

## Sooners vs. Shari'a: The Constitutional and Societal Problems Raised by the Oklahoma State Ban on Islamic Shari'a Law

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### Introduction

In the spring of 2010, Oklahoma's legislature approved the "Save our State" amendment to the state constitution, and in the subsequent November election it was passed by popular vote.<sup>1</sup> The key provision of this amendment is a ban on judicial consideration of both international and Islamic Shari'a<sup>2</sup> law when a court is deciding a case.<sup>3</sup> The amendment compels Oklahoma courts to adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations, and established common law.<sup>4</sup> The amendment also permits courts to consider the law of another state if necessary, as long as "the law of the other state does not include Sharia Law."<sup>5</sup>

Shari'a is the religious law of Islam.<sup>6</sup> It is derived from teachings found in the Qur'an and the examples provided by the

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

2. شريعة in Arabic script. This is often transliterated as *Sharia*, *Shar'ia*, or *Shari'ah* in addition to *Shari'a*. WORDREFERENCE.COM, <http://forum.wordreference.com/showthread.php?t=2161918> (last visited Apr. 19, 2012).

3. H.R.J. Res. 1056 ("The courts shall not look to the legal precept of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law."). For a detailed discussion of the Constitutional issues raised by the amendment's ban on international law in Oklahoma courts, see Penny M. Venetis, *The Unconstitutionality of Oklahoma's SQ 755 and Other Provisions Like It that Bar State Courts from Considering International Law*, 59 CLEV. ST. L. REV. 189 (2011) (arguing that Oklahoma's ban on international law in its court system conflicts with the Supremacy Clause, federal common law, the Full Faith and Credit Clause, and separation of powers doctrine).

4. H.R.J. Res. 1056.

5. *Id.*

6. Ariane de Vogue, *Federal Appeals Court Considers Sharia Law*, ABCNEWS.COM (Sept. 12, 2011, 10:37 AM), <http://abcnews.go.com/blogs/politics/2011/09/federal>

Islamic prophet Muhammad.<sup>7</sup> The amendment was on the state ballot in November 2010, where it passed by an overwhelming margin.<sup>8</sup> Although Oklahoma's population is less than one percent Muslim, lawmakers responsible for drafting the measure considered the ban a necessary "preemptive strike" against Islamic law infiltrating Oklahoma.<sup>9</sup> However, shortly after being passed, certification of the ban was temporarily blocked by a federal judge on constitutional grounds, pending a suit brought by Muneer Awad, a Muslim Oklahoma resident.<sup>10</sup> The preliminary injunction that prevented certification of the amendment was appealed to the Tenth Circuit Court of Appeals, and the court heard arguments on September 12, 2011.<sup>11</sup> On January 10, 2012, the Tenth Circuit

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-appeals-court-considers-sharia-law/.

7. Toni Johnson & Lauren Vriens, *Islam: Governing Under Sharia*, CFR.ORG (Oct. 24, 2011), <http://www.cfr.org/religion/islam-governing-under-sharia/p8034>.

8. *Summary Results: General Election – November 2, 2010*, OKLA. ST. ELECTION BOARD (Nov. 2, 2010), <http://www.ok.gov/elections/support/10gen.html> (explaining that the amendment was proposed to voters as State Question 755, with 695,650 (70.08%) voting for the proposal and 296,944 (29.92%) voting against the proposal); Ed Barnes, *Oklahoma's Ban on Shariah Law Blocked: Supporters Blame State Attorney General*, FOXNEWS.COM (Nov. 8, 2010), <http://www.foxnews.com/us/2010/11/08/oklahomas-ban-shariah-law-blocked-critics-say-attorney-general-failed-respond/> ("[The ballot initiative] passed with 70 percent of the vote . . .").

9. See Nicholas Riccardi, *Measure Would Outlaw Islamic Law in Oklahoma – Where It Doesn't Exist*, L.A. TIMES (Oct. 28, 2010), <http://articles.latimes.com/2010/oct/28/nation/la-na-sharia-oklahoma-20101029> (noting that Oklahoma, a state with over 3.5 million residents, has only 15,000 Muslims); Mark Schlachtenhaufen, *Sharia Law, Courts Likely on 2010 Ballot*, EDMONDSUN.COM (June 4, 2010), <http://www.edmondsun.com/local/x1996914371/Sharia-law-courts-likely-on-2010-ballot> (noting that Republican State Representative Lewis Moore considered the legislation necessary to combat the "onslaught" coming Oklahoma's way, and that Republican State Representative Rex Duncan referred to the increasing acknowledgement of Shari'a in England's judicial system as "a cancer upon the survivability of the UK"); Joel Siegel, *Islamic Sharia Law to Be Banned in, ah, Oklahoma*, ABCNEWS.COM (June 14, 2010), <http://abcnews.go.com/US/Media/oklahoma-pass-laws-prohibiting-islamic-sharia-laws-apply/story?id=10908521>; *The Colbert Report* (Comedy Central television broadcast Nov. 3, 2010), available at <http://www.colbertnation.com/the-colbert-report-videos/364378/november-03-2010/stephen-colbert-gives-you-props> (sarcastically declaring that "just because something doesn't exist, doesn't mean you shouldn't ban it," and noting that Muslims make up a "full four-tenths of one percent of" the population of Oklahoma).

10. Jess Bravin, *Oklahoma Shariah Ban Halted*, WALL ST. J., Nov. 9, 2010, at A6. U.S. District Judge Vicki Miles-LaGrange enjoined the Oklahoma legislature from effecting the amendment, stating that it was substantially likely that the ban violates the Establishment Clause. Nathan Koppel, *Oklahoma Faces Appellate Showdown Over Anti-Sharia Law*, WALL ST. J. LAW BLOG (Sept. 8, 2011, 5:30 PM), <http://blogs.wsj.com/law/2011/09/08/oklahoma-faces-appellate-showdown-over-anti-sharia-law/>.

11. Chandra Bhatnagar, *Oklahoma Seeks to "Save" Itself from the Requirements of the U.S. Constitution*, ACLU BLOG OF RTS. (Sept. 15, 2011, 5:17 PM), <http://www.aclu.org/blog/human-rights-religion-belief/oklahoma-seeks-save-itself>.

upheld the injunction, allowing the Oklahoma district court to rule on the merits of Mr. Awad's claims.<sup>12</sup>

This Article will address the constitutional problems presented by the Oklahoma ban, as well as the moral and societal implications of the legislation, and the anti-Shari'a movement across the United States. The discussion will begin in Part I with an overview of the history and origins of Shari'a, and continue with an examination of how Shari'a fits in with Western legal systems, in particular the United States legal system. Part II will discuss the background and circumstances that led to Oklahoma's adoption of the Shari'a ban, as well as review the subsequent blocking of that ban, the status of the case in the courts, and the continuing reactions and developments around the nation. Part III will present arguments for why the Oklahoma ban on Shari'a is unconstitutional and unnecessary, why the Tenth Circuit Court of Appeals was correct in upholding the Oklahoma district court's preliminary injunction, and why the district court should invalidate the amendment. Part IV will proceed by arguing that Oklahoma's amendment is a reflection of the widespread anti-Muslim sentiments in the United States, that approval of such an amendment is a step towards state-sponsored discrimination which could further spread across the country, and what actions the Federal government as well as state governments should pursue in order to address the ever growing problem of anti-Muslim discrimination in the United States.

## I. An Overview of Shari'a

### A. History and Origins

Although a fully detailed review of Shari'a is beyond the scope of this Article, a short summary of Shari'a is necessary to understand the context of arguments herein. Shari'a is a rough translation of Islamic religious law.<sup>13</sup> The original Arabic word, *sharī'a*, referred to the area surrounding a well, and also had connections to "path," "road," or "highway."<sup>14</sup> In the context in which it appears in the Qur'an, Islam's central religious text, *sharī'a* defines the "practical aspect of religion."<sup>15</sup> That is, the

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12. *Awad v. Ziriax*, 570 F.3d 1111 (10th Cir. 2012).

13. Frank Griffel, *Introduction to SHARI'A: ISLAMIC LAW IN THE CONTEMPORARY CONTEXT* 1, 2 (Abbas Amanat & Frank Griffel eds., 2007).

14. *Id.*

15. *Id.*

word appeared in the Qur'an to distinguish Islam as a new religion, separate from existing faiths.<sup>16</sup> Muslim scholars have developed an array of explanations as to how *shari'a* obtained its religious meaning, but within common Muslim understanding the word Shari'a has come to define the principles and regulations that govern Muslim life.<sup>17</sup>

The rules of Shari'a have their origins in four traditional sources.<sup>18</sup> These sources are the Qur'an, the Sunna, Ijma', and Qiyas.<sup>19</sup> As mentioned above, the Qur'an is the most holy book in Islam, literally the Book of God.<sup>20</sup> The Sunna consists of the words and actions of the Islamic prophet Muhammad.<sup>21</sup> Specifically, the Sunna includes all the records of Muhammad's customary practices and interpretations, as well as those of his companions.<sup>22</sup> Ijma' is defined as the consensus of Muslim legal scholars concerning issues not clearly resolved by the Qur'an or the Sunna.<sup>23</sup> Finally, Qiyas stands for analogical reasoning.<sup>24</sup> Analogical arguments are permitted in order to accommodate problems that arise as society progresses, but these arguments are limited in that they can never be used in opposition to rules provided by the first three sources.<sup>25</sup>

16. *Id.* ("We have set you on a *shari'a* of command, so follow it." (quoting the Qur'an 45:18)). However, the word does not play an important role in the Qur'an, and this is actually the only instance in which it appears. *Id.*

17. *Id.* at 2-3.

18. See RODOLPHE J.A. DE SEIFE, *THE SHARI'A: AN INTRODUCTION TO THE LAW OF ISLAM* 25-34 (1993).

19. *Id.*

20. JOHN BURTON, *THE SOURCES OF ISLAMIC LAW: ISLAMIC THEORIES OF ABROGATION* 9 (1990) ("Into this volume have been assembled the texts of the individual revelations brought down by the angel from God directly to Muhammad throughout the course of his Prophetic career.").

