America's Muslim Problem:
Anti-Shariah Laws and the Threat to American Civil Rights[•]

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Abstract: More than a decade after 9/11, America has a "Muslim" problem. In July 2010, Oklahoma became the first State in our Nation's history to pass anti-Shariah legislation. A Federal judge subsequently struck down the law, ruling it unconstitutional, and the 10th Circuit Court of Appeals affirmed. While anti-Shariah advocates are unable to cite a single example of Islamic Shariah's application in preference to, or superior to, the United States Constitution, at least twenty additional states have passed, or attempted to pass, unprecedented legislation banning either Shariah or a blanket condemnation of the vaguely defined "foreign law." This article argues that the anti-Shariah movement in America promotes an unconstitutional agenda, violates fundamental American Muslim civil liberties, and ultimately addresses an unfounded threat. It demonstrates that, far from any alleged Shariah threat, such legislation violates the civil liberties of millions of Americans of various faiths—not just of American Muslims. It concludes with a thorough repudiation of alleged examples of Shariah's infiltration into American courts, and proves that our Constitution has the numerous internal protections necessary to ensure that it remains the sole sovereign law of the land, as it has since inception.

Keywords: Shariah, Islam, Muslim, American, U.S. Constitution

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation, as inoperative as though it had never been passed."[1]

[•] Given the unique authorship and content of this article (see following footnote), the citation format deviates from the standard Claremont Journal of Religion format.

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[1] Norton v. Shelby County, 118 US 425 (1885).

Introduction

The American experiment, among its many ambitions, intended to put an end to tyranny and enjoin universal religious freedom for all its residents. Prior to the American Revolution, the international community pointed to America's commitment to religious diversity as the gravest threat to America's unity.[2] The Founders, however, believed that a free, even competitive, religious market would "ensure religious vitality and prevent religious wars."[3] In other words, religious liberty, not regulation, was the path the Founders chose to foster a pluralistic society.[4] Despite these noble intentions, this principle did not give practical effect immediately, particularly to religious minorities. While Americans today enjoy generous religious freedom, the road here has been long, arduous, and is ongoing. The current debate questions whether Muslim-Americans have the right to freely practice their faith, as politicians have come to call Islam and America "incompatible."[5] To date, over twenty states have passed, or attempted to pass, some sort of anti-Shariah legislation.[6] Elected government officials have proposed discharging from service all Muslims serving in the military.[7] Others have proposed that Islam is not a religion, but rather a governmental, political, or fascist ideology.[8]

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[2] Frank Lambert, *The Founding Fathers and the Place of Religion in America* at 206 (2003)
[3] Id. at 206
[4] Id. at 206
[5] Rick Santorum: Sharia 'is Evil': POLITICO http://www.politico.com/news/stories/0311/51166.html (last visited on Dec. 6, 2011)
[6] See Appendix A
[7] Tennessee State Rick Womick (R) interview on the Steve Gill Show, http://www.youtube.com/watch?feature=player_embedded&v=xRMq2nWat0o (Last visited on Dec. 7, 2011)
[8] See Supra note 5 and note 7

The anti-Islam and anti-Muslim campaign is not the first time America has seen discrimination of religious minorities. While campaigning for office, President John F. Kennedy recognized the need to defend his Catholic faith and assure Americans that the United States Constitution commanded his loyalty—not the Vatican.[9] American Jews, Mormons, and Quakers have likewise experienced religious persecution and discrimination.[10] Enslaved Africans and the Native Americans, each of whom suffered brutal religious (and physical) persecution, preceded these groups. Therefore, while incredible, the anti-Shariah campaign that has enveloped nearly half of our states is, unfortunately, not without precedent.

The ramifications of this campaign, however, go far beyond affecting only Muslim-Americans. This paper demonstrates that the anti-Shariah movement is nothing more than an unconstitutional attempt to strip millions of American citizens, Muslim and non-Muslim, of their fundamental rights. Additionally, the anti-Shariah movement is a threat to the pluralistic society our Founders envisioned when they framed the Constitution.[11]

Part II of this paper analyzes Shariah to properly describe exactly what it entails. Indeed, a consistent theme in anti-Shariah legislation nationwide is a lack of even a rudimentary understanding of what is being banned. Part III discusses the anti-Shariah movement's origins and briefly analyzes the elements and prohibitions common to the various proposed forms of legislation. Part IV demonstrates at length

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[9] Gary Donaldson, *The first modern campaign: Kennedy, Nixon, and the election of 1960* 107 (2007)

[10] See e.g., Governor Boggs of Missouri ordered that "[t]he Mormons must be treated as enemies, and must be exterminated or driven from the state if necessary for the public peace—their outrages are beyond all description." Available at http://www.newsinhistory.com/blog/missouri-governor-issues-extermination-order-against-mormons

[11] See Supra note 2

why anti-Shariah and the amorphous anti-foreign legislation are unconstitutional violations of Muslim and non-Muslim American civil rights. Part V repudiates three select cases of a report promoted as evidence that Shariah has infiltrated American courts. Part VI concludes this paper and demonstrates that anti-Shariah laws violate the fundamental rights of Muslims, Jews, and Christians—indeed, they violate the rights of any American who practices a faith or engages in international business.

Part II. An Overview of Shariah

a. What is Shariah?

Shariah is the law derived from the Qur'an and literally means the way or path to [a water source],[12] similar to Abrahamic tradition[13] Prophet Muhammad's Sunnah[14] and Hadith[15] are not absolutely binding in Islamic jurisprudence but serve instead as persuasive authority to interpret the Qur'an, which is binding and always held as superior to Sunnah and Hadith.[16] Though only one version of the Qur'an

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[12] C.E. Bosworth, E. van Donzel, W.P. Heinrichs, G. Lecomte, *The Encyclopaedia of Islam New Edition Volume IX* 326 (1997). "…the origin of *shari* and *shari'a* meaning way, path, road, highway. It is from here that the specialist religious use emerged"

[13] In fact, the word *Yarah* (i.e. the root of the Hebrew word Torah) means precisely the same thing, demonstrating Shariah's root in Abrahamic tradition. Exodus 19:13 Lexicon *yarah* (yaw-raw'): to flow as water (i.e. to rain); transitively, to lay or throw (especially an arrow, i.e. to shoot); figuratively, to point out (as if by aiming the finger), to teach *available at* http://lexicon.scripturetext.com/exodus/19-13.htm; See also, C.E. Bosworth, E. van Donzel, W.P. Heinrichs, G. Lecomte, *The Encyclopaedia of Islam New Edition Volume IX* 326 (1997). "This word [sharia] is applied also to the neck of a camel; hence also *shura'iyya*, a long-necked camel. This field of use is cognate with *Biblical and Talmudic Hebrew sara' meaning to stretch/be stretched and is likely to be the origin of shari and shari'a meaning way*, path, road, highway. It is from here that the specialist religious use emerged." (emphasis added)

[14] The Sunnah are the Prophet Muhammad's recorded actions

[15] The Hadith are the Prophet Muhammad's recorded sayings. Hadith vary in authenticity and veracity While hundreds of thousands of Hadith have been recorded, the six most authentic books of Bukhari, Muslim, al-Nasai, Abu Dawood, Trimidi, and Ibne Maajaah are most heavily relied upon, while numerous other books are available as well

[16] Muhammad Zafrullah Khan, *Gardens of the Righteous* X (1975) ("The Quran is the code, the Sunnah of the Prophet is its illustration. The Holy Prophet cautioned his Companions to be extremely careful in watching, listening to, and reporting whatever he said or did or abstained from. To make

exists, Muslims are not monolithic and Shariah is not recorded as a single canon. On the contrary, several different schools of *fiqh*, or jurisprudence, interpret Shariah in different ways. The four branches of jurisprudence that have been most influential throughout Islamic history are the *Hanafi*,[17] *Hanbali*,[18] *Maliki*,[19] and *Shafi'i*[20]. Other influential schools of jurisprudence include *Ibadi*[21] and *Zahiri*.[22] This list is by no means comprehensive, but it illustrates a cross-section of the diversity of thought within the Muslim world and throughout Islamic history.

That each school of jurisprudence might interpret Shariah differently should not be surprising. By analogy, consider that United States Supreme Court Justices

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assurance doubly sure, he laid down the criterion that if anything attributed to him was not in accord with the Quran it was to be rejected as not proceeding from him.")

[17] B. Lewis, V.L. Menage, Ch. Pellat, J. Schacht, *The Encyclopaedia of Islam New Edition Volume III* 162-63 (1986). "Hanafiyya [is] the Hanafi *madhab* or school of religious law, named after Abu Hanifa (d. 767). It grew out of the main body of the ancient school of Kufa, and absorbed the ancient school of Basra, too…the Hanafi school was favoured by the first Abbasid caliphs. It has always been well represented in its home country and in Syria."

[18] B. Lewis, V.L. Menage, Ch. Pellat, J. Schacht, *The Encyclopaedia of Islam New Edition Volume III* 158-59 (1986). "Hanabali denotes the followers of the school of theology, law and morality which grew from the teaching of Ahmad b. Hanbal (d. 855), whose principal works, the *Musnand* and the *responsa*, had begun to be codified even during the lifetime of the author."

[19] C.E. Bosworth, E. van Donzel, B. Lewis, Ch. Pellat, *The Encyclopaedia of Islam New Edition Volume VI* 263-64 (1991). "Malik B. Anas, a Muslim jurist, the Imam of the madhab of the Malikis, which is named after him, and frequently called briefly the Imam of Medina."

[20] C.E. Bosworth, E. van Donzel, W.P. Heinrichs, G. Lecomte, *The Encyclopaedia of Islam New Edition Volume IX* 181 (1997). "alShafi'i…the founder, of the Shafi'I school. The biographers are all agreed in dating the birth of al-Shafi'I in 767, the year of the death of Abu Hanifa."

[21] B. Lewis, V.L. Menage, Ch. Pellat, J. Schacht, *The Encyclopaedia of Islam New Edition Volume III* 648 (1986). "Al-Ibadiyya, one of the main branches of the Kharidis, representatives of which are today found in Uman, East Africa, Tripolitania and southern Algeria. The sect takes its name from that of one of those said to have founded it, 'Abd Allah b. Ibad al-Murri al-Tamimi. Yet another form is…Ibada."

[22] P.J. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs, *The Encyclopaedia of Islam New Edition Volume XI* 394 (2002). "al-Zahiriyya, a theologico-juridical shool in mediaeval Islam which may be situated, among madhabs as a whole, "at the furthest limit of orthodoxy." It is, furthermore, the only school that owest its existence and its name to a principle of law, Zahiri in this case. Thus it relies exclusively on the literal (*zahir*) sense of the Kur'an and of Tradition, rejecting *ra'y* but also *kiyas*."

often interpret the Constitution either on the theory of Originalism[23] or Living Constitutionalism.[24] Neither theory is correct or incorrect per se, but depending on the theory employed, Justices applying the same facts according to the same law may reasonably arrive at diametrically opposing conclusions. This is a possibility when interpreting any law—Shariah is no exception.

b. The Five Branches of Shariah

Shariah is comprised of five main branches: *adab*[25] (moral behavior and manners), *ibadah* [26] (ritual worship), *i'tiqadat*[27] (beliefs), *mu'amalat*[28] (transactions and contracts), and *'uqubat*[29] (punishments). Of these five categories, adab, ibadah, and i'tiqadat, are practiced strictly through a Muslim's personal relationship with his Creator. They are understood as the core tenets of Islamic teaching. Part IV of this paper explains why these three branches of Shariah, addressing matters of personal morals, worship, and beliefs, are protected under the First Amendment. Indeed, not all aspects of Shariah are concerned with generally applicable laws in the same way "laws" are perceived of in the United States. The most appropriate

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[23] Center for the Study of Constitutional Originalism, "Originalism is the view that the Constitution should be interpreted in accordance with its original meaning—that is, the meaning it had at the time of its enactment." available at http://www.sandiego.edu/law/centers/csco/about.php

[24] David A. Strauss, *The Living Constitution* 1 (2010) ("A "living constitution" is one that evolves, changes over time, and adapts to new circumstances, without being formally amended.")

