The Other Muslim Bans: State Legislation Against "Islamic Law"

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Abstract

This Article addresses and critiques the case for state-level legislative bans on courts citing "Islamic law" or the law of Muslim-majority countries. In particular, the Article reviews the most substantive evidence adduced by the bans' supporters, in the form of a set of state court cases published by the Center for Security Policy (CSP). Very few of these cases, in fact, show courts actually applying Islamic or foreign law, and in none of these cases would the various forms of proposed legislation have been likely to alter the result. Thus even this report does not suggest a need for the state laws purporting to ban sharīʿa*. The Article thus argues that even if these bans are not unconstitutionally discriminatory in their effect, they are ineffective at achieving their claimed purpose.*

This Article was originally published as an Occasional Paper in the Harvard Papers in Islamic Law *series in 2018.*

* The author thanks Abed Awad, Lea Brilmayer, Chibli Mallat, Intisar Rabb, Sharon Tai, and two anonymous reviewers for inspiring, supporting, and editing this project.

CONTENTS

Introduction

President Donald Trump's executive orders blocking travel and immigration from five Muslim-majority countries are not the only measures that have recently sparked debate over legal responses to alleged threats to the United States from Islam and Muslims.[1] In the first months of 2017, Arkansas and Texas enacted, while Idaho, Montana, Oregon, and Wisconsin considered, laws that would prohibit courts from using foreign law. The bills' advocates claimed that such legislation was necessary to meet the threat posed by Islamic law (commonly called *sharīʿa*).[2] These states follow in the wake of Florida, North Carolina, Kansas, Arizona, Louisiana, and Tennessee, all of which have enacted such bans since 2010.[3] These efforts began in Oklahoma, where a 2010

1 *See* Trump v. Hawaii, 138 S. Ct. 2392 (2018); Int'l Refugee Assistance Project v. Trump, 857 F. 3d 554 (4th Cir. 2017); Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017); Sarsour v. Trump, 245 F. Supp. 3d 719 (E.D. Va. 2017).

2 H.B. 1041, 91st Gen. Assemb., Reg. Sess. (Ark. 2017), http://www.arkleg.state.ar.us/assembly/2017/2017R/Pages/BillInformation.aspx?measureno=HB1041 [https://perma.cc/2FCW-H4N2]; H.B. 94, 2017 Leg., 1st Reg. Sess. (Idaho 2017), https://legislature.idaho.gov/sessioninfo/2017/legislation/h0094 [https://perma.cc/6SPA-UQAN]; S.B. 479, 79th Leg. Assemb., Reg. Sess. (Or. 2017), https://olis.leg.state.or.us/liz/2017R1/Measures/Overview/SB479 [https://perma.cc/P98Q-DD26]; H.B. 45, 2017 Leg., 85(R) Sess. (Tex. 2017), http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=85R&Bill=HB45 [https://perma.cc/5KY3-NXTH]; A.B. 401, 2017–2018 Leg. (Wis. 2017–2018), http://docs.legis.wisconsin.gov/2017/related/proposals/ab401 [https://perma.cc/X3UV-YYX8]. *See also* Erin Loranger, *Bill Would Prohibit State Courts from Applying Islamic Law*, Helena Indep. Rec. (Jan. 24, 2017), http://helenair.com/news/politics/state/bill-would-prohibit-state-courts-from-applying-islamic-law/article_e8e8765e-0949-55ed-941d-5dd785d13a05.html [https://perma.cc/VF8F-Z7MJ]; George Prentice, *It's Back: Anti-Sharia Law Measure Resurfaces at Idaho Legislature*, Boise Wkly. (Feb. 1, 2017), https://www.boiseweekly.com/boise/its-back-anti-sharia-law-measure-surfaces-at-idaho-legislature/Content?oid=3974008 [https://perma.cc/2MPQ-DXDX]. Montana's governor vetoed the bill there (Bobby Caina Calvan, *Montana Governor Rejects Bill Banning Sharia Law in Courts*, Helena Indep. Rec./Associated Press (Apr. 6, 2017), http://helenair.com/news/politics/montana-governor-rejects-bill-banning-sharia-law-in-courts/article_7424b33d-6583-5c1d-a0da-73ae9f875af5.html [https://perma.cc/8LC8-LEYM]).

3 *See* Florida Chapter 2014-10, S.B. 386, 2014 Leg. (Fla. 2014), http://laws.flrules.org/2014/10 [https://perma.cc/Q6B5-5QQL]; H.B. 2087, 2011 Reg. Sess. (Kan. 2011), http://www.kslegislature.org/li_2012/b2011_12/measures/documents/hb2087_01_0000.pdf [https://perma.cc/G47C-CC7K]; H.B. 522, 2013 Gen. Assemb. (N.C. 2013), http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=h522 [https://perma.cc/PBX3-QXKK]; Ariz. Rev. Stat. Ann.

referendum authorized a "Save Our State" constitutional amendment that specifically banned state courts from considering "international law or Sharia law."[4]

The debate about these bills is often expressed in terms of religious freedom and discrimination concerns,[5] but this Article takes a different angle—asking whether these laws are effective in their stated goals. I argue, using the bills' proponents' own evidence, that they are not effective, thereby suggesting that there is little to this legislative movement beyond misperceptions and possibly unconstitutional discrimination.

Fears that courts are applying Islamic law in violation of constitutional rights arose in parallel to the rise of the Tea Party, when former House Speaker Newt Gingrich memorably warned of "creeping sharia" during his own short-lived campaign for president.[6] However, the anti-*sharīʿa* movement lived on beyond 2010, and seems to have blossomed in conjunction with the successful 2016 Trump campaign. Even though federal courts quickly enjoined the Oklahoma amendment,[7] the continued proliferation of anti-foreign law bills proves that academic observers were wrong to believe that "[t]his legislative moment in middle America passed quickly."[8]

By August 2017, anti-foreign or anti-religion law bills had been introduced in forty-three states.[9] David Nersessian useful-

§ 12-3101 (2011); La. Rev. Stat. Ann. § 9:6001 (2010); H.B. 3768, 106th Gen. Assemb., 2d Reg. Sess. (Tenn. 2010).

4 *See* H.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010), https://www.sos.ok.gov/documents/questions/755.pdf [https://perma.cc/L59T-CS8R].

5 *See infra* note 15.

6 *See* Newt Gingrich, *No Mosque at Ground Zero*, Human Events (July 28, 2010), http://www.humanevents.com/2010/07/28/no-mosque-at-ground-zero [https://perma.cc/6Q8B-PZV]; Scott Shane, *In Islamic Law, Gingrich Sees a Mortal Threat to U.S.*, N.Y. Times (Dec. 21, 2011), http://www.nytimes.com/2011/12/22/us/politics/in-shariah-gingrich-sees-mortal-threat-to-us.html [https://perma.cc/49HB-9B9T].

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

8 *See, e.g.*, Ruth Miller, Review Article, *Save Our State: A Decade of Writing on Jurisdiction and Sovereignty in East and West Asia*, 45 Int'l J. Middle E. Stud. 149, 149 (2013).

9 Hatewatch Staff, *Anti-Sharia Law Bills in the United States*, Southern Poverty Law Center (Feb. 5, 2018), https://www.splcenter.org/hatewatch/2018/02/05/anti-sharia-law-bills-united-states [https://perma.cc/SN68-QBRQ].

ly divides these "blocking" laws into three types: "full," "rights-based," and "reciprocal."[10] "Full" blocking legislation, such as the bill approved in Oklahoma in 2010 (and then enjoined by a federal judge), simply ban the application of certain elements of foreign, religious, or international law.[11] "Rights-based" laws, such as those enacted in Arizona in 2011 and North Carolina in 2013, prevent courts from recognizing foreign laws if doing so would "work[] a rights infringement in practice."[12] The model "American Laws for American Courts" (ALAC) bill, and the Kansas bill signed into law in 2012, reflect a third, "reciprocal" approach, "block[ing] foreign laws that do not provide the same rights protection as American state or federal law."[13] A fourth approach, not noted by Nersessian's typology, might be called a "public policy" approach. Florida's 2014 law, for example, simply prevents courts from recognizing or enforcing foreign laws if they conflict with Florida's "strong public policy," and it reiterates the aspects of public policy already found in the state's case law.[14]

This Article asks whether such blocking bills, especially the second, third, and fourth types, serve any purpose—are they needed to change the rules of decision in U.S. state courts, and would they have resulted in previously decided cases turning out differently? I approach these questions by engaging with the most substantive evidence the bills' proponents have yet produced—a 635-page report, *Sharia Law in American State Courts* (*SLASC*), published by the Center for Security Policy (CSP), a conservative Washington think tank.[15] The report, issued in 2011, serves as the

10 *See* David L. Nersessian, *How Legislative Bans on Foreign and International Law Obstruct the Practice and Regulation of American Lawyers*, 44 Ariz. St. L.J. 1647, 1700 (2012).

11 *Id.* at 1655–56; *see also Awad*, 670 F.3d at 1111 (affirming a lower court's injunction).

12 Nersessian, *supra* note 10, at 1656; Elizabeth LaForgia, *North Carolina Governor Allows Anti-Sharia Bill to Become Law*, Jurist (Aug. 27, 2013), http://jurist.org/paperchase/2013/08/north-carolina-governor-allows-anti-sharia-bill-to-become-law.php [https://perma.cc/S7U9-J45H].

13 Nersessian, *supra* note 10, at 1656.

14 *See* S.B. 386, 2014 Leg. (Fla. 2014), *supra* note 3.

15 Center for Security Policy, Sharia Law and American State Courts: An Assessment of State Appellate Court Cases (2011) [hereinafter SLASC].

foundation for a 2014 book.[16] The report lists fifty state-court cases in which, it claims, U.S. courts have applied *sharīʿa*, or in which Islamic law or the law of Muslim states was "relevant" to the decision. Scholars have typically passed over this report without much discussion, but I aim to take it on its own terms and to show that it misrepresents and misconstrues the available evidence. While the report does provide a useful look at how state courts engage with Islamic and Muslim law (a distinction discussed below), that look does not reveal the picture the CSP report paints. In fact, a close analysis of the cases shows that, when engaging with Islamic and Muslim law, U.S. courts consistently look to established limiting principles from the fields of contracts, family law, and conflict of laws. There is no indication of a problematic line of major cases that both recognized foreign law and would be fixed easily by the proposed types of legislation.

I. Existing Arguments and Counter-Arguments on Blocking Bills

a. First Amendment Challenges

Oklahoma's initial ban quickly drew federal constitutional challenges because it directly targeted Islam. Two days after voters approved the state constitutional amendment in a referendum, a Muslim Oklahoman named Muneer Awad challenged the amendment's certification, arguing that it would violate his rights under the Establishment and Free Exercise Clauses of the U.S. Constitution's First Amendment. The Federal District Court for the Western District of Oklahoma granted an injunction, which the Court of Appeals for the Tenth Circuit affirmed on appeal on Establishment Clause grounds. Specifically, the Tenth Circuit held that Awad was likely to prevail in his claim that the amendment "discriminated among religions," and was therefore subject to strict scrutiny—a

16 Center for Security Policy, Sharia in American Courts: The Expanding Incursion of Islamic Law in the U.S. Legal System (2014). In this Article I cite the report, but the book is based on the same cases.

test it would fail, as the state did not "identify any actual problem the challenged amendment seeks to solve."[17] In 2013, the District Court made the injunction permanent.[18]

Faced with these challenges, advocates of blocking laws have shifted their support toward more limited, and facially religiously neutral, bills of the "rights-based" and "reciprocal" varieties.[19] However, such laws may still be vulnerable to First Amendment challenges based on their intent or impact.[20] Indeed, there seems to be evidence for this view. Many state legislators have been clear that the newer blocking bills are still aimed at Islam, even if the laws' texts do not say so.[21] South Carolina State Representative Chip Limehouse, who sponsored a "reciprocal" blocking bill in that state, noted, "I think in order to avoid the constitutional challenges that will certainly come, we're gonna change the word Sharia Law to foreign law."[22] One of blocking bills' main advocates, lawyer David Yerushalmi, indicated that his efforts were specif-

17 *Awad*, 670 F.3d at 1129–30.

