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# CONSTRUCTING THE OTHER: U.S. MUSLIMS, ANTI-SHARIA LAW, AND THE CONSTITUTIONAL CONSEQUENCES OF VOLATILE INTERCULTURAL RHETORIC

CARLO A. PEDRIOLI\*

*Ignorance is the parent of fear, and being completely nonplussed and confounded about the stranger, I confess I was now as much afraid of him as if it was the devil himself who had thus broken into my room at the dead of night.*<sup>1</sup>

## I. INTRODUCTION

Recently, legislators have proposed, discussed, and passed various laws that aimed to limit the use of foreign law, international law, and Sharia in state court systems. During the latest set of legislative sessions, legislators in twenty-three states put forth forty-one bills of this sort.<sup>2</sup> Most of the bills died at the ends of the legislative sessions, but not all did.<sup>3</sup> If

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1. HERMAN MELVILLE, *MOBY DICK* 34 (Hershel Parker & Harrison Hayford eds., W.W. Norton & Co. 2d ed. 2002) (1851).

2. Bill Raftery, *Bans on Court Use of Sharia/International Law: Showdown Vote in Michigan Set for After November Election*, *GAVEL TO GAVEL* (October 4, 2012), <http://gaveltogavel.us/site/2012/10/04/bans-on-court-use-of-shariainternational-law-showdown-vote-in-michigan-set-for-after-november-election>.

3. *Id.*

trends were to continue, proponents of such bills would introduce similar bills in new states and revive bills in states that had tabled the bills.<sup>4</sup>

While foreign law, as the law of another country,<sup>5</sup> and international law, as the law among various nations,<sup>6</sup> are relatively easy to understand at a conceptual level, Sharia may prove more difficult for individuals outside of Islamic circles to grasp. Sharia is a branch of Islamic law, which has two main branches, Sharia and fiqh.<sup>7</sup> Sharia is “the divine law that is infallible, perfect, universal, eternal and unchanging.”<sup>8</sup> In a literal sense, Sharia means “path to the watering place,” which suggests that Sharia “is the source of life.”<sup>9</sup> Sharia calls upon several sacred texts, including the Koran, which is the Muslim holy book, and the Sunnah, which contains sayings of the prophet Muhammad.<sup>10</sup> In contrast with Sharia, fiqh is the human comprehension of divine law, which is fallible and changing.<sup>11</sup> In a literal sense, fiqh means “‘understanding’ or ‘perception.’”<sup>12</sup> Fiqh is a recognition that humans grapple with the Koran and the Sunnah to try to understand what transcends human understanding.<sup>13</sup> Islamic law is not uniform throughout the world, and such law has various schools of interpretation.<sup>14</sup> Sunni Muslims have schools of interpretation called Hanafi, Maliki, Shafi’i, and Hanbali, while Shia Muslims have a school of interpretation called Ithna Ashari.<sup>15</sup> Not surprisingly, Islamic scholars often disagree on the content of Islamic law.<sup>16</sup>

In linking Sharia, by which legislators probably mean Islamic law in general, to foreign and international law, legislators have constructed

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

5. BLACK’S LAW DICTIONARY 720 (9th ed. 2009).

6. *Id.* at 892.

7. Frank Vogel, *An Introduction to Law of the Islamic World*, 31 INT’L J. LEGAL INFO. 353, 356–57 (2003).

8. *Id.* at 356.

9. Donald Brown, *A Destruction of Muslim Identity: Ontario’s Decision to Stop Shari’a-based Arbitration*, 32 N.C. J. INT’L L. & COM. REG. 495, 515 (2007).

10. *Id.*

11. Vogel, *supra* note 7, at 356–57.

12. *Id.* at 357.

13. *Id.*

14. James Thornback, *The Portrayal of Sharia in Ontario*, 10 APPEAL 1, 5 (2005).

15. *Id.* at 4. Of the world’s 1.3 billion Muslims, 85 percent are Sunni, and 15 percent are Shia. Sahar F. Aziz, *Sticks and Stones, the Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y. CITY L. REV. 33, 45 (2009).

16. John R. Bowen, *How Could English Courts Recognize Shariah?*, 7 U. ST. THOMAS L.J. 411, 434 (2010).

Sharia as “foreign” or “international,” neither of which is “American” as related to the United States. This rhetorical approach has unfolded in various proposed constitutional amendments. For example, in Iowa, a proposed state constitutional amendment aimed to prohibit state courts from upholding the law of another state if the law of the other state included Sharia.<sup>17</sup> The proposed amendment commanded, “The courts shall not use the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia law.”<sup>18</sup> In Missouri, a corresponding proposed state constitutional amendment, in almost the exact same language, declared, “The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia law.”<sup>19</sup> In Alabama, a proposed state constitutional amendment used language comparable to that of the proposed amendments in Iowa and Missouri.<sup>20</sup> In Wyoming, a similar proposed state constitutional amendment instructed, “The courts shall not consider the legal precepts of other nations or cultures including, without limitation, international law and Sharia law.”<sup>21</sup> In New Mexico, a comparable state constitutional amendment declared, “The courts shall not consider or apply Sharia law.”<sup>22</sup>

Not all of the proposed laws specifically identified Sharia. For instance, in 2010, Louisiana passed a law that purported “to protect its citizens from the application of foreign laws when the application of a foreign law [would] result in the violation of a right guaranteed by the constitution of this state or of the United States.”<sup>23</sup> Nearly a year later, Arizona passed a law that prohibited enforcement of foreign law if such enforcement would violate a right that the Arizona Constitution or the U.S. Constitution guaranteed, or if such enforcement would conflict with the laws of Arizona or the United States.<sup>24</sup>

Because it became law, one proposed state constitutional amendment that rhetorically linked Sharia to foreign and international law is of

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17. H.R.J. Res. 14, 84th Gen. Assemb., Reg. Sess. (Iowa 2011).

18. *Id.*

19. H.R.J. Res. 31, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011).

20. H.R. 597, 2011 Leg., Reg. Sess. (Ala. 2011); S. 62, 2011 Leg., Reg. Sess. (Ala. 2011).

21. H.R.J. Res. 8, 2011 Leg., 2011 Gen. Sess. (Wyo. 2011).

22. S.J. Res. 18, 2011 Leg., Reg. Sess. (N.M. 2011).

23. 2010 La. Acts, No. 714, § 6000(B).

24. H.B. 2064, 50th Leg., 1st Reg. Sess. (Ariz. 2011). A domestic court is unlikely to uphold a foreign law that would violate domestic law. Thus, one may wonder why states would pass laws that solve a non-existent problem.

particular note. In the 2010 midterm elections, Oklahoma passed State Question 755 (“SQ 755”), a constitutional amendment that aimed to place restrictions on the use of foreign law, international law, and Sharia in Oklahoma courts.<sup>25</sup> SQ 755 declared, “The Courts shall not look to the legal precepts of other nations and cultures. Specifically, the courts shall not consider international law or Sharia Law.”<sup>26</sup> SQ 755 would prohibit Oklahoma courts from considering law from another state if the other state’s law included Sharia.<sup>27</sup>

That many of these proposed laws were so similar should not be a surprise. David Yerushalmi, a lawyer and a “Hasidic Jew with a history of controversial statements about race, immigration and Islam,” began writing a model anti-Sharia statute in 2009.<sup>28</sup> Yerushalmi designed his model statute to appeal to both those opposed to Islam and those against the influence of foreign law in the United States.<sup>29</sup> Frank Gaffney, “a hawkish policy analyst and commentator,” as well as president of the Center for Security Policy, who had funded Yerushalmi’s work in the past, promoted the anti-Sharia model statute.<sup>30</sup> In 2009, a nonprofit organization named the American Public Policy Alliance came into being and began recruiting lawyers who could act as legislative sponsors for the bills.<sup>31</sup> Gaffney stated that he and Yerushalmi planned to “engender a national debate about the nature of Shariah and the need to protect [the] Constitution and country from it.”<sup>32</sup>

Sharia, like other types of religious law, could appear in civil courts in the United States in various ways. For instance, some Muslims may want to arbitrate or mediate contractual disputes, divorce matters, or child custody issues according to Sharia. Just as civil courts have enforced arbitration

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25. H.R.J. Res. 1056, 52nd Leg. 2d Reg. Sess. (Okla. 2010), also known as Okla. State Question 755 (Gen. Elect. Nov. 2, 2010).

26. *Id.* § 1(C).

27. *Id.*

28. Elliott, *supra* note 4. *See also States Move to Ban Islamic Sharia Law*, NAT’L PUB. RADIO (March 11, 2011), <http://www.npr.org/2011/03/11/134458058/States-Move-to-Ban-Islamic-Sharia-Law> [hereinafter *States Move*].

29. Elliott, *supra* note 4.

30. *Id.*

31. *Id.*

32. *Id.* Some groups responded to Yerushalmi’s proposed law, which aimed to characterize Sharia “as one of the greatest threats to American freedom since the cold war.” *Id.* For instance, Catholic bishops and Jewish groups, as well as the American Civil Liberties Union, criticized the law. *Id.* Muslims responded as well. Salam Al-Marayati, president of the Muslim Public Affairs Council, described the rhetoric as “purely a political wedge to create fear and hysteria.” *Id.*

decisions from the Jewish *beth din* system that have conformed to secular arbitration standards, civil courts could enforce Sharia-based arbitration decisions that conformed to the same standards.<sup>33</sup> Additionally, many Muslims may want to execute their wills according to Sharia. As with other valid wills, secular or sacred in nature, probate courts would execute valid Muslim wills according to the requests of the testators.

Laws like Oklahoma's State Question 755 are problematic for a variety of reasons. One key reason is that such laws discriminate against U.S. Muslims, out of whose religious tradition Sharia comes, and fail to offer an explanation for such discrimination, instead appealing to public ignorance of Islam and fear of terrorism. The result of such laws is to sacrifice the rights of rank-and-file U.S. Muslims in the middle of the political theater. To focus on a law that has been approved by the legislature and then the public, rather than on those laws that simply have been proposed, this Article will address the case of Oklahoma's SQ 755. Greater understanding of the legal and communication problems associated with SQ 755, particularly as those problems impact U.S. Muslims, a religious minority that makes up less than 1 percent of the adult U.S. population,<sup>34</sup> will provide both legislators and members of the public an opportunity to become more informed regarding passing future legislation and voting on future state constitutional amendments of this sort.

This Article initially will contextualize the matter of SQ 755 by noting how U.S. society in general, and Oklahoma in particular, have constructed U.S. Muslims as Others, or Strangers. Then the Article will offer some background on SQ 755, which itself is a specific manifestation of the rhetorical construction of Muslims as Others. Next the Article will analyze how SQ 755 violates various provisions of the U.S. Constitution, including the Establishment Clause, the Free Exercise Clause, the Supremacy Clause, the Full Faith and Credit Clause, the Due Process Clause, and the Contracts

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33. Omar T. Mohammedi, *Shariah-Compliant Wills*, 25 PROB. & PROP. 58, 63 (2011).

34. U.S. CENSUS BUREAU, POPULATION DIVISION, TABLE 75: SELF-DESCRIBED RELIGIOUS IDENTIFICATION OF ADULT POPULATION: 1990 TO 2008, available at <http://www.census.gov/compendia/statab/2011/tables/11s0075.pdf>. The Pew Research Center estimates that Muslims make up 0.6 percent of the adult U.S. population. PEW RESEARCH CENTER, MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 9 (2007), available at <http://pewresearch.org/assets/pdf/muslim-americans.pdf>. The make-up of the U.S. Muslim population is diverse. Out of all U.S. Muslims, 38 percent are White, 26 percent are Black, 20 percent are Asian, and 16 percent are mixed or other. *Id.* at 17.

Clause. Finally, the Article will suggest a dialogic approach,<sup>35</sup> channeled through the Johari Window, which is a vehicle for information exchange,<sup>36</sup> for deconstructing the notion of U.S. Muslims as Others and reconstructing them as Selves, or non-Strangers, within U.S. culture.

## II. MUSLIMS AS OTHERS IN THE UNITED STATES

U.S. society has constructed, or, in some cases, at least tolerated the construction of, Muslims as Others. The Other is the Stranger.<sup>37</sup> In ancient times, travelers came home with stories of Strangers.<sup>38</sup> Frequently, those travelers would offer their responses to Others' "bizarre and abnormal ways-of-doing" and "compliment[ ] themselves on their superiority."<sup>39</sup> The Other is not always someone<sup>40</sup> who lives elsewhere. Rather he or she may be someone new to an area who desires to be a permanent part of the community in the future. In this case, the Stranger is not "the wanderer who comes today and goes tomorrow, but rather [is] the person who comes today and stays tomorrow."<sup>41</sup> One can encounter the Other "at the airport, on the subway, in the hotel corridor, in the supermarket aisles, in a conversation with a call-center operator, in Starbucks, 7-11, Taco Bell, and the ubiquitous 'Irish bars' that dot urban landscapes around the world."<sup>42</sup> Today, as in earlier times, the Other is inferior to the "gold standard" of

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35. In Greek, the term "dialogue" refers to "seeing through." Liyakatali Takim, *From Conversion to Conversation: Interfaith Dialogue in Post 9-11 America*, 94 THE MUSLIM WORLD 343, 346 (2004). Dialogue can foster better understandings among different groups, including faith groups, and promote peaceful co-existence. *Id.* Alwi Shihab notes that dialogue "is the most appropriate stance to meet the demands of the pluralism of society and the maturity humanity has reached in this age." Alwi Shihab, *Christian-Muslim Relations into the Twenty-first Century*, 15 ISLAM & CHRISTIAN-MUSLIM REL. 65, 74 (2004).