21. See *id.* at 10-11. Sunna, the practices of Muhammad, were compiled as *hadith*, and although much of the most central tenets of Islamic law are derived from the Qur'an, "the majority of rulings in Shari'a derive from [the Sunna]." Griffel, *supra* note 13, at 3.

22. BURTON, *supra* note 20, at 10-11.

23. DE SEIFE, *supra* note 18, at 33 ("[Ijma' has not been completely clarified. It is usually defined as the infallible consensus of the qualified legal scholars of a given generation, on a practice or rule of law . . . [T]here are some who hold that even a consensus of scholars . . . rests on the agreed practice of the whole community.").

24. *Id.* at 33 ("Islam accepts opinions and beliefs dealing with circumstances not provided for in the Qur'an or in the Sunna by following a text that deals with a similar circumstance in which a rule contained in the Qur'an or Sunna was used and extending that rule to a similar, if not identical, situation.").

25. *Id.* at 34 (noting that, even with the restrictions on Ijma' and Qiyas, "an enormous amount of Islamic law rests on these last two sources (consensus and analogy), and there is a feeling that the consensus has proved to be the most important source of all . . .").

Similar to modern law in Western culture, traditional precepts of Shari'a provide direction concerning issues such as marriage, divorce, inheritance, taxation, commerce, and war.<sup>26</sup> However, unlike common perceptions of law in the West, Shari'a includes commandments regarding various aspects of Muslim personal life.<sup>27</sup> Fasting, acts of worship, conduct between spouses, commitment to family, behavior at funerals, and decency of clothing are just a few of the numerous facets of Muslim existence that Shari'a may govern.<sup>28</sup> Thus, while Shari'a provides a legal framework to regulate Islamic society, it also serves as a moral code for Muslims, much like the Bible serves Christians.<sup>29</sup>

In short, similar to other religious doctrines around the world, the meaning of Shari'a varies among Muslims.<sup>30</sup> In modern times there has been an effort to establish a unified vision of Shari'a.<sup>31</sup> Many Muslims living in Muslim countries consider Shari'a to be a cohesive code of law in the same vein as European codes.<sup>32</sup> Hence, traditional Shari'a practices are prevalent in these countries.<sup>33</sup> For Muslims living in non-Muslim countries, however, Shari'a may not be as prominent in their everyday lives, and some Muslims may reject some Shari'a practices outright.<sup>34</sup> Likewise,

26. Griffel, *supra* note 13, at 1.

27. *Id.* ("What many Muslims regard as being determined by Shari'a . . . includes much that modern Westerners would not recognize as law.")

28. *Id.* ("Shari'a also provides answers to the most vital moral questions of the contemporary world, such as the legitimacy of violence or torture, just war, suicide and self-sacrifice, or the means of combating injustice.")

29. CORRINA STANDKE, SHARIA-THE ISLAMIC LAW 2-3 (2008) ("Sharia includes aspects such as politics, economics, banking, contracts, family, pilgrimage, sexuality, hygiene, and social issues."); Engy Abdelkader, *American Muslim Sister-Wives? Polygamy in the American Muslim Community*, HUFFINGTON POST (Oct. 17, 2011), [http://www.huffingtonpost.com/engy-abdelkader/american-muslim-sisterwiv\\_b\\_1001163.html](http://www.huffingtonpost.com/engy-abdelkader/american-muslim-sisterwiv_b_1001163.html) (noting that observance of Shari'a principles is often a private and personal matter for Muslims, and stating that volunteering at a soup kitchen, showing kindness to animals, refraining from dishonesty, or donating money to help the needy is observance of Shari'a).

30. Griffel, *supra* note 13, at 12 (explaining that some Muslims and Muslim countries adhere more closely to the classical period of Islam, when Shari'a was the prominent law, while others connect more with the modernist period).

31. *Id.* at 12-13 ("The process of canonization of law during the nineteenth and twentieth centuries has shaped the understanding of Shari'a probably more than anything else . . . where the . . . sayings of . . . Muhammad . . . as well as the . . . verses of the Qur'an, are viewed almost as if they were paragraphs in a Muslim civil code.")

32. *Id.* at 13.

33. *Id.* at 11.

34. CYNTHIA BROUGH, CONG. RESEARCH SERV., APPLICATION OF RELIGIOUS LAW IN U.S. COURTS: SELECTED LEGAL ISSUES 5 (2011) ("As in other religions, individuals have a range of views about the appropriateness and desirability of using religious law and principles to decide important questions. Some Muslims

Muslims hold significantly varying views concerning the correct role of any government in protecting, interpreting, or enforcing Shari'a.<sup>35</sup> Even among Muslim countries, application of Shari'a varies greatly.<sup>36</sup> Various schools of Islamic thought have developed, and while some countries embrace a very orthodox form of Islam, others follow a more liberal interpretation with a greater focus on Qiyas.<sup>37</sup> Furthermore, within countries that follow a supposed uniform model of Shari'a, individuals may not adhere to a single school of thought in their personal lives.<sup>38</sup> The bottom line is that finding one all-encompassing characterization of Shari'a is difficult; many varying interpretations of what Shari'a actually means and how it should be applied exist in the Muslim world.<sup>39</sup>

### *B. Shari'a in the United States*

In the United States, religious law, such as Shari'a, cannot be officially adopted by federal, state, or local governments in accordance with the First Amendment of the Constitution.<sup>40</sup> Religious law is not legally binding on United States citizens.<sup>41</sup> This does not mean that courts never recognize religious law.<sup>42</sup> Courts may incorporate religious law into the United States legal system in cases where individuals voluntarily submit themselves to religious provisions, for instance in commercial contracts or divorce settlements.<sup>43</sup> Other cases that raise questions of religious

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reject the use of long-standing sharia practices and traditions for resolving judicial and personal matters.”).

35. *Id.*

36. See Johnson & Vriens, *supra* note 7 (explaining that many Muslim countries, such as Nigeria and Kenya, have a dual system with a secular government as well as Shari'a courts, where Muslims can bring disputes in areas such as marriage, divorce, inheritance, and guardianship).

37. *Id.* The most Orthodox form of Islamic law is followed in countries such as Saudi Arabia and Afghanistan (under Taliban rule), while countries adhering to the most liberal forms include Egypt, Pakistan, India, and Turkey. *Id.*

38. *Id.* (explaining that the variation of Shari'a adherence among individuals means that the distinctions between liberal and Orthodox interpretations of Shari'a has a greater impact on a country's legal system than it does on individual citizens).

39. See Jan Michiel Otto, *Introduction* to SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT 17, 24 (Jan Michiel Otto ed., 2010) (“There is no such thing as a, that is one, Islamic law, a text that clearly and unequivocally establishes all the rules of a Muslim's behaviour. There is a great divergence of views . . . of exactly what rules belong to Islamic law.”).

40. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”); BROUGHER, *supra* note 34, at 2.

41. BROUGHER, *supra* note 34, at 2.

42. *Id.*

43. See *id.*; Barbara Bradley Hagerty, *Religious Laws Long Recognized by U.S.*

law often stem from the application of impartial property or contract doctrine to religious institutions.<sup>44</sup> Thus, United States courts do sometimes examine religious laws when settling disputes, but they will not apply religious doctrine in reaching a decision.<sup>45</sup>

In the United States, opponents of Shari'a often describe it as barbaric and extreme, and therefore say that it has no place in this country.<sup>46</sup> Perhaps the most contentious area of Shari'a is its articulation of appropriate punishments for criminal acts.<sup>47</sup> Certain punishments suggested under Shari'a, such as flogging, stoning, and execution, are the subject of intense controversy in the West.<sup>48</sup> While fearful detractors warn of such practices being justified in the United States by judicial application of Shari'a, such sentences are prescribed infrequently in most Muslim countries, and less severe penalties are often deemed acceptable.<sup>49</sup> This is a reflection of the nature of Shari'a as a collection of principles rather than a uniform code of law.<sup>50</sup> It is true that some Muslims believe Shari'a is the answer to the problems they face while living in "corrupt autocracies," and would therefore welcome the establishment of Shari'a by the United States government.<sup>51</sup> But many other Muslims believe in a secular state, and that governmental enforcement of Shari'a detracts from its

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*Courts*, NAT'L PUB. RADIO (Sept. 8, 2010), <http://www.npr.org/templates/story/story.php?storyId=129731015> ("U.S. courts already accommodate Shariah law, following a long history of incorporating religious laws into the U.S. legal system."); *see also*, e.g., *Woodlands Christian Acad. v. Weibust*, No. 09-10-00010-CV, 2010 WL 3910366, at \*4 (Tex. Ct. App. Oct. 7, 2010) (upholding an arbitration agreement that relied on holy scriptures to govern the conciliation process).

44. *See, e.g.*, *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring) (referencing cases arising in the "application of otherwise neutral property or contract principles to religious institutions").

45. *See, e.g.*, *Serbian E. Orthodox Diocese for U. S. & Can. v. Milivojevic*, 426 U.S. 696, 698–708 (1975) (examining some facets of religious law to determine the structure of the church, but refusing to look further into religious law to resolve the ultimate dispute).

46. *See Johnson & Vriens, supra note 7.*

47. Noah Feldman, *Why Shariah?*, N.Y. TIMES MAG., Mar. 16, 2008, at 46, 48 ("To many, the word 'Shariah' conjures horrors of hands cut off, adulterers stoned and women oppressed."); *Johnson & Vriens, supra note 7* (discussing the different categories of offenses under Shari'a as "those that are prescribed a specific punishment in the Quran, . . . those that fall under a judge's discretion, and those resolved through a tit-for-tat measure").

48. *Johnson & Vriens, supra note 7.*

49. *Id.*

50. *See Griffel, supra note 13*, at 12.

51. *See Feldman, supra note 47*, at 48 ("At its core, Shariah represents the idea that all human beings—and all human governments—are subject to justice under the law.").

religiousness.<sup>52</sup> To these Muslims, the notion of an Islamic state is false from a religious point of view.<sup>53</sup> Thus, many Muslims in the United States desire to incorporate Shari'a in their personal matters on an individual basis, not via state-imposed regulations or court orders.<sup>54</sup> Voluntary agreements that incorporate religious provisions reflect the joint approval of the parties to rely on religious principles and institutions to resolve differences.<sup>55</sup> Such voluntary agreements allow Muslims, as well as members of other faith groups, to conduct their own personal dealings in the manner they see fit and seek remedy when the agreed-upon provisions are breached.

