

CONTRACTING INTO RELIGIOUS LAW: ANTI-SHARIA ENACTMENTS AND THE ESTABLISHMENT AND FREE EXERCISE CLAUSES

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INTRODUCTION

Muneer Awad, an American Muslim resident of Oklahoma, wrote his last will and testament.¹ However, unlike the wills of most Americans, his might not be probated by the courts of Oklahoma because it is based on his Muslim faith.² Under Oklahoma's "Save Our State Amendment,"³ state courts are prohibited from considering the legal precepts of foreign nations or religions.⁴ This amendment, which was overwhelmingly approved by voters in 2010,⁵ is part of a recent wave of anti-Sharia enactments⁶ targeting foreign and religious laws, many of which particularly target Islamic law (Sharia).⁷

While these enactments have yet to receive much judicial scrutiny because of their novelty,⁸ they have created a firestorm of public controversy

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¹ Abdus Sattar Ghazali, *Federal Court Deals Blow to "Anti-Muslim" Bigots*, AM. MUSLIM PERSP. (JAN. 11, 2012), http://www.amperspective.com/?page_id=2256.

² *Awad v. Zirriax*, 754 F. Supp. 2d 1298, 1304, 1308 (W.D. Okla. 2010) (granting preliminary injunction on the certification of Oklahoma's referendum results that would bar courts from considering Sharia law), *aff'd*, 670 F.3d 1111 (10th Cir. 2012).

³ H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010).

⁴ *Id.*

⁵ Justin Elliott, *Oklahoma Voters Approve Ban on Sharia Law*, SALON (NOV. 2, 2010), http://www.salon.com/2010/11/03/oklahoma_sharia_law_ban.

⁶ For simplicity and clarity, this Comment generally refers to these as "anti-Sharia enactments," although they include legislative enactments, proposed bills, and constitutional amendments and do not all overtly target Sharia law.

⁷ See, e.g., H.R.B. 2379, 49th Leg., 2d Reg. Sess. (Ariz. 2010); S.J. Res. 1387, 118th Sess. (S.C. 2010); H.R.J. Res. 1004, 2011 Leg., 86th Sess. (S.D. 2011); H.R.J. Res. 57, 82d Leg., Reg. Sess. (Tex. 2011); H.R.J. Res. 0008, 61st Leg., Gen. Sess. (Wyo. 2011).

⁸ The only court to consider the constitutionality of any of these bills granted a preliminary injunction on the certification of Oklahoma's referendum results but has yet to consider the substantive issues. *Awad v. Zirriax*, 754 F. Supp. 2d 1298, 1304, 1308 (W.D. Okla. 2010), *aff'd*, 670 F.3d 1111 (10th Cir. 2012).

and galvanized both supporters and opponents.⁹ The American Bar Association (“ABA”) also joined the controversy, adopting a resolution opposing these enactments as unconstitutional.¹⁰ This drew accusations from some supporters of anti-Sharia enactments that the ABA “has decided to undertake the fight for Sharia law.”¹¹ As courts around the country are likely to soon consider the constitutionality of these enactments, a deeper understanding of the Religion Clauses of the First Amendment¹² and their application to these enactments becomes increasingly important. Specifically, this Comment addresses the implications of anti-Sharia enactments for parties who incorporate religious laws into their contracts and seek to introduce extrinsic evidence to explain their intent when a dispute arises over the parties’ intent or the meaning of a contract term. Although most anti-Sharia enactments target Sharia law overtly or covertly, they also have a major impact on certain practices among some Jewish-American communities, and thus this Comment explores the adverse consequences for both religious groups.

Ultimately, this Comment argues that anti-Sharia enactments that target one religion or religion in general violate the Free Exercise Clause. These enactments prohibit parties from voluntarily incorporating contract terms based on their religious beliefs even where courts would be able to enforce those terms without violating the Establishment Clause. Furthermore, anti-Sharia enactments that prohibit courts from enforcing contracts or arbitration decisions based on laws that do not provide the same rights guaranteed by the Constitution violate the Establishment Clause by requiring courts to pass judgment on matters of religious doctrine. However, religious communities that seek to govern their private transactions by religious laws can avoid the adverse effects of anti-Sharia enactments by employing more specific contract terms and increasing their reliance on religious arbitration panels. Courts can also avoid the constitutional problems created by anti-Sharia enactments by interpreting them narrowly so as to only prohibit courts from applying religious laws in a manner that violates the Establishment Clause.

Part I of this Comment provides a background to this topic by giving an introduction to Sharia law, surveying the different forms that anti-Sharia enactments have taken, and addressing the different contexts in which foreign and religious laws may be applicable in American courts. Part II ex-

⁹ Leah Nelson, *Oklahoma’s Shariah Law Ban Creates Controversy*, S. POVERTY L. CENTER, <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2011/spring/oklahoma-shariah-law-ban-creates-controversy> (last visited Mar. 15, 2013).

¹⁰ AM. BAR ASS’N HOUSE OF DELEGATES, RESOLUTION 113A (2011), available at http://www.abanow.org/wordpress/wp-content/files_flutter/13105754842011_hod_annual_meeting_summary_of_resolutions.authcheckdam.pdf.

¹¹ Pamela Geller, *The ABA’s Jihad*, AM. THINKER (Feb. 22, 2011), http://www.americanthinker.com/2011/02/the_abas_jihad.html.

¹² U.S. CONST. amend. I.

plains the Religion Clauses of the First Amendment. Part III analyzes the constitutionality of anti-Sharia enactments under the Religion Clauses. Part IV discusses why the limited consideration of religious matters within the framework of the “neutral principles of law” approach as applied to contracts incorporating religious principles does not offend the Establishment Clause. Finally, Part V proposes three solutions to the constitutional problems created by anti-Sharia enactments and discusses limitations on those solutions.

I. FOREIGN AND RELIGIOUS LAWS IN AMERICAN COURTS

This Part begins by providing a brief overview of Sharia. It then proceeds by discussing some of the goals and motivations of the anti-Sharia movement and surveying three broad categories of enactments that generally characterize the majority of anti-Sharia enactments. Finally, this Part provides a background on the application of foreign and religious laws in American courts.

A. *What Is Sharia Law?*

At the center of the debate over anti-Sharia enactments is the fear of Sharia law.¹³ But what largely remains a mystery to much of the public is what Sharia law really is. “[Sharia] is an Arabic word that means the Path to be followed.”¹⁴ It is the moral, religious, ethical, and legal system based on Islam’s two primary sources: the Holy Qu’ran, which Muslims believe to be the literal word of God, and the *Sunnah*, the teachings and practices of Prophet Muhammad.¹⁵ These primary sources are also supplemented by secondary sources: (1) a process of analogy to the primary sources similar to the common law (*Qiyas*); (2) rulings based on the consensus of Islamic scholars (*Ijmaa’*); and (3) independent reasoning by jurists in individual cases (*Ijtihad*).¹⁶

Sharia is based on five principles known as the *maqasid* (literally, objectives) of Sharia: the preservation of religion, life, intellect, family lines,

¹³ See Elliott, *supra* note 5.

¹⁴ Amira Mashhour, *Islamic Law and Gender Equality—Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, 27 HUM. RTS. Q. 562, 565 (2005) (quoting ABDUR RAHMAN I. DOI, SHARI’AH: THE ISLAMIC LAW 2 (1984)).

¹⁵ *Id.* at 565-66.

¹⁶ JOHN L. ESPOSITO, WOMEN IN MUSLIM FAMILY LAW 3 (1982); Mashhour, *supra* note 14, at 566.

and property rights.¹⁷ Based on these five objectives, Sharia has developed into one of the most comprehensive religious legal systems with intricate jurisprudences in nearly all areas of law, including family law, contracts, criminal law, financial transactions, and property rights.¹⁸

Unlike the modern Western conception of the roles of law and religion, which emphasizes the separation of religion and state, there is no separation of mosque and state in Islam.¹⁹ Unlike Christianity, for example, which emphasizes orthodoxy over religious practice and where the clergy are considered religious ministers rather than legal scholars, Sharia views the law as an integral part of theology and places a heavy emphasis on religious practice, which naturally includes legal discourse.²⁰

Because of this interconnection, Islam has developed a complex body of law that governs both private and public affairs.²¹ To that end, Sharia “prescribes rules regarding worship (*ibadat*) and ‘civil transactions’ (*mu’amalat*).”²² Under the latter category, Sharia governs areas of law that would be considered secular areas of law in the West, including: (1) commercial transactions, such as contracts, property disputes, loans, and mortgages; (2) family matters, such as marriage, divorce, and child custody; and (3) criminal law.²³

In the United States, however, the import of Sharia law is not in criminal law; disputes involving the application of Sharia almost invariably involve contract disputes and family law cases where the parties incorporated tenants of Sharia into prenuptial or antenuptial agreements.²⁴ One recent study of Sharia law in American courts found that out of the fifty studied cases, thirty-eight involved family law, five involved contracts, and two involved property disputes.²⁵ In other words, Sharia law is only relevant in American courts in cases where the parties contracted into Sharia by incorporating elements of Sharia into their contractual agreements.

Parties may contract into Sharia law in a variety of cases. One of the most commonly litigated cases in the context of family law is the *mahr* contract, an antenuptial agreement requiring the Muslim groom to give a certain sum of money to the bride.²⁶ Parties may also incorporate Sharia

¹⁷ MUHAMMAD UMER CHAPRA, *THE ISLAMIC VISION OF DEVELOPMENT IN THE LIGHT OF MAQASID AL-SHARI’AH* 4 (2008).

¹⁸ See Mark L. Movsesian, *Fiqh and Canons: Reflections on Islamic and Christian Jurisprudence*, 40 SETON HALL L. REV. 861, 862 (2010) (discussing the importance of law in Islamic culture).

¹⁹ *Id.*

²⁰ *Id.* at 863.

²¹ *Id.* at 868.

²² *Id.*

²³ *Id.*

²⁴ See CTR. FOR SEC. POLICY, *SHARIAH LAW AND AMERICAN STATE COURTS* 11 (2011).

²⁵ *Id.*

²⁶ See Chelsea A. Sizemore, Comment, *Enforcing Islamic Mahr Agreements: The American Judge’s Interpretational Dilemma*, 18 GEO. MASON L. REV. 1085, 1087 (2011).

into contracts concerning property ownership. For example, Sharia recognizes two kinds of joint property—indivisible and divisible property.²⁷ Where property is jointly owned and one cotenant seeks to sell his share, the other cotenant has a priority of right to buy that share through a right known as *shuf'a* (i.e., preemption).²⁸ Thus, Muslim cotenants may draft a *shuf'a* contract that governs the disposition of their property in case of a sale or future severance of the jointly owned property.²⁹ These examples illustrate how parties may contract into Sharia law, and disputes that subsequently arise may involve disputes over the enforceability and terms of those contracts and thus require courts to inquire into their religiously based terms.³⁰

Parties may also contract into other religious laws besides Sharia. Jewish law (Halacha), like Islamic law, governs a wide range of topics relegated in the West to secular courts, including family law, contracts, and private lawsuits.³¹ Like Islam, Judaism places a heavy emphasis on law as a central part of religion and rejects the strict separation of the religious and the secular.³² Consequently, Jewish Americans have established religious courts known as the *beth din* to arbitrate religious disputes, and their arbitration decisions have generally been enforced in secular courts.³³ Jewish Americans also rely on religious contracts to govern financial transactions regulated by Jewish law, such as the *heter iska*, a contractual instrument used to avoid violating the ban on usury in Jewish law.³⁴ Therefore, parties can contract into religious laws in a variety of ways, and inevitable contractual disputes bring these religious agreements into American courts.³⁵

²⁷ RAJ BHALA, UNDERSTANDING ISLAMIC LAW (SHARI'A) 479 (2011).

²⁸ *Id.* at 480; see generally David H. Price, *The Cultural Effects of Conveyance Loss in Gravity-Fed Irrigation Systems*, 34 ETHNOLOGY 273, 279 (1995).

²⁹ See BHALA, *supra* note 27, at 480.

³⁰ See, e.g., *Rahman v. Hossain*, No. A-5191-08T3, 2010 WL 4075316, at *1-2 (N.J. Super. Ct. App. Div. June 17, 2010) (per curiam); *Odatalla v. Odatalla*, 810 A.2d 93, 94 (N.J. Super. Ct. Ch. Div. 2002); *Avitzur v. Avitzur*, 446 N.E. 2d 136, 136 (N.Y. 1983); *Greenberg v. Greenberg*, 656 N.Y.S.2d 369, 370 (App. Div. 1997); *Lieberman v. Lieberman*, 566 N.Y.S.2d 490, 492 (Sup. Ct. 1991); *Mikel v. Scharf*, 432 N.Y.S.2d 602, 606 (Sup. Ct. 1980); *Ahmed v. Ahmed*, 261 S.W.3d 190, 195 (Tex. App. 2008).

³¹ See generally Ginnine Fried, Comment, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633 (2004).

³² See Movsesian, *supra* note 18, at 871 (contrasting Judaism and Islam, which emphasize the importance of law, with Christianity).

³³ Fried, *supra* note 31, at 634, 643.

³⁴ See Michael A. Helfand, *Fighting for the Debtor's Soul: Regulating Religious Commercial Conduct*, 19 GEO. MASON. L. REV. 157, 158-59 (2011).

³⁵ See, e.g., *In re Scholl*, 621 A.2d 808, 809 (Del. Fam. Ct. 1992); *Rahman*, 2010 WL 4075316, at *1-2; *Odatalla*, 810 A.2d at 94; *Avitzur*, 446 N.E. 2d at 136; *Greenberg*, 656 N.Y.S.2d at 369; *Lieberman*, 566 N.Y.S.2d at 492-93; *Mikel*, 432 N.Y.S.2d at 606; *Ahmed*, 261 S.W.3d at 195.

