How Do You Solve A Problem Like Sharia? Awad v. Ziriax and the Question of Sharia Law in America

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How Do You Solve a Problem Like Sharia? *Awad v. Ziriax* and the Question of Sharia Law in America

I. INTRODUCTION

The European Court of Human Rights has stated that the tenets of Islamic *sharia*1 law are “incompatible with the fundamental principles of

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1. The word “sharia” is transliterated from Arabic and, thus, has various possible English spellings, including “sharia,” “shariah,” “shari’a,” and “shari’ah.” Additionally, it is sometimes capitalized as a proper noun (e.g. “Sharia,” “Shari’ah,” etc.). This Comment will employ the term
Former Speaker of the United States House of Representatives and one-time presidential candidate Newt Gingrich has characterized it as a “mortal threat to the survival of freedom in the United States and in the world as we know it.”

Countries that claim to be governed by the provisions of *sharia* employ criminal punishments that can only be described as cruel and barbaric: the amputation of hands and feet on the opposite sides of the body for crimes such as “highway robbery;”

imprisonment or death by stoning for the “crime” of adultery;

flogging for the “sin” of drinking alcohol; and “eye-for-an-eye” retribution in kind for all manner of injuries. To millions across the globe, however, *sharia* law has a far more benign and spiritual meaning; for these devout Muslims, the tenets of the *sharia* are a source of comfort and inspiration, the basis of a
democracy.”

“*sharia*,” in the lower case, except in instances where alternative spellings of the word are used in proper titles or quotations.


5. In late 2011, many newspapers around the world carried the story of an Afghan rape victim known only as Gulnaz, who was imprisoned under Afghanistan’s strict adultery laws and was only released due to the personal intervention of Afghan President Hamid Karzai, allegedly on the condition that she marry her rapist. Jean MacKenzie, *Gulnaz: Afghan Rape Victim May Be Forced to Marry Attacker*, GLOBAL POST (Dec. 19, 2011, 6:00 AM), http://web2.globalpost.com/dispatch/news-regions/asia-pacific/afghanistan/111218/gulnaz-afghan-rape-victim. The Iranian Penal Code, on the other hand, stipulates that adulterers should be partially buried—a male adulterer up to his waist, and a female adulterer up to her chest—and stoned to death with stones approximately the size of tangerines. Christopher Beam, *How Does Stoning Work in Iran?*, SLATE (Aug. 2, 2010, 6:34 PM), http://www.slate.com/articles/news_and_politics/explainer/2010/08/how_does_stoning_work_in_iran.html.


divinely-inspired, objective morality that provides meaning and direction to their lives.8

Over the past decade, interest in, and fear of, Islamic sharia law has grown immeasurably in the United States.9 This interest, and this fear, can largely be traced to the terrorist attacks of September 11, 2001,10 when Americans were confronted with a radical ideology—al-Qaeda’s brand of violent, jihadist Islamism—that purported to represent the true face of Islam, a religion in which, prior to the attacks, comparatively few non-Muslim Americans had demonstrated any significant level of interest. In the aftermath of the September 11 attacks, politicians, experts, and ordinary citizens struggled to make sense of what had happened, and what role, if any, the religious tenets of Islam had played in the attack. Some, including President George W. Bush, insisted that al-Qaeda’s murderous ideology was wholly divorced from the peaceful nature of the Islamic religion.11 Others, however, darkly insinuated that Islam itself could be inherently violent—and that many of the United States’ Muslim citizens were, effectively, acting as a fifth column bent on the “Islamization” of America.12

The latter view has, particularly in the past several years, captured the imagination of large swathes of the American public.13 Jolted by the doom-

9. As a point of reference, searches of the databases of three major United States newspapers—the New York Times, the Washington Post, and the Los Angeles Times—reveal that press reports from the early 2000s discuss sharia in reference to foreign affairs in such countries as Afghanistan, Iran, and Nigeria. However, press reports concerning the possible application of sharia law in the United States did not begin to be published until the latter part of the decade, as a number of books—including BAT YE’OR, EURABIA: THE EURO-ARAB AXIS (2005); MARK STEYN, AMERICA ALONE: THE END OF THE WORLD AS WE KNOW IT (2006); BRUCE BAWER, WHILE EUROPE SLEPT: HOW RADICAL ISLAM IS DESTROYING THE WEST FROM WITHIN (2007); and MELANIE PHILLIPS, LONDONISTAN (2007)—began to popularize the idea that Islamists were infiltrating the West and seeking to undermine its institutions.

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saying of bloggers, cable news and radio pundits, and politicians—unnerved by high-profile, controversial events involving Muslim-Americans, such as the Fort Hood shooting and the debate concerning the “Ground Zero” Mosque—non-Muslim Americans seem to be increasingly divided and confused about their Muslim-American neighbors, Islam in general, and sharia law in particular. A recent poll conducted by the Brookings Institute and the Public Policy Research Institute, for instance, found that almost half of the American public believes the religion of Islam to be at odds with American values, and nearly a third believes that Muslim-Americans want to establish sharia law in the United States.

In response to this rising concern about sharia law, as well as a scattering of much-touted cases in which sharia was allegedly applied in United States courts, nearly two dozen states have considered measures to

calbered by the Brookings Institution and the Public Policy Research Institute, revealed that, as of August 2011, approximately 30% of the American public believes that Muslim-Americans want to establish sharia law in America; that approximately 47% of the American public believes that Islam is at odds with American values; and that significant minorities of Americans are “uncomfortable” with certain aspects of Islam. Id. at 10, 11, 14, 18.


16. Such as Newt Gingrich. See Shane, supra note 3.

17. See JONES ET AL., supra note 13, at 10–16.

18. Id. at 10–11.

19. Fifty such cases from twenty-three states are outlined in one anti-sharia publication released by the Center for Security Policy. CTR. FOR SECURITY POL’Y, SHARIA LAW AND AMERICAN STATE COURTS: AN ASSESSMENT OF STATE APPELLATE COURT CASES 54–606 (2011), available at http://shariainamericancourts.com/wp-content/uploads/2011/06/Sharia_Law_And_American_State_Courts_1.4_06212011.pdf. Perhaps the most frequently cited case by those who seek to demonstrate the alleged “threat” of sharia law is the now-infamous New Jersey case of S.D. v. M.J.R., in which a trial court judge ruled that a Muslim husband, based on his religious beliefs regarding the rights of a husband and the subservient role of a wife, lacked the requisite criminal intent to have committed sexual assault and criminal sexual contact—even though the evidence was sufficiently established for the judge to also decide that acts which would otherwise have constituted such crimes had, in fact, occurred. 415 N.J. Super. 417, 427–29, 431 (N.J. Super. Ct. App. Div. 2010). Although the case was promptly overturned on appeal, id. at 432–39, anti-sharia advocates allege that the trial court’s ruling demonstrates the erosion of American values in the courtroom and
banned the application of *sharia* in their respective state judicial systems.²⁰ Among these states, however, it was Oklahoma that caused the debate about anti-*sharia* measures to explode onto the national scene, when, in the 2010 general election, the citizens of Oklahoma passed a ballot initiative, State Question 755 (“SQ 755”), intended to insert a ban on the application of *sharia* law into the text of the Oklahoma Constitution.²¹ The initiative was immediately challenged by Muneer Awad, a Muslim citizen of Oklahoma, who asserted that the certification of SQ 755 and its incorporation into Oklahoma’s constitution would violate the First Amendment of the United States Constitution.²² The Federal District Court for the Western District of Oklahoma agreed with Awad, issuing a preliminary injunction preventing the certification of SQ 755, and, in January 2012, the Tenth Circuit Court of Appeals upheld the district court’s ruling on the likely unconstitutionality of the initiative.²³ *Awad v. Ziriax* was the first case in which an American court ruled on the constitutionality of an attempt to ban or limit Islamic *sharia* law, and both the district and appellate courts firmly ruled that Oklahoma’s attempt violated the United States Constitution.²⁴ In the wake of the *Awad* judgment, however, confusion about and animosity toward *sharia* law remain: right-wing proponents of banning *sharia* reacted to the Tenth Circuit’s decision with dismay,²⁵ and other states


²⁰See Bill Raftery, *Bans on Court Use of Sharia/International Law: Law in Arizona, Bills Advance in Missouri and Texas, Failing in Most States*, GAVEL TO GAVEL: A REVIEW OF STATE LEGISLATION AFFECTING THE COURTS (May 3, 2011), http://gaveltogavel.us/site/2011/05/03/bans-on-court-use-of-shariainternational-law-law-in-arizona-bills-advance-in-missouri-and-texas-failing-in-most-states/. The states that have considered legislation that would bar consideration of *sharia* law include: Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Maine, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, and Wyoming. *Id.* The vast majority of this legislation has since failed. *Id.*


²⁴*Id.*

²⁵Pamela Geller, see note 14, for instance, responded to the *Awad* decision by writing: “It’s
have not ceased their attempts to prevent the application of *sharia* in their respective judicial systems. As fears of “Islamization” in the United States and, particularly, in United States courts, continue to percolate, this Comment seeks to examine the issues raised by the *Awad* decision in order to shed greater light on the titular question of *sharia* law in America. This Comment contends that the *Awad* judgment was correctly decided, that the most commonly-objected-to aspects of *sharia* law are already prohibited under existing American constitutional and civil law, and that Oklahoma’s—and other states’—attempts to ban *sharia* law are not only unconstitutional, but would, if enacted, have profound and negative implications for the United States’ continuing struggle against radical Islamist terrorism.

Part II of this Comment discusses the events that provided the prelude to the original district court decision in *Awad*. Part III provides a background on the religo-cultural and constitutional legal issues involved in the *Awad* case and in the discussion of *sharia* law in America more generally. Part III.A examines Islamic *sharia* law itself, describing what *sharia* is, where it comes from, and, briefly, how it has developed since the founding of Islam. Part III.B describes the First Amendment constitutional jurisprudence that was relevant to the district court’s and the Tenth Circuit’s examination of the *Awad* case—specifically, the jurisprudential background to the First Amendment’s Establishment and Free Exercise Clauses.

Part IV describes the procedural history of the *Awad* case to date, examining, in Part IV.A, the district court’s judgment in the case and then, in Part IV.B, the Tenth Circuit’s decision affirming the district court’s holding. Part V analyzes why the two courts in *Awad* reached the correct legal result, discussing not only the First Amendment argument that


27. See infra notes 38–51 and accompanying text.

28. See infra notes 52–144 and accompanying text.

29. See infra notes 52–101 and accompanying text.

30. See infra notes 102–44 and accompanying text.

31. See infra notes 145–70 and accompanying text.
provided the courts’ central basis for enjoining SQ 755’s certification, but also the over-arching constitutional and policy reasons that demonstrate the futility and even danger inherent in attempts to ban sharia law. Part V.A briefly affirms the First Amendment analysis of the two Awad courts. Part V.B argues that, even if sharia law was truly as terrible, misogynistic, and discriminatory as its critics claim, current constitutional protections and civil laws would already outlaw the most pernicious aspects of sharia, making sharia bans like SQ 755 redundant. Finally, Part V.C asserts that, from a purely policy-oriented perspective, attempts to ban sharia law in the United States are counter-productive and actually hinder the United States’ goal of marginalizing and defeating radical Islamists. Part VI examines the impact that the Awad decision has had on state attempts to ban or limit sharia law. Part VII concludes this Comment.