Still, in the event that a United States federal or state court is faced with religious principles in a given case, if a conflict arises between religious law and United States law, United States law will always prevail.<sup>56</sup> There are certain instances where application of religious law diverges from public policy, or conflicts with other societal or legal concerns, and therefore a court will refuse to uphold such an application.<sup>57</sup> These conflicts can arise in settings as impactful as defenses to criminal charges, as well as in less obvious areas of law, such as procedure.<sup>58</sup> Either way, there is no danger of the United States judiciary officially adopting Shari'a, or any other religious law.

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52. See Abdullahi Ahmed An-Na'im, *Thomas Jefferson, Islam and the State*, HUFFINGTON POST (Mar. 20, 2008), [http://www.huffingtonpost.com/abdullahi-ahmed-annaim/thomas-jefferson-islam-an\\_b\\_92533.html](http://www.huffingtonpost.com/abdullahi-ahmed-annaim/thomas-jefferson-islam-an_b_92533.html)? ("Enforcing a Shari'a through coercive power of the state negates its religious nature, because Muslims would be observing the law of the state and not freely performing their religious obligation as Muslims.").

53. See *id.* (asserting that Islam does not prescribe a form of government, that there is no mention of the state in the Qur'an, and that "any observance of Shari'a can be best achieved when the state is neutral regarding all religious doctrines").

54. See Johnson & Vriens, *supra* note 7.

55. See BROUGHER, *supra* note 34, at 3.

56. Hagerty, *supra* note 43; see, e.g., *Aleem v. Aleem*, 931 A.2d 1123 (Md. Ct. Spec. App. 2007) (denying a husband's purported right under *talaq* to withhold property from his divorced wife because it conflicted with Maryland law and public policy); *S.D. v. M.J.R.*, 2 A.3d 412, 422 (N.J. Super. Ct. App. Div. 2010) (ruling that husband acted with requisite intent for sexual assault and criminal sexual contact, regardless of his view that his religion permitted his action).

57. BROUGHER, *supra* note 34, at 4.

58. See, e.g., *M.J.R.*, 2 A.3d at 422; David Bailey, *Woman in Somali Militant Funding Trial Held in Contempt*, REUTERS, Oct. 3, 2011, available at <http://www.reuters.com/article/2011/10/04/us-minnesota-alshabaab-idUSTRE79305S20111004> (reporting that a woman facing charges in a Minnesota court was cited for criminal contempt after refusing to stand as a federal judge entered the courtroom, notwithstanding her claim of religious grounds for her behavior).

## II. The "Save our State" Amendment

### A. *Oklahoma's Ban on Shari'a*

In May, 2010, the Oklahoma legislature passed House Joint Resolution No. 1056 by a combined vote of 123-12.<sup>59</sup> The resolution directed the Secretary of State to submit a proposed amendment to Section 1, Article VII of the Oklahoma Constitution to a popular vote for approval or rejection.<sup>60</sup> Section 1, Subsection C of the resolution is entitled the "Save Our State" Amendment, and provides that:

The Courts . . . when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, and the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international 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.<sup>61</sup>

This resolution required passage by popular vote.<sup>62</sup> If passed, it would amend the state Constitution by changing the section that governs the courts in Oklahoma.<sup>63</sup> The gist of the amendment is to "make courts rely on federal and state laws when deciding cases," rather than considering international law or, specifically, Shari'a law.<sup>64</sup> The primary means to accomplish this directive is to forbid courts from considering international law or Shari'a when deciding cases.<sup>65</sup>

Proponents of the resolution concede that Shari'a has not been applied in Oklahoma courts at any level.<sup>66</sup> A search for "Shari'a" (sharia, shariah, shar'ia) in Oklahoma state cases returns no instances of a court addressing Shari'a prior to the

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

60. *Id.* at § 1.

61. *Id.* at § 1(c).

62. *Id.* at § 2 (describing the language of the proposed ballot measure).

63. *Id.*

64. *Id.*

65. *See id.*

66. *See de Vogue, supra* note 6 (stating that a district judge ruled that a delay in certifying the approved amendment would cause minimal harm because the defendants were "not aware of any situation where Sharia Law has been applied in an Oklahoma court").

proposed amendment.<sup>67</sup> In two cases in the Oklahoma federal judiciary, the court concluded that a country's potential "anti-Christian" persecution of individuals did not warrant a grant of asylum in the United States.<sup>68</sup> Additionally, legal experts have been unable to find even one occurrence of a United States judge applying Shari'a to render a decision.<sup>69</sup>

Nevertheless, the resolution's drafters considered the amendment a necessary preemption to "save" Oklahoma from the eventual encroachment of Shari'a on its legal system.<sup>70</sup> They pointed to a handful of cases where Shari'a principles were considered by the court in the same context that courts have historically considered principles of other religions, that is, in private agreements.<sup>71</sup> Perhaps the most ballyhooed case came out of New Jersey, where a state judge ruled that a Muslim man could not be guilty of raping his wife because his religious belief was that a wife is required to have sex with her husband if her husband so demands.<sup>72</sup> The decision, however, was quickly overturned with the appellate court citing well-recognized precedent under the First Amendment that invalidates religion as an excuse for criminal conduct.<sup>73</sup> This illustrates the aforementioned principle that where there is a conflict between United States law and religious law, United States law prevails—a principle that calls

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67. *Search Results*, WESTLAWNEXT, <https://1.next.westlaw.com/> (type "Sharia"; filter by Oklahoma; click save; click search; repeat with alternate transliterations) (last conducted Apr. 4, 2012).

68. See *Sidabutar v. Gonzales*, 503 F.3d 1116, 1125 (10th Cir. 2007) (quoting the Board of Immigration Appeals as saying: "Islamic Shari'a law is not imposed on Christians, and, in practice, most Indonesians enjoy a high degree of religious freedom"); *Bastian v. Gonzales*, 187 F. App'x 891, 895 (10th Cir. 2006) (mentioning Shari'a only to state that "efforts to impose Sharia law nationally [in Indonesia] have not been successful" (citation omitted)).

69. Siegel, *supra* note 9.

70. See H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010) ("Subsection C of this section shall be known as the '*Save Our State*' Amendment." (emphasis added)); Siegel, *supra* note 9. The article notes that Republican State Representative Rex Duncan, a "chief architect of the measure" and chair of the state House Judiciary Committee, called the ban a "preemptive strike" against Shari'a. Duncan adds, "[Shari'a is] not an imminent threat in Oklahoma yet, but it's a storm on the horizon in other states." *Id.*

71. Riccardi, *supra* note 9; Eugene Volokh, *Sharia Law Enforced in Texas!*, VOLOKH CONSPIRACY (Feb. 8, 2008, 1:01 AM), <http://volokh.com/posts/1202454061.shtml> (discussing cases in which courts considered and denied challenges to an arbitration agreement when arbitration relied on Shari'a principles); see *Abd Alla v. Mourssi*, 680 N.W.2d 569 (Minn. Ct. App. 2004).

72. Riccardi, *supra* note 9.

73. *S.D. v. M.J.R.*, 2 A.3d 412, 422 (N.J. Super. Ct. App. Div. 2010).

into question whether legislation like the “Save our State” amendment is necessary.<sup>74</sup>

While the necessity of the amendment remained questionable, the matter was submitted to Oklahoma voters.<sup>75</sup> Placed on the ballot as State Question 755, the proposal received relatively little attention initially.<sup>76</sup> Throughout the summer of 2010 there was little campaigning for or against the measure, and only one public poll was taken regarding the amendment.<sup>77</sup> This changed as election season drew closer though, and groups began airing advertisements and making phone calls, encouraging voters to support the amendment.<sup>78</sup> On November 2, 2010, over seventy percent of Oklahoma voters voted in favor of State Question 755.<sup>79</sup>

### *B. Federal Injunction on the Oklahoma Ban and Further Developments*

After the proposal was overwhelmingly approved by Oklahoma voters, the constitutionality of the amendment was immediately challenged by the Council on American-Islamic Relations (CAIR) via the Executive Director of CAIR’s Oklahoma chapter, Muneer Awad.<sup>80</sup> Awad filed a lawsuit in the federal Western District Court of Oklahoma and argued that the ban on Oklahoma courts’ consideration of Shari’a violates the Establishment Clause and the Free Exercise Clause of the First

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74. Proponents of the measure also objected to the influence of Justices Ginsburg, Kagan, and Sotomayor, and their purported inclinations to rely on foreign law. Justice Ginsburg responded to such criticism stating that foreign opinions “are not authoritative; they set no binding precedent for the U.S. judge. But they can add to the store of knowledge relevant to the solution of trying questions.” Jess Bravin, *The New Political Landscape: Oklahoma Is Sued over Shariah Ban*, WALL ST. J., Nov. 5, 2010, at A5.

75. Riccardi, *supra* note 9.

76. *Id.*

77. *Id.* The poll was a scientific telephone survey of 755 likely voters in Oklahoma, conducted July 16–21, 2010, by SoonerPoll.com. Randy Krehbiel, *School Funding Bid Shows Support*, TULSA WORLD, Aug. 5, 2010, at A12. The poll included 384 Democrats, 340 Republicans, and 31 independents. In this poll 49% approved of the ban, 24% opposed the ban, and 27% were undecided. *Id.*

78. Riccardi, *supra* note 9 (stating that a group called Act! for America, whose self-described mission is to fight radical Islam, began running radio advertisements and making phone calls to Oklahoma voters in support of the Shari’a ban).

79. Stephanie Samuel, *Oklahoma Voters Approve Sharia Ban*, CHRISTIAN POST (Nov. 3, 2010), <http://www.christianpost.com/news/okla-voters-approve-sharia-ban-47479/>.