B. *State Enactments Prohibiting Judicial Consideration of Foreign and Religious Laws*

The fear of Sharia law and its importation into the United States is not new.³⁶ However, the recent wave of anti-Sharia enactments is a novel phenomenon sparked by the increasingly vocal message of opponents of Sharia that it is “an existential threat to America.”³⁷ In order to understand the increase in anti-Sharia enactments during the past two years, one must understand some of the goals and motivations of this movement. A number of factors have fueled this movement, including increasing fears of home-grown terrorism and a number of controversies over plans to build mosques that have met local opposition.³⁸

One man in particular has spearheaded the effort to ban courts from considering foreign, cultural, or religious laws, especially Sharia law—David Yerushalmi, an attorney who drafted much of the model legislation that became the rubric for anti-Sharia enactments.³⁹ Yerushalmi’s stated goal is to raise awareness about the threat of Sharia to America, and to some extent, his message has become influential and gained traction among some politicians.⁴⁰

Anti-Sharia enactments are a natural byproduct of the growing climate of fear and distrust of American Muslims in the past years. Polls indicate that Islam is currently the most negatively viewed religion in the U.S., and more than 43% of Americans “admit to feeling at least ‘a little’ prejudice towards Muslims.”⁴¹ However, the impact of anti-Sharia enactments goes far beyond American Muslims and will likely directly affect Jewish Americans, Native Americans, and other religious minorities.⁴² Because of the importance of law in Judaism and Islam, Jews and Muslims will likely be

³⁶ See, e.g., Elisabeth Bumiller, *21st-Century Warnings of a Threat Rooted in the 7th*, N.Y. TIMES, Dec. 12, 2005, at A19.

³⁷ Juana Summers, *GOP Litmus Test: Sharia Opposition*, POLITICO (May 10, 2011, 4:33 AM), <http://www.politico.com/news/stories/0511/54605.html>.

³⁸ Andrea Elliott, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES (July 30, 2011), <http://www.nytimes.com/2011/07/31/us/31shariah.html>.

³⁹ *Id.*

⁴⁰ Then-presidential candidate Michelle Bachman (R-MN), among other politicians, signed a pledge to reject Islamic law as a “totalitarian” system. *Id.*

⁴¹ *In U.S., Religious Prejudice Stronger Against Muslims*, GALLUP (Jan. 21, 2010), <http://www.gallup.com/poll/125312/religious-prejudice-stronger-against-muslims.aspx>.

⁴² See Sheila Musaji, *Anti-Sharia Movements’ Unintended Consequences for Jews, Native Americans, and Others*, AM. MUSLIM (Sept. 6, 2011), <http://theamericanmuslim.org/tam.php/features/articles/anti-sharia-movements-unintended-consequences>; Toby Tabachnick, *Jewish Leaders Brand Anti-Sharia Bill Discriminatory*, JEWISH CHRON. (Dec. 29, 2011), http://thejewishchronicle.net/view/full_story/16929776/article-Jewish-leaders-brand-anti-Sharia-bill-discriminatory?instance=this_just_in.

the most directly affected religious minorities, and many Jewish groups have voiced their opposition to anti-Sharia enactments on that basis.⁴³

However, one cannot lump all anti-Sharia enactments into one pile. There are constitutionally significant differences in the wording of the various bills and constitutional amendments. One can broadly characterize these enactments into three categories: (1) enactments that explicitly target Sharia law; (2) blanket prohibitions on the consideration of any foreign, cultural, or religious laws; and (3) enactments that forbid courts from considering the legal precepts of any system that does not provide the same protections guaranteed by the U.S. Constitution and the constitutions of the respective states.⁴⁴ These distinctions are constitutionally significant and directly impact the central issue in this Comment—namely, whether these enactments violate the Religion Clauses of the First Amendment.

1. Enactments Explicitly Targeting Sharia (Category A)

The most controversial anti-Sharia enactments (Category A) specifically mention Sharia as a legal source that courts may not consider.⁴⁵ For example, Oklahoma's "Save Our State Amendment" provides that "courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia law."⁴⁶ Using almost identical language, a proposed bill in South Carolina prohibits courts from considering foreign or cultural laws, specifically stating that "courts shall not consider Sharia Law, international law, the constitutions, laws, rules, regulations, and decisions of courts or tribunals of other nations."⁴⁷ Wyoming's House Joint Resolution 0008 goes even further, stating that courts may not consider Sharia law or the decisions of other American states that "include Sharia law."⁴⁸ Similarly, a proposed bill in Arizona would prohibit the consideration of any "religious sectarian law" and would define this to include Sharia law, canon law, Halacha, and karma.⁴⁹ The bill

⁴³ Ron Kampeas, *Anti-Sharia Laws Stir Concerns that Halachah Could Be Next*, JEWISH WK. (May 1, 2011), http://www.thejewishweek.com/news/national/anti_sharia_laws_stir_concerns_halachah_could_be_next.

⁴⁴ See Helfand, *supra* note 34, at 162-63.

⁴⁵ H.R.B. 2379, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (referred to House Judiciary Committee); S.J. Res. 14, 50th Leg., 2d Sess. (N.M. 2012) ("The courts shall not consider or apply Sharia law.") (died); H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010); S.J. Res. 1387, 118th Sess. (S.C. 2010) (referred to Committee on Judiciary); H.R.J. Res. 0008, 61st Leg., Gen. Sess. (Wyo. 2011).

⁴⁶ Okla. H.R.J. Res. 1056

⁴⁷ S.C. S.J. Res. 1387.

⁴⁸ Wyo. H.R.J. Res. 0008.

⁴⁹ Ariz. H.R.B. 2379.

also provides for the impeachment of any judge who considers any of these laws or any foreign or cultural law in any judicial decision.⁵⁰

2. Blanket Prohibitions on Consideration of Religious or Foreign Laws (Category B)

Other enactments (Category B) do not explicitly mention Sharia law but provide blanket prohibitions on the consideration of any foreign, cultural, or religious laws in any case.⁵¹ For example, Texas's House Joint Resolution 57 provides that courts "may not enforce, consider, or apply any religious or cultural law."⁵² South Dakota's House Joint Resolution 1004 states that no "court may apply international law, the law of any foreign nation, or any foreign religious or moral code with the force of law in the adjudication of any case under its jurisdiction."⁵³ Although the South Dakota Legislature unanimously voted to table this proposal in February, 2011,⁵⁴ it is nonetheless important to consider the constitutionality of similarly worded statutes.

3. Prohibitions on Consideration of Legal Systems that Do Not Provide the Same Protections as the U.S. or State Constitutions (Category C)

A third category of enactments (Category C) is more narrowly worded, prohibiting the consideration of foreign, cultural, and religious laws if those laws do not provide the same protections guaranteed by the U.S. Constitution or the state's constitution.⁵⁵ Tennessee's Senate Bill 3740 makes unenforceable any contract, court decision, administrative decision, or arbitration decision that incorporates any foreign or religious laws that would violate the rights and privileges guaranteed under the U.S. or Tennessee Con-

⁵⁰ *Id.*

⁵¹ H.R.J. Res. 1004, 2011 Leg., 86th Sess. (S.D. 2011); H.R.J. Res. 57, 82d Leg., Reg. Sess. (Tex. 2011). Both of these resolutions were proposals for state constitutional amendments. *See* S.D. H.R.J. Res. 1004; Tex. H.R.J. Res. 57.

⁵² Tex. H.R.J. Res. 57.

⁵³ S.D. H.R.J. Res. 1004.

⁵⁴ *2011 Session Roll Call: House Joint Resolution 1004*, S.D. LEGISLATURE, <http://legis.state.sd.us/sessions/2011/RollCall.aspx?Vote=1374> (last visited Mar. 15, 2013).

⁵⁵ ARIZ. REV. STAT. ANN. § 12-3103 (2011) ("A court, arbitrator, administrative agency or other adjudicative, mediation or enforcement authority shall not enforce a foreign law if doing so would violate a right guaranteed by the Constitution of this state or of the United States or conflict with the laws of the United States or of this state."); H.R. 575, 84th Gen. Assemb., Reg. Sess. (Iowa 2011) ("'Foreign law' includes a religious law . . . Any foreign law or other law that is in conflict with the principles of the Declaration of Independence, the Constitution of the United States, or the Constitution of the State of Iowa shall have no force or effect in this state."); Legis. B. 647, 102d Leg., 1st Sess. (Neb. 2011) (in Senate Judiciary Committee); S.B. 3740, 106th Gen. Assemb., Reg. Sess. (Tenn. 2010).

stitution.⁵⁶ Nebraska is also considering a bill that would similarly prohibit the consideration by any court of any foreign or religious laws as well as the enforcement of any contract or arbitration decision that incorporates any foreign or religious laws if such laws would violate rights guaranteed under the U.S. or Nebraska Constitution.⁵⁷ That bill would specifically prohibit courts from enforcing contractual provisions that select such foreign or religious laws in a choice of law provision.⁵⁸

C. *Application of Foreign or Religious Law in American Courts*

The relevance of these anti-Sharia enactments hinges largely on the extent to which courts may consider religious or foreign laws in the first instance. With the increasing globalization of the world economy, courts are increasingly called upon to consider foreign and religious laws in disputes ranging from commercial transactions and the enforcement of money damages to divorce decrees and the validity of marriages.⁵⁹

Courts regularly enforce contractual choice of law provisions that designate foreign laws as the applicable law in case of a dispute.⁶⁰ Perhaps one of the most important rationales for enforcing such provisions is that foreign corporations would otherwise be reluctant to trade with American corporations out of fear of unfavorable and, at times, hostile law.⁶¹ American courts have applied foreign laws in the contexts of maritime disputes,⁶² interpretation of contract terms,⁶³ torts claims arising out of contractual obligations,⁶⁴ and torts committed in foreign countries.⁶⁵ When such disputes

⁵⁶ Tenn. S.B. 3740.

⁵⁷ Neb. Legis. B. 647.

⁵⁸ *Id.*

⁵⁹ Abed Awad, *Oklahoma Amendment Is Unconstitutional*, NAT'L L.J. (Nov. 15, 2010), www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202474801918.

⁶⁰ *Milanovich v. Costa Crociere, S.p.A.*, 954 F.2d 763, 767 (D.C. Cir. 1992) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971)).

⁶¹ Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CH. L. REV. 1151, 1225 (2000) (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-9 (1972) (upholding forum-selection clause in order to preserve and expand trade)).

⁶² *Trans-Tec Asia v. M/V Harmony Container*, 518 F.3d 1120, 1124 (9th Cir. 2008) (applying Malaysian law to a maritime dispute pursuant to a choice-of-law provision in a contract between a U.S. and a Malaysian corporation); *Milanovich*, 954 F.2d at 768 (applying Italian statute of limitations in an action under federal maritime law).

⁶³ *Bunker Holdings, Ltd. v. Green Pac. A/S*, 346 Fed. App'x 969, 973 (4th Cir. 2009) (per curiam) (applying Greek law to a claim for conversion and unjust enrichment arising out of a contract with a Greek choice-of-law provision).

⁶⁴ *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1163-64 (11th Cir. 2009) (applying Dutch statute of limitations to a personal injury claim).

⁶⁵ *Levine v. Arabian Am. Oil Co.*, No. 84 Civ. 2396 (RLC), 1985 WL 3945, at * 4-5 (S.D.N.Y. Nov. 27, 1985) (granting summary judgment to defendant in plaintiff's tort claims arising out of actions

concerning the application of foreign law involve a country that incorporates aspects of Sharia law, such as Saudi Arabia⁶⁶ or Pakistan,⁶⁷ the issue of whether courts can consider religious laws becomes pertinent.

Not only have courts considered and applied foreign laws in a variety of cases, but they have also applied foreign laws in cases where such laws are based in part on religious law. For example, in *Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co.*,⁶⁸ the appellate court affirmed the trial court's application of Saudi Arabian law to a dispute between partners in a joint venture where the defendant's counterclaim arose out of a contract entered by the parties in Saudi Arabia.⁶⁹ The court considered the testimony of an expert on Saudi Arabian law, which is based largely on Sharia law, and concluded that the plaintiff's release defense under the contract was invalid under Saudi Arabian law.⁷⁰

Needless to say, courts considering the application of foreign law must navigate the complexities of conflict of law rules that vary by jurisdiction. For example, in *Levine v. Arabian American Oil Co.*,⁷¹ the court faced difficult questions in determining whether to apply American or Saudi Arabian law to a tort claim that is cognizable in U.S. courts but not in Saudi Arabia.⁷² Because of the difficulty of that conflict of law question, the court refused to impose sanctions on the plaintiff's attorneys after ruling that Saudi Arabian law governed the case and precluded the plaintiff from suing the defendant.⁷³

Courts also often consider foreign and religious laws in the context of family disputes. The Uniform Child Custody Jurisdiction Act, which all fifty states and the District of Columbia have adopted with minor variations,⁷⁴ provides for the enforcement of child custody orders issued by courts in foreign countries, provided that the issuing court had jurisdiction and the parties were provided reasonable notice and the opportunity to be heard.⁷⁵ Parties may also call upon courts to consider religious laws in de-

in Saudi Arabia, because Saudi law does not recognize the plaintiff's tort claims), *aff'd*, 800 F.2d 1128 (2d Cir. 1986).

⁶⁶ Toni Johnson & Lauren Vriens, *Islam: Governing Under Sharia*, COUNCIL ON FOREIGN REL. (Jan. 9, 2013), <http://www.cfr.org/religion/islam-governing-under-sharia/p8034>.

⁶⁷ *Id.*

⁶⁸ 866 A.2d 1 (Del. 2005).

⁶⁹ *Id.* at 22.

⁷⁰ *Id.* at 22-23.

⁷¹ No. 84 Civ. 2396 (RLC), 1985 WL 3945 (S.D.N.Y. Nov. 27, 1985) *aff'd*, 800 F.2d 1128 (2d Cir. 1986).

⁷² *Id.* at *7-8 (granting summary judgment to defendant in plaintiff's tort claims arising out of actions in Saudi Arabia, because Saudi law does not recognize the plaintiff's tort claims).

⁷³ *Levine v. Arabian Am. Oil Co.*, 664 F. Supp. 733, 736-37 (S.D.N.Y. 1987).

⁷⁴ *Malik v. Malik*, 638 A.2d 1184, 1186 (Md. Ct. Spec. App. 1994).