[25] H.A.R. Gibb, J.H. Kramers, E. Levi-Provencal, J. Schacht, *The Encyclopaedia of Islam New Edition Volume I* 175 (1986). "*Adab*: sunna, habit, hereditary norm of conduct, custom derived from models in a religious sense."

[26] *C*.E. Bosworth, E. van Donzel, W.P. Heinrichs, Ch. Pellat, *The Encyclopaedia of Islam New Edition Volume VII* 255 (1993). "*Ibadat*: ritual Islamic law."

[27] E. van Donzel, B. Lewis, Ch. Pella, *The Encyclopaedia of Islam New Edition Volume IV* 279 (1993). "*Itikad*: belief, opinion, thinking, deep conviction."

[28] *C*.E. Bosworth, E. van Donzel, W.P. Heinrichs, Ch. Pellat, *The Encyclopaedia of Islam New Edition Volume VII* 255 (1993). "*Mu'amalat*: a term which designates in words of *fikh* the bilateral contracts."

[29] *'Uqubat* (penal code), that is, the punishments called hadd *available at* http://www.hizmetbooks.org/Endless_Bliss_Second_Fascicle/bliss2-33.htm.

way to describe these three aspects of Shariah is guidance for moral conduct for individuals.

Shariah's fourth branch, mu'amalat, addresses matters of contract and transactional law such as family law (marriage, divorce, child custody), real and personal property, civil suits, wills and estates, business transactions, and generally any non-criminal matter. By definition, mu'amalat governs civil relationships between people and between organizations or both—often resolvable through mediation and arbitration. Long-established American law allows an individual to write a contract with generous flexibility, provided the contract adheres to the principle of good faith and fair dealing, and is not inherently against public policy and thereby illegal.[30] Thus, Shariah mu'amalat interactions generally qualify for Constitutional protection; Part IV analyzes this principle in more detail as well.

The fifth branch of Shariah, 'uqubat, or punishments, addresses consequences to criminal activities such as murder, theft, assault, battery, rape, abuse, perjury, treason, obstruction of justice, fraud, or incitement to violence among any list of crimes against others. As secular laws also address these activities, they are matters to which the right to address belongs exclusively to the respective nation's sovereign government, and that can only be fully resolved through criminal courts. The 'uqubat branch is significant to this discussion because the driving force behind the anti-Shariah legislation movement stems from a fundamental misunderstanding of this branch of Shariah.

[30] See Infra note 160, 161, 163

The media's relentless focus on extremist behavior often promotes the misguided belief that the ʻuqubat branch prescribes "honor killings," stoning, and death for apostasy.[31] While a thorough repudiation of such assertions is beyond the scope of this paper, far from prescribing such barbaric acts, long-established Shariah precedents from the Qur'an, Sunnah, and hadith, particularly and vociferously condemn each of the aforementioned practices.[32] Notably, every example that anti-Shariah advocates cite of Shariah's alleged imposition in American courts refers only to matters of mu'amalat, or personal contractual and transactional law—matters that are Constitutionally protected. In fact, the misapplication of ʻuquabat notwithstanding, anti-Shariah advocates are unable to cite even a single example

[31] Nick Wing, *Wyoming Weighs Bill That Would Ban Sharia Law*, THE HUFFINGTON POST, Jan. 26, 2011, *available at* http://www.huffingtonpost.com/2011/01/26/wyoming-sharia-law-bill_n_814266.html. "Wyoming State Representative Gerald Gay proposed an anti-Shariah constitutional amendment as "…a 'pre-emptive strike' to ensure judges don't rely on Shariah in cases involving, for example, arranged marriages, 'honor killings' [sic] or usury cases.")

[32] Honor killings and stoning to death are completely against Islam. Neither the Qur'an nor the Hadith validate this practice. In fact, the Qur'an prescribes punishment (not via stoning) for those who falsely accuse others of adultery (24:5). Thus, on one hand it condemn adultery and fornication by prescribing a punishment for it and on the other it sets high standards of justice by prescribing a punishment for those who accuse wrongly. Some Islamic Jurisprudents falsely prescribe, "stoning to death" as a punishment for adultery. They base it on a tradition of the Holy Prophet in which a Jewish couple was stoned due to their illicit behavior of adultery. The Holy Prophet prescribed this punishment in accordance with the Mosaic Law (Leviticus 20:10 and Deuteronomy 22:22) as a last resort, and upon the insistence of the adulterer. Islam, however, has never endorsed stoning for any crime whatsoever. In fact, the only time Islam endorses capital punishment is for intentional murder and for treason (5:33). Even then, stoning is not a permitted means of delivering capital punishment. Likewise, the alleged punishment of apostasy in Islam has no basis in the Qur'an and was not practiced by the Prophet Muhammad. In fact, the Qur'an specifically states, "there shall be no compulsion in the religion" (2:257). Prolific Muslim scholar, President of the UN General Assembly, and President of the World Supreme Court, Sir Muhammad Zafrullah Khan writes, "Islam has guaranteed freedom of conscience and freedom of belief, and has announced in the plainest terms that so far as faith is concerned everyone is answerable to God Almighty alone. The Holy Prophet, peace be on him, was commanded to proclaim that he had not been appointed a keeper over the people, nor had he been made responsible for them. No one has been made responsible for another's faith. Everyone is responsible for himself. No one can be compelled to become a Muslim, nor can anyone be expelled from Islam by compulsion. There is no compulsion whatever in Islam. So far as the Holy Quran is concerned there is no text, no verse, not a single word that prescribes any worldly, political or administrative punishment for apostacy." Sir Muhammad Zafrullah Khan, *Punishment for Apostacy in Islam*, *available at* http://www.alislam.org/books/apostacy/6.html

where the Shariah element of 'uqubat was applied in an American court in partiality to the American law—or even applied at all. [33]

Furthermore, Shariah restricts its own application in preference to an established law of the land, and only allows its application insofar as it does not conflict with the law of the land—demanding that Muslims pledge obedience to those in authority over them.[34] This is precisely why, despite intense religious persecution, the early Muslims fled Mecca and sought asylum elsewhere—rather than respond to violence with violence. Arms were thus only permitted in self-defense to protect universal religious freedom. [35]

To refer to an example more applicable to contemporary times, Shariah allows polygamy in certain situations,[36] while American law forbids polygamy categorically.[37] Therefore, a Muslim man living in the United States is both legally, per the Constitution, and Islamically, per Shariah, forbidden from practicing

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[33] The Qur'an 22:40-41 states, "Permission to fight is given to those against whom war is made, because they have been wronged — and Allah indeed has power to help them — Those who have been driven out from their homes unjustly only because they said, 'Our Lord is Allah' — And if Allah did not repel some men by means of others, there would surely have been pulled down cloisters and churches and synagogues and mosques, wherein the name of Allah is oft commemorated. And Allah will surely help one who helps Him. Allah is indeed Powerful, Mighty."

[34] The Qur'an 4:60 states, "O ye who believe! obey God, and obey *His* Messenger, and those who are in authority among you." In this verse, three authorities are mentioned, the last of which deliberately abstains from any religious connotation, but still requires obedience. Combined with the Qur'an's repeated restrictions from creating disorder in the Earth(See e.g. 2:12, 28, 61, 206; 5:33, 34; 7:57, 75, 86, 87, 104, 143; 11:86; 29:37), Shariah sets the precedent that a Muslim must not only obey the government authority over him, but must also maintain loyalty to his country of residence. Additionally, Anas said, "The Messenger of Allah, may Allah bless him and grant him peace, said, "Hear and obey, even if an Abyssinian slave with a head like a raisin is appointed over you." [al-Bukhari]

[35] Awad, Abed, "The True Story of Sharia in American Courts," Nation, The *available a t* http://www.thenation.com/article/168378/true-story-sharia-american-courts# (Last Visited May 22, 2014)

[36] The Qur'an 4:4 states, "And if you fear that you will not be fair in dealing with the orphans, then marry of women as may be agreeable to you, two, or three, or four; and if you fear you will not deal justly, then marry only one or what your right hands possess. That is the nearest way for you to avoid injustice."

[37] Reynolds v. United States, 98 U.S. 145 (1878)

polygamy. Likewise, in ‘uqubat matters, the United States Government is sovereign and has a detailed criminal penal code. Therefore, it is both Constitutionally and Islamically impossible that ‘uqubat regulations ever be applied in an American courtroom.

Finally, contrary to assertions that Shariah commands theocratic rule, the Qur’an does not promote or identify any particular government structure. Instead, the Qur’an commands that *adl* or “absolute justice” be employed as the determining factor in whatever structure of government a nation’s people choose.[38] As a practical example, when Prophet Muhammad was the ruler of Medina, he promulgated the Charter of Medina, in which Muslims alone were subject to Shariah, while Jews were held to the Law of the Torah—and both were equal citizens of one government.[39] Even as the de facto ruler of all Arabia, Prophet Muhammad forbade any religious compulsion, as per Qur’anic teaching.[40] “No other religion in history spread so rapidly as Islam. The West has widely believed that this surge of religion

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[38] The Qur’an 4:59 states, “Verily, God commands you to make over the trusts to those entitled to them, and that, when you judge between men, you judge with justice. And surely excellent is that with which God admonishes you! God is All-Hearing, All-Seeing.” Likewise, the Qur'an says, "Verily, God enjoins justice, and the doing of good to others; and giving like kindred; and forbids indecency and manifest evil and transgression. He admonishes you that you may take heed" (16:91). In both examples, it is crucial to note that no religious connotation is employed in how to judge. Rather, the universal principle of justice is the de facto determinant in ruling a society

[39] See e.g., Charter of Medina Article 17 forbids religious discrimination, “No Jew shall be wronged for being a Jew.” Article 18 hold justice, not personal relationships, as the grounds on which to determine alliances, “The enemies of the Jews who follow us [Muslims] shall not be helped.” Article 19 ensures a unified front against an attack, no matter the identity of the attacker, “The peace of the Believers (of the State of Madinah) cannot be divided. (it is either peace or war for all. It cannot be that a part of the population is at war with the outsiders and a part is at peace).” Articles 30 and 31 establish religious freedom, prescribing punishments only for those who act unjustly, regardless of their faith, “The Jews of Bani Awf will be treated as one community with the Believers. The Jews have their religion. This will also apply to their freedmen. The exception will be those who act unjustly and sinfully. By so doing they wrong themselves and their families.” Article 30, “The same applies to Jews of Bani Al-Najjar, Bani Al Harith, Bani Saeeda, Bani Jusham, Bani Al Aws, Thaalba, and the Jaffna, (a clan of the Bani Thaalba) and the Bani Al Shutayba.” available at
http://www.constitution.org/cons/medina/macharter.htm

[40] The Qur’an 2:257 states, “There shall be no compulsion in matters of religion.”

was made possible by the sword. But no modern scholar accepts this idea, and the Qur'an is explicit in the support of the freedom of conscience."[41] Shariah's appropriate application is that of a personal guidance between a Muslim and his Creator—never as an intrusive penal code.

Despite Shariah's restriction on mixing mosque and state, it is obvious that nations like Iran, Pakistan, and Saudi Arabia all enforce some form of theocratic rule. These theocratic or quasi-theocratic regimes have each arisen within the last century and act contrary to Qur'anic teachings. The evidence that these contemporary regimes act contrary to Qur'anic teaching is found in earlier Muslim governments who embraced Qur'anic teachings on ruling with justice, embracing multiculturalism, pluralism, interfaith harmony, and intellectual advancement. As the PBS produced "Cities of Light" documentary notes:

> Unlike the Romans and Visigoths before them, Muslim rulers seemed to grasp that the Jews and Christians who preceded them to the Iberian Peninsula were necessary partners in a productive society. The fascinating story of a central bureaucracy staffed by elites from all three faiths, with Jews in all but the highest post and Christian scholars outperforming "native" Arabic speakers in their own language and culture, is a fascinating and powerful antidote to our modern stereotypes concerning Christians, Jews, and Muslims.[42]

Muslim Spain, for example, well reflected the precedent of secular governance that Prophet Muhammad established in the Charter of Medina. Thus, rather than focusing on the narrowness of just the past century, an expanded view of Islam's 1400 year history demonstrates that for centuries after Islam's advent, Muslim governments indeed ruled with justice, secularism, and separation of mosque and

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[41] James Michener, *Islam: The Misunderstood Religion* 68-70, READER'S DIGEST (May 1955)
[42] http://www.pbs.org/programs/citiesoflight/ (last visited on May 22, 2014)

state. The contemporary regimes of Pakistan, Iran, and Saudi Arabia are the exception—not the rule.