36. Lynn Little, *Leadership Communication and the Johari Window*, 24 ADMINISTRATOR 4, 4 (2005).

37. Lynda Dee Dixon, Cultural Self-Knowledge and Knowledge of Others: Cherokee Humanistic Research Project, Article Version of Keynote Address at the National Communication Association Hope Faculty Development Institute 16, 17 (2005).

38. *Id.*

39. *Id.*

40. The Other can be an institution. For a description of the rhetorical construction of the Catholic Church as Other in Mormon discourse, see generally Phil J. Chidester, "Firm in Defense of Freedom, Family, and Christianity": Mormonism, Pope John Paul II, and the Rhetorical Other, in THE RHETORIC OF POPE JOHN PAUL II 283 (Joseph R. Blaney & Joseph P. Zoppetti eds., 2009).

41. GEORG SIMMEL, THE SOCIOLOGY OF GEORG SIMMEL 402 (Kurt H. Wolff ed. & trans., 1964).

42. Tim Simpson, *The Proximal Other: Globalization and the Itinerant Subject of Intercultural Communication Research*, 31 INT'L & INTERCULTURAL ANN. 1, 23 (2008).

one's own culture or group.<sup>43</sup> The process of othering defines membership in a group and reinforces the norms of the group,<sup>44</sup> and being the Other is only possible in relation to such a group.<sup>45</sup>

Recent immigrants who face the challenge of assimilation into mainstream U.S. culture,<sup>46</sup> including many Muslims,<sup>47</sup> are easily constructed as Others. Assimilation is "a state that reflects a maximum convergence of strangers' internal conditions with those of the natives and of a minimum maintenance of the original cultural habits."<sup>48</sup> Some observers see assimilation as something that produces "more 'functional' immigrants,"<sup>49</sup> while other observers see it as a process that "can lead to immigrant feelings of isolation, depression, hatred toward the host culture, and to a state of monoculturalism."<sup>50</sup> Whether or not assimilation is desirable, it is more difficult when a group stands out, which many U.S. Muslims do since they are more visually identifiable than non-Muslims.<sup>51</sup> For example, many Muslim women wear veils.<sup>52</sup> Society can then easily construct such individuals as Others.

Those outside the immigrant group, in this case non-Muslims, often fear the immigrant group. Reasons for the fear can include the different religious rituals, clothing, and language of the new group.<sup>53</sup> Difference

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43. Dixon, *supra* note 37, at 17, 18.

44. Lori DeWitt, *The Other Side of Othering: How Muslims Construct American Christians Through Dialogue*, Paper Presented at the National Communication Association Annual Meeting 7 (2008).

45. WILLIAM B. GUDYKUNST & YOUNG YUN KIM, *COMMUNICATING WITH STRANGERS* 25 (3d ed. 1997).

46. Young and second-generation immigrants are often more willing to assimilate. Maram Hallak & Kathryn Quina, *In the Shadows of the Twin Towers: Muslim Immigrant Women's Voices Emerge*, 51 *SEX ROLES* 329, 332 (2004).

47. During the twentieth century, a dramatic increase in the migration of Muslims to the United States took place. Takim, *supra* note 35, at 343.

48. GUDYKUNST & KIM, *supra* note 45, at 338.

49. Stephen M. Croucher, *French-Muslim Reactions to the Law Banning Religious Symbols in Schools: A Mixed Methods Analysis*, 2 *J. INT'L & INTERCULTURAL COMM.* 1, 11 (2009) (discussing Muslims in France).

50. *Id.*

51. *Id.* at 3.

52. *Id.*

53. *Id.* at 12 (discussing French and British fear of Muslim immigrants). See also Lori G. Beaman, *The Myth of Pluralism, Diversity, and Vigor: The Constitutional Privilege of Protestantism in the United States and Canada*, 42 *J. SCI. STUD. RELIG.* 311, 319–20 (2003) (providing a Canadian example of the intersection of immigrant religion and the workplace in which a Sikh, because of his religious beliefs, refused to wear a hard hat at work).

between the Self and the Other is key.<sup>54</sup> Often, seriously engaging this difference can challenge majority assumptions and beliefs, which is uncomfortable.<sup>55</sup> By exploiting fear, powerful cultural communicators, including the media,<sup>56</sup> produce rhetoric that implies “that an abject population threatens the common good and must be rigorously governed and monitored by all sectors of society.”<sup>57</sup> Othering involves discourse that can dehumanize the Other, and the process of othering justifies negative action toward the Other.<sup>58</sup> While doing rhetorical, or even physical, violence to the Other, the majority group loses an opportunity to understand itself more deeply through open dialogue with the Other.<sup>59</sup> If the majority group fully destroys the Other, the majority group will need to create another Other to maintain in-group cohesion.<sup>60</sup>

U.S. society constructed Muslims as Others early in its history, setting precedent for later eras.<sup>61</sup> Muslims were some of the first slaves brought to the Americas,<sup>62</sup> and, during the eighteenth century, thousands of young West African Muslims of different ethnic backgrounds were brought to what became the United States.<sup>63</sup> Although most Muslim slaves have remained anonymous or left behind only names,<sup>64</sup> some information on Muslim slaves survived. For instance, a Muslim named Ayuba Souleyman was taken from Gambia and enslaved on a Maryland tobacco plantation.<sup>65</sup>

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54. Simpson, *supra* note 42, at 22, 24.

55. Jennifer Lyn Simpson & Rebecca Brown Adelman, *Voice and the “Other”: Interactive Theatre As a Model for Education and Liberation on University Campuses*, in SOCIAL JUSTICE AND COMMUNICATION SCHOLARSHIP 77, 81 (Omar Swartz ed., 2006).

56. Mary Frances Casper, *American Dreaming and Cultural Ethnocentrism: A Critical Discourse Analysis of the Mythic Discourse in the U.S. State Department’s Shared Values Initiative 71* (2007) (unpublished Ph.D. dissertation, North Dakota State University) (on file with Main Library, North Dakota State University).

57. Lauren Berlant, *The Face of America and the State of Emergency*, in DISCIPLINARITY AND DISSENT IN CULTURAL STUDIES 397, 397 (Cary Nelson & Dilip Parameshwar Gaonkar eds., 1996).

58. DeWitt, *supra* note 44, at 7.

59. Simpson & Adelman, *supra* note 55, at 81.

60. Chidester, *supra* note 40, at 287.

61. Future U.S. society was not exclusively responsible for this historical othering. Some Muslims in Africa participated in the enslavement of different Muslims sent to the future United States. ALLAN D. AUSTIN, *AFRICAN MUSLIMS IN ANTEBELLUM AMERICA: A SOURCEBOOK* 27 (1984).

62. Samory Rashid, *Divergent Perspectives on Islam in America*, 20 J. MUSLIM MINORITY AFF. 75, 75 (2000).

63. AUSTIN, *supra* note 61, at 32–36; Lansiné Kaba, *Americans Discover Islam through the Black Muslim Experience*, in ISLAM IN NORTH AMERICA: A SOURCEBOOK 25, 26 (Michael A. Köszegi & J. Gordon Melton eds., 1992).

64. AUSTIN, *supra* note 61, at 38.

65. Kaba, *supra* note 63, at 26.

Souleyman impressed his slave masters with his understanding of Arabic.<sup>66</sup> Another Muslim, Saliou Bilalia, was taken from the Bambara capital of Segou and, after being enslaved elsewhere, was enslaved on a Georgia plantation.<sup>67</sup> Since the time of slavery, the Muslim community, othered as it was, has remained present in the United States.<sup>68</sup>

In the wake of the terrorist attacks of September 11, 2001, U.S. Muslims, who make up less than 1 percent of the adult population of a country that has an adult population that is at least 75 percent Christian,<sup>69</sup> have suffered especially strong religiously-based discrimination. Indeed, U.S. society has continued to construct its Muslim members as Others.<sup>70</sup> Between September 11, 2001, and February 8, 2002, 1717 anti-Muslims incidents were reported to the Council on American-Islamic Relations.<sup>71</sup> Since 2001, the U.S. Department of Justice has investigated over 800 incidents of violence, vandalism, and arson against people the Department believed to be Muslim, Arab, or South Asian.<sup>72</sup> Examples of this type of unlawful activity include a May 2010 pipe bomb that went off in a Jacksonville mosque and incidents of vandalism against a Miami-area mosque and school, one of which unfolded when bullets were fired into the property.<sup>73</sup> According to Assistant U.S. Attorney General for Civil Rights

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66. *Id.*

67. *Id.*

68. Brown, *supra* note 9, at 510.

69. U.S. CENSUS BUREAU, *supra* note 34.

70. Despite being widespread, this discrimination is somewhat ironic. Islam is part of the monotheistic Judeo, Christian, and Islamic tradition with Abrahamic roots. Rashid, *supra* note 62, at 75.

71. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1575 n.1 (2002). The reports consisted of the following: 289 physical assaults or cases of property damage; 166 cases of workplace discrimination; 191 incidents of profiling at the airport; 224 cases of intimidation by the Federal Bureau of Investigation, the police, or the Immigration and Naturalization Service; 74 incidents of discrimination at school; 315 cases of hate mail; 56 death threats; 16 bomb threats; 372 incidents of public harassment; and 11 deaths. *Id.*

72. *US Muslims 'Face Growing Discrimination': Anti-Muslim Bigotry Includes Inflammatory Rhetoric by Elected Officials, Congressional Panel Is Told*, ALJAZEERA.NET (Mar. 29, 2011, 11:53 PM), <http://english.aljazeera.net/news/americas/2011/03/2011329195150913510.html> [hereinafter *US Muslims*]. The grouping of these categories is itself problematic. For instance, not all Muslims are Arabs, and not all Arabs are Muslims. Volpp, *supra* note 71, at 1576.

73. Damien Cave, *Far from Ground Zero, Obscure Pastor Is Ignored No Longer*, N.Y. TIMES, Aug. 25, 2010, <http://www.nytimes.com/2010/08/26/us/26gainesville.html>. Also in Florida, a Gainesville pastor burned a copy of the Koran after a widely-publicized series of events. Lizette Alvarez, *Pastor Who Burned Koran Says He Was Duped into Holding Back*, N.Y. TIMES, Apr. 16, 2011, <http://www.nytimes.com/2011/04/17/us/17jones.html>. The pastor, Terry Jones, said the following about his understanding of the Koran: "I have no experience with it whatsoever. I only know what the Bible says." Cave, *supra*.

Thomas Perez, since 2001, workplace discrimination against Muslims has jumped 150 percent.<sup>74</sup>

Additionally, opposition to the building of an Islamic community center two blocks north of the former site of the World Trade Center buildings in Manhattan developed when activists started to denounce the plans during the 2010 midterm election cycle.<sup>75</sup> The proposed facility would contain prayer space, a performing arts center, a restaurant, and a pool.<sup>76</sup> Even though Muslims died in the World Trade Center attacks, either in the buildings themselves or responding to the scene, polling indicated that most people in the United States opposed building the facility near ground zero.<sup>77</sup> Somehow popular sentiment has blamed the Islamic faith for the terrorist attacks.

Protests against Muslim facilities, especially mosques, and the Islamic faith itself have taken place around the country.<sup>78</sup> For instance, protests have occurred in California, Tennessee, Wisconsin, and elsewhere.<sup>79</sup> One protester in Temecula, California, a mother and grandmother, said, “I don’t want them here opening mosques in every city . . . . They don’t belong here.”<sup>80</sup> Although numerous Muslims are U.S. citizens, they are somehow “forever foreign” in the eyes of many non-Muslims.<sup>81</sup>

Nearly a decade after September 11, 2001, in March 2011, Representative Peter King of New York held a hearing on what he claimed to be the radicalization of U.S. Muslims.<sup>82</sup> The title for the hearing was “The Extent of Radicalization in the American Muslim Community and that Community’s Response.”<sup>83</sup> King’s House Homeland Security Committee aimed to examine whether the U.S. Muslim community was

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74. *US Muslims*, *supra* note 72.

75. Michael Barbaro, *Debate Heats up About Mosque Near Ground Zero*, N.Y. TIMES, July 30, 2010, <http://www.nytimes.com/2010/07/31/nyregion/31mosque.html>.

76. *Id.*

77. *Id.*

78. David Schaper, *Religious Freedom, Free Speech Face off Nationwide*, NAT’L PUB. RADIO (Aug. 21, 2010), <http://www.npr.org/templates/story/story.php?storyId=129330121>.

79. *Id.*

80. *Id.*

81. Aziz, *supra* note 15, at 36. This view of nationality is Eurocentric. *Id.* at 35.

82. Alan Gomez, *Poll: Most Say Congressional Hearings on Muslims Are OK*, USA TODAY, Mar. 10, 2011, [http://www.usatoday.com/news/washington/2011-03-09-muslim-congressional-hearings-poll\\_N.htm](http://www.usatoday.com/news/washington/2011-03-09-muslim-congressional-hearings-poll_N.htm).

