SAVING OKLAHOMA'S "SAVE OUR STATE" AMENDMENT: SHARIA LAW IN THE WEST AND SUGGESTIONS TO PROTECT SIMILAR STATE LEGISLATION FROM CONSTITUTIONAL ATTACK

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I. INTRODUCTION

In recent years, an increasing number of states have introduced bills and constitutional amendments seeking to ban or limit the use of Sharia or international law in state court decisions.[1] While the overwhelming majority of such bills have failed to achieve passage,[2] Oklahoma succeeded in 2010 in passing a state constitutional amendment popularly known as the "Save Our State" Amendment (the "Amendment"), which sought to ban state courts from considering international law in general and Sharia Law in particular.[3] The Amendment passed decisively by referendum on November 2, 2010, with voter approval over 70%.[4]

Shortly thereafter, Muneer Awad (a Muslim resident of Oklahoma) challenged the Amendment in U.S. District Court on the grounds that it violated both the Establishment Clause and the Free Exercise Clause of the U.S. Constitution. Awad obtained a preliminary injunction to prevent certification of the election result.[5]

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[1] *See* Asma T. Uddin & Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST AMEND. L. REV. 363, 370 (2012).

[2] *Id.* at 371.

[3] H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010), *available at* https://www.sos.ok.gov/documents/questions/755.pdf.

[4] Oklahoma "Sharia Law Amendment", State Question 755 (2010), BALLOTPEDIA, http://ballotpedia.org/wiki/index.php/Oklahoma_%22Sharia_Law_Amendment%22,_State_Question_755 (2010).

[5] *See* Awad v. Ziriax, 754 F. Supp. 2d 1298 (W.D. Okla. 2010), *aff'd*, 670 F.3d

The State appealed the District Court's ruling to the Tenth Circuit, which affirmed the injunction, holding that the Amendment violated the Establishment Clause, but the court declined to reach the question of whether the Amendment also violated the Free Exercise Clause.[6] While the Tenth Circuit's result may be correct in this particular case, it is important to understand the complex reasons why state legislatures across the United States continue to propose measures very similar to the "Save Our State" Amendment. This perceived backlash against Sharia should not merely be dismissed as an "Islamophobic" reaction of close-minded individuals in the wake of 9/11; to do so would ignore real and ominous developments in Western countries with significant Muslim populations.

Sharia is generally defined as "[t]he body of Islamic religious law applicable to police, banking, business, contracts, and social issues."[7] While this general definition introduces the very basic concept that Sharia seeks to govern a wide array of societal and economic interactions, it fails to capture the distinctions made among various Islamic countries and sects.[8] The nuances of Sharia will be developed more fully below, but the fact that there exist differing interpretations of Sharia is introduced here simply to emphasize that there is not a single, definitive interpretation of Sharia in the Muslim world.

Muslim practitioners in Islamic countries have developed Sharia law along two separate tracks.[9] On one track is the traditional conception of Sharia as a personal guide for believers; that is, the application of Sharia is "limited to religious observance by Muslims, and elements of family law."[10] This particular form of Sharia, which deals mostly with personal behavior, is purely voluntary among

1111 (10th Cir. 2012).

[6] *See* Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012).

[7] BLACK'S LAW DICTIONARY 1501 (9th ed. 2011).

[8] For example, there exist five distinct schools of thought on the interpretation of Sharia: the Hanafi school (the most liberal and most influential), the Maliki school, the Shafi'i school, the Hanbali school, and the Jafari school (practiced by the majority of Shia Muslims). Toni Johnson & Lauren Vriens, *Islam: Governing Under Sharia*, COUNCIL ON FOREIGN RELATIONS (Jan. 9, 2013), http://www.cfr.org/religion/islam-governing-under-sharia/p8034.

[9] DR. IRFAN AL-ALAWI ET AL., CTR. FOR ISLAMIC PLURALISM, A GUIDE TO SHARIAH LAW AND ISLAMIST IDEOLOGY IN WESTERN EUROPE 2007-2009 5 (2009), *available at* http://www.islamicpluralism.org/documents/shariah-law-islamist-ideology-western-europe.pdf [hereinafter A GUIDE TO SHARIAH LAW].

[10] *Id.*

adherents in Western countries.[11] Moreover, the traditional conception of Sharia directs followers living in Western countries to "obey the laws and customs of the land to which they move, and to set a good example to their non-Muslim neighbors."[12] Indeed, prior to the rise of more radical forms of Sharia in the twentieth century, Islamic adherents in Western countries rarely challenged the validity of Western legal systems as applied to them.[13] Thus, traditional Sharia generally has had no impact on Western legal systems, although some of its applications can conflict with the Western legal tradition in certain areas such as family law.[14] For example, it is far more common in the sensitive area of family law for Muslims to "decline Western marriage, or be prevented by Western law . . . from turning to Western courts regarding divorce and inheritance."[15] This apparent clash notwithstanding, the traditional conception of Sharia does not typically conflict with the legal systems of Western countries because it does not advocate that adherents should flout the laws of the non-Muslim countries in which they reside.[16]

On the other track is the radical, or Islamist, conception of Sharia,[17] which "holds that the West is an area of unbelief and that Muslims living in Western lands cannot obey Western laws but must establish their own Islamic legal standard."[18] Gaining more support in recent years among both Muslims and non-Muslims in Western countries is the idea—originated in Islamist circles—of "parallel Sharia," which states that Muslims in non-Muslim countries should be permitted to operate a legal system in parallel with the secular legal system of the Western country in which they reside.[19] While some "Islamophobes" in Western countries claim that they will eventually be forced to adhere to Sharia, this worry seems misplaced and unwarranted. Rather, the greater emphasis should be placed on the specter of a legal system that forces a particular religious group to adhere to the tenets of religious law with no possibility of intervention or adjudication by the secular courts.[20]

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[11] *Id.* at 7.
[12] *Id.* at 9.
[13] *Id.*
[14] *Id.* at 7–8.
[15] A GUIDE TO SHARIAH LAW, *supra* note 9, at 7–8.
[16] *Id.* at 9.
[17] *Id.* at 5.
[18] *Id.* at 10.
[19] *Id.*
[20] *Id.*

The concept of "parallel Sharia" falls somewhere in between the traditional conception of Sharia, which holds that Muslims should obey the laws of non-Muslim countries while still adhering to the personal tenets of Islam, and the radical conception of Sharia, which holds that Muslims in non-Muslim countries should not feel compelled to obey the commands of the secular legal system.[21] "Parallel Sharia" calls for the establishment of a separate legal system in non-Muslim countries based on the laws of the Muslim faith *and enforced by the non-Muslim secular governments themselves*.[22] It must be noted, however, that a "parallel Sharia" system would not necessarily include those radical elements supported by some adherents of the Islamist conception.[23] Nevertheless, there is always the danger that radical elements of Sharia could be introduced into such a system.[24] Indeed, the idea of a parallel system of justice originated in radical circles.[25] Various scholars, including some with radical beliefs, have euphemistically referred to "parallel Sharia" as "*fiqh* . . . for minorities," or "a body of opinion derived from *Shariah* doctrine to govern the lives of Muslim minorities in non-Muslim lands."[26] These euphemisms seemingly serve to give off the appearance that the supporters of parallel Sharia merely seek a "reasonable accommodation" of their religion, when in fact the true goal of "parallel Sharia" is to bring Muslim minorities under an entirely separate legal system administered by religious authorities and enforced by Western governments.[27]

Many Western countries have already adopted a system of "reasonable accommodation" of differing religious views.[28] In the United States, for example, employment regulations promulgated in accordance with Title VII of the Civil Rights Act specifically define "reasonable accommodation" and provide direction as to the manner in which employers falling within the purview of the Act should accommodate the religious views of their employees.[29] "Reasonable accommodation" is certainly an idea ingrained in our constitutional system and is clearly in line with the First Amendment's command

[21] A GUIDE TO SHARIAH LAW, *supra* note 9, at 15.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 16.
[25] *Id.*
[26] *Id.*
[27] A GUIDE TO SHARIAH LAW, *supra* note 9, at 17.
[28] *Id.*
[29] 29 C.F.R. § 1605.2 (2012).

that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[30] The concept of a parallel system of justice for a religious minority, however, would seem to exceed that constitutional command and foster isolation and separation of the minority from the rest of society.[31] It seems axiomatic that the Establishment Clause would be violated by a system of law that treats individuals differently solely on the basis of the religion that they practice.

