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Saving Oklahoma's "Save Our State" Amendment: A History of Sharia Law in the West and Suggestions to Save Similar State Legislation from Federal Constitutional Attack

Steven M. Rosato[*]

I. Introduction

In recent years, an increasing number of statehouses across the country have introduced bills and state 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, however, 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, and he obtained a preliminary injunction to prevent certification of the election result.[5] The State appealed the District Court's ruling to the Tenth Circuit, which subsequently 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

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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.J.R. 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_"Sharia_Law_Amendment",_State_Question_755_(2010).

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

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

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 be to 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.

The thinking with regard to the proper application of Sharia to Muslim adherents in Islamic countries has developed 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 adherents

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[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.*

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 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

[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.

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]

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] Notwithstanding that fact, 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

[19] *Id.*
[20] *Id.*
[21] A GUIDE TO SHARIAH LAW, *supra* note 9, at 15.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 16.
[25] *Id.*
[26] *Id.* (emphasis in original)

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 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]

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,

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[27] A GUIDE TO SHARIAH LAW, *supra* note 9, at 16.
[28] *Id.* at 17.
[29] 29 C.F.R. § 1605.2 (2012).
[30] U.S. CONST. amend. I.
[31] A GUIDE TO SHARIAH LAW, *supra* note 9, at 17–19.
[32] *See generally id.* at 23–125.
[33] Raheel Raza, *The Rise of Sharia in the West*, INT'L HUMANIST AND ETHICAL UNION (Mar. 15, 2012, 8:21 PM), http://iheu.org/rise-sharia-west.

accounts for approximately 4.8% of the total population, with several cities reporting double-digit minority populations—there has been increasing focus on compliance with the tenets of Sharia in these countries, and statistics point to increasing radicalization of Muslim youth in Western countries such as Great Britain.[34]

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 flesh out the Tenth Circuit's analysis and frame the constitutional discussion of alternatives to the "Save Our State" Amendment to be offered in Part V, Part III will examine current Supreme Court jurisprudence in the context of both the Establishment Clause and the Free Exercise Clause, which set 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 (specifically Great Britain), 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

[34] *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.

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 February 1, 2010.[35] The stated purpose of the resolution was to "requir[e] the courts to uphold and adhere to federal and state law."[36] 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:

> 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.[37]

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

[35] Okla. B. History, 2010 Reg. Sess. H.J. Res. 1056.
[36] *Id.*
[37] Okla. H.R. News Release, 52d Leg., 2d Reg. Sess., April 20, 2010.

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.[38]

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.[39]

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.[40] The Attorney General, perhaps ill advisedly 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."[41] The Tenth Circuit noted that "[w]ithout intervention, the proposed amendment would likely have been certified on November 9, 2010."[42]

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

[38] Okla. H.R. Journal, 2010 Reg. Sess. No. 62, May, 18, 2010; Okla. S. Journal, 2010 Reg. Sess. No. 64, May 24, 2010.
[39] H.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010) (emphasis added).
[40] Awad v. Ziriax, 670 F.3d 1111, 1118 (10th Cir. 2012).
[41] *Id.*
[42] *Id.* (citing Okla. State Board Election Rule § 230:35-3-91(c))

U.S. District Court against the Oklahoma Election Board seeking to enjoin the board from certifying the Amendment's election result.[43] 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.[44] The district court issued a temporary restraining order on November 9, 2010, and on November 29, a preliminary injunction was granted.[45] The Election Board then appealed the district court's decision on December 1, 2010.

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.[46] 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 provides sufficient grounds to uphold the preliminary injunction[.]"[47] 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 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.'"[48] 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 this case.

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[43] *Id.* at 1118–19.
[44] *Id.* at 1119.
[45] *Id.*
[46] *Awad*, 670 F.3d at 1126 (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).
[47] *Id.* at 1119.
[48] *Id.* at 1126 (quoting Larson v. Valente, 456 U.S. 228, 252 (1982)) (emphasis in original).