83. *King to Convene Radicalization Hearing on March 10*, U.S. HOUSE OF REPS. (Mar. 4, 2011), [http://www.house.gov/apps/list/hearing/ny03\\_king/conveneradhearing.html](http://www.house.gov/apps/list/hearing/ny03_king/conveneradhearing.html).

doing enough to help law enforcement capture radicalized Muslims.<sup>84</sup> Critics of the hearing, including various civil rights groups, said that King was unfairly singling out Muslims.<sup>85</sup> However, according to a USA Today/Gallup poll, 52 percent of the U.S. public said the hearing was appropriate.<sup>86</sup> The same poll indicated that more U.S. citizens believed U.S. Muslims were committed to Islam than believed such Muslims were supportive of the United States.<sup>87</sup>

In addition to King, various other public communicators have exploited and cultivated an anti-Islamic sentiment in the country.<sup>88</sup> Several mainstream political candidates picked up on the anti-Muslim rhetoric.<sup>89</sup> For example, former Speaker of the U.S. House of Representatives Newt Gingrich and House Representative Michele Bachmann signed a pledge to reject Islamic law, which they described as “totalitarian control.”<sup>90</sup> Gingrich, Bachmann, and former Governor of Alaska Sarah Palin warned about a supposed Sharia threat.<sup>91</sup> Lieutenant Governor of Tennessee Ron Ramsey, who was campaigning for the Republican nomination for governor, claimed that Islam was a cult that the First Amendment may not protect.<sup>92</sup> Marvin Scott, a congressional candidate from Indiana who was challenging Representative Andre Carson, then one of two Muslim members of Congress, asked at a news conference, “[W]hen are young

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84. Gomez, *supra* note 82.

85. *Id.* Representative Keith Ellison of Minnesota, then one of only two Muslims in the Congress, observed, “People’s civil rights cannot be a popularity contest.” *Id.* He added, “What percentage of Americans would say it’s OK to intern Japanese people in 1941?” *Id.* Several months later, Deputy National Security Advisor Denis McDonough warned that casting a shadow of suspicion on the whole Muslim community regarding terrorist activity might “feed the sense of disenchantment and disenfranchisement that may spur violent extremist radicalization.” Scott Shane, *To Fight Radical Islam, U.S. Wants Muslim Allies*, N.Y. TIMES, Aug. 3, 2011, <http://www.nytimes.com/2011/08/04/us/04extreme.html>.

86. Gomez, *supra* note 82.

87. *Id.*

88. Cave, *supra* note 73.

89. *Id.* See also Schaper, *supra* note 78.

90. Elliott, *supra* note 4.

91. *Who’s Behind the Movement to Ban Shariah Law?*, NAT’L PUB. RADIO (Aug. 9, 2011), <http://www.npr.org/2011/08/09/139168699/whos-behind-the-movement-to-ban-shariah-law>. Not all Republicans have agreed with this rhetoric. For example, Governor Chris Christie of New Jersey, who nominated Sohail Mohammed, a Muslim, to the state’s superior court, faced criticism because of his nominee’s religion. Wayne Parry, *NJ Muslim: From 9/11 Detainee Lawyer to Judge*, STAR TRIBUNE, July 31, 2011, <http://www.startribune.com/printarticle/?id=126484173>. In response to the criticism, Christie replied, “This Sharia law business is crap; it’s crazy and I’m tired of dealing with crazies. I’m happy he’s willing to serve after all this baloney.” *Id.*

92. Schaper, *supra* note 78.

people indoctrinated into the Muslim ideal and how much are they willing to carry out? I mean, it's no different than the Japanese kamikazes."<sup>93</sup>

Oklahoma has not excused Muslims from the othering process. After Muneer Awad, an Oklahoma Muslim, filed a lawsuit over SQ 755, claiming the amendment violated his constitutional right to religious freedom,<sup>94</sup> large mosques in Oklahoma City and Tulsa received a flood of hateful e-mail.<sup>95</sup> One individual sent a video of a man who was destroying a mosque.<sup>96</sup> Awad himself received "an avalanche of hate mail" for filing the lawsuit.<sup>97</sup>

Despite the absence of any strong evidence to support a connection, many people in the United States have tried to make a connection between the practices of average U.S. Muslims and the actions of terrorists,<sup>98</sup> somehow seeing "an encroaching Islamic threat."<sup>99</sup> Although the September 11 attackers claimed to be Muslim,<sup>100</sup> some of the civilians killed in the attacks were Muslim themselves.<sup>101</sup> Of note, while U.S. society has constructed Muslims as Others, particularly after the September 11 attacks, the same society did not construct White people as Others following the 1995 bombing of the Murrah Federal Building in Oklahoma City.<sup>102</sup> Timothy McVeigh, the individual primarily responsible for the 1995 bombing, was White.<sup>103</sup> Society chose to think of McVeigh "as an individual deviant, a bad actor," not representative of any larger group.<sup>104</sup> However, the same society has chosen to think of the September 11

93. *Id.*

94. *See infra* Section III.

95. James C. McKinley, Jr., *Oklahoma Surprise: Islam as an Election Issue*, N.Y. TIMES, Nov. 14, 2010, <http://www.nytimes.com/2010/11/15/us/15oklahoma.html>.

96. *Id.*

97. Leah Nelson, *Oklahoma's Shariah Law Ban Creates Controversy*, SPLC INTELLIGENCE REPORT, Spring 2011, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2011/spring/oklahoma-shariah-law-ban-creates-controversy>.

98. *States Move*, *supra* note 28.

99. *The Law of the Land*, 97 A.B.A. J. 14 (May 2011).

100. Somehow extremists often manage to speak on behalf of a group, perhaps because more moderate voices within the group do not speak up. Takim, *supra* note 35, at 343.

101. Jonathan K. Stubbs, *The Bottom Rung of America's Race Ladder: After the September 11 Catastrophe Are American Muslims Becoming America's New N . . . s?*, 19 J. L. & RELIG. 115, 120 (2003-04). In solidarity with their fellow citizens after September 11, many Muslims put up U.S. flags at their mosques, on their homes, and in their cars. Takim, *supra* note 35, at 344.

102. Stubbs, *supra* note 101, at 122-23.

103. *Id.* at 123.

104. Volpp, *supra* note 71, at 1584-85.

attackers, who claimed to be Muslim, as representatives of Islam.<sup>105</sup> As one might expect, a Gallup poll indicated that 53 percent of the U.S. public had an opinion on Islam that was “not too favorable” or “not favorable at all.”<sup>106</sup>

This type of associational rhetoric has taken its toll on Muslims in the United States. For example, 53 percent of U.S. Muslims reported that, since the September 11 attacks, being Muslim in the United States was harder than before the attacks.<sup>107</sup> Unlike other individuals in the United States, who are often worried about economic and employment problems, Muslims state that their biggest problems are discrimination, being viewed as terrorists, ignorance of Islam, and negative stereotyping.<sup>108</sup> Additionally, 54 percent of Muslims believe that, in its antiterrorism effort, the government targets them “for increased surveillance and monitoring.”<sup>109</sup>

Politicians, looking for issues to mobilize voters, have exploited for political advantage the perception that Islam is “inherently violent and incompatible with Western values and norms.”<sup>110</sup> Reflecting on the effectiveness of this type of political rhetoric, Muslim scholar Reza Aslan observed, “I cannot think of a time in which anti-Islamic sentiment has been higher than it is today.”<sup>111</sup> Human rights lawyer Arsalan Iftikhar, himself a Muslim, added, “We’re starting to feel like strangers in a strange land now . . . .”<sup>112</sup> Although many state legislators are attorneys and thus should know better, they chose to propose and discuss law that would violate the U.S. Constitution, particularly with regard to the rights of individuals. This was the case in Oklahoma.

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105. *Id.* at 1585.

106. GALLUP, RELIGIOUS PERCEPTIONS IN AMERICA: WITH AN IN-DEPTH ANALYSIS OF U.S. ATTITUDES TOWARD MUSLIMS AND ISLAM 8 (2009). In the same poll, 63 percent of the public admitted to having “very little knowledge” of Islam or “none at all.” *Id.* at 9. People who are prejudiced against a group often know little about that group. Emily Kalled Lovell, *A Survey of Arab-Muslims in the United States and Canada*, in ISLAM IN NORTH AMERICA: A SOURCEBOOK 59, 61 (Michael A. Köszegi & J. Gordon Melton eds., 1992).

107. PEW RESEARCH CENTER, *supra* note 34, at 35.

108. *Id.* at 36.

109. *Id.* Many non-Muslims in the United States see this phenomenon in the same way as their Muslim counterparts do; 45 percent of non-Muslims believe that, in its counterterrorism effort, the government targets Muslims. *Id.*

110. Takim, *supra* note 35, at 344.

111. Schaper, *supra* note 78.

112. *Id.*

### III. SQ 755 AND ENSUING LITIGATION

Oklahoma State Representative Rex Duncan and State Senator Anthony Sykes, the main legislative sponsors of SQ 755,<sup>113</sup> called the question the “Save Our State Amendment.”<sup>114</sup> In May 2010, SQ 755 passed in the Oklahoma House of Representatives by a vote of 91-2 and in the Oklahoma Senate by a vote of 41-2.<sup>115</sup> SQ 755, which would have amended Article VII, Section 1 of the Oklahoma Constitution, included the following language:

The Courts provided for in subsection A of this section, when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.<sup>116</sup>

Some concern developed regarding the ballot title of SQ 755. In Oklahoma, the ballot title of a proposed constitutional amendment is important because a court considers the title in interpreting the measure, regardless of whether the text of the measure is vague.<sup>117</sup> Originally, the ballot title was as follows:

This measure amends the State Constitution. It would change a section that deals with the courts of this state. It would make courts rely on federal and state laws when deciding cases. It would forbid courts from looking at international law or Sharia Law when deciding cases.<sup>118</sup>

On June 2, 2010, Oklahoma Attorney General W. A. Drew Edmondson wrote a letter to Oklahoma Secretary of State M. Susan Savage, Oklahoma Senate President Pro Tempore Glenn Coffee, and Oklahoma House of

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113. Barbara Bradley Hagerty, *Oklahoma's Anti-Shariah Law Put on Hold, For Now*, NAT'L PUB. RADIO (Nov. 8, 2010), <http://www.npr.org/templates/story/story.php?storyId=131168920>.

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

115. John R. Crook, *Oklahoma to Hold November 2010 Referendum on Constitutional Amendment Banning State Courts from Applying International and Sharia Law*, 104 AM. J. INT'L L. 658, 658 n.2 (2010).

116. Okla. H.R.J. Res. 1056 § 1(C).

117. *Sw. Bell Tel. Co. v. Okla. State Bd. of Equalization*, 231 P.3d 638, 642 (Okla. 2009).

118. Okla. H.R.J. Res. 1056 § 2.

Representatives Speaker Chris Benge, notifying them that the Attorney General's office believed that the title of SQ 755 was unlawful.<sup>119</sup> According to the Attorney General, SQ 755 did "not adequately explain the effect of the proposition because it [did] not explain what either Sharia Law or international law" was.<sup>120</sup> Two days later, the Attorney General submitted a revised ballot title to the same three state officers.<sup>121</sup> The new ballot title stated the following:

This measure amends the State Constitution. It changes a section that deals with the courts of this state. It would amend Article 7, Section 1. It makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. It forbids courts from considering or using Sharia Law.

International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons.

The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties.

Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed.<sup>122</sup>

Nearly three weeks later, the Attorney General sent the three state officers mentioned above a letter that confirmed his acceptance of the amended ballot title.<sup>123</sup> The same day, Secretary of State Savage sent SQ 755 to Governor Brad Henry<sup>124</sup> and Secretary of the State Election Board Paul Ziriach.<sup>125</sup> On August 9, 2010, Governor Henry declared that

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119. See Letter from W. A. Drew Edmondson, Okla. Att'y Gen., to M. Susan Savage, Okla. Sec'y of State; Glenn Coffee, Okla. Senate Pres. Pro Tempore; and Chris Benge, Okla. House of Reps. Speaker (June 2, 2010), available at <https://www.sos.ok.gov/documents/questions/755.pdf>.

120. *Id.*

121. See Letter from W. A. Drew Edmondson, Okla. Att'y Gen., to M. Susan Savage, Okla. Sec'y of State; Glenn Coffee, Okla. Senate Pres. Pro Tempore; and Chris Benge, Okla. House of Reps. Speaker (June 4, 2010), available at <https://www.sos.ok.gov/documents/questions/755.pdf>.

122. Okla. H.R.J. Res. 1056 § 2.

123. See Letter from W. A. Drew Edmondson, Okla. Att'y Gen., to M. Susan Savage, Okla. Sec'y of State; Glenn Coffee, Okla. Senate Pres. Pro Tempore; and Chris Benge, Okla. House of Reps. Speaker (June 24, 2010), available at <https://www.sos.ok.gov/documents/questions/755.pdf>.

124. See Letter from M. Susan Savage, Okla. Att'y Gen., to Brad Henry, Okla. Governor (June 24, 2010), available at <https://www.sos.ok.gov/documents/questions/755.pdf>.

125. See Letter from M. Susan Savage, Okla. Att'y Gen., to Paul Ziriach, Sec'y Okla. State Election Bd. (June 24, 2010), available at <https://www.sos.ok.gov/documents/questions/755.pdf>.

