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Ann Laquer Estin

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Ann Laquer Estin*

American courts confront questions of religious law in family disputes and other cases involving matters such as contracts, torts, or the use of private arbitration tribunals for dispute resolution. In each of these areas, secular courts must endeavor to strike a constitutional balance between free exercise and establishment concerns when disputants present their controversies, claims, or evidence to the court. Adherents of religious law face the corresponding challenge of determining how and when to invoke secular legal authority in their private disputes. But religious family law practices provoke particularly intense and polarized debate in the United States and other nations.

For the most part, we consider family matters to be located within a zone of privacy, unless there are harms to family members that the state must address.[1] Individuals may choose to govern their lives through norms of religious law, even when these have no secular legal effect.[2] For those public rights and obligations that depend on personal or family status,

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1. On marital privacy, see for example *Griswold v. Connecticut*, 381 U.S. 479 (1965).

2. *See* Ann Laquer Estin, *Unofficial Family Law*, 94 IOWA L. REV. 449 (2009); *see also* JULIE MACFARLANE, ISLAMIC DIVORCE IN NORTH AMERICA: A SHARI'A PATH IN A SECULAR SOCIETY (2012) (discussing use of parallel civil and religious divorce procedures). For a notable decision affirming this practice, see *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013).

however, the state maintains a monopoly over the legal definition of spousal or parent-child relationships. In this public sphere, questions of marriage validity, divorce recognition and parentage determination become important for purposes of criminal law, creditor's rights, bankruptcy, income tax, inheritance, Social Security benefits, immigration and many other subjects.

As a family law scholar, I believe that the goals of secular and religious family law are often harmonious, and I have argued for a legal pluralism in the United States that is subject to the constraints of our fundamental "political and constitutional values, [including principles] of equality, nondiscrimination, [due process,] and religious freedom . . . as well as the protective policies that form the foundation for our particular rules of family law."[3] This vision of pluralism seeks to accommodate diverse cultural and religious traditions within our secular legal system, and rejects an approach in which autonomous religious institutions exercise independent authority over family law matters.[4] This approach "reflects a contemporary understanding of our society as a diverse and multicultural one, and of the family as central to the establishment of identity and meaning in private life."[5] My writing has explored the process in which common law courts adjudicating these cases have begun to develop principles defining the terms and limits for accommodation of religious family practices,[6] and I have followed with interest as many judges and scholars in the United States and other countries have made thoughtful contributions to this dialogue.[7]

The debate over multicultural accommodation and fundamental values has taken a new direction since 2010, with the enactment of legislation in several states designed to constrain the process through which courts

3. *See, e.g.*, Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 541 (2004). It would also be subject to constraints of criminal law and the public child welfare system. *See id.* at 568 n. 169.

4. On the definitional and membership problems associated with formal legal pluralism, see Ann Laquer Estin, *Family Law, Pluralism, and Human Rights*, 25 EMORY INT'L L. REV. 811, 824-27 (2011).

5. *Embracing Tradition*, *supra* note 3, at 541.

6. In addition to the other articles previously cited, see also The Multi-Cultural Family (Ann Laquer Estin, ed. 2008), Ann Laquer Estin, *Toward a Multicultural Family Law*, 38 FAM. L.Q. 501 (2004)

7. *See* The Multi-Cultural Family, *supra* note 6, *see also* MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION (Joel A. Nichols, ed. 2012).

evaluate relevant principles of religious law.[8] At the outset, these proposals were framed to prohibit any consideration of Sharia law, until the federal courts ruled that the Oklahoma ballot initiative taking this approach violated the Establishment Clause.[9] More recent statutes apply more broadly to any "foreign law,"[10] and seek to control state courts' consideration of "foreign law" by two techniques: (1) restricting the use of traditional common law principles of comity and forum non conveniens,[11] and (2) limiting the enforcement of contractual choice of law and forum selection agreements.[12]

In their campaign to enact these laws, the proponents have focused on family law, tempering the sweeping language of their legislation with exemptions for contracts entered into by corporations or other business entities,[13] or directing the new restrictions exclusively to family law.[14] It is not evident how or whether the new statutes will lead to different outcomes in family disputes. The proponents pointed to examples of cases in which state courts considered a claim or evidence based on religious law or practice,[15] but the same examples suggest that courts were able to handle these issues appropriately.[16] There is reason for concern, however, that the

8. An argument for this type of legislation is advanced by *Shariah Law and American State Courts: An Assessment of State Appellate Court Cases*, CTR. FOR SEC. POLICY (May 20, 2011), *available at* http://shariahinamericancourts.com/wp-content/uploads/2011/06/Sharia_Law_And_American_State_Courts_1.4_06212011.pdf; *see also* Andrea Elliott, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES (July 30, 2011), http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all&_r=0. For arguments against enactment of this legislation, see Faiza Patel et al., CTR. FOR AM. PROGRESS, *Foreign Law Bans: Legal Uncertainties and Practical Problems* (May 23, 2013), *available at* http://www.brennancenter.org/sites/default/files/publications/ForeignLawBans.pdf; Salli A. Swartz, ABA, *Resolution and Report 113A* (Aug. 8–9, 2011), *available at http://www.americanbar.org/content/dam/aba/directories/policy/2011_am_113a.authcheckdam.pdf*.

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

10. *Accord* KAN. STAT. ANN. § 60-5102 (West, Westlaw through 2013 Sess.); TENN. CODE ANN. § 20-15-101 (LEXIS through 2013 First Reg. Sess.).