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 so doing will "survive only if it is 'closely fitted to the furtherance of any compelling interest asserted.'"[49] 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 in this case 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.[50] 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*."[51] As to the second argument, Judge Matheson concluded that the Amendment clearly discriminated against Islam.[52] 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.[53] 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."[54] 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

[49] *Id.* at 1127 (quoting *Larson*, 456 U.S. at 255).
[50] *Id.*
[51] *Id.* (quoting *Larson*, 456 U.S. at 247 n.23).
[52] *Awad*, 670 F.3d at 1128.
[53] *Id.*
[54] *Id.* at 1128–29.

therefore that the amendment sought to ban consideration of all religious laws.[55] 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.[56]

Finding that *Larson*'s strict scrutiny test applied, Judge Matheson then went on to analyze the Amendment under the test.[57] The first prong of the strict scrutiny test requires that the State demonstrate a compelling interest.[58] 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."[59] 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."[60] The court found that the government did "not identify any *actual* problem the challenged amendment seeks to solve."[61] Moreover, Judge Matheson held 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."[62] Therefore, the court concluded that the government had not asserted a compelling state interest.[63] Even though the court's finding on the compelling-interest prong of the test mooted the need to consider

[55] *Id.* at 1129.
[56] *Id.*
[57] *Id.*
[58] *Awad*, 670 F.3d at 1129.
[59] *Id.* at 1130.
[60] *Id.* (quoting Aplt. Supp. Br. at 16).
[61] *Id.* (emphasis in original)
[62] *Id.*
[63] *Id.*

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."[64]

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 language of the "Save Our State" Amendment was fatally flawed by its explicitly singling out of Sharia law. In light of that explicit discrimination, the court had no choice but to apply the *Larson* test. With respect to Judge Matheson's application of strict scrutiny, the analysis seems to be spot on 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[65] 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,[66] 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 that the "Save Our State" Amendment seeks to achieve, 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

[64] *Awad*, 670 F.3d at 1131.
[65] *Id.* at 1130.
[66] *Id.* (stating that "Oklahoma's asserted interest is a valid state concern.")

proposed in Part V below might implicate on 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 the chief test 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*.[67] The case involved challenges to statutes in Rhode Island and Pennsylvania that provided state aid or benefits to nonpublic schools.[68] The Rhode Island statute provided salary supplementation to nonpublic school teachers that taught secular subjects, while the Pennsylvania statute provided for reimbursement of teachers' salaries, textbooks, and other materials only for courses related to secular subjects.[69]

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;[70] (2) the statute's "principal or primary effect must be one that neither advances nor inhibits religion";[71] and (3) "the statute must not foster 'an excessive government entanglement with religion.'" [72] 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."[73] 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

[67] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[68] *Id.* at 602.
[69] *Id.* at 602–03.
[70] *Id.* at 612.
[71] *Id.*
[72] *Id.* at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).
[73] *Lemon*, 403 U.S. at 614.

these religiously affiliated schools.[74] 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."[75] Moreover, the fact that the statute involved direct aid to religiously affiliated schools pointed to a finding of excessive entanglement.[76]

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.[77] 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.[78] All other religious organizations were exempt from the reporting and registration requirements.[79] 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."[80]

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."[81] The Court did provide a brief discussion of the *Lemon* test in the context of this case, stating that the third prong—excessive entanglement—was most directly implicated in *Larson* for substantially

[74] *See id.* at 618–20.
[75] *Id*. at 620–21.
[76] *Id.* at 621.
[77] Larson v. Valente, 456 U.S. 228 (1982).
[78] *Id.* at 230–31.
[79] *Id.* at 231–32.
[80] *Id.* at 244.
[81] *Id.* at 246.

similar reasons as those presented in *Lemon* itself.[82] 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.[83] The Court found the government's asserted interest in rooting out fraud to be unconvincing.[84]

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.[85] 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 well.[86] 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.[87] 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

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[82] *See id.* at 251–54.
[83] *Larson*, 456 U.S. at 255.
[84] *Id.*
[85] *See* Emp't Div. v. Smith, 494 U.S. 872, 879–80 (1990).
[86] *See* Braunfeld v. Brown, 366 U.S. 599 (1961).
[87] *Id.* at 601–02.

expensive."[88] Moreover, the Court stated that legislatures could not possibly be expected to "enact no 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."[89] As a result, the Court upheld Pennsylvania's Sunday closing law.[90] Accordingly, it is important to note that laws that do not necessarily prohibit one from practicing his or her religion will 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.[91] The Court, in applying a form of strict scrutiny, found that the denial of benefits violated the Free Exercise Clause.[92] 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."[93] The Court did not expressly overrule *Braunfeld*, even though the dissent argued that "the decision necessarily overrules *Braunfeld v. Brown*."[94] 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 that Saturday be their day of rest. [95] Justice Brennan seemed to take issue with the apparent conditioning of employment benefits on one's religious beliefs, which he