⁷⁵ *Id.* at 1187.

termining whether a valid marriage was formed.⁷⁶ For example, if a wife living in New York seeks a divorce in a New York state court while her husband seeks an annulment in Egypt, claiming that there never was a valid marriage, New York courts applying New York conflict of law rules may have to consider and apply Egyptian family law—a system based largely on Sharia law.⁷⁷

Courts are also increasingly considering the enforceability of Islamic *mahr* contracts—antenuptial agreements requiring the Muslim groom to give a certain sum of money to the bride.⁷⁸ To be enforceable, *mahr* agreements must conform to the applicable state rules governing antenuptial contracts.⁷⁹ Common state law requirements include full disclosure by both parties of their financial status, representation by separate lawyers, and a written contract spelling out the terms of the antenuptial agreement.⁸⁰ Applying general contract principles to *mahr* agreements, some courts have allowed the introduction of parol evidence consisting of the testimony of Islamic scholars and the parties involved to determine the meaning of *mahr* agreements where the meaning of the terms is in dispute.⁸¹

Because the cases most directly affected by anti-Sharia enactments often involve parties that contracted into religious law, the most important area of controversy involving the consideration of religious law involves the admissibility of parol evidence—extrinsic evidence of the parties' intent or the meaning of the terms⁸²—where a contract is unclear.⁸³ Although the parol evidence rule varies by jurisdiction, it generally precludes parties from introducing extrinsic evidence to vary a fully integrated contract representing the full extent of the parties' agreement.⁸⁴ Therefore, where the parties have adopted a complete and exclusive statement of their agreement, neither party may use extrinsic evidence to vary or supplement the terms of the contract.⁸⁵ However, where a contract is not fully integrated, extrinsic

⁷⁶ See Justin Elliot, *What Sharia Law Actually Means*, SALON (Feb. 26, 2011), http://www.salon.com/news/politics/war_room/2011/02/26/sharia_the_real_story.

⁷⁷ *Id.*

⁷⁸ See Sizemore, *supra* note 26, at 1087.

⁷⁹ Richard Freeland, *The Islamic Institution of Mahr and American Law*, 4 GONZ. J. INT'L L. 1, 2 (2000).

⁸⁰ *Id.* at 2-3.

⁸¹ *Rahman v. Hossain*, No. A-5191-08T3, 2010 WL 4075316, at *1 (N.J. Super. Ct. App. Div. June 17, 2010) (per curiam) (relying on expert testimony to clarify the terms of the *mahr* agreement); *Odatalla v. Odatalla*, 810 A.2d 93, 97-98 (N.J. Super. Ct. Ch. Div. 2002) (relying on the wife's testimony to clarify the terms of the *mahr* agreement); *Ahmed v. Ahmed*, 261 S.W.3d 190, 195 (Tex. App. 2008) (relying on the wife's testimony to clarify the terms of the *mahr* agreement).

⁸² BALLENTINE'S LAW DICTIONARY 914 (3d ed. 1969).

⁸³ See, e.g., *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863 (Ct. App. 2001); *Rahman*, 2010 WL 4075316, at *1-2.

⁸⁴ 29A AM. JUR. 2D *Evidence* § 1104 (2011).

⁸⁵ See *Hall v. Hall*, 777 P.2d 255, 256 (Idaho 1989); *Goglio v. Star Valley Ranch Ass'n*, 48 P.3d 1072, 1083-84 (Wyo. 2002).

evidence is generally admissible to supplement and explain the writing.⁸⁶ Moreover, extrinsic evidence is generally admissible to explain ambiguities in the meaning of a written contract, even if it is fully integrated.⁸⁷ It is in this context that courts most often grapple with the issue of whether to consider testimony involving contracts incorporating religious laws.⁸⁸

II. BETWEEN FREE EXERCISE AND ESTABLISHMENT

Before analyzing the constitutionality of anti-Sharia enactments, it is critical to first review the recent Supreme Court cases on the Religion Clauses. The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁸⁹ The Religion Clauses of the First Amendment must be understood in conjunction with one another because their purposes and requirements are often in conflict.⁹⁰ One principle protected by the Religion Clauses is the separation of religion and state, which was succinctly articulated by Thomas Jefferson when he wrote that the Establishment Clause erects “a wall of separation between church and State.”⁹¹ Another central principle is that of equality between religions, described by the Supreme Court in *Larson v. Valente*⁹² as “[t]he clearest command of the Establishment Clause.”⁹³ A third principle is protecting freedom of choice and prohibiting governmental coercion in religious matters.⁹⁴ But these principles are not always in harmony with one another. This Part provides a brief background on the Free Exercise Clause and the Establishment Clause of the First Amendment.

A. *Free Exercise*

To understand the application of the Free Exercise Clause to anti-Sharia enactments, it is helpful to trace the evolution of the Supreme Court’s Free Exercise doctrine over the years. This Section discusses the early interpretation of the Free Exercise Clause in the Supreme Court case

⁸⁶ RESTATEMENT (SECOND) OF CONTRACTS § 216 (1981).

⁸⁷ *Id.* § 214.

⁸⁸ See, e.g., *Shaban*, 105 Cal. Rptr. 2d at 866; *Rahman*, 2010 WL 4075316, at *1-2.

⁸⁹ U.S. CONST. amend. I.

⁹⁰ See Alan Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 692 (1968).

⁹¹ *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879)).

⁹² 456 U.S. 228 (1982).

⁹³ *Id.* at 244.

⁹⁴ See *Walz v. Tax Comm’n*, 397 U.S. 664, 694-95 (1970) (Harlan, J., concurring).

of *Reynolds v. United States*,⁹⁵ the creation of the neutrality test in *Employment Division v. Smith*,⁹⁶ and the clarification of the neutrality principle in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.⁹⁷

In *Reynolds*, the Supreme Court interpreted the Free Exercise Clause narrowly, holding that a generally applicable criminal law banning bigamy did not violate the free exercise rights of Mormons.⁹⁸ To hold otherwise, the Court professed, would be “to permit every citizen to become a law unto himself.”⁹⁹ Thus the Court essentially reinforced the protection of religious *beliefs* while restricting constitutional protections for religious *conduct*.¹⁰⁰

Nearly a century later, the Court in *Sherbert v. Verner*¹⁰¹ expanded free exercise protections by holding that the denial of unemployment benefits to an individual who was unemployed due to her observance of the Sabbath violated the Free Exercise Clause, notwithstanding the general applicability and facial neutrality of the law in question.¹⁰² This represented a drastic expansion of free exercise protection to cover not only religious *belief* but also religious *conduct*.¹⁰³

In *Employment Division v. Smith*, however, the Court reversed course and held that the Free Exercise Clause does not prohibit “neutral, generally applicable” laws that regulate religious conduct, and such laws need not pass strict scrutiny.¹⁰⁴ This decision partially revived *Reynolds* and construed *Sherbert* as applicable only in cases where religious exemptions would be appropriate because the laws lend themselves to individualized assessment of the targeted conduct.¹⁰⁵

Smith was widely criticized for providing an inadequate framework for free exercise analysis and for going against the rationale of the Religion Clauses.¹⁰⁶ In due course, the Court clarified its Free Exercise doctrine in *Church of Lukumi*, where it held that laws that are not facially neutral or are not generally applicable must meet strict scrutiny under the Free Exercise

⁹⁵ 98 U.S. 145 (1879).

⁹⁶ 494 U.S. 872 (1990).

⁹⁷ 508 U.S. 520 (1993).

⁹⁸ *Reynolds*, 98 U.S. at 165-66.

⁹⁹ *Id.* at 167.

¹⁰⁰ Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1124 (1990).

¹⁰¹ 374 U.S. 398 (1963).

¹⁰² *Id.* at 403-04.

¹⁰³ See *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 38 (1989) (Scalia, J., dissenting) (“In such cases as *Sherbert v. Verner*, *Wisconsin v. Yoder*, *Thomas v. Review Bd. of Ind. Employment Security Div.*, and *Hobbie v. Unemployment Appeals Comm’n of Fla.*, we held that the Free Exercise Clause of the First Amendment required religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws.” (citations omitted)).

¹⁰⁴ *Emp’t Div. v. Smith*, 494 U.S. 872, 878-80 (1990).

¹⁰⁵ *Id.* at 884-85.

¹⁰⁶ McConnell, *supra* note 100, at 1111.

Clause—they must be necessary for a compelling state interest.¹⁰⁷ The challenged city ordinance in *Church of Lukumi* prohibited the sacrificial killing of animals without specifically mentioning the Santeria religion anywhere in the text of the ordinance.¹⁰⁸ Moreover, the ordinance made no explicit reference to religion in general.¹⁰⁹

Nonetheless, the Court held that facial neutrality is not dispositive of the Free Exercise Clause challenge brought by the Santeria Church of the Lukumi, because “[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.”¹¹⁰ In determining whether the ordinance violated the Free Exercise Clause, therefore, a plurality of the Court inquired into the object of the ordinance as well as its consequences.¹¹¹ The object, the Court found, was “to target petitioners and their religious practices.”¹¹² The consequence of the ordinance was an adverse effect almost exclusively on practitioners of the Santeria religion; the ordinance even explicitly exempted kosher animal slaughter from its operation.¹¹³ This, the Court concluded, was a form of “religious gerrymander[ing]” that violated the free exercise rights of members of the Santeria religion.¹¹⁴

B. *The Establishment Clause*

In analyzing government actions that may run afoul of the Free Exercise Clause, it is important to consider the other side of the coin in the Religion Clauses—the Establishment Clause. This is especially important when analyzing laws, such as anti-Sharia enactments, that appear to target religious practices because government action that is intended to satisfy the Free Exercise Clause may violate the Establishment Clause, and vice versa.¹¹⁵ Supreme Court justices and legal scholars have advocated numerous approaches to analyzing government action under the Establishment Clause, including the *Lemon* test,¹¹⁶ neutrality between religions,¹¹⁷ neutrali-

¹⁰⁷ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

¹⁰⁸ *Id.* at 527-28.

¹⁰⁹ *Id.* at 534.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 534-38.

¹¹² *Id.* at 535.

¹¹³ *Church of Lukumi*, 508 U.S. at 536.

¹¹⁴ *Id.* at 534-37 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

¹¹⁵ See Schwarz, *supra* note 90, at 692 (illustrating the conflict between the Free Exercise Clause and Establishment Clause through the recognition of a conscientious objection to military service).

¹¹⁶ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

¹¹⁷ See *Wallace v. Jaffree*, 472 U.S. 38, 110-13 (1985) (Rehnquist, J., dissenting).

ty between religion and nonreligion,¹¹⁸ and the endorsement-disapproval test advanced by Justice O'Connor.¹¹⁹ This Section briefly discusses the *Lemon* test, which is the leading Establishment Clause test,¹²⁰ and its application in the context of the “neutral principles of law” doctrine that is pertinent to religious disputes adjudicated in civil courts.

In *Lemon v. Kurtzman*,¹²¹ the Court established a three-part test for determining whether government action violates the Establishment Clause.¹²² First, government action must have a secular purpose.¹²³ Second, its primary effect must neither advance nor inhibit religion.¹²⁴ Finally, it must not create excessive entanglement between government and religion.¹²⁵

Because courts must avoid excessive entanglement with religion,¹²⁶ complications necessarily arise where a case involves both religious and secular disputes.¹²⁷ When discussing legislation that prohibits courts from considering religious laws, an important question arises: when, if ever, may courts consider religious matters without violating the Establishment Clause? This question was answered by the Supreme Court in *Jones v. Wolf*,¹²⁸ where the Court approved of the “neutral principles of law” approach to the adjudication of disputes involving religious and secular matters.¹²⁹ In *Jones*, members of a divided church called upon a Georgia court to adjudicate a church property dispute.¹³⁰ The Georgia court used “neutral principles of law” to adjudicate the dispute, an approach that limits courts to considering general principles of law without delving into religious doctrine.¹³¹

Affirming the approach adopted by Georgia, the Court held that the “neutral principles of law” approach is consistent with the Establishment

¹¹⁸ See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001-02 (1990).

¹¹⁹ *Lynch v. Donnelly*, 465 U.S. 668, 687-91 (1984) (O'Connor, J., concurring); see also Jay Wexler, *Government Disapproval of Religion*, BYU L. REV. (forthcoming 2013) (manuscript at 1-3), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1883597.

¹²⁰ E.g., Amy J. Alexander, Comment, *When Life Gives You the Lemon Test: An Overview of the Lemon Test and Its Application*, 3 PHOENIX L. REV. 641, 642 (2010) (“[T]he [*Lemon*] test remains the leading method to determine whether a government entity has violated the Establishment Clause.”).

¹²¹ 403 U.S. 602 (1971).

¹²² *Id.* at 612-13.

¹²³ *Id.* at 612.

¹²⁴ *Id.*

¹²⁵ *Id.* at 613.

¹²⁶ *Id.*

¹²⁷ See, e.g., *Reynolds v. United States*, 98 U.S. 145, 165-66 (1879) (demonstrating that a neutral criminal law may interfere with a religious practice).

¹²⁸ 443 U.S. 595 (1979).

¹²⁹ *Id.* at 602-03.

¹³⁰ *Id.* at 598-99.

¹³¹ *Id.* at 599-600.

Clause.¹³² While the Establishment Clause prohibits courts from passing judgment on religious controversies in resolving disputes among church members, it does not prohibit courts from applying objective, well-established legal concepts, such as the principles of property or contract law, to disputes within religious institutions.¹³³ Based on the neutral principles of law approach, churches and other religious institutions can rely on general principles of law to carefully construct charters, trusts, and contracts to ensure that secular courts can adjudicate disputes that arise without violating the Establishment Clause.¹³⁴

However, the Court in *Jones* acknowledged the difficulties that the neutral principles of law approach raises, and it delineated what courts may and may not consider in adjudicating disputes involving both doctrinal and nondoctrinal issues.¹³⁵ While courts may consider religious materials, such as church constitutions or contracts drawing on religious doctrines, in adjudicating property disputes, they may only consider such materials in purely secular terms without delving into conflicting religious doctrine.¹³⁶ Thus, courts would be limited to considering, for example, whether parties to a contract based on religious principles consented, whether the contract violates public policy, and the meaning of contractual provisions.¹³⁷

III. ANTI-SHARIA ENACTMENTS AND THE RELIGION CLAUSES

As alluded to earlier, the seemingly slight differences between the various forms that anti-Sharia enactments have taken is constitutionally significant. In light of the *Smith* and *Church of Lukumi* decisions, whether legislation is facially neutral is a significant starting point under the Free Exercise Clause.¹³⁸ But facial neutrality is not dispositive of free exercise challenges to government action; the objectives and consequences of the challenged government action must be considered as well.¹³⁹ This Part first analyzes whether anti-Sharia enactments implicate the Free Exercise Clause at all, and then it analyzes the three main categories of anti-Sharia enactments separately to highlight the constitutional significance of the different forms they have taken and the different constitutional problems each category raises.