Sharia law has been introduced to varying degrees in some of the most influential countries in Europe, including Great Britain, Germany, the Netherlands, France, and Spain.[32] Great Britain in particular has seen a dramatic increase in Islamic radicalism in conjunction with louder calls for the establishment of "parallel Sharia" within its borders; in fact, the British government sanctioned the creation of approximately eighty Sharia courts.[33] While all of these countries have relatively small Muslim populations—Britain's Muslim population, for example, accounts for approximately 4.8% of the total population—there has been increasing focus on compliance with the tenets of Sharia in these countries.[34] In addition, various statistics point to increasing radicalization of Muslim youth in Western countries such as Great Britain.[35]

This Comment will examine both the constitutionality of state statutes or constitutional amendments that seek to ban the consideration of Sharia law in judicial decision-making, and potential alternative forms of legislation that might achieve the same goal of separation of church and state that state constitutional amendments like the "Save Our State" Amendment seek to achieve. Part II of this Comment will provide background on Oklahoma's "Save Our State" Amendment, along with an analysis of the Tenth Circuit's decision in *Awad v. Ziriax*. In order to further examine the Tenth Circuit's analysis and frame the constitutional discussion of alternatives to the

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[30] U.S. CONST. amend. I.

[31] A GUIDE TO SHARIAH LAW, *supra* note 9, at 17–19.

[32] *See generally id.* at 23–25.

[33] Raheel Raza, *The Rise of Sharia in the West*, INT'L HUMANIST AND ETHICAL UNION (Mar. 15, 2012, 7:21 PM), http://iheu.org/rise-sharia-west.

[34] *Id.*

[35] *Id.*; Douglas Murray, *It's Official: Muslim Population of Britain Doubles*, GATESTONE INSTITUTE (Dec. 21, 2012, 4:30 AM), http://www.gatestoneinstitute.org/3511/britain-muslim-population-doubles; *see British Muslims Poll: Key Points*, BBC NEWS (Jan. 29, 2007, 1:04 PM), http://news.bbc.co.uk/2/hi/6309983.stm.

"Save Our State" Amendment to be offered in Part V, Part III will examine current Supreme Court jurisprudence of both the Establishment Clause and the Free Exercise Clause, which sets forth the parameters in which state legislation on religious issues must operate. Next, Part IV will provide an in-depth background on Sharia law and its influence in various Western countries, ultimately arguing that the increasing influence of Sharia law in Western countries and calls for parallel systems of Sharia have been driving forces behind the proposal of apparently anti-Sharia legislation in state legislatures across the United States. Returning to the "Save Our State" Amendment and similar state legislative initiatives, Part V will begin with a discussion of the principles of federalism and argue that states should be granted significant autonomy to craft rules of decision for their courts. This Part will then go on to analyze various possible state statutes and constitutional amendments that seek to limit consideration of religious law in the secular courts and determine whether each alternative would pass constitutional muster under either Establishment Clause or Free Exercise Clause analysis. Finally, Part VI will conclude by stating that regardless of one's views on the advisability of state constitutional amendments or statutes seeking to ban consideration of religious doctrine in state court, so long as those amendments or statutes do not run afoul of the Religion Clauses of the First Amendment, states should be free to craft rules of decision for their courts if they deem it to be of sufficient necessity to do so.

II. OKLAHOMA'S "SAVE OUR STATE" AMENDMENT AND AN ANALYSIS OF THE TENTH CIRCUIT'S DECISION IN *AWAD V. ZIRIAX*

A. The "Save Our State" Amendment

The Oklahoma House of Representatives originally introduced the "Save Our State" Amendment as a House Joint Resolution on January 11, 2010.[36] The stated purpose of the resolution was to "make courts rely on federal and state laws when deciding cases."[37] An Oklahoma House News Release provides a glimpse into the thinking of Oklahoma politicians as to the reasons why the Amendment was necessary. In the Release, Representative Rex Duncan said:

[36] Okla. B. History, 2010 Reg. Sess. H.J. Res. 1056, *available at* http://newlsb.lsb.state.ok.us/BillInfo.aspx?Bill=HJR1056&Session=1000.

[37] H.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010), *available at* http://webserver1.lsb.state.ok.us/cf_pdf/200910%20INT/hres/HJR1056%20INT.PDF.

> Oklahomans should not have to worry that their rights could be undermined by foreign court rulings in countries that do not have our respect for individual liberty and justice for all. Unfortunately, some judges in other states and on the federal bench have begun to cite international law in their court decisions, creating the need for this constitutional amendment.[38]

Based on this quote, one could infer that Oklahoma politicians were largely concerned with the possibility that the state's judges might attempt to rest their decisions on international law and sought to prevent that from happening. Both the Oklahoma House and Senate eventually passed the Joint Resolution almost unanimously on May 18, 2010, and May 24, 2010, respectively.[39]

The relevant text of the Amendment, as adopted by the Oklahoma Legislature, is as follows:

> The Courts . . . shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated thereto, and if necessary the law of another of the United States *provided the law of the other state does not include Sharia Law*, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. *Specifically, the courts shall not consider international law or Sharia Law.* The provisions of this subsection shall apply to all cases before the respective courts, including, but not limited to, cases of first impression.[40]

Thus, the language of the Amendment specifically mentioned "Sharia Law" twice. Following revisions of the Ballot Question by the Attorney General, the Amendment was put up for referendum as State Question 755 to Oklahoma voters on November 2, 2010, and just over 70% of voters approved it.[41] The Attorney General, perhaps

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[38] Okla. H.R. News Release, 52d Leg., 2d Reg. Sess., April 20, 2010, *available at* http://www.okhouse.gov/Media/News_Story.aspx?NewsID=3571.

[39] Okla. H.R. Journal, 2010 Reg. Sess. No. 62, May, 18, 2010, *available at* http://www.okhouse.gov/52LEG/okh02856.txt; Okla. S. Journal, 2010 Reg. Sess. No. 64, May 24, 2010, *available at* http://www.oksenate.gov/legislation/votes/votes_2010/2010_votes.aspx.

[40] H.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010) (emphasis added), *available at* https://www.sos.ok.gov/documents/legislation/52nd/2010/2R/HJ/1056.pdf.

[41] Awad v. Ziriax, 670 F.3d 1111, 1118 (10th Cir. 2012).

unwisely as the later discussion on Sharia will demonstrate, revised the Ballot Question to state that "*Sharia Law is Islamic Law. It is based on two principal sources, the Koran and the teachings of Mohammed.*"[42] The Tenth Circuit noted that "[w]ithout intervention, the proposed amendment would likely have been certified on November 9, 2010."[43]

B. The Decision in Awad v. Ziriax

On November 4, 2010, Muneer Awad, a practicing Muslim and the executive director of the Oklahoma Chapter of the Council on American-Islamic Relations (CAIR), brought suit in U.S. District Court against the Oklahoma Election Board seeking to enjoin the board from certifying the Amendment's election result.[44] Mr. Awad argued that the Amendment violated both the Establishment Clause and Free Exercise Clause due to the fact that the Amendment explicitly singled out Islam for negative treatment.[45] The district court issued a temporary restraining order on November 9, 2010, and on November 29, the court granted a preliminary injunction.[46] The Election Board then appealed the district court's decision on December 1, 2010.[47]

The Tenth Circuit considered Mr. Awad's argument that the Amendment violated the Establishment Clause in the context of the standard for granting a preliminary injunction.[48] It is important to note that the court declined to reach Mr. Awad's Free Exercise Clause claim because it found that his "Establishment Clause claim provide[d] sufficient grounds to uphold the preliminary injunction[.]"[49] The court first set out to determine whether it should apply the *Lemon* test or the *Larson* test—the two primary Establishment Clause tests—in the context of this case.

The *Lemon* test will be discussed in-depth in the Part III of this

[42] *Id.*

[43] *Id.* (citing Okla. State Board Election Rule § 230:35-3-91(c)).

[44] *Id.* at 1118–19.

[45] *Id.* at 1119.

[46] *Id.*

[47] *Awad*, 670 F.3d at 1119.

[48] *Id.* at 1125 (quoting Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC, 562 F.3d 1067, 1070 (10th Cir. 2009)) (stating that in order for the court to grant a preliminary injunction, the plaintiff must establish four factors: (1) substantial likelihood of success on the merits; (2) denial would result in irreparable injury; (3) the threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the public interest would not be adversely affected by the granting of the injunction).

[49] *Id.* at 1119.

Comment, but for the purposes of this case it is sufficient to note "that *Lemon* applies to 'laws affording uniform benefit to *all* religions, and not to provisions . . . that discriminate *among* religions.'"[50] Thus, the test would seem to apply only in instances where the law at issue does not single out a religion for disparate treatment, which would, of course, make it inapposite for application in *Awad*. The *Larson* test will also be discussed in greater detail below, but the Tenth Circuit noted that *Larson* applies when "a law discriminates among religions," and a law that does so will "survive only if it is 'closely fitted to the furtherance of any compelling interest asserted.'"[51] In other words, if a law discriminates against a particular religion, the traditional rubric of strict scrutiny commonly used in Fourteenth Amendment Equal Protection Clause analysis applies.