[88] *Id.* at 605.
[89] *Id.* at 606.
[90] *Id.* at 609.
[91] *See* Sherbert v. Verner, 374 U.S. 398 (1963).
[92] *See id.* at 403–10.
[93] Emp't Div. v. Smith, 494 U.S. 872, 883 (1990) (citing *Sherbert*, 374 U.S. at 402-03).
[94] *Sherbert*, 374 U.S. at 421 (Harlan, J., dissenting).
[95] *Id.* at 408–09.

held to "effectively [penalize] the free exercise of [appellant's] constitutional liberties,"[96] and found that the State's interest in this case in preventing fraudulent claims for unemployment benefits was not sufficiently compelling.[97] Despite 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.[98] 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.[99] 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.[100] 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."[101] Although the Court acknowledged the state's strong interest in providing for compulsory school attendance, the Court stated that because of Amish's 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

[96] *Id.* at 406.
[97] *Id.* at 409.
[98] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).
[99] *See id.* at 215–36.
[100] *Id.*
[101] *Id.* at 233 (internal quotations omitted).

particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish."[102] Because the State was unable to do so, the Court exempted the Amish from this generally applicable law, while leaving the law intact.[103] 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.[104] In *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.[105] 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.[106] 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."[107] Moreover, Justice Scalia declined to extend the analysis in *Sherbert* to this case because this case involved conduct prohibited by criminal law, and not merely a dispute over employment compensation.[108] Justice Scalia concluded his opinion by arguing against application of the strict scrutiny analysis

[102] *Id.* at 236.
[103] *Id.* at 235–36.
[104] Emp't Div. v. Smith, 494 U.S. 872 (1990).
[105] *Id.* at 872.
[106] *Id.* at 881.
[107] *Id.* at 882.
[108] *See id.* at 882–85.

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.[109] 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.

One final case—which may be most pertinent to the discussion to follow—involved a challenge by practitioners of the Santeria religion to city ordinances seeking to prohibit the ritual slaughter of animals.[110] 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.[111] 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.[112] 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 alternatives 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

[109] *See id.* at 886–90.
[110] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
[111] *See id.* at 533–40.
[112] *See id.* at 546–47.

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."[113] At its core, Sharia, which means "path" in Arabic, seeks first and foremost to govern "daily routines, familial and religious obligations, and financial dealings."[114] 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."[115]

In Islamic countries, Sharia has moved along two separate tracks: traditional Sharia and 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."[116] That is, traditional Sharia generally applies "to the personal practice of religious observance, family issues, and finance, *but not to crime or governance*."[117] Thus, in its traditional sense, Sharia is relegated to personal religious issues and family issues, but plays no part in the administration of the secular government—and nearly every Muslim country (save for Sudan, Iran, and Saudi Arabia) adheres to this point of view.[118]

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

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[113] BLACK'S LAW DICTIONARY 1501 (9th ed. 2011).
[114] Johnson & Vriens, *supra* note 8.
[115] A GUIDE TO SHARIAH LAW, *supra* note 9, at 5.
[116] *Id.*
[117] *Id.* at 6 (emphasis added).
[118] *Id.* at 6–7.

dress.[119] In Western countries, none of these requirements is 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.[120]

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.[121] Adherents of traditional Sharia generally view matters related to marriage and sexual relations to be governed by religious law and not by secular law.[122] In many cases, Muslims "may decline Western marriage, or be prevented by Western law . . . from turning to Western courts regarding divorce and inheritance."[123] Thus, while traditional Sharia may vindicate the rights of women after the fact, the poor and unequal treatment of women in family matters continues to pervade Muslim societies.[124] For example, while the practice is declining (especially among more affluent Muslims), traditional Sharia has allowed for arranged marriages, provided that they are consensual but not clearly stating that the woman has a choice in the matter.[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

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[119] *Id.* at 7.
[120] *Id.*
[121] Johnson & Vriens, *supra* note 8.
[122] A GUIDE TO SHARIAH LAW, *supra* note 9, at 7.
[123] *Id.* at 7–8.
[124] *Id.* at 8.
[125] *Id.*
[126] *See generally*, U.N. Div. for the Advancement of Women, *Considerations of Honor Crimes, FGM, Kidnapping/Rape, and Early Marriage in Selected Arab Nations* (May 11, 2009), *available at* http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20_Sherifa%20Zuhur%20-%20II_.pdf [hereinafter *Considerations of Honor Crimes*].

honor."[127] While many Muslim societies have rejected FGM, it is still considered 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, while 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 and reject terrorism in all of its forms.[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

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[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.