¹³² *Id.* at 602.

¹³³ *Id.* at 602-03.

¹³⁴ *Jones*, 443 U.S. at 603-04.

¹³⁵ *Id.* at 604.

¹³⁶ *Id.*

¹³⁷ See *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) (“[T]here are neutral principles of law, . . . which can be applied without ‘establishing’ churches to which property is awarded.”).

¹³⁸ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

¹³⁹ *Id.* at 534-35.

A. *Anti-Sharia Enactments and Restrictions on Religious Conduct*

Before delving into the analysis of the different anti-Sharia enactments under the Religion Clauses, a preliminary question is in order. What, if any, religious conduct is restricted or regulated by anti-Sharia enactments? After all, both *Smith* and *Church of Lukumi* involved government regulation of religious practices—the use of peyote in *Smith*¹⁴⁰ and animal sacrifice in *Church of Lukumi*.¹⁴¹ Furthermore, the texts of anti-Sharia enactments appear to regulate the conduct of courts rather than private, religious practices.¹⁴²

All of that may be true, but by prohibiting courts from considering religious law, anti-Sharia enactments necessarily restrict the religious practices of Muslims, Jews, and other religious communities that emphasize the connection between religion and law.¹⁴³ As discussed above, Sharia is a broad umbrella that governs nearly every area of law, including private and public affairs, financial transactions, family law, contracts, and property disputes.¹⁴⁴ In the U.S., the religious practice that anti-Sharia enactments restrict is the ability to enforce religiously based contracts and arbitration decisions where the parties to such contracts and arbitrations voluntarily consented to be bound by their terms.¹⁴⁵ A few examples of religiously based contracts suffice to explicate this point.

A Muslim business drafting an *istisna'* contract—a Sharia-compliant contract whereby goods are customarily manufactured by the seller after prepayment by the buyer¹⁴⁶—may seek court enforcement if a dispute arises. Under an *istisna'* contract, the seller-manufacturer is not personally liable for any defect in the product, but the buyer has a remedy for the seller's breach of his duty to provide conforming goods—namely, damages set out in a liquidated damages clause that is enforceable so long as it is not punitive.¹⁴⁷ Under contract law in most states, a court would enforce such a commercial contract.¹⁴⁸ Suppose, however, that while the terms of the contract are not clearly drafted, the parties' intent to form an *istisna'* contract is clear. In such a case, courts would generally allow the introduction of parol

¹⁴⁰ *Emp't Div. v. Smith*, 494 U.S. 872, 874, 878 (1990).

¹⁴¹ *Church of Lukumi*, 508 U.S. at 524.

¹⁴² See, e.g., H.R.B. 2379, 49th Leg., 2d Reg. Sess. (Ariz. 2010); H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010); S.J. Res. 1387, 2010 Leg., 118th Sess. (S.C. 2010); H.R.J. Res. 0008, 61st Leg., Gen. Sess. (Wyo. 2011).

¹⁴³ See Helfand, *supra* note 34, at 157-58.

¹⁴⁴ Movsesian, *supra* note 18, at 862 (discussing the importance of law in Islamic culture and its broad scope).

¹⁴⁵ See Nathan B. Oman, *Bargaining in the Shadow of God's Law: Islamic Mahr Contracts and the Perils of Legal Specialization*, 45 WAKE FOREST L. REV. 579, 593-94 (2010).

¹⁴⁶ BHALA, *supra* note 27, at 556-57.

¹⁴⁷ *Id.* at 557.

¹⁴⁸ *Id.*

evidence—extrinsic evidence of the parties' intent and the meaning of the contract terms—to supplement the written contract.¹⁴⁹ In this case, the parol evidence would consist of expert testimony on *istisna'* contracts—testimony that necessarily involves aspects of Sharia.

In the area of family law, Muslim newlyweds typically enter *mahr* agreements whereby the groom either immediately pays an agreed sum of money to the bride or immediately pays a portion of the agreed sum and defers the rest of the payment.¹⁵⁰ Where a portion of the *mahr* is deferred, a couple seeking a divorce may dispute the contents and enforceability of the *mahr* agreement. If, as in the above example, the *mahr* agreement otherwise conforms to the state's antenuptial contract rules, it would generally be enforceable.¹⁵¹ However, to interpret the disputed *mahr* and determine its enforceability, judges often have to consider testimony about *mahr*—a marriage obligation rooted in Sharia law.¹⁵²

In *Rahman v. Hossain*,¹⁵³ for example, a Muslim husband sought the return of a \$12,500 *mahr* upon divorce, claiming that his wife was at fault in the divorce.¹⁵⁴ Relying on the testimony of an expert in Sharia law, the court interpreted the *mahr* agreement to require the return of the *mahr* if the wife was at fault in the divorce, and because the wife refused to maintain her personal hygiene, left the state unilaterally, and refused to engage in marital relations, the court held that she was at fault and ordered her to return the *mahr*.¹⁵⁵

In *Rahman*, the court did what it would have done in any other dispute over a contract with unclear terms or where the intent of the parties is disputed—it considered parol evidence regarding the meaning of the contract and the intent of the parties.¹⁵⁶ Similarly, a Muslim man and woman may call upon a court to determine *whether* they formed a valid marriage, and in the absence of a civil marriage, courts may have to consider the testimony of clergymen to determine whether a marriage was valid.¹⁵⁷

¹⁴⁹ See, e.g., U.C.C. § 2-202 (2001).

¹⁵⁰ Freeland, *supra* note 79, at 1-2.

¹⁵¹ See *supra* note 81.

¹⁵² E.g. *Rahman v. Hossain*, No. A-5191-08T3, 2010 WL 4075316, at *1-2 (N.J. Super. Ct. App. Div. June 17, 2010) (per curiam) (considering the expert testimony of an Islamic scholar to interpret a *mahr* contract).

¹⁵³ No. A-5191-08T3, 2010 WL 4075316 (N.J. Super. Ct. App. Div. June 17, 2010) (per curiam).

¹⁵⁴ *Id.* at *1.

¹⁵⁵ *Id.*

¹⁵⁶ See *id.* at *1-2.

¹⁵⁷ See, e.g., *Persad v. Balram*, 724 N.Y.S.2d 560, 562-63 (Sup. Ct. 2001) (holding, after considering the expert testimony of a Hindu priest, that a marriage conducted in a Hindu religious ceremony constituted a legal marriage, even in the absence of a civil marriage or a marriage license); *Aghili v. Saadatnejadi*, 958 S.W.2d 784, 787-88 (Tenn. Ct. App. 1997) (holding, after considering the expert testimony of a professor of Islamic studies, that the imam who performed the parties' marriage was a qualified Islamic clergyman who had the authority to officiate at their wedding).

The examples can go on, and the above illustrations merely provide a window into a vast world of private transactions based on religious law that anti-Sharia enactments directly impact. While the above examples drew on disputes involving Sharia law, there are many other examples of courts being called upon to adjudicate disputes arising under other religious laws, such as Halacha.¹⁵⁸ This highlights the potentially far-reaching implications of anti-Sharia enactments—not only for American Muslims—but for other religious minorities as well, and it illustrates the significant impact that anti-Sharia enactments may have on private religious conduct in the area of contract law.

Certain religious communities view religion as a source of both faith and law.¹⁵⁹ Such communities often seek legal enforcement of contracts based on religious law¹⁶⁰ and engage in alternative dispute resolution using religious arbitration courts.¹⁶¹ However, when disputes arise over a religious contract or an arbitration decision, courts must first understand the disputes before determining whether they have jurisdiction to resolve the disputes, and if so, how to resolve them. For example, the institution of *mahr* is more complicated than a simple contract regarding the transfer of money from the groom to the bride or the deferral of a portion of that sum. Rather, it is part of a broader scheme based on Sharia law regarding marriage, divorce, and property rights.¹⁶²

Under Islamic marriage laws, there is no analogy to the common law concept of coverture, and a Muslim wife does not lose her legal identity upon marriage or forfeit any rights to her property.¹⁶³ Furthermore, there is no concept of marital property in Islam, and upon divorce, each individual takes his or her individual property.¹⁶⁴ With these added intricacies in mind, it becomes apparent why judges considering the enforceability and the terms of *mahr* agreements will almost invariably need to rely on the expert testimony of scholars or experts in Sharia law to understand such agreements before deciding whether to enforce a particular *mahr* agreement.

It is also important to note that religious contracts that find their way into state courts directly implicate the religious practices of the parties to the disputes. As the above discussion of the applicability of Sharia law in

¹⁵⁸ See, e.g., *Arnav Indus., Inc. Emp. Ret. Trust v. Westside Realty Assocs.*, 579 N.Y.S.2d 382, 383 (App. Div. 1992); *Barclay Commerce Corp. v. Finkelstein*, 205 N.Y.S.2d 551, 552 (App. Div. 1960) (per curiam); *Heimbinder v. Berkovitz*, 670 N.Y.S.2d 301, 308 (Sup. Ct. 1998); *Bollag v. Dresdner*, 495 N.Y.S.2d 560, 563 (Civ. Ct. 1985); *Leibovici v. Rawicki*, 290 N.Y.S.2d 997, 1001 (Civ. Ct. 1968).

¹⁵⁹ Helfand, *supra* note 34, at 157-58.

¹⁶⁰ See Oman, *supra* note 145, at 579-81.

¹⁶¹ See R. Seth Shippee, Comment, “*Blessed Are the Peacemakers*”: Faith-Based Approaches to Dispute Resolution, 9 ILSA J. INT’L & COMP. L. 237, 238 (2002).

¹⁶² See Oman, *supra* note 145, at 589-92.

¹⁶³ *Id.* at 590.

¹⁶⁴ *Id.*

U.S. courts illustrates, Sharia law is an essential part of a Muslim's religious and moral philosophy.¹⁶⁵ Because law is deeply woven into Islamic religious texts and in the religious practices of Muslims,¹⁶⁶ much conduct that finds its way into courts as a result of disputes between Muslims is a form of religious practice.¹⁶⁷

For example, Muslim newlyweds entering *mahr* agreements are essentially creating a contract, but they are also engaging in a religious practice that Islam requires for a marriage to be valid.¹⁶⁸ In other words, just like a devout Catholic's religious doctrine requires him to attend mass and observe Lent, a Muslim groom is required to pay the *mahr* to form a valid marriage.¹⁶⁹ Likewise, two Muslim businessmen entering a contract for an interest-free long-term sale are fulfilling a religious obligation to refrain from engaging in usury.¹⁷⁰ Similarly, Jewish businessmen entering *heter iska* contracts are engaging in religious conduct.¹⁷¹ Jewish law prohibits Jews from charging interest to fellow Jews, and rabbis created the *heter iska* to structure business agreements so as to avoid violating the ban on usury.¹⁷² In short, whether a case involves a *mahr*, an *istisna'* contract, a will, a *shuf'a* agreement, or a *heter iska* (to name a few examples), it involves religious conduct.¹⁷³

The above discussion indicates that enactments that bar courts from considering any religious material in any case implicate the free exercise rights of those religious communities that emphasize the interconnectedness of religion and law.¹⁷⁴ Thus, while these enactments may implicate other legal or constitutional rights and run afoul of constitutional provisions such as the Contract Clause and the Supremacy Clause,¹⁷⁵ they also restrict reli-

¹⁶⁵ See Movsesian, *supra* note 18, at 862 (discussing the importance of law in Islamic culture and in all transactions among Muslims).

¹⁶⁶ Oman, *supra* note 145, at 588.

¹⁶⁷ See *id.* at 593.

¹⁶⁸ *Id.* at 589.

¹⁶⁹ See *id.* at 590.

¹⁷⁰ Sharia law explicitly forbids usurious transactions, and the Qur'an says, "O you who have attained . . . faith! Remain conscious of God and give up all outstanding gains from usury . . ." THE MESSAGE OF THE QUR'AN 2:278 (Muhammad Asad trans., 2003).

¹⁷¹ See Helfand, *supra* note 34, at 159.

¹⁷² Daniel Klein, Comment, *The Islamic and Jewish Laws of Usury: A Bridge to Commercial Growth and Peace in the Middle East*, 23 DENV. J. INT'L L. & POL'Y 535, 536 (1995).

¹⁷³ See, e.g., *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1303 (W.D. Okla. 2010) (granting preliminary injunction on the certification of Oklahoma's referendum results that would ban courts from considering Sharia law, because such an enactment would interfere with plaintiff's ability to have his will probated by Oklahoma courts), *aff'd*, 670 F.3d 1111 (10th Cir. 2012).

¹⁷⁴ While Christians may not be affected heavily by such enactments, Muslims, who place a heavy emphasis on religious-legal practices would be. For an in-depth discussion of the importance of law in Islam, see generally Movsesian, *supra* note 18.

¹⁷⁵ AM. BAR ASS'N HOUSE OF DELEGATES, *supra* note 10 (arguing that anti-Sharia enactments violate the Supremacy Clause by restricting the enforceability of arbitrations, the Contracts Clause by

gious conduct that at times is not merely recommended but in fact required by religious doctrine.¹⁷⁶ Because of those implications for religious practices, an analysis of anti-Sharia enactments that focuses solely on freedom of contract, for example, is insufficient. Moreover, because most anti-Sharia enactments explicitly target religion rather than certain classes of contracts,¹⁷⁷ the Free Exercise Clause analysis of *Church of Lukumi* is highly relevant.¹⁷⁸ The following Sections discuss the impact of the three main categories of anti-Sharia enactments on the free exercise of religion.