The Tenth Circuit held that the *Larson* test applied, and rejected the Election Board's arguments that *Larson* was not good law in light of the fact that it is rarely used or, in the alternative, was not applicable to the facts of this case.[52] In response to the Election Board's first argument, the court stated that "*Larson*'s rare use likely reflects that legislatures seldom pass laws that make 'explicit and deliberate distinctions between different religious organizations' as contemplated in *Larson*."[53] As to the second argument, Judge Matheson concluded that the Amendment clearly discriminated against Islam.[54] The Election Board argued that the Amendment only named Sharia law as an example and that the law's primary purpose was to ban Oklahoma courts from considering any religious law in their decisions.[55] Judge Matheson, however, pointed to the Amendment's plain language, which explicitly provided that state court judges are forbidden from considering the law of any state that includes Sharia law, "but does not prohibit Oklahoma courts from upholding and adhering to laws of other states that include the laws of any other religion."[56] The Election Board argued in the alternative that the use of the word "culture" in the Amendment was meant to be synonymous with "religion," and therefore that the amendment

[50] *Id.* at 1126 (quoting Larson v. Valente, 456 U.S. 228, 252 (1982)) (emphasis in original).

[51] *Id.* at 1127 (quoting *Larson*, 456 U.S. at 255).

[52] *Id.*

[53] *Awad*, 670 F.3d at 1127 (quoting *Larson*, 456 U.S. at 247 n.23).

[54] *Id.* at 1128.

[55] *Id.*

[56] *Id.* at 1128–29.

sought to ban consideration of all religious laws.[57] Judge Matheson rejected this argument as well, stating that even if that were the case, the Amendment would still purportedly permit judges to consider religious laws or precepts that are part of Oklahoma culture.[58]

Finding that *Larson*'s strict scrutiny test applied, Judge Matheson then went on to analyze the Amendment under the test.[59] The first prong of the strict scrutiny test requires that the State demonstrate a compelling interest.[60] In order to do so, the government must demonstrate a real, identifiable harm that it is seeking to rectify; "overly general statements of abstract principles do not satisfy the government's burden to articulate a compelling interest."[61] Judge Matheson found that the government failed to show a compelling interest because it included only one sentence in its supplemental brief on the issue, which simply stated that "Oklahoma certainly has a compelling interest in determining what law is applied in Oklahoma courts."[62] The court found that the government did "not identify any *actual problem* the challenged amendment seeks to solve."[63] Moreover, Judge Matheson noted that the government failed to identify any concrete example of a case in which an Oklahoma judge applied Sharia or international law, "let alone that such applications or uses had resulted in concrete problems in Oklahoma."[64] Therefore, the court concluded that the government had not asserted a compelling state interest.[65] Even though the court's finding on the compelling-interest prong of the test mooted the need to consider whether the law was narrowly tailored (the second prong of the test), Judge Matheson observed that "the amendment's complete ban of Sharia law is hardly an exercise of narrow tailoring."[66]

In the final analysis, it would appear that the Tenth Circuit was correct in affirming the district court's grant of the preliminary injunction. Judge Matheson's decision to apply the *Larson* test, rather than the *Lemon* test, was well reasoned because the explicit singling

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[57] *Id.* at 1129.

[58] *Id.*

[59] *Awad*, 670 F.3d at 1129.

[60] *Id.*

[61] *Id.* at 1130.

[62] *Id.* (quoting Supplemental Brief of Appellants at 16, *Awad*, 670 F.3d 1111 (No. 10-6273)).

[63] *Id.*

[64] *Id.*

[65] *Awad*, 670 F.3d at 1130.

[66] *Id.* at 1131.

out of Sharia law rendered the "Save Our State" Amendment fatally flawed. In light of that explicit discrimination, the court had no choice but to apply the *Larson* test.[67] With respect to Judge Matheson's application of strict scrutiny, the analysis seems to be accurate as to whether the government asserted a compelling interest. It is difficult to argue that the single sentence included by the government in its brief[68] is sufficient to state a compelling interest. In the abstract, the government's interest in setting up the rules of decision for its courts is certainly a compelling one,[69] but the government utterly failed to point to any concrete problem that it was seeking to solve. The government could have, at the very least, pointed to cases in other states' courts or at the federal level that used or considered religious law or the legal precepts of other nations in rendering a decision. Therefore, it seems fairly clear that the statute fails to pass constitutional muster under the *Larson* test.

III. SUPREME COURT ESTABLISHMENT CLAUSE AND FREE EXERCISE CLAUSE JURISPRUDENCE

For the purposes of ensuring a full and fair analysis of alternative forms of state statutes or constitutional amendments that achieve the same goals as the "Save Our State" Amendment, it is important to flesh out the current state of Supreme Court jurisprudence in the realm of both the Free Exercise Clause and the Establishment Clause. The alternatives to be proposed in Part V below might implicate one or the other (or both), and each alternative will be analyzed within the framework laid out in this Part.

A. The Establishment Clause

The *Lemon* Test, which is one of the most well-known tests used by the Court when considering statutes that provide benefits to religion and religious organizations, was set forth in the 1971 case of *Lemon v. Kurtzman*.[70] The case involved challenges to statutes in Rhode Island and Pennsylvania that provided state aid or benefits to nonpublic schools, including ones that were religiously affiliated.[71] The Rhode Island statute provided salary supplementation to nonpublic school teachers that taught secular subjects, while the

[67] *See id.* at 1126–27.
[68] *Id.* at 1130.
[69] *Id.* (stating that "Oklahoma's asserted interest is a valid state concern.").
[70] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[71] *Id.* at 606.

Pennsylvania statute provided for reimbursement of teachers' salaries, textbooks, and other materials only for courses related to secular subjects.[72]

The test set forth by the *Lemon* Court consists of three separate prongs: (1) the Court must consider whether the challenged statute has a secular legislative purpose;[73] (2) the statute's "principal or primary effect must be one that neither advances nor inhibits religion";[74] and (3) "the statute must not foster 'an excessive government entanglement with religion.'"[75] As to the Rhode Island statute, the Court determined that because the government would have to continually oversee the operations of subsidized teachers to ensure that those teachers were not injecting their religious views into the classroom, there was impermissible entanglement between the government and these religiously affiliated schools.[76] In the case of the Pennsylvania statute, the Court similarly found that "the very restrictions and surveillance necessary to ensure that teachers play a strictly non-ideological role give rise to entanglements between church and state."[77] Moreover, the fact that the statute involved direct aid to religiously affiliated schools pointed to a finding of excessive entanglement.[78] Accordingly, the Court determined that both the Rhode Island and Pennsylvania statutes were unconstitutional because they violated the third prong of the test—that is, they represented "excessive entanglement between government and religion."[79]

In contrast to the *Lemon* test, the *Larson* test, as set forth in *Larson v. Valente*, applies in cases in which a statute discriminates among different religions.[80] The case involved a Minnesota statute that required religious organizations receiving less than fifty percent of total contributions from members or related organizations to register with the Minnesota Department of Commerce and file a detailed annual disclosure.[81] All other religious organizations were

[72] *Id.* at 606–07.
[73] *Id.* at 612.
[74] *Id.*
[75] *Id.* at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).
[76] *See Lemon*, 403 U.S. at 618–20.
[77] *Id.* at 620–21.
[78] *Id.* at 621.
[79] *Lemon*, 403 U.S. at 614.
[80] Larson v. Valente, 456 U.S. 228, 252 (1982).
[81] *Id.* at 230–31.

exempt from the reporting and registration requirements.[82] The Court began its analysis with an important observation: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[83]

From this general principle, the Court ultimately determined that "when [the Court is] presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality."[84] The Court did briefly discuss the *Lemon* test, stating that the third prong—excessive entanglement—was most directly implicated in the case for substantially similar reasons as those presented in *Lemon* itself.[85] Ultimately, however, the Court determined that the law was not narrowly tailored to serve a compelling government interest, and hence that it failed to pass constitutional muster under strict scrutiny analysis.[86] The Court found the government's asserted interest in rooting out fraud to be unconvincing.[87]

B. The Free Exercise Clause

While the Court has analyzed cases under the Free Exercise Clause in various contexts, this subpart will focus on one particular class of laws: neutral laws of general application. Neutral laws of general application are those laws that do not expressly implicate any religion and are intended to apply in any setting, regardless of one's religious views.[88] The Court's Free Exercise Clause jurisprudence in the context of neutral laws of general application is somewhat muddled, as the description of the cases below will demonstrate.

One of the leading cases in Free Exercise Clause jurisprudence, *Braunfeld v. Brown*, held Pennsylvania's Sunday closing law to be constitutionally permissible even though it placed additional economic burdens on Orthodox Jewish business owners whose religion required them to close their businesses on Saturdays, as

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[82] *Id.* at 231–32.

[83] *Id.* at 244.

[84] *Id.* at 246.

[85] *See id.* at 251–54.

[86] *Larson*, 456 U.S. at 255.