Part III. Anti-Shariah Legislation

a. Origins of the Anti-Shariah Campaign

The Anti-Defamation League ("ADL"), is the "nation's premier civil rights/human relations agency. [The] ADL fights anti-Semitism and all forms of bigotry, defends democratic ideals and protects civil rights for all."[43] The ADL traces the anti-Shariah movement's origins to David Yerushalmi, an Arizona lawyer and Hasidic Jew, reporting, "Yerushalmi's proposed legislation, which claims to "protect American citizens' constitutional rights against the infiltration and incursion of foreign laws and foreign legal doctrines, especially Islamic Shari'ah Law," has been the basis for anti-Shari'a measures introduced by state lawmakers in several states in recent years."[44] Ignoring for a moment the amorphous and undefined meaning of "foreign law," The *New York Times* affirms the ADL's position, calling Yerushalmi, "The Man Behind the Anti-Shariah Movement."[45] Despite Yerushalmi's lack of any formal training on Islamic Law, his efforts for the previous eight years have influenced Republican and Tea Party politicians alike in pushing his anti-Shariah agenda.[46] The *New York Times* further reports that, "…the movement is arguably

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[43] http://www.adl.org/about.asp (last visited on Nov. 17, 2011)
[44] *David Yerushalmi: A Driving Force Behind Anti-Sharia Efforts in the U.S.*, THE ANTI-DEFAMATION LEAGUE, March 25, 2011, available at http://www.adl.org/main_Interfaith/david_yerushalmi.htm
[45] Andrea Elliott, *The Man Behind the Anti-Shariah Movement*, THE NEW YORK TIMES, July 30, 2011, http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all (last visited on Nov. 17, 2011)
[46] Id

directed at a problem that is more imagined than real."[47] Yerushalmi's prejudice is not just limited to Muslims. On the contrary, the ADL reports:

> David Yerushalmi [is] an Arizona attorney with a record of anti-Muslim, anti-immigrant and anti-black bigotry…Yerushalmi has not only actively promoted his conspiratorial vision of Shari'a law, but has also sought to portray all Muslims as a threat. In one March 2006 article, for example, Yerushalmi even went so far as to claim that "[the] Muslim civilization is at war with [the] Judeo-Christian civilization…The Muslim peoples, those committed to Islam as we know it today, are our enemies"…Yerushalmi has also claimed, as he wrote in a 2006 article, that the United States is in trouble because it "rejected its Christian roots, the Constitution and federalism," and because it "embraced democracy" and multi-culturalism…Liberal Jews, according to Yerushalmi are "the leading proponents of all forms of anti-Western, anti-American, anti-Christian movements, campaigns, and ideologies," and to argue otherwise one would have to be "literally divorced from reality." Liberal Jews, according to Yerushalmi, have destroyed "their host nations like a fatal parasite"…[Yerushalmi] advocates somehow sealing all American borders and building "special criminal camps" to house undocumented migrants, where they would serve a three-year detention sentence, then be deported…He also contended that African-Americans are a "relatively murderous race killing itself."[48]

Likewise, Yerushalmi actively defends and works with organizations known for vitriolic propaganda like Stop The Islamization of America ("SIOA"),[49] whom the Southern Poverty Law Center[50] ("SPLC"), has labeled as an official hate group.[51] For perspective, SPLC only reserves the "hate group" label for the most incendiary of

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[47] Id

[48] http://www.adl.org/main_Interfaith/david_yerushalmi.htm (last visited on Nov. 17, 2011)

[49] The ADL reports, "Stop Islamization of America (SIOA), created in 2009, promotes a conspiratorial anti-Muslim agenda under the guise of fighting radical Islam. The group seeks to rouse public fears by consistently vilifying the Islamic faith and asserting the existence of an Islamic conspiracy to destroy "American" values." *available at http://www.adl.org/main_Extremism/sioa.htm* (last visited on Nov. 17, 2011)

[50] "The Southern Poverty Law Center is a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society…the SPLC is internationally known for tracking and exposing the activities of hate groups." *available at* http://www.splcenter.org/who-we-are (last visited on Nov. 17, 2011)

[51] http://www.splcenter.org/get-informed/hate-map#s=NY (last visited on Nov. 17, 2011)

organizations; SIOA's sister hate groups include the KKK and neo-Nazi parties.[52] Yet, Yerushalmi is SIOA's ardent supporter, often serving as their legal counsel. Yerushalmi also works with an anti-Islam organization called ACT for America.[53] SPLC featured ACT for America founder Bridgette Gabriel as one of America's ten leading anti-Islam personalities on their Summer 2011 Intelligence Report entitled "The Anti-Muslim Inner Circle."[54] The SPLC reports:

> …an amenable legion of right-wing media…are eager to promote [the anti-Muslim inner circle] as impartial experts or grassroots leaders. Yet a close look at their rhetoric reveals how doggedly this group works to provoke and guide populist anger over what is seen as the threat posed by the 0.6% of Americans who are Muslim — an agenda that goes beyond reasonable concern about terrorism into the realm of demonization.[55]

Such examples of Yerushalmi's less than reputable associates are certainly not exhaustive, but are provided to demonstrate a cross section of his unique mentality. This demonstration is significant not only because Yerushalmi's views are extremist, but because his extremist views of anti-Semitism, racial discrimination, and religious discrimination—not objective analysis or honest research—are the platforms upon which two dozen States either have passed, or are attempting to pass, anti-Shariah legislation. As the *New York Times*, the ADL, and the SPLC certify, the entire anti-Shariah legislation movement is not based on objective analysis, but

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[52] Id

[53] *Backgrounder: ACT! for America*, THE ANTI-DEFAMATION LEAGUE, March 25, 2011, *available at* http://www.adl.org/main_Interfaith/act_for_america_gabriel.htm. (reporting, "ACT! for America is an organization dedicated to combating what it describes as "the threat of radical Islam" to the safety of Americans and to democracy. ACT! promotes the idea that Islam is a backward and seditious political ideology and that Muslim immigration to the U.S. must end.")

[54] Robert Steinback, *The Anti-Muslim Inner Circle*, SOUTHERN POVERTY LAW CENTER, Intelligence Report, Summer 2011, Issue Number: 142, *available at* http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2011/summer/the-anti-muslim-inner-circle

[55] Id

on "demonization"[56] at the hands of an individual with "no formal training in Islamic Law," and with a history of "anti-Muslim, and anti-immigration, and anti-black bigotry."[57] Based on Yerushalmi's anti-Shariah model, Appendix A illustrates the states that have promoted legislation to either specifically ban Shariah, or to broadly ban foreign law (thereby including Shariah).

b. Common Elements and Prohibitions

Since many of these laws follow a single format, their overlap in substance and verbiage should not be surprising. Some bills single out Shariah specifically while others present the more broad term of "religious law." It is interesting how on the one hand, anti-Shariah advocates argue that Islam is not a religion but rather a political ideology (for the purposes of denying 1st Amendment Free Exercise rights), and on the other hand, they describe Shariah as "religious" law to invalidate it due to Establishment Clause jurisprudence.

This hypocrisy notwithstanding, most states present an even more broad categorical restriction of "foreign" or "international" law in an attempt to seem more neutral. Likewise, the majority of anti-Shariah bills address contracts. Some states make exceptions for businesses and corporations, perhaps in recognizing the economic value of such a caveat. Most states, however, made clear that courts were forbidden from referring to international, foreign, or cultural laws when delivering a judgment in a non-business matter. Each proposed law presents broad generalizations that, as the Federal judge who ultimately struck down an anti-

[56] Id

[57] See Supra note 41

Shariah law in Oklahoma wrote, fail to "identify any actual problem the challenged amendment seeks to solve." [58]

To date, at least twenty states have attempted to pass legislation banning Shariah.[59] Three states, Oklahoma, Tennessee, and Louisiana have succeeded in actually passing some form of anti-Shariah legislation.[60] Some states failed on their initial attempt, and several others have bills currently pending through their respective legislative processes. One notable tactic many states are utilizing is a transition from the word "Shariah" to the word "foreign," in an effort to present, at least on the surface, a more neutral bill. Part IV demonstrates, however, that this tactic still violates the United States Constitution. Or, as also explained, if this tactic does not violate the Constitution, it claims to address a legislative gap that does not exist.

Part IV. Anti-Shariah Laws are Unconstitutional, Unnecessary, & Detrimental

Governments worldwide typically fall into one of three categories in their governance of private and public religious practice. In the first category, nations like China largely antagonize and discourage religious practice, regardless of the religion or type.[61] Such nations consistently lead the world in human rights violations.[62] In

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[58] Awad, Abed, "The True Story of Sharia in American Courts," Nation, The *available at* http://www.thenation.com/article/168378/true-story-sharia-american-courts# (Last Visited May 22, 2014)

[59] See Appendix A.

[60] Tennessee and Louisiana passed versions of "American Law for American Courts" legislation (laws spearheaded by David Yerushalmi) while a federal judge overturned Oklahoma's SQ 755

[61] *See* U.S. DEP'T STATE, INT'L RELIGIOUS FREEDOM REP. 2010, (Nov. 17, 2010), http://www.state.gov/g/drl/rls/irf/2010/148863.htm. ("Proselytizing in public, unregistered places of worship, or by foreigners is not permitted. Some religious or spiritual groups are outlawed, including the Falun Gong. Other religious groups, such as Protestant "house churches" or Catholics loyal to the Vatican, are not outlawed, but are not permitted to openly hold religious services unless they affiliate with a patriotic religious association. In some parts of the country, authorities have charged religious believers unaffiliated with a patriotic religious association with "illegal religious

the second category, nations like Pakistan enforce laws criminalizing the free exercise of religion against only certain religious groups.[63] Such nations have experienced a general increase in internal religious violence and social hostilities against religious minorities, a blurring between church and state, economic downturn, and ongoing international condemnation.[64]

In the third category, nations like the United States have ratified and upheld legislation like the free exercise clause of First Amendment to the United States Constitution.[65] Accordingly, despite America's notable dark chapters, Americans have been empowered to push for equality and pluralism, challenging and dismantling discriminatory status quos. The anti-Shariah movement's greatest threat is that it seeks to shift America from a Category 3 nation to a Category 2 nation like Pakistan, or even a Category 1 nation like China. In fact, anti-Shariah and anti-foreign laws not only violate the fundamental rights of Muslim-Americans, but

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activities" or "disrupting social stability." Punishments for these charges range from fines to imprisonment.")

[62] The U.S. State Department has rated China as one of eight "Countries of Particular Concern" for China having "engaged in or tolerated particularly severe violations of religious freedom." *available at* http://www.state.gov/g/drl/irf/c13003.htm

[63] See e.g. Pakistan Penal Code 298-C. *Any person of the Quadiani group* or the Lahori group (who call themselves 'Ahmadis' or by any other name), *who, directly or indirectly, poses himself as Muslim*, or calls, or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims, *shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine*.") (emphasis added).

[64] See e.g. Reporting on Pakistan's treatment of religious minorities, Human Rights Watch states, "The Punjab [Pakistan] provincial government is either in denial about threats to minorities or is following a policy of willful discrimination…Provincial law enforcement authorities need to put aside their prejudices and protect religious minorities who are clearly in serious danger from both the Taliban and sectarian militant groups *historically supported by the state.*" *Pakistan: Repeal Blasphemy Law*, HUM. RTS. WATCH (Nov. 23, 2010), http://www.hrw.org/en/news/2010/11/22/pakistan-repeal-blasphemy-law (emphasis added)

[65] U.S. Const. amend. 1, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *available at* http://www.house.gov/house/Constitution/Constitution.html

they also violate the rights of Christians, Jews, and anyone who deals in international business—regardless of religious affiliation.

a. The First Amendment Protects Shariah's Adab, Ibadah, and I'tiqadat Branches, Rendering Anti-Shariah Legislation Unconstitutional

Supreme Court Chief Justice Warren wrote in the landmark 1966 *Miranda v. Arizona* case, "Where rights secured by the Federal Constitution are involved, there can be no rule-making or legislation which would abrogate them."[66] Most applicable to the discussion at hand, the Supreme Court reaffirmed with this encompassing statement, among numerous rights, First Amendment protections that forbade Congress from legislating in favor of, or against any religion.[67] This Congressional check is typically understood as the separation of church and state and has worked remarkably well since the Bill of Rights were ratified in 1791. In fact, Pew reports that among the world's twenty-five most populous countries, only Japan and Brazil have fewer government and social hostilities against religion than the United States.[68]

Anti-Shariah laws, by definition, violate the First Amendment because they "prohibit" Muslim Americans from "the free exercise" of the personal practice of their religion, Islam. The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…"[69]

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[66] Miranda v. Arizona, 384 US 436 (1966)
[67] Id
[68] Pew: Rising Restrictions on Religion *available at* http://pewforum.org/Government/Rising-Restrictions-on-Religion%282%29.aspx?src=prc-headline
[69] U.S. Const. Amend. 1 *available at* http://www.house.gov/house/Constitution/Constitution.html

These two simple conditions restrict the government from both interference in the free exercise of religion and from sanctioning any particular religion.