80. *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1301 (W.D. Okla. 2010); *see de Vogue, supra* note 6; Press Release, American Civil Liberties Union, ACLU and CAIR Urge Court to Uphold Ruling Blocking Oklahoma Sharia and International Law Ban (May 10, 2011), *available at* <http://www.aclu.org/human-rights-religion-belief/aclu-and-cair-urge-court-uphold-ruling-blocking-oklahoma-sharia-and-int>.

Amendment.<sup>81</sup> Awad moved for a preliminary injunction preventing Oklahoma from certifying the election result until the merits of his claims could be evaluated by the court.<sup>82</sup>

The district court held that Awad had a substantial likelihood of success on the merits of his claims, and that he would likely suffer “irreparable harm” without an injunction.<sup>83</sup> Thus, the court granted the preliminary injunction based on the balance of hardships between the plaintiff and Oklahoma voters, and the public interest of protecting constitutional rights.<sup>84</sup> The ruling was appealed to the Tenth Circuit, and the circuit court sustained the temporary injunction.<sup>85</sup>

After the Oklahoma amendment became headline news, similar legislation began to appear around the country, with more than a dozen states considering measures to ban Shari’a, though these measures have not yet been submitted to voters.<sup>86</sup> As of October 2011, approximately fifty anti-Shari’a bills had been introduced in more than twenty states, with three having passed.<sup>87</sup> In some of these states the word “Shari’a” has been removed from the bill’s language, but the intent appears to be unchanged.<sup>88</sup>

81. *Awad*, 754 F. Supp. 2d at 1302.

82. *Id.*

83. *Id.* at 1305–08.

84. *Id.* at 1307–08. The court reasoned that the possibility of Awad losing his First Amendment rights, “for even minimal periods of time,” constitutes irreparable injury, and that this injury outweighs any injury the Oklahoma electorate may incur due to delayed certification of the election results. *Id.* Defendants presented no evidence of Shari’a being applied in Oklahoma courts, thus the only likely injury weighing against the injunction is denial of immediately fulfilling the will of the voters. *Id.*

85. *Awad v. Ziriax*, 570 F.3d 1111 (10th Cir. 2012).

86. *States Move to Ban Islamic Sharia Law*, NPR.ORG (Mar. 11, 2011), <http://www.npr.org/2011/03/11/134458058/States-Move-To-Ban-Islamic-Sharia-Law> (discussing such laws in a dozen states, including Tennessee, where commentators have criticized the anti-Shari’a proposal as particularly far reaching because it would classify certain acts under the law as felonies); Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMP. L. 303, 320–21 (2011) (citing the National Conference of State Legislatures as asserting that such measures have been proposed in Arizona, Florida, Louisiana, South Carolina, Tennessee, and Utah).

87. Abdelkader, *supra* note 29 (“[A]pproximately 50 ‘anti-Sharia’ bills have been introduced in more than 20 states and three have passed, including those in Oklahoma, Louisiana and Tennessee.”); see Alicia Gay, *ACLU Lens: The Truth Behind the Anti-Sharia Movement*, ACLU BLOG OF RTS. (Aug. 1, 2011, 2:52 PM), <http://www.aclu.org/blog/religion-belief/aclu-lens-truth-behind-anti-sharia-movement> (stating that over the past few years anti-Shari’a legislation has been introduced in twenty-six states, but that Oklahoma’s proposal is the only legislation that has actually been submitted to the voters).

88. Ashby Jones & Joe Palazzolo, *States Target Foreign Law – Critics Say Bills Curbing Judges’ Discretion Are Unneeded, Show Anti-Islam Bias*, WALL ST. J., Feb.

Various justifications for such measures have been given, including protectionist principles similar to the Oklahoma ban, combating terrorism, and protecting Muslim women.<sup>89</sup> Such widespread legislative action has contributed to an "anti-Shari'a movement" in the United States, and it is difficult to say just how far this movement will proceed in the absence of definitive court action.<sup>90</sup>

### III. The Unconstitutionality of the "Save our State" Amendment

The amendment to Oklahoma's Constitution banning Shari'a from being considered in its courts violates the U.S. Constitution on at least three grounds.<sup>91</sup> First, the ban violates the Establishment Clause of the First Amendment and its prohibition on governmental favoritism with regard to any one religion.<sup>92</sup> Oklahoma's ban excludes Muslims in favor of other, predominantly Christian, religions.<sup>93</sup> Second, the amendment violates the Free Exercise Clause of the First Amendment and its prohibition on laws with antireligious purposes.<sup>94</sup> The "Save our State" amendment is discriminatory against Muslim Americans, and seeks to preserve prejudice against Muslims in the Oklahoma Constitution.<sup>95</sup> Third, the proposal violates the Equal Protection Clause because it discriminates against Muslim Oklahomans, a discrete group without political power within the state.<sup>96</sup>

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7, 2012, at A3 (quoting Ameer Awad as saying: "Removing Shari'a was purely a political move . . . . The goals are all the same: to target Islam").

89. See *id.*; William F. O'Brien, *Multiculturalism Continues to Grow in Central Oklahoma*, EDMONDSUN.COM (Oct. 11, 2011), <http://www.edmondsun.com/opinion/x1372391653/Multiculturalism-continues-to-grow-in-Central-Oklahoma; States Move to Ban Islamic Sharia Law>, *supra* note 86.

90. Gay, *supra* note 87.

91. Although outside the scope of this Article, the "Save our State" amendment also bans consideration of international law in Oklahoma courts, and thus likely violates the Supremacy Clause, the Full Faith and Credit Clause, and the separation of powers doctrine. See Venetis, *supra* note 3, at 201-13.

92. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

93. Marci A. Hamilton, *The Oklahoma Referendum Prohibiting State Courts from Applying International or Sharia Law*, FINDLAW.COM (Nov. 11, 2010), <http://writ.news.findlaw.com/hamilton/20101111.html> ("Some Oklahoma legislators defended the constitutional amendment on the theory that Oklahoma needs to secure and retain its Judeo-Christian foundation and heritage against Islamic assaults.").

94. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

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

96. See U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person

### A. *Establishment Clause Violation*

The Oklahoma Shari'a ban violates the Establishment Clause of the First Amendment of the United States Constitution, which prohibits Congress from making any law with respect to an establishment of religion.<sup>97</sup> When we hear espousal of "the separation of church and state," it is the Establishment Clause that provides constitutional weight for such a claim.<sup>98</sup> The primary and uncontroversial interpretation of this clause is that it bars the government from establishing an official church or national religion in the United States.<sup>99</sup> Hence, government-mandated adherence to a certain faith or coerced financial contributions to any religious institution are facial violations of the Establishment Clause.<sup>100</sup> Further interpretations—those that incorporate prohibitions beyond such overt government encroachments into the religious lives of United States citizens—are more controversial.<sup>101</sup> Analysis of the clause in modern times has raised concerns regarding government sponsorship or promotion of religious principles or symbols, public financial support of religious institutions, and government accommodation of one religious group over another.<sup>102</sup> Stemming from these interpretations, the United States Supreme Court has held that school prayer led by school officials, a state law requiring the Ten Commandments be posted in public school classrooms, the prominent display of a nativity scene at a county courthouse, and a state tax exemption for certain religious publications, are all in violation of the Establishment Clause.<sup>103</sup>

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within its jurisdiction the equal protection of the laws.").

97. U.S. CONST. amend. I. The Fourteenth Amendment to the U.S. Constitution made the Establishment Clause applicable to state governments, not just Congress. See *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8 (1947) ("The First Amendment, as made applicable to the states by the Fourteenth commands that a state 'shall make no law respecting an establishment of Religion . . .,'" (citation omitted)).

98. *Everson*, 330 U.S. at 16 ("In the words of [Thomas] Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" (citation omitted)).

99. KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 1318 (Robert C. Clark et al. eds., 17th ed. 2010) ("All interpretations of the Establishment Clause agree that it prohibits the creation of an official church.").

100. *Id.*

101. *Id.* (explaining that various Establishment Clause questions have generated disparate opinions; examples include disagreement over the constitutionality of noncoercive government endorsement of religion, allotment of public financial support to religious entities, and official sponsorship of religious symbols).

102. *Id.* at 1318–19.

103. See, e.g., *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (holding that a tax

Though the above examples seem like evidence that the Establishment Clause operates to restrict religion, the clause actually promotes religious freedom.<sup>104</sup> It serves to dampen the overall authority of the government.<sup>105</sup> In such a case where government authority is limited, the corresponding result is that individual freedom expands.<sup>106</sup> For instance, in the case of the nativity scene, the Establishment Clause forbids erection of such a display on the grounds of a public courthouse.<sup>107</sup> This is a restriction on the government's authority or jurisdiction in operating its *public* buildings, and it serves to expand the freedoms of citizens who are opposed to such a display, either for religious or nonreligious reasons.<sup>108</sup> Nonestablishment can be seen as prohibiting restrictions on individual choices that arise from governmental aid or promotion of religion.<sup>109</sup> In other words, governmental preference of one religion over another inhibits a citizen's ability to choose his or her own religious belief, and restrictions on governmental favoritism promote individual freedom.<sup>110</sup>

That government should not prefer one religion over another is a fundamental principle of the Establishment Clause.<sup>111</sup> In the case of Oklahoma's proposed Shari'a ban, the state is obviously not

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exemption for certain religious publications, but not others, is unconstitutional); *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) (holding that a prominently displayed nativity scene in a government building violates the clause); *Stone v. Graham*, 449 U.S. 39 (1980) (holding unconstitutional a Kentucky law requiring that the Ten Commandments be posted in each public classroom); *Engel v. Vitale*, 370 U.S. 421 (1962) (striking down a local school board's directive to recite a state-prepared, nondenominational prayer each day in class).

104. Carl H. Esbeck, *When Accommodations for Religion Violate the Establishment Clause: Regularizing the Supreme Court's Analysis*, 110 W. VA. L. REV. 359, 363 (2007) ("Not only are the Religion Clauses not in conflict, but the Establishment Clause is pro-freedom of religion, same as the Free Exercise Clause.").