[87] *See id.*

[88] *See* Emp't Div. v. Smith, 494 U.S. 872, 879–80 (1990), *superseded by statute*, American Indian Religious Freedom Act, Pub. L. No. 103-334, § 2, 108 Stat. 3123 (1994).

well.[89] These business owners argued that the statute violated the Free Exercise Clause because they would be forced to incur significant economic losses while adherents to other faiths, such as Christianity, would be given a considerable advantage.[90] The Court noted that the Sunday closing law at issue did "not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to the appellants operates so as to make the practice of their religious beliefs more expensive."[91] Moreover, the Court stated that legislatures could not possibly be expected to avoid enacting any "law regulating conduct that may in some way result in an economic disadvantage to some sects and not to others because of the special practices of the various religions."[92] As a result, the Court upheld Pennsylvania's Sunday closing law.[93] Accordingly, it is important to note that laws that do not necessarily prohibit one from practicing his or her religion will usually be deemed constitutional.

In another seminal case, *Sherbert v. Verner*, which seems in direct conflict with the holding in *Braunfeld*, the Court held unconstitutional the denial of unemployment benefits to a woman who was fired from her job for refusing to work on her day of Sabbath and subsequently refused to take other jobs for substantially the same reason.[94] The Court, in applying a form of strict scrutiny, found that the denial of benefits violated the Free Exercise Clause.[95] Specifically, Justice Brennan put forth a balancing test, stating that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."[96] The Court did not expressly overrule *Braunfeld*, even though the dissent argued that "the decision necessarily overrules *Braunfeld v. Brown*."[97] Justice Brennan sought to distinguish the case from *Braunfeld*, noting that the State in that case had "a strong state interest in providing one uniform day of rest for all workers[,]" and that it would not have been administratively feasible to exempt those whose faith required

[89] *See* Braunfeld v. Brown, 366 U.S. 599 (1961).

[90] *Id.* at 601–02.

[91] *Id.* at 605.

[92] *Id.* at 606.

[93] *Id.* at 609.

[94] *See* Sherbert v. Verner, 374 U.S. 398 (1963).

[95] *See id.* at 403–10.

[96] Emp't Div. v. Smith, 494 U.S. 872, 883 (1990) (citing *Sherbert*, 374 U.S. at 402–03).

[97] *Sherbert*, 374 U.S. at 421 (Harlan, J., dissenting).

that Saturday be their day of rest.[98] Justice Brennan seemed to take issue with the apparent conditioning of employment benefits on one's religious beliefs, which he held to "effectively [penalize] the free exercise of [appellant's] constitutional liberties,"[99] and found that the State's interest in this case in preventing fraudulent claims for unemployment benefits was not sufficiently compelling.[100] Despite Justice Brennan's attempt to distinguish *Braunfeld*, however, the ultimate results in these two cases seem difficult to square. Both cases concerned a law generally applicable to all citizens that placed an economic cost on the exercise of one's religion, yet they reached diametrically opposite results.

In a third case, the Court extended a religious exemption to Amish families allowing them to opt out of the state's compulsory school attendance statute.[101] In his opinion for the Court, Chief Justice Burger balanced the religious interests of Amish parents in removing their children from secular schools against the state's interest in ensuring that all students attended school until age sixteen.[102] Ultimately, he found that the Amish parents' interests in directing their children's religious upbringing outweighed the interest of the state in requiring these Amish children to attend school for, at most, two additional years.[103] Chief Justice Burger seemed to employ a standard of review akin to strict scrutiny, stating that "when the interests of parenthood are combined with a free exercise claim . . . more than merely a reasonable relation to some purpose within the competency of the State is required to sustain the validity of the State's requirement under the First Amendment."[104] Although the Court acknowledged the state's strong interest in providing for compulsory school attendance, the Court stated that because of the Amish parents' strong showing of the adverse effect of the compulsory attendance law on the practice of their religious beliefs, the burden shifted to the State "to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish."[105] Because the State was unable to do so, the Court

[98] *Id.* at 408–09.
[99] *Id.* at 406.
[100] *See id.* at 409.
[101] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).
[102] *See id.* at 215–36.
[103] *Id.* at 234–36.
[104] *Id.* at 233 (internal quotations omitted).
[105] *Id.* at 236.

exempted the Amish from this generally applicable law, while leaving the law intact.[106] The result in this case seems to be fairly consistent with that reached in *Sherbert* and further supports the notion that under certain circumstances, a religious group may be granted an exemption from a neutral law of general application upon a strong showing of the adverse effects of that law on that group's religious beliefs.

In a later case, however, the Court declined to extend a religious exemption to an Oregon law prohibiting the ingestion of peyote.[107] In *Employment Division, Department of Human Resources of Oregon v. Smith*, the respondents were fired from their jobs for ingesting peyote, and their unemployment compensation applications were subsequently denied upon a finding that they were disqualified from receiving benefits because they were fired for work-related misconduct.[108] In his opinion, Justice Scalia distinguished this case from prior cases involving neutral laws of general applicability in which the Court held that the Free Exercise Clause barred their application, reasoning that those cases involved not just the Free Exercise Clause, but the violation of some other constitutional right, as well.[109] Justice Scalia found that "[t]he present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right."[110] Moreover, Justice Scalia declined to extend the analysis in *Sherbert* to the situation in *Smith* because the case involved conduct prohibited by criminal law, and not merely a dispute over employment compensation.[111] Justice Scalia concluded his opinion by arguing against application of the strict scrutiny analysis employed in *Sherbert* to cases such as this one, where to do so would potentially invalidate a wide range of generally applicable laws and enable citizens to avoid criminal laws on the basis of their religious beliefs.[112] Thus, while the Court seemed to distinguish this case from prior Free Exercise Clause cases, it would appear that Justice Scalia sought to limit the use of heightened scrutiny in Free Exercise Clause cases involving neutral laws of general application.

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[106] *Id.* at 235–36.
[107] Emp't Div. v. Smith, 494 U.S. 872 (1990).
[108] *Id.* at 874.
[109] *Id.* at 881.
[110] *Id.* at 882.
[111] *See id.* at 882–85.
[112] *See id.* at 886–90.

One final case, which may be most pertinent to the following discussion, involved a challenge by practitioners of the Santeria religion to city ordinances seeking to prohibit the ritual slaughter of animals—*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[113] While the text of these ordinances may have been at least facially neutral, Justice Kennedy concluded that their actual purpose and effect was to single out the Santeria religion and suppress its religious practice of ritual slaughter.[114] In light of that finding, Justice Kennedy proceeded to apply strict scrutiny and found that the law was not narrowly tailored to serve a compelling governmental interest.[115] Importantly, this suggests that virtually any law, no matter how facially neutral or generally applicable it may appear, will likely be fatally flawed if there is evidence that its actual purpose was to single out a particular religious group for disparate treatment.

In sum, while all of the above-mentioned cases involved seemingly neutral laws of general application, they reached widely differing results. Based on the reasoning in these cases, it would appear that the determination of constitutionality is largely dependent upon the specific facts of each case. This notion will be important when applying Free Exercise Clause analysis to the alternative forms of legislation to be suggested in Part V below.

IV. A BACKGROUND ON SHARIA LAW AND THE CONCEPT OF PARALLEL SHARIA AND THEIR INFLUENCE IN WESTERN COUNTRIES

A. A Background on Sharia Law

In its most general sense, Sharia is defined as, "[t]he body of Islamic religious law applicable to police, banking, business, contracts, and social issues."[116] At its core, Sharia, which means "path" in Arabic, seeks first and foremost to govern "daily routines, familial and religious obligations, and financial dealings."[117] In addition, however, Sharia governs a wide variety of other behaviors, such as "inheritance, marriage and divorce, other moral issues, cleanliness and personal hygiene . . . criminal justice, and war."[118] In Islamic countries, Sharia has moved along two separate tracks: traditional

[113] 508 U.S. 520 (1993).
[114] *See id.* at 533–40.
[115] *See id.* at 546–47.
[116] BLACK'S LAW DICTIONARY1501 (9th ed. 2011).
[117] Johnson & Vriens, *supra* note 8.
[118] A GUIDE TO SHARIAH LAW, *supra* note 9, at 5.

Sharia and radical Islamist Sharia. Traditional Sharia is the most practiced form and is generally viewed as a personal guide, "limited to religious observance by Muslims, and elements of family law."[119] That is, traditional Sharia generally applies "to the personal practice of religious observance, family issues, and finance, *but not to crime or governance*."[120]

This traditional, or personal, form of Sharia thus mainly concerns the regulation of only personal behaviors of Muslims and does not conflict with secular law. For example, personal Sharia governs the products a Muslim may purchase, the foods a Muslim may eat, the beverages a Muslim may consume (alcohol is forbidden), and the manner in which a Muslim must pray or dress.[121] In Western countries, none of these requirements are foisted upon non-Muslims, and Muslims themselves voluntarily adhere to the guidelines of Sharia law; as a result, this form of Sharia does not pose any meaningful threat to Western legal systems.[122]

A more hotly contested area of traditional Sharia in which problems have arisen, however, is in the area of family law, particularly with respect to the disparate treatment of women in such matters.[123] Adherents of traditional Sharia generally view matters related to marriage and sexual relations to be governed by religious law and not by secular law.[124] In many cases, Muslims "may decline Western marriage, or be prevented by Western law . . . from turning to Western courts regarding divorce and inheritance."[125] In addition, some Muslim countries such as Saudi Arabia sanction female genital mutilation (FGM), "honor" murders, and forced marriage and divorce.[126] In fact, recent UN estimates show that "thousands of women are killed annually in the name of family honor."[127] While many Muslim societies have rejected FGM, it is still considered

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[119] *Id.*

[120] *Id.* at 6 (emphasis added).