[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.*

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 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 actually seeks to attack only the most radical elements of Sharia and does not seek to undermine in any way 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 depart largely in the area of family law, with the most ominous

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[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.").

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

[137] *See supra* p. 6.

[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] *Id.*

[140] *Id.*

consequences of that departure 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, 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 frighteningly, 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

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[141] *Id.*
[142] A GUIDE TO SHARIAH LAW, *supra* note 9, at 10.
[143] *Id.* (emphasis in original)
[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/news/uknews/1574694/Bishop-warns-of-no-go-zones-for-non-Muslims.html.
[146] A GUIDE TO SHARIAH LAW, *supra* note 9, at 11.

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 or refuses to have sex with him.[151] In addition, the practice of FGM seems to have broad support among radical Sharia adherents, and they believe that the cutting of the woman's clitoris actually serves to dignify or purify women.[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

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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 offenses.")

149 *Id.*

150 *Id.* at 12.

151 *Considerations of Honor Crimes*, *supra* note 126, at 21.

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.

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. It is perhaps for this reason that many so-called "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. In addition, the diametrically opposing views of traditional and radical Sharia adherents may have 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 is a somewhat middle road between traditional Sharia and radical Sharia that was developed in Europe in the 20th century.[156] Parallel Sharia departs from traditional Sharia in that it advocates a separate legal system that Western governments would be charged with enforcing.[157] It differs from the radical conception of Sharia because "it is limited to personal and family law as well as, increasingly, financial transactions."[158] 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

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

introduction of radical Sharia in their countries.[159] 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.[160] 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."[161]

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.[162] 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.[163] Taha Jabir Al-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.[164] 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.[165]

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[159] A GUIDE TO SHARIAH LAW, *supra* note 9, at 16.
[160] *Id.*
[161] *Id.*
[162] *Id.; See, e.g.*, Taha Jabir al-Alwani, TOWARDS A FIQH FOR MINORITIES: SOME BASIC REFLECTIONS (2003).
[163] Al-Alwani, *supra* note 162, at xi–xiii.
[164] *Id.* at xi.
[165] A GUIDE TO SHARIAH LAW, *supra* note 9, at 17.

Certainly, the concept of parallel Sharia could merely be accepted as a theory of reasonable accommodation of religion, and as such, perfectly acceptable in countries such as the United States under current constitutional jurisprudence.[166] 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.[167] 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.[168] Conversely, the Supreme Court's holding in *Employment Division v. Smith* could be viewed as a judgment that to permit exemption from a generally applicable drug law solely because of religious beliefs would be to *unreasonably* accommodate one's religion.[169] 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.[170]

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.[171] It seems plain, however, that 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

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[166] *Id.*
[167] *See generally* Emp't Div. v. Smith, 494 U.S. 872 (1990).
[168] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).
[169] *See Smith*, 494 U.S. 872 (1990).
[170] A GUIDE TO SHARIAH LAW, *supra* note 9, at 17.
[171] *Id.* at 18.

disillusionment with the national government for permitting such a dual system of law to operate in a country that seemingly respected the rule of law. It is perhaps possible that supporters of parallel Sharia are aware of the nature of the actual effects of such a system on society, but that their goal is to give Sharia law a foothold in Europe and the United States for possibly nefarious purposes in the future.[172] As stated previously, an important aspect of the concept of parallel Sharia is the idea that Western governments would be charged with its enforcement.[173] 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.

C. Sharia Law in Great Britain

In light of the shared history and interests of the United States and Great Britain, Great Britain's experience with Sharia law in recent years provides a good opportunity to gain a sense of the specific developments occurring in Western countries with respect to Sharia. Britain is currently home to approximately 2.7 million Muslims and 1,500 mosques.[174] Over the last thirty years or so, Britain has become a hotbed of Islamic radicalism in Europe.[175] In cities with significant Muslim populations such as London, Birmingham, and Oldham, radicalism takes the form of "jihadist financing and recruitment activity, mainly introduced from Pakistan[.]"[176] Great Britain's response to the increasing radicalization of Muslim communities is not particularly assertive, although the government has acted swiftly and decisively in the face of the