SQ 755 would be submitted to the electorate at the next election.<sup>126</sup> On November 2, 2010, SQ 755 passed with the support of over 70 percent of the voting public.<sup>127</sup>

Two days later, on November 4, 2010, Muneer Awad, head of the Oklahoma chapter of the Council on American-Islamic Relations, and himself a Muslim, challenged SQ 755 in the U.S. District Court for the Western District of Oklahoma, asserting that SQ 755 violated his religious freedom.<sup>128</sup> Awad asked Judge Vicki Miles-LaGrange to grant initially a temporary restraining order and then a preliminary injunction against Defendants Paul Ziriach, Thomas Prince, Ramon Watkins, and Susan Turpen (collectively “Defendants”), all of whom were members of the Oklahoma State Board of Elections, that would prevent them from certifying the election results for SQ 755.<sup>129</sup> On November 9, 2010, Judge Miles-LaGrange granted Awad’s request for a temporary restraining order,<sup>130</sup> and on November 29, 2010, she granted his request for a preliminary injunction.<sup>131</sup>

On December 1, 2010, the Defendants provided notice that they would appeal to the U.S. Court of Appeals for the Tenth Circuit.<sup>132</sup> A three-judge panel of the Tenth Circuit, which consisted of Scott Matheson, Terrence O’Brien, and Monroe McKay, heard oral argument on September 12, 2011, and issued its unanimous decision on January 10, 2012.<sup>133</sup> Speaking for the panel, Judge Matheson concluded that the district court had not abused its discretion in granting the preliminary injunction.<sup>134</sup>

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126. See Brad Henry, Okla. Governor, Exec. Proclamation (Aug. 9, 2010), available at <https://www.sos.ok.gov/documents/questions/755.pdf>.

127. Hagerty, *supra* note 113.

128. *Id.*

129. Awad v. Ziriach, 754 F. Supp. 2d 1298, 1301–02 (W.D. Okla. 2010).

130. Awad v. Ziriach, No. CIV-10-1186-M, 2010 WL 4676996, at \*5 (W.D. Okla. Nov. 9, 2010).

131. Awad, 754 F. Supp. 2d at 1308.

On his website, Senator Anthony Sykes attempted to justify the anti-Sharia amendment, claiming, “They certainly don’t respect equal treatment regardless of gender in Shariah law.” Hagerty, *supra* note 113. He added, “They’re very abusive and downright ill-treat women as unequal citizens in Shariah law, and we certainly don’t want that here in America.” *Id.*

Muneer Awad responded to that position, noting, “It’s a ridiculous and offensive stereotype, an attempt to capitalize on the fears of people who don’t know anything about Islam.” *Id.* He continued, “We already have laws that prevent violence against women: You can’t engage in a crime and consider it somehow related to your faith.” *Id.*

132. Awad v. Ziriach, 670 F.3d 1111, 1119 (10th Cir. 2012).

133. *Id.* at 1116, 1119.

134. *Id.* at 1133.

#### IV. CONSTITUTIONAL VIOLATIONS THAT RESULT FROM OTHERING MUSLIMS THROUGH SQ 755

In its attempt to other Oklahoma Muslims, SQ 755 violates the U.S. Constitution for a variety of reasons. Specifically, SQ 755 offends the Establishment Clause, the Free Exercise Clause, the Supremacy Clause, the Full Faith and Credit Clause, the Due Process Clause, and the Contracts Clause. Some of the constitutional violations directly harm Muslims; other violations do not. This section of the paper will examine how the law violates each clause noted.

##### A. ESTABLISHMENT CLAUSE VIOLATION

SQ 755 violates the First Amendment's Establishment Clause, which provides that "Congress shall make no law respecting an establishment of religion."<sup>135</sup> The Establishment Clause also protects against action by the states.<sup>136</sup> If a law purportedly discriminates based on religious denomination, "the initial inquiry is whether the law facially differentiates among religions."<sup>137</sup> If the law facially discriminates among religions, strict scrutiny applies, and the government must show a compelling interest and that the law "is closely fitted to further that interest."<sup>138</sup> However, if a law does not facially discriminate against a religious group, a three-part analysis takes place under the *Lemon* test.<sup>139</sup> A seemingly neutral law violates the Establishment Clause if (1) the law lacks "a secular legislative purpose," (2) the "principal or primary effect" of the law "advances [or] inhibits religion," or (3) the law fosters "an excessive government entanglement with religion."<sup>140</sup> To be unconstitutional, a law only needs to violate one prong of the *Lemon* test.<sup>141</sup>

Strict scrutiny analysis and the *Lemon* test are not mutually exclusive. Indeed, the two analytic approaches overlap to a notable degree, particularly with regard to the first two prongs of the *Lemon* test.<sup>142</sup> If a law

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135. U.S. CONST. amend. I.

136. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947) (incorporating the Establishment Clause).

137. *Hernandez v. Comm'r*, 490 U.S. 680, 695 (1989).

138. *Larson v. Valente*, 456 U.S. 228, 246–47 (1982).

139. *Hernandez*, 490 U.S. at 695.

140. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). Although several justices on the U.S. Supreme Court, in particular Justice Antonin Scalia, have called for the *Lemon* test to be overruled, such overruling has not yet occurred. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1246 (4th ed. 2011).

141. CHERMERINSKY, *supra* note 140, at 1246.

142. *Id.* at 1245.

targets one type of religious group for discrimination, the law is likely to lack a secular legislative purpose because the members of the body that passed the law probably belong to more established religious groups. Also, the law likely will have a primary effect of inhibiting the targeted religious group and thus advancing more established religious groups.

Under either strict scrutiny analysis or the *Lemon* test, SQ 755 would violate the Establishment Clause. The ensuing two subsections demonstrate how.

#### 1. SQ 755 Fails Strict Scrutiny Analysis

SQ 755 discriminates on its face against Muslims, and thus strict scrutiny would apply. The amendment specifically references that “the courts shall not consider . . . Sharia Law” and that state courts can consider the law of another state of the United States only if “the law of the other state does not include Sharia Law.”<sup>143</sup> Sharia is based on the traditions of Muslims. If one were to doubt that, the amendment adds that “Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed.”<sup>144</sup>

For the law to survive strict scrutiny analysis, Oklahoma would need to show a compelling interest and that SQ 755 would be necessary to promote that interest, but the state can make no such showing.<sup>145</sup> One possibility for a compelling interest, at which the text of SQ 755 hints, is protecting the state from Islamic influence. However, such an interest would be flagrant discrimination against a religious minority group. No one has made a serious argument that Oklahoma courts have decided numerous

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

144. *Id.* § 2.

145. In a different constitutional context, that of the Equal Protection Clause, the Supreme Court has explained how discrimination against a minority group can fail to withstand even the low standard of rational basis review. *See Romer v. Evans*, 517 U.S. 620 (1996). The Court noted how a Colorado constitutional amendment that discriminated against gays and lesbians “raise[d] the inevitable inference that the disadvantage imposed [was] born of animosity toward the class of persons affected.” *Id.* at 634. The Court went on to say that the idea of equal protection of the laws “must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” *Id.* at 634–35 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). Consequently, in discriminating against Muslims, proponents of SQ 755, who face the challenge of withstanding strict scrutiny analysis, would be unlikely to succeed.

cases based on Sharia to the detriment of either the state judiciary or the public.<sup>146</sup>

A more serious possibility for a compelling interest, particularly after September 11, would be protecting the public from terrorism.<sup>147</sup> However, how keeping Sharia and Islamic traditions out of Oklahoma courts, such as in the cases of mediation or arbitration, would reduce terrorism is unclear. The connection between terrorism and Islam is too weak. No one has proven that most rank-and-file U.S. Muslims are more violent than rank-and-file adherents of other religious traditions. The law captures a whole religious group because a few of its extreme adherents are dangerous. A law necessary to achieve an interest in protecting the public from terrorism would target terrorists, regardless of their supposed religious beliefs, not Muslims in general. Accordingly, in the absence of a compelling interest where the law is necessary to achieve that interest, SQ 755 violates the Establishment Clause.

## 2. SQ 755 Fails the *Lemon* Test

Even if SQ 755 did not facially discriminate against Muslims,<sup>148</sup> the amendment still would violate the Establishment Clause because the amendment would fail the *Lemon* test. First, the law lacks a secular purpose, in violation of the first prong of the *Lemon* test. On its face, the law does a poor job of pretending to be secular in nature. Although the law may seek to prevent the Oklahoma courts from “look[ing] to the legal precepts of other nations or cultures,” SQ 755 then adds that “the courts shall not consider international law or Sharia Law.”<sup>149</sup> SQ 755 also states that courts can consider the law of another state only if “the law of the other state does not include Sharia Law.”<sup>150</sup> Specifically, because the law has the purpose of prohibiting the intersection of the courts and the religious traditions of Muslims, the purpose of the law is not secular in nature.

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146. At the preliminary injunction hearing, counsel for the Defendants was unaware of even one instance in which an Oklahoma court had applied Sharia. *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1308 (W.D. Okla. 2010).

147. The Tenth Circuit was unable to identify a compelling state interest for SQ 755, so the court could not evaluate whether such a state interest was closely fitted to the law in question. *Awad v. Ziriax*, 670 F.3d 1111, 1130–31 (10th Cir. 2012). The court commented, “One cannot try on a glove to see if it fits when the glove is missing.” *Id.*

148. Appellants argued that Sharia was just one example of religious law banned in state courts under SQ 755. *Id.* at 1128.

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

150. *Id.*

When one is determining whether SQ 755 has a secular purpose, looking at the statements made by the legislators who wanted to reduce the potential influence of Sharia can be helpful. Public statements, including those made to the news media, can shed insight on the purpose of the members of the legislature, and a court considers such statements in determining whether a purpose is secular.<sup>151</sup> Although official legislative intent in Oklahoma is rare,<sup>152</sup> Oklahoma State Representative Rex Duncan, a key author and sponsor of what became SQ 755, offered detailed insight into the unofficial purpose of SQ 755 by focusing on Islam and Sharia, particularly in his communications with the news media. Before the November 2010 election, Duncan stated that SQ 755 would “constitute a pre-emptive strike against Sharia law coming to Oklahoma.”<sup>153</sup> He declared, “Oklahomans recognize that America was founded on Judeo-Christian values, and we’re unapologetically grateful that God has blessed America and blessed Oklahoma.”<sup>154</sup> Duncan asserted that the amendment was “just a simple effort to ensure that our courts are not used to undermine those founding principles and turn Oklahoma into something that our founding fathers and our great-grandparents wouldn’t recognize.”<sup>155</sup> According to Duncan, without SQ 755, Muslims would locate “a backdoor way to get Sharia Law in the courts.”<sup>156</sup> Duncan believed that the United States was in “a cultural war, . . . a social war, . . . [and] a war for the survival of [the] country.”<sup>157</sup>

The purpose of SQ 755 also can be understood through consideration of interest group rhetoric in favor of the law. During the 2010 election campaign, Act! For America, a group that strongly supported the amendment in a very public way, claimed that SQ 755 would prevent the

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151. See, e.g., *McCreary Cnty. v. Am. Civ. Liberties Union of Ky.*, 545 U.S. 844, 851 (2005); *Edwards v. Aguillard*, 482 U.S. 578, 591–93 (1987). The asserted purpose that a court identifies must be genuine and “not a sham.” *McCreary*, 545 U.S. at 864.

152. See *Resources Regarding Oklahoma’s Legislative Measures*, ODL Online, <http://www.odl.state.ok.us/lawinfo/billinfo.htm> (last visited Nov. 14, 2012).

153. Gale Courey Toensing, *Oklahoma Lawmakers Aim to Ban International and Sharia Law from State Courts*, INDIAN COUNTRY TODAY, Oct. 26, 2010, <http://indiancountrytodaymedianetwork.com/ictarchives/2010/10/26/oklahoma-lawmakers-aim-to-ban-international-and-sharia-law-from-state-courts-81581>.

154. Nelson, *supra* note 97.

155. *Id.*

156. *Oklahoma Lawmaker Wants Sharia Law Banned*, FOXNEWS.COM (June 21, 2010), <http://www.foxnews.com/story/0,2933,595026,00.html>.

157. Nelson, *supra* note 97.

takeover of Oklahoma by Muslim extremists.<sup>158</sup> Act! For America radio commercials advised audiences that Sharia had begun infiltrating the United States.<sup>159</sup> In a radio commercial, the narrator discussed what was supposed to be “just one chilling example of how Islamic Shariah law ha[d] begun to penetrate America.”<sup>160</sup> In an interview, Brigitte Gabriel, the leader of Act! For America, stated, “We want to make sure that the people in Oklahoma are educated about what Shariah law is all about and its ramifications.”<sup>161</sup> Gabriel warned of the need “to make sure women [would] be protected from Shariah law.”<sup>162</sup>

Letters to the editor during the 2010 election cycle also focused on the concern of alleged infiltration of Islamic law into the United States, and such letters offer insight into the purpose of SQ 755 as some of the voters who supported the amendment understood it.<sup>163</sup> For example, one writer asserted that voting against SQ 755 would help “Islamists in their ‘stealth jihad,’ an ongoing, insidious effort to surreptitiously retool the United States into an Islamic nation.”<sup>164</sup> The same writer claimed that Sharia was “already creeping into the United States” and that it was “only a matter of time until it [came] to Oklahoma.”<sup>165</sup> Another writer asked, “By the way, haven’t you heard enough about Muslims lately, with the mosque near ground zero? That’s a slap in the face of every American. So, vote yes on

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158. Stephen Clark, *Group Launches Media Blitz in Oklahoma for Anti-Shariah Ballot Initiative*, FOXNEWS.COM (Oct. 20, 2010), <http://www.foxnews.com/politics/2010/10/20/anti-islamic-group-launches-media-blitz-oklahoma-anti-shariah-ballot-initiative>. Act! For America spent \$60,000 to promote SQ 755, and the group’s campaign involved 600,000 robocalls to voters. Elliott, *supra* note 4.