[121] *Id.* at 7.

[122] *Id.*

[123] Johnson & Vriens, *supra* note 8.

[124] A GUIDE TO SHARIAH LAW, *supra* note 9, at 7.

[125] *Id.* at 7–8.

[126] *Id.* at 8.

[127] Johnson & Vriens, *supra* note 8; Hillary Mayell, *Thousands of Women Killed for Family "Honor"*, NATIONAL GEOGRAPHIC NEWS (Feb. 12, 2002), http://news.nationalgeographic.com/news/2002/02/0212_020212_honorkilling.html.

mandatory in some Muslim cultures.[128] Finally, a well-known example to those in Western countries is the disparate dress requirements imposed on Muslim men and women. While both men and women are expected to be modest, men are not subjected to the same strict body covering requirements to which Muslim women must adhere.[129] These examples demonstrate only some of the ways in which there is potential for conflict between Western conceptions of gender equality and Sharia family law.[130]

Generally speaking, although the above discussion demonstrates some tension between Western ideals and Islamic law, the relationship between traditional Sharia law and Western law has not historically been adversarial in nature.[131] In fact, Muslim immigrants in Western countries adhering to traditional Sharia actively partake in the political process in their new countries.[132] Moreover, these traditional Sharia adherents widely accept Western law, and traditional Sharia actually mandates that Muslims accept and abide by the law of the country in which they reside; if they refuse to do so, they are directed to leave that country for a Muslim one.[133] Finally, and perhaps most importantly, traditional Sharia *does not apply to non-Muslims*; for example, non-Muslims in Western countries are not required in any way to adhere to the Muslim ban on consumption of alcohol.[134] This rule of thumb applies in almost every Muslim country, with the exception of Saudi Arabia.[135] Accordingly, any fears among non-Muslims in Western countries that they might be forced to submit to the dictates of Sharia law would seem to be largely unfounded.

The radical Islamist conception of Sharia, however, is the one

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[128] Johnson & Vriens, *supra* note 8.

[129] *Islamic Dress Code*, MASJID AL-MUSLIMIIN, http://www.almasjid.com/content/islamic_dress_code (last visited April 8, 2013).

[130] It should be noted, however, that these examples are not being pointed out to cast aspersions on Muslims or even to posit that they are common practices in Muslim societies; rather, they are only mentioned for the purpose of demonstrating that there do exist Muslim practices that those in Western countries would view as anathema to their own conceptions of justice and equality.

[131] A GUIDE TO SHARIAH LAW, *supra* note 9, at 9.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.* at 9–10; *Saudi Arabia Country Specific Information*, TRAVEL.STATE.GOV, http://travel.state.gov/travel/cis_pa_tw/cis/cis_1012.html (last visited Apr. 17, 2013) ("Penalties for the . . . consumption of alcohol . . . in Saudi Arabia are severe. Convicted offenders can expect long jail sentences, heavy fines, public floggings, and/or deportation.").

that generates the greatest fear among non-Muslims that the Western legal system could one day be overtaken by Sharia principles of law. For the most part, radical elements of Sharia persist in very few Islamic countries, and adherents to radical Sharia make up a tiny minority of the minority Muslim populations in Western countries.[136] As stated previously, however, this Comment seeks to draw out some of the reasons why States would even consider adopting a law that would prohibit consideration of Sharia in their courts.[137] Such legislation ostensibly seeks to attack only the most radical elements of Sharia; it does not seek to undermine traditional Muslim practices, and indeed that is the view of at least some moderate Muslims.[138]

The radical conception of Sharia "holds that the West is an area of unbelief and that Muslims living in Western lands cannot obey Western laws but must establish their own Islamic legal standard."[139] Adherents of radical Sharia call for far more than simply personal practice of the Muslim faith; their stated goal is to create Islamic States governed solely by Sharia law.[140] Traditional and radical Sharia diverge largely in the area of family law, with the most ominous consequences of that divergence falling on women.[141] While traditional Sharia certainly contradicts typical Western views with respect to its treatment of women on certain issues, adherents to radical Sharia believe that women should be further subordinated in society.[142] Practices in Saudi Arabia serve as the best example of the operation of radical Sharia; the government in Saudi Arabia believes "that *Shariah* forbids women from driving vehicles, appearing in public without a full and loose body covering, [or] meeting with male non-relatives in the absence of a family member of the woman as chaperone . . . ."[143] In addition to the poor treatment of women that radical Sharia adherents advocate, they have also attempted in some cases to impose the dictates of Sharia on non-Muslims—for example,

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[136] A GUIDE TO SHARIAH LAW, *supra* note 9, at 10.

[137] *See supra* Part I.

[138] Raza, *supra* note 33 ("The ban on using Sharia law in State courts in the USA perfectly complies with the constitution because it bans not Islam but the violent interpretation of Islam.").

[139] Stephen Suleyman Schwartz, *Shariah Law and Islamist Ideology in Western Europe*, GATESTONE INSTITUTE (Sept. 24, 2009, 6:30 AM), http://www.gatestoneinstitute.org/817/shariah-law-and-islamist-ideology-in-western-europe.

[140] Raza, *supra* note 33.

[141] *See id.*

[142] A GUIDE TO SHARIAH LAW, *supra* note 9, at 10.

[143] *Id.* (emphasis in original)

radical Sharia adherents in a number of communities in Western countries sought to prohibit non-Muslim neighbors from dealing in any business having to do with alcohol or pigs.[144] Even more alarmingly, some in Britain alleged the existence of "no-go zones" for non-Muslims, in which the communities are essentially closed Muslim societies hostile towards non-Muslims.[145]

Radical Sharia further calls on its adherents to abstain from Western political processes and states that Western laws against terrorism are not applicable to them.[146] In addition, radical Sharia supporters "indoctrinate Muslims in the belief that adherence to Islamic law exempts immigrant Muslims or their offspring from obedience to common and criminal law in Western countries," and advocate that its adherents are to disregard the social and personal responsibilities that they may have with non-Muslims and even with moderate Muslims.[147] Radical Sharia adherents also believe that they are justified in behaving in a variety of manners that would seem repugnant to Western societies.[148] Essentially, radical Sharia espouses the view that because Sharia law derives from divine sources and secular law does not, "secular law may be ignored or violated."[149]

Apart from their view on the invalidity of secular law, adherents to radical Sharia advocate for a number of oppressive policies in the area of family law. For example, some supporters of radical Sharia apparently support the execution of homosexuals.[150] Adherents also believe that it is permissible for a husband to beat his wife if the wife becomes rebellious.[151] In addition, the practice of FGM seems to have broad support among radical Sharia adherents, and they believe that

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[144] *Id.* at 10–11.

[145] *See* Macer Hall, *Fury at 'No-go' Areas Ruled by the Fanatics*, DAILY EXPRESS (Jan. 7, 2008), http://www.express.co.uk/posts/view/30614/Fury-at-No-go-areas-ruled-by-the-fanatics; Jonathan Wynne-Jones, *Bishop Warns of No-go Zones for Non-Muslims*, THE TELEGRAPH (Jan. 6, 2008), http://www.telegraph.co.uk/new /uknews/1574694/Bishop-warns-of-no-go-zones-for-non-Muslims.html.

[146] A GUIDE TO SHARIAH LAW, *supra* note 9, at 11.

[147] *Id.*

[148] *Id.* ("Followers of radical *Shariah* also claim justification to physically degrade women, children, and employees, borrow money from non-Muslims without repaying it, contract student loans and default on them, rent property without fulfilling lease and other responsibilities, commit identity fraud and otherwise steal property, and generally defy the law followed by their neighbours, down to such simple matters as traffic offences.").

[149] *Id.*

[150] *Id.* at 12.