Anti-Shariah laws, however, threaten to restrict the adab (behavior, morals and manners), ibadah (ritual worship), and i'tiqadat (beliefs) branches of Shariah. Personal morals, worship, and beliefs are necessarily protected under the First Amendment, and their protection has been upheld countless times throughout our nation's history. In the landmark 1878 case, *Reynolds v. U.S.,* the Supreme Court held:

> Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned… Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.[70]

Thus, the Supreme Court distinguished beliefs from practices—allowing restrictions on the latter in certain situations (in this case polygamy) but categorically forbidding government interference on the former, i.e. beliefs. On this ground alone, the broadly written anti-Shariah laws are unconstitutional because they make no exception for matters of conscience, instead impeding on the behavior morals, ritual worship, and belief, i.e. the adab, ibadah, and the I'tiqadat branches of Shariah.

The Supreme Court has further clarified when the government may interfere with religious practices and under what circumstances. In the 1971 case *Lemon v. Krutzman*, the Supreme Court defined these circumstances with a three-step test.[71] A law that interferes with religious practice must fulfill what has come to be known as the *Lemon Test* to be held constitutional under the Establishment Clause of the

[70] Reynolds v. United States, 98 U.S. 145, 162, 25 L. Ed. 244 (1878)
[71] Lemon v. Kurtzman, 403 U.S. 602 (1971)

First Amendment.[72] First, the law must serve a valid secular purpose.[73] Second, it must not have the primary consequence of either inhibiting or advancing any religion.[74] And third, it must not result in excessive entanglement between religion and government.[75] Applying this test to anti-Shariah laws, what valid secular purpose might a law banning the free exercise of personal Islamic behavior morals, beliefs, and worship serve? A law that bans personal religious belief is by definition not a secular law and violates the congressional restriction elucidated in *Reynolds*.[76]

Proponents of the anti-Shariah movement may argue that their ban has secular elements. Whether or not they are correct in this claim is irrelevant, as the fact remains that anti-Shariah laws also have religious elements, rendering them unconstitutional. Justice O'Connor's later addition to the Lemon Test defines the first prong to also include "the Endorsement Test" (*Lynch* v. *Donnelly*):

> Endorsement sends a message to non-adherents 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. The proper inquiry under the purpose prong of Lemon, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion.

Anti-Shariah laws fail this test because they inherently express the governmental disapproval of religion.

The second element established in *Lemon v. Krutzman* requires that the law must not endorse or inhibit religion.[77] Again, anti-Shariah laws fail this test as a ban on Shariah directly inhibits Muslims from the free exercise of their religion, Islam,

[72] Id
[73] Id
[74] Id
[75] Id
[76] Reynolds v. United States, 98 U.S. 145, 162, 25 L. Ed. 244 (1878).
[77] Lemon v. Kurtzman, 403 U.S. 602 (1971).

once again rendering the law unconstitutional. It seems clear that such restrictions on religion undoubtedly entangle religion and government. Considering, however, that this third element is admittedly a subjective analysis, and that anti-Shariah laws already violate the first two elements, whether or not anti-Shariah laws also violate this third element is irrelevant to the foregone conclusion that they violate the precedent established in *Reynolds* and *Lemon*—and thus are unconstitutional.

b. The Privileges and Immunities Clause, and Mu'amalat Constitutionality

a. The Privileges and Immunities Clause Renders Anti-Shariah Legislation Unconstitutional

Critics may allege that anti-Shariah laws do not restrict personal worship, only actions contrary to the United States Constitution, a governmental right affirmed in the *Reynolds* decision.[78] Accepting this fallacious argument as true *arguendo*, however, not one of the anti-Shariah laws specifies this distinction,[79] but instead makes broad generalizations to categorically ban Shariah in its entirety. That is, none of the proposed or enacted legislations cite what Shariah practices that are actually being practiced in America are unconstitutional, and therefore require legislative ban.

Moreover, should any anti-Shariah law even make this distinction, it would still be unconstitutional because it violates the Privileges and Immunities Clause of

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[78] Reynolds v. United States, 98 U.S. 145, 162, 25 L. Ed. 244 (1878) (holding that "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").
[79] See Appendix A.

Article IV, Section 2, Clause 1 of the United States Constitution.[80] This clause holds that states must provide citizens of the several states the same Constitutionally protected fundamental rights.[81] Judge Bushrod Washington explained the purpose and guarantees of the Privileges and Immunities Clause:

> What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety...[82]

Likewise, the Supreme Court reaffirmed this principle in *Paul v. Virginia* in 1868:

> It was undoubtedly the object of the [Privileges and Immunities] clause…to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws.[83]

Five years later in 1873, the famous Slaughterhouse Court cited Judge Washington again, "[P]rivileges [*sic*] and immunities....are, in the language of Judge Washington, those rights which are fundamental."[84] Anti-Shariah laws violate the Privileges and Immunities Clause specifically because they restrict the fundamental freedom of religion and conscience rights of Muslim Americans. For example, the Supreme

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[80] U.S. Const. art. IV, sect. 2, cl. 1 states, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This Clause prevents a State from treating citizens of other States in a discriminatory manner. *available at http://www.house.gov/house/Constitution/Constitution.html.*
[81] Id.
[82] Corfield v. Coryell (6 Fed. Cas. 546, no. 3,230 C.C.E.D.Pa. 1823)
[83] Paul v. Virginia, 75 U.S. 168 (1868).
[84] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 116 , 122 (1873).

Court did not hold Montana's distinction between residents and non-residents on hunting elk as a violation of the Privileges and Immunities clause because hunting is a recreational sport, not a Constitutionally protected fundamental right.[85] The Supreme Court did, however, determine in the Slaughterhouse Cases when it was permissible for a State to restrict a fundamental right:

> Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all…[86]

Likewise, the Supreme Court held in 1914:

> It is settled [however] that neither the 'contract' clause nor the 'due process' clause had the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property [or other vested] rights are held subject to its fair exercise.[87]

Thus, states may implement a restriction on a fundamental right due to a compelling State interest.[88] But, in attempting to enforce SQ 755, for example, Oklahoma imposes a restriction of fundamental rights on non-citizens entering Oklahoma, and does so without offering a compelling State interest.

Under the Oklahoma SQ 755 Shariah ban, Muslims would be legally forbidden from mu'amalat or contractual interactions like Islamic marriage, divorce,

[85] Baldwin v. Fish and Game Commission of Montana 436 U.S. 371 (1978).
[86] *Slaughter-House Cases*, 83 U.S. 36 (1873).
[87] Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548, 558 (1914).
[88] *Slaughter-House Cases*, 83 U.S. 36 (1873).

inheritance, wills, estate planning, giving charity, paying the *Zakat*,[89] and adoption. Likewise, Muslims would be legally forbidden from adab, ibadah, and I'tiqadat actions like celebrating religious holidays, praying five times a day, fasting, and Muslim women could no longer wear a *hijab*,[90] and Muslim male infants could no longer be circumcised—all of which Shariah prescribes.

Oklahoma, and all states seeking to ban Shariah, must first demonstrate why it is "necessary or proper for the mutual good of all"[91] to restrict, for example, a Muslim-American couple from signing a *Nikah*[92] form and hiring an Imam to conduct their Nikah. The same burden applies on states to demonstrate the "…health, safety…or general welfare of the community,"[93] achieved in restricting Muslim-Americans from hiring an attorney to write their wills, estates, and inheritances, or conduct funeral proceedings according to the mu'amalat branch of Shariah. Of the twenty plus anti-Shariah or anti-foreign law legislations proposed,

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[89] *Zakat* is a tax the Qur'an enjoins upon wealthy Muslims. It is generally understood throughout various schools of jurisprudence as a means to ensure capital is not kept stagnant in one place, but in constant circulation. The Qur'an 2:44 states, "And observe Prayer and pay the Zakat, and bow down with those who bow."

[90] A *hijab* is a head covering Muslim women are enjoined to wear per the Qur'an 24:32, "And say to the believing women that they restrain their eyes and guard their private parts, and that they disclose not their natural and artificial beauty except that which is apparent thereof, *and that they draw their head-coverings over their bosoms*, and that they disclose not their beauty save to their husbands, or to their fathers, or the fathers of their husbands or their sons or the sons of their husbands or their brothers, or the sons of their brothers, or the sons of their sisters, or their women, or what their right hands possess, or such of male attendants as have no sexual appetite, or young children who have no knowledge of the hidden parts of women. And they strike not their feet so that what they hide of their ornaments may become known. And turn ye to Allah all together, O believers, that you may succeed." (emphasis added).

[91] *Slaughter-House Cases*, 83 U.S. 36 (1873).

[92] A *Nikah* is the Muslim marriage ceremony in which the groom publicly affirms his agreement to marry his bride at a mutually agreed upon dowry gifted from him to her, and the father of the bride, through his daughters permission and approval, affirms his daughters marriage to the groom. An Imam conducts the *Nikah* ceremony.

[93] *Atlantic Coast Line*, 232 U.S. 548 (1914).

not a single one meets this fundamental constitutional threshold as set forth in Article IV of the Privileges and Immunities Clause.

b. Shariah Mu'amalat Actions are Constitutionally Protected

The Second Restatement of Contracts defines a contract (*mu'amala[t]*) in its most basic form as, "…a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[94] The Second Restatement continues, "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[95] Mu'amalat is likewise a "term which designates…bilateral contracts."[96] The Second Restatement also holds that courts have the right to void or not enforce any unconscionable contract or contract term.[97] A valid contract is simply a legally binding promise enacted in good faith to perform, in exchange for consideration, and is subject to a court to enforce or void if deemed unconscionable. A restriction on Shariah mu'amalat transactions counters a permission expressly defined in the Second Restatement of Contracts.

The Second Restatement of Contracts notwithstanding, however, the Supreme Court has consistently held that the First and Fourteenth Amendments preclude a civil court from deciding religious contractual disputes—which instead are under the sole discretion of the respective religious body.[98] For example, in

[94] Restatement (2nd) Contracts §1. Contract Defined
[95] Restatement (2nd) Contracts §205. Duty of Good Faith and Fair Dealing
[96] *See supra* note 28.
[97] Restatement (2nd) Contracts §208. Unconscionable Contract or Term. This also addresses illegal contracts, or contracts against the security and safety of third parties. Such contracts are void *ab initio* by virtue that they violate public policy, are facially illegal, or harm third parties.
[98] Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich, 426 U.S. 696, 708-09, 96 S. Ct. 2372, 2380, 49 L. Ed. 2d 151 (1976).

Serbian Eastern Orthodox Diocese for the U.S. of America and Canada v. Milivojevich ("Serbian") the Supreme Court held:

> Consistently with the First and Fourteenth Amendments "civil courts do not inquire whether the relevant (hierarchical) church governing body has power under religious law (to decide such disputes)… Such a determination … frequently necessitates the interpretation of ambiguous religious law and usage. To permit civil courts to probe deeply enough into the allocation of power within a hierarchical) church so as to decide…religious law (governing church polity)…would violate the First Amendment in much the same manner as civil determination of religious doctrine."[99]

The same Court also stated, "Religious freedom encompasses the 'power (of religious bodies) to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'"[100] The Supreme Court made the aforementioned decision while overturning the Supreme Court of Illinois, which permitted an inquiry into private church matters. Thus, not only did the Supreme Court explicitly forbid the government from intruding in religious contractual matters, it explained that the sole authority rests with the religious organization in question.