11. *See, e.g.*, KAN. STAT. ANN. §§ 60-5103, 60-5105(b) (West, Westlaw through 2013 Sess.).

12. *See, e.g.*, KAN. STAT. ANN. §§ 60-5104, 60-5105(a) (West, Westlaw through 2013 Sess.).

13. *See, e.g.*, KAN. STAT. ANN. § 60-5108 (West, Westlaw through 2013 Sess.); TENN. CODE ANN. § 20-15-105 (LEXIS through 2013 First Reg. Sess.).

14. Patel et al., *supra* note 8, at 5–6, 28–29, 50 n.19, 56 n.158; *see, e.g.*, N.C. GEN. STAT. § 1-87.14 (LEXIS through 2013 Sess.).

15. *See Shariah Law and American State Courts*, *supra* note 8, at 29–42 (listing "Top 20 Cases").

16. *See* Patel et al., supra note 8, at 6–7 (rebutting the argument related to the "Top 20" cases).

more extreme form of these statutes will do serious harm to the ordinary practices of international comity in transnational family law cases.[17]

In some formulations—as enacted in states such as Arizona, Louisiana, North Carolina, and Tennessee—the new foreign law statutes seem designed to reaffirm the well-established principle that courts may not enforce a foreign law "if doing so would violate a right guaranteed by the [state or federal] Constitution . . . or conflict with the laws of the United States or this state."[18] In states such as Kansas and Oklahoma, the statutory language is much more sweeping. Kansas prohibits any ruling based,

> in whole or in part on any foreign law, legal code or system that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights and privileges granted under the United States and Kansas constitutions, including, but not limited to, equal protection, due process, free exercise of religion, freedom of speech or press, and any right of privacy or marriage.[19]

This seems to require a broad comparative constitutional law inquiry, in every choice of law or comity case, to determine whether the nation concerned has protections that are identical to those in Kansas.[20]

With this essay, my goal is not to critique or interpret the new foreign law statutes.[21] Rather, I intend to trace the contours of comity and

17. *See* Ayelet Shachar, *Faith in Law? Diffusing Tensions Between Diversity and Equality*, *in* MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION, *supra* note 7, at 341, 346–49. There are also many other reasons to object to these laws, including their potential to increase the vulnerability of some family members in religious minority communities. *See id*.

18. ARIZ. REV. STAT. ANN. § 12-3103 (Westlaw through First Special Sessions of the Fifty-first Legis.); *see La*. REV. STAT. ANN. § 6001 (Westlaw through 2013 Sess.); *see also N.C. Gen. Stat* § 1-87.14 (LEXIS through 2013 Sess.); TENN. CODE ANN. § 20-15-102 (LEXIS through 2013 First Reg. Sess.). For the principle that courts in the United States cannot recognize and enforce foreign judgments that violate our public policy or due process norms, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW section 482 (1987). On the interpretation problems that may arise under these statutes, see Patel et al., *supra* note 8, at 15–24; *see also* Swartz, *supra* note 8, at 9–11 (arguing that "existing law already provides adequate protections").

19. KAN. STAT. ANN. § 60-5103 (West, Westlaw through 2013 Sess.); *see also* OKLA. STAT. ANN. tit. 12, § 20(B) (West, Westlaw through 2013 Legis. Sess.) (same).

20. *See* Patel et al., *supra* note 8, at 15–17.

21. In addition to Patel et al., *supra* note 8, see generally Aaron Fellmeth, *U.S. State Legislation to Limit Use of International and Foreign Law*, 106 AM. J. INT'L L. 107 (2012); Carlo A. Pedrioli,

constitutional law more generally, noting the circumstances in which courts deciding family law matters under ordinary comity or contract principles might refuse to apply foreign or religious law, or to recognize and enforce a judgment or arbitral award. From a constitutional perspective, the important questions involve procedural and substantive protections for family rights under the Due Process Clause, equality and nondiscrimination arguments under the Equal Protection Clause, and religious freedom protected by the Establishment and Free Exercise Clauses.

Constitutional doctrines provide the clearest possible threshold definition of both due process and public policy, and provide a useful lens for examining the types of concerns that courts might have in deciding these cases. In my view, state courts have generally done a good job using comity, contract, and the Constitution to manage cases involving foreign and religious family law. The most difficult cases they face are problematic, not because they reference foreign or religious law, but because they involve transnational families with ongoing ties to multiple countries and legal systems. This presents a conceptual problem, which is not clearly addressed in these cases, regarding how we should define and understand the meaning of membership in our broader legal and political community.

I. COMITY, CONTRACTS, AND DUE PROCESS

Most discussions of international comity in the United States begin with *Hilton v. Guyot*,[22] which suggested that foreign country court judgments meeting basic requirements of reliability and fairness should be given legal effect, but also that a court asked to extend comity has discretion in making this determination.[23] Contemporary formulations of the *Hilton* principle

Constructing the Other: U.S. Muslims, Anti-Sharia Law, and the Constitutional Consequences of Volatile Intercultural Rhetoric, 22 S. CAL. INTERDISC. L.J. 65 (2012); Ryan H. Boyer, Comment, *"Unveiling" Kansas's Ban on Application of Foreign Law*, 61 U. KAN. L. REV. 1061 (2013); Sarah M. Fallon, Note, *Justice for All: American Muslims, Sharia Law, and Maintaining Comity Within American Jurisprudence*, 36 B.C. INT'L & COMP. L. REV. 153 (2013); Bradford J. Kelley, Comment, *Bad Moon Rising: The Sharia Law Bans*, 73 LA. L. REV. 601 (2013).