159. Ben Smith & Byron Tau, *Anti-Islamic Groups Go Mainstream*, POLITICO, Mar. 7, 2011, <http://www.politico.com/news/stories/0311/50837.html>.

160. Clark, *supra* note 158. The example used in the radio advertisement was of a New Jersey family court judge’s decision against granting a restraining order to a woman who had been repeatedly sexually abused by her husband; the husband believed he was acting according to his Muslim faith. *Id.* The advertisement did not mention that the decision was overturned on appeal. *Id.* See also *S.D. v. M.J.R.*, 2 A.3d 412 (N.J. Super. Ct. App. Div. 2010).

161. Clark, *supra* note 158.

162. *Id.*

163. The letters to the editor cited in this Article come from the newspaper the *Tulsa World*. Tulsa is the second largest city in Oklahoma. *U.S. Census Bureau Delivers Oklahoma’s 2010 Census Population Totals, Including First Look at Race and Hispanic Origin Data for Legislative Redistricting*, U.S. CENSUS 2010 (Feb. 15, 2011), <http://2010.census.gov/news/releases/operations/cb11-cn33.html>.

164. Joe A. Putnam, Letter to the Editor, *SQ 755 Supported*, TULSA WORLD, Oct. 27, 2010, [http://www.tulsaworld.com/opinion/article.aspx?subjectid=62&articleid=20101027\\_62\\_A16\\_Oppone431965](http://www.tulsaworld.com/opinion/article.aspx?subjectid=62&articleid=20101027_62_A16_Oppone431965).

165. *Id.*

SQ 755.”<sup>166</sup> Referencing Muslims and their faith, a different editorialist maintained that there were “millions of Americans who [would] not tolerate these kinds of godless laws and practices.”<sup>167</sup> The editorialist “urge[d] all Oklahomans to embrace SQ 755.”<sup>168</sup> He concluded, “Yes to freedom, and no to tyranny.”<sup>169</sup> A few days after the election, another individual declared, “If [Muslims] think that they can’t practice Islam without Shariah law in force, then let them go back to an Islamic country.”<sup>170</sup> He added, “May God help us if the Muslims win this fight.”<sup>171</sup>

As one can see from the text of the amendment, the rhetoric of a key author and sponsor of the amendment in the Oklahoma Legislature, and various supporting rhetorics from the 2010 election cycle, SQ 755 lacks a secular purpose. The purpose is to discriminate against Muslims based on their faith.

Second, the law would have the primary effect of advancing non-Muslim religions and inhibiting Islam. Specifically, the law would advance Christian denominations. SQ 755 is a form of symbolic endorsement, which creates the impression that the government favors a particular religious tradition or traditions.<sup>172</sup> In a state like Oklahoma, where the population is less than 1 percent Muslim,<sup>173</sup> if the government restricts the influence of one religion, Islam, then other religions would receive an implied endorsement from the state government. Christian denominations, already approximately 89 percent of the state population,<sup>174</sup> would benefit. In targeting Islam, a supposedly dangerous religion, the law sends a

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166. Wayne Shearhart, Letter to the Editor, *For SQ 751, 755*, TULSA WORLD, Oct. 7, 2010, [http://www.tulsaworld.com/opinion/article.aspx?subjectid=62&articleid=20101007\\_62\\_A16\\_Iwantt684112](http://www.tulsaworld.com/opinion/article.aspx?subjectid=62&articleid=20101007_62_A16_Iwantt684112).

167. Paul Carnes, Letter to the Editor, *Yes to Freedom*, TULSA WORLD, July 25, 2010, [http://www.tulsaworld.com/opinion/article.aspx?subjectid=62&articleid=20100725\\_62\\_G2\\_StateR571555](http://www.tulsaworld.com/opinion/article.aspx?subjectid=62&articleid=20100725_62_G2_StateR571555).

168. *Id.*

169. *Id.*

170. Phil Essley, Letter to the Editor, *Shariah Law is a Problem*, TULSA WORLD, Nov. 13, 2010, [http://www.tulsaworld.com/opinion/article.aspx?subjectid=62&articleid=20101113\\_62\\_0\\_BullTh568588](http://www.tulsaworld.com/opinion/article.aspx?subjectid=62&articleid=20101113_62_0_BullTh568588).

171. *Id.*

172. *See* Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion).

173. Tim Talley, *ACLU Asks Court to Enjoin Oklahoma Sharia Law Measure*, TULSA WORLD (May 10, 2011, 3:47 PM), [http://www.tulsaworld.com/news/article.aspx?subjectid=14&articleid=20110510\\_14\\_0\\_OKLAHO809670](http://www.tulsaworld.com/news/article.aspx?subjectid=14&articleid=20110510_14_0_OKLAHO809670).

174. Jeffrey M. Jones, *Tracking Religious Affiliation, State by State*, GALLUP.COM (June 22, 2004), <http://www.gallup.com/poll/12091/Tracking-Religious-Affiliation-State-State.aspx>.

message that untargeted religious traditions are not dangerous and thus are safe. Safe religions are presumably good. Even though “one religious denomination cannot be officially preferred over another,”<sup>175</sup> if the government expresses its disapproval of Islam, but not of other religious groups, that would constitute an implied statement of preference.

The opposite side of the advancement and inhibition coin is that the law would inhibit the practice of Islam, also in violation of the second prong of the *Lemon* test. SQ 755 prohibits courts from “consider[ing] . . . Sharia Law.”<sup>176</sup> Since Sharia is a part of Islam, SQ 755 would prevent state courts from considering aspects of Islam in cases where this type of consideration would be appropriate, such as enforcing mediations or arbitrations. In taking an anti-Muslim stance, the state government violates the idea that the government should remain neutral regarding religious practice.

Oddly enough, a primary effect of SQ 755 would be to contradict the Oklahoma Religious Freedom Act (“ORFA”). The ORFA prohibits the government from “substantially burden[ing] a person’s free exercise of religion even if the burden results from a rule of general applicability.”<sup>177</sup> Under the ORFA, the government must show that the substantial burden on free exercise of religion is essential to furthering a compelling state interest and the least restrictive means for furthering that interest.<sup>178</sup> SQ 755 would have the primary effect of impacting a Muslim who wanted to sue for a violation of the ORFA by preventing him or her from doing so because the state court could not consider the Muslim’s religion, which, by definition, would draw upon Sharia. Thus, state government would inhibit the practice of Islam.

Third, the law promotes excessive government entanglement with religion, in violation of the third prong of the *Lemon* test. A range of conceptions of Sharia exists,<sup>179</sup> and because it lacks a central authority,<sup>180</sup>

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175. *Larson v. Valente*, 456 U.S. 228, 244 (1982).

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

177. OKLA. STAT. tit. 51, § 253(A) (2012).

178. *Id.* §§ 253(B)(1), (B)(2).

179. Dominic McGoldrick, *Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws*, 9 HUM. RTS. L. REV. 603, 605 (2009). McGoldrick notes that Sharia “can be understood as an abstract philosophical concept or overarching meta-norm approximating to the rule of law. Alternatively, it can be understood as more of a moral conception . . .” *Id.* To devout Muslims, Sharia has a “moral and metaphysical purpose.” *Id.* Sharia also “can be more narrowly conceived as embodying Islamically derived rules and norms” or even “as a flexible general system of law (like common law or civil law).” *Id.* at 606.

Sharia has several different schools of interpretation.<sup>181</sup> Sunni Muslims have schools of interpretation called Hanafi, Maliki, Shafi'i, and Hanbali; Shia Muslims have a school of interpretation called Ithna Ashari.<sup>182</sup> With different traditions in different countries and various schools of religious thought, Sharia would prove especially problematic for Oklahoma courts, which, in determining whether something really was a form of Sharia,<sup>183</sup> would have to interpret religious law.<sup>184</sup> Also, if courts had to determine whether out-of-state law was based on Sharia, they again would be determining what constituted Sharia. The revised ballot title for SQ 755 stated only that "Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed."<sup>185</sup> Without further guidance, state courts would not know the details of the Koran or Muhammad's teachings. The courts would have to make inquiries to find out, and excessive government entanglement with religion would result.

Therefore, because SQ 755 lacks a secular purpose, would have the primary effect of advancing and inhibiting religion, and would promote excessive entanglement between government and religion, the law fails all three prongs of the *Lemon* test. As such, even if the amendment were not facially discriminatory, it still would violate the Establishment Clause.

#### B. FREE EXERCISE CLAUSE VIOLATION

In addition to violating the Establishment Clause, SQ 755 violates the First Amendment's Free Exercise Clause, which provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."<sup>186</sup> The Free Exercise Clause also protects against action by the states.<sup>187</sup> A

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180. *Id.*

181. Thornback, *supra* note 14, at 5.

182. *Id.* at 4. Of the world's 1.3 billion Muslims, 85 percent are Sunni, and 15 percent are Shia. Aziz, *supra* note 15, at 45.

183. An important difference exists between a court's determining whether a legal concept is part of Sharia and the same court's enforcing a mediation agreement that the parties claim is based on Sharia. Regardless of whether the mediation agreement actually is based on Sharia, as long as the result does not violate public policy and the process does not involve coercion, the court could enforce the settlement. However, determining whether a concept is part of Sharia would involve substantive inquiry into what is Sharia, and that inquiry would lead to excessive government entanglement with religion.

184. For the complications associated with a civil court's interpreting religious law, see, for example, Marianne Perciaccante, *The Courts and Canon Law*, 6 CORNELL J.L. & PUB. POL'Y 171 (1996) or Patty Gerstenblith, *Civil Court Resolution of Property Disputes Among Religious Organizations*, 39 AM. U. L. REV. 513 (1990).

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

186. U.S. CONST. amend. I.

187. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause).

challenge under the Free Exercise Clause must include proof that a law burdens one's ability to practice one's religion. When a law targets religion, the law undergoes strict scrutiny analysis.<sup>188</sup> Then government must have a compelling interest for the law, and the law must be narrowly tailored in reaching that interest.<sup>189</sup> If a facially neutral law of general applicability merely impacts someone's free exercise of religion, the law receives only rational basis review.<sup>190</sup> In that case, government must have a legitimate purpose, and the means used must be rationally related to furthering that purpose.<sup>191</sup>

Regardless of whether strict scrutiny analysis or rational basis review applied, SQ 755 would violate the Free Exercise Clause. The ensuing two subsections explain how.

### 1. SQ 755 Fails Strict Scrutiny Analysis

Because SQ 755 prohibits Oklahoma state courts from considering Sharia, the amendment would impact Muslims' free exercise of religion in a variety of ways. For example, some Muslims may choose to arbitrate their contractual disputes according to Sharia.<sup>192</sup> Also, Muslims may want to use Sharia-based arbitration boards or mediations in divorce or child custody matters.<sup>193</sup> Under SQ 755, these scenarios would not be possible, as Oklahoma courts would be prohibited from considering Sharia.

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

189. *Id.*

190. *Emp't Div. v. Smith*, 494 U.S. 872, 882–85 (1990) (rejecting strict scrutiny analysis of a facially neutral law); *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 531. *See also* CHEMERINSKY, *supra* note 140, at 1304.

191. CHEMERINSKY, *supra* note 140, at 552–53, 1304.

192. *See* Almas Khan, *The Interaction between Shariah and International Law in Arbitration*, 6 CHI. J. INT'L L. 791, 792 (2006) (discussing the proposed Sharia-based arbitration boards in Ontario, Canada).

193. In the 2000s, the prospect of Sharia-based arbitration in family law cases received consideration in Ontario, Canada. Thornback, *supra* note 14, at 1, 5–6. The idea was that spouses could choose to have their disputes arbitrated under Sharia and have a provincial court enforce the decision. *Id.* at 6. Although Catholics and Jews had participated in faith-based arbitration in Ontario for years, the controversy over such arbitration only developed when Muslims called for equal rights. Brown, *supra* note 9, at 545; *Jews, Muslims to Fight for Tribunals*, CBC NEWS (Sept. 14, 2005), <http://www.cbc.ca/news/canada/story/2005/09/14/sharia-protests-20050914.html>.

In the United Kingdom, Muslims have obtained advice from Sharia councils. Asma Khalid, *Sharia Councils Spark Debate in Britain*, NAT'L PUB. RADIO (Oct. 27, 2008), <http://www.npr.org/templates/story/story.php?storyId=96162078>. However, the councils have lacked authority to enforce their decisions. *Growing Use of Sharia by UK Muslims*, BBC NEWS (Jan. 16, 2012), <http://www.bbc.co.uk/news/uk-16522447>.

Additionally, Sharia places significance upon having a written will,<sup>194</sup> which was one of the issues in the *Awad* case.<sup>195</sup> Mr. Awad claimed that SQ 755 would impact how a court would oversee the probating of his Sharia-based will.<sup>196</sup>

In general, as long as Sharia-based provisions of a document, such as a will, did not violate secular law, the Sharia provisions would be enforceable. This is so because civil courts in the United States have accepted similar religious provisions based, for example, on Judaism that did not violate secular law.<sup>197</sup> As with mediation or arbitration in general, the court would want to verify that the process, regardless of the tradition involved, was voluntary and consensual.<sup>198</sup> With no state court available to consider contractual arbitration, probate, and family law matters that Sharia has influenced, Muslims would suffer a detrimental impact to their ability to exercise their religion freely.