II. BACKGROUND

The series of events that would culminate in the Awad judgment began in the spring of 2010, when the Oklahoma Legislature passed Enrolled House Joint Resolution 1056 (EHJR 1056), also known as the “Save Our State” amendment. Described as a “pre-emptive strike against [s]haria law coming to Oklahoma” by State Representative Rex Duncan, its primary author, EHJR 1056 proposed the amendment of Oklahoma’s constitution to prevent Oklahoma courts from considering international or Islamic sharia law in their judicial decisions. Specifically, the EHJR 1056 called for the addition of the following sub-section to Section 1 of Article VII of the Oklahoma Constitution:

C. 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 determinations.

32. See infra notes 171–218 and accompanying text.
33. See infra notes 172–84 and accompanying text.
34. See infra notes 185–98 and accompanying text.
35. See infra notes 199–218 and accompanying text.
36. See infra notes 219–29 and accompanying text.
37. See infra note 230 and accompanying text.
40. See Awad, 754 F. Supp. 2d at 1302. Specifically, the EHJR 1056 called for the addition of the following subsection to Section 1 of Article VII of the Oklahoma Constitution:
provisions of the Oklahoma Constitution, the adoption of EHJR 1056 by the Oklahoma Legislature required that the joint resolution be submitted to the public for approval at the next general election.\(^{41}\) This constitutional requirement led to the creation of State Question 755 (SQ 755), a ballot initiative incorporating the language of the “Save Our State” amendment, which was to be put to the vote of Oklahoma’s citizens during the general election on November 2, 2010.\(^{42}\)

Although a legal technicality threatened to scuttle SQ 755 during the course of its certification by the Oklahoma Attorney General and Secretary of State,\(^ {43}\) the final text of the ballot initiative eventually read as follows:

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\(^ {44}\) and the teaching of Mohammed.\(^ {45}\)
Despite its simplistic definition of sharia law, and its almost risible call to ban the use of international law in Oklahoma courts, SQ 755 was overwhelmingly supported by Oklahoma’s citizens: the ballot initiative was approved by slightly over seventy percent of the state’s voters.

The approval of SQ 755 in the November 2, 2010 general election meant that the initiative’s proposed changes to the Oklahoma Constitution would take effect as soon as the Oklahoma State Board of Elections certified the election results. This certification was scheduled to occur on November 9. Two days after the election, Muneer Awad, a Muslim citizen of Oklahoma and the executive director of Oklahoma’s branch of the Council on American-Islamic Relations (CAIR-OK), filed suit against the members of the Oklahoma State Board of Elections in federal district court, seeking a preliminary injunction to prevent this certification from taking place. Asserting that his Islamic faith “inform[ed] the character and content of his personal and professional relationships,” Awad argued that SQ 755’s proscription of sharia law interfered with his right to practice that faith by 1) creating an excessive government entanglement in religion in violation of the Establishment Clause of the First Amendment of the United States Constitution, 2) infringing his right to freely exercise his faith in violation of the Free Exercise Clause of the First Amendment, and 3) improperly constraining his freedoms of contract and testation.

On November 9, the day that the November 2 election results would have been certified, the district court issued a temporary restraining order enjoining the certification of SQ 755 pending the court’s final decision on Awad’s request for a preliminary injunction. The stage was set for one of the most controversial Establishment Clause battles in recent history.

including “Qur’an,” “Quran,” “Coran,” and similar variations. This Comment will employ the term “Qur’an,” except in instances where alternative spellings of the word are used in proper titles or quotations.

45. Awad, 754 F. Supp. 2d at 1301.
46. Id. at 1302.
48. Id.
49. Id. at 1–2.
50. Id. at 3, 6–8. Awad’s argument with respect to the freedoms of contract and testament concerned his last will and testament, which incorporated Islamic customs concerning burial instructions, bequests, and divisions of the estate of the deceased. Id. at 6–8. Awad feared that, were SQ 755 to be certified and incorporated into the Oklahoma Constitution, an Oklahoma probate court could invalidate his will based on its use of sharia-based principles. Id. at 7–8.
III. RELEVANT LAW

The legal issues involved in Awad v. Ziriax represent a curious intersection of constitutional rights and religo-cultural rules. This section will address the state of the relevant law involved in the Awad case, beginning with an explanation of Islamic sharia law and then moving on to an examination of current First Amendment jurisprudence concerning the Establishment and Free Exercise Clauses.

A. Sharia Law

Sharia law, defined in its broadest possible sense, is the system of Islamic rules and regulations that governs not only civil and criminal justice in an Islamic state, but also the personal and moral conduct of such a state’s Muslim citizens. Unlike the civil and common law legal systems with which most Westerners are familiar—systems based on clearly codified written laws, as in France and most of Europe, or on combinations of codified laws and precedential case law, as in the United Kingdom and the United States—sharia law combines purportedly divine dictates, customary law, and clerical analogy to create religious rules, societal norms, instructions for personal conduct, and civil and criminal laws. For this reason, the very term “sharia law” is actually a misnomer, as the sharia can most clearly be understood as describing societal aspirations that are not legally binding unless adopted as law by a governing authority. Additionally, as will be described more fully below, there are significant disagreements within the Islamic world itself regarding the content of the

52. See RAJ BHALA, UNDERSTANDING ISLAMIC LAW (SHAR'I'A), at xix–xxii (2011). Bhala quotes S.G. Vesey-Fitzgerald, describing the comprehensive nature of sharia law and its difference from traditional Western conceptions of what “law” is:

Law . . . in any sense in which a Western lawyer would recognize the term, is but a part of the whole Islamic system, or rather, it is not even a part but one of several inextricably combined elements thereof. [Sharia], the Islamic term which is commonly rendered in English by “law” is, rather, the “Whole Duty of Man.” Moral and pastoral theology and ethics; high spiritual aspiration and . . . detailed ritualistic and formal observance . . .; all aspects of law; public and private hygiene; and even good manners are all part and parcel of the [sharia]. . . .

Id. at xx (quoting S.G. Vesey-Fitzgerald, Nature and Sources of the Sharia, in I LAW IN THE MIDDLE EAST 86 (Majid Khadduri & Herbert J. Lebesny eds., 1955)).


54. See BHALA, supra note 52, at xix–xxii.

Thus, while the term “sharia law” appears to denote a well-established and clearly-defined body of rules and regulations, the reality is that sharia is far more nebulous than its classification as “law” would suggest.57

1. Sources of Law

Oklahoma’s SQ 755 defined sharia as having “two principal sources, the Koran and the teaching of Mohammed.”58 Although SQ 755 correctly identified the two principal sources of sharia law, there are actually four main sources from which the content of the sharia is derived: the Qur’an, the sunna (collected tales of the life and actions of Muhammad), qiyas (i.e. “analogy”), and ijma (i.e. “consensus”).59 Collectively, the sources of the sharia make up the fiqh—the collected corpus of Islamic jurisprudence that, essentially, dictates the content of sharia law.60 Because qiyas and ijma, the secondary sources of fiqh, are both intricately connected to the Islamic precepts laid out in the Qur’an and the sunna,61 the language of SQ 755 would likely ban the “consider[ation] or [use]” of all these sources of sharia.62

The Qur’an, Islam’s holy book, provides the central foundation of the

56. Lombardi, supra note 55, at 92–96. See also JAN MICHEL OTTO, SHARIA AND NATIONAL LAW IN MUSLIM COUNTRIES: TENSIONS AND OPPORTUNITIES FOR DUTCH AND EU FOREIGN POLICY 7–8 (2008). As Professor Jan Michel Otto, who has authored numerous books and articles on the subject of sharia, writes:

[N]umerous interpretations of sharia can be found in laws, scholarly literature, the media and in popular perceptions. . . . Due to the extraordinary variety of views on sharia within Muslim countries, the ‘rules in use’ of sharia differ greatly between [various Muslim] groups. When people refer to the sharia, they are, in fact, referring to their sharia . . . .

OTTO, supra.


60. The term “fiqh” can also refer to the process of deducing the content of sharia law, for instance through one of the four sources of sharia elaborated above and described infra, notes 63–79. See Abdal-Haqq, supra note 59, at 14 (“Fiqh (Islamic Jurisprudence) refers to both the science of deducing and applying the principles and injunctions of Shari’ah, as well as the sum total of the deductions by particular jurists.”).

61. See infra notes 63–73 and accompanying text.

whole of Islamic theology and, thus, the central foundation of the sharia.\textsuperscript{63} According to Islamic tradition, the Qur’an was dictated to Muhammad by the angel Jibrīl (the Arabic form of the Christian “Gabriel”) over the course of twenty-three years, between roughly 610 and 632 AD.\textsuperscript{64} For this reason, it is viewed as the inspired word of Allah (God).\textsuperscript{65}

The Qur’an is the central point of reference for the content of Islamic law: its 114 surahs, or chapters, and 6235 verses form the foundation of sharia. Though the Qur’an is not, by any means, a legal code, it contains a number of specifically legal commands mixed into the generally moral, religious, and devotional matters that comprise the majority of its content. Approximately 350 of the Qur’an’s 6235 verses contain legal instructions, although this number is imprecise as “a learned scholar [or] mujtahid” may “derive a rule of law even from the parables and historical passages of the Qur’an.”\textsuperscript{66} These legal verses, which are commonly known as the ayat al-ahkam, concern such matters as inheritance, marriage, divorce, commercial transactions, and criminal law.\textsuperscript{67} Because of the Qur’an’s seminal importance to the Islamic faith, it not only comprises a source of Islamic law in and of itself, but is also used to derive and interpret the other three sources of sharia law.\textsuperscript{68}