22. 159 U.S. 113 (1895).

23. *See* Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 8–11 (1991). Contemporary formulations of the comity principle follow this broad approach. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 481–82; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971).

enumerate similar requirements—including, whether "the judgment was rendered [by] . . . a judicial system that . . . provide[s] impartial tribunals [and] . . . procedures compatible with due process of law;" whether the foreign court had an appropriate basis for exercising "jurisdiction over the defendant;" and whether the defendant had notice and an opportunity for a hearing.[24] As part of the discretion accorded by the comity doctrine, states may deny recognition to foreign judgments based on a "strong public policy" that "would have precluded recovery" if the matter had been tried in its own courts.[25]

State courts determining whether to extend comity to foreign judgments in family law cases generally apply the same requirements developed in interstate cases decided under the Due Process Clause or the Full Faith and Credit Clause.[26] These requirements primarily concern jurisdictional grounds and the question of notice and an opportunity for a hearing.[27] Similarly, in cases involving marital agreements concluded abroad, state courts may apply their own laws to determine how and whether the agreement should be enforced.[28]

For divorce, the rule in the United States is that jurisdiction must be based on the residence or domicile of one of the parties in the forum state.[29] This principle has a long history in the context of migratory interstate divorces as well as international cases.[30] Courts deny comity to a divorce obtained abroad by a petitioner living with his or her spouse in the United States, even if the foreign court had a basis for jurisdiction, such as

24. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482.

25. *Id*.; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 98 cmt. g, 117 cmt. c.

26. *See generally* ANN LAQUER ESTIN, INTERNATIONAL FAMILY LAW DESK BOOK, 14–15 (2012) [hereafter ABA DESK BOOK] (discussing comity).

27. *Id*. at 6; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 484 (Recognition of Foreign Divorce Decrees); *id*. § 485 (Recognition and Enforcement of Foreign Child Custody Orders); *id*. § 486 (Recognition and Enforcement of Foreign Support Orders). Courts may extend comity to orders of foreign religious tribunals, but only if those orders have civil legal effect in the country where they were issued. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 484–86.

28. *E.g*., Shaban v. Shaban, 105 Cal. Rptr. 2d 863, 865 (Ct. App. 2001); Atassi v. Atassi, 451 S.E.2d 371, 373–74, 376 (N.C. Ct. App. 1995); *see also* ABA DESK BOOK, *supra* note 26, at 81–83.

29. *See* Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 385–86 (2007).

30. *See id*.

nationality, that was sufficient under its own law.[31] Personal jurisdiction is not required to litigate personal status matters in the United States—including dissolution of marriage[32] and termination of parental rights.[33] It is necessary for litigation of the financial aspects of divorce,[34] however, and also for establishing parentage and determining child support.[35] This practice has been described as divisible divorce jurisdiction. Courts apply the same principles to international matters, both under the doctrine of comity and the more specific formulations of statutes—such as the Uniform Interstate Family Support Act (UIFSA) and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).[36] Constitutional due process norms also require notice and an opportunity for a hearing in family law cases even—or especially—when personal jurisdiction is not mandatory.[37] Courts apply the same rule in international cases, denying comity to custody and divorce orders entered by foreign tribunals that failed to provide the respondent with notice and an opportunity for a hearing.[38]

In a significant group of cases, state courts have refused comity to orders of foreign religious tribunals exercising official authority that was not consistent with United States due process norms.[39] Following the divisible

31. *See, e.g.*, *In re* Ramadan, 891 A.2d 1186, 1190 (N.H. 2006), Farag v. Farag, 772 N.Y.S.2d 368, 371 (N.Y. App. Div. 2004); *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 484 (Recognition and Enforcement of Foreign Divorce Decrees); *see also* ABA DESK BOOK, *supra* note 26, at 62 nn.87–89.

32. *See* Pennoyer v. Neff, 95 U.S. 714, 734–35 (1877); *see also* Williams v. North Carolina, 317 U.S. 287, 298–99 (1942).

33. *See, e.g.*, Utah *ex rel*. W.A., 63 P.3d 607, 613–17 (Utah 2002); *In re* R.W., 39 A.3d 682, 693 (Vt. 2011); *see also* UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT (UCCJEA) § 201(c), 9 U.L.A. 23–24 (1997).

34. *See* Kulko v. Super. Ct. of Cal., 436 U.S. 84 (1978); Estin v. Estin, 334 U.S. 541 (1948).

35. *See Kulko*, 436 U.S. 84; *see also* UNIFORM INTERSTATE FAMILY SUPPORT ACT (UIFSA) § 201, 9 U.L.A. (Part 1B) 235 (1999 & Supp. 2012).

36. *See* ABA DESK BOOK, *supra* note 26, at 92–93 (financial aspects of divorce); *id*. at 145–53 (parental responsibilities); *id*. at 228–37 (child support). *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 485 (Recognition and Enforcement of Foreign Child Custody Orders) (1987); *id*. § 486 (Recognition and Enforcement of Foreign Support Orders).

37. *See* ABA DESK BOOK, *supra* note 26, at 6; *see also* Ann Laquer Estin, *Global Child Welfare: The Challenges for Family Law*, 63 OKLA. L. REV. 691, 696–701 (2011).

38. *E.g.*, Seewald v. Seewald, 22 P.3d 580, 584–85 (Colo. App. 2001); *see* ABA DESK BOOK, *supra* note 26, at 62 nn.90–91.