The protections of the Free Exercise Clause apply when the law in question “discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons,”<sup>199</sup> and SQ 755 discriminates against Islam. The language of SQ 755 reads, “Specifically, the courts shall not consider . . . Sharia Law.”<sup>200</sup> The amendment also states that Oklahoma courts may consider “the law of another state of the United States provided the law of the other state does not include Sharia Law.”<sup>201</sup> Nowhere does the amendment mention any other faiths such as Judaism or Christianity. In terms of religion, the amendment focuses only on Sharia, or Islamic law, which means that the law targets adherents of Islam.

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194. Mohammadi, *supra* note 33, at 59.

195. *Awad v. Ziriak*, 754 F. Supp. 2d 1298, 1298 (W.D. Okla. 2010).

196. Compl. TRO & Prelim. Inj. at 7–8, *Awad v. Ziriak*, No. CIV-10-1186-M (W.D. Okla. Nov. 4, 2010).

197. Faith-based arbitration systems have worked successfully in the United States. One example is the Jewish beth din system. Mohammadi, *supra* note 33, at 63. Under this system, three rabbis preside over matters such as divorce and general business. *Id.* The principles of Halakhah, or Jewish law, govern. *Id.* When the procedures conform to the requirements of secular arbitration, civil courts usually enforce the decisions. *Id.*

198. McGoldrick, *supra* note 179, at 636. Some have expressed concern for the rights of women in Islamic alternative dispute resolution processes. *Id.* at 636–37. While this may be a concern in some cases, the argument is not unique. Other religious traditions are not free from sexism. Thornback, *supra* note 14, at 7–8.

199. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

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

201. *Id.*

Consequently, Oklahoma must show that SQ 755 supports a compelling state interest and that the means used are narrowly tailored to achieve that interest. In this case, the government has no clearly articulated compelling interest. Given the remarks of Representative Duncan noted above, one might think that the asserted government interest would be protecting Oklahoma from Islam. For example, Duncan expressed his belief that the United States was in “a cultural war, . . . a social war, . . . [and] a war for the survival of [the] country.”<sup>202</sup> However, the state has no interest in taking sides in a so-called “culture war,” particularly when the sides to the supposed “war” would be religious groups, and the government’s promoting a particular religious view would violate government neutrality toward religion. Moreover, no one has made a serious case that Oklahoma courts have decided cases based on Sharia to the detriment of either the state judiciary or the public.<sup>203</sup> Protecting Oklahoma from Islam is discrimination against a religious minority group, not a compelling state interest.

In light of the September 11 terrorist attacks, as well as other terrorist attacks on the United States and its allies, protecting the public from terrorism is a compelling state interest. Proponents of SQ 755 may advocate that, since terrorism is a serious problem and some terrorists claim to be Muslim, passing laws that restrict an aspect of Islam such as Sharia would reduce terrorism. To the contrary, and on a more logical level, the connection between terrorism and Islam is weak. Rank-and-file Muslims in the United States who attend Friday prayer services at their local mosques are not terrorists; members of Al-Qaeda are. SQ 755 captures an entire religious group because a few of its extreme adherents are dangerous. A narrowly tailored law would target terrorists, regardless of their purported religious beliefs, not Muslims in general. Nonetheless, how prohibiting the consideration of Sharia in state courts would combat terrorism remains unclear. Consequently, the government either lacks a clearly articulated compelling interest, or, if the government had such an interest, the means used would not be narrowly tailored to achieve that interest. Thus, SQ 755 violates the Free Exercise Clause.

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202. Nelson, *supra* note 97.

203. See *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1308 (W.D. Okla. 2010).

## 2. SQ 755 Fails Rational Basis Review

Even if SQ 755 did not specifically target Muslims,<sup>204</sup> the law would fail to withstand rational basis review. For a serious state interest like protecting the public from terrorism, which easily would be legitimate, the government would be unable to show how keeping Sharia out of state courts reasonably would protect members of the public from terrorism. As noted above, no one has demonstrated that most Muslims, adherents of various forms of Sharia, are terrorists. The actual terrorists, like members of Al-Qaeda, have no history of practicing terrorism through infiltration of state court systems. Rather, terrorists engage in image events, or visually-gripping activities that, through dissemination in the mass media, draw attention to particular causes.<sup>205</sup> For instance, terrorists inflict violence upon people and landmarks, as members of Al-Qaeda did on September 11. Taking over a state court system through discourse, even if that were possible, would not draw attention to terrorists' causes because almost no one in the general public would notice. Most of the rhetoric of the court system is within the technical sphere of the law,<sup>206</sup> a sphere which judges, lawyers, and support staff inhabit. The governmental means used would be unreasonable and simply based on a general fear of terrorism and a lack of understanding of the Islamic faith.<sup>207</sup> Accordingly, under rational basis review, as under strict scrutiny analysis, SQ 755 would offend the Free Exercise Clause.

On a related statutory note, in contradiction to the Oklahoma Religious Freedom Act, SQ 755 would impact negatively a Muslim's ability to exercise his or her faith freely. Since SQ 755 would prohibit state courts from "consider[ing] . . . Sharia Law,"<sup>208</sup> the courts would be unable to hear the case of a Muslim who had suffered governmental discrimination based on faith. This would be the situation even though, under Oklahoma

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204. Appellants argued that Sharia was only one example of religious law banned in state courts under SQ 755. *Awad v. Ziriax*, 670 F.3d 1111, 1128 (10th Cir. 2012).

205. See KEVIN MICHAEL DELUCA, *IMAGE POLITICS: THE NEW RHETORIC OF ENVIRONMENTAL ACTIVISM* 1–22 (1999); GUS MARTIN, *UNDERSTANDING TERRORISM: CHALLENGES, PERSPECTIVES, AND ISSUES* 393–95 (2d ed. 2006). In the context of terrorism, the image event contains a dimension of violence that is not necessarily present with image events in other contexts.

206. For more on the technical sphere of argument in contrast to the personal and public spheres of argument, see G. Thomas Goodnight, *The Personal, Technical, and Public Spheres of Argument: A Speculative Inquiry into the Art of Public Deliberation*, 18 J. AM. FORENSIC ASS'N 214 (1982).

207. Similarly, a Colorado constitutional amendment that targeted gays and lesbians was based on discrimination against an unpopular group, and the law failed rational basis review. See *Romer v. Evans*, 517 U.S. 620 (1996).

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

law, the government should have to prove a compelling state interest to justify interfering with the practice of a Muslim's, or anyone else's, religion and demonstrate that the means used to promote the interest were the least restrictive.<sup>209</sup> Especially in the case of socially less-favored religions, free exercise of religion can become the target of discrimination, and, in the absence of suitable legal recourse, the free exercise of religion becomes weaker.

### C. SUPREMACY CLAUSE VIOLATION

Outside of the First Amendment realm, SQ 755 violates the Supremacy Clause of Article VI. The Supremacy Clause proclaims that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”<sup>210</sup> Treaties can be self-executory or executory. Self-executory treaties do not require implementing legislation by both houses of Congress before they take effect; such treaties take effect immediately on ratification by the Senate.<sup>211</sup> As Chief Justice John Marshall wrote, a valid self-executing treaty has “to be regarded in courts of justice as equivalent to an act of the legislature.”<sup>212</sup> In contrast, executory treaties require implementing legislation by both houses of Congress before such treaties take effect.<sup>213</sup>

A valid treaty overrides conflicting state law.<sup>214</sup> This is true of either a self-executory treaty or an executory treaty for which Congress has passed implementing legislation. Indeed, the U.S. Supreme Court has indicated that states must adhere to treaties,<sup>215</sup> and that the Tenth Amendment does not limit the federal treaty power.<sup>216</sup> Moreover, the Supremacy Clause requires that, regardless of any contrary state law, state judges are bound by the terms of treaties to which the United States is a party.<sup>217</sup>

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209. OKLA. STAT. tit. 51, §§ 253(B)(1), (B)(2) (2012).

210. U.S. CONST. art. VI, cl. 2.

211. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

212. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

213. *Whitney*, 124 U.S. at 194.

214. *See Hauenstein v. Lynham*, 100 U.S. 483, 488 (1880); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 282 (1796). *See also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416 (2003) (“Generally, then, valid executive agreements are fit to preempt state law, just as treaties are”).

215. *Baldwin v. Franks*, 120 U.S. 678, 682–83 (1887) (“It is true, also, that the treaties made by the United States, and in force, are part of the supreme law of the land, and that they are as binding within the territorial limits of the states as they are elsewhere”).

216. *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

217. U.S. CONST. art VI, cl. 2.

One of the key ideas behind the Supremacy Clause, which SQ 755 ignores, was to ensure that states would honor treaties to which the United States was a party.<sup>218</sup> This notion dates back to the period after the Revolutionary War, when some states refused to honor the Treaty of Paris.<sup>219</sup> Although the Treaty of Paris guaranteed that the law would not bar the collection of war-related debts, states passed laws that prohibited the British from collecting on war debts.<sup>220</sup> The states' actions were an international embarrassment to the United States.<sup>221</sup> While Congress, acting under the Articles of Confederation, attempted to get the states to comply with the Treaty of Paris, the federal government could not make state courts enforce the Treaty.<sup>222</sup> The Supreme Court has described the attitude of state courts during that time as "notoriously frosty" toward British creditors.<sup>223</sup> The Supremacy Clause became the long-term solution to this problem.

Just as federal law draws upon and incorporates international treaties, federal law also draws upon and incorporates international law in general.<sup>224</sup> The Supreme Court has declared, "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."<sup>225</sup> In the absence of a treaty, a controlling executive or legislative act, or a court decision, a court will look "to the customs and usages of civilized nations," including academic commentary.<sup>226</sup> Under the Supremacy Clause, such federal law preempts conflicting state law.<sup>227</sup>

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218. Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 901 (2004).

219. CHRISTOPHER R. DRAHOZAL, *THE SUPREMACY CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 8-9* (2004); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 753 (2010).

220. DRAHOZAL, *supra* note 219, at 8-9. *See also* JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88, 94 (2002).

221. Van Alstine, *supra* note 218, at 901.

222. DRAHOZAL, *supra* note 219, at 6-7, 10-11.

223. *JPMorgan Chase Bank*, 536 U.S. at 94. Nonetheless, most states eventually repealed their laws that conflicted with the Treaty of Paris. DRAHOZAL, *supra* note 219, at 11.

224. *Paquete Habana*, 175 U.S. 677, 700 (1900); *Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

225. *Paquete Habana*, 175 U.S. at 700.

226. *Id.*

227. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

SQ 755 handles the mandate of the Supremacy Clause awkwardly.<sup>228</sup> On one hand, the state amendment prohibits Oklahoma courts from “consider[ing] international law,” which the amendment defines as “includ[ing] international agreements, as well as treaties.”<sup>229</sup> On the other hand, SQ 755 also directs state courts to “uphold and adhere to the law as provided in the United States Constitution,”<sup>230</sup> which mandates that courts recognize ratified treaties as part of federal law. The amendment is self-contradictory. Even if it were not, international law that is part of federal law is binding on the states, including Oklahoma. The state cannot defy federal law that is based on treaties. Accordingly, SQ 755 violates the Supremacy Clause.

#### D. FULL FAITH AND CREDIT CLAUSE VIOLATION

As well as the Supremacy Clause, SQ 755 also violates the Full Faith and Credit Clause of Article IV. The Clause says, “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”<sup>231</sup> When a court of competent jurisdiction, both personal and subject matter, in one state enters judgment, a court in another jurisdiction must respect the judgment.<sup>232</sup> In this situation, the requirement of the Full Faith and Credit Clause is so “exacting” that such a final judgment “qualifies for recognition throughout the land.”<sup>233</sup> Public policy exceptions to such judgments are not honored.<sup>234</sup> One of the aims of the Full Faith and Credit Clause was to “transform[ ] an aggregation of independent, sovereign States into a nation.”<sup>235</sup> If local policy must give way from time to time, that “is part of the price of our federal system.”<sup>236</sup> Although the court in the second state has to honor a judgment from the court in the first state, in the absence of a judgment, the

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228. Martha F. Davis & Johanna Kalb, *Oklahoma and Beyond: Understanding the Wave of State Anti-Transnational Law Initiatives*, 87 IND. L.J. SUPP. 1, 9 (2011).

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

230. *Id.*

231. U.S. CONST. art. IV, § 1.

232. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998). *See also Nevada v. Hall*, 440 U.S. 410, 421 (1979).

233. *Baker*, 522 U.S. at 233.

234. *Id.* (distinguishing between looking at public policy exceptions to judgments, which is not allowed, from looking at public policy considerations in deciding the applicable law in the forum state, which is allowed).

235. *Id.* at 234 (quoting *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948)).

236. *Sherrer*, 334 U.S. at 355 (quoting *Williams v. North Carolina*, 317 U.S. 287, 302 (1942)).

court in the second state does not have to adopt law from the first state to make its own decision.<sup>237</sup>

SQ 755 provides that Oklahoma courts “shall uphold and adhere to the law,” including, “if necessary[,] the law of another state of the United States provided the law of the other state does not include Sharia Law.”<sup>238</sup> One could interpret the mandate of SQ 755 to be that an Oklahoma court would not give full faith and credit to the judgment of a court in a sibling state if the court in the sibling state used Sharia in making a decision in that particular case. Alternatively, one could interpret the mandate to be that an Oklahoma court would not give full faith and credit to any judgment of a court in the sibling state if the sibling state itself used Sharia in any of its laws. Given the language of the amendment, either reading is logical.<sup>239</sup>

Regardless of how one interprets this provision in the amendment, the provision violates the Full Faith and Credit Clause. Since Muslims may draw upon Sharia in matters related to contracts, marriage, divorce, and adoption, for instance, and since such matters may lead to court-enforced judgments in various states, other states would have to enforce the out-of-state judgments.<sup>240</sup> When an individual calls upon an Oklahoma court to give full faith and credit to either an out-of-state judgment that involves Sharia or a judgment from a state that more generally considers Sharia, under SQ 755, a violation of the Full Faith and Credit Clause would result.