[151] A GUIDE TO SHARIAH LAW, *supra* note 9, at 12.

the cutting of the woman's clitoris actually promotes her health.[152] Also prevalent in radical Sharia is the concept of punishment for "crimes" completely disproportionate to the conduct at issue. In Saudi Arabia, for example, a person found guilty of adultery is subject to as many as 100 lashes.[153] A person caught drinking alcohol earns anywhere from forty to eighty lashes, and in one horrifying case, a Saudi man was given 4,750 lashes for having sex with his sister-in-law.[154] Even more examples of excessive punishment for "morals offenses" abound, but just these few examples illustrate the extreme views of society embraced by radical Sharia adherents. Adherents to traditional Sharia have expressed concern that adherents to radical Sharia seek to impose this strict form of law in all Muslim countries and even in Muslim communities within Western societies.[155]

Thus, Muslim thinking is somewhat bifurcated with respect to the nature of Sharia to which Muslims should adhere. While the large majority of Muslims support the traditional, or personal, conception of Sharia, radical Sharia adherents still seem to pervade the landscape, and their prominence in media reporting gives the public the impression that their numbers and influence on Muslim discourse are greater than they are in reality.[156] It is perhaps for this reason that many "Islamophobes" accord the imposition of Sharia law in Western countries the status of a clear and present danger, even though most empirical data would suggest the threat to be far less grave and far more remote in reality.[157] In addition, the diametrically opposing views of traditional and radical Sharia adherents may have

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[152] *Id.*

[153] Dr. Ahmad Shafaat, *Punishment for Adultery in Islam: A Detailed Examination*, ISLAMIC PERSPECTIVES, http://www.islamicperspectives.com/stoning1.htm (last visited Apr. 16, 2013).

[154] Saqr al-Amry, *4,750 Lashes, Six-Year Jail for Adultery*, ARAB NEWS (Feb. 18, 2002, 12:00 AM), http://english.arabnews.com/node/218604.

[155] A GUIDE TO SHARIAH LAW, *supra* note 9, at 15.

[156] *See, e.g.*, Andrew Gilligan, *Islamic Extremism: So Did We Cure the Problem?*, THE TELEGRAPH (Apr. 26, 2011, 8:34 PM), http://www.telegraph.co.uk/news/worldnews/wikileaks/8475290 /Islamist-extremism-so-did-we-cure-the-problem.html; Melanie Phillips, *Londonistan: Radical Islam and the Disintegration of British Society*, MIDDLE EAST FORUM (May 17, 2006), http://www.meforum.org/994/londonistan-radical-islam-and-the-disintegration.

[157] *See, e.g.*, *British Muslims Poll: Key Points*, BBC NEWS (Jan. 29, 2007, 1:04 PM), http://news.bbc.co.uk/2/hi/6309983.stm. For example, on the whole, 59% of British Muslims prefer British law to Sharia law versus only 28% who prefer Sharia. For the 16–24 year-old cohort, however, support for the imposition of Sharia rises to 37% versus 17% support from British Muslims age fifty-five and over. *Id.*

led to the creation of a "middle way" that is the topic of the next section: parallel Sharia.

B. History and Background on Parallel Sharia

Parallel Sharia strikes a balance between traditional Sharia and radical Sharia that was developed in Europe in the 20th century.[158] Parallel Sharia departs from traditional Sharia in that it advocates a separate legal system that Western governments would be charged with enforcing.[159] It differs from the radical conception of Sharia because "it is limited to personal and family law as well as, increasingly, financial transactions."[160] While some have characterized the concept of parallel Sharia as a compromise between Muslim minorities and Western governments, many non-Muslim commentators view it as merely a Trojan horse for the introduction of radical Sharia in their countries.[161] At first glance, the concept of parallel Sharia seems quite benign; it simply asks that Muslims be permitted to live under the laws of their religion and requests enforcement assistance from the Western government. But upon further inspection, the concept is rife with radical tinges because it advocates a separatist view of society in which a small minority lives under one set of rules while all others live under a different set of rules.[162] Moreover, the concept of parallel Sharia opens the door for radicalization, "since, in a Muslim-only legal structure, Muslim representatives of varying orientations could gain authority."[163]

While parallel Sharia poses as moderation between traditional and radical Sharia, the concept has actually been most strongly advanced in radical circles, with a great deal of scholarly contribution to the area originating in the United States.[164] Euphemistically termed "fiqh for minorities"—that is, Islamic legal interpretation for minorities—the concept of parallel Sharia is grounded in a false view of the history of Muslims living in non-Muslim lands.[165] Taha Jabir Al-

[158] A GUIDE TO SHARIAH LAW, *supra* note 9, at 15.

[159] *Id.*

[160] *Id.*

[161] *Id.* at 16.

[162] *Id.*

[163] A GUIDE TO SHARIAH LAW, *supra* note 9, at 16.

[164] *Id.*; *See, e.g.*, TAHA JABIR AL-ALWANI, TOWARDS A FIQH FOR MINORITIES: SOME BASIC REFLECTIONS (2003).

[165] AL-ALWANI, *supra* note 164, at xi–xiii; A GUIDE TO SHARIAH LAW, *supra* note 9, at 17.

Alwani, an Iraqi-born cleric formerly residing in the United States and a leading proponent of parallel Sharia, claimed that Muslims dominated the world in antiquity and affluent Muslims traveling to non-Muslim lands would regularly set up mini-societies over which Muslim law had complete dominion, without any interference from Western authorities.[166] This view of history is not grounded in any reality, but it appears to reinforce the view that Muslims living in non-Muslim lands should not be obligated to follow the dictates of secular law.[167]

Certainly, the concept of parallel Sharia could merely be accepted as a theory of reasonable accommodation of religion, and as such, would be perfectly acceptable in countries such as the United States under current constitutional jurisprudence.[168] This notion, however, proves too simplistic. The concept of reasonable accommodation has never incorporated the idea that an entire religious minority should be outside the purview of all secular law; rather, it merely posits that in certain circumstances, the law may bend, but not break, to a *reasonable* extent to accommodate one's religious preferences.[169] Indeed, the idea of reasonable accommodation can be seen in the case of *Wisconsin v. Yoder*, discussed *supra*, in which the Supreme Court granted a narrow exemption to Amish schoolchildren by allowing them to forgo two extra years of mandatory schooling.[170] Conversely, the Supreme Court's holding in *Employment Division v. Smith* could be viewed as a judgment that permitting exemption from a generally applicable drug law solely because of religious beliefs would be an *unreasonable* religious accommodation.[171] Parallel Sharia goes far beyond a reasonable accommodation of religion because it advocates a separatist viewpoint and would lead to further fracturing of the legal and social ties that bind all members of a given society together.[172]

Nonetheless, advocates of parallel Sharia continue to espouse the view that Western acceptance of the idea would actually serve the twin goals of unity among the Muslim population and comity between Muslims and non-Muslims.[173] It seems plain, however, that

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166 AL-ALWANI, *supra* note 164, at xi.

167 A GUIDE TO SHARIAH LAW, *supra* note 9, at 17.

168 *Id.*

169 *See generally* Emp't Div. v. Smith, 494 U.S. 872 (1990).

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

171 *See generally Smith*, 494 U.S. 872.

172 A GUIDE TO SHARIAH LAW, *supra* note 9, at 17.

173 *Id.* at 18.

permitting one minority population to live under its own set of rules would have one of two effects: feelings of resentment and suspiciousness between Muslims and non-Muslims, and incredulousness and disillusionment with the government for permitting such a dual legal system to operate in a country that seemingly respected the rule of law. As stated previously, an important aspect of the concept of parallel Sharia is the idea that Western governments would be charged with its enforcement.[174] If a Western government such as the United States were indeed to formally adopt such a system, it would seem difficult to argue that the system does not violate the precept of separation of church and state that most view as a fundamental requirement of modern democratic societies.

V. PRINCIPLES OF FEDERALISM AND ALTERNATIVES TO THE "SAVE OUR STATE" AMENDMENT

The concept of "Our Federalism" has been an important one since the founding of this country. Put simply, "Our Federalism" is the "recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."[175] The Founding Fathers were sensitive to the notion that State governments should be free to carry out their legitimate functions without undue interference from the federal government, and this notion still "occupies a highly important place in our Nation's history and its future."[176] The concept of "Our Federalism" is perhaps most definitively embodied in the Tenth Amendment to the Constitution, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[177] Thus, while the Constitution prescribes the outer bounds of the function of the federal government, it leaves to the States any powers not specifically delegated to the federal government.

Among the powers left to the states is the power to shape their respective judiciaries. Indeed, the broad power of the states to establish the nature, function, and rules of their courts has long been

[174] *Id.* at 21.
[175] Younger v. Harris, 401 U.S. 37, 44 (1971).
[176] *Id.* at 44–45.
[177] U.S. CONST. amend. X.

recognized.[178] While Article III of the United States Constitution and *Marbury v. Madison* place constraints on the ability of the Congress to shape the judiciary and its rules of decision (since the judiciary, and in particular the Supreme Court, is the final expositor of the law),[179] no such constraints exist at the State level except for those imposed by State constitutions or statutes. States are free to direct the rules of decision of their courts without federal interference, whether through legislation (to the extent possible under the State constitution), judicial action, or through the State constitutional amendment process.[180]

It is against this backdrop of federalism that this Comment offers potential alternatives to the "Save Our State" Amendment. At their core, state constitutional amendments or statutes like the "Save Our State" Amendment are merely rules of judicial procedure because they seek to provide the state courts with guidance as to the law on which decisions should be based.[181] As such, the states should be free to amend their state constitutions or enact legislation to force their judiciaries to adhere to particular rules of decision, so long as those amendments or statutes comport with the principles embodied in, and the individual rights secured by, the federal Constitution.[182] While it may be the case that the "Save Our State" Amendment was fatally flawed in its blatant discrimination, there is no reason why similar state constitutional amendments or statutes seeking to achieve the same goal of separation of church and state could not pass muster under First Amendment analysis.