The second source of Islamic jurisprudence can be found in the sunna, which describes the practices of and examples set by Muhammad.\textsuperscript{69} Use of

\begin{footnotes}
\footnote{63. See Abdal-Haqq, supra note 59, at 11. See also Maulana Muhammad ‘Ali, INTRODUCTION TO THE STUDY OF THE HOLY QUR’ĀN 22 (1992).}
\footnote{64. See BHALA, supra note 52, at 74–75.}
\footnote{65. Indeed, as Mū’il Yūsuf ‘Izz al-Dīn, an Islamic scholar and author, explains: The Qur’an, or the Book, al-Kita̲b, represents the most important source of Islamic law, being the ultimate word of the Divine. It is not seen by Muslims as purely a book of law, since it is a book that includes clarification of every matter. The word al-Kita̲b indicates the significance of textual authority in the Islamic legal mind. It therefore also implies what was composed and given by God; this first source of Islamic law is to be respected more than any human-made law. MAWIL IZZI DIEN, ISLAMIC LAW: FROM HISTORICAL FOUNDATIONS TO CONTEMPORARY PRACTICE 37 (Univ. of Notre Dame Press, 2004).}
\footnote{66. See DIEN, supra note 65, at 37–38. An example of sharia derived directly from the Qur’an can be found in the area of inheritance law—one area of Islamic law that was at issue in Awad. See Complaint Seeking a Temp. Restraining Order and Preliminary Injunction at 3, 6–8, Awad v. Ziriax, 754 F. Supp. 2d 1298 (W.D. Okla. 2010) (No. CIV-10-1186-M). Sura 4:11 is a Qur’anic verse which provides explicit instructions regarding the distribution of property: “Allah (thus) directs you / As regards your children’s / (Inheritance): to the male, / A portion equal to that / Of two females: if / Daughters, two or more, / Their share is two-thirds / Of the inheritance; / If only / One, her share / Is a half.” THE MEANING OF THE HOLY QUR’ĀN 4:11 (‘Abdullah Yūsuf ‘Ali trans., 11th ed. 2009).}
\footnote{67. See id.}
\footnote{68. See DIEN, supra note 65, at 37–38. An example of sharia derived directly from the Qur’an can be found in the area of inheritance law—one area of Islamic law that was at issue in Awad. See Complaint Seeking a Temp. Restraining Order and Preliminary Injunction at 3, 6–8, Awad v. Ziriax, 754 F. Supp. 2d 1298 (W.D. Okla. 2010) (No. CIV-10-1186-M). Sura 4:11 is a Qur’anic verse which provides explicit instructions regarding the distribution of property: “Allah (thus) directs you / As regards your children’s / (Inheritance): to the male, / A portion equal to that / Of two females: if only / Daughters, two or more, / Their share is two-thirds / Of the inheritance; / If only one, her share / Is a half.” THE MEANING OF THE HOLY QUR’ĀN 4:11 (‘Abdullah Yūsuf ‘Ali trans., 11th ed. 2009).}
\footnote{69. See ISLAM: A SHORT GUIDE TO THE FAITH 38–40 (Roger Allen & Shawkat M. Toorawa eds., 2011); Abdal-Haqq, supra note 59, at 12–14; see also RAYMOND IBRAHIM, INTRODUCTION TO THE AL-QAEDA READER, at 1, 7 (Raymond Ibrahim ed., 2007). As Raymond Ibrahim, a Coptic Christian scholar of Islam and Islamism writes, “the importance of the sunna arises from the function of

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the sunna as a source of sharia law can be traced to Qur’anic injunction: the Qur’an not only instructs Muslims to “[o]bey God and His Messenger [e.g. Muhammad],” but also states that all of mankind has an “excellent pattern (of conduct)” in the person of Muhammad. Even more explicitly, a later Qur’anic verse commands Muslims to “take what the Messenger [e.g. Muhammad] Assigns to you, and deny / Yourselves that which he / Withholds from you.” Thus, in the early centuries of Islam, Islamic religious scholars collected reports—known as hadith—of the teachings, sayings, and actions of Muhammad, which, collectively, form the corpus of the sunna.

While the Qu’ran and the sunna comprise the two primary sources of sharia law, there are two other key principles used to derive the content of sharia law: the principles of ijma and qiyas. Ijma is the Islamic term for a form of consensus among religious scholars—or, in some interpretations, among the entire Muslim community—that can settle the moral status of a questionable act. Allegedly grounded in a statement by Muhammad that the Muslim community would “never agree upon an error,” ijma operates under the principle that a unanimous consensus on a particular topic is a miraculous sign proving the infallibility of the community’s decision regarding that topic. Because of the difficulty involved in achieving unanimous consensus, however, the fourth and final source of sharia law, qiyas, is quite important. Qiyas is a form of clerical analogy employed to determine the legality or morality of actions that are not directly addressed in the Qu’ran or the sunna. It principally involves analogizing the action in

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71.  Id. at 59:7.
72.  GUIDE TO THE FAITH, supra note 69, at 38. In the Sunni religious tradition, there are six collections of hadith that are considered especially authentic: the hadith collections of Abu al-Bukhari, Abu Husein ibn Muslim, Abu Duwood, Abu al-Tirmidhi, Abu al-Darimi, and Abu ibn Majah. SEYYED HOSSEIN NASR, ISLAM: RELIGION, HISTORY, AND CIVILIZATION 55 (2003) (“‘The Six Correct Books’ . . . constitute the canonical and orthodox sources of Hadith in the Sunni world, [and] are the Jaʿfī’s al-sahih of Abū ‘Abd Allāh al-Bukhārī, the Ṣaḥīḥ of Abu’l-Ḥusayn ibn Muslim al-Nayshabūrī, the Sunan of Abū Da’ūd al-Siḍiṣṭānī, the Jaʿfī’s of Abū ʿIsā al-Tirmidhī, the Sunan of Abū Muhammad al-Ḍairī, and the Sunan of Abū “Abd Allāh ibn Majah. There have been other important compilations, but they never gained the authority of these six works.”).
73.  See Abdal-Haq, supra note 59, at 16–19.
74.  See COULSON, supra note 59, at 77. See also IBRAHIM, supra note 69, at 89; Lombardi, supra note 55, at 93.
75.  COULSON, supra note 59, at 77; see also Lombardi, supra note 55, at 93.
76.  See IBRAHIM, supra note 69, at 8; see also Lombardi, supra note 55, at 93.
question to similar circumstances that are elaborated in the Islamic holy texts or that have been addressed in previous clerical rulings. 77

A brief note should be made here of *ijtihad*, the concept of individual reasoning, which may—or may not—be legitimately viewed as a fifth method of deriving the content of the *sharia*. 78 *Ijtihad* is a controversial subject in the Islamic world: use of *ijtihad* to interpret the *sharia* has been informally prohibited by the Muslim *ulema* (Islamic religious scholars) since the Tenth Century, a prohibition that was given “official” sanction in the Thirteenth Century, when the Iraqi *ulema* declared the doors to *ijtihad* permanently closed. 79 These groups of medieval scholars, like the Islamists of the modern day, feared the effect that changing circumstances and new interactions with foreign cultures would have on Islamic traditions, and they believed that “[b]y closing the door to individual reasoning . . . the guiding principles of Islam would remain intact for posterity.” 80 Despite the traditional prohibition on the use of *ijtihad*, not all Muslim scholars accepted this ban on individual reasoning as legitimate, 81 and, indeed, among certain sects and branches of Islam *ijtihad* remained an important source of jurisprudential derivation. 82 In the modern day, debates concerning the relevance and legitimacy of *ijtihad* remain extremely topical and form an

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77. See Lombardi, supra note 55, at 93.
78. See Abdal-Haqq, supra note 59, at 20–22.
79. *Id.* See also BHALA, supra note 52, at 335–36. As scholars of Islamic legal development explain, the discouragement of *ijtihad* arose because, by the Tenth Century the point had been reached when the scholars of all schools [e.g., the madh’hab, see *infra* notes 84–101 and accompanying text] felt that all essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself to the effect that from that time onwards no one might be deemed to have the necessary qualifications for independent reasoning in law, and that all future activity would have to be confined to the explanation, application, and, at the most, interpretation of the doctrine as it had been laid down once and for all.

BHALA, supra note 52, at 335–36 (emphasis in original) (citation added) (quoting JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 70 (1982)).
81. For instance, Muhammad Iqbal, a prominent Muslim poet and philosopher who lived in British-controlled India from his birth in 1877 to his death in 1938, wrote that “[t]he closing of the door of *ijtihad* is pure fiction suggested partly by the crystallization of legal thought in Islam, and partly by that intellectual laziness which, especially in the period of spiritual decay, turns great thinkers into idols. If some of the later doctors have upheld this fiction, modern Islam is not bound by this voluntary surrender of intellectual independence.

82. Shi’ite Muslims, for instance, were traditionally more open to the use of *ijtihad*—particularly by their divine leaders, the Imams—than their Sunni brethren. See Abdal-Haqq, supra note 59, at 29.

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important part of the ideological struggle between Islamists and Islamic moderates throughout the Muslim world.\textsuperscript{83}

2. \textit{Madh’hab}s: The Schools of Islamic Law

While all Muslims agree—at least in principle—with the four main sources of \textit{sharia} law discussed above,\textsuperscript{84} important differences regarding the \textit{content} of the \textit{sharia} remain. There are two principal reasons for this. The first is the inter-religious split amongst the early Muslim faithful that occurred shortly after the death of Muhammad.\textsuperscript{85} This schism—engendered by a disagreement over who should replace Muhammad as the \textit{caliph}, or leader, of the Muslim community—resulted in the separation of Islam into two branches: the Sunnis and the Shi’ites.\textsuperscript{86} While the Sunni-Shi’a split is certainly an important factor in the study of comparative \textit{sharia} law,\textsuperscript{87} a full account of the religious differences between these two branches of Islam is beyond the scope of this Comment. The second, and, for the purposes of this Comment, more significant, reason for the differences among Muslims with respect to the content of \textit{sharia} law can be found in the development of the \textit{madh’hab}s, separate and distinct schools of Islamic jurisprudence, within the first several centuries after the birth of Islam.\textsuperscript{88}

The development of the \textit{madh’hab}s began as the founding generation of the Islamic religion—and, specifically, the \textit{Sahaba}, or companions of Muhammad—passed away and as Islamic armies advanced from Arabia, conquering nearly all of the Middle East and much of Northern Africa mere decades after the death of Muhammad.\textsuperscript{89} While the former deprived the early Muslims of the knowledge and guidance of those who had directly interacted with Islam’s holy prophet, the latter forced them into contact with

\begin{itemize}
  \item \textsuperscript{84} See Abdal-Haqq, \textit{supra} note 59, at 14.
  \item \textsuperscript{85} See \textit{BHALA}, \textit{supra} note 52, at 186–203.
  \item \textsuperscript{86} See \textit{id}.
  \item \textsuperscript{87} See \textit{KAMALI}, \textit{supra} note 8, at 87–93.
  \item \textsuperscript{88} The word “\textit{madh’hab}” or “\textit{madhhab}” literally means the “way of going.” Abdal-Haqq, \textit{supra} note 59, at 24. Thus, the word is used to describe the different paths or schools of Islamic legal thought. See \textit{id} at 24–29.
\end{itemize}
new cultures and peoples; both required the Muslim community to develop principles for interpreting, extending, and applying the *sharia* law that Muhammad had established.\(^9^0\) The early Islamic scholars, applying the *fiqh* methodologies discussed above in various ways, developed over a dozen *madh'habs*, or schools of Islamic jurisprudence.\(^9^1\) As time passed, however, five main schools of thought crystallized, and these five *madh'habs* remain the central schools of Islamic thought to this day.\(^9^2\)

The five principle schools of Islamic jurisprudence are the Hanafi, Maliki, Shafi'i, Hanbali, and Jafari schools, each named after the Islamic scholar whose system of thought and interpretation established its basic theological and interpretive methodologies.\(^9^3\) Again, it should be noted that the different schools of Islamic thought all recognize the authority of the same sources from which the *sharia* is derived; the central difference among the schools is the relative importance of each source and the degree to which each is relevant or applicable.\(^9^4\) The earliest of the five *madh'habs*, the Hanafi School, was based on the teachings and jurisprudence of Abu Hanifa (702–767 C.E.), a merchant and scholar who emphasized the use of *qiyas* to deduce the *sharia* in instances when the Qur’an, *sunna*, and consensus of the *Sahaba* did not speak to the question at issue.\(^9^5\) In contrast to the Hanafi and other schools, the chronologically subsequent Maliki School, founded on the jurisprudence of Malik Ibn Anas Ibn Amir (717–802 C.E.), supplemented the typical four sources of law with a new, unique source: the customs and traditions of the people of Medina, the second holiest city in Islam.\(^9^6\) Because of the Medinans’ reverence for custom and tradition stretching back to the time of Muhammad, Malik Amir reasoned, the traditions of the city likely carried the imprimatur of the Prophet and the founding generation of Muslims and, thus, could carry jurisprudential weight.\(^9^7\) The Shafi‘i School, the third major *madhhab* founded upon the teachings of Muhammad Idris ash-Shafi‘i (769–820 C.E.), returned to the traditional quartet of jurisprudential sources, heavily emphasizing the Qur’an and *sunna* over both *ijma* and *qiyas*.\(^9^8\) Continuing the Shafi‘i drive back toward traditional