Additional full faith and credit problems arise with SQ 755’s prohibition of international and foreign law. The distinction between international and foreign law is worth noting in this context. International law is the law that nations of the world have agreed upon through treaties.<sup>241</sup> In contrast, foreign law is the law of another nation.<sup>242</sup> SQ 755 specifically mentions international law and suggests foreign law through the language “other nations and cultures.”<sup>243</sup> Especially in cases that involve international business, courts in other states may base their decisions on international or foreign law. Also, out-of-state courts may sit

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237. *Baker*, 522 U.S. at 232.

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

239. Penny M. Venetis, *The Unconstitutionality of Oklahoma’s SQ 755 and Other Provisions Like It That Bar State Courts from Considering International Law*, 59 CLEV. ST. L. REV. 189, 208 (2011).

240. *Id.*

241. BLACK’S LAW DICTIONARY, *supra* note 5, at 892.

242. *Id.* at 720.

243. Okla. H.R.J. Res. 1056 § 1(C).

in states that use international or foreign law more generally. When a judgment based on international or foreign law comes into being in a court in one state, or a judgment not based on international or foreign law comes into being in a state that more generally considers international or foreign law, a court in another state would have to accept the prior judgment pursuant to the Full Faith and Credit Clause. If Oklahoma courts were to refuse to grant full faith and credit to an out-of-state decision grounded in either situation, the courts would violate the Full Faith and Credit Clause.

On a related note, SQ 755 causes problems for comity, an idea closely related to the idea of full faith and credit. In terms of the judiciary, comity is the idea that, in the interest of courtesy, courts recognize the judicial acts of courts in other jurisdictions, including courts in other countries.<sup>244</sup> In cases of family law or business disputes, as well as other areas of law, states can choose to enforce foreign judgments. For example, if a party to a divorce moves to the United States from another country and has a child custody arrangement from a foreign court, the party might ask a court in the state where the party now resides to enforce the foreign judgment.<sup>245</sup> Although the state court would not have to enforce the foreign judgment,<sup>246</sup> the court could opt to do so. Regardless of whether the foreign judgment was a good solution to the child custody situation, SQ 755 would prohibit its enforcement in Oklahoma. Thus, as it does with the Full Faith and Credit Clause, the proposed amendment would violate the notion of comity.

#### E. DUE PROCESS CLAUSE VIOLATION

Not only does SQ 755 violate the Full Faith and Credit Clause, but the amendment also violates the Due Process Clause of the Fourteenth Amendment. The Due Process Clause provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”<sup>247</sup> Under the procedural dimension of due process, the government must give

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244. BLACK’S LAW DICTIONARY, *supra* note 5, at 303–04.

245. Davis & Kalb, *supra* note 228, at 12.

246. Hilton v. Guyot, 159 U.S. 113, 163–64 (1895). Sometimes a court might opt not to enforce a foreign decision. *See, e.g.*, Small v. United States, 544 U.S. 385, 394 (2005) (refusing to honor conviction in Japanese court as within the statutory meaning of “convicted in any court” because the court was not a court in the United States). If a foreign decision violates the public policy of a U.S. forum, a court in the U.S. forum is unlikely to enforce the decision. *See, e.g.*, Loucks v. Standard Oil Co. of N.Y., 224 N.Y. 99, 110 (N.Y. 1918).

247. U.S. CONST. amend. XIV, § 1.

someone “of ordinary intelligence fair notice of what is prohibited.”<sup>248</sup> If the notice is too vague, it will encourage “seriously discriminatory enforcement,” which is impermissible.<sup>249</sup>

In this case, Oklahoma has not provided “fair notice of what is prohibited.”<sup>250</sup> The state has merely told the public that “the courts shall not consider . . . Sharia Law.”<sup>251</sup> The amendment then proceeds to define Sharia as “Islamic law,” which “is based on two principal sources, the Koran and the teaching of Mohammed.”<sup>252</sup> This definition fails to address the deep complexity of Sharia, which includes centuries of Islamic law from the founding of Islam by the prophet Muhammad to contemporary times.<sup>253</sup> Different schools of Islamic thought interpret the Koran and the teachings of Muhammad differently, which leads to different interpretations of Sharia within the Islamic community.<sup>254</sup> With its definition of Sharia, SQ 755 fails to consider such complexity.

A reasonable person would not know precisely to what form of Sharia the law referred.<sup>255</sup> For example, if two Muslim parties wanted to enter into a business contract for the sale of motorcycles and agreed to some form of Sharia-based arbitration in the event of a dispute, the state law would not advise them which version or versions of Sharia to avoid. If the parties had a dispute, went to Sharia-based arbitration per their agreement, and asked an Oklahoma court to enforce the arbitration decision, and if the court were unable to do so under SQ 755, one of the parties could suffer a loss of property, the motorcycles, without “fair notice of what [was] prohibited.”<sup>256</sup> Different courts could issue different results in similar cases, and, based on the vagueness of the law, the public would have little idea what type of Sharia to avoid. “[S]eriously discriminatory enforcement” would be a strong possibility.<sup>257</sup> Accordingly, SQ 755 violates the Due Process Clause.

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248. U.S. v. Williams, 553 U.S. 285, 304 (2008).

249. *Id.*

250. *Id.*

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

252. *Id.* § 2.

253. Khan, *supra* note 192, at 793.

254. Thornback, *supra* note 14, at 5.

255. One could argue that, since SQ 755 does not specify what type of Sharia it bans, the law bans all types of Sharia. However, the text of SQ 755 does not use the word “all.” That different interpretations of the state constitutional amendment are possible suggests the vagueness of the amendment and therefore a conflict with the Due Process Clause.

256. U.S. v. Williams, 553 U.S. 285, 304 (2008).

257. *Id.*

## F. CONTRACTS CLAUSE VIOLATION

Beyond the Due Process Clause, SQ 755 violates the Contracts Clause of Article I. Under the Contracts Clause, “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts.”<sup>258</sup> The Contracts Clause applies to pre-existing contracts only.<sup>259</sup> One of the concerns of the Framers of the Constitution was that states might pass laws that would help debtors at the expense of creditors.<sup>260</sup> In addition to preventing relief for debtors, the Framers aimed to make credit more available by giving creditors confidence that they would be repaid.<sup>261</sup>

Although the U.S. Supreme Court has not always been deeply concerned with an eighteenth century meaning of the Contracts Clause,<sup>262</sup> the Court has demanded that, when a state has caused “a substantial impairment of a contractual relationship,”<sup>263</sup> the law must pass rational basis review. 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,”<sup>264</sup> and the law must be reasonable and “of a character appropriate to the public purpose justifying [the legislation’s] adoption.”<sup>265</sup>

SQ 755 violates the Contracts Clause because the amendment would impact forum selection and choice of law provisions, as well as mediation and arbitration clauses. Since SQ 755 prohibits consideration of “legal precepts of other nations or cultures[,] . . . international law[,] or Sharia Law,”<sup>266</sup> a problem would arise when parties opt for foreign law, international law, or Sharia to frame their contracts.

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258. U.S. CONST. art. I, § 10, cl. 1.

259. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 217 (1827).

260. CHEMERINSKY, *supra* note 140, at 646.

261. *Id.*

262. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 442–43 (1934) (upholding a Minnesota law that, in putting a moratorium on mortgage foreclosures during the Great Depression, impaired the obligation of contracts). In *Blaisdell*, the Court quoted from Chief Justice John Marshall, who observed that the Constitution was “intended to endure for ages to come” and would need “to be adapted to the various *crises* of human affairs.” *Id.* at 443 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819)).

263. *Energy Reserves Grp., Inc. v. Kan. Power & Light*, 459 U.S. 400, 411 (1983) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)).

264. *Id.* at 411–12.

265. *Id.* at 412 (quoting *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977)).

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

A hypothetical situation illustrates how the law would impact a choice of law provision that calls for Sharia.<sup>267</sup> In the case of a pre-existing contract, two Muslim businesspeople may agree upon some sort of Sharia-based mediation for resolving a dispute. As long as the religious traditions do not violate secular law, the parties normally would be able to ask a court to enforce a mediation agreement, and the court would be likely to enforce the agreement. However, in Oklahoma, since the courts would be barred from considering Sharia, a court could not enforce the Sharia-based mediation. If resolving the dispute in a manner consistent with their religious values is very important to the parties, and if they have made the effort to put such an approach into their contract, the court's inability to enforce the mediation would be "a substantial impairment of a contractual relationship."<sup>268</sup> The dispute could not be resolved in a manner consistent with the parties' agreement.

Oklahoma would have a difficult time showing a "significant and legitimate purpose behind the regulation."<sup>269</sup> SQ 755 does not specifically provide a purpose for the amendment. One purpose, suggested outside of the text of the amendment by Representative Duncan, was protecting Oklahoma from Muslim influence in a "culture war." As previously explained, this is not a legitimate purpose. A more serious purpose for state action would be something like countering terrorism, but, even if the state did have a significant and legitimate purpose for the law, the law would not be reasonable and "of a character appropriate to the public purpose justifying [the legislation's] adoption."<sup>270</sup> Here, the state clearly would be unable to show that prohibiting the consideration of Sharia in certain legal disputes would reduce terrorism. Most Muslim businesspeople who resort to the courts for enforcement of faith-based mediation are unlikely to be terrorists; instead, the businesspeople are regular individuals who have an interest in resolving their disputes according to their religious values. The means used for furthering a possible state purpose would not relate to the purpose. Thus, the amendment would violate the Contracts Clause.

Outside of the constitutional realm, but still related to an underlying concern of the Contracts Clause, is the unpredictability of the business

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267. Courts usually uphold choice of law provisions unless the provisions violate public policy. See *Lauritzen v. Larsen*, 345 U.S. 571, 588–89 (1953).

268. *Energy Reserves Grp.*, 459 U.S. at 411.

269. *Id.*

270. *Id.* at 411–12.

climate in Oklahoma that would result under SQ 755.<sup>271</sup> If the terms of contracts became potentially unenforceable, local, out-of-state, and foreign businesspeople would face greater overall uncertainty in their business dealings. Individuals and companies would become more cautious about doing business in such an unstable climate, and eventually less business would be likely to result. Additionally, SQ 755 facilitates the perception that Oklahoma courts would be hostile to applying foreign law, even if the parties to a contract agreed to that law in their contract.<sup>272</sup> As a result, a foreign business would be more likely to demand a foreign forum.<sup>273</sup> Also, when foreign jurisdictions detect this anti-foreign law sentiment, their courts will be less likely to apply U.S. law.<sup>274</sup> Accordingly, harmful interference with business would be virtually inevitable.

#### V. A RHETORICAL APPROACH BEYOND OTHERING MUSLIMS

Someone unfamiliar with anti-Sharia rhetoric may ponder why the Oklahoma Legislature and the voting public that turned out on November 2, 2010, seemed to distrust the state judiciary so strongly that they would aim to proscribe the state courts from “look[ing] to the legal precepts of other nations and cultures[,] . . . international law[,] or Sharia Law.”<sup>275</sup> One might think that perhaps the rhetoric of “judicial activism” took hold in the public mind of Oklahoma.<sup>276</sup> Then one might wonder upon what legal cases the public relied to determine that the judiciary had displayed an abuse of power that related to foreign law, international law, or Sharia. Although a state constitutional amendment generally changes the constitution and thus technically does not violate separation of powers among the branches of the state government,<sup>277</sup> the legislature’s seeking to limit what the courts can consider would suggest interfering with judicial independence.<sup>278</sup>

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271. Davis & Kalb, *supra* note 228, at 12–13.

272. Salli A. Swartz, *Resolution 113A*, 2011 A.B.A. SEC. INT’L LAW 4.

273. *Id.* at 5.

274. *Id.*

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

276. *See* Nelson, *supra* note 97.

277. Venetis, *supra* note 239, at 212.

278. Davis & Kalb, *supra* note 228, at 14–15.

The approval of SQ 755 signified more than public distrust of the judiciary, the third and least understood branch of government.<sup>279</sup> The state legislature and its rhetorical allies, taking advantage of public ignorance of Islam and fear of terrorism, and attempting to make a connection between rank-and-file Muslims and terrorists, constructed Oklahoma Muslims as Others. Muslims make up less than 1 percent of the Oklahoma population,<sup>280</sup> and no serious evidence exists that they tried to take over the state or even the state judiciary. Regardless, reason did not prevail.

Further complicating this situation is the complex nature of religious identities, in this case those of U.S. Muslims. One can say that “links among Muslims of different races, regions, and languages remain more rhetorical than pragmatic, signaling a loose affinity of faith, not an actual alliance of forces, whether military or political or both.”<sup>281</sup> Also, since factions exist within religious traditions, members of religious communities, including the Muslim community, contest religious space.<sup>282</sup>

Given the rhetoric of ignorance and fear that promoted SQ 755 in Oklahoma, as well as the rhetoric of ignorance and fear regarding Muslims that the United States has produced more generally, a better non-Muslim understanding of U.S. Muslims, both in Oklahoma and around the nation, is essential to more civil and productive discourse that is respectful of everyone’s constitutional rights. The idea that non-Muslims, those generally in the privileged position in a religious context in the United States, do not need to change their rhetorical trajectory is problematic.<sup>283</sup> In light of their social privilege and thus power, non-Muslims, most of whom are Christian,<sup>284</sup> must play a key role in reversing the process of othering Muslims.