Applied to mu'amalat transactions, Supreme Court precedent clarifies that Muslim-Americans have full constitutional authority and protection to engage in Shariah-compliant mu'amalat transactions such as marriage, divorce, wills, estates, inheritances, etc. Courts only reserve the right to nullify contracts—religious or

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[99] Id. *citing* Md. & Va. Churches v. Sharpsburg Church, 396 U.S. 367, 369, 90 S.Ct. 499, 500, 24 L.Ed.2d 582 (1970).

[100] Id. *citing* Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116, 73 S.Ct. 143, 154, 97 L.Ed. 120. Pp. 2385-2387 (1952).

otherwise—that are inherently illegal or against established public policy.[101] This is a burden that anti-Shariah legislation has not even attempted to address, much less fulfill. In mu'amalat matters, the Supreme Court is explicitly clear—government interference is a violation of the First and Fourteenth Amendments.[102] In fact, the Supreme Court has given extreme leverage to religious organizations in America, recently unanimously holding that the "Ministerial Exception" precluded a former teacher from suing a church for alleged employment discrimination—all to ensure the church's First Amendment rights were not violated.[103]

To illustrate by comparison, if similar anti-Shariah mu'amalat contractual restrictions were imposed on other faith groups, Catholic Bishops would, for example, be forbidden from reading the Last Rites.[104] The government could literally force a religious organization to hire a clergyperson, even contrary to a

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[101] Restatement (2nd) Contracts §208. Unconscionable Contract or Term. This also addresses illegal contracts, or contracts against the security and safety of third parties. Such contracts are void *ab initio* by virtue that they violate public policy, are facially illegal, or harm third parties.

[102] Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969); Watson v. Jones, 80 U.S. (13 Wall.) 679, 727, 20 L.Ed. 666 (1871).) and (Alicea Hernandez v. Catholic Bishop of Chicago, 320 F.3d 698 (7th Cir.2003)(affirming dismissal of discrimination claims); Scharon v. St. Luke's Episcopal Presbyterian Hospitals, 929 F.2d 360 (8th Cir.1991)(affirming summary judgment in favor of church on age and sex-discrimination claims following priest's discharge); Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354, 1359 (D.C.Cir.1990)(affirming dismissal of minister's age-discrimination and breach-of-contract claims for church's denial of pastorship); Hutchison v. Thomas, 789 F.2d 392 (6th Cir.1986)(affirming dismissal of complaint, including claims of breach of contract and defamation, for church's forced retirement of minister); Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir.1985)(affirming summary judgment for church on discriminatory denial-of-pastorship claim), *cert. denied* 478 U.S. 1020, 106 S.Ct. 3333, 92 L.Ed.2d 739 (1986); Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir.1974)).

[103] Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, et al., No. 10-553, U.S. Sup. (Justice Thomas concurring, "the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister.").

[104] The Last Rites are, "the very last prayers and ministrations given to many Christians before death. The last rites go by various names and include different practices in different Christian traditions. They may be administered to those awaiting execution, mortally wounded, or terminally ill. The term is used by some Christians outside the Roman Catholic Church, such as Anglicans…"
http://en.wikipedia.org/wiki/Last_Rites (last visited on Nov. 20, 2011).

congregation's wishes.[105] A Jewish Rabbi, likewise, would be forbidden from performing *Mohel*.[106] The entire Beth Din system would necessarily be dismantled as it is based on *Halacha,* or the Jewish Law of the Torah. In fact, for those states seeking to ban all foreign or religious law in general, and not just Shariah Law specifically, the described restrictions on Catholics and Jews would become an absolute reality. Recent reports indicate that American Catholics are increasingly using canon courts to resolve disputes—indicating the broad negative consequences of anti-Shariah legislation.[107] Rabbi Linda Holtzmann of Reconstructionist synagogue Mishkan Shalom in Roxborough described Pennsylvania's proposed anti-Shariah law stating, "[They] are strong of Germany in the 1930s when repeatedly, Jewish Law was brought forward and defamed in the courts as a way of defaming all Jewish tradition."[108]

In addition to violating fundamental rights for millions of people of faith, such a ban would likely cripple business and commerce. For example, Michael J. Broyde, a member of the country's largest Jewish legal court – Beth Din of America – commented on Georgia's HB 45 American Law for American Court's Act, "[The bill would] incapacitate Georgia companies as they engage in international

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[105] Hutchison v. Thomas, 789 F.2d 392 (6th Cir.1986)(affirming dismissal of complaint, including claims of breach of contract and defamation, for church's forced retirement of minister).

[106] For Jews, the Torah prescribes circumcision of their male infants is a religious obligation. "This is My covenant between Me, and between you and your offspring that you must keep: You must circumcise every male. You shall be circumcised through the flesh of your foreskin. This shall be the mark of the covenant between Me and you. 'Throughout all generations, every male shall be circumcised when he is eight days old…The uncircumcised male whose foreskin has not been circumcised, shall have his soul cut off from his people; he has broken My covenant.' (Gen. 17:10-14)

[107] Rachel Zoll, *More Catholics take complaints to church court*, ASSOCIATED PRESS, Jan. 15, 2012, *available at* http://news.yahoo.com/more-us-catholics-complaints-church-court-185049115.html.

[108] Randy LoBasso, *Why Does PA Care About Banishing Sharia Law?*, PHILADELPHIA WEEKLY, Dec. 21, 2011, *available at* http://www.philadelphiaweekly.com/news-and-opinion/135952863.html#ixzz1hBY6A02F.

commerce."[109] HB 45 tactfully avoids mentioning "Shariah" specifically, and only mentions "foreign law."[110] This is significant because it demonstrates practically that even allegedly "neutral" legislation violates the First and Fourteenth Amendments.[111] Likewise, commenting on Oklahoma SQ 755 (which explicitly mentions Shariah), Ohio University international law professor, Peter Krug, explains that Oklahoma businesses that conduct transactions with international organizations may suffer because, "many transactions between companies rely on international treaties to uphold contracts" and "lawyers could take advantage of the lack of clarity in the language to challenge cases."[112] It is clear, therefore, that in restricting Shariah mu'amalat transactions, anti-Shariah laws are in complete contravention to the Fourteenth Amendment Privileges and Immunities Clause.

Perhaps in an effort to remain a step ahead of the Privileges and Immunities Clause, States like Arizona have taken the "Category 1" China approach and have categorically banned all religious laws.[113] This solves nothing, however, because such a ban is still in violation of the First Amendment—unconstitutionally restricting the free exercise of religion.[114]

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[109] Zaid Jilani, *At Least 13 States Have Introduced Bills Guarding Against Non-Existant Threat of Sharia Law*, THINKPROGRESS, Feb. 8, 2011, *available at* http://thinkprogress.org/politics/2011/02/08/142590/sharia-states/.

[110] *See Supra* note 74, Georgia HB 45 states, "A court, arbitrator, administrative agency, or other tribunal shall not enforce a foreign law if doing so would violate a right guaranteed by the Constitution of this state or of the United States."

[111] See Part IV(d) for a thorough analysis of the unconstitutionality of banning "foreign law" specifically.

[112] Tanya Somanader, *In Banning Sharia Law, Oklahoma Voters May Have Voted Against Native American Rights, Too*, THINKPROGRESS, Nov. 11, 2010, *available at* http://thinkprogress.org/politics/2010/11/11/129512/oklahoma-sharia-native-americans/.

[113] *See Supra* note 61.

[114] *See Supra* Part IV(a).

Likewise, anti-Shariah advocates have not considered the International Covenant on Civil and Political Rights ("ICCPR"), a binding international treaty that protects a variety of rights including freedom of religion, speech, association, assembly, due process, electoral rights, and fair trial.[115] The United States signed and ratified the ICCPR in 1992.[116] The Supremacy Clause holds that ratified international Treaties take precedence over State Law, "…all Treaties made…shall be the supreme Law of the Land…any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[117]

Two brief examples should suffice to demonstrate that anti-Shariah laws violate the United State's ratified obligations to the ICCPR. Article 18 of the ICCPR guarantees freedom of religion[118] and Article 19 of the ICCPR guarantees freedom of expression.[119] Under anti-Shariah law enforcement, Muslim-Americans can neither

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[115] ICCPR full text *available at* http://www2.ohchr.org/english/law/ccpr.htm.
[116] 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).
[117] US Const. art. IV cl. 2 states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties* made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, *any Thing in the Constitution or Laws of any State to the Contrary notwithstanding*." *available at* http://www.house.gov/house/Constitution/Constitution.html (emphasis added).
[118] ICCPR art. 18 states: 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.
[119] ICCPR art. 19 states: 1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

practice their religion nor express their personal beliefs—in clear violation of the United States obligations to the ICCPR. Not surprisingly, every proposed anti-Shariah or anti-foreign law entirely ignores the ICCPR.

c. The Supremacy Clause Renders Anti-Shariah Legislation Unnecessary and Why the *'uqubat* Branch Does Not Threaten American Sovereignty

Critics next claim that the alleged infusion of 'uqubat, or Shariah's punishment branch, into American courts is the ultimate threat that requires anti-Shariah legislation. This claim, however, is baseless because of Article VI, Clause 2 of the United States Constitution, better known as the Supremacy Clause.[120]

Before delving into the Supremacy Clause, it is necessary to first establish that the allegation that 'uqubat punishments are infiltrating American jurisprudence is unfounded. Anti-Shariah advocates are unable to cite a single example in America's 235-year history when Shariah 'uqubat punishments were implemented, much less even proposed, in preference to the United States penal code. On the contrary, Shariah itself forbids that it be applied as superior to the established law of the land, save what the law of the land explicitly permits (thus why Islam forbids creating disorder once order has already been established).[121] Furthermore, as the Prophet Muhammad demonstrated with the Charter of Medina, Islam categorically

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3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

[120] U.S. Const. art. VI. sect. 2 states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *available at* http://www.house.gov/house/Constitution/Constitution.html.

[121] *See Supra* note 34; *See also Supra* note 36.

forbids that Shariah be applied in any capacity to non-Muslims, for any reason.[122] Likewise, no Muslim-American organization has ever petitioned, much less received approval from, the government to apply ‘uqubat punishments to a criminal in preference to the United States penal code.

To humor the critics for a moment, if such an ‘uqubat law were somehow proposed in a state or federal Congress, passed through a bicameral legislature, and signed into law by a governor or the President, then the Judiciary would still quash it under the Supremacy Clause. This is because, "Judges in every State shall be bound [to the Supremacy Clause], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[123] Over two centuries of Supreme Court jurisprudence demonstrates that one and only one law remains sovereign in the United States—the law based on the U.S. Constitution.

The Supreme Court has repeatedly quashed various religious practices that conflict with the Constitution.[124] For example, in *Engel v. Vitale*, the Supreme Court forbade government-mandated prayer in public schools.[125] In *Abington School District v. Schempp*, the Supreme Court forbade mandated Bible readings or Lord's Prayer recitations in public schools.[126] In *Edwards v. Aguillard*, the Supreme Court held that teaching creationism in schools is unconstitutional.[127] On the other hand,

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[122] *See Supra* note 37.
[123] US Const. art. IV cl. 2 states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *available at* http://www.house.gov/house/Constitution/Constitution.html.
[124] Reynolds v. United States, 98 U.S. 145, 162, 25 L. Ed. 244 (1878)
[125] Engel v. Vitale, 370 U.S. 421 (1962).
[126] Abington School District v. Schempp 374 U.S. 203 (1963).
[127] Edwards v. Aguillard, 482 U.S. 578 (1987).

in *Wisconsin v. Yoder*, the Supreme Court protected parents' right to remove their children from school for religious reasons.[128] In *Watchtower Society v. Village of Stratton*, the Supreme Court held that the government may not require evangelists to obtain a permit before preaching door-to-door because such a requirement violates the First Amendment.[129] Thus, the Supreme Court has repeatedly tackled and protected against the impediment of unconstitutional Christian law on civil rights numerous times throughout American history. The burden to explain why the Supreme Court is incapable or unwilling to protect against an unconstitutional impediment of Islamic law on civil rights rests upon anti-Shariah advocates. To date, this is a burden they have not even attempted to fulfill.