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[172] *Id.*
[173] *Id.* at 21.
[174] Murray, *supra* note 34; *UK Mosque/Masjid Directory*, MUSLIMSINBRITAIN.ORG, http://mosques.muslimsinbritain.org/ (last visited Apr. 21, 2013).
[175] 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.
[176] A GUIDE TO SHARIAH LAW, *supra* note 9, at 23.

most radical elements in society.[177] The government has sought to improve dialogue through interaction with so-called moderates in order to dissuade radicals from violence, but this course of action has unfortunately not improved the situation.[178]

In recent years, the religious and political elite in Great Britain have waded into controversial waters with respect to the role of Sharia law in British civil law generally.[179] In 2008, for example, the Archbishop of Canterbury urged "acceptance of some (unspecified) aspects of *Shariah* alongside existing civil law in the United Kingdom."[180] Soon thereafter, the British equivalent of the Chief Justice of the Supreme Court lent credence to the Archbishop's statement by showing support for resolution of business and family disputes via Sharia mediation.[181] The Lord Chief Justice, however, was careful to point out that moral[182] or criminal punishment could not be handed down via any Sharia mediation process.[183]

This willingness to accept Sharia as a legitimate means for dispute resolution seems to have grown out of developments beginning in the 1990s that focused on greater accommodation of Islamic business practices, such as the Islamic bar against interest payments on loans.[184] While the accommodation of Islamic beliefs in business and finance is hardly a cause for concern, these accommodations appear to have emboldened radical Sharia adherents to push for even greater concessions in other facets of society such as, for example, the issue of forced marriages.[185] As the last decade wore on, Islamic fundamentalists pushed for the establishment of Islamic holidays as national holidays, and it was reported that 40% of British Muslims favored

[177] *Id.*
[178] *Id.* at 23–24.
[179] *Id.* at 24.
[180] *Id.*
[181] *Id.*
[182] *See supra* p. 25 for examples of "morals" punishment.
[183] A GUIDE TO SHARIAH LAW, *supra* note 9, at 24.
[184] *See id.* at 25–29.
[185] *Id.* at 29.

the use of Sharia in Great Britain.[186] In the aftermath of the statements made by fundamentalists and the report, apparently moderate voices of the British Muslim community spoke out, including Member of Parliament Shahid Malik, who condemned demands for Sharia and the creation of national holidays for Islamic holidays.[187] Mr. Malik recited the principle of the moderate and traditional conception of Sharia that Muslims are to abide by the laws of the country in which they live.[188] Although a great majority of British Muslims continues to hold moderate views with respect to the proper place of Sharia in non-secular society, it appears as though the loud voices of Islamic fundamentalists have gained a foothold with the younger generation of British Muslims, as statistics published in 2007 by Policy Exchange demonstrate.[189] In addition to the Policy Exchange survey, a 2008 YouGov survey of Muslim students in Great Britain found that "32 per cent of Muslim students polled said killing in the name of religion was justified, compared to 2 per cent of non-Muslims."[190]

In view of the changing attitudes among younger British Muslims, it is important to examine the ways in which radical Sharia adherents in Britain seek to influence society. One such avenue of influence for radical Sharia advocates has been in the area of family and schooling, and these radicals have "call[ed] for Muslim children to be educated only in Islamic

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[186] *The Latest WikiLeaks Revelation: 1 in 3 British Muslim Students Back Killing for Islam and 40% Want Sharia Law*, MAIL ONLINE (Dec. 22, 2010, 10:24 AM), http://www.dailymail.co.uk/news/article-1340599/WikiLeaks-1-3-British-Muslim-students-killing-Islam-40-want-Sharia-law.html. It must be noted that reporting on Muslim support for the introduction of Sharia appeared misleading, since the reporting failed to distinguish "between *Shariah* as questionable but nonviolent concepts in finance and medicine" and the more radical elements of Sharia involving harsh punishments such as stoning and amputation, thus leaving the public "with the strong impression that nearly half of British Muslims sought the introduction" of such punishments to both Muslims and non-Muslims alike. A GUIDE TO SHARIAH LAW, *supra* note 9, at 30.

[187] A GUIDE TO SHARIAH LAW, *supra* note 9, at 31.

[188] *Id.* at 31–32.