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91. Id.
92. Id.
93. Id.
94. See id. at 26–29. While each of the five *madh'habs* give the Qur’an and the *sunna* the preeminent positions of importance in the interpretation of sharia law, the use of *ijma* and *qiyas*, as well as the extent to which certain *hadith* of the *sunna* are or are not accurate, differ widely between the schools. Id.
97. See KAMALI, *supra* note 8, at 73–76.
98. See id. at 77–83; see also Abdal-Haqq, *supra* note 59, at 27–28.
sources of *fiqh*, the Hanbali School, widely recognized as the strictest, most conservative, and most traditional Islamic *madh'hab*, practically eliminated the use of any jurisprudential source other than the Qur’an and *sunna*.\(^9\)

Centered around the teachings of Ahmad Ibn Hanbal (778–855 C.E.), the Hanbali School emphasized the *hadith* tradition of the *sunna* more heavily than any other school, accepting the primacy of even weakly supported *hadith* over other sources of *fiqh*; rejecting the use of *ijma* (with the exception of any consensus reached about jurisprudential matters by the founding generation of Muslims); and employing *qiyyas* only as a last resort to address issues or questions that could not be settled by any other means.\(^10\)

Finally, the Jafari School, predominant among Shi’ite Muslims and founded upon the teachings of Abu Jafar Muhammad Al-Baqir (d. 735) and Jafar Sadiq (d. 765), the fifth and sixth Shi’ite Imams, emphasizes the importance of the Qur’an and *sunna*, but is also traditionally recognized as allowing a broader acceptance of *ijtihad*—the process of individual reasoning that is generally frowned upon in the other Islamic *madh’hab*s.\(^11\)

**B. First Amendment Jurisprudence: Freedom of Religion**

The First Amendment of the United States Constitution, protecting religious freedom as well as other important rights, was adopted during the First Congress to assuage what many of the Founding Fathers viewed as the pernicious effects of government imposing itself into the religious realm.\(^12\)

The relevant section of the Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”\(^13\) In constitutional jurisprudence, the two clauses of this section are known respectively as the Establishment Clause and the Free Exercise Clause. A clear understanding of current constitutional

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\(^9\) See Kamali, supra note 8, at 83–84; see also Abidal-Haqq, supra note 59, at 28–29.

\(^10\) See Abidal-Haqq, supra note 59, at 28–29.

\(^11\) See Kamali, supra note 8, at 87–93; see also Abidal-Haqq, supra note 59, at 29.

\(^12\) Reynolds v. United States, 98 U.S. 145, 162–64 (1879). As the Supreme Court noted, “Before the adoption of the Constitution, attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the States . . . .” Id. at 162–63.

\(^13\) U.S. Const. amend. I.
interpretations of these clauses is essential to addressing the issues raised in Awad.

1. The Establishment Clause

The Establishment Clause prohibits Congress from making any law “respecting an establishment of religion.” Modern Establishment Clause jurisprudence can be traced to the 1947 case of Everson v. Board of Education of Ewing Township, in which the United States Supreme Court examined the constitutional validity of a state law using an Establishment Clause analysis—the first time any such analysis had been used with respect to the states. The issue in Everson arose when the Ewing Township Board of Education, acting under the impetus of a New Jersey law permitting local school districts to make rules and contracts related to the transport of children to and from schools, authorized a program to reimburse parents for the cost of bus fare for their children’s daily school commute. This reimbursement was paid to both the parents of children attending secular public schools and the parents of children attending local Catholic parochial schools, leading one disgruntled taxpayer to file suit against the Board of Education alleging that the reimbursement program violated the Establishment Clause. Despite a spirited dissent by Justice Rutledge, the Court held that the School Board’s reimbursement program was a public service that benefitted all families—religious or non-religious—and, thus, did not violate the Establishment Clause. More important than the Court’s decision regarding the reimbursement program, however, was the Court’s affirmation that the Establishment Clause, and the wide-ranging prohibitions on government action that it entails, had been applied to the states since the passage of the Fourteenth Amendment in 1868.

104. Id.
106. Everson, 330 U.S. at 3.
107. Id. at 3–4. The Everson plaintiff’s argument was essentially the same as one of the rationales for the First Amendment’s religious protection elaborated in Reynolds: that using taxpayer funds to reimburse the parents of Catholic school-goers caused the plaintiff to be “taxed, against [his] will, for the support of religion.” Reynolds, 98 U.S. at 162.
108. Everson, 330 U.S. at 16–18. Citing the historical development of the First Amendment’s religious protections, Justice Rutledge insisted that the First Amendment “forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises.” Id. at 41 (Rutledge, J., dissenting).
109. The Court offered an extensive list elaborating the meaning of the Establishment Clause, stating that the clause means at a minimum that neither a state nor the Federal government can “set up a church”; “pass laws which aid one religion, aid all religions, or prefer one religion over another”; “force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion”; or “openly or secretly, participate in the
The most significant development in modern Establishment Clause jurisprudence, however, came in 1971, when the Supreme Court created the now-infamous “Lemon test” in the case of Lemon v. Kurtzman. Lemon concerned a pair of state statutes from Pennsylvania and Rhode Island that provided state assistance to non-public schools: the Pennsylvania statute allowed for the provision of state aid in the form of partial reimbursements to the non-public schools for such things as “teachers’ salaries, textbooks, and instructional materials,” while the Rhode Island statute provided that the state would pay teachers at non-public schools a supplement to their annual salary. In addressing the question of whether these two statutes violated the Establishment Clause, the Court built upon several of its past First Amendment cases to conclude that a state statute could only pass constitutional muster if 1) “the statute [had] a secular legislative purpose,” 2) the statute’s “principal or primary effect [was] one that neither advance[d] nor inhibit[ed] religion,” and 3) “the statute [did] not foster ‘an excessive government entanglement with religion.’” Applying this three-part test to the Pennsylvania and Rhode Island statutes at issue, the Court found that both statutes were unconstitutional because they effectively created an “excessive entanglement between government and religion.”

Since its creation in 1971, the three-part “Lemon test” has been roundly criticized, both by legal scholars and by members of the Supreme Court itself. Indeed, the Court’s somewhat confusing track record of affairs of any religious organizations or groups.” Everson, 330 U.S. at 15–16. The Court further stated that the Establishment Clause meant that “[n]o person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance,” and that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.” Id. Lemon v. Kurtzman, 403 U.S. 602 (1971).

L. Id. at 606–07.

112. Id. at 612–13 (internal citations omitted).

113. Id. at 614.

114. See Carl H. Esbeck, The Lemon Test: Should It Be Retained, Reformulated or Rejected, 4 NOTRE DAME J.L. ETHICS & PUB. POL’Y 513, 543–48 (1990). “It is hard,” Esbeck wrote, “to think of a contemporary legal doctrine that is as besieged from all quarters as is the Lemon test.” Id. at 543.

Establishment Clause cases over the past several decades shows that the Lemon test is certainly not a bright-line rule: the test has been applied sporadically, and some Establishment Clause cases have been settled with no reference to the test at all. Further complicating the issue are numerous interpretations and explications of the Lemon test that have been offered by members of the Supreme Court over the years. As early as 1984, Justice O’Connor offered a reformulation of the Lemon test, the “endorsement test,” that has come to be accepted and used in numerous lower-level cases, including Awad. More recently, Justice Breyer has even declared that “no single mechanical formula . . . can accurately draw the constitutional line in every [Establishment Clause] case.” Nevertheless, the Lemon test continues to play an important role in the Supreme Court’s Establishment Clause jurisprudence: the test has been applied by the Court as recently as 2005, and, despite the criticism to which the test has been subjected, there seems to be little question that its three prongs—and its numerous corollaries—remain the primary factors for determining the constitutionality of government actions challenged under the Establishment Clause.


117. See Esbeck, supra note 114, at 515–31 (describing the various jurisprudential changes to the Lemon test that have occurred since its original formulation).

118. See Lynch, 465 U.S. at 687–94 (O’Connor, J., concurring). According to O’Connor, the primary aim of both the “purpose” and “effect” prongs of the Lemon test is to prevent the “endorsement” or “disapproval” of particular religious beliefs. Id. at 690. Under the “endorsement test,” a government practice should not communicate a “message of government endorsement or disapproval of religion”—even if no such endorsement or disapproval actually exists—because such a message would lead to the perception that some members of the community (those members belonging to the endorsed religion) were more privileged or highly valued than others. Id. at 688, 692. O’Connor’s endorsement test has been adopted as a key method for examining Establishment Clause cases in the Tenth Circuit, where the Court of Appeals has held that “the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that ‘religion or a particular religious belief is favored or preferred.’” Bauchman v. W. High Sch., 132 F.3d 542, 551 (10th Cir. 1997).


120. See McCready Cnty, v. ACLU of Ky., 545 U.S. 844, 859–66 (2005). In addition to Justice O’Connor’s “endorsement test,” described supra note 118 and accompanying text, another corollary to the Lemon test can be found in the case of Larson v. Valente, 456 U.S. 228 (1982). The so-called “Larson test” further complicates the realm of Establishment Clause jurisprudence by removing an entire subset of cases—cases involving State laws that “discriminate among religions,” rather than “affording [] uniform benefit[s] to all religions”—from the realm of Lemon test analysis. Id. at 252. These cases, the Court held, must be examined using a heightened level of scrutiny than the typical Lemon test analysis applies. Id. at 252–55. Larson is significant because the Larson test played a key role in the Tenth Circuit Court of Appeals’ analysis of the Awad case. See Awad v. Ziriax, 670 F.3d 1111, 1126–31 (10th Cir. 2012).
2. The Free Exercise Clause

The Free Exercise Clause of the United States Constitution provides that Congress shall make no law “prohibiting the free exercise” of religion. Together with the Establishment Clause, discussed above, the Free Exercise Clause provides the main bulwark of the Constitution’s protections of religious liberty. While a literal reading of the Free Exercise Clause might lead to the conclusion that the Constitution prohibits any governmental interference with religious exercise, expression, or worship, the application of the Clause in constitutional jurisprudence has proven to be far more complicated than such a narrow reading would suggest. Numerous federal and state statutes that effectively regulate or prohibit activities that could be undertaken for a religious purpose have been enacted, and many of these statutes have been upheld as constitutional. Indeed, the Supreme Court has recognized that the Free Exercise Clause encompasses two concepts: the “freedom to believe” and the “freedom to act.” While the freedom to believe is typically viewed as an “absolute” freedom, the freedom to act on one’s religious beliefs is not—it is a qualified freedom that is “subject to regulation for the protection of society.” Indeed, to afford religious action the full protection that the Free Exercise Clause appears to require would, as the Supreme Court held in one of its seminal cases on the subject, “make the professed doctrines of religious belief superior to the law of the land, and ... permit every citizen to become a law unto himself.”