Furthermore, the Supreme Court has enforced the Supremacy Clause numerous times to quash unconstitutional State or Federal laws that are unconstitutional.[130] The Supreme Court held in *Edgar v. Mite Corporation* that, "…a state statute is void to the extent that it actually conflicts with a valid Federal statute."[131] Thus, when either compliance with both Federal and State laws is not possible or, "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the Supremacy Clause invalidates the relevant State law.[132] Therefore, because anti-Shariah legislation violates the First and the Fourteenth Amendments, the Supremacy Clause automatically takes

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[128] Wisconsin v. Yoder, 406 U.S. 205 (1972).
[129] Watchtower Society v. Village of Stratton, 536 U.S. 150 (2002).
[130] Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Martin v. Hunter's Lessee, 14 U.S. 304 (1816); Cohens v. Virginia, 19 U.S. 264 (1821); Pennsylvania v. Nelson, 350 U.S. 497 (1956); Cooper v. Aaron, 358 U.S. 1 (1958); Edgar v. Mite Corporation, 457 U.S. 624 (1982); California v. ARC America Corp., 490 U.S. 93 (1989); Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000).
[131] Edgar v. Mite Corporation, 457 U.S. 624 (1982).
[132] Id

precedent and declares such laws unconstitutional. Applied to the alleged threat of ʻuqubat infiltration, such a law would invariably and inevitably conflict with Federal law and thus could not possibly stand constitutional scrutiny.

d. An Allegedly "Neutral" Ban on All Foreign Law Is Unconstitutional

a. The Contract and Privileges or Immunities Clauses

Recognizing that Shariah cannot constitutionally be banned directly, states are backtracking from their respective anti-Shariah legislations and the original use of the word Shariah, and are attempting to present a purportedly neutral ban on "foreign laws" instead.[133] State bans on foreign laws are yet unconstitutional for at least two reasons.

i. The Contracts Clause

First, states that pass a categorical ban on all foreign laws are in violation of Article 1, Section 10, Clause 1 of the United States Constitution, otherwise known as the Contract Clause, which states:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.[134]

Hence, two distinct conflicts occur when a state passes a law banning all foreign laws. First, the overly broad "foreign law" label invariably forbids Shariah mu'amalat transactions. As discussed, the Supreme Court has repeatedly held that such an act

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[133] See e.g. TN Press Release Center, *Shariah Law Pulled from Terrorism Bill*, TNREPORT, Mar. 22, 2011, *available at* http://www.tnreport.com/2011/03/shariah-law-pulled-from-terrorism-bill/.; See Appendix A for a full list of States specifically banning "foreign law" instead of Shariah Law.

[134] U.S. Const. art. 1 sect. 10 Cl. 1 *available at* http://www.house.gov/house/Constitution/Constitution.html

violates the First and Fourteenth Amendments. But, even if the state ban on foreign law makes an exception for mu'amalat transactions, such a ban would still fail to pass constitutional muster—hence, the second conflict.

This second Contracts Clause conflict of a categorical ban on foreign law deals with contracts in general. Private contractual religious law is but a single facet of the numerous types of contracts that American citizens employ on a regular basis. A significant portion of the $15 trillion United States economy is based on international contracts and transactions. Foreign law inevitably governs these international contracts and transactions. Recognizing the devastating economic consequences on international commerce that would result if each state were granted sovereignty to pass laws "impairing the Obligation of Contracts," the Founders reserved this right exclusively to the Federal Government.[135] And, in that capacity, the Federal Government has exercised its sovereignty numerous times to impair and restrict interaction with foreign nations.[136]

In fact, the right to moderate international trade is a federal power managed by the CBP as a division of the U.S. Department of Homeland Security, which describes itself as maintaining "responsibility for securing and facilitating trade and travel while enforcing hundreds of U.S. regulations, including immigration and drug

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[135] This right is reserved not only in the United States Constitution, but also, among other places, in Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702), Section 301 of Title 3 of the United States Code, Section 1732 of Title 22 of the United States Code, and Section 301 of the National Emergencies Act (50 U.S.C. 1631).

[136] E.g. On February 24, 1981, President Ronald Reagan issued Executive Order 12294 "Suspension of Litigation Against Iran" *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=43455#axzz1fryNd3lm. See also The Cuban Democracy Act, passed in 1992, which imposed severe trade sanctions with Cuba, including ensuring that, any vessel which has traded goods or services with Cuba cannot within 180 days dock at a U.S. port, and that currency traded from the U.S. to Cuba will be limited to prevent the Cuban government from obtaining access to U.S. currency, among numerous other trade and contract restrictions *available at* http://www.state.gov/www/regions/wha/cuba/democ_act_1992.html.

laws."[137] In doing so, the CBP is commissioned to "prevent [products] from entering the United States…that would injure community health, public safety, American workers, children, or domestic plant and animal life, or those that would defeat our national interests."[138] The CBP works with hundreds of laws and over forty United States government agencies to "assume the responsibility of protecting America from all threats."[139] Thus, a state ban on all foreign laws is both unconstitutional and unnecessary as it addresses a concern already managed by a federal organization.

Still, in *Energy Reserves Group v. Kansas Power & Light*, the Supreme Court developed a three-part test ("the Contracts Clause test") to determine if a state law addressing contracts was in compliance with the Contract Clause.[140] First, the state law must not substantially impair contractual relationships and obligations.[141] Second, the state "must have a significant and legitimate purpose behind the regulation, such as the remedying of a broad and general social or economic problem."[142] Third, the state law must be appropriate and reasonable for its intended purposes.[143] Applying the Contracts Clause test to states seeking to categorically ban foreign law, such laws do in fact substantially impair contractual relationships and obligations because they effectively forbid the use of foreign law. Likewise, states seeking to ban foreign law either do not define any "significant and legitimate purpose" for their regulation, or define it as to prevent "violation of the

[137] CPB division of the U.S. Department of Homeland Security *available at* http://www.cbp.gov/xp/cgov/about/.
[138] CPB Prohibited or Restricted Items *available at* http://www.cbp.gov/xp/cgov/travel/vacation/kbyg/prohibited_restricted.xml.
[139] Id
[140] Energy Reserves Group v. Kansas Power & Light 459 U.S. 400 (1983).
[141] Id
[142] Id
[143] Id

fundamental liberties, rights, and privileges of the [respective State] or United States Constitution,"[144] or to "prevent a court…from enforcing foreign law in [respective State]."[145] As already addressed, neither of these purposes is legitimate because fundamental religious liberties in private contract matters are not the business of the state,[146] and because of Supremacy Clause protections that ensure no foreign law may be applied superior to the United States Constitution in any manner.[147] Thus, the second part of the Contracts Clause test does not make state bans on foreign laws unconstitutional, as much as irrelevant.

Part three of the Contracts Clause test obliges that the state law must be appropriate and reasonable for its purpose. If a law is irrelevant, however, then it cannot be appropriate or reasonable for its intended purpose. Irrelevancy notwithstanding, a law that violates the Contracts Clause cannot possibly be an appropriate or reasonable measure to "protect the fundamental liberties of [State]"[148] or to "prevent a court from enforcing a foreign law in [State] court."[149] Thus, a ban on foreign law fails the Contracts Clause test, as set forth in *Energy Reserves Group v. Kansas Power & Light*.

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[144] *See Supra* note 100, North Carolina is promoting HB 640 to, "protect its citizens from the application of foreign law that would result in the violation of a right of a natural person guaranteed by the North Carolina Constitution or the United States Constitution."
[145] South Carolina, on the other hand, is more broadly promoting S.444 to, "prevent a court or other enforcement authority from enforcing foreign law in this state," *available at* http://www.scstatehouse.gov/sess119_2011-2012/bills/444.htm.
[146] *See Supra* Part IV(a).
[147] *See Supra* Part IV(b).
[148] See North Carolina HB640, *available at* http://www.ncga.state.nc.us/Sessions/2011/Bills/House/HTML/H640v0.html.
[149] See South Carolina S444, *available at* http://www.scstatehouse.gov/sess119_2011-2012/bills/444.htm.

Thus, state laws that make exceptions for business contracts based on foreign law themselves demonstrate the irrelevancy of their respective laws.[150] If states make an exception for foreign law for business contracts to ensure their respective courts comply with the Contracts Clause, then such laws simply re-affirm the Contracts Clause and address an area that the CPB and Homeland Security already monitor.

ii. The Privileges or Immunities Clause

Next, a ban on foreign law is unconstitutional because it violates the Privileges or Immunities Clause of the 14th Amendment. This clause appears in Section 1 of the 14th Amendment and states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[151]

In drafting this clause, John Bingham relied heavily on Judge Bushrod Washington's explanation of the Article IV Privileges and Immunities Clause cited earlier:[152] Anti-Shariah laws violate the Privileges and Immunities Clause because they restrict fundamental rights without providing a valid State interest.[153] With the passage of the 14th Amendment, the Privileges and Immunities Clause was meant to incorporate the same federal government obligations onto the states via the

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[150] See Appendix A.
[151] U.S. Const. Amend. 14 Sect. 1 Cl. 2 *available at* http://www.14thamendment.us/amendment/14th_amendment.html
[152] Corfield v. Coryell (6 Fed. Cas. 546, no. 3,230 C.C.E.D.Pa. 1823).
[153] *See Supra* notes 146-154.

Privileges or Immunities Clause. As notable American legal scholar Professor William Van Alstne explains about Privileges or Immunities Clause incorporation,

> Each [citizen] was given the same constitutional immunity from abridging acts of state government as each was already recognized to possess from abridgment by Congress. What was previously forbidden only to Congress to do was, by the passage of the Fourteenth Amendment, made equally forbidden to any state.[154]

Likewise, John Bingham explained best the need for the Privileges or Immunities clause:

> Many instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guarantied privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, "cruel and unusual punishments" have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none.[155]

Bingham's argument demonstrates the gap in protecting fundamental civil liberties of American citizens. A broad ban of foreign laws invariably bans mu'amalat transactions, and states are once again held responsible to explain the compelling state interest to restrict Muslim marriages, divorces, wills, estates, etc. Not surprisingly, none of the laws written to ban foreign laws refer to any such compelling interest that makes a categorical ban on foreign laws necessary.

b. A Foreign Law Ban Contradicts Supreme Court Precedent

A state ban on foreign law forbids an act the highest court in the United States has already deemed constitutional. Supreme Court precedent demonstrates

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[154] Van Alstyne, William, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236-1255 (1994).

[155] Cong. Globe, 39th Cong., 1st Sess., 2542 (1866), *quoted* in Adamson v. California, 332 U.S. 46, 92-118 (1947).

an established history of referring to international law as persuasive authority in domestic jurisprudence. For example, in 2002, the Supreme Court referred to international precedent in ruling unconstitutional the execution of mentally retarded offenders in *Adkins v. Virginia*.[156] Likewise, in the landmark 2003 Fourth Amendment privacy case, *Lawrence v. Texas*, Justice Kennedy cited a European Court of Human Rights decision to hold a Texas state statute banning sodomy as unconstitutional.[157] Again, in 2009, Justice Kennedy cited foreign law in *Graham v. Florida* to hold that it was unconstitutional to sentence juveniles convicted of non-violent homicide to life without parole.[158] But the United States Supreme Court has a rich history of citing foreign law as persuasive authority on complex issues like the death penalty and human rights.[159] It stands to reason, therefore, that employing foreign law for private civil affairs is likewise constitutional.