18 Awad v. Ziriax, 966 F. Supp. 2d 1198 (W.D. Okla. 2013).

19 *See, e.g.*, Bradford J. Kelley, Comment, *Bad Moon Rising: The Sharia Law Bans*, 73 La. L. Rev. 601 (2013); Steven M. Rosato, Comment, *Saving Oklahoma's "Save Our State" Amendment: Sharia Law in the West and Suggestions to Protect Similar State Legislation from Constitutional Attack*, 44 Seton Hall L. Rev. 659 (2014). *But see* Kimberly Karseboom, Note, *Sharia Law and America: The Constitutionality of Prohibiting the Consideration of Sharia Law in American Courts*, 10 Geo. J.L. & Pub. Pol'y 663 (2012) (defending the constitutionality of Oklahoma's law).

20 *See* Faiza Patel, Matthew Duss & Amos Toh, Foreign Law Bans: Legal Uncertainties and Practical Problems (2013); Gadeir Abbas, *Anti-Muslim Legislation and Its Hopeful Demise*, 39 Am. B. Ass'n: Hum. Rts. (2013), https://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/january_2013_no_2_religious_freedom/anti_muslim_legislation_and_its_hopeful_demise.html [https://perma.cc/WX6Y-8EF6]; Ryan H. Boyer, Note, *"Unveiling" Kansas's Ban on Application of Foreign Law*, 61 Kan. L. Rev. 1061 (2013); Muhammad Elsayed, Note, *Contracting into Religious Law: Anti-Sharia Enactments and the Free Exercise Clause*, 20 Geo. Mason L. Rev. 937, 961 (2013).

21 *See, e.g.*, Patel et al., *supra* note 20, at 33–35.

22 Javaria Khan & Hannah Allam, *Report: State Lawmakers Tweak Wording to Push Through Anti-Islam Bills*, Miami Herald (June 20, 2016), http://www.miamiherald.com/news/politics-government/article84931367.html [https://perma.cc/7NRT-BFCC]. This legislation, H. 3521, passed the House but not the Senate in the 2015–2016 term. *See* H. 3521, 2015 Leg. (S.C. 2015), http://www.scstatehouse.gov/billsearch.php?billnumbers=3521&session=121&summary=B [https://perma.cc/SSU5-FMGQ].

ically directed at *sharīʿa*, and went beyond merely changing the law: "If this thing passed in every state without any friction, it would have not served its purpose," he told *The New York Times*. "The purpose was heuristic—to get people asking this question, 'What is Shariah?'"[23]

b. Conflict of Laws Concerns

Alongside their constitutional arguments, opponents of blocking bills also argue that such bills are unnecessary. Even if elements of Islamic law, or the law of Muslim-majority countries, offend commonly held U.S. norms, the American Civil Liberties Union (ACLU) argues that there was no cause for concern because existing conflict-of-laws principles already provide safeguards. The ACLU notes that "[c]ourts may not defer to *any* law—religious or not—if doing so would result in an outcome contrary to public policy."[24]

The CSP, however, produced the *SLASC* report in large part to respond to these arguments. The report's introduction claims that it demonstrates "that Shariah law [*sic*] has entered into state court decisions, in conflict with the Constitution and state public policy."[25]

The report, the book based on it, and its associated website[26] have thus played an important role in the campaign for blocking bills. The report itself has been cited in news reports and blogs, by a U.S. Senator, in letters to the editor, and in at least

23 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 [https://perma.cc/5FSF-LPTA].

24 ACLU Program on Freedom of Religion and Belief, Nothing to Fear: Debunking the Mythical "Sharia Threat" to Our Judicial System 3 (2011) (emphasis original). *See also* Patel et al., *supra* note 20, at 33–35. The ACLU, responding to an earlier version of the CSP report, discusses a few of the cases analyzed herein.

25 SLASC, *supra* note 15, at 8.

26 Sharia in American Courts: The Expanding Incursion of Shariah Law and American State Courts (2014), http://shariahinamericancourts.com [https://perma.cc/T8AY-VF38].

one academic defense of anti-*sharīʿa* bills.[27] The cases it reprints also appear in a recent book by constitutional lawyer Jay Sekulow warning of "radical Islam"'s threat to the United States.[28] When state legislators claim that in unspecified court cases "[s]haria ha[s] already overtaken our American courts"—as Idaho State Representative Eric Redman did in 2016—they are likely also referring to the CSP report.[29] Notably, the American Public Policy Alliance, a principal advocate of model state legislation to ban the use of foreign law, prominently features the CSP report on its website. A sidebar advertises stories of "10 American Families and Shariah Law," describing cases drawn from the CSP report. The site explicitly invokes the report on its "Frequently Asked Questions" page to rebut a suggestion that existing legal doctrines protect against undesirable decisions.[30]

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27 *See, e.g.*, Kelley, *supra* note 19, at 609–12; Eli Clifton, *FBI: Center for Security Policy Sharia Report Made "Unsubstantiated Assertions,"* ThinkProgress (Feb. 24, 2012), https://thinkprogress.org/fbi-center-for-security-policy-sharia-report-made-unsubstantiated-assertions-6517a618ca91#.nheo48k1o [https://perma.cc/9QEG-FPTL]; Carla Garrison, *Why Islam's Sharia Law Is the Biggest Threat to American Safety*, Nat'l Black Robe Regiment (July 15, 2014), http://nationalblackroberegiment.com/islams-sharia-law-biggest-threat-american-safety [https://perma.cc/6PYA-352E]; Stephen M. Gelé, *Southern Poverty Law Center on Sharia in American Courts: Move On, Nothing to See Here*, Breitbart (June 20, 2011), http://www.breitbart.com/Big-Peace/2011/06/20/Southern-Poverty-Law-Center-on-Shariah-in-American-Courts--Move-On--Nothing-To-See-Here [https://perma.cc/2DJQ-KWMM]; Fred Grandy, *The Sharia Threat to America*, Am. Thinker (Dec. 28, 2012), http://www.americanthinker.com/articles/2012/12/the_sharia_threat_to_america.html [https://perma.cc/UKB2-DVEN]; William R. Levesque, *Appeals Court Won't Stop Hillsborough Judge from Considering Islamic Law*, Tampa Bay Times (Oct. 24, 2011), http://www.tampabay.com/news/courts/civil/appeals-court-wont-stop-hillsborough-judge-from-considering-islamic-law/1198321 [https://perma.cc/4F4R-CJ8F]; Robert Steinback, *Report Aiming to Prove "Creeping Sharia" Theory Proves the Opposite*, Southern Poverty Law Center: Hatewatch Blog (June 14, 2011), http://www.splcenter.org/blog/2011/06/14/report-to-prove-creeping-shariah-theory [https://perma.cc/NB26-A6XK].

28 Jay Sekulow, Unholy Alliance: The Agenda Iran, Russia, and Jihadists Share for Conquering the World 66–73 (2016).

29 *See* Betsy Z. Russell, *Redman, at Hearing on Anti-Sharia Law Bill, Says It's "Already Overtaken Our American Courts,"* Spokesman-Rev. (Spokane, Wash.) (Mar. 17, 2016), http://www.spokesman.com/blogs/boise/2016/mar/16/redman-hearing-anti-sharia-law-bill-says-its-already-overtaken-our-american-courts/ [https://perma.cc/HL88-Y3H3].

30 *American Laws for American Courts*, American Public Policy Alliance, http://publicpolicyalliance.org/legislation/american-laws-for-american-courts

What is missing, however, is an analysis of *whether* these cases actually illustrate a need for blocking bills. Would any of the different models of anti-*sharīʿa* laws have changed the outcome in these cases? Through an analysis of the facts, arguments, and outcomes in each of these cases, I argue that the answer is "no." The CSP report itself has no such analysis, simply coding each case as "sharia compliant" or "not sharia compliant" at the trial and appellate levels. I work through the state courts' interpretive efforts in different substantive areas, and I put these cases in their legal context. The discussion reveals that the blocking bills would be essentially meaningless: not only would they not change the outcome of any of these cases, but also very few, if any, of these cases raise plausible concerns about violating important existing values in the U.S. legal system. In other words, regardless of whether they are unconstitutional or discriminatory, bills banning foreign law are simply an ineffective solution to a non-existent problem. The only real importance of blocking laws, then, may lie in their likely discriminatory intent—perhaps bolstering the argument for their unconstitutionality.

First, however, a caveat: the cases in the report are certainly not a complete, and probably not a representative, sample of U.S. state court cases where courts are called on to apply Islamic law, though they do offer a broad picture. Collecting a database of all such cases would be valuable, and may be a useful future project.[31] However, for the purposes of this research, an analysis of the fifty cases cited by the CSP report, along with others that are

(last visited Apr. 18, 2020) [https://perma.cc/DM7W-DTYG]. To the extent scholars have been critical of the report, they have simply dismissed it with little discussion, analyzed only a few of the cases, or not considered what effect the proposed bans would have on the cases. *See, e.g.*, Elsayed, *supra* note 20, at 961; ACLU, *supra* note 24; Steinback, *supra* note 27; Ed Brayton, *The Fraudulent Sharia in American Courts "Study*," Science Blogs (June 10, 2011), http://scienceblogs.com/dispatches/2011/06/10/the-fraudulent-sharia-in-ameri [https://perma.cc/4WNS-3P5G]. The last piece, while not scholarly, is particularly cutting in its critique of the report's methodology.

31 For the SHARIAsource page designed to host such a collection, see the SHARIAsource Portal Special Collection, Islamic Law in U.S. Courts, beta.shariasource.com/projects/9.

connected and relevant, is useful to inform the debate over blocking bills. The CSP report represents the strongest, most substantive, and lengthiest argument presented by the bills' proponents, who have presumably mustered their best evidence. If the cases in the report do not provide convincing evidence of a significant problem with Islamic law in American courts, then the bills' proponents have not met their burden of proof.

II. Background: Islamic Law and the CSP Report

a. Muslim Law and American Conflicts of Law

A thorough discussion of the tenets of either Islamic law, or the principles of law in each of the world's many Muslim-majority states, is beyond the scope of this Article. A bit of background, however, is helpful. Islamic law, through most of history, was a "jurists' law."[32] It evolved through scholarly reasoning from the Qur'ān and recorded traditions attributed to the Prophet Muḥammad. Islamic law opinions were recorded in a variety of treatises representing different schools of interpretation, and those opinions were applied through *fatwā*s (opinions issued in response to real or hypothetical fact patterns) and judicial rulings, neither of which had precedential value. There is considerable variation among the four mainstream legal schools of Sunnī Islam (Ḥanafī, Ḥanbalī, Mālīkī, and Shāfiʿī), and between them and Shīʿī Islam, but many of the principles discussed here are common to all the schools, and the differences are not vital for our purposes.