39. *E.g.*, Tal v. Tal, 601 N.Y.S.2d 530 (N.Y. Sup. Ct. 1993); Atassi v. Atassi, 451 S.E.2d 371 (N.C. Ct. App. 1995).

divorce principle, courts have been most concerned with orders that address financial and custody issues, and their analysis often blends public policy and due process considerations.

States have taken different positions as to whether and when foreign judgments, based on different substantive legal standards, may be said to violate a strong public policy for comity purposes. This claim has not generally been successful with financial orders,[40] but state courts do require that foreign child custody orders must be based on a consideration of the best interests of the child.[41] Although courts apply this principle universally, they reach different conclusions on whether to make an independent determination of the child's best interests when asked to give effect to a foreign court's order.[42]

Beyond the realm of international comity, arbitration by Jewish or Islamic tribunals located within the United States has also been a flash point in controversies over the use of religious law.[43] Because all arbitration is based on an agreement between the parties, the protections are primarily contractual, with state or federal arbitration statutes setting the terms for enforcement of arbitral awards. Statutory or common law public policy norms define circumstances in which arbitration agreements should not be enforced, and the Supreme Court has consistently declined to extend constitutional due process into the realm of arbitration procedures.[44] In family arbitration, within the scope of statutes based on the Uniform

40. *See, e.g.*, Leitch v. Leitch, 382 N.W.2d 448, 450 (Iowa 1986); Dart v. Dart, 568 N.W.2d 353, 356–57 (Mich. Ct. App. 1997).

41. *See, e.g.*, Amin v. Bakhaty, 798 So.2d 75, 84–85 (La. 2001); Hosain v. Malik, 671 A.2d 988 (Md. Ct. Spec. App. 1996); Oehl v. Oehl, 272 S.E.2d 441, 443–44 (Va. 1980). *See generally* ABA DESK BOOK, *supra* note 26, at 146–47.

42. *See* ABA DESK BOOK, *supra* note 26, at 14–15. Note that this question is now typically addressed under UCCJEA § 105(c), 9 U.L.A. 13–14 (1997). *See, e.g.*, Dyce v. Christie, 17 So.3d 892 (Fla. Dist. Ct. App. 2009).

43. The broad questions in this area have been well explored in the legal literature. *See, e.g.*, *Embracing Tradition*, *supra* note 3, at 580–86; *Unofficial Family Law*, *supra* note 2, at 465–70; Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231 (2011). For an empirical research study addressing Muslim dispute resolution in divorce, see MACFARLANE, *supra* note 2, at 155–61.

44. For example, arbitration agreements may allow parties to obtain forms of relief that would otherwise be unavailable. *E.g.* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) (recovery of punitive damages). For a critique, see Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?*, 39 HARV. J. ON LEGIS. 281 (2002).

Arbitration Act,[45] courts have addressed problems of duress and unconscionability in the agreement to arbitrate,[46] and have defined some subjects—particularly child custody disputes—as subject to different standards of review.[47] When faced with agreements to arbitrate before religious tribunals, family law courts in the United States apply these neutral principles of arbitration and contract law.[48]

Public policies applied to contract enforcement are also important in the context of marital agreements, which have been another flash point in the debate over foreign and religious family law.[49] Some opponents of the foreign law bans have argued that the constitutional norms here should be construed in the other direction, to favor enforcement under the Contracts Clause.[50] Current doctrine permits the states to regulate contracts when there is a "significant and legitimate public purpose,"[51] which gives the courts wide latitude for the types of scrutiny typically applied to premarital or separation agreements.[52] It is much less clear that a complete ban on enforcement serves a purpose.

State courts applying the comity doctrine, working with the familiar procedural due process parameters of the United States Constitution and other generally applicable statutory and public policy norms, have been readily able to evaluate requests to recognize or enforce court judgments,

45. UNIF. ARBITRATION ACT, 7 U.L.A. 1 (2000).

46. *See Embracing Tradition*, *supra* note 3, at 584–85.

47. *See, e.g.*, Fawzy v. Fawzy, 973 A.2d 347 (N.J. 2009) (custody arbitration award enforceable, unless there is threat of harm to child); Miller v. Miller, 620 A.2d 1161 (Pa. Super. Ct. 1993) (custody arbitration award may be enforced, unless it is contrary to the best interests of the children). Other states refuse to enforce agreements to arbitrate child custody matters. *See, e.g.*, Kovacs v. Kovacs, 633 A.2d 425 (Md. Ct. Spec. App. 1993); Glauber v. Glauber, 600 N.Y.S.2d 740, 743 (N.Y. App. Div. 1993); Kelm v. Kelm, 749 N.E.2d 299 (Ohio 2001); Tuetken v. Tuetken, 320 S.W.3d 262 (Tenn. 2010). For a critique of this stance, see Jeffrey Haberman, *Child Custody: Don't Worry, a Bet Din Can Get It Right,* 11 CARDOZO J. CONFLICT RESOL. 613 (2010). Note that some states address arbitration of custody or child support matters by statute. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.5080 (West, Westlaw through 2014 Sess.); WIS. STAT. ANN. § 802.12(3) (West, Westlaw through 2013).

48. *See, e.g.*, Lang v. Levi, 16 A.3d 980 (Md. Ct. Spec. App. 2011); *see also infra* notes 94–11 and accompanying text.

49. *See generally Embracing Tradition*, *supra* note 3, at 569–77.