Thus, in attempting to ban foreign law, states must describe a legitimate state interest to avoid Contracts Clause issues, make an exception for the adab, ibadah, and I'tiqadat branches of Shariah Law to avoid Free Exercise Clause issues, make an exception for the mu'amalat branches of Shariah to avoid Privileges and Immunities Clause and Privileges or Immunities Clause issues, and allow judges to refer to international law per Supreme Court precedent. Rather than spend extensive resources to craft, pass, and enforce such a ban, State legislatures should recognize

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[156] Adkins v. Virginia 536 U.S. 304 (2002).
[157] Lawrence v. Texas, 539 U.S. 558, 573 (2003).
[158] Graham v. Florida, 130 S. Ct. 2011, 2033 (2010).
[159] Rebecca R. Zubaty, *Foreign Law and the U.S. Constitution: Delimiting the Range of Persuasive Authority*, 54 UCLA L. REV. 1413, 1414 (2007) *citing* Jeffrey Toobin, Swing Shift, NEW YORKER, Sept. 12, 2005, at 42, 42-43 (quoting New York University School of Law professor Norman Dorsen) ("When it comes to interpreting treaties or settling international business disputes, the Court has always looked to the laws of other countries, and the practice has not been particularly controversial.").

that such a law would exactly restate the law currently enforced in the United States.[160]

V. Analysis of Alleged Shariah Infiltration into American Courts

The aforementioned analysis notwithstanding, anti-Shariah advocates claim that such a ban is necessary because Shariah has already infiltrated American courts.[161] This section addresses these arguments and demonstrates that the alleged threat of Shariah in America is not merely, "more imagined than real,"[162] but in fact entirely imagined.

a. Where is Shariah Hiding and What is Being Banned?

Justice Brennan wrote in 1971, "It is monstrous that courts should aid or abet the lawbreaking police officer. It is abiding truth that '[n]othing can destroy a government more quickly than its own failure to observe its own laws or worse, its disregard of the charter of its own existence*.*'"[163] Yet, state representatives pushing for anti-Shariah laws are not only willfully ignorant of American law, but as their ignorance to Shariah indicates, they are not even sure what they are banning.

For example, Wyoming State Representative Gerald Gay proposed an anti-Shariah constitutional amendment as "…a 'pre-emptive strike' to ensure judges don't rely on Shariah in cases involving, for example, arranged marriages, 'honor

160 As Yogi Berra says, "You can observe a lot by watching." Yogi Berra, *You Can Observe A Lot By Watching: What I've Learned About Teamwork From the Yankees and Life* (2008).

161 Shariah Law and American Courts: An Assessment of State Appellate Court Cases, CENTER FOR SECURITY POLICY at 21.

162 *See Supra* note 42.

163 Mapp v. Ohio, 367 US 643, 659 (1961) in Harris v. New York, 401 US 222, 232. (1971). (emphasis added).

killings' [sic] or usury cases."[164] Likewise, when asked on multiple occasions to cite a single case in North Carolina history that would demonstrate the need for an anti-Shariah bill, State Representative George Cleveland finally admitted, "I do not have any specific examples off the top of my head."[165] Missouri State Representative, Paul Curtman, was posed the same question for the second time in April 2011 to justify his anti-Shariah bill and gave the same response as North Carolina Representative Cleveland.[166] A month earlier, when Representative Curtman was originally asked to cite a single example of Shariah in American courts, he advised the questioner that "Any Google search…is going to turn up cases for you."[167]

This brief analysis illustrates two points. First, it shows the dangerous levels of nationwide ignorance behind the anti-Shariah campaign and how it is jeopardizing the civil liberties of millions. Second, and as explained below, a simple reason explains why State representatives cannot cite a single example in American jurisprudence where Shariah trumped American law: no such example exists.

b. A Repudiation of the "Shariah Law and American Courts" Assessment

Critics may object to the claim that Shariah is not infiltrating American courts based on a recently published 635-page document entitled, "Shariah Law and American Courts: An Assessment of State Appellate Court Cases."[168] The document

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[164] Nick Wing, *Wyoming Weighs Bill That Would Ban Sharia Law*, THE HUFFINGTON POST, Jan. 26, 2011, *available at* http://www.huffingtonpost.com/2011/01/26/wyoming-sharia-law-bill_n_814266.html. *Also see supra* note 32.

[165] *Tim Murphy, BREAKING: Anti-Shariah Bill Sponsors Are Kind of Clueless*, MOTHER JONES, Apr. 22, 2011, *available at*http://motherjones.com/mojo/2011/04/anti-sharia-bill-sponsors-clueless-north-carolina.

[166] Id.

[167] Id.

[168] Shariah Law and American Courts: An Assessment of State Appellate Court Cases, CENTER FOR SECURITY POLICY, May 20, 2011. *available at* www.centerforsecuritypolicy.org.

was produced through the joint efforts of David Yerushalmi, ACT for America,[169] and the Center for Security Policy, a conservative Washington D.C. think tank[170]. It provides seventy cases as examples of Shariah's alleged infiltration into American courts, and states that its purpose is to:

> Encourage an informed, serious and civil public debate and policymakers' engagement with the issue of Shariah law in the United States of America [because] organizations such as the Muslim Brotherhood and their salafist [sic] coalition partners state openly their intent to impose the Shariah State and Shariah law.[171]

The seventy cited cases do not demonstrate any indication that Shariah is infiltrating American courts in preference to American law. In fact, each of the seventy cases demonstrates that American courts have consistently and unwaveringly held American law as the supreme law of the land. The following critique presents the non-peer reviewed document's three irreconcilable flaws.

First, the document presents a flawed foundation. It begins with a wholly incorrect explanation[172] of Shariah and cites a disingenuous claim of Qur'anic abrogation[173] without any evidence to support the claim.[174] It improperly conflates

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[169] ACT for America is a prominent anti-Islam organization in America. *See Supra* note 51.
[170] Id.
[171] Id. at 8.
[172] Id. at 8 (claiming in a conclusory manner, void of any references or arguments to support, that Shariah Law, "includes legally mandated, recommended, permitted, discouraged and prohibited practices that are explicitly biased against women, homosexuals, non-Muslims, former Muslims and those designated as blasphemers.").
[173] Critics of Islam cite the "theory of abrogation" to assert, without logical reason, that latter allegedly violent verses of the Qur'an abrogate earlier peaceful verses, thereby relegating the Qur'an as a book that commands violence. No serious scholar accepts this theory, and it has been repudiated on numerous occasions by Muslim and non-Muslim scholars. While a full repudiation of this theory is outside the scope of this paper, a general discussion is available here: Waseem A. Sayed Ph.D, *Reply to allegation that Holy Quran is composed of verses cancelling each other?*, ALISLAM, *available at http://www.alislam.org/egazette/updates/reply-to-allegation-that-holy-quran-is-composed-of-verses-cancelling-each-other/.*
[174] Id. at 15-16.

the State laws of nations like Pakistan and Iran with the Qur'an,[175] and remarkably claims—again unreferenced—that several reputable American organizations such as Harvard Law School are "supporting Shariah Law."[176]

Second, the document does not provide facts to support any of its assertions. For example, while the document cites ten organizations that are allegedly engaged in the "promotion and enforcement of Shariah law in the U.S.," it provides no evidence to support this claim, perhaps expecting the reader to simply accept the claim on face value. Of the ten organizations cited, the Assembly of Muslim Jurists of America ("AMJA") is the only Muslim-American organization the document analyzes.[177] But even this analysis is meritless.

The document claims AMJA is "committed to the establishment of Shariah law [in America]" and that because of AMJA's influence, "their statements of intent are important in understanding the possible threat of Shariah law intruding into the U.S. legal system."[178] Unable to cite a single step AMJA has taken to implement Shariah in America, the document cites AMJA scholars' views on mu'amalat matters expressed in conferences held in Canada, Denmark, and Bahrain, respectively, as evidence of their intent to implement Shariah in America.[179] This approach's fallacy notwithstanding, the document ignores AMJA's published and publicly available

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[175] Shariah Law and American Courts: An Assessment of State Appellate Court Cases, CENTER FOR SECURITY POLICY at 16-17.
[176] Id. at 20-21 (claiming, for example, that because Harvard Law School and Karamah: Muslim Women Lawyers for Human Rights, an organization Chaired by Dr. Azizah y. al-Hibri, Commissioner on the U.S. Commission on International Religious Freedom, offer Islamic Studies programs and classes, they are therefore supporting Shariah Law in America.).
[177] Id. at 22.
[178] Id. at 22.
[179] Id. at 25-28.

protocol entitled "Islam & the United States," which clarifies their official intent and views on America.[180] A cursory glance at this protocol offers:

> AMJA rejects any ideology or effort that aims to put the United States of America and Islam in conflict… In case of a conflict between a Muslim country and the United States, Muslims in America are encouraged to play an active role in bridging this divide and bringing about a peaceful resolution…[181]

Thus, the one Muslim-American organization the document attempts to analyze as an example of Shariah's alleged infiltration has previously publicly and clearly announced that a Muslim-American must work for peace and be loyal to America.[182]

c. "Shariah" Cases Employ United States Constitution, not Shariah

First, each of the seventy cases presented are mu'amalat contractual and transactional cases or cases addressing religious beliefs protected under the First Amendment. Conversely, among the seventy cases, not a single cited case is based on 'uqubat or punishment for criminal behavior.

In presenting its seventy cases, the document first summarizes the "Top 20 Cases" it deems "Highly Shariah Relevant" as examples of Shariah's infiltration into American courts.[183] Without actually analyzing these twenty cases, the document then uses more than 500 of its 635 pages to re-print the full court opinions of an additional fifty cases that it rates either "highly relevant" or "relevant" examples of Shariah's infiltration into American courts.[184] Again, the document offers no explanation or analysis of why or how these cases demonstrate Shariah's infiltration

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[180] Public Statement from the Assembly of Muslim Jurists of America (AMJA) *available at* http://www.amjaonline.com/en_public_statement.php (last visited on Nov. 22, 2011).
[181] Id. (last visited on Nov. 22, 2011).
[182] Id.
[183] Shariah Law and American Courts: An Assessment of State Appellate Court Cases, CENTER FOR SECURITY POLICY at 29.
[184] Id at 54-583.

into American courts, or even why some are "highly relevant" examples while others are merely "relevant" examples—leaving it to the reader to accept the claim at face value.[185] Of the seventy cited cases, fifty-three represent private civil family law cases, of which thirty-one address marriage/divorce and twenty-two address child custody, respectively.[186] Of the remaining cases, eight address private contract law, four address private property disputes, three address alleged Shariah Doctrine, one addresses personal tort injury against a corporation, and one addresses due process and equal protection.[187]

In sum, the document only provides a brief summary of the first twenty cases, provides no analysis of the remaining fifty cases, and makes bald conclusory statements that such cases are evidence of Shariah's infiltration into American courts.[188]

The next section selects a cross-section of three cases—an alleged Shariah Doctrine case, a private contract law case, and a family law case. This analysis should serve as an example of the fallacious reasoning and bald conclusory allegations of Shariah "infiltration" employed in regards to the remaining sixty-seven cases.

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[185] The "highly relevant" and "relevant" labels also beg the question of whether David Yerushalmi and his staff also discovered "irrelevant" examples of Shariah's alleged infiltration into American courts, but ignored them due to their explicit but subjective irrelevancy.

[186] Shariah Law and American Courts: An Assessment of State Appellate Court Cases, CENTER FOR SECURITY POLICY at 29-42 and 46.

[187] Id.