The dialogic approach<sup>285</sup> that this Article proposes begins with the Selves, the non-Muslims.<sup>286</sup> Such non-Muslims should recognize Muslims

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279. For the judiciary as the least understood branch of government, see Clifton Barnes, *Least Understood Branch: ABA Project Aims to Inform Public about the Judicial System*, BARLEADER, Nov.-Dec. 2006, [http://www.americanbar.org/publications/bar\\_leader/2006\\_07/3102/lub.html](http://www.americanbar.org/publications/bar_leader/2006_07/3102/lub.html).

280. Talley, *supra* note 173.

281. BRUCE B. LAWRENCE, SHATTERING THE MYTH: ISLAM BEYOND VIOLENCE 24 (1998).

282. Takim, *supra* note 35, at 350.

283. Dixon, *supra* note 37, at 18.

284. Christians make up approximately 75 percent of the adults in the United States. See U.S. CENSUS BUREAU, *supra* note 34.

285. Previously, religious leaders have called for dialogue among faith traditions. For example, during the Catholic Church’s Second Vatican Council in the 1960s, Pope Paul VI and the council fathers called for dialogue with the world, which would include other faith traditions. POPE PAUL VI,

as “outsider[s] within,”<sup>287</sup> or “stranger[s] in our midst[.]”<sup>288</sup> Rather than thinking of Muslims as elsewhere, non-Muslims should begin to see them as localized and here to remain.<sup>289</sup> Indeed, Muslims and non-Muslims live in the same society.<sup>290</sup>

Realistically, “one cannot assume that [physical] proximity of cultural others will lead to [productive] communication.”<sup>291</sup> Without a doubt, a “gap of cultural difference” exists between the Selves and Others in the United States.<sup>292</sup> However, the Selves need to cultivate the desire to communicate productively with Others.<sup>293</sup> Motivation to communicate across cultures and religions stems from one’s ability to manage anxiety about the unpredictability regarding the communication.<sup>294</sup> The success of SQ 755 in Oklahoma shows how difficult managing such anxiety is. Indeed, authentic communication with Others can lead to the uncomfortable questioning of the Self’s assumptions and beliefs.<sup>295</sup> Useful intercultural communication skills that non-Muslims can employ “include empathy, the ability to adapt one’s behavior to the context, and the ability to gather information in order to reduce uncertainty about the other.”<sup>296</sup> Employing such skills allows one to develop intercultural competence and

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PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD (GAUDIUM ET SPES) 40 (1965), available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_const\\_19651207\\_gaudium-et-spes\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html). Paul VI expressed the call for dialogue in these words: “Everything we have said about the dignity of the human person, and about the human community and the profound meaning of human activity, lays the foundation for the relationship between the Church and the world, and provides the basis for dialogue between them.” *Id.* Specifically, Paul VI expressed respect for the works of “other Christian Churches and ecclesial communities.” *Id.*

286. The participants in this discourse would need to be rank-and-file members of the communities with stakes in the matter, not just academics. Takim, *supra* note 35, at 348. Additionally, religious leaders would have a role to play in the dialogue since they should be wary of allowing manipulation of their faith traditions for political purposes. Shihab, *supra* note 35, at 74–75.

287. DeWitt, *supra* note 44, at 9 (italics omitted).

288. Crispin Thurlow & Amoshaun Toft, *Others’ Voices: Why “Dispatches from the Street”?*, 1 J. INT’L & INTERCULTURAL COMM. 265, 266 (2008).

289. *Id.*; SIMMEL, *supra* note 41, at 402.

290. In many cases worldwide, Muslims and non-Muslims, usually Christians, live together in society. For example, just as Muslims live in North America and Europe, Christians live in India, Pakistan, and Indonesia. Shihab, *supra* note 35, at 76.

291. Simpson, *supra* note 42, at 12.

292. *Id.* at 24.

293. *Id.* at 14–16 (noting the interest in relationships between Selves and Others).

294. *Id.* at 20.

295. Simpson & Adelman, *supra* note 55, at 81.

296. Simpson, *supra* note 42, at 20.

become “a free agent engaged actively in a process of evolution and growth.”<sup>297</sup>

Interactions with other people help to create one’s discursive reality, and this is true with the discursive realities that non-Muslims have regarding Muslims. One way of conceptualizing where the Self is in relation to the Other is through the Johari Window, a concept that psychologists Joseph Luft and Harry Ingram created in the 1950s.<sup>298</sup> The Johari Window, illustrated below, helps communicating parties understand how the parties perceive one another.<sup>299</sup> The idea is that, by reflecting on experiences, people become more aware of their reactions to those experiences and can apply the knowledge to situations in the future.<sup>300</sup>

The Johari Window has four quadrants that facilitate reflection. Quadrant 1 represents what the Self and the Other know about the Self.<sup>301</sup> Quadrant 2 stands for what the Other knows about the Self but the Self is unaware of.<sup>302</sup> Quadrant 3 represents the information that the Self keeps secret from the Other.<sup>303</sup> Quadrant 4 stands for the information that neither the Self nor the Other knows about the Self.<sup>304</sup> As people learn more about themselves, the quadrants change in size.<sup>305</sup> Specifically, as individuals reveal more about their hidden selves and learn more about their blind areas, the unknown areas will shrink.<sup>306</sup> Because of the possibility of finding something new through this communication, examination of the Self involves some risk.<sup>307</sup>

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297. Dreauna Moon, *Interclass Travel, Cultural Adaptation, and "Passing" as a Disjunctive Inter/Cultural Practice*, in *CONSTITUTING CULTURAL DIFFERENCE THROUGH DISCOURSE* 215, 218 (Mary Jane Collier ed., 2000).

298. DeWitt, *supra* note 44, at 15.

299. Dorothy Solé, *Johari's Window for Generating Questions*, 40 *J. ADOL. & ADULT LITERACY* 481, 481 (1997).

300. Kirsten Jack & Anne Smith, *Promoting Self-Awareness in Nurses to Improve Nursing Practice*, 21 *NURSING STD.* 47, 52 (2007). Developing self-awareness is an ongoing process. *Id.* at 50.

301. DeWitt, *supra* note 44, at 15.

302. *Id.*

303. *Id.*

304. *Id.*

305. Jack & Smith, *supra* note 300, at 50.

306. *Id.*

307. *Id.*

	KNOWN TO SELF	UNKNOWN TO SELF
KNOWN TO OTHERS	<p><u>Quadrant 1: Open Area</u></p> <ul style="list-style-type: none"> <li>• Known to Self and Others</li> <li>• Presentation of Self openly shared with Others</li> </ul>	<p><u>Quadrant 2: Blind Spot</u></p> <ul style="list-style-type: none"> <li>• Unknown to Self but known to Others</li> <li>• Revealed to Self through evaluation and feedback</li> </ul>
UNKNOWN TO OTHERS	<p><u>Quadrant 3: Facade</u></p> <ul style="list-style-type: none"> <li>• Known to Self but not to Others</li> <li>• Revealed to Others through disclosure</li> </ul>	<p><u>Quadrant 4: Unknown</u></p> <ul style="list-style-type: none"> <li>• Unknown to Self and Others</li> <li>• Revealed through exploration and discovery</li> </ul>

One wonders whether any of the non-Muslim legislators who voted for SQ 755, or any of the non-Muslim citizens who voted for the constitutional amendment, previously had any serious conversations with Muslims. In a 2009 Gallup poll, individuals who reported not knowing any Muslims were “twice as likely to express ‘a great deal’ of prejudice” against Muslims as compared to individuals who reported knowing Muslims.<sup>308</sup> Perhaps the fact that the population of Oklahoma is less than 1 percent Muslim makes it difficult for non-Muslims to converse with Muslims.<sup>309</sup> Indeed, non-Muslim residents outside of states like Oklahoma may have an easier time finding opportunities for dialogue.

Regardless, nearly 30 percent of the voting public in Oklahoma disapproved of SQ 755.<sup>310</sup> That figure represents a considerable minority that may be open to dialoguing with Muslims at school, at work, or in the

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308. GALLUP, *supra* note 106, at 5.

309. Talley, *supra* note 173.

310. Hagerty, *supra* note 113.

neighborhood.<sup>311</sup> Indeed, the dialogue generally should unfold within the context of pre-existing relationships because more depth exists within human relationships than outside of them. Some of the individuals who voted against the amendment may be open not only to dialoguing with Muslims, but also to sharing those rhetorical experiences with family and friends who, while not the strongest supporters of SQ 755, may have voted for the amendment out of ignorance or fear.

Dialogue should begin with Quadrant 1 of the Johari Window. After breaking the ice, the parties would take turns discussing what they feel they already know about each other. Examples of what parties may know about each other could be that non-Muslims who are Christian generally have Sunday as their holy day and that Muslims have Friday as their holy day. The depth involved in this part of the conversation would depend on how much non-Muslims and Muslims in the particular situation already know about each other.

Next, the discourse should proceed to Quadrant 2. Since the non-Muslim culture has othered Muslims, the Selves should begin the perception-checking process; this would be an offer of good will from members of the religious power structure. Specifically, what information do non-Muslims lack about themselves that Muslims know about them?<sup>312</sup> In other words, how do Muslims perceive non-Muslims? If non-Muslims discover that Muslims have substantiated negative perceptions about non-Muslims, the non-Muslims may opt to try to change those perceptions by changing their own rhetorics and actions. If non-Muslims find out that Muslims have unsubstantiated negative perceptions about non-Muslims, the non-Muslims may realize that they themselves may have faulty perceptions of Muslims. Either way, the non-Muslims would have an opportunity to learn about how the Others see the Selves.

Although non-Muslims have been in the dominant position and have had the opportunity to other Muslims, Muslims themselves may have their own perception problems about non-Muslims,<sup>313</sup> so reversing the process would be beneficial. What information do Muslims lack about themselves that non-Muslims know about them? In other words, how do non-Muslims perceive Muslims? If Muslims find out that non-Muslims have substantiated negative perceptions about Muslims, the Muslims may opt to

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311. Takim, *supra* note 35, at 348.

312. DeWitt, *supra* note 44, at 17–18.

313. Takim, *supra* note 35, at 347.

try to change those perceptions by changing their own rhetorics and actions. If Muslims find out that non-Muslims have unsubstantiated negative perceptions about Muslims, the Muslims may realize that they themselves may have faulty perceptions of non-Muslims. Either way, the Muslims would have an opportunity to learn about how the Selves see the Others.

Depending on the depth of the discussion related to Quadrant 2, the parties may, over time and with a developing relationship, be able to move to Quadrants 3 and 4. Discourse related to Quadrant 3 would involve intentionally revealing private information, such as personal religious experiences, to the other party. This would only happen if one party feels especially comfortable with the other party. Finally, discourse related to Quadrant 4 would involve the mutual discovery of new information. Through discussion, the parties could explore topics related to life and faith in a way that may lead to reflection and thus previously unknown insights.

As the parties employ more productive communication to learn about each other, particularly in the context of faith, they should become better educated and will be less likely to engage in hateful rhetoric. Knowing more about the Self, including areas that need attention, makes relating to Others easier.<sup>314</sup> If fewer members of the public produce and are receptive to hateful rhetoric, politicians will be less likely to engage in that type of unproductive discourse, and measures like SQ 755 will be less likely to develop and gain support.

## VI. CONCLUSION

Expressing concern that some politicians have sacrificed the rights of rank-and-file U.S. Muslims to engage in melodramatic political theater, this Article has argued that laws like Oklahoma's SQ 755 are highly problematic. The Article noted how the United States in general and Oklahoma in particular have constructed, or at least tolerated the construction of, Muslims as Others, and the Article also provided some background on the genesis of SQ 755, a specific case of othering Muslims. The Article then explained how SQ 755 violates the Establishment Clause, the Free Exercise Clause, the Supremacy Clause, the Full Faith and Credit Clause, the Due Process Clause, and the Contracts Clause of the U.S. Constitution. Finally, the Article presented a dialogic approach that, through the Johari Window, offers hope for deconstructing the notion of

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314. Jack & Smith, *supra* note 300, at 52.

U.S. Muslims as Others and reconstructing them as Selves in mainstream U.S. society.

When non-Muslims and Muslims come together to dialogue, they create a rhetorical space that allows for learning about Selves and Others. As cultures interface and learn, they have the opportunity to negotiate differences,<sup>315</sup> hopefully in a manner far removed from hateful rhetoric designed to appeal to ignorance and fear. New Jersey Judge Sohail Mohammed observed, “When you are ignorant about something or someone, that brings fear. If you get to know someone and more about them, you remove that fear and we can see people for who they are.”<sup>316</sup> Although major differences exist, non-Muslims, most of whom are Christian, and Muslims will discover that they have common concerns such as social justice, human dignity, and freedom.<sup>317</sup> These and other related areas offer possibilities for fruitful exploration beyond anti-Sharia rhetoric.

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315. Brown, *supra* note 9, at 546.

316. Parry, *supra* note 91.

317. Shihab, *supra* note 35, at 74. *See also* Takim, *supra* note 35, at 352.