Three substantive aspects of Islamic law are particularly prominent in the U.S. cases at issue. Upon marriage, the parties agree to a marriage contract. Notably, husbands traditionally give

32 The following discussion is based on Wael Hallaq, An Introduction to Islamic Law (2009) (giving basic background on Islamic law); Chibli Mallat, Introduction to Middle Eastern Law (2007) (giving basic background on Islamic and Muslim law); Abed Awad, *Islamic Family Law in American Courts: A Rich, Diverse and Evolving Jurisprudence*, *in* Muslim Family Law in Western Courts (Elisa Giunchi ed., 2014) (giving an overview of the ways U.S. courts engage with Islamic family law).

their wives a dowry (*mahr* or *ṣadāq*), which has been conventionally divided into two parts. One part is paid immediately, while the "deferred" dowry is payable by the husband to the wife only upon divorce or death, unless specified otherwise in the contract.[33] Because there is, generally, no community property in most schools of Islamic law, the deferred dowry acts to compensate the wife for the loss of support from her husband's property and income that she might experience upon divorce.[34] Husbands, classically, could unilaterally divorce their wives by pronouncing *ṭalāq* (a verbal formula for dissolution of the marriage).[35] Upon divorce, child custody is typically determined by the age and gender of the children; the mother is assumed to take custody of children up to a certain age (older for girls than for boys), and the father for children older than that.[36] These principles, traditionally found in Islamic law treatises,[37] have been partially, but not completely, adopted in the family law codes of various Muslim-majority states.[38]

To refer both to Islamic law as a religious tradition and to the law of Muslim-majority countries incorporating Islamic principles—the usage apparently meant by those who fear "*sharīʿa*"

33 Mallat, *supra* note 32, at 100, 360–61.

34 *Id.*

35 Hallaq, *supra* note 32, at 172.

36 Mallat, *supra* note 32, at 357.

37 For a few English translations of such treatises, see, for example, ʻAlī Ibn Abī Bakr Al-Marghīnānī & Imran Ahsan Khan Nyazee, Al-Hidāyah/The Guidance (2006); Ahmad Ibn Luʼlu' Ibn Al-Naqīb, Reliance of the Traveller Nuḥ Ḥā Mīm Keller (ed. 1999); Majid Khadduri, The Islamic Law of Nations: Shaybani's *Siyar* (2001).

38 For arguments that these principles violate human and constitutional rights, and should be limited or not enforced in U.S. courts, see Lindsey E. Blenkhorn, Note, *Islamic Marriage Contracts in American Courts: Interpreting* Mahr *Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. Cal. L. Rev. 189 (2002); Monica E. Henderson, *U.S. State Court Review of Islamic Law Custody Decrees: When Are Islamic Custody Decrees in the Child's Best Interest?*, 36 Brandeis J. Fam. L. 423, 427–29 (1998); Chelsea A. Sizemore, Note, *Enforcing Islamic* Mahr *Agreements: The American Judge's Interpretational Dilemma*, 18 Geo. Mason L. Rev. 1085 (2011). For an overview arguing for a comparative perspective in approaching Muslim family law in U.S. courts, see Emily L. Thompson & F. Soniya Yunus, *Choice of Laws or Choice of Culture: How Western Nations Treat the Islamic Marriage Contract in Domestic Courts*, 25 Wis. Int'l L.J. 361 (2007).

in the United States—I use the term "Muslim law."[39] This includes not only Islamic law as interpreted by scholars or invoked in contracts but also the law of Muslim-majority countries (like Egypt or Pakistan) that explicitly draws, at least to some extent, on the Islamic legal tradition. Some majority non-Muslim countries, such as India and Israel, also draw on Islamic law to regulate Muslim personal and family status. The Supreme Court of India, notably, held the practice of triple *ṭalāq* (by which a husband sought to unilaterally and irrevocably divorce his wife by pronouncing *ṭalāq* three times outside of court) unconstitutional in 2017.[40]

American courts, meanwhile, are often called upon to engage with foreign law and foreign judgments (known as comity). The need for this engagement can happen in several ways. First, the parties might have agreed, in a contract, for disputes to be governed by foreign law. Second, foreign law might govern a tort case depending on where the wrongful act giving rise to the civil claim occurred. Third, in such cases one party may argue that because of the existing foreign connections, U.S. courts should dismiss the case so that foreign courts, more conversant with the facts and the law, can hear it (a doctrine known as *forum non conveniens*).[41] Such arguments can occur in both commercial and family law contexts. Parties also, at times, contract to subject themselves to rules drawn from neither foreign nor U.S. law, but from other sources—including religious legal systems like Islamic law.[42] Finally—and importantly in many of the cases below—Islamic or Muslim law might enter courts not as law, but as "extrinsic evidence" of

39 This distinction is loosely based on the usage in Khaled Abou El Fadl, Rebellion and Violence in Islamic Law 2–3 (2001).

40 *See* Supreme Court of India, *Shayara Bano v. Union of India, etc. (Supreme Court of India): Judgment on Constitutionalism of Triple Ṭalāq*, SHARIASOURCE (Sept. 11, 2017), https://beta.shariasource.com/documents/2982 [https://perma.cc/X2CF-M7TL]. *See also* Hallaq, *supra* note 32, at 143–51; Mallat, *supra* note 32, at 364–65.

41 For a review of comity in the context of foreign law bans, see 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).

42 *See* Michael A. Helfand, *Litigating Religion*, 93 B.U. L. Rev. 493 (2012); Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 Santa Clara L. Rev. 501 (2012).

the cultural and religious attitudes that governed parties' beliefs about their rights or responsibilities.[43] There are important limits, however, on the circumstances in which courts will enforce foreign law, and on the substantive and procedural requirements that law must meet to be enforceable. These limits will become clear in the ensuing discussion, but at a basic level, courts will usually not enforce foreign law when it conflicts with the "public policy" of their own state. This can sometimes include constitutional concerns for due process and equal protection. More specific barriers to enforcing foreign law exist in the context of child custody—a major topic here—where widely adopted uniform legislation requires that foreign decrees, to be enforceable, be reached under laws in "substantial conformity" with those of the court asked to enforce the law (the forum). This legislation, the Uniform Child Custody Jurisdiction Act (UCCJA, adopted by all fifty states by 1983) and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA, adopted by many states since 1997), ensures that courts apply the "best interests of the child" standard in assigning custody.[44]

b. Methodological Problems with the CSP Report

A number of the cases cited by the CSP seem entirely out of place, and were likely located only because they used the terms "Islamic law" or "Muslims." These cases have no place in a debate about *sharīʿa* in American courts, and indeed serve only to call into question the research behind the *SLASC* report. In thirteen cases—all at the appellate level—the courts were never called upon to enforce foreign judgments or apply Muslim law.[45]

43 Awad, *supra* note 32, at 170.

44 Henderson, *supra* note 38, at 433; Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA): A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 75 N.D. L. Rev. 301 (1999).

45 Technically, Ivaldi v. Ivaldi, 672 A.2d 1226 (N.J. Super. Ct. App. Div. 1996), could be placed in this category because foreign and Islamic law played no role in the outcome of the child custody case, but I have chosen to discuss it below because the Court, after deciding that New Jersey had no jurisdiction, found, in dicta (or arguably as an alternative ground of decision), that Moroccan law *would* have been granted comity. *See In re* Ferguson, 361 P.2d 417 (Cal. 1961); Mohammad v. Moham-

The most irrelevant case is one in which African American Muslim inmates unsuccessfully sought further access to religious materials in a California prison in 1961—never invoking Islamic or foreign law.[46] Five other cases are criminal. In the Illinois case of *People v. Jones*, a male, Muslim defendant who beat his wife to death (and severely injured two other women to whom he claimed he was religiously married) claimed ineffective assistance of counsel because his attorney could not locate an Islamic scholar who would endorse his belief that he was within his rights to "discipline" the women. The Illinois appeals court noted that it "seriously doubt[s] that anyone knowledgeable on Islamic teachings would have proved helpful to this defense[,]" because the record "reflects a grave misapplication of any Islamic license for his conduct."[47] The court went on to articulate the basic principle that religious beliefs cannot serve as defenses against laws of general applicability. "If a religion sanctions conduct that can form the basis for murder, and a practitioner engages in such conduct and kills someone, that practitioner need be prepared to speak to God from prison."[48]

In 2010, a New Jersey appeals court carefully walked through a similar analysis. That court traced the relationship between religious license and legal restraint from nineteenth-century polygamy jurisprudence to the more recent case of *City of Boerne v. Flores,* before reversing a trial court's revocation of a restraining order against a husband accused of beating and raping his wife. Both were Moroccan citizens.[49] This case attracted wide-

mad, 358 So. 2d 610 (Fla. Dist. Ct. App. 1978); People v. Jones, 697 N.E.2d 457, 460 (Ill. App. Ct. 1988); Shady v. Shady, 858 N.E.2d 128 (Ind. Ct. App. 2007); Amro v. Iowa Dist. Court for Story Cty., 429 N.W.2d 135 (Iowa 1988); State v. Haque, 726 A.2d 205 (Me. 1999); Tazziz v. Tazziz, 533 N.E.2d 202 (Mass. App. Ct. 1988); State v. Al-Hussaini, 579 N.W. 2d 561 (Neb. Ct. App. 1998); Kamal v. Imroz, 759 N.W.2d 914, 915 (Neb. 2009); S.D. v. M.J.R., 2 A.3d 412, 422–26 (N.J. Super. Ct. App. Div. 2010); Abouzahr v. Matera-Abouzahr, 824 A.2d 268 (N.J. Super. Ct. App. Div. 2003); Pirayesh v. Pirayesh, 596 S.E.2d 505 (S.C. Ct. App. 2004); Accomack Cty. Dept. Soc. Servs. v. Muslimani, 403 S.E.2d 1 (Va. Ct. App. 1991).

46 *In re* Ferguson, 361 P.2d 417 (Cal. 1961).

47 People v. Jones, 697 N.E.2d 457, 460 (Ill. App. Ct. 1988).

48 *Id.*

49 S.D. v. M.J.R., 2 A.3d 412, 422–26 (N.J. Super. Ct. App. Div. 2010). *See*

spread attention from legal scholars and conservative as well as liberal commentators alike.[50] In two other cases cited in the CSP report, defendants attempted to use their cultural and religious background, including Islam, to claim that they had not formed criminal intent or to mitigate their sentences. In both cases, trial and appellate courts alike rejected these arguments.[51] Finally, in a third case, the norms of "Muslim culture" were invoked in a child custody matter involving a man accused of sexually abusing, and then marrying, his stepdaughter. But the dueling evidence about what is allowed in "Muslim culture" played no role in the trial and appellate courts' decisions.[52] To the limited extent that Islam was involved in any of these cases, it represented individual claims about religious beliefs and cultural norms, not law, and it never impacted the final outcome of the cases.[53]

In other cases cited by the report, Muslim law *could* have entered the case, but did not for procedural reasons—for example, when claims about an Islamic marriage agreement were dropped on remand,[54] or when a couple "married pursuant to Islamic law,"

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also City of Boerne v. Flores, 521 U.S. 507 (1997).

50 *See, e.g.*, Abed Awad, *The True Story of Sharia in American Courts*, Nation (June 13, 2012), http://www.thenation.com/article/168378/true-story-Sharia-american-courts [https://perma.cc/3KNU-89DY]; Cully Stimson, *The Real Impact of Sharia Law in America*, Heritage Foundation: Foundry (Sept. 22, 2010), http://blog.heritage.org/2010/09/02/the-real-impact-of-sharia-law-in-america [https://perma.cc/76DV-6F3E]; Eugene Volokh, *Cultural Defense Accepted as to Nonconsensual Sex in New Jersey Trial Court, Rejected on Appeal*, Volokh Conspiracy (July 23, 2010), http://www.volokh.com/2010/07/23/cultural-defense-accepted-as-to-nonconsensual-sex-in-new-jersey-trial-court-rejected-on-appeal [https://perma.cc/A26Y-KUNN].

51 *See* State v. Haque, 726 A.2d 205 (Me. 1999); State v. Al-Hussaini, 579 N.W.2d 561 (Neb. Ct. App. 1998).

52 Accomack Cty. Dept. of Soc. Servs. v. Muslimani, 403 S.E.2d 1 (Va. Ct. App. 1991). The appellate court remanded the case on entirely separate grounds for further fact-finding.