50. *See* Patel et al., *supra* note 8, at 23–24. *See generally* U.S. CONST. art. I, § 10, cl. 1 (Contracts Clause).

51. *See* Energy Reserves Grp. v. Kan. Power & Light Co., 459 U.S. 400, 411–13 (1983).

52. *See generally* ABA DESK BOOK, *supra* note 26, at 79–83.

arbitration orders, or marital agreements based on foreign or religious law. There are strong arguments for extending comity to foreign marriages and divorces, to protect the parties' reasonable expectations and avoid situations in which a marriage is treated as valid and continuing in some places and not in others. With respect to the ancillary consequences of marriage and divorce—including financial matters and parental responsibility questions—there are strong reasons to encourage private dispute resolution in its many forms. Both of these conclusions also follow from the traditional view that family relationships deserve a degree of deference and protection from state interference.

II. PUBLIC POLICY AND FUNDAMENTAL FAMILY RIGHTS

Exercising the discretion accorded by the comity doctrine, states may refuse recognition to a foreign law or judgment based on a strong public policy that would have precluded recovery if the matter had been tried in its own courts.[53] For courts in the United States, there should be no doubt that comity is already subject to the substantive protections for marriage and divorce, parental decision-making, and the termination of parental rights that the Supreme Court has identified under the Due Process Clause. Just as a court judgment violating due process principles would not be entitled to Full Faith and Credit or comity, a judgment that infringed an individual's fundamental rights should not be enforced in either a domestic or aninternational case. A significant body of case law explores the contours of these rights.

Supreme Court decisions have repeatedly identified the right to marry as a fundamental right.[54] In *Turner v. Safley*, in a context that triggered a lower level of scrutiny, the Court acted unanimously to invalidate regulations limiting prisoners' ability to marry, on the basis that the restriction was "not reasonably related to legitimate penological interests."[55] Writing for the

53. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482(2)(d) and cmt. f (1987); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 98 cmt. g, 117 cmt. c (1971). In family law, the public policy exception requires something more than different grounds for divorce or approaches to division of marital assets.

54. *Accord* Zablocki v. Redhail, 434 U.S. 374, 383–87 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

55. Turner v. Safley, 482 U.S. 78, 99 (1987).

Court, Justice O'Connor noted that "inmate marriages, like others, are expressions of emotional support and public commitment;" that "the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication;" and that "marital status often is a precondition to the receipt of government benefits (*e.g.,* Social Security benefits), property rights (*e.g.,* tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.,* legitimation of children born out of wedlock)."[56] When faced with due process claims regarding marital dissolution, the Court has conceptualized divorce as a counterpoint to marriage: "the adjustment of a fundamental human relationship."[57]

Viewing marriage and divorce as fundamental rights, the constitutional arguments seem to line up against the foreign law bans. To the extent that proponents of these bans reference practices such as polygamy, child marriage, and divorce by repudiation, these are already prohibited by state laws.[58] Rules that deny legal recognition of foreign marriages or divorces risk depriving individuals of the many basic and important rights that depend on family status, and should, accordingly, be justified by some compelling governmental interest. Based on cases such as *Turner*, it seems unlikely that the generalized fears behind the foreign laws bans could meet this standard.[59]

Parent-child relationships also give rise to fundamental rights,[60] but these are balanced against the state's compelling interest in protecting children from harm.[61] The Supreme Court requires special protections for parents in cases involving termination of parental rights,[62] and deference to a fit parent's decision-making regarding her child's visits with extended family members.[63] The Supreme Court has been more ambivalent in its

56. *Id*. at 95–96.

57. Boddie v. Connecticut, 401 U.S. 371, 383 (1971); *cf*. Sosna v. Iowa, 419 U.S. 393 (1975). *See generally Family Law Federalism*, *supra* note 29, at 424–28.

58. *See generally Embracing Tradition*, *supra* note 3, at 567–69.

59. *See also* Patel et al., *supra* note 8.

60. *E.g*., Pierce v. Soc'y of the Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

61. *See* Prince v. Massachusetts, 321 U.S. 158, 164–70 (1944). Given this balancing act, the Supreme Court's more recent decisions are best characterized as imposing an intermediate level of scrutiny. *See* David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461 (2006).

62. *See e.g*., M.L.B. v. S.L.J., 519 U.S. 102 (1996); Santosky v. Kramer, 455 U.S. 745 (1982).

63. *Accord* Troxel v. Granville, 530 U.S. 57 (2000).

protection of the parental rights for unwed fathers,[64] and courts have generally declined to extend the "fundamental rights" framework to custody litigation between a child's parents.[65] As a constitutional matter, therefore, the best interests of the child test provides sufficient protection, except in cases that also involve claims of discrimination based on race or gender.

In general, therefore, fundamental parental rights are not undermined by the usual comity analysis, which asks whether the tribunal entered an order consistent with the best interests of the child. For a custody determination made by a foreign court or religious arbitration tribunal, however, there are other concerns—particularly when the other legal system draws substantive or procedural distinctions between the parental rights of fathers and mothers. Similarly, laws that base child custody or support rights on race, religion, or birth status would trigger serious constitutional equality questions.