105. *Id.* (explaining that the Establishment Clause operates as a structural clause that limits the government's net authority or jurisdiction, and, "as with the doctrine of separation of powers, a consequence of any structural limit on government authority is to expand the breathing room for the exercise of the people's liberty").

106. *Id.*

107. *Allegheny*, 492 U.S. at 578-79.

108. See Esbeck, *supra* note 104, at 364 (using the example of a public school teacher leading her class in the Lord's Prayer every morning to make the same point).

109. See *id.*

110. *Id.*

111. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994) (stating that this principle is "at the heart of the Establishment Clause").

promoting Islam or showing any preference to it; the opposite is the case.<sup>112</sup> But by singling out Shari'a in the language of the amendment and naming no other religious law as being subject to the ban, Oklahoma is, in effect, favoring all other religions over Islam.<sup>113</sup> If the amendment, instead of banning Shari'a, prohibited all religious law from being used in its courts, then there would at least be an argument that the Establishment Clause is not violated.<sup>114</sup> Oklahoma would not be showing preference for other religions over Islam; rather the burden would be placed on all religions equally.<sup>115</sup> The Supreme Court has frequently dismissed Establishment Clause challenges upon a showing that a law provides benefits or imposes burdens to religions in general, without favoritism.<sup>116</sup> Indeed, there is "ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'"<sup>117</sup> Oklahoma's actions are far from neutral, however, and deny the rights of its Muslim residents to exercise their religion as they see fit.<sup>118</sup>

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

113. See *id.*; THE PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY—RELIGIOUS AFFILIATION: DIVERSE AND DYNAMIC 100 (Feb. 2008), available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf> [Hereinafter PEW FORUM]. Over 85% of Oklahoma's population adheres to some form of Christian tradition, 12% is unaffiliated, and six other traditions constitute the remaining portion of the population (less than 3%, including less than 0.5% Muslim). PEW FORUM, *supra*; cf. *Larson v. Valente*, 456 U.S. 228, 254 (1982) (invalidating Minnesota legislation, noting that "the provision was drafted with the explicit intention of including particular religious denominations and excluding others").

114. See Tanya Somanader, *Oklahoma's New Bill to Block Sharia Law Will Now Ban all Religious Law, Hurt Businesses*, THINK PROGRESS (Mar. 22, 2011), <http://thinkprogress.org/politics/2011/03/22/151853/oklahoma-sharia-update/>. In fact, in the time since voters approved the Oklahoma amendment and it was subsequently blocked, legislators have proposed a new bill doing just that, placing a ban on all religious law instead of only Shari'a. *Id.* (discussing the new bill, which opponents argue still violates the Establishment Clause). Similarly, during oral arguments before the Tenth Circuit Court of Appeals, Oklahoma's attorney argued that the original bill does not target a particular religion, and Shari'a is only listed as an illustration. Daniel Mach, *Defending the Indefensible: Oklahoma Struggles to Salvage Its Unconstitutional Sharia Ban*, ACLU BLOG OF RTS. (Sept. 13, 2011, 2:06 PM), <http://www.aclu.org/blog/religion-belief/defending-indefensible-oklahoma-struggles-salvage-its-unconstitutional-sharia>.

115. See Somanader, *supra* note 114.

116. See *Grumet*, 512 U.S. at 704 ("[W]e have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges.").

117. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987).

118. See Mach, *supra* note 114.

1. Violation of the "*Lemon* Test"

In addition to violating the Establishment Clause principle that government cannot show preference for certain religions over others, Oklahoma's ban on Shari'a likely violates the Establishment Clause by failing the "*Lemon* test" articulated in *Lemon v. Kurtzman*.<sup>119</sup> *Lemon* held that a government action must satisfy three benchmarks in order to survive an Establishment Clause attack.<sup>120</sup> First, the action "must have a secular legislative purpose."<sup>121</sup> Second, the government action's primary effect must neither advance nor inhibit religion.<sup>122</sup> Third, the action must not cause an "excessive government entanglement with religion."<sup>123</sup> While the *Lemon* test has incurred increasing criticism and scrutiny in the years since its first application, it has never been formally abandoned by the Court, and it is still applied by many lower courts.<sup>124</sup>

The Oklahoma ban on Shari'a is likely to fail all three prongs of the *Lemon* test.<sup>125</sup> While the Oklahoma legislature may claim that its purpose in drafting the "Save our State" amendment was secular, comments from state representatives calling the ban a "preemptive strike" on Shari'a and asserting that Islamic law is a "cancer" belie that claim.<sup>126</sup> The ban also has the primary effect of inhibiting religion and thus violates the second criteria of *Lemon*.<sup>127</sup> The amendment specifically prohibits Islamic religious law from being considered in Oklahoma courts, thereby potentially

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119. 403 U.S. 602 (1971). The *Lemon* test has been criticized, and several Justices have called for its repudiation. See SULLIVAN, *supra* note 99, at 1319. However, faced with these criticisms, the Court has not abandoned the *Lemon* test. *Id.* Courts still rely on the *Lemon* test's elements; in fact, the district court in the case against Oklahoma's ban relied on *Lemon*'s three factors. *Awad v. Ziriox*, 754 F. Supp. 2d 1298 (W.D. Okla. 2010).

120. *Lemon*, 403 U.S. at 612.

121. *Id.*

122. *Id.*

123. *Id.* at 613.

124. SULLIVAN, *supra* note 99, at 1319. Included in those courts that still rely on the *Lemon* test are the District Court for the Western District of Oklahoma, and Tenth Circuit Court of Appeals, the court that reviewed the district court's injunction of the "Save our State" amendment. See *Awad*, 754 F. Supp. 2d at 1305; *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1030 (10th Cir. 2008). While the district court applied the *Lemon* test in granting the preliminary injunction, the Tenth Circuit chose to apply *Larson v. Valente* in its review of the injunction in this case because it concluded that *Larson*, though rarely used, is proper in cases of government discrimination among religions. *Awad v. Ziriox*, 570 F.3d 1111, 1126–27 (10th Cir. 2012) (citing *Larson v. Valente*, 456 U.S. 228 (1982)).

125. *Lemon*, 403 U.S. at 612–13.

126. See Schlachtenhaufen, *supra* note 9; Siegel, *supra* note 9.

127. See *Lemon*, 403 U.S. at 612.

inhibiting any of the state's Muslims from enforcing private agreements that contain Shari'a principles.<sup>128</sup> Finally, the amendment likely violates the third prong of *Lemon* because it would result in an excessive government entanglement with religion.<sup>129</sup> The amendment forms a relationship between Shari'a and Oklahoma via the state constitution.<sup>130</sup> Under the ban, in order to evaluate what is and is not permissible, Oklahoma courts would be required to investigate the boundaries of Shari'a, which, as discussed above, are not always easy to identify.<sup>131</sup> Furthermore, Shari'a principles not only govern the lives of Muslims, but also the terms of some commercial transactions.<sup>132</sup> The Oklahoma ban would severely restrict the validity of such terms in court, and the government's action would reach into certain Muslim business dealings as well.<sup>133</sup> These likely developments demonstrate an excessive government entanglement in religion, and violate the *Lemon* test.<sup>134</sup>

## 2. Violation of the Endorsement Test

While it seems clear that the Oklahoma ban violates *Lemon*, that test has fallen out of favor in some corners of the judiciary.<sup>135</sup> Therefore, it is important to examine the Oklahoma ban through other Establishment Clause standards.<sup>136</sup> One such standard of

128. See Riccardi, *supra* note 9.

129. See *Lemon*, 403 U.S. at 612.

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

131. *Awad v. Ziriox*, 754 F. Supp. 2d 1298, 1307 (W.D. Okla. 2010) ("[T]o comply with the amendment, Oklahoma courts will be faced with determining the content of Sharia Law, and, thus, the content of plaintiff's religious doctrines . . . . [I]t is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs." (internal quotations omitted)).

132. L. Ali Khan & Jasmine Abou-Kassem, *Oklahoma Ban on Sharia Is Unconstitutional*, MWC NEWS (Nov. 9, 2010), <http://mwcnews.net/focus/analysis/6496-oklahoma-ban-on-shariah-is-unconstitutional.html>. Khan explains that Shari'a is the choice of law in numerous international contracts, and he provides an example of a multi-million dollar contract between a Saudi Arabian corporation and an American telecommunication company, in which the parties agreed to subject the contract to Shari'a law. *Id.* In a breach of contract case, the court enforced the Shari'a agreement, and rendered a ruling, based on Shari'a principles, that was favorable to the American corporation. *Id.*

133. *Id.* For instance, suppose a Muslim community wants to establish a Mosque, and in doing so negotiates a lease for property that includes principles of Shari'a that both parties agree upon. In the event of a dispute, the Oklahoma amendment would forbid a court to examine any lease terms based on Shari'a principles, thereby circumventing a religious practice of the Muslim community.

134. See *Lemon*, 403 U.S. at 612.

135. See *supra* note 119.

136. See SULLIVAN & GUNTHER, *supra* note 99, at 1319.

significance is the "endorsement test."<sup>137</sup> Under the endorsement test, the question is whether "the government intends to convey a message of endorsement or disapproval of religion."<sup>138</sup> The endorsement test stems from the purpose and effect prongs of the *Lemon* test, and seeks to identify when a governmental practice either has the purpose or effect of endorsing religion.<sup>139</sup> This test is a formalized version of the rationale behind the prohibition of governmental religious favoritism discussed above.<sup>140</sup> Essentially, government endorsement or disapproval of certain religions or religious practices distinguishes adherents and nonadherents to the religion as insiders favored by the government and outcasts disfavored by the government.<sup>141</sup> This is precisely what the Shari'a ban does.<sup>142</sup> Muslims, having been singled out in the state constitution, are now outsiders in the court of law and the community.<sup>143</sup> Even if a Muslim is not interested in pursuing enforcement of Shari'a principles in court, Oklahoma has made it clear that a significant aspect of his or her religion is disapproved of by the state.<sup>144</sup> In doing so, Oklahoma has made adherence to Islam detrimental to Muslims' standing in the political community.<sup>145</sup>

Oklahoma's amendment fails both the *Lemon* test and the endorsement test.<sup>146</sup> Such overt governmental favoritism of some

137. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) ("The Establishment Clause prohibits government from making adherence to a religion relevant . . . to a person's standing in the political community. Government can run afoul . . . in two principal ways. One is excessive entanglement with religious institutions . . . . The second and more direct infringement is government endorsement or disapproval of religion." (emphasis added) (citations omitted)).