53 For the question of culture as a legal justification, see Alison Dundes Rentein, The Cultural Defense (2004).

54 Mohammad v. Mohammad, 371 So. 2d 1070 (Fla. Dist. Ct. App. 1979) (noting that the husband dropped the claims based on their Iranian marriage contract). *See also* Mohammad v. Mohammad, 358 So. 2d 610 (Fla. Dist. Ct. App. 1978) (remanding the case to consider the contract). The latter is the case noted by the CSP. Tazziz v. Tazziz, 533 N.E.2d 202 (Mass. App. Ct. 1988), may be similar, but it is also possible that the case was settled or decided by a lower court, without leaving a record in Westlaw, which I used for my research.

but resolved their divorce entirely under Nebraska law.[55] In *Amro v. Iowa District Court for Story County*, "Islamic law" was present only insofar as a man held in contempt of court invoked it in an unsuccessful (and disingenuous, the court found) attempt to persuade his father to return his son to the United States in compliance with a custody order.[56] Finally, in three other child custody cases, courts noted concerns that one parent might abduct a child to certain Muslim-majority countries, but were never called upon to apply these countries' laws.[57]

These thirteen cases, then, contribute nothing to discussions about the place of Islamic and foreign law in American courts, because in none of them were courts called upon to consider foreign judgments, foreign law, or Islamic law. Their inclusion in the report calls into question the rigor of the CSP's research. Moreover, the inclusion of several criminal cases, in which defendants did no more than invoke cultural defenses (which all failed) leads one to wonder if the report's authors simply sought to associate Muslims with criminal activity.

III. Cases Where Muslim Law Was at Issue

In twenty-two of the cases cited by the CSP, parties requested that U.S. state courts apply Muslim law or an Islamic contract provision, but ultimately the courts did not (either at the trial or appellate level). In sixteen other cases, the courts (either at trial or, if heard on appeal, at that level) ultimately enforced a foreign judgment or recognized foreign or Islamic law. Before discussing these cases, it is important to note that, as a threshold matter, in only 32% of these cases (sixteen cases total) did courts enforce

55 Kamal v. Imroz, 759 N.W.2d 914, 915 (Neb. 2009).

56 Amro v. Iowa Dist. Court for Story Cty., 429 N.W.2d 135 (Iowa 1988).

57 *See* Shady v. Shady, 858 N.E.2d 128 (Ind. Ct. App. 2007) (noting that child abduction to Egypt would be easier for the father to prevail upon because Egypt might not recognize the wife's civil divorce); Abouzahr v. Matera-Abouzahr, 824 A.2d 268 (N.J. Super. Ct. App. Div. 2003) (noting, but largely discrediting, concerns that the father would abduct the child to Lebanon); Pirayesh v. Pirayesh, 596 S.E.2d 505 (S.C. Ct. App. 2004) (affirming a family court order banning the father from traveling with the children outside the United States for risk of possible abduction to Iran).

any foreign law, regardless of whether the law recognized impinged upon any party's rights. By contrast, in 44% of cases where parties sought to apply Islamic or Muslim law, courts found that the basic tools of choice of law, comity, and contract law made that law inapplicable. The following discussion will examine six areas of law, showing how courts have drawn careful lines between permissible and impermissible invocations of foreign law or Islamic contract provisions. I begin with the areas often seen as least problematic (litigation and arbitration) and move on to those that have caused more concern (family law).

a. Litigation: Forum Non Conveniens *and Foreign Law*

Cross-border litigation cases are largely, though not entirely, absent from the CSP report. This is a bit surprising, given the volume of business between American and Middle Eastern corporations. Indeed, a Westlaw search for state and federal cases involving the terms "*forum non conveniens*" and "Saudi Arabia," in Texas alone, reveals forty opinions since 1971. However, only three of these cases were in *state* courts, and the only one that involved Saudi *law* (as opposed to simply mentioning the country) was noted in the *SLASC* report, and will be discussed below.[58] This omission, therefore, may reflect the report's limitation to state, as opposed to federal, courts, and the tendency for complex cross-border litigation to be filed in, or removed to, federal court. More importantly, the relative absence of cross-border litigation in the CSP's report reflects the fact that anti-*sharīʿa* advocates are generally unconcerned about subjecting businesses to foreign law. Many anti-*sharīʿa* bills, as well as the American Public Policy Alliance's model bill, explicitly allow corporate entities to include choice of law clauses in their contracts that would lead to U.S. courts resolving cases in accordance with foreign law.[59]

58 This case is CPS Int'l, Inc. v. Dresser Indus., Inc., 911 S.W.2d 18 (Tex. Ct. App. 1995); the other two cases are Dickerson v. Doyle, 170 S.W.3d 713 (Tex. Ct. App. 2005), and Ace Ins. Co. v. Zurich Am. Ins. Co., 59 S.W.3d 424 (Tex. Ct. App. 2001).

59 *See, e.g.*, Kan. Stat. Ann. § 60-5108 (2013) ("Without prejudice to any

Ordinary litigation in American courts involving foreign law falls into two basic categories: cases where a party seeks to invoke foreign law, and cases where a party asks a U.S. court to dismiss the charges so the case can be refiled in a more suitable foreign forum (*forum non conveniens*). Anti-*sharīʿa* bills have sought to limit both the enforcement of foreign law and the granting of *forum non conveniens*.

Both of the CSP's cases involving *forum non conveniens*, however, resulted in U.S. courts *not* dismissing the case and retaining jurisdiction. In *Rhodes v. ITT Sheraton Corp.*, a trial court denied the defendants' motion to dismiss for *forum non conveniens* in a suit filed by a British plaintiff, injured at a resort in Jeddah, Saudi Arabia, alleging that the two corporate defendants, parent companies of the Jeddah Sheraton, were liable for negligence and breach of implied warranty.[60] The court based its decision on "the existence of biases against women and non-Muslims in Saudi Arabia," as well as that country's restrictions on party testimony and written evidence, its lack of uniform procedures or binding judicial precedent, and other practical factors related to the availability of evidence and documents.[61] Indeed, the court noted that Massachusetts was the "corporate home forum" of both defendants.[62]

In the report's second *forum non conveniens* case, an Iranian Bahá'í refugee, resident in California, sued her stepmother, also a U.S. resident, for damages arising out of a dispute about the probate of the plaintiff's father's estate (the defendant's estranged husband), who had died in Iran.[63] The California trial court stayed,

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legal right, this act shall not apply to a corporation, association, partnership, limited liability company, limited liability partnership or other legal entity that contracts to subject itself to foreign law or courts in a jurisdiction other than this state or the United States."); American Public Policy Alliance, Model ALAC Act, http://publicpolicyalliance.org/legislation/model-alac-bill [https://perma.cc/5CJD-65YZ] ("Without prejudice to any legal right, this act shall not apply to a corporation, partnership, limited liability company, business association, or other legal entity that contracts to subject itself to foreign law in a jurisdiction other than this state or the United States.").

60 Rhodes v. ITT Sheraton Corp., No. CIV.A. 97-4530-B, 1999 WL 26874 (Mass. Super. Ct. Jan. 15, 1999).

61 *Id.* at *2–5.

62 *Id.* at *5.

63 *See* Karson v. Soleimani, Nos. B216360, B219698, 2010 WL 2992071

and then dismissed, the suit based on *forum non conveniens*, but the appellate court reversed, finding that the defendant had not met her burden of proving that an adequate alternative forum was available. In part this ruling was procedural, as it was unclear whether the defendant was subject to Iranian jurisdiction or service of process.[64] But she had also not shown that Iran had "an independent judiciary" that would "apply principles of due process," as required by California case law.[65] In particular, the plaintiff had produced a 2009 U.S. Department of State report on Iranian human rights, calling into question the Iranian judiciary's independence.[66] Taken together, these two cases provide no evidence that state courts overlook constitutional due process or equal protection concerns in granting *forum non conveniens*. Instead these cases suggest that courts do indeed meet their obligations to attend to other forums' law, and their protections, before transferring cases out of the country. Because the CSP report did not identify any cases in which courts granted *forum non conveniens*, it provides no evidence that the principle is being abused.

The CSP report does note three cases in which state appellate courts agreed to *enforce* foreign law in litigation matters. Two of these featured commercial litigation involving Saudi Arabia, while the third was a dispute between a creditor and two married couples. None seem to implicate constitutional rights.

In the first case, the court applied Saudi law to remove certain claims from the suit.[67] In a suit by an American corporation and its Panamanian subsidiary against Saudi defendants for breach of contract and tort claims arising from a failed joint venture, the Texas Court of Appeals applied ordinary tools of contract interpretation to conclude that all of the relevant breach of contract claims were governed by Texas, not Saudi, law. The court, citing the *Restatement (Second) of Conflicts*, found that Saudi Arabia had a more "significant relationship" with the conduct at issue in

(Cal. Ct. App. Aug. 2, 2010).

64 *Id.* at *6.

65 *Id.* at *3, *7.

66 *Id.* at *7.

67 *Dresser*, 911 S.W.2d 18.

the tort claims, and that Saudi law should thus apply.[68] However, the court also ruled that Saudi law recognized no equivalent to the types of tort actions (tortious interference, civil conspiracy, and breach of fiduciary duty), and thus dismissed these claims.[69] The court considered, and rejected, the argument that depriving plaintiffs of these causes of action would impermissibly violate Texan public policy. "The fact that the law of another state is materially different from the law of this state does not itself establish that application of the other state's law would offend the fundamental policy of Texas,"[70] the court noted, and it saw no reason to conclude that Texas's interests in applying its own tort law outweighed its interest in having claims "governed by the state with the most significant relationship to the claims and parties."[71] The end result of *Dresser*, then, was to allow *only* claims under Texas law to proceed, and the court applied Saudi law only to eliminate, not to create, causes of action. It is difficult to see how the court's analysis would have changed if it explicitly considered the parties' constitutional rights, especially as it found that its ruling did not violate Texas's "fundamental policy."

In the later case of *Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co.*,[72] a Saudi energy company ("SABIC") sought declaratory judgment in Delaware that it had not overcharged two other companies, which then counterclaimed for breach of contract and the Saudi tort of *ghaṣb*, or "usurpation."[73] All parties agreed that Saudi law governed,[74] and the Delaware Supreme Court affirmed lower courts' rulings that this changed the

68 *Id.* at 28–31.

69 *Id.* at 31–33.

70 *Id.* at 34 (quoting DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 680 (Tex. 1990)).

71 The court thus found that, according to Texas Supreme Court precedent, the Restatement (Second) of Conflicts' "most significant relationship test itself is woven into the fabric of Texas policy." *Id.*

72 866 A.2d 1 (Del. 2005).

73 For *ghaṣb* in general and in Saudi law, see Mallat, *supra* note 32, at 289–90; O. Spies, *Ghaṣb*, *in* Encyclopaedia of Islam (P. Bearman et al. eds., 2d ed. 1960–2005), http://dx.doi.org/10.1163/1573-3912_islam_SIM_2470 [https://perma.cc/66XD-DHCZ].

74 *Saudi Basic Indus.*, 866 A.2d at 15.

elements of tort liability and the extent of available damages. But here again, there is no indication that Saudi law infringed on any party's constitutional rights. Indeed, the Delaware Supreme Court went out of its way to note that the parties' rights were protected. Noting that SABIC's challenges to the jury instructions implied a view "that this case should never have been tried to, or decided by, a jury," the court reminded the parties that SABIC had moved to avoid a jury trial, but that the trial court "ruled that ExxonMobil was constitutionally entitled to have a jury decide its counterclaims."[75] Thus, in the only instance where constitutional rights were implicated in this case, the Delaware courts ensured that such rights were protected even while recognizing Saudi law. Indeed, the Saudi energy company lost the case—under Saudi law—and was ordered to pay $416.8 million.

The third case in this category, *Nationwide Resources Corp. v. Massabni*,[76] involved individual litigants on one side rather than a corporation, and foreign law was critical to the outcome. Nationwide Resources, a creditor, sought to garnish a note for a debt owed to Pierre Zouheil by the Jankes, a married couple to whom he had loaned money. Zouheil, a Christian Syrian citizen who, with his wife Linda, had been domiciled in Morocco at the time of the loan to the Jankes but who now resided in Arizona, argued that the note was his and his wife's community property, and thus not subject to garnishment.[77] Although Arizona law created a "presumption that all property acquired by either spouse during marriage is community property,"[78] the trial court found that the note was Pierre Zouheil's separate property based on Moroccan law (which the appellate court referred to as "Islamic law").[79] The appellate court, however, noted that Moroccan law itself (in the form of a 1957 Royal Decree) applied to alien non-Muslims "their national law regarding their personal status."[80] Because Pierre and Linda

75 *Id.* at 36–37.
76 694 P.2d 290 (Ariz. Ct. App. 1984).
77 *Id.* at 292–93.
78 *Id.* at 293.
79 *Id.* at 294.
80 *Id.* (quoting Michel Bourely, Droit public marocain 44 (1965)).