[189] *See 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, fifty-nine percent of British Muslims prefer British law to Sharia law versus twenty-eight percent who prefer Sharia. For the 16–24 year-old cohort, however, support for the imposition of Sharia rises to thirty-seven percent versus seventeen percent support from British Muslims age fifty-five and over. *Id.*

[190] Jamie Howard, *Radical Islam Gains Ground in Campuses*, THE GUARDIAN (July 26, 2008), http://www.guardian.co.uk/world/2008/jul/27/islam.highereducation.

schools."[191] At this point, efforts to gather support among the Muslim community for the teaching of an Islamic curriculum in state-funded schools has largely failed.[192] Indeed, of 376,000 Muslim school-age children, only 1,770 attended state-funded Muslim schools as of 2007.[193] The specter of potential radicalization looms, however, even in non-religious state schools, as evidenced by the Muslim Council of Britain's (MCB) 2007 call "to introduce 'parallel *Shariah*' in state schools" through a plan that sought to limit Muslim students' exposure to the ideas of other religions and impose Muslim dress codes and special accommodations for Muslim students.[194] In addition, "[t]he MCB has sought to introduce anti-evolution, anti-Jewish, and general anti-Western literature into British state schools."[195] Notwithstanding the MCB's efforts, however, it must be noted "that Muslim parents in Western Europe continue to mainly seek education for their children in non-Muslim state schools."[196] But the fact remains that organizations in Great Britain such as the MCB continue to push their radical agenda, and their voices continue to be heard.

One of the most important undertakings of radical Sharia adherents in Great Britain is their effort to introduce the concept of parallel Sharia, discussed previously.[197] While there already exist entirely unproblematic Islamic tribunals to adjudicate mostly matters related to marriage and divorce, advocates of radical Sharia seek "official state enforcement of religious decrees" to which all Muslims, whether they want to or not, are obligated to adhere.[198] Of course, if two parties to a dispute agree to have the matter heard before a religious arbitration

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[191] A GUIDE TO SHARIAH LAW, *supra* note 9, at 35.
[192] *See id.* at 37.
[193] *Faith Schools Set for Expansion*, BBC NEWS (Sept. 10, 2007, 5:34 PM), http://news.bbc.co.uk/2/hi/6986398.stm.
[194] A GUIDE TO SHARIAH LAW, *supra* note 9, at 37–38.
[195] *Id.* at 38.
[196] *Id.*
[197] *See supra* Part IV.B.
[198] A GUIDE TO SHARIAH LAW, *supra* note 9, at 39.

tribunal, there is no problem in seeking enforcement of any judgment rendered by such a tribunal in a court of law.[199] A problem would arise, however, if such tribunals were able to gain jurisdiction over a dispute in the absence of an agreement between the parties to have the matter so adjudicated, since arbitration is fundamentally rooted in contract law.[200] This type of obligatory submission to religious adjudication of disputes is exactly the type of system that radical Sharia adherents in Britain seek, even though a decisive majority of British Muslims oppose such a system and fear backlash as a result of these radicals' calls for such a system.[201] In addition to pushback from the Muslim population at large, the British Muslim legal community is strongly opposed to the introduction of obligatory Sharia law enforced and administered by the state.[202] Therefore, while it is certainly troubling that there exist influential groups in Great Britain pushing for a parallel system of Sharia, the strong opposition to the implementation of such a system among British Muslims should prove to be a strong safeguard in the years to come.

The majority of Muslims living in Western countries seem to live their lives in much the same manner as adherents of other faiths—they seek to follow the moral and ethical obligations imposed on them by their religion while complying with the obligations that secular law imposes.[203] Unfortunately, however, a minority of radical Muslims in Western countries—through louder and more widely reported protestations—have caused considerable consternation and stoked fear that the majority of Muslims seek to live under their own system of law based on the Islamic faith. As this Part demonstrates, this notion could not be further from the truth. This

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[199] *Id.*
[200] *See* BLACK'S LAW DICTIONARY 119 (9th ed. 2011).
[201] A GUIDE TO SHARIAH LAW, *supra* note 9, at 40.
[202] *Id.* at 41.
[203] *See* Sheikh Yusuf al-Qaradawi, *Duties of Muslims Living in the West*, QURANFORALL.ORG, http://www.quranforall.org/fatawaa/duties.htm (last visited Apr. 21, 2013).