B. *Category A Enactments and Neutrality Between Religions*

Category A enactments explicitly prohibit courts from considering Sharia law.¹⁷⁹ Oklahoma's "Save Our State Amendment," for example, forbids courts from considering the legal precepts of other countries or religions and says, "[s]pecifically, the courts shall not consider international law or Sharia law."¹⁸⁰ Unlike other categories of anti-Sharia enactments, which target religious laws in general or seek to reinforce the supremacy of the Constitution over foreign and religious laws, Category A enactments specifically exclude Sharia law from courts. Whether these enactments violate the Free Exercise Clause depends on whether they are neutral and generally applicable, and if they are not, whether they are necessary for a compelling state interest.¹⁸¹

With Category A enactments, the texts of the enactments are dispositive of the neutrality inquiry. The Free Exercise Clause prohibits government action that restricts or regulates religious conduct because of its religious motivations in the absence of a compelling state interest.¹⁸² The difficulty often faced by courts is determining whether a law targets religious practices *because* of its religious nature or merely to serve a broader, legitimate government interest.¹⁸³ However, with Category A enactments, this

restricting the enforceability of otherwise valid contracts, and the Full Faith and Credit Clause by rendering unenforceable judgments of other states' courts).

¹⁷⁶ See, e.g., Oman, *supra* note 145, at 590 (discussing the requirement of *mahr* in Islamic marriages).

¹⁷⁷ See, e.g., H.R.B. 2379, 49th Leg., 2d Reg. Sess. (Ariz. 2010); H.J.R. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010); S.J. Res. 1387, 118th Sess. (S.C. 2010); H.R.J. Res. 0008, 61st Leg., Gen. Sess. (Wyo. 2011).

¹⁷⁸ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 538-39 (1993).

¹⁷⁹ See, e.g., Ariz. H.R.B. 2379; Okla. H.R.J. Res. 1056; S.C. S.J. Res. 1387; Wyo. H.R.J. Res. 0008.

¹⁸⁰ Okla. H.R.J. Res. 1056.

¹⁸¹ See *Church of Lukumi*, 508 U.S. at 538-39.

¹⁸² *Id.* at 532.

¹⁸³ See, e.g., *Gillette v. United States*, 401 U.S. 437, 452-54 (1971) (discussing the legitimate secular interests served by conscientious objector laws).

problem is nonexistent. These enactments explicitly single out Sharia law for different treatment and make explicit what is implicit in other anti-Sharia enactments—namely, that Sharia law is the target of the legislation.¹⁸⁴ The Supreme Court has consistently held that the Free Exercise Clause prohibits the official disapproval of a particular religion.¹⁸⁵ Moreover, the Court has stated that “the minimum requirement of neutrality is that a law not discriminate on its face.”¹⁸⁶

In *Smith*, the Court abandoned the compelling interest test for neutral, generally applicable laws that restrict religious conduct, asserting “that an individual’s religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”¹⁸⁷ The *Smith* decision limited free exercise protections but still maintained the view “that neither criminal punishment nor civil disabilities can be inflicted on religious minorities identified by name, doctrine, or ritual.”¹⁸⁸ This led to widespread criticism of *Smith* by legal scholars,¹⁸⁹ many of whom argued that, as Professor Douglas Laycock put it, “the obvious forms of persecution are not the ones a contemporary American majority is likely to use.”¹⁹⁰ But in the case of Category A enactments, majorities in multiple states did precisely that, and by using an obvious form of targeting one religion, they went beyond the ordinance overturned in *Church of Lukumi*. In *Church of Lukumi*, where the Court held that while nothing in the ordinance actually mentioned the Santeria religion, the purpose and effect of the ordinance was to target Santeria, and thus the Court nonetheless held that the ordinance violated the Free Exercise Clause by targeting Santeria indirectly.¹⁹¹

Because they overtly disapprove of a particular religion and fail the minimum requirement of facial neutrality, Category A enactments must meet strict scrutiny to pass constitutional muster under the Free Exercise Clause.¹⁹² “Strict scrutiny” is the highest level of constitutional review, requiring the government to show that its actions are necessary for a compel-

¹⁸⁴ See *supra* notes 177, 179-81, and accompanying text.

¹⁸⁵ See, e.g., *Sch. Dist. v. Ball*, 473 U.S. 373, 389 (1985), *overruled on other grounds* by *Agostini v. Felton*, 521 U.S. 203 (1997); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); *Epperson v. Arkansas*, 393 U.S. 97, 106-07 (1968); *Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947).

¹⁸⁶ *Church of Lukumi*, 508 U.S. at 533.

¹⁸⁷ *Emp’t Div. v. Smith*, 494 U.S. 872, 878-79 (1990).

¹⁸⁸ Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 4.

¹⁸⁹ See, e.g., Steven H. Aden and Lee J. Strang, *When a “Rule” Doesn’t Rule: The Failure of the Oregon Employment Division v. Smith “Hybrid Rights Exception”*, 108 PENN. ST. L. REV. 573, 581 (2003); Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 260; McConnell, *supra* note 100, at 1124.

¹⁹⁰ Laycock, *supra* note 188, at 4.

¹⁹¹ *Church of Lukumi*, 508 U.S. at 527-28, 538.

¹⁹² *Id.* at 546.

ling governmental interest.¹⁹³ In applying the compelling interest test to laws restricting religious conduct, the Court has stated “that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”¹⁹⁴

The government interest advanced by proponents of Category A enactments is the protection of constitutional rights from the encroachment of religious laws on the U.S. Constitution and state laws.¹⁹⁵ A recent New Jersey court’s misunderstanding of the law of criminal intent further compounded this fear of foreign and religious laws creeping into U.S. courts.¹⁹⁶ In *S.D. v. M.J.R.*,¹⁹⁷ a New Jersey judge refused to issue a restraining order against a man accused of sexually assaulting his wife on the grounds that the man could not have formed the requisite criminal intent; the man believed that his religion allowed him to have nonconsensual sex with his wife.¹⁹⁸ Reversing the trial court, the appellate court held that the sexual assault statute does not specify a required state of mind, and therefore, evidence that the man acted knowingly was sufficient under the statute.¹⁹⁹ The issue in that case, however, was a trial judge’s misunderstanding of a state criminal statute rather than the application or even consideration of Sharia law, and it is atypical of the cases most directly affected by anti-Sharia enactments—cases where parties voluntarily contracted into religious law.²⁰⁰

The state interest advanced by Category A enactments addresses legitimate concerns regarding the importation of foreign or religious laws.²⁰¹ A growing movement of legal scholars advocates the internationalization of certain areas of the law, leading many legislators to lose confidence that American courts will always uphold the U.S. Constitution.²⁰² Proponents of anti-Sharia enactments also argue that there is an inherent clash between American values and Sharia law and fear that courts will one day turn to

¹⁹³ See *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

¹⁹⁴ *Id.*

¹⁹⁵ See Elliott, *supra* note 38.

¹⁹⁶ Abed Awad, *Religion-Based Claim in Abuse Case Wisely Pierced by Appeals Court*, N.J. L.J. (Sept. 17, 2010), <http://shariainamerica.files.wordpress.com/2011/09/religion-based-claim-in-abuse-case-wisely-pierced-by-appeals-court5.pdf>.

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

¹⁹⁸ *Id.* at 417-18, 427.

¹⁹⁹ *Id.* at 428.

²⁰⁰ Awad, *supra* note 196.

²⁰¹ Justice Scalia, for example, has emphatically condemned the reliance of U.S. courts on foreign precedent and legal developments. Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 130-33 (2005). He has also argued that “[t]he Framers would, I am confident, be appalled by the proposition that, for example, the American peoples’ democratic adoption of the death penalty[] could be judicially nullified because of the disapproving views of foreigners.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 750 (2004) (Scalia, J., concurring) (citation omitted).

²⁰² *Judicial Reliance on Foreign Law: Hearing Before the H. Subcomm. on the Const. of the H. Comm. on the Judiciary*, 112th Cong. 4 (2011) (statement of Jeremy Rabkin, Professor of Law, George Mason University).

Sharia law for guidance.²⁰³ Thus, one could form a legitimate argument that anti-Sharia enactments will ensure that U.S. courts will not, for example, look to Saudi Arabian or other religious or foreign laws in determining criminal punishments, applying family law, or probating wills.

However, a legitimate argument is not sufficient to meet the compelling state interest test.²⁰⁴ Because of the infringement on religious practices and the use of language that lacks facial neutrality, the government interest must be “of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.”²⁰⁵ This determination requires balancing the interests advanced by the government against the individual’s interest in freely exercising his or her religion.²⁰⁶ Under Category A enactments, judges are categorically barred from “considering” Sharia law in any case.²⁰⁷ Under these enactments, the court in *Rahman* would likely have been unable to grant the husband any relief because it could not interpret the secular terms of the contract without reference to extrinsic evidence rooted in Sharia law.²⁰⁸ If the court cannot consider any testimony regarding the parties’ intent or the meaning of the contract terms because such testimony would require the court to consider matters that fall under the broad umbrella of Sharia law, Muslim litigants would have no recourse in many disputes. This would render many religiously based contracts unenforceable where parol evidence is needed to clarify the terms of a contract and would thereby place a substantial burden on the religious practices of Muslims, Jews, and other religious groups.²⁰⁹

In addition, anti-Sharia enactments are not necessary for achieving the goals of preventing Sharia law and other religious laws from overriding the U.S. Constitution and state laws.²¹⁰ The Supremacy Clause of the U.S. Constitution ensures the supremacy of U.S. law and the federal Constitution.²¹¹ What’s more, the Establishment Clause prohibits courts from *applying* religious law in any dispute in both state and federal courts, including in the examples cited above where religious contracts are in dispute.²¹² For exam-

²⁰³ Tabachnick, *supra* note 42.

²⁰⁴ *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

²⁰⁵ *Id.* at 214.

²⁰⁶ *Id.* at 215.

²⁰⁷ H.R.B. 2379, 49th Leg., 2d Reg. Sess. (Ariz. 2010); H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010); S.J. Res. 1387, 118th Sess. (S.C. 2010); H.R.J. Res. 0008, 61st Leg., Gen. Sess. (Wyo. 2011).

²⁰⁸ See *supra* notes 153-58 and accompanying text.

²⁰⁹ See *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1308 (W.D. Okla. 2010) (granting preliminary injunction on the certification of Oklahoma’s referendum results that would ban courts from considering Islamic Sharia law), *aff’d*, 670 F.3d 1111 (10th Cir. 2012).

²¹⁰ See AM. BAR ASS’N HOUSE OF DELEGATES, *supra* note 10 (noting that the ABA agrees that such laws are unnecessary and unconstitutional).

²¹¹ U.S. CONST. art. VI, cl. 2.

²¹² U.S. CONST. amend. I.

ple, in *Rahman*, if the court had been faced with an issue involving conflicting religious doctrine and a battle of the experts between Islamic scholars with differing views on a *mahr* rather than a simple dispute over the meaning of a contract term, the Establishment Clause would prohibit the court from passing judgment on matters of conflicting religious doctrine.²¹³ However, using neutral principles of law, such as the parol evidence rule and the state's contract rules, the court in *Rahman* was able to adjudicate the dispute without delving into religious doctrine in violation of the Establishment Clause.²¹⁴

Finally, it is important to note that Sharia law and religious law in general is only relevant in a tiny fraction of cases involving private disputes where the parties freely and voluntarily consented to be governed by principles of religious law.²¹⁵ The main concern of proponents of anti-Sharia enactments is, as one politician put it, that "Muslims . . . will keep growing in numbers and override our system of law and impose Sharia law."²¹⁶ But the reality is that Sharia law is only as relevant to a case as the parties to a contract make it—they must contract into Sharia (or any other religious law) for it to have any import in a case.²¹⁷

A study conducted by the Center for Security Policy on Sharia law in U.S. courts analyzed fifty cases where Sharia was, according to the study, relevant in one way or another.²¹⁸ The study's findings indicate that the overwhelming majority of those cases involved private disputes over contracts, property, and family cases where parties incorporated elements of Sharia into antenuptial agreements.²¹⁹ The study classified three cases under "Shariah doctrine," including a case of a Muslim inmate suing to remove restrictions on his religious practices, an arbitration enforcement dispute, and a criminal case where an individual sought to reduce a murder charge to a manslaughter charge based on his rage towards his wife, which he attributed to his traditional upbringing in India.²²⁰ The latter three cases notably did not actually consider or apply Sharia law.²²¹

In short, cases where courts consider Sharia law within the parameters of the doctrine of neutral principles of law are cases where both parties vol-

²¹³ See *Jones v. Wolf*, 443 U.S. 595, 603 (1979).

²¹⁴ See *Rahman v. Hossain*, No. A-5191-08T3, 2010 WL 4075316, at *1-2 (N.J. Super. Ct. App. Div. June 17, 2010) (per curiam).

²¹⁵ See *supra* notes 24-35 and accompanying text.

²¹⁶ Brian Montopoli, *Fears of Sharia Law in America Grow Among Conservatives*, CBS NEWS (Oct. 13, 2010, 6:00 AM), http://www.cbsnews.com/8301-503544_162-20019405-503544.html.

²¹⁷ See *supra* notes 24-35 and accompanying text.

²¹⁸ CTR. FOR SEC. POLICY, *supra* note 24, at 11.

²¹⁹ *Id.*

²²⁰ *Id.* at 67, 165-66, 267-68.

²²¹ See *In re Ferguson*, 361 P.2d 417, 420-21 (Cal. 1961); *N. Am. Islamic Trust, Inc. v. Muslim Ctr. of Miami, Inc.*, 771 So.2d 1227, 1228-29 (Fla. Dist. Ct. App. 2000); *State v. Haque*, 726 A.2d 205, 207-09 (Me. 1999).

untarily consented to be governed by such principles; courts must still inquire into the validity of the consent given as they would in any other contract dispute.²²² Therefore, anti-Sharia enactments are not necessary to serve the interest of preventing religious laws from “creeping” into American courts.

C. *Category B Enactments and Neutrality Between Religion and Nonreligion*

While Category A legislation distinguishes among religions and targets Islamic law explicitly, Category B enactments appear neutral on their face.²²³ Without mentioning Sharia, these enactments prohibit the consideration of *any* religious laws.²²⁴ Although these enactments do not target one religion explicitly, they target religion in general.²²⁵ Wills and contracts with references to religious beliefs, although otherwise enforceable, would become unenforceable in state courts, regardless of the religion of the parties involved.²²⁶

Read in conjunction, “the [R]eligion [C]lause[s] require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.”²²⁷ *Smith* and *Church of Lukumi*, therefore, require “that religious conduct be treated no worse than analogous secular behavior.”²²⁸ Thus a law that would make a secular contract enforceable and render unenforceable an analogous contract based on religious principles that is otherwise enforceable—even where courts avoid religious doctrine and apply neutral principles of law—would run afoul of the Court’s admonition in *Smith* “that a State would be ‘prohibiting the free exercise [of religion]’ if it sought to ban . . . acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.”²²⁹

Moreover, despite their facial neutrality, the legislative intent behind Category B enactments must also be considered in determining whether they in fact target a specific religion. The Supreme Court has consistently

²²² See, e.g., *Greenberg v. Greenberg*, 656 N.Y.S.2d 369, 370 (App. Div. 1997) (considering whether two Jewish parties who entered a religious arbitration agreement freely consented to the arbitration despite the threat of a *siruv*, a form of religious ostracism in Jewish communities).