III. EQUAL PROTECTION AND THE FAMILY

The prohibition of laws or practices that discriminate on the basis of race or other protected grounds—such as religion or national origin—stands at the core of equal protection. Laws barring interracial marriages have been unconstitutional throughout the country since *Loving v. Virginia*,[66] and the Supreme Court concluded in *Palmore v. Sidoti* that a child custody determination based on the race of the parties was similarly unconstitutional.[67] A judgment based explicitly on the parties' race or ethnicity would clearly be unenforceable in the United States.[68]

Classifications based on gender were once pervasive in American family law, with its roots in the English ecclesiastical and common law, including the law of marriage, divorce, family property and parental rights and responsibilities. Similar principles were carried over into the emerging public structures that regulate and support families, such as federal income

64. *Compare* Stanley v. Illinois, 405 U.S. 645 (1972), *and* Caban v. Mohammed, 441 U.S. 380 (1979), *with* Lehr v. Robertsen, 463 U.S. 248 (1983), *and* Nguyen v. INS, 533 U.S. 53 (2001).

65. *Cf.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 3 (2004) (rejecting noncustodial parent's assertion of fundamental parental right to determine child's schooling). *See generally* Meyer, *supra* note 61 (discussing noncustodial parents' rights).

66. 388 U.S. 1 (1967).

67. 466 U.S. 429 (1984).

68. Rulings based on religious considerations or membership would more likely be treated as raising First Amendment questions. *See infra* Part IV.

tax and the Social Security program. Since the 1970s, however, the Supreme Court has required that legislative classifications based on gender or marital status have a direct and substantial relationship to some important governmental purpose, and may not simply reflect "mechanical application of traditional, often inaccurate assumptions about the proper roles of men and women."[69] In family law, these rulings have required that husbands and wives have the same rights with regard to alimony,[70] that sons and daughters have the same rights to financial support,[71] and that fathers and mothers have the same parental rights with respect to children they have both raised.[72]

Given the distinct legal positions of husbands and wives under Jewish and Islamic law, gender inequality has been the central issue for courts and commentators debating family law pluralism.[73] Their concern is that women face religious and communal pressure to agree to procedural and substantive rules that will be unfair in comparison to what the secular law provides.[74] Women who wish to live their lives according to different moral or religious principles, clearly have a right to forego other legal remedies that might otherwise be available. When couples bring their agreements or arbitration awards to secular courts as the basis for obtaining a civil divorce decree, however, those courts appropriately consider claims of unfairness—including claims of gender bias.[75]

Equality principles have also led the Supreme Court to strike most statutes that discriminate between children born to married or unmarried parents, insuring for example that they must have the same rights to parental

69. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 726 (1982).

70. Orr v. Orr, 440 U.S. 268 (1979) (striking Alabama statute under which husbands, but not wives, could be ordered to pay alimony).

71. Stanton v. Stanton, 421 U.S. 7, 17–18 (1975) (striking Utah statute under which girls reached majority at 18 and boys at 21).

72. Caban v. Mohammed, 441 U.S. 380 (1979). *But see* Nguyen v. INS, 533 U.S. 53, 73 (2001) (sustaining federal statute making it more difficult for child born abroad to claim United States citizenship through an unmarried father than an unmarried mother). Many cases have explored the rights of unmarried fathers, starting with Stanley v. Illinois, 405 U.S. 645 (1972).

73. *E.g.*, Linda C. McClain, *Marriage Pluralism in the United States: On Civil and Religious Jurisdiction and the Demands of Equal Citizenship*, *in* MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION, *supra* note 7, at 309; Shachar, *supra* note 17; Julia Halloran McLaughlin, *Taking Religion Out of Civil Divorce*, 65 RUTGERS L. REV. 395 (2013).

74. *Accord* Shachar, *supra* note 17, at 354.

75. *See, e.g.*, Aleem v. Aleem, 947 A.2d 489, 501–02 (Md. 2008).

support.[76] This presents a notable conflict with religious legal systems, which generally refuse to recognize father–child relationships formed outside the marital context.

IV. FAMILIES AND THE FIRST AMENDMENT

The most difficult challenges for secular state courts faced with questions of religious law or practice arise under the First Amendment Religion Clauses. While the constitutional text has been understood to protect minority religious beliefs, the Supreme Court's ruling in *Reynolds v. United States* rejected the claim that religious practices such as polygamy should be protected.[77] Contemporary doctrine holds that states cannot target or prefer a particular religion, but may enact laws that are neutral and generally applicable—even if these constrain or penalize religious practices.[78]

The neutrality requirement does important work in marriage law. To the extent that secular American family laws recognize the authority of religious clergy or groups to solemnize marriages, all clergy or groups must have the same authority.[79] If some premarital or marital agreements are enforced by the courts, marital agreements that include religious terms should also be enforced—subject to scrutiny based on the same neutral and general principles applied to similar agreements with no religious terms. When presented with agreements for *mahr*, for example, state courts appropriately consider contract defenses—including, rules of procedural and substantive unconscionability.[80] One important aspect of the Supreme Court's First Amendment doctrine is that the state governments should avoid making

76. *E.g.*, Mills v. Habluetzel, 456 U.S. 91 (1982); Gomez v. Perez, 409 U.S. 535 (1973); Levy v. Louisiana, 391 U.S. 68 (1971). Here as well, the Court has applied intermediate scrutiny, see *Nguyenv. INS*, 533 U.S. 53, 60 (2001).

77. 98 U.S. 145 (1878).

78. *See, e.g.*, Emp't. Div. v. Smith, 494 U.S. 872 (1990); *cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013) (holding that facially neutral polygamous cohabitation law was not neutral in application and enforcement). Applying this framework, the direct ban on reference to sharia law was clearly unconstitutional, because it targeted a particular religion. *See supra* note 9, and accompanying text.

79. *See, e.g.*, Persad v. Balram, 724 N.Y.S.2d 560 (N.Y. Sup. Ct. 2001).