is not to say that Islamic radicalism in Western countries is not a cause for concern, however. Fears of increasing influence of Muslim radicals are perfectly legitimate, and Western governments should not hesitate to take steps to safeguard against further radicalization in the future. Whether stemming the tide of increasing radicalization is achieved through appropriate legislation, better education of both Muslims and non-Muslims on the virtues of a secular government separate from religion,[204] through better and more frequent reporting on the views of everyday mainstream Muslims, or through a combination of those initiatives, this issue is a challenge that Western countries must address in order to preserve their respective systems of government and quell the divisiveness that religious issues such as this one so often foment. Dismissing the concerns that many harbor with respect to Islamic radicalism as "Islamophobia" is a simplistic view that ignores the real and identifiable harm that could result from acquiescing to the demands of a radical few while turning a blind eye to the silent majority of Muslims in Western countries who simply seek the same things that all other citizens seek from their governments: unbiased and just application of the secular laws and freedom to practice their religion as they see fit.

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 a "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

[204] One might argue that religion informs the crafting of secular law even in the United States, but the Supreme Court has long recognized that the government should not take into account the religious leanings of its citizens when making laws. *See, e.g.*, Reynolds v. United States, 98 U.S. (8 Otto) 145, 166–67 (1878) ("So here, as a law of the organization of society, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.").

their separate functions in their separate ways."[205] 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."[206] 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."[207] 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 recognized.[208] 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), [209] 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.[210]

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[205] Younger v. Harris, 401 U.S. 37, 44 (1971).
[206] *Id.* at 44–45.
[207] U.S. CONST. amend. X.
[208] 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...")
[209] *See* U.S. CONST. art. III; Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
[210] *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

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.[211] 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.[212] 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.

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.[213] 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:

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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))).

[211] *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).

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

[213] *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).

> 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.[214]

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 here 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.[215] 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.[216] 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 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

[214] H.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010) (emphasis added).
[215] *See* ARIZ. REV. STAT. ANN. §§ 12-3101 to -3103 (2012).
[216] Uddin & Pantzer, *supra* note 1, at 371.

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.[217] 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.[218]

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 Constitution, laws, and ratified treaties of the United States and the territories of the United States, or the constitution and laws of this State."[219] 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

[217] *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 imposition of liability to be codification of common law).

[218] It is important to note that the Supreme Court has 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.

[219] ARIZ. REV. STAT. ANN. § 12-3101 (2012).

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";[220] indeed, the plain language of the proposed statute never mentions religion and thus could not possibly be construed to single out any specific religion. Thus, 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;[221] (2) the statute's "principal or primary effect . . . neither advances nor inhibits religion";[222] and (3) "the statute [does] not foster 'an excessive government entanglement with religion.'"[223]

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 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

[220] Larson v. Valente, 456 U.S. 228, 246 (1982).
[221] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
[222] *Id.*
[223] *Id.* at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674).

constitution of this state or of the United States or conflict with the laws of this State."[224] 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.[225] 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"[226] 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

[224] H.B. 2064, 50th Leg., 1st Reg. Sess. (Ariz. 2011), *available at* http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=hb2064&Session_Id=102.
[225] *See* Braunfeld v. Brown, 366 U.S. 599 (1961).
[226] *Id.* at 606.

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 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 narrowing 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.[227] 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."[228] The bill goes on to

[227] *See* Uddin & Pantzer, *supra* note 1, at 373–74.
[228] H.B. 2582, 50th Leg., 1st Reg. Sess. (Ariz. 2011), available at http://www.azleg.gov/legtext/50leg/1r/bills/hb2582p.pdf.

define religious sectarian law has "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."[229]

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 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.[230] 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,[231] the purpose of the proposed statute is certainly secular in nature, since the chief aim of the

[229] *Id.*
[230] Awad v. Ziriax, 670 F.3d 1111, 1120 (10th Cir. 2012).
[231] *See supra* p. 38.

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. While the statute would seem to satisfy the first prong of the *Lemon* Test, however, difficulties may arise in satisfying the second and third prongs of the test.[232] As 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,[233] 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.[234] Thus, the proposed statute 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[235] 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 an entanglement

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[232] *Id.*

[233] *See supra* text accompanying note 218.

[234] *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 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.").

[235] *See supra* p. 38.

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.[236] The question, then, is whether the proposed statute could be construed as having an underlying discriminatory purpose that is not revealed by its plain language. 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

[236] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

of this kind. The legislative findings appended to the proposed Arizona bill provides 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.[237] 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.[238] 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 radical 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 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 Court has long recognized the states' broad power to develop their respective

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

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, the 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.