²²³ See H.R.J. Res. 1004, 2011 Leg., 86th Sess. (S.D. 2011); H.R.J. Res. 57, 82d Leg., Reg. Sess. (Tex. 2011).

²²⁴ E.g., S.D. H.R.J. Res. 1004; Tex. H.R.J. Res. 57.

²²⁵ E.g., S.D. H.R.J. Res. 1004; Tex. H.R.J. Res. 57.

²²⁶ See S.D. H.R.J. Res. 1004; Tex. H.R.J. Res. 57.

²²⁷ Laycock, *supra* note 118, at 1001.

²²⁸ Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi, and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 881 (2001).

²²⁹ *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990) (first alteration in original).

held that the Free Exercise Clause prohibits the official disapproval of a particular religion,²³⁰ and the question becomes whether a specific law in fact disapproves of religion or is a neutral and generally applicable law. Scholars have advocated two interpretations of this neutrality principle.²³¹ Under the “formal neutrality” approach, the Religion Clauses prohibit official classifications based on religion and require facial neutrality, a concept similar to the Equal Protection Clause of the Fourteenth Amendment.²³² Courts have roundly rejected this approach,²³³ and the plurality in *Church of Lukumi* explicitly refused to limit its neutrality inquiry to the facial neutrality of the challenged law and inquired further into the objects and consequences of the law.²³⁴

The legislative intent behind Category B legislation as expressed by its proponents and drafters—namely, the exclusion of Sharia law—informs the neutrality inquiry under *Church of Lukumi*.²³⁵ After the district judge in *Awad v. Ziriax*²³⁶ granted the plaintiff’s preliminary injunction barring the enforcement of the “Save Our State Amendment,”²³⁷ a Category A enactment, legislators in other states took their cues and began removing explicit references to Sharia.²³⁸ Nonetheless, the debate surrounding Category B enactments indicates that these enactments are also aimed at Sharia law specifically, notwithstanding the facial neutrality of the proposals.

Representative Leo Berman of Texas, who proposed an amendment to Texas’s constitution that would prohibit courts from considering any religious law, said, “[w]e want to make sure our courts are not [referring to international courts and laws of other countries], especially in regard to cultural laws. If that includes [S]hari’a law, then so be it.”²³⁹ Likewise, Representative Phil Jensen of South Dakota, one of the proponents of South Dakota’s House Joint Resolution 1004, said in support of H.J.R. 1004, “[i]n

²³⁰ See, e.g., *Sch. Dist. v. Ball*, 473 U.S. 373, 389 (1985), *overruled on other grounds by* *Agostini v. Felton*, 521 U.S. 203 (1997); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); *Epperson v. Arkansas*, 393 U.S. 97, 106-07 (1968); *Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947).

²³¹ Laycock, *supra* note 118, at 999-1001.

²³² See *id.* at 999.

²³³ *Id.* at 1000.

²³⁴ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

²³⁵ *Id.* at 540 (“Relevant evidence includes ... the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.”).

²³⁶ 754 F. Supp. 2d 1298 (W.D. Okla. 2010).

²³⁷ *Id.* at 1302-03.

²³⁸ See Joe Wolverton II, *Sponsor of Tenn. Anti-Shariah Law Removes Reference to Islam*, NEW AM. (Mar. 29, 2011), <http://thenewamerican.com/usnews/politics/item/5690-proposed-amendment-to-tennessee-anti-shariah-law-removes-reference-to-islam>.

²³⁹ *Anti-Muslim Bigotry Intensifies in U.S.*, ANTI-DEFAMATION LEAGUE (Aug. 27, 2010), http://www.adl.org/main_Extremism/muslim_bigotry.htm.

the Western world . . . Muslim men are starting to demand Sharia law so the wife cannot obtain a divorce. . . . It is alarming how many of our sisters and daughters who attend American universities are now marrying Muslim men.”²⁴⁰ That resolution has since been tabled by the legislature after Rep. Jensen announced that “[i]t was discovered by our judiciary [committee] that we already have in our code protections that should cover the concerns addressed.”²⁴¹ These statements by Rep. Berman and Rep. Jensen and the surrounding debate indicate that Category B enactments target Islam like Category A enactments, and under *Church of Lukumi*, the absence of explicit references to a particular religion is not dispositive of the neutrality inquiry.²⁴² Therefore, although Category B enactments appear to prefer non-religion over religion in general,²⁴³ the legislative history behind these enactments indicates that they have the same goals as Category A enactments.

Moreover, the effects of Category B enactments indicate that they are not neutral and generally applicable. In *Church of Lukumi*, the Court considered in its free exercise analysis the fact that the only community affected by the ordinance against animal sacrifice was the Santeria community and stated that, “[a]part from the text, the effect of a law in its real operation is strong evidence of its object.”²⁴⁴ Because of the heavy emphasis placed on law in Islam and Judaism and because the vast majority of litigated cases entailing religious law involve Muslims and Jews, those two groups will likely feel the brunt of such legislation.²⁴⁵ Moreover, the broad wording used in Category B enactments to avoid the facial neutrality problem created by Category A legislation raises other constitutional problems beyond violating the Free Exercise Clause, but those issues are not addressed in this Comment.²⁴⁶ Because Category B enactments are not neutral, courts should analyze their constitutionality under strict scrutiny. These

²⁴⁰ David Montgomery, *On Sharia Law*, RAPID CITY J. (Feb 5, 2011, 4:14 PM), <http://www.rapidcityjournal.com/app/blogs/politicalblog/?p=7212> (second alteration in original).

²⁴¹ Tim Murphy, *SD Rep. Who Authored Abortion Bill Nixes Sharia Ban*, MOTHER JONES (Feb. 18, 2011, 11:38 AM), <http://motherjones.com/mojo/2011/02/sd-rep-who-authored-abortion-bill-nixes-sharia-ban> (second alteration in original).

²⁴² *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

²⁴³ See, e.g., H.R.J. Res. 1004, 2011 Leg., 86th Sess. (S.D. 2011); H.R.J. Res. 57, 82d Leg., Reg. Sess. (Tex. 2011).

²⁴⁴ *Church of Lukumi*, 508 U.S. at 535.

²⁴⁵ See, e.g., Simcha Krauss, *Litigation in Secular Courts*, 2 J. HALACHA & CONTEMP. SOC’Y 35 (1982); Movsesian, *supra* note 18, at 862-70.

²⁴⁶ See AM. BAR ASS’N HOUSE OF DELEGATES, *supra* note 10. Category B enactments may also have serious unintended consequences. Statutes that summarily bar the consideration of foreign laws would, for example, effectively remove states from a number of child custody and child abduction agreements with foreign countries. Murphy, *supra* note 241. By rendering a broad swath of contracts unenforceable and hindering the ability of courts to enforce religious arbitration decision, Category B enactments may also violate the Contracts Clause and the Supremacy Clause. AM. BAR ASS’N HOUSE OF DELEGATES, *supra* note 10; see also *supra* note 175.

enactments raise the same problems as Category A and similarly fail a strict scrutiny analysis.

D. *Category C Enactments and the Establishment Clause*

Category C enactments, which prohibit the consideration of laws that would not provide the same protections guaranteed by the Constitution,²⁴⁷ raise a different kind of constitutional problem. For example, Tennessee's proposed bill, states that

[a]ny court, arbitration panel, tribunal, or administrative agency ruling or decision that is based in whole or in part on any substantive or procedural law, legal code or legal system of another state, foreign jurisdiction or foreign country that would violate rights and privileges granted under the United States or Tennessee Constitution is declared to be against the public policy of this [state] and is unenforceable in this state.²⁴⁸

Unlike Category A and Category B enactments, Category C enactments do not refer to religious laws specifically.²⁴⁹ Rather, these enactments target all legal systems that do not provide the same rights and privileges granted under the U.S. Constitution or the constitution of the state.²⁵⁰

In so far as these enactments prohibit courts from basing their decisions on foreign legal systems that do not provide the same protections guaranteed under the U.S. Constitution, these enactments are superfluous. If, for example, a court were to rely on a foreign country's laws to allow the detention of a suspect without a judicial determination of probable cause beyond the forty-eight hour limit established by the Supreme Court, it would clearly violate the suspect's Fourth Amendment rights.²⁵¹ Likewise, a court would violate the Equal Protection Clause if it treated the testimony of a woman differently from the testimony of a man without showing that such action was substantially related to the achievement of an important government interest.²⁵² In other words, if Category C enactments merely reiterate the fact that courts may not violate the protections guaranteed under the U.S. Constitution or the constitutions of the respective states, they add nothing to existing constitutional protections.

²⁴⁷ See, e.g., Legis. B. 647, 102d Leg., 1st Sess. (Neb. 2011); S.B. 3740, 106th Gen. Assemb., Reg. Sess. (Tenn. 2010).

²⁴⁸ Tenn. S.B. 3740.

²⁴⁹ See *supra* note 247.

²⁵⁰ Neb. Legis. B. 647.

²⁵¹ *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 55-56 (1991).

²⁵² See *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980) (“[O]ur precedents require that gender-based discriminations must serve important governmental objectives and that the discriminatory means employed must be substantially related to the achievement of those objectives.”).

However, Category C enactments go beyond that and forbid courts from enforcing arbitration decisions that are based in whole or in part on laws that do not provide the same protections as the U.S. Constitution.²⁵³ As such, in the context of religious arbitration, courts would have to inquire into matters of religious law and resolve disputed religious doctrines in order to determine *whether* a set of laws considered by a religious arbitration panel provides the same protections as the Constitution. Category C enactments would require courts to study religious doctrine and pass judgment on what protections are or are not afforded under a religious legal system. This would violate the Establishment Clause and deviate from the neutral principles of law approach to resolving intrareligious disputes.²⁵⁴ Unlike in the cases discussed above, where courts consider parol evidence regarding the meaning of a contract term without passing judgment on the merits of the underlying religious beliefs and without resolving doctrinal conflicts,²⁵⁵ Category C enactments would require courts to pass judgment on the merits of religious laws to determine whether they provide the same substantive rights as the U.S. Constitution.

When parties voluntarily agree to arbitrate a dispute before a religious tribunal, the decisions of the tribunal are generally enforceable in civil courts, regardless of the secular or religious basis for the arbitration decision.²⁵⁶ This is so even though religious arbitration panels do not always provide parties with the same procedural or substantive rights guaranteed by the Constitution.²⁵⁷ Under Jewish law, for example, only male rabbis may preside over a *beth din*, a rabbinical court often resorted to by Jewish Americans for arbitration.²⁵⁸ Jewish law also holds that the power of divorce rests entirely in the hands of the husband.²⁵⁹ Under Jewish law, “[w]hen a man takes a wife and possesses her, if she fails to please him because he finds something obnoxious about her, then he writes her a bill of divorce-ment, hands it to her, and sends her away from his house.”²⁶⁰ On the other hand, a wife does not have that same right regarding her husband.²⁶¹

²⁵³ Neb. Legis. B. 647; Tenn. S.B. 3740.

²⁵⁴ See *Jones v. Wolf*, 443 U.S. 595, 602-03 (1979) (discussing the “neutral principles of law” approach).

²⁵⁵ See *supra* note 81.

²⁵⁶ *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1109 (D. Colo. 1999) (upholding the decision of a Christian Conciliation panel); *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 346 (D.C. 2005) (upholding an order compelling arbitration before a *beth din*, a Jewish rabbinical court); *Abd Alla v. Mourssi*, 680 N.W.2d 569, 572-74 (Minn. Ct. App. 2004) (upholding the decision of an Islamic arbitration panel applying Sharia law).

²⁵⁷ See generally *Fried*, *supra* note 31.

²⁵⁸ *Id.* at 641.

²⁵⁹ THE ENCYCLOPEDIA OF JUDAISM 210 (GEOFFREY WIGODER ed., 1989).

²⁶⁰ *Id.* (quoting *Deuteronomy* 24:1).

²⁶¹ See *Id.*

Under Sharia law, a husband has the unilateral right to divorce his wife subject to three limitations.²⁶² First, he may not take back the *mahr* already paid to his wife and must immediately pay the remaining amount of any deferred *mahr*.²⁶³ Second, he must pay *nafaqat al-'idda*—a temporary alimony for a period of three months.²⁶⁴ Third, he is obligated to pay *nafaqat al-mut'a*, which is a mandatory payment beyond the *mahr* due upon divorce.²⁶⁵ A Muslim woman seeking a divorce, on the other hand, has two options.²⁶⁶ First, she can seek a *tafriq*, which is a divorce for cause, such as abuse, cruelty, neglect, or abandonment.²⁶⁷ If she is granted a *tafriq*, she retains her right to the entire *mahr*, as well as *nafaqat al-mut'a* and *nafaqat al-'idda*, and she does not need the consent of her husband to the divorce.²⁶⁸ Second, she can seek a *khul'*, which is based on mutual consent without any requirement of showing cause for the divorce and is often accompanied by a relinquishment of the deferred *mahr* and repayment of any *mahr* already paid.²⁶⁹

Under both Jewish and Sharia law, therefore, there is a certain degree of departure from the protections guaranteed under the Constitution.²⁷⁰ Nonetheless, this deviation is allowed where the parties freely consented to religious arbitration, and courts have upheld the results of arbitrations to rabbinical and Islamic tribunals despite their obvious differences with the laws of the various states.²⁷¹ Under Category C enactments, however, courts would have to inquire into issues such as whether Jewish or Sharia law provides the same protections as the Constitution as a prerequisite to the enforceability of otherwise enforceable arbitration decisions. Such an inquiry necessitates improper and excessive entanglement with religion in violation of the Establishment Clause.²⁷²

The Supreme Court has held that:

²⁶² Oman, *supra* note 145, at 592.