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[178] Missouri v. Lewis, 101 U.S. 22, 30 (1879) ("It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter, and amount, and the finality and effect of their decisions . . . .").

[179] *See* U.S. CONST. art. III; Marbury v. Madison, 5 U.S. 137 (1803).

[180] *See* Erie. R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938) ("Supervision over either the legislative or judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence." (quoting Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting))).

[181] *See* H.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010) (requiring, among other things, Oklahoma courts to base decisions on federal and state law and regulations).

[182] *See Lewis*, 101 U.S. at 30.

A. The First Alternative to the "Save Our State" Amendment: An Amendment or Statute That Avoids Mention of Religion Entirely

In searching for constitutionally permissible alternatives to the "Save Our State" Amendment, the most obvious starting point would be a state constitutional amendment or statute that avoids the discriminatory singling out of a particular religion that proved to be the fatal flaw in the "Save Our State" Amendment under the Supreme Court's *Larson* Test.[183] That is, this type of state constitutional amendment would essentially mirror the "Save Our State" Amendment, with the references to Sharia stricken. Recall the language of the "Save Our State" Amendment:

> The Courts . . . shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated thereto, and if necessary the law of another state of the United States *provided the law of the other state does not include Sharia Law*, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. *Specifically, the courts shall not consider international law or Sharia Law.* The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.[184]

Thus, the type of state constitutional amendment proposed here would simply strike the italicized language above. Arizona passed a statute in 2011 with language similar to that proposed in this alternative in that it simply prohibited enforcement of foreign laws conflicting with the Constitution, laws, and treaties of the United States or with the constitution and laws of Arizona.[185] As of the time of this writing, Arizona's law is the only one with a similar aim as that of the "Save Our State" Amendment to achieve passage, and it has yet to be challenged in court as unconstitutional.[186] In light of those facts, the Arizona law would be a strong model for the drafting of a statute that enshrines the supremacy of domestic law while avoiding

[183] *See* Larson v. Valente, 456 U.S. 228, 246 (1982) (holding that laws discriminating among religion will be analyzed under the rubric of strict scrutiny); Awad v. Ziriax, 670 F.3d 1111, 1129–31 (10th Cir. 2012) (finding that the "Save Our State" Amendment failed to satisfy *Larson*'s strict scrutiny test).

[184] H.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010) (emphasis added).

[185] *See* ARIZ. REV. STAT. ANN. §§ 12-3101 to -3103 (2012).

[186] Uddin & Pantzer, *supra* note 1, at 371.

the unconstitutionally discriminatory pitfalls of the "Save Our State" Amendment. In assessing the effectiveness and constitutionality of a statute like Arizona's, the questions to be decided will be twofold: first, whether the resulting language would achieve the goals of strict adherence to federal and state law and separation of church and state that the original amendment sought; and second, whether the resulting language would raise any other constitutional problems.

As to the first question, while the amendment would clearly not have the same explicit effect as intended under the original, this revised amendment would certainly still enshrine the concept of the supremacy of state and federal law in state courthouses. How necessary such an amendment would be in light of the Supremacy Clause of the United States Constitution and the plenary police powers of the state under the Tenth Amendment is not a question that need be decided here; it is sufficient to state that there is no constitutional bar to codification of common law principles, and in fact, state legislatures across the country routinely engage in the practice of codification of judge-made law.[187] It must be noted, however, that while a law like Arizona's would certainly avoid the problem of discrimination seen in the "Save Our State" Amendment, avoidance of that problem would come at the expense of the goal of explicitly codifying a ban on consideration of religious doctrine in judicial decision-making.[188]

The more difficult question would be whether a constitutionally impermissible purpose in the context of the Religion Clauses of the First Amendment could still be gleaned from a statute similar to Arizona's, even though the statute contains no explicit mention of religion. The relevant language of the Arizona statute defines foreign law as "any law, rule or legal code or system other than the

[187] *See, e.g.*, S.C. CODE ANN. § 14-1-50 (2012) (reception statute for English common law); Moses v. Commonwealth, 611 S.E.2d 607, 613 (Va. Ct. App. 2005) (holding state statute to be a codification of the common law); Putrino v. Buffalo Athletic Club, 624 N.E.2d 676, 677 (N.Y. 1993) (finding the imposition of liability to be a codification of the common law).

[188] It is important to note that the Supreme Court has already declared that secular courts are prohibited from interpreting religious doctrine. *See* United States v. Ballard, 322 U.S. 78 (1944). Accordingly, it might be argued that this so-called "religious question doctrine" in fact obviates the need for explicit codification of a ban on consideration of religious doctrine in judicial decision-making. This Comment does not seek to pass judgment on the possible redundancy of such legislation in light of the "religious question doctrine." Rather, this Comment simply examines the constitutionality of such amendments, regardless of their ultimate necessity.

constitution, laws and ratified treaties of the United States and the territories of the United States, or the constitution and laws of this State."[189] Thus, the word "religion" appears nowhere in the statute; broadly interpreted, however, the "any law, rule or legal code or system" language could be construed to include religious doctrine. Of course, religious doctrines could be considered "systems" and religion does play an important part in a variety of legal systems across the globe, but it would be a tremendous leap to say that because the amendment mentions the word "system," it automatically has some discriminatory purpose against organized religion. Interpreted in a way that avoids the implication of religion, this language could mean merely that a state court is prohibited from using, as principal justification for its decision in a given case, law deriving from another country or culture. That is, the statute ostensibly permits consideration of laws deriving from another country or culture as persuasive, so long as those laws do not control the decision of the court. Assuming for the sake of argument, however, that the language of the statute does imply a ban on consideration of religious doctrine, analysis under the Establishment and Free Exercise Clauses of the First Amendment becomes appropriate.

As an initial matter, it seems clear that the *Larson* Test would not apply in this context because we are not "presented with a state law granting a denominational preference;"[190] indeed, the plain language of the proposed statute never mentions religion and thus could not possibly be construed to single out any specific religion. Therefore, the more appropriate test under the Establishment Clause for the purposes of the proposed statute would be the three-pronged *Lemon* Test, which requires that (1) the statute have a "secular legislative purpose;"[191] (2) the statute's "principal or primary effect . . . neither advances nor inhibits religion;"[192] and (3) "the statute [does] not foster 'an excessive government entanglement with religion.'"[193]

The proposed statute would meet the first prong of the test because its secular purpose ostensibly would be to protect citizens of a given state from the application of laws inconsistent with federal or state law. As a point of reference, the Arizona legislature itself

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189 ARIZ. REV. STAT. ANN. § 12-3101 (2012).

190 Larson v. Valente, 456 U.S. 228, 246 (1982).

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

192 *Id.*

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

declared that its intent in passing its statute was "to protect its citizens from the application of foreign laws when the application of a foreign law will result in the violation of a right guaranteed by the constitution of this state or of the United States or conflict with the laws of this State."[194] As to the second prong, the statute's principal or primary effect would simply be to force state judges to base their decisions on federal or state law and preclude application of foreign laws. Any effect that the law might have on religion could hardly be considered primary or principal. Thus, the proposed statute would pass the second prong of the test. Finally, the proposed statute would meet the third prong of the test because it would not require constant policing of interactions between the state judiciary and religion. Most of the policing and oversight of the state judiciary would be with respect to its general use of foreign law in its decision, with cases involving religious doctrine possibly comprising a small subset of cases within that larger class. Therefore, because the proposed statute would contravene neither the *Larson* Test nor the *Lemon* Test, the statute would likely be constitutional under Establishment Clause analysis.

In analyzing the proposed statute in the context of the Free Exercise Clause, probably the most appropriate point of departure for the analysis is the case of *Braunfeld v. Brown*, in which the Supreme Court upheld the constitutionality of Pennsylvania's generally applicable Sunday closing law even though it placed business owners observing a Saturday Sabbath at a decided disadvantage in relation to Sunday Sabbath observers.[195] The aim of the statute proposed here is generally to ensure that state court judges do not base their decisions on foreign law that is inconsistent with state or federal law. As such, the statute at most "imposes only an indirect burden on the exercise of religion"[196] and does not specifically outlaw any religious practice. Moreover, the proposed statute is only meant to apply to the state judiciary (a branch of government) and not to citizens generally, so it is difficult to see how the government could impose any substantial indirect burden on the citizenry's ability to live their lives in accordance with their respective faiths. Of course, the statute would indirectly affect citizens, since the cases that they bring in state court must necessarily be adjudicated in

[194] H.B. 2064, 50th Leg., 1st Reg. Sess. (Ariz. 2011), *available at* http://www.azleg.gov/legtext/50leg/1r/laws/0076.pdf.

[195] *See* Braunfeld v. Brown, 366 U.S. 599 (1961).