The question of which religious actions or observances Congress or the state legislatures can regulate, and which are protected and may not be regulated, is one that has remained a significant source of debate up to the present day. While responses to this question continue to develop as

121. U.S. CONST. amend. I.
123. See generally id. (describing the various legal limitations on the freedom of religion allowed under current Free Exercise jurisprudence).
124. See id. at 1211–30.
126. Id. at 303–04.
127. Reynolds v. United States, 98 U.S. 145, 167 (1879). The famous Reynolds case involved the question of polygamy, specifically whether a federal law prohibiting polygamy in United States territories was constitutional, as it (allegedly) infringed upon the religious beliefs of members of the Mormon Church. Id. at 161. The decision was the first instance in which the Court explicitly held that Congress could regulate certain religiously-based actions, even if it could not regulate religious beliefs. Id. at 167.
constitutional interpretation evolves, a brief overview of the Court’s recent Free Exercise Clause jurisprudence provides the beginnings of an answer. First, it should be noted that the Court’s initial decisions relating to the Free Exercise Clause—beginning with Reynolds in the late 1870s and continuing through Cantwell in the 1940s—did not seriously attempt to create a “test” for determining the validity of congressional regulation of religious practice. In these decisions, the Court applied a rather free-wheeling approach to its Free Exercise analysis, and largely seemed to take for granted the idea that certain actions (for instance, the practice of polygamy) simply fell outside the realm of religious protection.

It was not until 1963, with the case of Sherbert v. Verner, that the Supreme Court first developed a multi-factor test for determining the constitutionality of legislative restraints on religious action. In Sherbert, which dealt with a South Carolina unemployment law under which a member of the Seventh Day Adventist Church was denied unemployment benefits due to her faith-based refusal to work on Saturdays, the Court stipulated that a law’s validity under the Free Exercise Clause was a product of three factors. First, did the law actually impose a burden on the free exercise of the plaintiff’s religion? Second, if such a burden was imposed, was there a “compelling state interest” that justified this infringement of the plaintiff’s right to freely exercise his or her religion? Finally, even if the first two factors were met, did the state or federal government demonstrate that “no alternative forms of regulation” existed that would sufficiently satisfy the aims of the compelling state interest without infringing on a plaintiff’s First Amendment rights? This test, known as the “compelling state interest test,” served as the main method of determining Free Exercise constitutionality until 1990, when the Court decided the case of Employment Division v. Smith.

128. See id. at 167; see also Cantwell, 310 U.S. at 303.
129. See Reynolds, 98 U.S. at 163–67. In delineating the dividing line between religious liberty and government restriction, the Supreme Court cited Virginia’s early religious liberty statute, which drew a distinction between religious belief and action. Id. at 163. The government, the Court insinuated, can restrict actions when religious principles “break out into overt acts against peace and good order.” Id. (internal citation omitted). While the dichotomy between religious belief and religious action proved useful in other early Free Exercise cases—such as Cantwell, in which a Connecticut law concerning public religious solicitation was struck down due to the fact that it, effectively, allowed the secretary of the state’s Public Welfare Council to determine what was or was not a valid religious belief—the nebulous holding in Reynolds remained the only real “test” until the mid-1900s. See Sherbert v. Verner, 374 U.S. 398 (1963).
130. Sherbert, 374 U.S. at 403–09.
131. Id.
132. Id. at 403–04.
133. Id. at 406.
134. Id. at 407.
135. 494 U.S. 872, 877–79 (1990); see Daniel A. Crane, Beyond RFRA: Free Exercise of
With its decision in Smith, the infamous case that pitted Oregon’s anti-drug statutes against two Native Americans who had ingested peyote for allegedly sacramental purposes, the Supreme Court abandoned the “compelling state interest test,” returning to the more nebulous Free Exercise jurisprudence that characterized its pre-Sherbert decisions.\(^\text{136}\) “[T]he right of free exercise,” the Court held, “does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”\(^\text{137}\) Under the Court’s Smith analysis, no clear test was established; instead, a “neutral, generally applicable law” could only be held to violate the Free Exercise Clause in certain “hybrid cases,” in which the law at issue curtailed not only Free Exercise rights, but also other constitutional rights, such as the freedom of speech or freedom of the press.\(^\text{138}\)

Despite the outrage caused by the Court’s decision in Smith, the “hybrid case” theory remains the predominant method for determining whether a law violates the Free Exercise Clause.\(^\text{139}\) Since Smith, the theory has best been explicated in the case of Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, which set out three main principles governing Free Exercise examinations.\(^\text{140}\) First, at the most basic level, the protections of the Free Exercise Clause will always pertain “if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.”\(^\text{141}\) Second, echoing Smith, the Court held that a neutral law of general applicability “need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.”\(^\text{142}\) Finally, and conversely, a law

\(\text{Religion Comes of Age in the State Courts, 10 ST. THOMAS L. REV. 235, 235–36 (1998).}\)

\(\text{136. Smith, 494 U.S. at 877–79. See also Crane, supra note 135, at 235–36.}\)

\(\text{137. Smith, 494 U.S. at 879 (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).}\)

\(\text{138. See id. at 881–82.}\)

\(\text{139. The outcry against the Smith decision resulted in Congress passing the Religious Freedom Restoration Act (RFRA), which attempted to legislate around Smith by mandating the Sherbert “compelling state interest test” as the primary method of determining Free Exercise compliance, in late 1993. Crane, supra note 135, at 236–37. This showdown between Congress and the Supreme Court, however, ended with the invalidation of the RFRA in 1997, when the Court held the Act to be an unconstitutional attempt by Congress to legislate the meaning of the Constitution. City of Boerne v. Flores, 521 U.S. 507, 530–36 (1997). See Crane, supra note 135, at 238.}\)

\(\text{140. 508 U.S. 520 (1993).}\)

\(\text{141. Id. at 532.}\)

\(\text{142. Id. at 531.}\)
that is not neutral or generally applicable to the public as a whole “must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”143 A law lacks facial neutrality—and, thus, must be narrowly tailored to advance a compelling interest—if its object is “to infringe upon or restrict practices because of their religious motivation” or if it “refers to a religious practice without a secular meaning discernable from the language or context.”144

IV. PROCEDURAL HISTORY: THE JUDGMENT IN AWAD

In discussing the final judgment in the Awad case, it is necessary to explain both the judgment of the district court and that of the Tenth Circuit Court of Appeals. While both courts reached the same conclusion—that SQ 755 unconstitutionally violated the First Amendment—the reasoning and analysis that each court employed was very different.

A. Judgment of the Federal District Court of the Western District of Oklahoma

Almost three weeks passed between the federal district court’s issuance of a temporary injunction preventing the certification of Oklahoma’s sharia law ban and the date that the court issued its final decision regarding Awad’s requested preliminary injunction.145 In addressing the question of the preliminary injunction, the court first discussed the standard to be applied in determining whether a preliminary injunction should be granted.146 The court specified that a preliminary injunction should be granted only if 1) Awad had “a substantial likelihood of success” in overturning the provisions of SQ 755 on its constitutional merits; 2) Awad was likely to suffer “irreparable injury . . . if an injunction [was] denied;” 3) the threatened injury to Awad outweighed the injury that would result to the State of Oklahoma, the party opposing the injunction; and 4) granting the injunction “would not be adverse to the public interest.”147 Additionally, because Awad was seeking a special type of “disfavored” preliminary injunction—an injunction that would prevent SQ 755’s banning of sharia law from ever taking effect, the same relief that would occur if Awad challenged the constitutionality of the sharia law ban on its merits after SQ 755 became

143. Id. at 531–32.
144. Id. at 533.
146. Awad, 754 F. Supp. 2d at 1305.
147. Id. (citing Dominion Video Satellite, Inc. v. EchoStar Satellite Corp., 269 F.3d 1149, 1154 (10th Cir. 2001)).
part of Oklahoma’s constitution—he was required to satisfy a “heightened burden” and make an especially strong showing with respect to his likelihood of success.\textsuperscript{148}

The district court primarily focused its analysis on the first of the four elements required for Awad’s requested injunction to be granted: the likelihood of Awad’s success were he to challenge the constitutionality of the \textit{sharia} ban itself.\textsuperscript{149} The court first examined Awad’s assertion that SQ 755 violated the Establishment Clause, applying the \textit{Lemon} test in conjunction with Justice O’Connor’s “endorsement test.”\textsuperscript{150} Based on these tests, the court held that there was a strong likelihood that SQ 755 violated both the “effect” and “excessive entanglement” prongs of the \textit{Lemon} test.\textsuperscript{151} The court then turned to Awad’s claim that SQ 755 violated the Free Exercise Clause.\textsuperscript{152} Citing the Free Exercise principles laid out in \textit{Church of the Lukumi Babalu Aye}, the court held both that SQ 755 was not “facially neutral” and that the Oklahoma Board of Elections had offered no evidence that the amendment was “narrowly tailored” or justified by a compelling interest.\textsuperscript{153} Thus, the court ruled, Awad had made a sufficiently strong showing with respect to his likelihood of success on the merits to satisfy the

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\item[148.] \textit{Id.} (citing O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 975–76 (10th Cir. 2004)) (“If, however, a movant is seeking a disfavored preliminary injunction—preliminary injunctions that alter the status quo, mandatory preliminary injunctions, or preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits—the movant must satisfy a heightened burden.”).
\item[149.] \textit{Id.} at 1305–07.
\item[151.] \textit{Awad}, 754 F. Supp. 2d at 1306–07. With respect to the “effect” prong, the court noted that, under the “endorsement test,” SQ 755’s specific prohibition against the application of \textit{sharia} law, or the recognition of \textit{sharia}-based legal decisions from other states, “reasonably . . . may be viewed as specifically singling out Sharia Law, conveying a message of disapproval of plaintiff’s faith.” \textit{Id.} at 1306. Additionally, because \textit{sharia} law “is not actually ‘law’, but is religious traditions that provide guidance to plaintiff and other Muslims regarding the exercise of their faith,” the court noted that SQ 755’s prohibition of \textit{sharia} was even more likely to be viewed as an inappropriate and unconstitutional message of disapproval of the Muslim faith. \textit{Id.} With respect to the “excessive entanglement” prong, the court, reiterating that \textit{sharia} law is made up of “religious traditions that differ among Muslims” depending on their location and individualized beliefs, ruled that, in order to comply with SQ 755, “Oklahoma courts will be faced with determining the content of Sharia Law, and, thus, the content of plaintiff’s religious doctrines.” \textit{Id.} at 1306–07. Such a determination would be a blatant violation of the “excessive entanglement” prong of the \textit{Lemon} test. \textit{Id.} at 1307.
\item[152.] \textit{Id.} at 1307.
\item[153.] \textit{Id.} (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–33 (1993)).
\end{enumerate}
\end{footnotesize}
heightened burden necessary to justify his requested preliminary injunction.  