Zouheil were Syrians, the appellate court looked to Syrian statutes for the Catholic communities, which made property, by default, separate, unless explicitly designated as community property.[81] As a result of this analysis, the appellate court recognized the note as Pierre Zouheil's separate property, subject to garnishment. This case depended on the court's recognition of foreign (though not Islamic) law. But no party raised any constitutional objections, and it is difficult to see a presumption in favor of separate property, rather than in favor of community property, as a violation of due process or equal protection rights.

Thus, none of the commercial cases the CSP cites seem to involve the application of Islamic or Muslim law to the detriment of the parties' constitutional rights.

b. Litigation and Arbitration Under Islamic Law

Muslims in non-Muslim-majority countries sometimes contract to subject themselves to Islamic law, either by applying substantive rules or by resolving disputes through Islamic arbitration.[82] Leaving aside family law, which I will discuss below, CSP's sampling of U.S. state cases reflects four instances in which courts were called upon to enforce such contracts, either directly, by compelling arbitration, or indirectly, by enforcing arbitral awards. While Islamic arbitration has aroused debate, especially in the United Kingdom, where an official arbitral tribunal has been established,[83] the four arbitration cases in the CSP report do not suggest any challenges that blocking bans could remedy.

In the first of these cases, *El-Farra v. Sayyed*,[84] an *imām* sued his employer, the Islamic Center of Little Rock, Arkansas, for breach of contract, tortious interference with contract, and defamation. He based his claims on a contract allowing the Center's

81 *Id.* at 294–95.

82 *See, e.g.*, Mona Rafeeq, Note, *Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional American Notions of Justice?*, 28 Wis. Int'l L.J. 108 (2010).

83 *Id.* at 124.

84 226 S.W.3d 792 (Ark. 2006).

directors to terminate him "on valid grounds according to Islamic Jurisdiction (Shari'a)."[85] The Arkansas Supreme Court affirmed the circuit court decision in finding that it lacked subject matter jurisdiction because it could not adjudicate the claims based on "neutral principles of law." Here the court followed the test the U.S. Supreme Court laid out in a 1979 case, *Jones v. Wolf*, in part, that state courts could consider "neutral principles of law" in determining disputes over church property but had to defer to religious organizations on what constituted their "true" beliefs if deemed relevant in determining ownership.[86] The Arkansas Supreme Court applied the same reasoning to the *imām*'s defamation claims, which involved the Center's claims that he had violated Islamic law, and his derivative tortious interference action.[87] The Arkansas courts, at all levels, thus declined to take jurisdiction precisely because the case would force them to apply religious law.

The other three cases of contracts referencing non-family Islamic law all concerned arbitration. In the first case,[88] a Texas Court of Appeals overturned a lower court's decision to appoint arbitrators pursuant to a commercial contract between a computer manufacturer, DynCorp, and an oil company, Aramco. The question was not whether the contract required arbitration (in fact, *both* sides had moved to compel arbitration), or even whether Saudi law would govern, but simply whether U.S. or Saudi courts should appoint the arbitrators. The appellate court determined that the contract vested this duty in Saudi courts. Neither party challenged Saudi substantive law, or the degree of due process that the arbitral tribunal would afford.[89]

85 *Id.* at 793. The word "jurisprudence" may be meant, as this would fit more common translations.

86 *Id.* at 795; *see also* Jones v. Wolf, 443 U.S. 595, 599 (1979) (establishing the "neutral principles" test).

87 *El-Farra*, 226 S.W.3d at 796.

88 *In re* Aramco Servs. Co., No. 01-09-00624-CV, 2010 WL 1241525 (Tex. Ct. App. Mar. 19, 2010).

89 Aramco also challenged the appointed arbitrators on the grounds that they did not meet requirements to be Muslims and Saudi nationals, but the court did not reach this issue because it vacated the lower court's appointments. *Id.* at *4, *6. Had it reached this issue, it might have had to grapple with First Amendment religious

The other two cases involved the enforcement of arbitral awards. *Abd Alla v. Mourssi* and *Mansour v. Islamic Education Center of Tampa, Inc.*, involved disputes between Muslim business partners,[90] and over the corporate governance of an Islamic community center.[91] The question of arbitration under religious law is still hotly debated, not only in Muslim contexts, but also in Christian and Jewish contexts.[92] In neither of these two cases did any party claim that its constitutional rights had been violated.[93] The latter case, *Mansour*, attracted a great deal of attention because of the judge's comment that "as to the question of enforceability of the arbitrator's award the case should proceed under ecclesiastical Islamic law."[94] At least one scholar, Eugene Volokh, has argued that the *Mansour* decision was in error,[95] as it seemed to put the court in the position of enforcing substantive religious law. The constitutional question, however, would not be about the conduct of the arbitration itself, but what law the court itself should use in determining whether and how to enforce the arbitration's *outcome* if asked to do so. The traditional rule, as Volokh notes, is that courts will use "neutral principles of law" on this point.[96] Here, therefore, the Florida court may have erred.

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freedom and Fourteenth Amendment equal protection questions.

90 Abd Alla v. Mourssi, 680 N.W.2d 569 (Minn. Ct. App. 2004).

91 Mansour v. Islamic Education Center of Tampa, Inc., No. 08-CA-3497 (Fla. Cir. Ct. 2011), *aff'd*, No. 2D11-1159, 2011 WL 5926157 (Fla. Dist. Ct. App. Oct. 21, 2011).

92 *See, e.g.*, Helfand, *supra* note 42; Walter, *supra* note 42. For a relevant recent incident, see Eugene Volokh, *Court Enforces Religious Arbitration Agreement, Over Objection of Plaintiff*, Volokh Conspiracy (Oct. 15, 2013), http://www.volokh.com/2013/10/15/court-enforces-religious-arbitration-agreement-objection-plaintiff [https://perma.cc/K9LN-5FHC].

93 However, in *Mourssi*, the loser under arbitration argued the award should be set aside for fraud, corruption, or other undue means; the trial and appeals courts agreed that his claims were insufficiently clear as a matter of law. 680 N.W.2d at 573–74.

94 *Mansour*, No. 08-CA-3497 at *4.

95 *See* Eugene Volokh, *"The Case Should Proceed Under Ecclesiastical Islamic Law" / Jews, Kethubahs, and Gets*, Volokh Conspiracy (Mar. 25, 2011), http://www.volokh.com/2011/03/25/the-case-should-proceed-under-ecclesiastical-islamic-law-jews-ketubahs-and-gets [https://perma.cc/F8SV-RRVG].

96 *Id.*

c. Family Law

The majority of the Report's cases in which courts were asked to apply or enforce Muslim law—indeed, the majority of cases overall, thirty out of fifty—were in the area of family law, all dealing with heterosexual marriages. This area is also the subject of special concern among American activists, as evidenced by the Florida anti-foreign law bill's limitation to the family law arena.[97] These cases therefore deserve careful exploration. Accordingly, the following sections will examine how state courts have reasoned through the applicability, and inapplicability, of various types of Islamic law in four substantive areas of family law. The following sections are arranged in order, based on the "life cycle" of possible legal developments in a marriage: the validity of religious marriages, the validity of foreign divorces, the enforceability of foreign custody decrees, and the enforceability of marriage contracts. For the most part, I will show that courts have been careful in applying foreign law, and have been rigorous in testing its compliance with their states' public policy and with constitutional rights. There are a few cases, however, that raise questions.

i. Recognizing the Validity of Marriages

The first legal question in the marriage "life cycle" is whether a valid marriage has even been formed. In three cases located by the CSP, courts were faced with couples (both having split from one another) in which at least one party believed they were married under Islamic law, even though such marriage had not been confirmed by any U.S. state or foreign sovereign. In all three cases, the courts declined to find a valid marriage. In the 1988 case *Vryonis v. Vryonis*, an Iranian Shīʿī Muslim visiting professor at the UCLA Center for Near Eastern Studies, Fereshteh R. "Vryonis," wed the center's Greek Orthodox director, Speros Vryo-

97 Steve Miller, *Bill Prohibits Foreign Family Law in State Courts*, Wash. Times (May 1, 2014), http://www.washingtontimes.com/news/2014/may/1/bill-prohibits-foreign-family-law-in-state-courts [https://perma.cc/YB24-AAMJ].

nis, in a temporary marriage (*mutʿa*).[98] Likewise, in a 2010 Florida case, a couple had participated in a Muslim marriage ceremony, but did not receive a marriage license.[99] Finally, a Virginia appeals court dealt with a couple who had entered a proxy marriage in the United Kingdom, without having fulfilled British requirements for a valid marriage.[100] In all three cases, the courts held that the marriages were void—because Fereshteh had no "reasonable belief" that a valid California marriage existed; because the Virginia couple's "marriage" had been void *ab initio* under Virginia law; and because the U.K. proxy marriage, too, had not been valid according to the standards of the place where it was performed.[101]

None of these decisions are surprising, since they concerned American civil marriage laws and clear conflict of laws rules (and, in one case, the law of the same state as the appeals court). These rules would be applicable in dealing with any foreign marriage, regardless of whether it had anything to do with Islam or Muslims. Slightly more complicated are cases in which the marriage was performed abroad. In general, U.S. courts have a "strong public policy" in favor of recognizing marriage, partly to avoid the inequities which can result if one spouse believes he or she is entitled to support but none is forthcoming after separation.[102]

98 *See* Vryonis v. Vryonis (*In re* Marriage of Vryonis), 248 Cal. Rptr. 807 (Cal. Ct. App. 1988). Speros Vryonis, a prominent historian of the Middle East, wrote a classic history of Anatolians' medieval conversion to Islam, Speros Vryonis, Jr., The Decline and Fall of Medieval Hellenism in Asia Minor and the Process of Islamization from the Eleventh Through the Fifteenth Century (1971). His own personal life is now cited by those who fear the United States' "Islamization." The opinion, for reasons left unexplained, referred to Fereshteh with the last name Vryonis despite holding the marriage void. Today such temporary marriages are generally recognized only by Shīʿī scholars, and many of the rules—on maintenance, inheritance, or property—that apply to other marriages are inapplicable. *See* W. Heffening, *Mutʿa*, *in* Encyclopaedia of Islam (P. Bearman et al. eds., 2d ed. 1960–2005), http://dx.doi.org/10.1163/1573-3912_islam_COM_0819 [https://perma.cc/P8K7-364B].

99 *See* Betemariam v. Said, 48 So. 3d 121 (Fla. Dist. Ct. App. 2010).

100 *See* Farah v. Farah, 429 S.E.2d 626 (Va. Ct. App. 1993).

101 Vryonis v. Vryonis (*In re* Marriage of Vryonis), 248 Cal. Rptr. 807 (Cal. Ct. App. 1988); Betemariam v. Said, 48 So. 3d 121 (Fla. Dist. Ct. App. 2010); Farah v. Farah, 429 S.E.2d 626 (Va. Ct. App. 1993).

102 *See* Awad, *supra* note 32, at 181.

Two such cases appear in the CSP report, and they illustrate the lines American courts have drawn between marriages to which they will grant comity, and those to which they will not. In *Moustafa v. Moustafa*,[103] a Maryland appellate court refused to grant comity to a bigamous Egyptian marriage. The case involved a couple who had married in Egypt, come to the United States, and then divorced. The husband remarried in Egypt, but then remarried his first wife, telling her that he had divorced his second wife. The Maryland appellate court affirmed a lower court ruling granting an annulment to the second wife, on the grounds that the bigamous marriage was void. The key factor was that the husband had not presented enough evidence of Egyptian law's willingness to recognize a bigamous marriage, which would be necessary to overcome the appellate court's presumption that foreign law was the same as Maryland law, that is, "unless the law of a foreign jurisdiction is proven to be otherwise."[104] But the court also noted that in any case it would "nonetheless deny recognition and enforcement to those foreign judgments which are inconsistent with the public policies of the forum state,"[105] rightly implying that a bigamous marriage would fail this test.