²⁶³ MUHAMMAD MAZHERUDDIN SIDDIQI, WOMEN IN ISLAM 82 (1952).

²⁶⁴ M. Voorhoeve, Judges in a Web of Normative Orders: Judicial Practices at the Court of First Instance Tunis in the Field of Divorce Law (2011) (unpublished dissertation, University of Amsterdam), available at <http://dare.uva.nl/document/344436>.

²⁶⁵ Kamrul Hossain, *In Search of Equality: Marriage Related Laws for Muslim Women in Bangladesh*, 5 J. INT'L WOMEN'S STUD. 96, 103 (2003).

²⁶⁶ Oman, *supra* note 145, at 591.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 591-92.

²⁷⁰ Under the Equal Protection Clause, a state's justification for differential treatment of men and women must be "exceedingly persuasive." *United States v. Virginia*, 518 U.S. 515, 532-33 (1996). There is also "a strong presumption that gender classifications are invalid." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring).

²⁷¹ *See supra* note 256.

²⁷² *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (stating that government may not, consistent with the Establishment Clause, become excessively entangled with religion).

[T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.²⁷³

In other words, when religious organizations internally adjudicate disputes on the basis of religious law or disputes involving their internal governance, civil courts may neither inquire into the underlying rationales of their decisions nor pass judgment on their compliance with constitutional guarantees. Instead, courts must “accept their decisions as binding upon them.”²⁷⁴ A statute that would require courts to determine whether Sharia or Halacha complies with the U.S. Constitution as a prerequisite to enforcement of a religious arbitration decision would violate that principle.

Moreover, Category C enactments violate the Free Exercise Clause by effectively prohibiting Jews, Muslims, and other religious individuals from resorting to religious arbitration.²⁷⁵ While these enactments do not explicitly prohibit the resort to religious arbitration, they render the decisions of such arbitrations unenforceable where a court finds that the laws considered in the arbitration do not grant the parties the same rights as the U.S. Constitution.²⁷⁶ As discussed above, there are significant differences between rights granted to individuals under Jewish law and those granted under the U.S. Constitution and the laws of most states.²⁷⁷ However, Jewish law forbids Jews from resorting to secular courts to adjudicate disputes among themselves, and Jews who do so are considered to have desecrated God’s name and undermined the authority of *beth din* courts.²⁷⁸ As such, for many religious Jewish Americans, the ability to arbitrate disputes before a *beth din* and then seek court enforcement of arbitration decisions is an important part of their religious practices.²⁷⁹ Category C enactments would limit that practice by making rabbinical judgments unenforceable in state courts and would limit their enforceability to self-enforcement by the parties to a dispute.

²⁷³ Serbian E. Orthodox Diocese v. Milivojevic, 426 U.S. 696, 724-25 (1976).

²⁷⁴ *Id.* at 725.

²⁷⁵ See *supra* Part I.B.3.

²⁷⁶ See Legis. B. 647, 102d Leg., 1st Sess. (Neb. 2011); S.B. 3740, 106th Gen. Assemb., Reg. Sess. (Tenn. 2010).

²⁷⁷ See *supra* notes 258-62 and accompanying text.

²⁷⁸ Fried, *supra* note 31, at 636-37.

²⁷⁹ *Id.* at 635-38.

IV. ANTI-SHARIA ENACTMENTS AND THE ESTABLISHMENT CLAUSE COUNTERARGUMENT

The strongest counterargument to free exercise challenges to anti-Sharia enactments is that these enactments simply enforce the requirements of the Establishment Clause by prohibiting the application of religious law.²⁸⁰ Under *Lemon*, courts cannot, consistent with the Establishment Clause, engage in excessive entanglement with religion.²⁸¹ Therefore, one can argue that anti-Sharia enactments that prohibit the consideration of religious laws merely reiterate what the Establishment Clause already mandates.

However, the “neutral principles of law” approach, as delineated by the Court in *Jones v. Wolf*, establishes a constitutionally proper method of adjudicating disputes involving religious issues.²⁸² Under this approach, courts may apply secular law to religious contract disputes without delving into matters of conflicting religious doctrine and thus avoid violating the Establishment Clause.²⁸³ On this basis, courts have properly enforced contracts and arbitration agreements requiring arbitration before religious courts²⁸⁴ and considered the testimony of experts regarding the meaning of contract terms based on religious law.²⁸⁵

In applying the neutral principles of law doctrine, some courts have mechanically refused to adjudicate disputes involving religious agreements for fear of violating the Establishment Clause.²⁸⁶ This refusal to sift through complex cases to determine where secular matters end and religious doctrine begins can exact a heavy cost on religious individuals who may be left without legal recourse as a result of this hypersensitivity in dealing with religious disputes.²⁸⁷ In *Aflalo v. Aflalo*,²⁸⁸ for example, a Jewish wife asked a court to direct her husband to provide her with a *get*, a Jewish divorce without which she cannot remarry under Jewish law, pursuant to the par-

²⁸⁰ See U.S. CONST. amend. I.

²⁸¹ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

²⁸² *Jones v. Wolf*, 443 U.S. 595, 603 (1979).

²⁸³ *Sizemore*, *supra* note 26, at 1092.

²⁸⁴ *Avitzur v. Avitzur*, 446 N.E.2d 136, 138 (N.Y. 1983).

²⁸⁵ *Sizemore*, *supra* note 26, at 1094 (citing *Rahman v. Hossain*, No. A-5191-08T3, 2010 WL 4075316, at *1-2 (N.J. Super. Ct. App. Div. June 17, 2010) (per curiam) (relying on expert testimony to clarify the terms of the *mahr* agreement); *Odatalla v. Odatalla*, 810 A.2d 93, 97-98 (N.J. Super. Ct. Ch. Div. 2002) (relying on the wife’s testimony to clarify the terms of the *mahr* agreement); *Ahmed v. Ahmed*, 261 S.W.3d 190, 195 (Tex. App. 2008) (relying on the wife’s testimony to clarify the terms of the *mahr* agreement)).

²⁸⁶ See *Helfand*, *supra* note 34, at 159.

²⁸⁷ See *id.*

²⁸⁸ 685 A.2d 523 (N.J. Super. Ct. Ch. Div. 1996).

ties' premarital agreement.²⁸⁹ The court acknowledged that Jewish law "does not profess gender equality" but held, nonetheless, that it lacks the authority to require the husband to consent to the *get*.²⁹⁰ Without hearing expert testimony to determine whether a *get* is a religious or a civil matter, the court dismissed the wife's claims.²⁹¹

That approach ignores the fact that courts may apply neutral principles of law to enforce religiously based contract terms where the parties do not dispute the meaning of the religious terms as well as the secular terms of religiously based contracts.²⁹² In fact, many courts have properly applied neutral principles of law to disputes over the terms of religious contracts within the confines of the Establishment Clause.²⁹³ In *Hurwitz v. Hurwitz*,²⁹⁴ an early case on the enforceability of a *Ketubah*, a Jewish marriage document,²⁹⁵ the court distinguished the secular terms of the contract pertaining to property ownership from those provisions referring to the laws of Moses, holding that the court may enforce the secular terms without violating the Establishment Clause.²⁹⁶ Similarly, in *Minkin v. Minkin*,²⁹⁷ the court considered the testimony of several rabbis who testified that a *get* is a civil rather than a religious aspect of Jewish law and held that directing the husband to obtain a *get* does not offend the Establishment Clause but merely directs him to comply with his contractual obligations to his wife.²⁹⁸

Likewise, in *Odatalla v. Odatalla*,²⁹⁹ the court enforced the secular terms of a *mahr* contract that did not require the court to consider matters of conflicting religious doctrine.³⁰⁰ In *S.B. v. W.A.*,³⁰¹ a case involving the enforcement of a divorce decree and *mahr* judgment entered by a court in the United Arab Emirates in favor of the plaintiff wife, the court enforced the foreign judgments, notwithstanding the fact that U.A.E. law is primarily based on Sharia law.³⁰² Rejecting the argument that enforcement of the *mahr* judgment would violate principles of separation of church and state, the court explained that "agreements predicated upon religious doctrine and

²⁸⁹ *Id.* at 525.

²⁹⁰ *Id.* at 527.

²⁹¹ *Id.* at 528.

²⁹² Charles P. Trumbull, Note, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 621-22 (2006).

²⁹³ See *supra* note 81.

²⁹⁴ 215 N.Y.S. 184 (App. Div. 1926).

²⁹⁵ Elizabeth R. Lieberman, Note, *Avitzur v. Avitzur: The Constitutional Implications of Judicially Enforcing Religious Agreements*, 33 CATH. U. L. REV. 219, 222 (1983).

²⁹⁶ *Hurwitz*, 215 N.Y.S. at 187.

²⁹⁷ 434 A.2d 665 (N.J. Super. Ct. Ch. Div. 1981).

²⁹⁸ *Id.* at 668.

²⁹⁹ 810 A.2d 93 (N.J. Super. Ct. Ch. Div. 2002).

³⁰⁰ *Id.* at 98.

³⁰¹ No. 000408/11, 2012 WL 5936035 (Sup. Ct. Sep. 26, 2012).

³⁰² *Id.* at *2-3.

customs [may] be enforced in civil courts, as long as enforcement does not violate either the law or the public policy of the state.”³⁰³

In *Akileh v. Elchahal*,³⁰⁴ the court held that a *sadaq* (i.e., *mahr*) contract is enforceable so long as it complies with the state’s contract law.³⁰⁵ There, the wife testified that a *sadaq* is similar to the concept of dowry and may only be waived by the wife.³⁰⁶ Finding that marriage was sufficient consideration under Florida law, the court enforced the parties’ antenuptial agreement and awarded the wife the full amount of *sadaq* provided in the contract.³⁰⁷ Applying similar reasoning, the court in *Afghahi v. Ghafourian*³⁰⁸ allowed the wife to testify about the amount of *mahr* her husband owed her pursuant to their marriage contract and affirmed the award of the *mahr* to the wife.³⁰⁹

In the landmark New York case of *Avitzur v. Avitzur*,³¹⁰ the parties were married according to Jewish law, and their *Ketubah* required them to appear before a *beth din* in case of any family dispute.³¹¹ When the husband was granted a civil divorce on grounds of cruelty, the wife sought specific performance of the *Ketubah* contract so that she could obtain a *get* from the *beth din*, a prerequisite to remarriage under Jewish law.³¹² Rejecting the husband’s Establishment Clause arguments, the court ordered the husband to appear before the *beth din* pursuant to his contractual obligation, holding “that the obligations undertaken by the parties to the *Ketubah* are grounded in religious belief and practice does not preclude enforcement of its secular terms.”³¹³ In short, courts may—consistent with the Establishment Clause—enforce the secular terms of religiously motivated contracts as well as the religious terms of contracts where parties do not dispute the meaning of those terms.

Under most anti-Sharia enactments, however, the plaintiffs in all of the above cases would likely have no legal recourse, despite the fact that courts could adjudicate their disputes without violating the Establishment Clause. In other words, anti-Sharia enactments go beyond the scope of what is required under the Establishment Clause and restrict religious practices in violation of the Free Exercise Clause.

³⁰³ *Id.* at *17.

³⁰⁴ 666 So.2d 246 (Fla. Dist. Ct. App. 1996).

³⁰⁵ *Id.* at 248.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ No. 1481-09-4, 2010 WL 1189383 (Va. Ct. App. March 30, 2010).

³⁰⁹ *Id.* at *3-4; *see also* *Derakhshan v. Derakhshan*, 42 Va. Cir. 411, 414 (1997) (affirming the award of *mahr* provided for in a Muslim premarital agreement).

³¹⁰ 446 N.E.2d 136 (N.Y. 1983).

³¹¹ *Id.* at 138.

³¹² *Id.* at 137.

³¹³ *Id.* at 139.

V. PROPOSED SOLUTIONS

Courts faced with challenges to anti-Sharia enactments should strike Category A and B enactments as violations of the Free Exercise Clause, and courts should strike Category C enactments as violations of the Establishment Clause that necessitate improper entanglement with religion as well as violations of the Free Exercise Clause. However, while anti-Sharia enactments create multiple constitutional problems, particularly under the Free Exercise Clause, their real-world impact may be profound or minimal depending on how broadly they are interpreted. This Part discusses possible solutions to the constitutional problems raised by anti-Sharia enactments and possible responses by religious communities that are most directly impacted by these enactments.

A. *Narrow Construction of Anti-Sharia Enactments*

Much of this Comment's analysis of the violations of the Free Exercise Clause created by anti-Sharia enactments assumes a certain breadth in the interpretation of those statutes.³¹⁴ However, a narrower interpretation of some of these statutes may avoid some of the free exercise challenges based on the plain language of the statutes. Although anti-Sharia enactments generally use broad and sweeping language,³¹⁵ courts can interpret them to merely prohibit the *application* of religious laws as opposed to the *consideration* of religious laws.

If anti-Sharia enactments merely prohibit courts from *applying* religious laws in any case, there can be no violation of the Free Exercise Clause. There is no constitutional right to have courts apply a certain religious law in any case.³¹⁶ A court may not, for example, apply a punishment based on Sharia law in a criminal case against a Muslim defendant or Hala-cha in a case against a Jewish defendant.³¹⁷ Likewise, a court may not re-

³¹⁴ Not all enactments prohibiting the consideration of foreign or religious law have the same breadth. For example, Indiana's proposed enactment explicitly states that courts "may not interpret this chapter as limiting the right of any person to the free exercise of religion as guaranteed by the First Amendment to the Constitution of the United States or the Constitution of the State of Indiana." H.R.B. 1166, 117th Gen. Assemb., 2d Reg. Sess. (Ind. 2012). Similarly, a proposed bill in Missouri prohibiting the application of foreign law states: "No 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 of the United States Constitution and by the constitution of this state." H.R.B. 1512, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012).

³¹⁵ See *supra* Part I.B.1.

³¹⁶ See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (holding that government action must have a secular purpose, avoid excessive entanglement with religion, and not have a primary effect of advancing or inhibiting religion).