In comparison with Awad’s likely success on the merits of a constitutional challenge to SQ 755, the remaining three elements in the court’s preliminary injunction analysis were given relatively little attention. The court held that Awad had satisfied the “irreparable injury” element in a brief, two-sentence analysis. In a slightly more lengthy discussion, it then held that, because protecting Awad’s constitutional rights was more important than ratifying the will of the majority of Oklahoma voters, the “balance of harms” element was satisfied as well. Finally, the court, noting that the U.S. Constitution and Oklahoma statute both indicate that upholding individuals’ constitutional rights is inherently in the public interest, held that the “public interest” element was also satisfied.

Based on its analysis of Awad’s request for a preliminary injunction, and, particularly, on its analysis of Awad’s likely success in challenging the constitutionality of SQ 755, the district court granted the injunction, thereby preventing Oklahoma’s State Board of Elections from certifying the passage of the amendment and its incorporation into the Oklahoma Constitution.

B. Judgment of the Tenth Circuit Court of Appeals

After its loss in the district court, the Oklahoma Board of Elections appealed the decision to the Tenth Circuit Court of Appeals, which, in January 2012, affirmed the district court’s holding enjoining the certification of SQ 755. In affirming the injunction against SQ 755, the Tenth Circuit agreed with the district court’s analysis with respect to classifying Awad’s requested injunction as a disfavored injunction requiring a heightened standard of scrutiny. Applying the standard, four factor test for analyzing preliminary injunctions, it also affirmed the district court’s holdings that Awad had shown 1) that he would suffer irreparable injury if his injunction was denied, 2) that his injury would outweigh the injury the Oklahoma Board of Elections would suffer if the requested injunction was granted, and 3) that the requested injunction would not be adverse to the public interest.

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154. Id.
155. See id. at 1307–08.
156. Id. at 1307 (citing Elrod v. Burns, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”)).
157. Id. at 1308. Indeed, as the court noted, the very purpose of enshrining constitutional protections in the Bill of Rights was to prevent “certain individual rights from being taken away by the will of the majority.” Id.
158. Id.
159. Id.
161. Id. at 1125.
The Tenth Circuit, however, took a very different tack in addressing the most important of the four preliminary injunction factors: whether Awad had a significant likelihood of success on the merits of his case.162 First, while the district court had offered an extensive analysis of both Awad’s claim under the Establishment Clause and his claim under the Free Exercise Clause, the Tenth Circuit took a more circumscribed approach, merely considering Awad’s Establishment Clause claim.163 Because Awad successfully demonstrated the likely invalidity of SQ 755 under the Establishment Clause, the Tenth Circuit wrote, there was no need to consider his Free Exercise claim.164

Even more significant, however, was the Tenth Circuit’s rejection of the Lemon test and its application of another, much more rarely invoked Establishment Clause tool: the “test” described in Larson v. Valente.165 Quoting Larson, the Tenth Circuit insisted that the Lemon test “applies [only] to ‘laws affording uniform benefit to all religions, and not to provisions . . . that discriminate among religions.’”166 In instances where a state law actually discriminated among religions, on the other hand, the law must be strictly scrutinized to determine whether “it is ‘closely fitted to the furtherance of any compelling interest asserted.’”167 Because SQ 755 specifically singled out Islam and sharia law for particular censure, and, thus, facially “discriminated among religions” under the Larson test, its validity could only be demonstrated by the existence of a compelling government interest that SQ 755’s ban on sharia was “closely fitted” to address.168 The Tenth Circuit, however, ruled that banning sharia was not a “compelling government interest” of the State of Oklahoma because the Board of Elections’ inability to point to any case in which sharia was used indicated that no “actual problem” existed.169 While this holding alone was enough to show that Awad would likely succeed on the merits of his case under the Larson test, the court also noted that, even if the application of sharia did pose some real problem or concern, a complete ban on any “consideration” of sharia was “hardly an exercise of narrow tailoring.”170

162. See id. at 1129.
163. Id. at 1125.
164. Id. at 1119.
165. Id. at 1128.
166. Id. at 1126 (quoting Larson v. Valente, 456 U.S. 228, 252 (1982)).
167. Id. at 1127 (quoting Larson, 456 U.S. at 255).
168. Id. at 1130–31.
169. Id. at 1130.
170. Id. at 1131.
V. ANALYSIS

At the most basic level, the passage of Oklahoma’s ban on sharia law raises a number of important questions, only one of which was implicitly considered in the judicial decisions of the district court and the United States Court of Appeals for the Tenth Circuit and some of which went unconsidered by the courts and by the ban’s advocates. The first question, implicitly addressed by the courts, is whether or not SQ 755’s proposed ban on sharia and other forms of international law is constitutional. A second, much broader and as yet unaddressed, question is whether or not a ban on sharia is even necessary to prevent the dangers or effects that anti-sharia advocates fear. A third is the question of what effect domestic efforts aimed at limiting or challenging Islam will have on the United States’ larger ideological struggle against radical Islamism, as well as what effect such efforts will have on the loyalty of Muslim-American citizens. This Comment argues not only that 1) the district court and the Tenth Circuit reached the correct conclusion with respect to the First Amendment arguments raised in Awad, but also that 2) the most offensive and dangerous aspects of radical sharia law are already constitutionally prohibited by United States law, and that 3) efforts to ban sharia actually harm America’s ability to provide an ideological alternative to Islamism by encouraging the perception of an inevitable clash between American and Islamic values.

A. Constitutional Analysis: The Unconstitutionality of SQ 755 Under the First Amendment’s Establishment and Free Exercise Clauses

In determining whether to enjoin SQ 755’s certification by the Oklahoma State Board of Elections, the district court and the Tenth Circuit spent the most significant portions of their opinions on the question of Awad’s likely success on the merits. Specifically, the courts examined whether it was more likely than not that, if its provisions were directly challenged in a future lawsuit, SQ 755 would be struck down as unconstitutional for violating the Establishment Clause, the Free Exercise Clause, or both. Both courts concluded that Awad had a significant likelihood of successfully challenging the constitutionality of Oklahoma’s sharia ban if SQ 755 was incorporated into the Oklahoma Constitution. While the district and Tenth Circuit courts were analyzing the unconstitutionality of SQ 755 on the theoretical level required to grant or deny a preliminary injunction, both courts’ constitutional analyses were
correct: had SQ 755 been certified and its ban on *sharia* law incorporated into the Oklahoma Constitution, this ban would unconstitutionally violate both the Establishment and Free Exercise Clauses.175

With respect to Awad’s Establishment Clause analysis, the Tenth Circuit correctly held that, because SQ 755 facially “discriminated among religions,” any examination of the ballot initiative’s ban on *sharia* ought to be analyzed under the *Larson* test rather than the traditional *Lemon* test.176 The Supreme Court’s holding in *Larson*, which has yet to be overruled or superseded by any later case, stipulates that the *Lemon* test was “intended to apply to laws affording a uniform benefit to all religions, and not to provisions . . . that discriminate among religions.”177 Laws that discriminate among religions, such as the explicit ban on the application of *sharia* law described in SQ 755, are to be examined much more strictly: such a law “must be invalidated unless it is justified by a compelling governmental interest, and unless it is closely fitted to further that interest.”178 Under this analysis, the State of Oklahoma might have had a legitimately compelling interest in limiting or outlawing some of the actions that are justified or permitted under extreme interpretations of *sharia*—such as discrimination or violence against women, homosexuals, and non-Muslims. However, banning all applications of *sharia* law can hardly be considered a narrowly tailored way to address these legitimate interests.179 Because SQ 755’s ban on *sharia* is not narrowly tailored to address the interests cited by the State of Oklahoma, it cannot withstand the strict scrutiny of the Supreme Court’s current Establishment Clause jurisprudence.180

Although the Tenth Circuit only addressed Awad’s Establishment Clause claims, the *sharia* ban contained in SQ 755 would, as the district court explained in its opinion, also unconstitutionally violate the Free Exercise Clause. As discussed above, the current test for analyzing a Free Exercise claim can be found in the case of *Church of the Lukumi Babalu Aye*, in which the Supreme Court held that a law restricting religious exercise that is *not* neutral or generally applicable to the public as a whole

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175. See supra notes 172–73; see also infra notes 176–84.
178. Id. at 247 (citations omitted).
179. Because *sharia* law can encompass all aspects of a Muslim’s life—providing rules related to religious and societal behavior, criminal law, and such civil law subjects as testament and contract, among other things—banning *all* applications of *sharia* would needlessly outlaw harmless, and even beneficial, behavior. See supra notes 52–83 and accompanying text.
180. See *Larson*, 456 U.S. at 247; see also *Awad*, 670 F.3d at 1129.
“must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.” 181 Because the text of SQ 755 specifically singles out sharia law for particular censure, the ballot initiative is neither neutral nor generally applicable, and, thus, it must be analyzed under the strict scrutiny test outlined in Church of the Lukumi Babalu Aye. 182 SQ 755’s ban on sharia fails under both prongs of this strict scrutiny test: first, as the trial record indicates, the State of Oklahoma did not produce sufficient evidence to demonstrate either that a compelling governmental interest existed or that the ban was narrowly tailored to address that interest, whatever it might be; 183 second, even if the State of Oklahoma had a compelling interest in outlawing some of the more harmful and dangerous aspects of radical sharia law, its attempt to ban sharia law in its entirety is overbroad and, thus, is not narrowly tailored. 184

B. Current Constitutional and Legal Preclusion: The Redundancy of SQ 755 and Other Sharia Bans

Oklahoma’s SQ 755 was not merely unconstitutional and, as will be discussed below, a potential propaganda victory for Islamist extremists; it was also entirely unnecessary to outlaw the types of behavior and action that Oklahoman anti-sharia activists sought to prevent. Although neither the district court nor the Tenth Circuit explicitly articulate this argument, both courts implicitly reference it in their discussion of whether or not banning sharia is a “compelling interest” of the State of Oklahoma. 185 As the Tenth Circuit stated, it could not accept SQ 755’s sharia ban as a compelling interest because the Oklahoma State Board of Elections did “not identify any actual problem [that SQ 755 sought] to solve”—indeed, the Board could not cite “even a single instance where an Oklahoma court had applied sharia law or used the legal precepts of other nations or cultures, let alone that such applications or uses had resulted in concrete problems.” 186 The Board likely failed to find an example of sharia’s application not only because no such application had yet occurred, but also because existing constitutional interpretations and protections already prevent any such application from occurring at all. 187 Even if we accept the interpretation of sharia law held by

181. 508 U.S. 520, 531–32 (1993); see also supra notes 140–44 and accompanying text.
183. See id. at 1307.
184. See supra notes 52–83, 180 and accompanying text.
185. See Awad, 670 F.3d at 1129–31; Awad, 754 F. Supp. 2d at 1306–07.
186. Awad, 670 F.3d at 1130.
187. Andrew Rosenkranz, the Florida Regional Director for the Anti-Defamation League, has argued that bills banning sharia law (and international law more generally, see infra notes 220–25 and accompanying text) are “wholly redundant as the [individual state] and U.S. constitutions
Islam’s harshest critics to be true—an acceptance that, as explained above, fails to account for the diversity of thought between different sects and schools of Islam—it is likely that banning *sharia* would still fall outside the “compelling state interest” realm because the United States Constitution itself would largely prevent the application of this radical *sharia*.

