Pub. Policy Alliance, *supra* note 103.

> due process, freedom of religion, speech, or press, and any right of privacy or marriage as specifically defined by the constitution of this state.[189]

Given the arguable indeterminacy of Islamic Law, the ALAC bills provide a meaningful and constitutionally permissible solution.

A. The ALAC Bills and the Establishment Clause

The ALAC bills stand a much better chance of surviving the *Lemon* test because the bills are facially-neutral and therefore affect all religions equally. The Court has recognized that even if a law happens to coincide or harmonize with tenets of some or all religions, the bill will not necessarily fail the *Lemon* test.[190] Admittedly, the most difficult challenge that the foreign-law bills will face is the allegation that the bills were made for a discriminatory purpose directed against Islam.[191] However, the ALAC bills can survive this challenge by highlighting that the measures are not directed at Islam but are directed at the use and application of discordant Sharia Law tied to foreign countries that has crept into American courtrooms. ALAC advocates claim that the bills' "sole objective is to protect all U.S. citizens and residents from the application of foreign laws when the application of a foreign law will result in the violation, in the specific matter at issue, of a liberty guaranteed by the Constitution of the United States or the public policies of the state in question."[192] A further indication that the neutral purpose argument will succeed is the fact that only four times has the Court ever struck down a state action on the grounds that the action had an illegitimate religious motive.[193]

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189. LA. REV. STAT. ANN. § 9:6001 (2010).

190. Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 712 (1989). *See also* Harris v. McRae, 448 U.S. 297, 320 (1980) (noting that even if a law "may coincide with the religious tenets of the Roman Catholic Church [that] does not, without more, contravene the Establishment Clause").

191. *Hernandez*, 490 U.S. at 696. The Court noted that courts should look at whether a specific statute was born of animus.

192. Am. Pub. Policy Alliance, *supra* note 103.

193. McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S., 844, 859 (2005). These four times include *Stone v. Graham*, 449 U.S. 39 (1980) (holding that posting of copy of Ten Commandments on walls of public school classrooms had a religious purpose); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down Alabama school prayer and meditation statute); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act); and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) (holding

The current ALAC model is particularly designed to reinforce Establishment Clause protections. The ALAC model bill specifically provides that "[n]o court shall interpret this Act to require or authorize any court to adjudicate, or prohibit any religious organization from adjudicating, ecclesiastical matters . . . where adjudication by a court would violate the prohibition of the establishment clause . . . or violate the Constitution of this State."[194] Indeed, in 2011, the American Islamic Leadership Coalition (AILC) supported the proposed Michigan ALAC bill[195] and stated that the ALAC strengthens the "First Amendment's Establishment Clause and the separation between religion and state."[196]

B. The ALAC Bills and the Free Exercise Clause

Because the ALAC bills are facially-neutral, generally applicable, and do not discriminate against or target religious practice, the bills have a much better chance of surviving Free Exercise challenges.[197] In *Church of Lukumi,* the Court stressed that the legislature should receive deference on the question involving facial neutrality and that most laws satisfy the test.[198] In its support of the proposed Michigan ALAC bill, the AILC argues: "We see no evidence that statutes like HB 4769 will adversely impact the free exercise of our personal pietistic observance of Islam, which is not in conflict with the U.S. or Michigan constitutions."[199]

Furthermore, the ALAC bills provide sufficient protection to safeguard against Free Exercise violations. The ALAC bills specifically provide that "[n]o court or arbitrator shall interpret this Act to limit the right of any person to the free exercise of religion as guaranteed by the First Amendment to the U.S. Constitution and by the Constitution of this State."[200] One commentator argues that

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policy of permitting student-led, student-initiated prayer before football games unconstitutional).

194. Am. Pub. Policy Alliance, *American Laws for American Courts: Statement of Support*, http://publicpolicyalliance.org/support-american-laws/ (last visited Oct. 16, 2012).

195. H.R. 4769, 96th Leg., Reg. Sess. (Mich. 2011).

196. Am. Islamic Leadership Coal., *American Muslims Speak Out Against the Enforcement of Shari'ah Law in America*, AILC (Sept. 7, 2011), http://americanislamicleadership.org/AILC_Response_MI.

197. *See* discussion *supra* Part IV.B.

198. *See* discussion *supra* Part IV.B.

199. Am. Islamic Leadership Coal., *supra* note 196.

200. Am. Pub. Policy Alliance, *supra* note 103.

ALAC is a superior option because "it specifically says that the law cannot detract from the right to free exercise of religion, which would include religious courts like Jewish Bet Din or Catholic ecclesiastical courts."[201]

Like the potential Establishment Clause challenges, the most serious challenge to ALAC is the argument that the bills' text and operation demonstrate that they are not neutral.[202] However, the courts have repeatedly held that freedom of religion does not require the judiciary to void secular laws that may incidentally conflict with religious doctrine.[203] The Court has stressed that even if a law creates a substantial burden on free exercise rights, it will still be upheld if the law is justified by broad public interest.[204] It is against this backdrop that the next section will readdress and reinforce the argument that there is a compelling need for legislation.

C. The Compelling Need to Address the Rising Influence of Foreign and Sharia Law

Many compelling reasons support any legislative measures that combat the growing significance of Sharia Law. First, there is undoubtedly an interest in reinforcing the supremacy of state and federal law. Second, there is an interest in ensuring due process and other constitutional protections. As one commentator notes, "[T]he child custody cases in Maryland and Louisiana involved issues of gender discrimination, denial of freedom of travel, disregard for the best interests of a child, lack of procedural due process, and cruel and unusual punishment."[205] Third, and perhaps most importantly, preemptive and proactive measures should be taken to safeguard against Sharia Law's rising influence.[206] One expert report on the growth of Sharia in the United States contends that "shariah [sic] is wholly at odds with U.S. national sovereignty, the U.S. Constitution, and the liberties it guarantees."[207]

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201. Holton, *supra* note 184.

202. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535–36 (1993).

203. *See supra* notes 173–78 and accompanying text.

204. *See* Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 682 (1989).

205. Gelé, *supra* note 179.

206. *See* discussion *supra* Part I.

207. CTR. FOR SEC. POLICY, SHARIA: THE THREAT TO AMERICA 42 (2010), *available at* http://familysecuritymatters.org/docLib/20100915Shariah-TheThreattoAmerica.pdf.

A highly persuasive argument exists for taking preemptive and proactive measures to combat any chance of allowing a parallel legal system to take root in the United States, and the bills that address Sharia Law are a move in the right direction. A parallel Sharia Law system has proven to be particularly problematic in Britain. For example, one commentator notes that the use of Sharia councils in Britain has created a course where the country is "inadvertently sanctioning a parallel legal system which no longer embodies the values of British law regarding equal judicial treatment of men and women."[208] The report by the French intellectual think tank, L'Institut Montaigne, echoes these same concerns in France.[209] The French report shows that Muslim leaders are spearheading efforts to promote social marginalization to create a parallel Islamic society controlled by Sharia Law.[210] In support of the proposed ALAC bill in Michigan, the AILC stated: "The contrast between what has occurred in Britain and in Canada provides a roadmap for how the U.S. may address these legal issues."[211]

In a similar vein, the Center for Islamic Pluralism (CIP) warns that "the erection of a 'parallel *Shariah*' could also open a space for the introduction of radical *Shariah* principles, since, in a Muslim-only legal structure, Muslim representatives of varying orientations could gain authority."[212] The CIP study also found that the introduction of a parallel Sharia system threatens to restrict existing religious liberties rather than increase them.[213] The report warns that even a minimal "parallel *Shariah*" could be widely abused because it could come under the control of radicals who would exploit it to impose their own agenda.[214] A group that campaigns against the use of Sharia Law in Britain echoes this

208. Reiss, *supra* note 21, at 741. *See also* Robin Fretwell Wilson, *Privatizing Family Law in the Name of Religion*, 18 WM. & MARY BILL RTS. J. 925, 950 (2010).

209. *See* Kern, *supra* note 56.

210. *See id.*

211. Am. Islamic Leadership Coal., *supra* note 196 (explaining that Canadian Muslims successfully opposed the implementation of Sharia Law whereas Britain has allowed Sharia Law to thrive, creating a situation "where women are commonly subjected to forced marriage and the denial of basic human rights").

212. AL-ALAWI, SCHWARTZ, HASANI, SIRIN, DAUTI & AHMED, *supra* note 57, at 16.

213. *Id.* at 21.

214. *Id.* at 16.

warning.[215] This group warns that the existence of a parallel legal system "discriminates and sets up different and separate systems, standards and norms for 'different' people. It reinforces the fragmentation of society, and leaves large numbers of people, particularly women and children, at the mercy of elders and imams."[216] The group notes that the British system has led to a situation that "increases marginalisation and the further segregation of immigrant communities. It ensures that immigrants and new arrivals remain forever minorities and never equal citizens."[217]

CONCLUSION

The overarching argument in favor of combating the rising influence of Sharia Law and foreign law is quite simple: Americans have a fundamental interest in deciding what laws should govern in the courts and especially in prohibiting laws that conflict with existing American law. The case law clearly shows that existing law and judicial procedures have proven woefully inadequate in dealing with the growing problem of foreign law in American courts. Foreign legal doctrines should not be used as a Ho Chi Minh Trail around the Constitution.[218] Although some Sharia-specific bills are poorly worded, the legislation designed to inhibit or prohibit foreign legal doctrines antithetical to American constitutional protections are hardly xenophobic or futile measures.

The few bills specifically mentioning Sharia Law that state legislatures have either passed or considered have a greater likelihood of being struck down as violative of the First Amendment. For this reason, state legislators should pursue the ALAC bills. It is imperative that American law be clear and unambiguous: decisions based on foreign law and doctrines should not be applied or enforced when inconsistent with American public policy and constitutional guarantees. A silver bullet may not exist,

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215. *See* ONE LAW FOR ALL, SHARIA LAW IN BRITAIN: A THREAT TO ONE LAW FOR ALL AND EQUAL RIGHTS (2010), *available at* http://www.onelawforall.org.uk/wp-content/uploads/New-Report-Sharia-Law-in-Britain_fixed.pdf.

216. *Declaration*, ONE LAW FOR ALL, http://www.onelawforall.org.uk/about/ (last visited Oct. 17, 2012).

217. *Id.*

218. The Ho Chi Minh Trail was a complex network of paths used by North Vietnam to supply the Vietcong in South Vietnam during the Vietnam War. By using the neighboring countries Cambodia and Laos, North Vietnam was able to circumvent American military forces. *See* Thomas R. Stauch, *The United States and Vietnam: Overcoming the Past and Investing in the Future*, 28 INT'L LAW. 995, n.38–39 (1994) (describing the Ho Chi Minh Trail).

but the solution to the foreign law problem is certainly not silence and inaction. The question of limiting or prohibiting foreign sources of law, especially Sharia Law, should be taken very seriously in light of the above considerations. As more Muslims and other religious minorities continue to immigrate to the United States and become citizens, the courts must be well-equipped to account for the use of foreign sources of law, especially claims rooted in Sharia Law. The challenge is to provide American courts with proper guidance while simultaneously balancing constitutional protections. At the end of the day, common sense and American history show that Americans have a right to require that courts do not consider foreign laws that conflict with American laws.

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This Comment is dedicated to the American Combat Veterans of the wars in Iraq and Afghanistan.