80. *E.g.*, Odatalla v. Odatalla, 810 A.2d 93 (N.J. Super. Ct. Ch. Div. 2002); *see* Nathan B. Oman, *How to Judge Shari'a Contracts: A Guide to Islamic Marriage Agreements in American Courts,* 2011 UTAH L. REV. 287 (2011); *see also Embracing Tradition*, *supra* note 3, at 569–90.

individualized assessments of religious conduct,[81] and this principle is also important to courts determining whether it is possible to enforce a marital agreement that originates in a religious setting.[82]

Some courts apply a higher level of scrutiny to cases involving so-called hybrid rights, when a free exercise claim relates to another area protected by the Constitution. In *Wisconsin v. Yoder*, the religious freedom claim was recognized in combination with the fundamental right of parents to make important decisions regarding their children's upbringing.[83] Similarly, laws that appeared to be neutral and generally applicable, but which undermined the fundamental right to marry on religious grounds might fall within the scope of *Yoder*. These principles are less likely to be useful in custody or other disputes between parents, where the court cannot decide between religious views or prefer one parent's religion over the other's.[84]

Walking a fine line between the Free Exercise and Establishment Clauses, state courts have sometimes considered religion as a factor deciding custody disputes, particularly when there is evidence of the child's religious beliefs and needs,[85] or evidence that a parent's religiously motivated practices have had a negative effect on the child's best interests.[86] Without this sort of evidence, however, courts are clear that parental responsibility issues may not be determined on the basis of religious considerations.[87]

Similarly, in the context of divorce, state courts cannot favor one point of view when two spouses may have different religious views regarding divorce.[88] If members of a couple disagree over whether to cooperate in

81. *See Smith*, 494 U.S. at 882–84 (discussing claims for unemployment compensation after discharge).

82. *E.g.*, Victor v. Victor, 866 P.2d 899 (Ariz. Ct. App. 1993); Shaban v. Shaban, 105 Cal. Rptr. 2d 863 (Ct. App. 2001); Mayer-Kolker v. Kolker, 819 A.2d 17 (N.J. Super. Ct. App. Div. 2003).

83. 406 U.S. 205 (1972).

84. *E.g.*, Kendall v. Kendall, 687 N.E.2d 1228 (Mass. 1997); Sagar v. Sagar, 781 N.E.2d 54 (Mass. App. Ct. 2003).

85. Bonjour v. Bonjour, 592 P.2d 1233 (Alaska 1979).

86. *Kendall*, 687 N.E.2d 1228.

87. *E.g.*, Harrison v. Tauheed, 256 P.3d 851 (Kan. 2011); Katz v. Katz, 966 N.Y.S.2d 346 (N.Y. Sup. Ct. 2013), Shepp v. Shepp, 906 A.2d 1165 (Pa. 2006)*; see also* Jeffrey Shulman, *What* Yoder *Wrought: Religious Disparagement, Parental Alienation and the Best Interests of the Child*, 53 VILL. L. REV. 173 (2008).

88. *See* Sharma v. Sharma, 667 P.2d 395 (Kan. Ct. App. 1983); Wikoski v. Wikoski, 513 A.2d 986 (Pa. Super. Ct. 1986); Waite v. Waite, 150 S.W.3d 797, 801 (Tex. Ct. App. 2004); Trickey v. Trickey, 642 S.W.2d 47 (Tex. Ct. App. 1982).

religious proceedings or rituals to terminate their marriage, the state courts cannot order the recalcitrant member to participate.[89] This presents a particularly significant problem for observant Jewish women, who are unable to marry again without a *get*, or religious divorce.[90] The structural differences between the positions of husbands and wives, under religious law, create opportunities for strategic or abusive conduct that carries over into secular divorce proceedings.[91] Understanding that secular courts cannot address this issue directly, significant creativity has been brought to the effort to find a solution to the problem.[92] Jewish communities have come up with two significant responses: efforts to have legislatures enact *get* laws as a device to coordinate secular and religious divorce proceedings,[93] and the use of arbitration agreements to confer authority on a religious tribunal.[94]

In practice, New York's *get* laws have prompted a cooperative process between the rabbinic arbitration tribunals and the civil courts that has benefitted women who wish to harmonize their civil and religious family status.[95] The process has helped to reduce the opportunities for strategic

89. *See* Victor v. Victor, 866 P.2d 899 (Ariz. Ct. App. 1993); Aflalo v. Aflalo, 685 A.2d 523 (N.J. Super. Ct. Ch. Div. 1996). *But see Embracing Tradition*, *supra* note 3, at 579 (stating that "courts have relied on contract theories as a basis for ordering a recalcitrant spouse to appear before the *bet din* to deliver or accept a *get*").

90. *See Embracing Tradition*, *supra* note 3, at 578–86; *see also* Michael J. Broyde, *New York's Regulation of Jewish Marriage: Covenant, Contract, or Statute?*, *in* MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION, *supra* note 7, at 138.

91. *See Embracing Tradition*, *supra* note 3, at 578–86.

92. *See id*.; *Unofficial Family Law*, *supra* note 2, at 470–72.