[196] *Id.* at 606.

accordance with the statute, thus leaving open the possibility that their rights under the Free Exercise Clause are implicated in a given case involving religion. That problem would be ameliorated, however, by the proposed statute's requirement that state judges' decisions be made in accordance with the United States Constitution. That language would presumably be meant to include not just the text of the Constitution itself, but also the meaning of the Constitution as determined by the Supreme Court. Therefore, the proposed statute would not appear to endanger the citizens' free exercise rights, and the statute would consequently pass constitutional muster under Free Exercise Clause analysis as a neutral law of general applicability.

B. Another Alternative: Broad Banning of Consideration of Religious Law as Controlling Authority in a Given Case

A second type of state constitutional amendment or statute would be one that broadly bans consideration of any religious doctrine or international law, but with more precise and narrow language than the "Save Our State" Amendment's command that state courts "shall not consider international law or Sharia law." That is, the amendment or statute could broadly ban state judges from relying chiefly upon foreign or religious law as a basis for their decisions. Again, a proposed (but not passed) Arizona statute provides a strong model for this type of legislation.[197] The proposed Arizona bill, known as the "Arizona Foreign Decisions Act," begins by forbidding the Arizona courts from incorporating "any body of religious sectarian law into any decision, finding or opinion as controlling or influential authority."[198] The bill goes on to define religious sectarian law as "any statute, tenet or body of law evolving within and binding a specific religious sect or tribe," including "Sharia law, Canon law, Halacha and Karma."[199]

Thus, the proposed statute avoids the discriminatory pitfalls of the "Save Our State" Amendment by providing for a blanket ban of consideration of any religious law in state court; the fact that the statute specifically mentions as examples all of the most prominent religious doctrines implies the statute's intention to ban consideration of any religious law. Moreover, the reach of the law is

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[197] *See* Uddin & Pantzer, *supra* note 1, at 373–74.

[198] H.B. 2582, 50th Leg., 1st Reg. Sess. (Ariz. 2011), *available at* http://www.azleg.gov/legtext/50leg/1r/bills/hb2582p.pdf.

[199] *Id.*

narrowed in that it limits the ban only to situations in which the reasoning in a court's decision relies primarily upon religious law. As such, this type of statute would ostensibly avoid the potential injury raised by Mr. Awad in *Awad v. Ziriax*, in which he claimed that the "Save Our State" Amendment would prohibit a court from properly probating his will.[200] Because probate of one's will in accordance with that individual's wishes would not be chiefly reliant upon religious law (one's religious beliefs might underlie the directions contained within the will, but that would not be an issue for the court to decide), but rather upon state probate statutes, such a judicial proceeding would not be likely to fall within the ambit of the proposed statute. This proposed statute seemingly provides a more robust alternative to the first statute proposed in terms of its explicit language regarding religion, but the question becomes whether this explicit ban runs afoul of the Religion Clauses.

As with the first proposed statute, Establishment Clause analysis under the *Larson* Test would seem to be inapposite here, since the proposed statute does not single out any one religion for disparate treatment, but rather treats all religions in the exact same manner. Thus, analysis under the *Lemon* Test will be more appropriate in this case. As to the first prong of the Test,[201] the purpose of the proposed statute is certainly secular in nature, since the chief aim of the proposed statute is to ensure that religious law does not infect the state courts. That is, the statute's goal is to affirm and enshrine the separation of church and state. With respect to the second prong, the question is whether the proposed statute would have the principal or primary effect of inhibiting religion. Given that courts are already generally forbidden to interpret religious law,[202] it is difficult to see how a statute that simply reinforces that notion by forbidding the use of religious law as controlling authority for a judicial decision would inhibit religion in any way. Religious practice would not be inhibited simply because courts are forbidden from entertaining arguments emanating out of a religious doctrine, and in fact a law such as the one proposed would have the effect of leveling the playing field for all religions by ensuring that judicial decisions will not favor one religion over another.[203] Thus, the proposed statute

[200] Awad v. Ziriax, 670 F.3d 1111, 1120 (10th Cir. 2012).

[201] *See supra* Part III.A.

[202] *See supra* note 188.

[203] *See* Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 243 (1963) (Brennan, J., concurring) ("[I]n order to give effect to the First Amendment's

meets the second prong of the *Lemon* Test. Finally, the third prong of the *Lemon* Test requiring that the statute not cause excessive entanglement between government and religion[204] presents a closer question. The proposed statute, however, is distinguishable from a statute involving, for example, interaction between government and religious organizations because this statute merely amounts to a state court procedural rule and thus will not require any monitoring of interactions between any apparatus of the government and religious institutions. Rather, the statute would simply require monitoring of the behavior of state judges to ensure that they are not injecting religious law into their decisions. While one could argue that this monitoring could amount to an entanglement between government and religion in the abstract, it could hardly be said to be a concrete entanglement of religious and governmental interests. For that reason, the proposed statute should satisfy the third prong of the *Lemon* Test.

Analysis under the Free Exercise Clause might raise constitutional difficulties in the context of this statute, since it does not neatly fit into the category of a neutral law of general application. In one sense, the proposed law is not neutral because it explicitly discusses religion. Thus, as between religion and irreligion, the law is not neutral. In another sense, however, the law is arguably neutral because it treats all religions in the same manner. Neutrality, therefore, is in the eye of the beholder. Accepting for the sake of argument that the law is, in fact, neutral, the most appropriate Supreme Court case on which to base analysis of the proposed statute under the Free Exercise Clause would likely be *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, in which the Supreme Court held a seemingly neutral statute to be unconstitutional because it prohibited a practice of ritual slaughter that could be traced to a specific religion.[205] The question, then, is whether the proposed statute could be construed as having an underlying discriminatory purpose that its

purpose of requiring on the part of all organs of government a strict neutrality toward theological questions, courts should not undertake to decide such questions.").

[204] *See supra* Part III.A.

[205] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). One could argue that this case might also be applicable in the context of the first proposed alternative, but because it was a strain to find any religious motivation underlying that statute, application of *Lukumi* was strategically left for the second alternative. Indeed, application of that case seems particularly appropriate where a law mentions all of the major world religions, but may, in fact, be targeting only one. That situation simply seems to more closely track the one faced in *Lukumi*.

plain language does not reveal. As an initial matter, the proposed statute here is distinguishable from the statute at issue in *Lukumi* because while that statute sought to outlaw a specific practice of private citizens, this proposed statute simply seeks to regulate the conduct of the state judiciary in issuing decisions. Therefore, there is no pattern of conduct attributable to a specific religious group that could be identified here; rather, the proposed statute functions more as a prophylactic measure to prevent judges from injecting religious doctrine into their opinions. Moreover, in order to show an underlying discriminatory purpose against a certain religion, one would have to demonstrate that this statute is attacking known conduct of a particular religious group, and one would be hard-pressed to find evidence of this kind. The legislative findings appended to the proposed Arizona bill provide significant insight into the thinking of state legislators in possibly passing such a statute; those findings are replete with references to the First, Ninth, and Tenth Amendments, along with several other provisions of the federal Constitution.[206] Based on the legislative findings, it would seem that the overall purpose of the law would be to prevent the establishment of law on the basis of religious sectarian law, with no particular view towards outlawing the practice of any specific religion. Indeed, the plain language of the statute specifically identifies and outlaws judicial reliance on the laws of any of the major world religions while ensuring that the list of examples provided is not exhaustive.[207] For all of these reasons, the proposed statute would not be violative of the Free Exercise Clause, and therefore the law would likely be deemed constitutional in the context of the First Amendment.

VI. CONCLUSION

In recent years, the concept of parallel Sharia has gained steam in Western countries as the voices of more radical Sharia adherents have grown louder. While these views in no way represent the views of the majority of Muslims living in Western countries, they are views that have the support of more than just a few on the margins. In light of this, several states, including Oklahoma, have attempted through legislation to prevent ideas such as parallel Sharia from

[206] *See* H.B. 2582, 50th Leg., 1st Reg. Sess. (Ariz. 2011), *available at* http://www.azleg.gov/legtext/50leg/1r/bills/hb2582p.pdf.

[207] *See id.*

gaining a foothold in their governments and thereby undermining the time-honored concept of separation of church and state. While an initiative like the "Save Our State" Amendment offends both constitutional principles and general notions of fairness and justice, there should be no reason why states cannot take other steps to ensure that their judges apply only secular, domestic law. The Supreme Court has long recognized the states' broad power to develop their respective judiciaries, and if state legislatures view it of sufficient importance to pass laws enshrining the supremacy of federal and state law in judicial decisions, then they should be permitted to do so. As this Comment demonstrates, states have alternatives to the "Save Our State" Amendment that do not suffer from the same unconstitutionally discriminatory infirmity and achieve essentially the same goal. This issue is certainly a thorny one and the debate will continue to rage on as to whether laws similar to the "Save Our State" Amendment are even necessary or advisable, but the states' power to pass non-discriminatory laws that seek to keep religion out of their courts should not be up for debate.