By contrast, in the 2008 case *Ghassemi v. Ghassemi*, a Louisiana appeals court overturned a lower court decision and granted comity to an Iranian marriage between two first cousins.[106] The state of Iranian-U.S. relations, the appellate court pointed out, was irrelevant to a comity analysis, and instead the vital question was whether a first-cousin marriage violated a "strong public policy" in Louisiana, the test laid out in the state's Civil Code.[107] Based on the history of first-cousin marriages in Louisiana, and their legality in other states and foreign countries, the court found that there was no strong Louisiana public policy against such marriages, even though these types of marriages could not legally be formed in Louisiana at the time.

103 888 A.2d 1230 (Md. Ct. Spec. App. 2005).
104 *Id.* at 1234.
105 *Id.* (quoting Telnikoff v. Matusevich, 702 A.2d 230, 237 (Md. 1997)).
106 Ghassemi v. Ghassemi, 998 So. 2d 731 (La. App. 1 Cir., 2008).
107 *Id.* at 736.

These two cases, taken together, do not demonstrate that American courts are applying *sharīʿa* in violation of constitutional rights. Rather, they illustrate that the "public policy" exception to comity allows courts to make fine distinctions between the types of marriages they will recognize and those they will not. If the outcome in *Ghassemi* troubles legislators, the solution is probably not a blanket ban—as will be discussed below—but a more targeted statute.

ii. Recognizing Foreign Divorces

A much larger body of case law, reflected in the *SLASC* report, deals with whether, and when, courts will recognize divorce decrees from foreign countries, especially when those countries incorporate elements of Islamic law in their legal systems. The CSP report finds five such cases from Ohio, New Jersey, New Hampshire, Michigan, and Maryland involving divorces granted under Pakistani, Indian, and Syrian law.[108] As in the case of foreign marriages, these cases show that courts are quite willing to use public policy and constitutional objections to refuse comity—as they did in four of the five cases.

The simplest case, which never reached questions of substantive law, is *In re Ramadan*.[109] There, Sonia Ramadan, who had married Samer Ramadan in Lebanon, filed for divorce in New Hampshire, where they both lived. He moved to dismiss, arguing that he had pronounced *ṭalāq* (verbal divorce, as discussed above) the day before she filed, and had telephoned an attorney in Lebanon, then flown there, to sign paperwork for a Lebanese court to grant a divorce, which it did.[110] The New Hampshire Supreme Court, however, affirmed the trial court's refusal to dismiss the

108 Aleem v. Aleem, 947 A.2d 489 (Md. 2008); Tarikonda v. Pinjari, No. 287403, 2009 WL 930007 (Mich. Ct. App. Apr. 7, 2009); *In re* Ramadan, 891 A.2d 1186 (N.H. 2006); Chaudry v. Chaudry, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978); Rahawangi v. Alsamman, 2004-Ohio-4083, 2004 WL 1752957 (Ohio Ct. App. Aug. 5, 2004).

109 891 A.2d 1186 (N.H. 2006).

110 *Id.* at 1188.

wife's petition on these grounds. The court invoked the "strong public policy" exception to comity, finding that "recognizing an *ex parte* divorce obtained in a foreign nation where neither party is domiciled 'would frustrate and make vain all State laws regulating and limiting divorce.'"[111] Without reaching the substantive merits of whether the Lebanese court's procedures and standards had conflicted with New Hampshire or U.S. public policy or constitutional values, the court refused to grant comity.

An Ohio court considered the merits of a Syrian divorce in a roughly contemporaneous case, *Rahawangi v. Alsamman*.[112] The couple had married in Syria, come to the United States, and then moved to Saudi Arabia, where they separated. The wife, Hanadi Rahawangi, eventually moved to Ohio, where she filed for divorce. Her (ex-)husband, Husam Alsamman, moved to dismiss, arguing that a Syrian court had already granted a divorce.[113] The trial court, however, refused to grant comity to the Syrian divorce, and an appellate court upheld the ruling. Ohio doctrines of comity, the appellate court noted, provided that a divorce would not be recognized "where it was obtained by a procedure which denies due process of law in the real sense of the term, or was obtained by fraud, or where the divorce offends the public policy" of the state.[114] Alsamman, the trial court found, had served notice of the Syrian divorce proceedings only at Rahawangi's mother's house in Syria, despite having "full knowledge that the appellee and the children were residing in the United States."[115] "[T]his lack of due process fatally flawed the Syrian divorce proceeding," and thus neither the trial court nor the appellate court agreed to grant comity.[116] The Ohio courts in this case, then, came one step closer to

111 *Id.* at 1191 (quoting Slessinger v. Sec'y of Health & Human Servs., 835 F.2d 937, 942–43 (1st Cir. 1987)).

112 2004-Ohio-4083, 2004 WL 1752957 (Ohio Ct. App. Aug. 5, 2004).

113 *Id.* at *1–2.

114 *Id.* at *5 (quoting Kalia v. Kalia, 151 Ohio App. 3d 145, 155, 2002-Ohio-7160, 783 N.E.2d 623 (Ohio 2002)).

115 *Id.* at *6.

116 *Id.* The appellate court's standard of review meant that it did not consider the merits *de novo*, finding simply that "[t]he trial court's findings were not against the manifest weight of the evidence." *Id*.

the substantive merits than the New Hampshire Supreme Court had in *Ramadan*, reaching beyond the question of whether it would violate public policy to decline jurisdiction given the state's connections to the case, to challenge the procedures of the foreign court. But the outcome was the same in both cases, and in neither case did the respective court reach the substantive merits of the *law* that the foreign court had applied.

Maryland, Michigan, and New Jersey courts did reach those merits in the last three divorce cases, all dealing with *ṭalāq*. As noted above, *ṭalāq* is a procedure in the Islamic legal tradition by which husbands can divorce their wives verbally, and as often construed, without going to court.[117] The most important, and recent, *ṭalāq* case cited in the CSP report is *Aleem v. Aleem*.[118] The husband, Irfan Aleem, was an economist at the World Bank who resided with his wife, Farah, in Maryland. When she filed for divorce, he answered the complaint, without challenging jurisdiction, before going to the Pakistani Embassy in Washington and executing a *ṭalāq* divorce. He argued that the Maryland courts should grant comity to this "foreign divorce," divesting them of jurisdiction to divide the marital property (in particular, his World Bank pension, titled in his name and valued at about $1,000,000). This would leave Farah Aleem with only a $2,500 delayed dowry, due upon death or divorce, as specified in their Pakistani marriage contract.[119] The Maryland trial court refused to grant comity to this divorce, while the Court of Special Appeals sidestepped the issue, finding that the only justiciable controversy was the division of property—which it resolved in favor of Farah.[120]

117 The codified laws of many Muslim countries have curbed the extrajudicial use of *ṭalāq*. *See* J. Schacht & A. Layish, *Ṭalāḳ*, *in* Encyclopaedia of Islam (P. Bearman et al. eds., 2d ed. 1960–2005), http://dx.doi.org/10.1163/1573-3912_islam_COM_1159 [https://perma.cc/5U5X-7RMC].

118 947 A.2d 489 (Md. 2008).

119 *Id.* at 490–91. For cases on the enforceability of Islamic marriage contracts, see Aleem v. Aleem, 931 A.2d 1123 (Md. Ct. Spec. App. 2007), *infra* note 120; Tarikonda v. Pinjari, No. 287403, 2009 WL 930007 (Mich. Ct. App. Apr. 7, 2009), *infra* note 125; Chaudry v. Chaudry, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978), *infra* note 131; Siddiqui v. Siddiqui, 968 N.Y.S.2d. 945 (Sup. Ct. App. Div. 2013), *infra* note 129.

120 *See* Aleem v. Aleem, 931 A.2d 1123 (Md. Ct. Spec. App. 2007). This is the lower appeals court's opinion, and it also summarizes the trial court's findings.

The Maryland Court of Appeals, granting *certiorari*, emphatically refused to grant comity to either the Pakistani divorce itself or the division of property it entailed. Maryland, the appeals court pointed out, had expressed a public policy in favor of equitably dividing marital property. So the Pakistani division was in "direct conflict with our public policy," and therefore unenforceable.[121] Moreover, *ṭalāq* divorce itself was also contrary to the public policy of Maryland. The court noted that *ṭalāq* is asymmetrically available only to a husband, that it grants no due process to the affected wife, and that its acceptance for Maryland residents would afford a way for any husband who is the citizen of "any country in which Islamic law, *adopted as the civil law*, prevails" to circumvent Maryland courts. He could simply go to that country's embassy and divorce his wife by *ṭalāq* (as in this case) before she could complete a Maryland divorce.[122] Therefore, *ṭalāq* offended Maryland's public policy both on the issue of due process, and on the issue of equality. The court further pointed to Article 46 of the Maryland Declaration of Rights, providing that "[e]quality of rights under the law shall not be abridged or denied because of sex."[123]

Aleem represented not only a decisive, but also a highly visible, rejection of *ṭalāq*. It was heard by Maryland's highest court; it was argued for the husband by a partner (Priya Aiyar) at the elite appellate firm Kellogg, Huber, Hansen, Todd, Evans & Figel; and it was covered by the *Washington Post* and *Baltimore Sun*.[124]

Indeed, a year later, in the next *ṭalāq* case noted by the CSP report, a Michigan appeals court faced with a *ṭalāq* divorce cited *Aleem* as persuasive authority, and ruled the same way as the Maryland Court of Appeals had.[125] Saida Tarikonda, an Indian

121 *Aleem*, 947 A.2d at 502.

122 *Id.* at 500–01.

123 Md. Const. Declaration of Rts., art. 46.

124 *See* Ruben Castaneda, *Islamic Divorce Ruled Not Valid in Maryland*, Wash. Post (May 8, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/05/07/AR2008050703592.html [https://perma.cc/AWS4-XFVQ]; Nick Madigan, *Court Denies Islamic Divorce*, Baltimore Sun (May 7, 2008), http://articles.baltimoresun.com/2008-05-07/news/0805060427_1_aleem-divorce-wife [https://perma.cc/ZBV8-478T].

125 *See* Tarikonda v. Pinjari, No. 287403, 2009 WL 930007 (Mich. Ct. App.

Muslim woman living in Michigan, filed for divorce one month after her estranged husband, an Indian Muslim man who resided in New Jersey, had flown to India and pronounced *ṭalāq*. After a trial court recognized the Indian divorce, Tarikonda appealed, pointing to *Aleem* to support her position. The appeals court agreed with her, overturning the trial court decision and ruling that the Indian *ṭalāq* divorce was not entitled to comity, as it denied Tarikonda due process. Moreover, the court concluded, the male-female asymmetry embedded in *ṭalāq* was an "arbitrary and invidious" distinction, offensive to the Equal Protection Clauses of the Michigan and United States Constitutions.[126] "To accord comity to a system that denies equal protection," the appellate court held, "would ignore the rights of citizens and persons under the protection of Michigan's laws."[127]

In two other cases, courts implicitly accepted *Aleem*'s reasoning while distinguishing it under factual circumstances. They found that the husbands' use of Pakistani divorce law in these cases did not conflict with their states' public policy. In 2015 a Texas appellate court granted comity to a divorce performed in Pakistan for two Texas residents, after determining the procedure did not conflict with Texas public policy and particularly with due process or fundamental fairness. In this case, *Ashfaq v. Ashfaq*,[128] the court distinguished *Aleem* on the grounds that *Ashfaq*, unlike the Maryland case, concerned only divorce and not the division of property (which had occurred in a Texas court), and that the *Aleem* Court had not heard complete evidence on the state of Pakistani marriage law. Pakistan's 1939 Dissolution of Muslim Marriages Act, the *Ashfaq* Court noted, *did* give wives the right to initiate divorce, calling into question the *Aleem* Court's view that Pakistani law gave husbands asymmetrical rights. The court also noted that both husband and wife had been present in Pakistan when the divorce took place (unlike in *Aleem*, where the husband had gone

Apr. 7, 2009).