138. *Id.* at 691.

139. *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989) ("In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of endorsing religion . . ." (quotations omitted)).

140. See *supra* notes 119–34 and accompanying text.

141. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

142. See *Mach*, *supra* note 114.

143. See *id.*

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

145. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring); see, e.g., Ashby Jones & Joe Palazzolo, *States Target Foreign Law—Critics Say Bills Curbing Judges' Discretion Are Unneeded, Show Anti-Islam Bias*, WALL ST. J. (Feb. 7, 2012), <http://online.wsj.com/article/SB10001424052970204662204577199372686077412.html> (referencing comments made by presidential hopeful Newt Gingrich stating that he would be open to a Muslim-American president as long as the candidate renounced Shari'a).

146. See SULLIVAN & GUNTHER, *supra* note 99, at 1319.

religions over another cannot be upheld under the Establishment Clause.

### B. Free Exercise Clause Violation

The second constitutional provision that the Oklahoma Shari'a ban likely violates is the Free Exercise Clause. The Free Exercise Clause is the second portion of the First Amendment's freedom of religion language and it provides that Congress may not enact a law that prohibits the free exercise of any religion.<sup>147</sup> The Free Exercise Clause establishes that the government cannot command or prohibit religious beliefs among United States citizens.<sup>148</sup> But free "exercise" implies more than simply freedom of belief or expression; it suggests conduct and action.<sup>149</sup> While cases involving government-mandated beliefs are rare, free exercise issues arise often in cases where laws control religious practice or conduct.<sup>150</sup> In many instances these laws do not appear to regulate religious practices on their face, but when a court looks beyond the surface of the law, it uncovers a discriminatory purpose.<sup>151</sup>

The minimum requirement of religious neutrality is that a law does not discriminate on its face.<sup>152</sup> Modern legislation seldom displays overt hostility towards a specific faith group or religious practice.<sup>153</sup> However, in the case of the Shari'a ban in Oklahoma, state officials accomplished this precisely.<sup>154</sup> The Drafters crafted the Free Exercise Clause in part due to a history of religious persecution and intolerance prior to the formation of the United States.<sup>155</sup> Hence, the protection of the clause applies if a government action infringes on religious beliefs or conduct without advancing a compelling interest to justify such infringement.<sup>156</sup>

147. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof . . . ." (emphasis added)).

148. See SULLIVAN & GUNTHER, *supra* note 99, at 1285.

149. *Id.*

150. *Id.* at 1286.

151. See *id.*; see also, e.g., *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (invalidating a city ordinance that prohibited the ritual slaughter of animals, because the law, though facially neutral, actually was targeted at members of the Santeria faith, and therefore violated the Free Exercise Clause).

152. *Lukumi*, 508 U.S. at 533.

153. SULLIVAN & GUNTHER, *supra* note 99, at 1286.

154. See H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010) ("Specifically, the courts shall not consider . . . Sharia Law.").

155. *Lukumi*, 508 U.S. at 532.

156. *Id.* at 531–32 ("A law failing to satisfy [the requirements of neutrality and generality] must be justified by a compelling governmental interest and must be

Some Oklahoma officials would argue that the amendment advances such a compelling interest, and that interest is to prevent terrorism from infiltrating their state.<sup>157</sup> Though prevention of terrorist attacks is certainly a compelling interest, the government action must be “narrowly tailored to advance that interest.”<sup>158</sup> A general ban on recognition of any Shari’a principles in Oklahoma courts is not narrowly tailored in any sense.<sup>159</sup> First, the Oklahoma legislature provides no evidence that a Shari’a ban would accomplish such terrorism prevention.<sup>160</sup> Second, a ban on Shari’a has its greatest effect on Muslim Americans, the vast majority of whom are not terrorists.<sup>161</sup> Finally, it is unclear how banning Shari’a from Oklahoma courts would prevent terrorism.<sup>162</sup> Proponents of the ban insist that it will stop Shari’a from infiltrating the state’s judicial system and creating a welcoming environment for jihadists.<sup>163</sup> Yet until this amendment, there had been virtually no mention of Shari’a in Oklahoma court decisions and prospective application would be on a permissive basis with no possibility of replacing existing United States law.<sup>164</sup> The few instances in which United States courtrooms have addressed Shari’a show courts treating these matters in the same way they have treated claims brought by other religions: recognizing the religious principles when necessary, but refusing to enforce them in the face of conflicting United States law.<sup>165</sup> Shari’a is not “creeping” into the judiciary, and Islam is not threatening to take

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narrowly tailored to advance that interest.”); *Awad v. Ziriax*, 570 F.3d 1111, 1129 (10th Cir. 2012) (“[M]ere speculation of harm does not constitute a compelling state interest . . . . Appellants do not identify any *actual problem* the challenged amendment seeks to solve . . . they did not know of even a single instance [where Shari’a application or use] had resulted in concrete problems in Oklahoma.”).

157. See Hamilton, *supra* note 93.

158. *Lukumi*, 508 U.S. at 531–32 (“Neutrality and general applicability are interrelated, and as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied.”). Here the ban is not generally applicable, but mentions only Shari’a law as a disallowed religious doctrine. *Id.*

159. See Hamilton, *supra* note 93. Like many religious doctrines, Shari’a is subject to a wide array of interpretations, and a ban on Shari’a in general is not narrowly tailored to affect the small subset of Shari’a adherents who interpret it to justify their terrorism. See *id.*

160. See *id.*

161. DAVID SCHANZER ET AL., *ANTI-TERROR LESSONS OF MUSLIM-AMERICANS* 10 (2010) (stating that between September 11, 2001, and December 31, 2009, an average of seventeen Muslim Americans per year were linked to terrorist violence, with between 1.5 million and 2 million Muslims living in the United States).

162. See Hamilton, *supra* note 93.

163. See *id.*

164. See BROUGH, *supra* note 34; Siegel, *supra* note 9.

165. See Riccardi, *supra* note 9.

over Oklahoma's courts.<sup>166</sup> The amendment would restrict Muslims' right to the free exercise of their religious beliefs by disallowing them from enforcing agreements based upon Shari'a principles in their personal dealings.<sup>167</sup> Therefore, the amendment is in violation of the Free Exercise Clause of the First Amendment.

### C. Equal Protection Violation

The third constitutional provision that the Oklahoma Shari'a ban likely violates is the Equal Protection Clause, which prohibits states from denying any person equal protection under the law.<sup>168</sup> The Equal Protection Clause was initially aimed at alleviating racial discrimination against African Americans following emancipation.<sup>169</sup> Gradually, the Supreme Court applied equal protection to a host of other "suspect" classifications, including gender, national origin, and alienage.<sup>170</sup> While the Court has not identified a test for determining if a certain group qualifies for strict scrutiny under equal protection doctrine, it has recognized certain criteria that could establish such scrutiny as appropriate.<sup>171</sup> These criteria include subjection to discrimination, distinguishing characteristics that define a discrete group, and political powerlessness.<sup>172</sup> Intense discrimination against Muslim Americans is pervasive, especially over the past decade.<sup>173</sup> Furthermore, Muslim Oklahomans, constituting less than one percent of Oklahoma's population, are certainly a discrete group within the state.<sup>174</sup> Similarly, due to their relatively small number, it is virtually impossible for these citizens to address any governmental

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166. See Gay, *supra* note 87 ("The anti-Sharia movement would have you believe that Islamic law is encroaching on our legal system and is a threat to an American way of life. This is simply not true, and in fact the court cases cited by anti-Muslim groups as symptoms of some kind of "Muslim threat" actually show the opposite.").

167. See Hamilton, *supra* note 93.

168. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

169. SULLIVAN, *supra* note 99, at 500 ("In the earliest interpretation of the Fourteenth Amendment, in the Slaughter-House Cases, the Court suggested that concern with racial classifications exhausted the meaning of the clause.").

170. *Id.*

171. See, e.g., *Lyng v. Castillo*, 477 U.S. 635, 638–39 (1986) (analyzing whether a distinction based on membership in a "household" required heightened scrutiny).

172. *Id.*

173. See Heather L. Weaver, *9/11's Legacy of Religious Discrimination*, ACLU BLOG OF RTS. (Sept. 15, 2011, 4:23 PM), <http://www.aclu.org/blog/national-security-religion-belief/911s-legacy-religious-discrimination> ("It's no secret that, after 9/11, a wave of anti-Muslim bigotry washed over the country. The intensity of that prejudice has sustained it for a decade . . .").

174. Riccardi, *supra* note 9.

action against them through the political process. Their votes are too few in number to sway any election, and therefore political leaders can target them without meaningful consequence.<sup>175</sup> While meeting these criteria may not be sufficient to require strict scrutiny of government action against the Oklahoman Muslim community, it does lend credence to an equal protection defense against this action.<sup>176</sup> Without advocates in the courts, the Muslim community is not politically empowered to protect itself from this kind of discriminatory legislation, and therefore has limited alternatives to obtain equal protection under the law.<sup>177</sup>

Notwithstanding the above criteria, plaintiffs virtually never bring claims of religious discrimination under the Equal Protection Clause.<sup>178</sup> But in cases such as Oklahoma's Shari'a ban, where people feel like they are outsiders due to their government's action, the issue is of equality and therefore falls within the purpose of equal protection.<sup>179</sup> These religious minorities face the same difficulties of marginalization faced by racial minorities and women.<sup>180</sup> For instance, African Americans have long struggled with proving their similarity to White men in order to obtain equality under the law.<sup>181</sup> Similarly, equal rights for religious minorities depend on showing their similarity to Christian Americans.<sup>182</sup> White men have not historically needed to prove their entitlement to full citizenship.<sup>183</sup> It has been an assumed conclusion.<sup>184</sup> Likewise, Christian Americans have not needed to prove they were authentic, valid citizens; their status as an overwhelming majority created an assumption that such was the case.<sup>185</sup> Governmental expression of religion makes many members of minority religions (or people of no religion at all) feel

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175. *See id.*

176. *See Lyng*, 477 U.S. at 639.