[188] Because the document avoids offering any case analysis whatsoever, the only possible explanation is that these cases were chosen because they came up when the document's authors searched Google Scholar for "Sharia OR Muslim OR Islam OR Islamic." Each of the 50 cases cited under the "highly relevant" and "relevant" category are predicated with the aforementioned terms, or terms of a similar nature. Again, no explanation or analysis is offered to demonstrate Shariah's alleged infiltration. One can only assume that the authors of the document were merely complying with Missouri State Representative Paul Curtman's advice to "google" it. *See Supra* note 234.

d. In Re Jesse L. Ferguson Et Al. On Habeas Corpus—A Case of Shariah Doctrine Allegedly Superseding the United States Constitution[189]

In Re Ferguson is a 1961 California case in which petitioner, Jesse L. Ferguson and nine other inmates, filed a writ of habeas corpus citing religious discrimination and complained of an improper restriction on their right to communicate with their attorney.[190] Ferguson and his counterparts identified as Black Muslims, and claimed "they ha[d] been subjected to physical force by prison officials solely because of their affiliation with the Muslim movement."[191] The Court, instead, found that,

> …in each of the enumerated instances where physical force was used, one of the petitioners, because of a conflict involving his Muslim beliefs, became physically belligerent and aggressive toward a supervisory official. Since by their aggressiveness petitioners appear to have created a serious risk of physical harm to the prison officials who had charge of them…[it was] necessary to prevent a prisoner from doing bodily harm to a prison official.[192]

After a thorough analysis the Court concluded that, "the petitioners are not now entitled to relief in any respect complained of in the petition. Accordingly, the order to show cause is discharged, and the petition for the writ is denied."[193] In forming this opinion, the Court referenced only the California Constitution and domestic judicial precedent.[194] The only time the Qur'an was even mentioned was when the Court acknowledged the petitioners' request to procure a copy of a book similar to,

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[189] Shariah Law and American Courts: An Assessment of State Appellate Court Cases, CENTER FOR SECURITY POLICY at 67.
[190] In Re Jesse L. Ferguson Et Al. On Habeas Corpus ,55 Cal.2d 663 (1961).
[191] Id
[192] Id citing O'Brien v. Olson, 42 Cal.App.2d 449, 460 (109 P.2d 8).
[193] Id
[194] Id

but not exactly, the Qur'an—a request that the Court also denied.[195] The document makes no attempt to explain why the Court's decision to deny inmates their holy book is a "Relevant" example of "Shariah Doctrine" infiltrating American courts.[196]

e. El-Farra v. Islamic Center of Little Rock, Inc. Et Al. – A Case of Shariah Contract Law Allegedly Superseding the United States Constitution[197]

El-Farra v. Islamic Center of Little Rock, Inc. is a civil contract dispute heard in the Arkansas appeals court to determine, "whether the circuit court had subject-matter jurisdiction to entertain the claims of appellant, Monir El-Farra, a former Islamic minister, against the Islamic Center of Little Rock ["ICLR"] and the members of its executive committee, the appellees."[198] The ICLR terminated El-Farra's employment contract via a unanimous executive board vote because they were unhappy with his sermons and leadership tactics.[199] El-Farra filed suit against the "ICLR and members of its Executive Committee, alleging defamation, tortious interference with a contract, and breach of contract."[200] The Appeals Court affirmed the lower court's ruling:

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[195] Id. (holding, "In the case now engaging our attention, the record does not establish that petitioners seek to be permitted to purchase the orthodox Holy Koran, recognized as the scriptures of the Mohammedans and containing the professed revelations to Mohammed, and which is the basis for the religious, social, civil, commercial, military and legal regulations of the Mohammedan world. Nor does it appear that in the requests to the prison officials for permission to purchase their bible, petitioners made it clear to those officials that they were seeking to purchase the orthodox Holy Koran, rather than some version adapted to their "Black Muslim" doctrines. Manifestly then, respondent prison authorities cannot be herein directed to comply with petitioners' request to purchase their sacred book when it has not been established that a proper application has been made to the prison authorities thereby enabling them to exercise their discretionary power to manage the prison system." (Pen. Code, 5054, 5058.)).

[196] Shariah Law and American Courts: An Assessment of State Appellate Court Cases, CENTER FOR SECURITY POLICY at 67.

[197] Id at 61.

[198] El-Farra v. Islamic Center of Little Rock, Inc. Et Al., 226 S.W.3d 792 (2006). "The circuit court granted the appellees' motion for summary judgment, dismissing the minister's complaint with prejudice for lack of subject-matter jurisdiction. We affirm."

[199] Id

[200] Id

> The United States Supreme Court, applying the First Amendment, has held that civil courts are not a constitutionally permissible forum for a review of ecclesiastical disputes. The federal courts have repeatedly concluded that any attempt by civil courts to limit a religious institution's choice of its religious representatives would constitute an impermissible burden upon that institution's First Amendment rights.[201]

The Appeals Court cited further judicial precedent to conclude that, "the First Amendment protects the act of decision rather than the motivation behind it; therefore, whether the termination of appellant was based on secular reasons or Islamic doctrine, this court will not involve itself in ICLR's right to choose ministers without government interference.[202] The document alleges that *El-Farra v. Islamic Center* is a "Highly Relevant" example of "Shariah Contract Law" infiltrating American courts.[203] On the contrary, the court wrote specifically that it will "not involve itself in [Islamic doctrine]."[204]

f. S.D. v. M.J.R.[205] – A Case of Shariah Family Law Allegedly Superseding the United States Constitution

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[201] Id. (citing *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 710, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 449, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969); *Watson v. Jones,* 80 U.S. (13 Wall.) 679, 727, 20 L.Ed. 666 (1871).) and (*Alicea Hernandez v. Catholic Bishop of Chicago,* 320 F.3d 698 (7th Cir.2003)(affirming dismissal of discrimination claims); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals,* 929 F.2d 360 (8th Cir.1991)(affirming summary judgment in favor of church on age and sex-discrimination claims following priest's discharge); *Minker v. Baltimore Annual Conference of United Methodist Church,* 894 F.2d 1354, 1359 (D.C.Cir.1990)(affirming dismissal of minister's age-discrimination and breach-of-contract claims for church's denial of pastorship); *Hutchison v. Thomas,* 789 F.2d 392 (6th Cir.1986)(affirming dismissal of complaint, including claims of breach of contract and defamation, for church's forced retirement of minister); *Rayburn v. General Conference of Seventh-Day Adventists,* 772 F.2d 1164 (4th Cir.1985)(affirming summary judgment for church on discriminatory denial-of-pastorship claim), *cert. denied* 478 U.S. 1020, 106 S.Ct. 3333, 92 L.Ed.2d 739 (1986); *Simpson v. Wells Lamont Corp.,* 494 F.2d 490 (5th Cir.1974)).

[202] Id (citing *See, e.g., Cha v. Korean Presbyterian Church of Washington,* 262 Va. 604, 553 S.E.2d 511 (Va.2001) (church's decisions about appointment and removal of minister is beyond subject-matter jurisdiction of civil courts))

[203] Shariah Law and American Courts: An Assessment of State Appellate Court Cases, CENTER FOR SECURITY POLICY at 61.

[204] *See Supra* note 272

[205] Id at 468.

S.D. v. M.J.R. is a 2010 New Jersey domestic violence case in which S.D. (plaintiff) appealed the lower court's ruling which denied her a final restraining order against her abusive husband M.J.R. (defendant).[206] S.D. and M.J.R. are both Muslims.[207] The lower court wrongly denied S.D.'s restraining order against M.J.R.:

> This court does not feel that, under the circumstances, that this defendant had a criminal desire to or intent to sexually assault or to sexually contact the plaintiff when he did. The court believes that he was operating under his [religious] belief that it is, as the husband, his desire to have sex when and whether he wanted to, was something that was consistent with his practices and it was something that was not prohibited.[208]

The lower court admitted that according to New Jersey law, the plaintiff had a legal right to refuse defendant's advances—but still ruled against the plaintiff.[209] The Appeals Court cited *Reynolds v. United States*[210] to repudiate the lower court's ruling:

> Defendant's conduct in engaging in nonconsensual sexual intercourse was unquestionably knowing, regardless of his view that his religion permitted him to act as he did. As the judge recognized, the case thus presents a conflict between the criminal law and religious precepts. In resolving this conflict, the judge determined to except defendant from the operation of the State's statutes as the result of his religious beliefs. In doing so, the judge was mistaken.[211]

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[206] S.D. v. M.J.R., 2 A.3d 412 (N.J. Super. Ct. App. Div. (2010).
[207] Id
[208] Id
[209] Id
[210] Reynolds v. United States, 98 U.S. 166-67, 25 L. Ed. 244 (1878) (holding, "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.")
[211] S.D. v. M.J.R., 2 A.3d 412 (N.J. Super. Ct. App. Div. (2010) (citing Reynolds v. United States, 98 U.S. 145, 25 L. Ed. 244 (1878) (holding, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?") (emphasis added).

S.D. v. M.R.J. is a prime example that the checks and balances inherent in the United States Constitution are functional. The Appeals Court specifically cited to American precedent to hold that religious beliefs can never supersede the law of the land.[212] The document authors ignore this fact, and instead point to the lower courts error as evidence of Shariah infiltration. In doing so, the document authors commit two errors.

First, the document authors naively assume that judges always rule correctly in every matter. If that were the case, neither an appeals court nor a supreme court would ever be necessary. The lower court's judge did not implement Shariah, but incorrectly applied New Jersey Law because he ignored established American judicial precedent, the First Amendment, and the Supremacy Clause. Because of our functioning checks and balance system, however, the Appeals Court caught the error and restored justice.

Second, the document authors blame Shariah for the judge's error in interpreting the law. The error rests upon the judge who makes the error, not on the law that was illegally and incorrectly applied. *S.D. v. M.R.J.* instead serves as a powerful example of the checks and balances system inherent in our judiciary to ensure mistakes are rectified and the Constitution is uniformly upheld.

The gross mischaracterization of American court holdings presented in these three cases is a cross section of the mischaracterization presented in all seventy cases cited in the document. In short, anti-Shariah advocates are unable to cite a single substantive or ancillary example of Shariah's infiltration on American courts.

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[212] Id

Part V: Conclusion

The anti-Shariah and anti-foreign laws are unconstitutional for numerous reasons—the violation of the First and Fourteenth Amendments, the Privileges and Immunities Clause, and the Privileges or Immunities Clause. Additionally, these laws would strangle international commerce and economics, violate the Contracts Clause, and contradict Supreme Court precedent. Likewise, legislative attempts to prevent Shariah ʻuqubat application in our courts is unnecessary for several reasons: the Supremacy Clause already protects against it, Shariah itself forbids it be implemented as superior to the law of the land, and because no such ʻuqubat threat exists nor has it ever existed.

The leading advocate for this campaign, David Yerushalmi, is well known for his discrimination of Jews, Blacks, Immigrants—and now Muslims. The various state representatives promoting their individual Shariah bans demonstrate a substantive lack of understanding of exactly what Shariah is, and is not. Likewise, the "Shariah Law and American Courts" document fails to demonstrate a single example of Shariah's application in American courts in preference or superior to the United States Constitution. On the contrary, it provided numerous excellent examples that only the United States Constitution is employed as America's supreme and sole law.

In fact, anti-Shariah laws violate the fundamental rights of Muslims, Jews, and Christians—indeed, they violate the rights of any American who practices a faith or engages in international business. Anti-Shariah and anti-foreign laws are best understood as "an unconstitutional act…not a law; [that] confer no rights; impose no

duties; afford no protection; create no office; in legal contemplation, as inoperative as though [they] had never been passed."[213] The legally, financially, and practically correct decision is to repudiate the entire anti-Shariah campaign as offensive to American values. Instead, let us maintain the American experiment, work together to put an end to religious discrimination, and enjoin universal religious freedom for all of its residents—including Muslim-Americans.

[213] Norton v. Shelby County, 118 US 425 (1885).

Appendix A: State Anti-Shariah/Foreign/Religious Laws, Status, & Text

State	Law	Legislative Status*	Banning What?	Full Text
Alabama	SB 62	Active	Shariah Law	Available
Alaska	HB 88	Active	Foreign Law	Available
Arizona	HB 2582	Active	All Religious Law	Available
Arkansas	SB 97	Dead	Foreign Law	Available
Florida	SB 1294	Dead	Foreign Law	Available
Georgia	HB 45	Active	Foreign Law	Available
Indiana	HB 1078	Active	Foreign Law	Available
Indiana	SB 530	Active	Foreign Law	Available
Kansas	HB 2087	Active	Foreign Law	Available
Louisiana	Act 714	Enacted	Foreign Law	Available
Michigan	HB 4769	Active	Foreign Law	Available
Mississippi	HB 301	Dead	Shariah Law	Available
Missouri	HB 708	Active	Foreign Law	Available
Nebraska	LB 647	Active	Foreign Law	Available
North Carolina	HB 640	Active	Foreign Law	Available
Oklahoma	SQ 755	Enacted/Suspended	Shariah Law	Available
Pennsylvania	HB 2029	Active	Foreign Law	Available
South Carolina	S 444	Active	Foreign Law	Available
South Dakota	HRJ 1004	Active	Religious Law	Available
Tennessee	SB 1028	Enacted	Shariah Law	Available
Texas	HJR 57	Dead	Religious Law	Available
Utah	N/A	Withdrawn	Shariah Law	N/A
Virginia	HB 631	Active	Foreign Law	Available
Wyoming	HJR 8	Active	Shariah Law	Available

*Dead = Proposal did not become law and is not active in the process
*Active = Proposal is progressing through the legislature but not a law yet (may mean stagnant but not dead)
*Enacted = Proposal passed both State legislatures, was signed by the Governor, and is current State Law