126 *Id.* at *3.

127 *Id.*

128 467 S.W.3d 539 (Tx. Ct. App. 2015).

to the Pakistani Embassy while both were present in the United States), and that the wife in *Ashfaq* had received notice of the divorce before it was finalized, had an opportunity to respond, and indicated her acceptance by accepting the *mahr* (dowry) payment in Pakistan (unlike in *Aleem*).

Similarly, in 2013 a New York appellate court distinguished *Aleem* (and *Tarikonda*) in a case in which a husband residing in the United States obtained a divorce in Pakistan while proceedings (which he initiated) were ongoing in the United States.[129] Here, as in *Ashfaq*, the court noted that unlike in *Aleem*, property division was not at issue and the wife had received notice before the divorce was finalized but had not challenged it until two years later (in which time the husband had remarried in reliance on the Pakistani divorce).

Taken together, these Maryland, Michigan, Texas, and New York cases suggest that courts have continued to look closely at the facts in determining whether foreign *ṭalāq* divorces conflict with U.S. public policy. Their analyses usually relied on U.S. laws requiring due process and prohibiting sex-based discrimination.[130]

The third, and oldest, *ṭalāq* case included in the CSP report, however, shows that not all U.S. state courts have refused to accord comity to such divorces. In 1978, a New Jersey appellate court dealt with a dispute between a Pakistani husband, Hanif Chaudry, living in New Jersey, and wife, Parveen Chaudry, who was residing in Pakistan with their children.[131] In response to Parveen's petition in a New Jersey court, Hanif argued that he was already divorced from her, having pronounced *ṭalāq* at the Pakistani Consulate in New York, and that the Pakistani divorce, in accordance with the couple's marriage contract, had settled all questions of property distribution and maintenance.[132] The trial judge rejected these arguments, finding that the Pakistani divorce

129 Siddiqui v. Siddiqui, 968 N.Y.S.2d 945 (Sup. Ct. App. Div. 2013).

130 *See also* Awad, *supra* note 32, at 175–79 (discussing several cases in which U.S. courts applied comity analysis to foreign divorces granted under Islamic or Muslim law).

131 *See* Chaudry v. Chaudry, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978).

132 *Id.* at 1002, 1004.

(in the words of the case he cited) "failed to constitute a judicial proceeding."[133] Furthermore, he ruled against the husband on the grounds that the Pakistani property distribution was "so offensive to this State's public policy as to invalidate the divorce and to entitle her to separate maintenance," which he awarded.[134]

A New Jersey appellate court, however, reversed this decision, implicitly finding that the *ṭalāq* divorce *did* afford the wife due process. The court determined that, because the wife, Parveen Chaudry, had (unsuccessfully) contested the divorce in Pakistani courts up to the appellate level, and because both parties were Pakistani citizens throughout the proceedings, "principles of comity require that the divorce be recognized."[135] Moreover, the court concluded, the parties had a sufficient nexus to Pakistan that it would be improper for New Jersey courts to grant separate maintenance, alimony, or equitable distribution of property.[136] Indeed, the court continued, the wife was entitled only to the $1,500 delayed dowry specified in the couple's marriage contract, which was "freely negotiated" with "no proof that the agreement was not fair and reasonable at the time it was made."[137] The appellate court thus ordered that the Pakistani divorce be recognized, with no payments to Parveen Chaudry, though it noted that she could still petition to adjust support payments if insufficient to provide for the children, of whom she had retained custody.[138]

Commentators have critiqued *Chaudry*, noting the apparent injustice of "effectively precluding Parveen—after fourteen years of marriage—from any portion of her psychiatrist-husband's estate."[139] Critics have also called the case's legal reasoning "confused."[140] Indeed, there are several troubling aspects in the case.

133 *See id.* at 1002. The quotation is not found in the appellate opinion; it is drawn from Shikoh v. Murff, 257 F.2d 306, 308 (2d Cir. 1958), upon which, according to the appellate opinion, the trial judge relied.

134 *Chaudry*, 388 A.2d at 1002.

135 *Id.* at 1005.

136 *Id.* at 1006.

137 *Id.*

138 *Id.* at 1007–08.

139 Blenkhorn, *supra* note 38, at 190.

140 Nathan B. Oman, *How to Judge* Shari'a *Contracts: A Guide to Islamic*

The court placed some weight on Parveen's residence in Pakistan in determining the case's strong connection to that country, "even though, as the trial judge found, it was the husband's conduct that prevented the wife" from coming to the United States.[141] Moreover, while the appellate court referred to the Pakistani marriage contract as "freely negotiated," it also admitted that "[u]nder Pakistan law she [Parveen] was not entitled to alimony or support upon a divorce. A provision in the agreement to the contrary would be void as a matter of law."[142] Thus, as Professor Nathan Oman argues, the court "in effect adopted Pakistani property law as a whole under the guise of interpreting a contract[.]"[143] More fundamentally, the trial court's factual determinations are far from making clear that the Pakistani courts granted Parveen sufficient judicial process to satisfy American standards.

Despite its flaws, a New Jersey appellate court cited *Chaudry* in 2012 (after the CSP report was published), as it remanded a disputed Pakistani divorce to a lower court for further proceedings to determine the extent of judicial procedures accorded a Pakistani woman whose husband divorced her in Pakistan.[144] The court emphasized, however, that "[t]he issues to be addressed before rejecting or applying comity principles include review of the Pakistani tribunal's jurisdictional determination and an examination of whether the judgment's determination of the issues does not offend New Jersey's public policy."[145] It does not appear that any court has cited *Chaudry* in actually granting comity to a *ṭalāq* divorce.[146]

Marriage Agreements in American Courts, 2011 Utah L. Rev. 287, 313 (2011).

141 *Chaudry*, 388 A.2d at 1006. The couple had lived in the United States between 1966 and 1968, and when Parveen and the children then returned to Pakistan, they expected Hanif would follow, but he did not for two years, and then quickly returned to the United States. According to Parveen's testimony, Hanif "agreed to arrange for her and the children to join him," but "[t]here is a conflict in the proofs as to his good faith efforts" to accomplish this. *Id.* at 1004.

142 *Id.*

143 Oman, *supra* note 140, at 314.

144 Sajjad v. Cheema, 51 A.3d 146, 158–60 (N.J. Super. Ct. App. Div. 2012).

145 *Id.* at 159–60.

146 Only two other cases involving foreign marriages seem to cite *Chaudry*. One was *Aleem*, in which the husband invoked *Chaudry*. But only the lower Maryland

While each of these decisions turned on the facts of the particular case and the law of the country concerned, more courts seem to have embraced *Aleem*, with its skeptical approach to *ṭalāq*, than *Chaudry* with its more permissive approach.

iii. Enforcing Marriage Contracts

Both *Aleem* and *Chaudry* touch on another issue that is prominent in CSP's collection of U.S. state cases dealing with Islamic law: the validity of marriage contracts, and in particular of deferred dowries and the lack of community property (noted above). In general, when dealing with Islamic marriage contracts, American courts sometimes approach them as prenuptial agreements (which, if valid, would preempt the equitable distribution of assets and alimony payments) or as simple contracts. It is easier for marriage contracts to be enforced as contracts, because states generally require that prenuptial agreements be made with legal advice and financial disclosures for both parties.[147] In eight of the *SLASC* report's cases, state appellate courts dealt with Islamic marriage contracts, and they split evenly on whether to apply them.[148] Tracing the reasoning will reveal some common trends

appellate court noted the case in its opinion, and it did not follow *Chaudry*'s lead in applying Pakistani marital property law. *See* Aleem v. Aleem, 931 A.2d at 1123, 1131, 1135. A Texas appeals court, while declining to uphold a non-judicial *ṭalāq* divorce, distinguished *Chaudry* based on the Pakistani court's confirmation of *ṭalāq*, absent in the case at bar. *See* Seth v. Seth, 694 S.W.2d 459, 463–64 (Tex. Ct. App. 1985). *Chaudry* has also been noted by a Louisiana appellate court in the context of *mahr* (dowry) and community property (Shaheen v. Khan, 142 So. 3d 257 (La. App. 2014); *ṭalāq* divorce was not at issue), and a California court has cited *Chaudry* for the proposition that a party's (in *Chaudry*, the wife's) choice to litigate a divorce in a foreign court weighs in favor of comity if that party later challenges the foreign divorce (*In re* Marriage of Ruppert, 2014 WL 6853696 (Cal. Ct. App. 2014); the case concerned German law and neither party was Muslim).

147 *See* Awad, *supra* note 32, at 174; *see also* The Islamic Marriage Contract (Asifa Quraishi & Frank E. Vogel eds., 2009).

148 Shaban v. Shaban (*In re* Marriage of Shaban), 105 Cal. Rptr. 2d 863 (Cal. Ct. App. 2001); Dajani v. Dajani (*In re* Marriage of Dajani), 251 Cal. Rptr. 871, 872 (Cal. Ct. App. 1988); Akileh v. Elchahal, 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996); Rahman v. Hossain, 2010 WL 4075316 (N.J. Super. Ct. App. Div. June 17, 2010); Chaudry v. Chaudry, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978); Afghahi v. Ghafoorian, No. 1481-09-4, 2010 WL 1189383 (Va. Ct. App. Mar. 30, 2010); *In re*

in courts' approaches, as well as the absence of any clear constitutional problems.

Two of the CSP's cases on this issue are either unclear or irrelevant, and therefore will not be discussed in this section. In one of these cases, *Mohammad v. Mohammad*, a Florida appellate court reversed a trial court's award of alimony and child support in a divorce between two Florida residents married in Iran, ordering the lower court to consider the validity of their marriage contract. But the parties dropped the contract issue on appeal.[149] Equally inapplicable is *In re Marriage of Notash*, in which a Texas appeals court considered claims, under Texas law, to modify an Iranian divorce decree. Neither party contested the validity of the divorce, and, apparently, neither party challenged the trial court's finding that their marriage contract was "void under the law and public policy of this State." (It is unclear what the contract's provisions were.)[150]

In deciding whether and how to enforce a typical Islamic marriage contract, courts essentially face two questions: first, whether they will require the husband to pay the delayed dowry (which can be accomplished if the marriage contract is construed as a simple contract); and second, whether this payment suffices to deprive the wife of her other interests in marital property (which would require the contract to be construed as a prenuptial agreement).[151]

The courts' approach to the first question is relatively consistent, at least in the CSP's selection of cases.[152] The classic analysis is found in *Akileh v. Elchahal*, a Florida case of first impression, which held that the secular portions of a contract "touching on" religious matters are still enforceable, if they can be applied

Marriage of Obaidi and Qayoum, 226 P.3d 787 (Wash. Ct. App. 2010); *In re* Marriage of Altayar and Muhyaddin, 139 Wash. App. 1066 (Wash. Ct. App. 2007).

149 *See Mohammad*, 358 So. 2d at 610; *see also* Mohammad v. Mohammad, 371 So. 2d 1070 (Fla. Dist. Ct. App. 1979) (noting that, between the case being remanded in 1978 and returning to the court in 1979, the issue had been dropped).

150 *In re* Marriage of Notash, 118 S.W.3d 868, 871 (Tex. Ct. App. 2003).

151 *See generally* Awad, *supra* note 32.