177. Riccardi, *supra* note 9.

178. Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 666 (2008) (providing an in-depth analysis of several good reasons to employ the Equal Protection Clause—in addition to the Establishment Clause and Free Exercise Clause—for certain religious discrimination cases).

179. *See id.* at 665–66.

180. *See id.* at 670.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

like tolerated outsiders, and therefore unequal in the eyes of their government.<sup>186</sup>

In addition to these factors, the Supreme Court has hinted that in Free Exercise and Establishment Clause cases, there may be an equal protection concern as well.<sup>187</sup> In a tax exemptions case, Justice Harlan discussed the Establishment Clause's requirement of government neutrality, and explained that "[n]eutrality in its application requires an equal protection mode of analysis."<sup>188</sup> In a case where the Court invalidated a state constitutional provision barring clergymen from serving as delegates to a state constitutional convention, Justice White disagreed with the Court's Free Exercise Clause justification and stated that he would rest his decision on the provision's impingement of equal protection of the laws.<sup>189</sup> Furthermore, in *Board of Education v. Grumet*,<sup>190</sup> Justice O'Connor pointed out the value of the Equal Protection Clause in analyzing religion cases:

We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." "Just as we subject to the most exacting scrutiny laws that make classifications based on race . . . so too we strictly scrutinize governmental classifications based on religion."

This emphasis on equal treatment is, I think, an eminently sound approach. In my view, the Religion Clauses—the Free Exercise Clause, the Establishment Clause . . . and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits.<sup>191</sup>

Such language indicates at least some historical support from the Supreme Court for an equal protection analysis of cases involving governmental religious discrimination.<sup>192</sup> By singling out Shari'a, Oklahoma is not providing Muslim Oklahomans with equal treatment under the law. Instead Oklahoma asserts that Muslim Oklahomans' Islamic faith affects their legal rights as citizens.<sup>193</sup>

186. *Id.* at 672.

187. *Id.* at 679.

188. *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

189. *McDaniel v. Paty*, 435 U.S. 618, 643–44 (White, J., concurring).

190. 512 U.S. 687 (1994).

191. *Id.* at 714–15 (O'Connor, J., concurring) (citations omitted).

192. *Id.*

193. See *Awad v. Ziriax*, 570 F.3d 1111 (10th Cir. 2012) (upholding an injunction that would block the implementation of the "Save our State" Amendment).

Accordingly, Oklahoma's ban on Shari'a is a case that warrants analysis under the standard of strict scrutiny.<sup>194</sup>

#### IV. Oklahoma's Anti-Shari'a Legislation Is a Reflection of Discrimination Against Muslims in the United States

The ban of Shari'a in Oklahoma courts is but one example of an anti-Shari'a movement in the United States.<sup>195</sup> This movement is a manifestation of the ongoing discrimination that Muslim Americans face every day and the fear of Islam that permeates much of the country.<sup>196</sup> This pervasive anti-Muslim discrimination and fear of Islam have seen a steady increase since September 11, 2001.<sup>197</sup> After the terrorist attacks that destroyed the World Trade Center and damaged the Pentagon, hundreds of hate crimes against mosques and individual Muslims were reported.<sup>198</sup> Islamic centers were vandalized, Muslims faced ridicule when attempting to practice their faith in various locales, and sometimes such hassles escalated into outright civil rights violations.<sup>199</sup> Many Muslims attribute these experiences to the lack of understanding that exists in the United States regarding their religion and its tenets.<sup>200</sup> As more time separates the present from the events of September 11, 2001, the prejudice and bigotry towards Muslims has not waned;<sup>201</sup> if anything, it has only increased.<sup>202</sup>

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194. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993) (noting that laws that burden religious practices and are "not neutral or not of general application" must be reviewed under the standard of strict scrutiny).

195. See Jones & Palazzolo, *supra* note 88; Gay, *supra* note 87.

196. See Jones & Palazzolo, *supra* note 88. "The anti-Sharia law movement clearly seeks to ride the recent wave of anti-Muslim bias in this country, pushing laws that are rooted in the baseless idea that U.S. Muslims wish to impose Islamic law on American courts." *Id.*

197. See ACLU, A CALL TO COURAGE: RECLAIMING OUR LIBERTIES TEN YEARS AFTER 9/11, at 4-9 (2011) (reviewing a multitude of anti-Muslim actions over the past ten years); *Map - Nationwide Anti-Mosque Activity*, ACLU, [www.aclu.org/maps/map-nationwide-anti-mosque-activity](http://www.aclu.org/maps/map-nationwide-anti-mosque-activity) (last visited Apr. 14, 2012) (compiling anti-mosque incidents across the country over the past five years); Weaver, *supra* note 173.

198. ROBERT WUTHNOW, AMERICA AND THE CHALLENGES OF RELIGIOUS DIVERSITY 87 (2005).

199. See *id.*; Jeff Karoub, *Roger Stockham Arrested with Explosives Outside Major U.S. Mosque*, HUFFINGTON POST (Jan. 30, 2011), [www.huffingtonpost.com/2011/01/30/roger-stockham-arrested-explosives\\_n\\_815984.html](http://www.huffingtonpost.com/2011/01/30/roger-stockham-arrested-explosives_n_815984.html) ("[Stockham] was traveling with explosives in his vehicle with the intention of blowing up [a mosque] where mourners had gathered for a funeral . . ."); *Mosque in Jacksonville, Fla., Firebombed*, UPI (May 12, 2010), [http://www.upi.com/Top\\_News/US/2010/05/12/Mosque-in-Jacksonville-Fla-firebombed/UPI-85931273693653/](http://www.upi.com/Top_News/US/2010/05/12/Mosque-in-Jacksonville-Fla-firebombed/UPI-85931273693653/).

200. WUTHNOW, *supra* note 198, at 87-88.

201. See Weaver, *supra* note 173.

202. Mark Potok, *FBI Reports Dramatic Spike in Anti-Muslim Hate Violence*,

Apart from discrimination on a personal level, Muslims face growing challenges from state and local governments and agencies that seem determined to promote anti-Muslim sentiment.<sup>203</sup> The “Save our State” amendment in Oklahoma is one such example of a state government impermissibly encroaching on Muslims’ rights. In the time since Oklahoma voters responded to the amendment with widespread approval, a multitude of other states have taken up similar legislation.<sup>204</sup> A few of these states subsequently removed anti-Shari’a language from their bills after facing criticism from advocacy groups.<sup>205</sup> But even among the states that succumbed to such pressure, the underlying purpose of the legislation remained unchanged.<sup>206</sup>

The political uproar over a proposed Islamic center near the World Trade Center site (the so called “Ground Zero Mosque,” which is not a mosque and is not located at Ground Zero<sup>207</sup>) loudly expressed the distrust that some Americans harbor towards Muslims.<sup>208</sup> Elsewhere, local governments have tried using zoning

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HUFFINGTON POST (Nov. 14, 2011), [http://www.huffingtonpost.com/mark-potok/fbi-reports-dramatic-spik\\_b\\_1092996.html](http://www.huffingtonpost.com/mark-potok/fbi-reports-dramatic-spik_b_1092996.html) (reporting that last year the FBI recorded a fifty percent increase in anti-Muslim hate crimes from those recorded in 2009, and noting that FBI statistics compiled each year are known to dramatically understate the real levels of hate crimes).

203. See, e.g., Spencer Ackerman, *FBI Teaches Agents: ‘Mainstream’ Muslims are ‘Violent, Radical,’* WIRED (Sept. 14, 2011), <http://www.wired.com/dangerroom/2011/09/fbi-muslims-radical/all/1> (reporting on the FBI’s practice of “teaching its counterterrorism agents that ‘main stream’ [sic] American Muslims are likely to be terrorist sympathizers, that . . . Muhammad was a ‘cult leader,’ and that the Islamic practice of giving charity is actually a ‘funding mechanism for combat’”).

204. *States Move to Ban Islamic Sharia Law*, *supra* note 86.

205. Jerome Socolovsky, *Analysts: Efforts to Ban Sharia in US States Reflect Continued Anxiety Over Islam*, VOICE OF AM. (Apr. 4, 2011), <http://www.voanews.com/english/news/religion/Efforts-to-Ban-Sharia-in-US-States-Reflect-Continued-Anxiety-over-Islam-119206334.html> (noting that Oklahoma and Tennessee have recently introduced legislation banning religious law in general, with specific mention of Shari’a removed).

206. See *id.* Oklahoma Representative Sally Kern—author of the Oklahoma bill banning any law, rule, legal code, or system that does not offer the same protections as the Constitution—says the target is still Shari’a. *Id.*

207. Matt Sledge, *Just How Far Is the “Ground Zero Mosque” from Ground Zero?*, HUFFINGTON POST (July 28, 2010), [www.huffingtonpost.com/matt-sledge/just-how-far-is-the-groun\\_b\\_660585.html](http://www.huffingtonpost.com/matt-sledge/just-how-far-is-the-groun_b_660585.html) (noting that the proposed “Ground Zero Mosque” is two blocks away from the World Trade Center site).