93. *See Embracing Tradition*, *supra* note 3, at 578–86. In the debate over multicultural accommodation, *get* laws represent the opposite end of the spectrum from the new foreign law bans. *See id*. In the United States, New York is the only state with *get* legislation. *See id*.; *see also* N.Y. DOM. REL. LAW § 236(B)(5)(h), (B)(6)(d) (McKinney, Westlaw through L.2014, chapters 1 to 3) (enacted 1962); N.Y. DOM. REL. LAW § 253 (McKinney, Westlaw through L.2014, chapters 1 to 3) (enacted 1983); Broyde, *supra* note 90, at 148–61. *Get* legislation was enacted in the United Kingdom in 2002. *See* Divorce (Religious Marriages) Act 2002, c. 27 (Eng.). *See also Embracing Tradition*, *supra* note 3, at 581 n.257

94. *See Embracing Tradition*, *supra* note 3, at 578–86. Arbitration agreements may also prove useful for Muslim communities. *See id*. at 575–77; *see also* Mohammad H. Fadel, *Political Liberalism, Islamic Family Law, and Family Law Pluralism*, *in* MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION, *supra* note 7, at 164, 193–96; *cf*. Broyde, *supra* note 90, at 154 n.67 (noting the question of whether New York's *get* statute might apply to Islamic marriages (citations omitted)).

95. *See Embracing Tradition*, *supra* note 3, at 582–83; *see also* Broyde, *supra* note 90.

behavior between individuals who both intend to remain within the religious community.[96] If one member of a couple left the community and objected to the procedure—and the statute—on First Amendment grounds, it could face a serious establishment and free exercise challenge.[97] Beyond New York, where there are no *get* laws, state courts rely on the neutral principles of contract and arbitration law to review agreements to arbitrate before religious tribunals, as well as the outcomes of those proceedings.[98] In this context, courts also recognize clearly the constraints under the First Amendment on this review process.[99]

V. CONCLUSION

For international family law cases—including those in which a foreign court applied Islamic or Jewish law—the ordinary comity framework incorporates important protections established by constitutional law and public policy. In domestic cases, neutral principles of contract and arbitration law work reasonably well for couples and families who anticipate and plan for private ordering and dispute resolution in a religious law framework.[100] While it is clear that American courts must avoid direct interpretation or application of religious law, the traditional approach to both comity and contract do not require state courts to reject a judgment or agreement based on different substantive laws. This is precisely the point of both the comity doctrine and the move toward greater private ordering in family law.

The biggest challenge, both conceptually and practically, comes in transnational cases involving families with ties to multiple countries and legal systems over time. For example, consider a couple who marry abroad and relocate to the United States.[101] How much of the legal system from the country where they were married should follow them to the United States,

96. *See Embracing Tradition*, *supra* note 3, at 583.

97. *Cf. In re* Marriage of Goldman, 554 N.E.2d 1016, 1025–26 (Ill. App. Ct. 1990) (Johnson, J., dissenting); *Embracing Tradition*, *supra* note 3, at 579–80.

98. *See Embracing Tradition*, *supra* note 3, at 578–86.

99. *E.g.*, Lang v. Levi, 16 A.3d 980 (Md. Ct. Spec. App. 2011).

100. *See* Broyde, *supra* note 90, at 147–48 (noting that couples may not anticipate and plan ahead for these problems at the time of their marriage).

101. *E.g.*, Shaban v. Shaban, 105 Cal. Rptr. 2d 863 (Ct. App. 2001).

and for how long? How can a court determine whether they intended to be governed in the future by the law under which they were married, rather than the law of the place where they have relocated? How far should husband or wife be permitted to forum shop by moving between the couple's country of origin and the place where they have established domicile, residence, or citizenship? What if the reason for seeking a religious divorce in the United States is to assure that their status will be recognized, if one or both of them return to their home country?[102]

There are similar challenges in cases involving families who are "transnational" in the sense that they span different countries and legal systems in a single moment in time. For example, a husband and father may relocate to the United States, and choose not to bring his wife and children.[103] Or a family may try living in the United States together, and some family members may decide to return to their original home country. Or a wife may come to the United States and seek the benefit of more generous family law rules.[104] What laws should be applied to the family disputes that follow? How quickly should our laws and policies begin to override those of the country where the family began? Should the family members living abroad have the same opportunity to forum shop between the two legal systems as the family members living in the United States?[105]

These problems extend beyond the realm of family law. We have begun to recognize that failure to protect family members from serious domestic violence is a type of persecution that may be a basis for refugee status. Should foreign citizens be able to seek asylum on the basis of foreign laws that define important family status or legal rights on the basis of gender or legitimacy of birth?

In these circumstances, we have moved beyond the law of comity and the ordinary framework of contract law. Courts are understandably reluctant to treat the comity doctrine or a marital agreement like a permanent forum selection choice of law trump card. The questions in these cases are also not

102. *Cf.* MACFARLANE, *supra* note 2, at 227–31 (noting particular difficulties surrounding divorce for Muslim families in transnational cases). As Mohammad Fadel notes, a judgment from an Islamic court is necessary to establish a divorced woman's legal and moral entitlements within the Muslim community. Fadel, *supra* note 94, at 191.

103. *E.g.*, Chaudry v. Chaudry, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978).

104. *E.g.*, Hosain v. Malik, 671 A.2d 988 (Md. Ct. Spec. App. 1996).

105. *E.g.*, Amin v. Bakhaty, 798 So.2d 75, 84-85 (La. 2001).

constitutional, except in the broader sense of how we understand the process by which people become members of our political and legal community. This may suggest a more sympathetic double reading of the recent strain of foreign law statutes as legally misguided and problematic on one hand, and on the other as a strong and affirmative statement of the desire to embrace and include all families present within our borders in the broader legal institutions that shape and define our society.

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