Assume, for the sake of argument, that critics of Islam and anti-*sharia* activists are correct in their beliefs about the Islamic faith—that Muslim-Americans seek to slowly force Islamic law on America by “entwin[ing] the West in sharia: first legitimiz[ing] Islamic law in Western eyes; then establish[ing] the principle that, where applicable, Islamic law can override existing secular law; and finally, work[ing] to increase the areas of Western life in which Islamic law is deemed applicable.”

Even if such a program of “creeping *sharia*” was currently being undertaken, and radical Islamists were truly seeking to establish *sharia*-compliant parallel societies in the United States, existing constitutional safeguards would already provide a significant obstacle to such an endeavor. The Constitution does not exist in a vacuum, and, ironically, the very constitutional interpretations that, as the Awad court held, prevent Oklahoma and other states from banning *sharia* law outright also allow limitations of radical interpretations of *sharia*.

There is a large body of precedent demonstrating that religious beliefs cannot trump secular United States law, particularly when compelling societal interests are at stake: neither polygamy nor drug use, for instance, are exempt from criminal statutes banning such actions merely because they are engaged in out of religious conviction.

For all of their gloomy predictions of Islamization in the American heartland, anti-*sharia* activists have failed to explain how or why United

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189. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–33 (1993). Under the *Church of the Lukumi Babalu Aye* precedent, for instance, actions that would be lawful religious duties in a country like Taliban-era Afghanistan—for example, killing homosexuals—could easily and justifiably be outlawed without infringing upon the First Amendment right of radical Muslims to freely exercise their religion; hate crime legislation is not specifically directed against the real or perceived religious beliefs of Islamist fundamentalists, but, rather, is generally applicable to the public as a whole and, thus, does not need to be justified by a “compelling government interest.” *Id.* at 531–33.

States civil and criminal law, supported by over one hundred years of Supreme Court precedent, would suddenly cease to apply to Muslim-Americans. Under the *Church of the Lukumi Babalu Aye* “compelling state interest” test, current statutes prohibiting polygamy, domestic violence, homophobic hate crimes, and other harmful conduct would almost certainly serve as constitutionally-protected checks on the ability of radical Islamists to institute their extreme interpretations of *sharia* law.\(^{191}\) Indeed, in the few judicial cases in which real or perceived Islamic mores and American laws have, arguably, come into direct conflict, it is the Islamic mores that are laid aside: in the New Jersey case of *S.D. v. M.J.R.*, for instance, an appellate court rejected the idea that a Muslim husband’s religious beliefs concerning the roles of husbands and wives negated the criminal intent necessary to find him guilty of committing a proven sexual assault.\(^{192}\) It is even less clear how even more extreme aspects of radical *sharia*—such as the punishments of amputation, lashing, and stoning for certain crimes, or the judicial practice of settling all cases, whether civil or criminal, without a jury—would not run afoul of constitutional prohibitions on “cruel or unusual punishment” or constitutional requirements that juries be impaneled for criminal and certain civil cases.\(^{193}\)

Anti-*sharia* activists respond to such criticisms by insisting that immediate application of radical *sharia*’s most extreme aspects is not the goal of American Islamists—that, instead, Islamists seek to gradually erode constitutional prohibitions on their more radical practices, slowly causing the American public and courts to accept the application of *sharia* policies in ever-broadening circumstances.\(^{194}\) The success of such a strategy, however, seems unlikely; as described above, the Constitution’s extensive protections against many of the more troublesome aspects of radical *sharia* law are so wide-ranging that they are unlikely to be dramatically changed without a constitutional amendment. As of 2010, however, the Muslim population of the United States was only about 2.6 million—less than 1% of the nation’s population.\(^{195}\) In other words, Muslim-Americans are in no demographic position to radically alter the United States Constitution, even assuming that they wanted to—an assumption that is not borne out by recent data, which

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191. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 520, 531–33; *see also supra* note 185.
192. 415 N.J. Super. 417, 427–29, 431 (N.J. Super. Ct. App. Div. 2010). While anti-*sharia* activists are certainly justified in their disgust at the lower court’s culturally relativistic ruling in this case, *supra* note 19, the appellate court’s decision shows that United States law will not accept such relativism and will continue to apply to all citizens regardless of their religious convictions. *Id.*
193. U.S. CONST. amends. VI, VII, VIII.
194. *See McCarthy*, *supra* note 188, at 94.
indicates that a vast majority of Muslim-Americans are not interested in establishing a parallel court system of *sharia* tribunals.  

Within the context of current legal prohibitions on violence and discrimination, Oklahoma’s attempt to ban *sharia* law through the passage of SQ 755 was not only blatantly unconstitutional, as both the district court and the Tenth Circuit Court of Appeals held—it was also redundant. SQ 755 would not have made current prohibitions on such things as domestic violence; spousal rape; discrimination based on gender, sexual orientation, or religion; and brutal corporal punishment any more likely to be enforced. Instead, the blanket ban on *sharia* only interfered with far more benign activities—such as *sharia*-based family arbitration, contract formation, and testation—that even the most non-radical Muslims might choose to engage in. Banning these sorts of activities with legislation that has little, if any, effect on the most brutal aspects of radical *sharia* law is not only antithetical to America’s cherished values and freedoms, but also, as will be discussed immediately below, needlessly antagonizes law-abiding Muslim-American citizens.

**C. Diffusing the “Clash of Civilizations”: Awad and Counter-Extremism Policy**

Part of the rationale behind anti-Islamic initiatives like Oklahoma’s SQ 755 is the global rise in Islamic extremism that has occurred over the past thirty years, a phenomenon that has spread from stereotypical hotbeds of radicalism, like the Palestinian Territories, Egypt, and Afghanistan, to Southeast Asia, Africa, and even small-town America. This rise in

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198. Indeed, the Awad case itself was, at the most fundamental level, concerned with Muneer Awad’s rights of testation, rather than the more extreme aspects of radical sharia with which the Oklahoma voting populace was, no doubt, much more concerned. See Complaint Seeking a Temp. Restraining Order and Preliminary Injunction at 6–8, *Awad v. Ziriax*, 754 F. Supp. 2d 1298 (W.D. Okla. 2010) (No. CIV-10-1186-M).

199. While the origins of modern Islamist fundamentalism can be traced back nearly a hundred years to the religio-political ideology of Muslim Brotherhood founder Hassan al-Banna, militant Islamism, such as the type exhibited by al-Qaeda, is more directly inspired by the Afghan-Soviet War of the 1980s and the writings of Abdullah Azzam, the “Godfather of Jihad.” Chris Suellentrop, *Abdullah Azzam: The Godfather of Jihad*, Slate (Apr. 16, 2002, 2:26 PM), http://www.slate.com/articles/news_and_politics/assessment/2002/04/abduallah_azzam.html. Since its formation in the late 1980s, al-Qaeda has spread this militant ideology across the Middle East, to
violence, terrorism, and extremist interpretations of Islam, the argument goes, proves that Islam itself is inherently violent, and, thus, that legislative checks on Islam and Islamic ideology are necessary to prevent the spread of extremism and to protect women, minorities, and other groups that are frequent targets of Islamist extremists. 200 This anti-Islam argument, embodied in the immediate case by the passage of Oklahoma’s SQ 755, plays into the hands of al-Qaeda in two ways. First, it encourages and perpetuates the infamous “clash of civilizations” thesis—the idea that inherent differences between Western and Islamic cultures must necessarily lead to at least some level of conflict between the two. 201 Second, it inadvertently, and foolishly, acknowledges al-Qaeda and other radical Muslims who share its ideology to be the true arbiters of Islamic thought and theology. 202 In this context, the decision in Awad must be viewed not only as


202. As numerous writers, reporters, and academics have pointed out, Osama bin Laden himself had no formal Islamic training. See Rohan Gunaratna, Inside Al Qaeda: Global Network of Terror 86–87 (2002) (noting that bin Laden not only “was not trained as a religious scholar,” but, in fact, “had no formal training in Islam apart from what he had gleaned from his own reading . . . .”); Eric Marrapodi, Bin Laden’s Theology a Radical Break with Traditional Islam, CNN Belief Blog (May 4, 2011, 3:00 AM), http://religion.blogs.cnn.com/2011/05/04/bin-ladens-theology/ (discussing bin Laden’s lack of religious authority with a number of prominent academics—including Ebrahim Moosa, a professor of religion and Islamic studies at Duke University; John Esposito, a professor of religion and international affairs at Georgetown University’s School of Foreign Service; and Aftab Malik, a global expert on Muslim affairs at the United Nations Alliance of Civilization). Indeed, even Islamic religious scholars were adamant that bin Laden and al-Qaeda did not speak for Islam. Prominent American Islamic scholar Hamza Yusuf, for instance, derided bin Laden’s attempts to use religious exhortations and Islamic fatwas to frame his radical views:

According to Islamic law, [Osama bin Laden] does not represent legitimate state authority. He has no authority to declare war on anybody . . . . [I]t is very dangerous for us to say that Osama bin Laden represents Muslim law because he does not. He does not

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a powerful defense of the United States’ principles and ideals, but also as an essential tool in the United States’ global ideological struggle against radical Islamists.

The idea that civilizational and cultural differences must, almost necessarily, lead to conflict between the West and the Muslim world—first proposed by political theorist Samuel Huntington in the early 1990s—has come to be an accepted trope amongst radical Islamists. The extremist group Hizb ut-Tahrir has published its own pamphlet explaining the “inevitability” of this clash, and Osama bin Laden himself supported and encouraged the “clash of civilizations” thesis. So far, however, a broader acceptance of this theory within the Muslim world has largely failed to have that authority. The only people who can declare jihad are legitimate rulers, and none of these groups has that legitimacy.

SCOTT KUGLE, REBEL BETWEEN SPIRIT AND LAW: AHMAD ZARRUQ, SAINTHOOD, AND AUTHORITY IN ISLAM 21 (2006) (quoting Hamza Yusuf). Similarly, Muhammad Tahir-ul-Quadri, a prominent Pakistani Islamic scholar and religious leader, published a spirited, 512-page fatwa condemning suicide bombings and terrorism—al-Qaeda’s most prominent tactics—as un-Islamic. MUHAMMAD TAHIR-UL-QADRI, FATWA ON TERRORISM AND SUICIDE BOMBINGS (2010). When United States policy-makers, such as the Oklahoma legislature, castigate the so-called “Islam” of Osama bin Laden and other Islamists by attempting to limit Muslim-Americans’ freedom of religion, they inadvertently reinforce the false perception that it is bin Laden—and not the Muslims and Islamic scholars who oppose him—who offers the “correct” interpretation of the Islamic faith.