208. See Anushay Hossain, *Park 51: The Ground Zero Mosque Is Not a Mosque*, HUFFINGTON POST (Aug. 19, 2010), [http://www.huffingtonpost.com/anushay-hossain/park-51-the-ground-zero-m\\_b\\_686950.html](http://www.huffingtonpost.com/anushay-hossain/park-51-the-ground-zero-m_b_686950.html). The property had been used as an overflow prayer space for hundreds of Muslims, and was purchased (with plans to develop) to provide a Muslim push-back against the extremists. Ralph Blumenthal, *Muslim Prayers and Renewal Near Ground Zero*, N.Y. TIMES, Dec. 9, 2009, at A1. The planned center was approved by a city advisory board in 2010, despite political uproar. *NYC Community Board Oks Ground Zero Mosque Plans*,

technicalities to prevent Muslims from acquiring routine permits to build or develop property.<sup>209</sup> A standard justification for these reactions toward Islam is concern about terrorism.<sup>210</sup> But such actions of governments and political leaders have their greatest effect on innocent Muslim Americans, and the important fact remains that terrorism is not a Muslim phenomenon.<sup>211</sup>

Unfortunately, much of these publicized anti-Muslim assertions are being used to gain political capital in some parts of the United States.<sup>212</sup> This political strategy is another explanation for the flood of anti-Shari'a bills being proposed across the country.<sup>213</sup> As the 2012 election cycle is under way, some politicians are capitalizing on anti-Muslim sentiment in hopes of gaining an advantage over their political opponents.<sup>214</sup> Many of these politicians face little risk in attacking Shari'a and Islam because they are running in states like Oklahoma, where the Muslim population is too small to significantly influence an election.<sup>215</sup> Endorsements of such rhetoric and misinformation by politicians and the media exacerbate the problem to the extent

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ASSOCIATED PRESS, May 25, 2010, available at <http://www.foxnews.com/us/2010/05/25/community-board-votes-support-plans-mosque-cultural-center-near-nycs-ground/>.

209. Weaver, *supra* note 173 (explaining how some permits were only reinstated after the ACLU intervened).

210. See Socolovsky, *supra* note 205. David Yerushalmi, a Washington, D.C.-based lawyer who helped author anti-Shari'a bills, says he just wants to help law enforcement authorities fight terrorism; Yerushalmi says, "We know that all of the jihadists, every single one of them, base their doctrine of jihad on Sharia law." *Id.*

211. *Id.* This seems especially relevant in Oklahoma, site of the second worst terrorist attack in United States history. That attack was committed by Timothy McVeigh, a man who was raised Roman Catholic and identified as agnostic. Julian Borger, *McVeigh Faces Day of Reckoning*, GUARDIAN, June 11, 2001, at 1; Robert D. McFadden, *Terror in Oklahoma: The Suspect; One Man's Complex Path to Extremism*, N.Y. TIMES, Apr. 23, 1995, at 1.1.

212. See, e.g., Jerome Socolovsky, *Sharia Creates Controversy in US*, VOICE OF AM. (Sept. 29, 2010), <http://www.voanews.com/english/news/usa/Sharia-Creates-Controversy-in-US--104038379.html> (examining former speaker of the House Newt Gingrich's publicized anti-Shari'a remarks calling for a federal ban, and quoting Muslim Congressman Keith Ellison: "He knows what he is saying is wrong . . . . He knows it is unconstitutional. But he thinks he can squeak out a political advantage by doing this.").

213. See Abdelkader, *supra* note 29 (stating that approximately fifty "anti-sharia" bills have been introduced).

214. See Socolovsky, *supra* note 212. There are also suggestions that the Oklahoma amendment was similarly politically motivated. See James C. McKinley Jr., *Oklahoma Surprise: Islam as an Election Issue*, N.Y. TIMES, Nov. 15, 2010, at A12 ("[T]he anxiety among some voters about illegal immigrants and Muslims has become a potent political weapon.").

215. See, e.g., PEW FORUM, *supra* note 113.

that state governments feel the need to sanction discrimination against Muslims; anti-Muslim sentiment continues to rise.<sup>216</sup>

Unjustified state-sanctioned discrimination, against any group, is unconstitutional and cannot be tolerated.<sup>217</sup> The Oklahoma district court must invalidate Oklahoma's ban on Shari'a because it is an unconstitutional violation of Muslim rights.<sup>218</sup> The court must set the precedent that such blatantly inequitable legislation will not survive constitutional challenges in federal court. If the court fails to invalidate the amendment, the Supreme Court of the United States must do so. Such facially discriminatory government action violates the Establishment, Free Exercise, and Equal Protection Clauses of the Constitution. The Court has a duty to protect those individuals who cannot find resolution through the political process.

### **Conclusions and Recommended Action to Prevent Anti-Muslim Discrimination in the Future**

Judicial invalidation of Oklahoma's amendment would be a victory in the battle, but not a victory in the war. The ruling from the Tenth Circuit Court of Appeals upholding the injunction against certification of the amendment gives hope that the Shari'a ban is well on its way to invalidation.<sup>219</sup> Such judicial action is necessary to protect the small group of Muslims who live in Oklahoma.<sup>220</sup> But the judiciary cannot substantially address the underlying issues that lead to legislation like the "Save our State" amendment. Both the federal and state governments must take initiative to address anti-Muslim discrimination. Such initiative is beginning to manifest itself. The Constitution, Civil Rights, and Human Rights Subcommittee in the United States Senate took a step in the right direction last spring when it held a hearing on anti-Muslim bigotry.<sup>221</sup> The Obama administration has taken

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216. H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010); see Deepa Kumar, *Fighting Islamophobia: A Response to Critics*, MRZINE (Mar. 4, 2006), <http://www.mrzine.monthlyreview.org/2006/kumar030406.html> ("One of the consequences of the relentless attacks on Islam and Muslims by politicians and the media is that Islamophobic sentiment is on the rise.").

217. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531–33 (1993).

218. See *id.*

219. See *Awad v. Ziriax*, 570 F.3d 1111 (10th Cir. 2012); Evan Perez, *Court Faults Oklahoma Ban on Islamic Law*, WALL ST. J. (Jan. 10, 2012), [online.wsj.com/article/SB10001424052970204257504577152942544192440.html](http://online.wsj.com/article/SB10001424052970204257504577152942544192440.html).

220. See, e.g., PEW FORUM, *supra* note 113 (stating that Muslims currently constitute 0.5% of Oklahoma's population).

221. Kelly Kennedy, *Senate to Hold Hearing on Anti-Muslim Bigotry*, USA

strides to initiate a new beginning for the relationship between the United States and the Muslim world.<sup>222</sup> Republican New Jersey Governor Chris Christie spoke out publicly against the anti-Shari'a movement after being criticized for appointing a Muslim judge to the state Superior Court.<sup>223</sup> These are positive examples of appropriate government responses to anti-Muslim discrimination.

Legislators in Oklahoma should take similar steps to repudiate the repugnant discrimination that has plagued their state. The government should schedule legislative hearings on Islam and Shari'a to give the small Muslim minority a voice in the state government.<sup>224</sup> Such hearings would provide a forum for the public to voice their concerns, and would provide an opportunity for Muslims who adhere to Shari'a principles in their daily lives to explain what their faith means to them, and how legislation such as the "Save our State" amendment encroaches on their faith.<sup>225</sup> In addition, Muslims would have an opportunity to publicly defend themselves against accusations from the state government.<sup>226</sup>

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TODAY (Mar. 27, 2011), [http://www.usatoday.com/news/washington/2011-03-28-muslims28\\_ST\\_N.htm](http://www.usatoday.com/news/washington/2011-03-28-muslims28_ST_N.htm). This hearing was in contrast to a House hearing about the radicalization of Muslims, and was attacked by the leader of that hearing, Representative Peter King, a Republican from New York, who stated that "Muslim Americans are perpetuating a myth that there's a bias against Muslims." *Id.* This is evidence that even at the highest level of government some political leaders consider Islam to be an enemy of the United States. See Robert Kolker, *Peter King's Muslim Problem*, N.Y. MAG. (Mar. 6, 2011), <http://www.nymag.com/news/politics/peter-king-2011-3/>.

222. Barack Obama, President of the United States, Inaugural Address (Jan. 20, 2009), available at <http://www.nytimes.com/2009/01/20/us/politics/20text-obama.html?pagewanted=all>. "To the Muslim world, we seek a new way forward, based on mutual interest and mutual respect." *Id.*

223. Chris Moody, *Chris Christie Slams Fearmongering over Sharia Law*, YAHOO! NEWS (Aug. 4, 2011), <http://news.yahoo.com/blogs/ticket/chris-christie-slams-fearmongering-over-sharia-law-210648303.html>.

Sharia law has nothing to do with this at all. It's crazy. . . . The [judge is] an American citizen . . . [and] admitted lawyer . . . swearing an oath to uphold the laws . . . the constitution of the state of New Jersey, and the Constitution of the United States . . . This Sharia law business is . . . just crazy.

*Id.*

224. For a discussion about the importance of including minorities in democratic policy making, see WILLIAM F. SHIJA, *PROMOTING DEMOCRACY: THE CHALLENGE OF RAISING CITIZEN PARTICIPATION* (2011), available at [http://www.commonwealthministers.com/images/uploads/documents/Shija\\_5.pdf](http://www.commonwealthministers.com/images/uploads/documents/Shija_5.pdf). "Although democratic practice gives the majority the right to govern, good governance must always allow the minority to participate in decision-making . . . The challenge is often to confront the reluctance of the majority to involve the minority in governance . . ." *Id.* at 2.

225. See *id.*

226. For instance, in Representative Peter King's hearing regarding Muslim radicalization, Muslim Representative Keith Ellison testified in defense of

Providing such a forum for Muslim Oklahomans would put a face on the minority the legislature is targeting, and enable legislators to make informed decisions regarding a small group of largely mischaracterized citizens.<sup>227</sup> Without such outreach and leadership by our nation's officials, Muslims will continue to be targets of discrimination, both from the general public and opportunistic political figures.<sup>228</sup> Such discrimination must not continue, and it is up to our leaders to ensure that Muslim Americans, like all Americans, are accepted and supported in this country.

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Muslims. Elizabeth Tenety, *Rep. Keith Ellison Weeps at Hearing on Muslim American Communities*, WASH. POST (Mar. 10, 2011), [http://onfaith.washingtonpost.com/onfaith/undergod/2011/03/rep\\_keith\\_ellison\\_weeps\\_at\\_hearing\\_on\\_muslim\\_american\\_communities.html](http://onfaith.washingtonpost.com/onfaith/undergod/2011/03/rep_keith_ellison_weeps_at_hearing_on_muslim_american_communities.html).

227. See PEW FORUM, *supra* note 113 (noting that Muslims represent only 0.6% of the adult population in the United States).

228. WUTHNOW, *supra* note 198, at 87–88 (describing the hundreds of hate crimes committed against Muslims); Socolovsky, *supra* note 205.