³¹⁷ *Id.*

solve church, mosque, or synagogue property disputes on the basis of religious doctrine.³¹⁸ Courts also may not, consistent with the Establishment Clause, direct parties to engage in purely religious conduct.³¹⁹ Nor can they decide any kind of dispute on the basis of their interpretation of religious doctrine.³²⁰

Courts may, however, consider “objective, well-established concepts of trust and property law familiar to lawyers and judges.”³²¹ Courts may consider expert testimony and parol evidence to interpret an ambiguous contract—even a contract that draws on religious principles—or to determine whether it can enforce the contract without violating the Establishment Clause.³²² For example, the court in *Odatalla v. Odatalla* allowed the wife to testify about the meaning of the terms of a *mahr* contract, including testimony that the deferred *mahr* is usually not requested under Islamic customs except upon divorce or the death of the husband.³²³ This testimony, although based on principles of Sharia, meets the requirements of the neutral principles of law doctrine—it merely clarifies the intent of the parties to the contract and is admissible as it would be in any other dispute over an ambiguous contract.³²⁴ Regardless of the religious motivations of the contracting parties, the contract is enforceable if it involves secular contractual obligations.³²⁵ On the other hand, if the testimony involved disputes over the interpretation of religious doctrines, courts may not pass judgment on such intrareligious disputes.³²⁶

Although there is a fine line between *considering* religious doctrine using neutral principles of law to determine the meaning of a contract and *applying* religious law, it is a constitutionally significant distinction.³²⁷ If courts interpret anti-Sharia enactments narrowly so as to prohibit the latter while permitting the former, anti-Sharia enactments would not violate the

³¹⁸ *Jones v. Wolf*, 443 U.S. 595, 602 (1979); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976) (citing *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969)).

³¹⁹ *Minkin v. Minkin*, 434 A.2d 665, 666 (N.J. Super. Ct. Ch. Div. 1981).

³²⁰ *See Sch. Dist. v. Schempp*, 374 U.S. 203, 222-23 (1963) (stating that, to withstand scrutiny under the Establishment Clause, government action must have a secular purpose and neither advance nor inhibit religion).

³²¹ *Jones*, 443 U.S. at 603.

³²² *See supra* note 81.

³²³ *Odatalla v. Odatalla*, 810 A.2d 93, 97-98 (N.J. Super. Ct. Ch. Div. 2002).

³²⁴ *Id.* at 96.

³²⁵ *See id.* at 97-98.

³²⁶ *See Jones*, 443 U.S. at 602.

³²⁷ *Compare Rahman v. Hossain*, No. A-5191-08T3, 2010 WL 4075316, at *4 (N.J. Super. Ct. App. Div. June 17, 2010) (relying on expert testimony to clarify the terms of the *mahr* agreement), *with Aflalo v. Aflalo*, 685 A.2d 523, 528 (N.J. Super. Ct. Ch. Div. 1996) (refusing to enforce a *Keutubah*, because doing so would require the court to resolve religious disputes and direct someone to engage in primarily religious conduct).

Free Exercise Clause; rather, they would merely reinforce the mandate of the Establishment Clause.

Nonetheless, that does not necessarily mean that all anti-Sharia enactments would be constitutional under a narrow construction. Category A enactments, which explicitly target Islamic law, would violate the Establishment Clause even with a narrow construction by officially disapproving of a particular religion.³²⁸ In granting a preliminary injunction against Oklahoma's "Save Our State Amendment" in *Awad v. Ziriax*, the judge wrote that the amendment, by singling out one religion, "conveys a message of disapproval of plaintiff's faith and, consequently, has the effect of inhibiting plaintiff's religion."³²⁹ In other words, even with a narrow statutory construction, anti-Sharia enactments may run afoul of the Establishment Clause if they explicitly target a particular religion.

B. *Expanding Reliance on Religious Arbitration*

Another possible solution to the limitations placed on the practices of religious-legal communities is to rely more on religious arbitration rather than resorting to state courts for enforcement of religious agreements or the resolution of property, contract, and family disputes. Today, "traditional, faith-based alternatives to the mainstream legal system are alive and well, and in many ways, busier and more influential than ever."³³⁰ Christians, Jews, and Muslims have developed a variety of alternative dispute resolution mechanisms, such as the *beth din* for Jews, peace ministries for Christians, and Islamic courts for Muslims.³³¹ In recent years, Catholics have increased their reliance on church courts that resolve disputes among Catholics based on canon law.³³² By relying on religious arbitration outside of state courts, parties can avoid the prohibition on the consideration of religious laws by state courts.

Parties who wish to arbitrate their disputes before religious arbitration panels sign a contract with a choice of law provision identifying the applicable religious law and a forum-selection clause identifying the arbitration forum.³³³ As a prerequisite to enforceability, the parties must voluntarily

³²⁸ For an in-depth analysis of the disapproval portion of Justice O'Connor's "endorsement-disapproval" Establishment Clause test, see Wexler, *supra* note 119.

³²⁹ *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1306 (W.D. Okla. 2010), *aff'd*, 670 F.3d 1111 (10th Cir. 2012).

³³⁰ Shippee, *supra* note 161, at 238.

³³¹ Michael C. Grossman, Note, *Is This Arbitration? Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 177, 179-80 (2007).

³³² Rachel Zoll, *More US Catholics Take Complaints to Church Court*, ASSOCIATED PRESS (Jan. 15, 2012), <http://news.yahoo.com/more-us-catholics-complaints-church-court-185049115.html>.

³³³ See, e.g., *Arbitration Agreement for the Chicago Rabbinical Council*, CHI. RABBINICAL COUNCIL, <http://www.crcweb.org/AGREEMENT%20TO%20MEDIATION.pdf> (last visited Mar. 15,

agree to arbitrate, and the arbitrators must be neutral and objective parties.³³⁴ Absent coercion or evidence of bias on the arbitrator's part, "American courts routinely enforce money judgments and other orders by [religious arbitrators]."³³⁵ However, contracts between family members resolving private disputes as opposed to commercial contracts—particularly those involving the waiver of statutory rights—require closer scrutiny to ensure fairness to both parties.³³⁶ Although there is no per se requirement that the parties to such contracts have separate counsel, courts have indicated that attorneys and judges have a heightened duty to protect the parties by providing them with all the information relevant to potential conflicts of interest and the importance of seeking counsel before entering into such contracts.³³⁷

Under Category A and B enactments, state courts generally may enforce arbitration orders rendered by religious arbitration panels, because courts would not need to consider the underlying reasoning behind the orders or hear the testimony of the religious arbitrators.³³⁸ However, even under Category A and B enactments, parties may have difficulty challenging the validity of a religious arbitration decision where courts would have to consider religious matters to determine whether the parties freely consented to the arbitration.³³⁹ For example, rabbinical courts often issue a *sh'tar* or *k'sav seruv*, a contempt order, when a party refuses to submit to the rabbinical court.³⁴⁰ Some courts have held that the threat of such communal ostracism does not rise to the level of coercion.³⁴¹ However, to make such a determination, a court may need to hear testimony on the *seruv*, and such testimony involves providing the court with information on a practice under Jewish law.³⁴² What is more, under Category C enactments, courts would likely be completely barred from enforcing arbitration decisions of

2013); *Arbitration Agreement of the Beth Din of America*, BETH DIN AM., http://www.bethdin.org/docs/PDF3-Binding_Arbitration_Agreement.pdf (last visited Mar. 15, 2013); *Mediation/Arbitration of the Peacekeeper Ministries*, PEACEKEEPER MINISTRIES, <http://www.peacemaker.net/site/c.aqKFLTOBIpH/b.1172255/apps/s/content.asp?ct=1245687> (last visited Mar. 15, 2013).

³³⁴ See *In re Marriage of Popack*, 998 P.2d 464, 468 (Colo. App. 2000).

³³⁵ *Dial 800 v. Fesbinder*, 12 Cal. Rptr. 3d 711, 724 (Ct. App. 2004).

³³⁶ Gregg Temple, *Freedom of Contract and Intimate Relationships*, 8 HARV. J.L. & PUB. POL'Y 121, 134 (1985).

³³⁷ *Id.* at 134 (citing *Klemm v. Superior Court*, 142 Cal Rptr. 509, 513 (Ct. App. 1977)).

³³⁸ *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) ("Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement.").

³³⁹ See *Greenberg v. Greenberg*, 656 N.Y.S.2d 369, 370 (App. Div. 1997); *Lieberman v. Lieberman*, 566 N.Y.S.2d 490, 495-96 (Sup. Ct. 1991); *Mikel v. Scharf*, 432 N.Y.S.2d 602, 606 (Sup. Ct. 1980).

³⁴⁰ See *Greenberg*, 656 N.Y.S.2d at 369-70.

³⁴¹ See, e.g., *id.* at 370.

³⁴² See *id.*

rabbinical and Islamic courts,³⁴³ because such arbitration panels rely on laws that do not provide parties the same protections afforded under the U.S. Constitution and the laws of the respective states.³⁴⁴

In short, under Category A and B enactments, religious groups can expand their reliance on religious arbitration to avoid the complete prohibition on the consideration of religious laws in state courts, and courts will generally enforce such arbitration decisions.³⁴⁵ On the other hand, under Category C enactments, judicial enforcement is likely not available, and therefore, the effectiveness of religious arbitration will largely depend on the effectiveness of self-enforcement by the parties and extrajudicial enforcement mechanisms, such as communal pressure to comply with religious arbitration decisions.³⁴⁶ Jewish courts have long-established enforcement mechanisms such as the *seruv*, a contempt order issued by rabbinical courts,³⁴⁷ and American Muslims may need to develop similar enforcement mechanisms to substitute for the absence of judicial enforcement under Category C enactments.

C. Contracting Around Anti-Sharia Laws

Perhaps the most effective response by religious communities to avoid the effects of anti-Sharia enactments is to contract around these statutes. In most cases where courts need to consider religious matters, and therefore, would run afoul of anti-Sharia enactments, parties have failed to specify their intent and to clearly delineate their contractual obligations.³⁴⁸ For example, in the case of *In re Marriage of Shaban*,³⁴⁹ the husband sought to apply Islamic law to a *mahr* contract that consisted of a one-page document naming the bride, the groom, and the *mahr* and stating: "Legal marriage concluded in Accordance with God's Book and the precepts of His Prophet and with the mutual agreement of the husband and the wife's representative."³⁵⁰ The court held that the husband could not introduce parol evidence to explain the intent of the parties, because the contract was far too vague and did not satisfy the requirements of the state's statute of frauds.³⁵¹

A certain amount of vagueness may be unavoidable in drafting contracts, and parties may even intentionally draft vague terms and leave the

³⁴³ See Legis. B. 647, 102d Leg., 1st Sess. (Neb. 2011); S.B. 3740, 106th Gen. Assemb., Reg. Sess. (Tenn. 2010).

³⁴⁴ See *supra* notes 258-71 and accompanying text.

³⁴⁵ See *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001).

³⁴⁶ See, e.g., *Greenberg*, 656 N.Y.S.2d at 370.

³⁴⁷ See *id.* at 369-70.

³⁴⁸ See *supra* note 255.

³⁴⁹ 105 Cal. Rptr. 2d 863 (Ct. App. 2001).

³⁵⁰ *Id.* at 866 (internal quotation marks omitted).

³⁵¹ *Id.* at 869.

outcome of litigation to the discretion of courts.³⁵² But if the goal is to avoid the need to introduce parol evidence, then parties should draft terms as precisely and clearly as possible.³⁵³ While this will impose higher transaction costs on the parties, this front-end cost is well worth it given the high back-end cost to the parties if courts refuse to enforce their contract.³⁵⁴

Most Islamic marriage contracts are based on standard, boilerplate contracts provided by local imams, and many are drafted vaguely.³⁵⁵ If such contracts and other legal documents drawing on religious principles, such as *heter iska* contracts, *mahr* agreements, and wills, are drafted clearly, precisely, and without reference to the underlying religious doctrines, they would be enforceable even under anti-Sharia enactments, because courts would not need to consider religious laws.³⁵⁶ Even without anti-Sharia enactments, many courts are reluctant to enforce vague contract terms or to consider parol evidence consisting of religious doctrines.³⁵⁷ Consequently, it is imperative for religious communities to develop detailed terms for religious agreements, wills, and contracts to ensure their enforceability in state courts without the need to resort to parol evidence.³⁵⁸

CONCLUSION

Anti-Sharia enactments violate the rights of religious minorities to incorporate their religious legal traditions into their private contracts. Judges faced with challenges to these enactments should strike Category A and B enactments as violations of the Free Exercise Clause, and courts should also strike Category C enactments as violations of the Establishment Clause since they would require courts to determine whether laws relied upon by religious arbitration panels afforded parties the same rights guaranteed under the Constitution. While the Establishment Clause concerns of the proponents of these enactments are legitimate and have motivated some courts to refuse to enforce religious contracts,³⁵⁹ because of the broad language

³⁵² Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 818 (2006).

³⁵³ *Id.* at 835.

³⁵⁴ *Id.*

³⁵⁵ Lindsey E. Blenkhorn, Note, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189, 210-11 (2002).

³⁵⁶ See *Odatalla v. Odatalla*, 810 A.2d 93, 97 (N.J. Super. Ct. Ch. Div. 2002).

³⁵⁷ See, e.g., *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 868-69 (Ct. App. 2001) (refusing to enforce a *mahr* agreement due to its vagueness).

³⁵⁸ Azizah Y. al-Hibri, *Muslim Marriage Contract in American Courts*, Address at the Minaret of Freedom Banquet (May 20, 2000), (transcript available at <http://www.minaret.org/azizah.htm>).

³⁵⁹ E.g., *Aflalo v. Aflalo*, 685 A.2d 523, 528 (N.J. Super. Ct. Ch. Div. 1996) (refusing to enforce a *Ketubah*, because doing so would violate the Establishment Clause).

employed by these enactments, they will directly restrict the religious exercise of members of religious communities without serving a compelling state interest.

However, even if courts do not strike these enactments as unconstitutional, they should narrowly construe them to only forbid courts from applying religious laws or passing judgment on matters of religious doctrine in violation of the Establishment Clause. Furthermore, even if courts do not strike anti-Sharia enactments, religious communities should avoid the application of anti-Sharia enactments by increasing their reliance on alternative dispute resolution mechanisms and more detailed contract terms that would obviate the need for courts to consider parol evidence involving religious matters.