203. See generally Huntington, supra note 201 (outlining Huntington’s theory of the “clash of civilizations”).


205. See HATMIYYAT SIRA’A UL-HADHARAT [THE INEVITABILITY OF THE CLASH OF CIVILISATION] 28–62 (2002), available at http://www.e-prism.org/images/clashofcivilisation.pdf. See also PETER L. BERGEN, THE Osama BIN LADEN I KNOW: AN ORAL HISTORY OF AL QAEDA’S LEADER 322 (2006); Osama bin Laden, Declaration of War Against the Americans Occupying the Land of the Two Holy Places, PBS NEWSHOUR (Aug. 23, 1996, 12:21 PM), http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html; Osama bin Laden, Text of World Islamic Front’s Statement Urging Jihad Against Jews and Crusaders, INVESTIGATIVE PROJECT ON TERRORISM (Feb. 23, 1998), http://www.investigativeproject.org/document/id/180. Osama bin Laden endorsed the clash of civilizations thesis in an interview with the Arabic-language news network Al Jazeera conducted shortly after 9/11, stating that there was “no doubt” that he supported and believed in the existence of this civilizational clash. BERGEN, supra, at 322. Indeed, the idea of a civilizational clash between the United States, in conjunction with its allies (particularly the Jewish state of Israel), has been present since bin Laden’s earliest anti-American writings. See bin Laden, Declaration of War, supra (accusing a “Zionist-Crusader Alliance” of seeking to occupy the Arabian Peninsula and of exploiting and murdering Muslims throughout the Middle East). Bin Laden later expanded his anti-American vision, making his perception of a clash of civilizations even more explicit by issuing a fatwa declaring that “kill[ing] . . . Americans and their allies” was “an individual duty for every Muslim in every country throughout the world. See bin Laden, Text of World Islamic Front’s Statement, supra.
materialize: while tensions concerning the proper balance between liberal values and Islamic traditions and identity are certainly present within many Muslim societies, research has shown that the majority of Muslims across the globe support democratic institutions and have rejected the violence and extremism propounded by al-Qaeda. Thus, one of bin Laden’s primary goals was to inflame cultural differences in order to persuade Muslims that the West, led by the United States, was their inveterate enemy, an opponent of their Islamic values that must be violently confronted. Even though bin Laden himself has been eliminated, this strategy remains a central concern of al-Qaeda: an al-Qaeda strategy paper discovered in Germany, for instance, reveals that the organization “expects . . . growing fear among the general population and increasing reprisals on the part of the security [forces] will marginalize Muslims.” As a result of such escalation,” the paper continues, “Muslims will join the Holy War in ever larger numbers.” The strategy described in this paper is indicative not just of al-Qaeda’s goals in Germany, but, indeed, of the organization’s global aspirations: if Western governments marginalize their Muslim citizens by attacking their faith, calling their loyalty into question, or subjecting them to unwarranted or unlawful harassment by police or security forces, these governments will inadvertently encourage both the “clash of civilizations” perception and the very radicalization that al-Qaeda itself seeks to foment.


207. After bin Laden’s death at the hands of United States Navy SEALS, for instance, documents captured from his Abbottabad compound revealed that he was deeply concerned with portraying al-Qaeda’s image in such a way as to instill and reinforce the perception among Muslims that they were “in a holy war with America.” Seized Bin Laden Writings Yield New Details, Rwandan Woman Convicted of Genocide, PBS NEWSHOUR: THE RUNDOWN (June 24, 2011, 8:27 AM), http://www.pbs.org/newshour/rundown/2011/06/seized-materials-reveal-bin-laden-ties-rwandan-woman-convicted-of-genocide.html (quoting the Associated Press).


209. Id.

210. An example of this kind of avoidable cycle can be found in an incident that occurred in the United States in January 2011: in response to what it perceived as unjustified police investigation and harassment of Muslim communities, CAIR, the Council of American-Islamic Relations, published an online poster-graphic with the headline “Build a Wall of Resistance,” extolling Muslim-Americans not to talk to the FBI. Todd Starnes, CAIR Says Poster Warning Against Helping FBI is Misinterpreted, FOX NEWS (Jan. 13, 2011),
Anti-Islamic legislation, such as Oklahoma’s ban on the application or consideration of *sharia* law, must be analyzed with al-Qaeda’s—and other radical Islamists’—global strategy in mind. Far from seriously addressing the real or perceived threats that anti-*sharia* activists fear, Oklahoma’s SQ 755 and other, similar measures, likely increase Islamic radicalization by perpetuating a false dichotomy between “Western” and “Islamic” values. There is a profound difference between the *sharia* propounded by Islamist extremists and that followed by the vast majority of Muslims, both in the United States and across the globe. For a state like Oklahoma to condense thirteen centuries of Islamic thought into one monolithic “*Sharia*” not only ignores a wealth of diversity within the global Islamic community; it also encourages the very civilizational rift that al-Qaeda and other radical groups still seek to beget.

As has been described in the foregoing Comment, *sharia* law is not so much a specific legal code as it is a way of life for adherents to the Islamic faith. For this reason, Paul Marshall, a leading scholar in the study of religious freedom, writes:

> [C]riticism of the notion of *shari’a* often sounds strange to Muslims, even though they might disagree with stoning adulterous women or cutting the hands off thieves. Criticizing *shari’a* as such, as distinct from “extreme *shari’a*,” can sound like a criticism of “justice” or “rights” or “the right” or “the good.”

Far from merely criticizing *sharia*, as the district court points out, Oklahoma’s attempt to ban *sharia* altogether “conveys a message of
disapproval of [the entire Islamic] faith.”214 Indeed, Awad’s contentions that SQ 755 “conveys an official government message of disapproval and hostility toward his religious beliefs” and sends a message to Muslim-American citizens that they are “outsider[s and] not [ ] full member[s] of the political community” are feelings that are likely shared by the wider Muslim-American community as a whole.215 At a time when domestic radicalization and the attendant risk of homegrown terrorism are on the rise, these are precisely the kind of messages that American policy-makers should not be conveying to the nation’s Muslim-American citizens.216

In refusing to allow the certification of SQ 755 and, thus, preventing its subsequent incorporation into Oklahoma’s constitution, the Awad courts did not merely prevent an unconstitutional and redundant law from going into effect.217 They also, perhaps just as importantly, prevented the Oklahoma electorate from inadvertently handing a significant propaganda victory and recruiting tool to al-Qaeda and other Islamist extremists.218

VI. IMPACT

As the first judicial examination of state attempts to ban or limit the application of sharia law in American courts, the Tenth Circuit Court of Appeals’ judgment in Awad will likely have a significant impact on further legal controversies that arise with respect to this issue. Most significantly, the Awad judgment demonstrates that facially discriminatory legislation—e.g., legislation that textually specifies limitations on Islam or sharia—will not survive constitutional scrutiny.219 Because of its emphasis on textual language and intent, however, the Awad decision has not caused states attempting to ban sharia to abandon their efforts.220 Instead, state legislators have begun changing the language of their legislation in an attempt to

215. Id. at 1303.
216. See JEROME P. BIELOPERA, CONG. RESEARCH SERV., AMERICAN JIHADIST TERRORISM: COMBATING A COMPLEX THREAT (2011), available at http://www.fas.org/sgp/crs/terror/R41416.pdf. In the past two and a half years, between May 2009 and October 2011, thirty-two “homegrown” jihadist terrorist plots have been disrupted, compared to twenty-one such plots disrupted during the seven and a half years between 9/11 in 2001 and April 2009. Id.
217. See supra notes 172–98 and accompanying text.
218. See supra notes 199–217 and accompanying text.
219. See Awad v. Ziriax, 670 F.3d 1111, 1126–30 (10th Cir. 2012); Awad, 754 F. Supp. 2d at 1305–08.
strategically avoid “singling out” Islam as Oklahoma’s SQ 755 did.\footnote{Indeed, this is the very strategy that anti-sharia activists have advised states to follow in the wake of the \textit{Awad} judgment. See Frank J. Gaffney, Jr., \textit{American Laws for American Courts: Preserving the Constitution Means Rejecting Shariah}, WASH. TIMES (Jan. 23, 2012), http://www.washingtontimes.com/news/2012/jan/23/american-laws-for-american-courts/. Arizona’s legislation followed this general strategy. See id. More recent legislation, such as Virginia’s House Bill 631, also appears to be using more generalized language in an attempt to evade \textit{Awad}’s prohibitions. See Va. H.B. 631.} One popular strategy, which has already been employed by three states, is to use the “American Laws for American Courts” draft legislation created by vehemently anti-sharia lawyer David Yerushalmi for an organization called the American Public Policy Alliance.\footnote{See American Laws for American Courts, AM. PUB’Y ALLIANCE, http://publicpolicyalliance.org/?page_id=38 (last visited Jan. 8, 2013). See also Gaffney, supra note 221 (“While Shariah would certainly be covered by [American Laws for American Courts initiatives], it is not singled out for special treatment. No challenge has been mounted thus far in any of the states where it is the law today. And some 20 other states are actively considering ALAC’s adoption in the current legislative session.”).} This draft legislation places a blanket ban on the application of “foreign law[s], legal code[s], or system[s]” by forbidding courts and other state tribunals from basing their decisions on any source of law that “would not grant the parties affected by the ruling or decision the same fundamental liberties, rights, and privileges granted under the U.S. and [State] Constitutions.”\footnote{American Laws for American Courts, supra note 222.}

To date, no challenge has been raised against state laws modeled on the “American Laws for American Courts” legislation.\footnote{See Frank Gaffney, Jr., \textit{American Laws for American Courts}, CTR. FOR SECURITY POL’Y (Jan. 23, 2012), http://www.centerforsecuritypolicy.org/p18912.xml.} While it, thus, remains to be seen whether such laws will be upheld as constitutional, it is likely that, like the blatant sharia ban in SQ 755, these back-handed attempts to limit the application of sharia will also fail to pass constitutional muster.\footnote{See generally Penny M. Venetis, \textit{The Unconstitutionality of Oklahoma’s SQ 755 and Other Provisions Like It That Bar State Courts from Considering International Law}, 59 CLEV. ST. L. REV. 189 (2011) (explaining the unconstitutionality of legal provisions that seek to ban the application or consideration of international law).} Such laws will likely result in confusion with respect to which foreign laws will be explicitly barred from consideration. Under the United States Constitution’s Supremacy Clause, federal law, which \textit{includes} international law, in the form of treaties between the United States and other countries, is the supreme law of the land.\footnote{U.S. CONST. art. VI, § 2.} While a ban on “foreign” law could be interpreted to exclude foreign precepts constitutionally incorporated into United States domestic law, the distinction between
applicable and inapplicable foreign law will not always be clear; indeed, “a
gen-eral ban on international law may be a constitutional violation if that ban
is interpreted to include restrictions on the consideration of treaties or other
international agreements that the United States has entered or adopted
pursuant to the U.S. Constitution.” Legal provisions like the American
Laws for American Courts initiatives may also unconstitutionally interfere
with judicial independence by placing legislative constraints on judicial
decision-making. Finally, policy considerations, such as interference with
principles of Full Faith and Credit, problems of comity, and the threat of
unintended consequences, should cause states to think twice before
implementing these types of blanket bans on international or foreign law.

VII. CONCLUSION

The significance of the Awad v. Ziriax decision cannot be overstated. In
a world in which the United States faces a continuing ideological struggle
with radical Islamists—a struggle that will likely gain an even broader
significance as Islamist political groups wield greater power in a post-Arab
Spring Middle East—it is imperative that the country maintains its
fundamental values by protecting the rights of all American citizens to
worship freely and to practice their religion without public approbation or
government interference. It is equally imperative that American policy-
makers do not inadvertently reinforce the Islamist “clash of civilizations”
narrative by positing an inherent dichotomy between Western and Islamic
values. In light of these considerations, the decision in Awad v. Ziriax
represents a victory not only for American values, but also for American
credibility within the wider Islamic world.

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228. See id., at 6–14.
229. See id.; Venetis, supra note 225, at 207–15.
230. See supra notes 199–218 and accompanying text.
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