152 *See also id.* at 173–74.

according to "neutral principles" of contract law (applying a test derived from the 1979 U.S. Supreme Court case *Jones v. Wolf*).[153] In *Akileh*, the appellate court established that the marriage contract had been accompanied by sufficient consideration (the marriage itself), and that there was a meeting of the minds. It thus overturned a lower court, instructing it to enforce the contract and order Safwan Elchahal to pay Asma Akileh a deferred dowry of $50,000, even though Akileh had initiated the divorce. (Here, the Florida court directly disagreed with a California appellate court, which had in 1988 held that a *mahr* payment requirement upon divorce was *not* enforceable in such a situation, because California public policy opposed contracts that "facilitate divorce or separation by providing for a settlement only in the event of such an occurrence."[154] This case is not noted in the CSP report.)

While it did not reach the merits, a Virginia appeals court, in another CSP case, likewise upheld a lower court's enforcement of a delayed dowry provision in an Iranian marriage contract. That delayed dowry payment was worth about $141,000.[155]

The last two cases noted by the CSP report that address delayed dowries are, in different ways, the exceptions proving the rule that such payments will be enforced if they can be interpreted according to neutral principles of contract law. But they also reveal different understandings of what "neutral principles" are. In 2010, a Washington appeals court overturned a lower court decision enforcing a delayed dowry payment of $20,000 after Afghan Canadian Husna Obaidi filed for divorce from her husband, Afghan

153 Akileh v. Elchahal, 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996). *See also* Jones v. Wolf, 443 U.S. at 605 (describing the "neutral principles" approach); Aziz v. Aziz, 488 N.Y.S.2d 123, 124 (N.Y. Sup. Ct. 1985) (holding that an Islamic marriage contract's "secular terms are enforceable as a contractual obligation, notwithstanding that it was entered into as part of a religious ceremony"). Although *Akileh* prominently cites *Aziz*, the latter case is not included in the CSP report. Another case often cited by later decisions, and in scholarly treatments of the topic, but not noted by the CSP is Odatalla v. Odatalla, 810 A.2d 93 (N.J. Super. Ct. Ch. Div. 2002), in which the court enforced a *mahr* payment by applying the "neutral principles" test.

154 Dajani v. Dajani (*In re* Marriage of Dajani), 251 Cal. Rptr. 871, 872 (Cal. Ct. App. 1988).

155 *See* Afghahi v. Ghafoorian, No. 1481-09-4, 2010 WL 1189383 (Va. Ct. App. Mar. 30, 2010).

American Khalid Qayoum.[156] The lower court had found a contract based on neutral principles of law, and had then continued on to find that "the wife was not abused, not unfaithful, and did not do anything to create a forfeiture of the *mahr* under Islamic law."[157] The appellate court, however, believed that under the neutral principles of Washington contract law, and based on the facts that the trial court had found, "there was no meeting of the minds," and thus no contract. In particular, the Court noted that the negotiations and the document were in Farsi, a language Qayoum did not speak, and that the lower court had described Qayoum as "psychologically coerced in [his] own mind with family pressures."[158]

In sharp contrast and in the same year, but on the other side of the country, a New Jersey appellate court used the same methodology as the trial court in *Obaidi*—an approach the Washington appeals court rejected. A couple was married in Maryland, signing a contract "to be united 'under the law of Islam.'"[159] The husband, Arifur Rahman, made an immediate (i.e., upon marriage) dowry payment of $12,500. Upon granting a divorce, a New Jersey trial judge ordered the wife, Obhi Hossain, to return the payment. Finding the payment enforceable under neutral principles, subject to "the law of Islam," the trial judge heard expert testimony on the law's content. At a default hearing, in which Hossain and her attorney could not participate because of their default posture (the reasons for which are unclear), the court heard expert testimony from "a New Jersey attorney knowledgeable in Islamic law," who informed the court that, "under Islamic law and customs," the court could order the wife to return the dowry "if it made a finding that the ex-wife was 'at fault' in precipitating the divorce."[160] The judge made such a finding, specifically that Hossain's "undisclosed mental illness constituted an impediment to the marriage under

156 *See In re* Marriage of Obaidi and Qayoum, 226 P.3d 787 (Wash. Ct. App. 2010).

157 *Id.* at 790.

158 *Id.* at 791.

159 Rahman v. Hossain, 2010 WL 4075316 at *1 (N.J. Super. Ct. App. Div. June 17, 2010).

160 *Id.*

Islamic law."[161] The appellate court upheld this decision. Both courts regarded the couple's marriage contract as simply that—a contract—and attempted to apply the contract according to the parties' expressed intent that the contract be governed by "the law of Islam," as interpreted by the expert witness. Presumably the wife's counsel could have, if not in default, introduced any concerns that the outcome abridged her constitutional rights.

These cases suggest that all courts have applied *Jones v. Wolf*'s "neutral principles" test, but in different ways. Sometimes these differences may arise from a careful attention to states' different public policies, as in California's refusal to allow delayed *mahr* payments when the wife initiates divorce, while Florida does the opposite.[162] At other times, however, the differences arise from entirely different understandings of how broadly "neutral principles" can sweep, and how much they can be allowed to fill in gaps in a contract.[163] Most importantly for our purposes, it is far from clear that any of the cases noted in the CSP report on dowry payments have impinged on constitutional rights.

Courts are in greater agreement on the second question raised by Islamic marriage contracts: whether they operate to deprive wives of their interests in marital property beyond their dowries. In *Chaudry*, as noted above, a New Jersey appeals court held that they did, finding a $1,500 delayed dowry to have been "freely negotiated" by Parveen Chaudry in exchange for her interests in her husband's other property.[164] But no other court has ever cited *Chaudry* for such a proposition, and in all three of the CSP report's relevant cases, courts have refused to find or enforce such terms. As noted above, the Maryland courts, at every level, refused to interpret the Aleems' marriage contract so as to deprive Farah Aleem of equitable distribution.[165]

161 *Id.* at *2.

162 *Compare Akileh*, 666 So. 2d at 246, *with Dajani*, 251 Cal. Rptr. at 871.

163 *Compare In re* Marriage of Obaidi and Qayoum, 226 P.3d at 787, *with* Rahman v. Hossain, 2010 WL 4075316 at *1.

164 *See Chaudry*, 388 A.2d at 1000.

165 *See Aleem*, 947 A.2d at 489; *Aleem*, 931 A.2d at 1123.

Two other cases in the *SLASC* report deal directly with women's waiver of interests in their husbands' property; courts refused to enforce such provisions in both cases. In 2007, a Washington appellate panel interpreted an Islamic marriage contract between two Iraqi immigrants as a prenuptial agreement, and upheld a trial court's refusal to enforce it.[166] The agreement promised the wife, Sarab Muhyaddin, nineteen grams of twenty-one-karat gold, in exchange for relinquishing claims to marital property to her husband, Souhail Altayar. A prenuptial agreement, the court noted, must meet a two-step test in Washington: it must be "substantively fair and reasonable for the party not seeking to enforce it," and parties must disclose their assets and have the opportunity to obtain counsel, so that they can enter the agreement "voluntarily and with full knowledge."[167] The agreement in question failed both steps because "[o]n its face, the exchange of 19 pieces of gold for equitable property rights under Washington law is not fair, and Altayar presented no evidence to prove otherwise."[168] Moreover, "[e]ven if it were a fair agreement, there is no evidence that he disclosed his assets or that Muhyaddin received any independent advice."[169]

A more complex analysis, turning on California rather than Washington law but coming to the same conclusion, appears in the case *Shaban v. Shaban*.[170] In a couple, married in Egypt and divorced in California, the husband, Ahmad, pointed to an Egyptian marriage contract prescribing a delayed *mahr* payment of 500 Egyptian pounds (said at oral arguments to be worth about $30 at the time).[171] Ahmad argued that the contract incorporated Islamic law, thus depriving his wife, Sherifa, of any interest in his medical practice or retirement accounts.[172] The trial court reject-

166 *See In re* Marriage of Altayar and Muhyaddin, 139 Wash. App. 1066 (Wash. Ct. App. 2007).

167 *Id.* at 2.

168 *Id.* at 3.

169 *Id.*

170 Shaban v. Shaban (*In re* Marriage of Shaban), 105 Cal. Rptr. 2d 863 (Cal. Ct. App. 2001).

171 *Id.* at 866.

172 *Id.* at 866–67.

ed this claim, as did the appellate court. Turning to the principles of California contract law, the court noted that the state's statute of frauds required all prenuptial agreements to be signed writings, and that parol evidence (evidence from beyond the contract, necessary here to clarify the agreement) was allowable only to clarify terms of art, but not to constitute the contract itself. Taken together, these two principles required that "the writing, 'considered alone,' must express 'the essential terms with sufficient certainty to constitute an enforceable contract;' hence 'recovery may not be predicated upon *parol proof of material terms omitted from the written memorandum*.'"[173] The court therefore affirmed the trial court's refusal to enforce the agreement, while noting that it did not consider Muhyaddin's public policy attacks on the contract. "After all," the court asked, "how can one say that an agreement offends public policy when it is not possible even to state its terms?"[174]

Shaban, like the other cases dealing with marriage contracts adduced by the CSP report and discussed in this section, shows that courts have in fact generally been attentive to public policy considerations, the First Amendment, statutes, and general principles of contract law when they are called upon to interpret and apply Islamic marriage contracts. Some cases may appear problematic depending on one's policy preferences (for example, enforcing delayed *mahr* agreements that mitigate the financial impact of divorce on wives more than on husbands), but federalism allows states to adopt different substantive divorce law and, for the most part, requires them to recognize that of other states—as the contrast between *Akileh* and *Dajani* illustrates. Other cases—*Chaudry* comes to mind, here as in the previous section—may raise more serious concerns. But the cases cited here suggest that courts are likely, overall, to find that enforcing delayed *mahr* payments to wives, but not to the detriment of their other marital property interests, vindicates freedom to contract, while uphold-

173 *Id.* at 869 (quoting Burge v. Krug, 160 Cal. App. 2d 201 (Cal. Ct. App. 1958) (emphasis original)).

174 *Id.*

ing state public policies in the equitable distribution of marital property.

iv. Recognizing Foreign Custody Decrees

The previous sections have traced cases on the legal "life cycle" of marriages, from marriage to divorce to property distribution. Now it is time to turn to the last, and usually most fraught, issue: child custody. These cases, understandably, provoke strong emotional responses, not only from parents but also observers. While a few of the cases in which American courts were called upon to enforce foreign decrees could plausibly be challenged on normative grounds, there is no evidence here, as elsewhere, that courts are applying Muslim law at the expense of constitutional rights, or that there are problems that could be easily fixed by legislating generally against foreign law.

Leaving aside one case in which the court rendered no decision on the merits, and which may have been settled after the appellate court remanded it for further fact-finding,[175] there are eleven cases in the CSP report in which U.S. state courts were called upon to enforce custody decrees from other courts, or to decline jurisdiction in comity to pending custody proceedings in other courts. In four cases, courts granted comity or declined jurisdiction in favor of foreign courts; in the other seven, they did not.

These cases, like those involving marital contracts, reveal that courts have applied fairly consistent, but not fully uniform, principles to varying fact situations. Most notably, the UCCJ(E)A provides for granting comity to foreign custody decrees (whether from other states or from other countries).[176] Monica Henderson has suggested that this provision means that "state courts likely will abandon foreign decrees from courts that do not clearly base

175 *See* Tazziz v. Tazziz, 533 N.E.2d 202 (Mass. App. Ct. 1988) (remanding a custody case to the trial court for fact-finding pertaining to whether it had jurisdiction and what law would be applied by an Israeli *sharīʿa* court if the Massachusetts case were dismissed).

176 *See* Henderson, *supra* note 38, at 423.

custody decisions on best interest [of the child] criteria."[177] This finding is also true of the cases presented in the CSP report.

In the most recent of these cases, a Massachusetts appeals court in 2010 used the touchstone of the "best interests of the child" to affirm a lower court's refusal to grant comity to a custody decree issued by a "Lebanese Sunnite court."[178] The Massachusetts Child Custody Jurisdiction Act, the court noted, requires courts to grant comity to "custody determinations in substantial conformity" with Massachusetts's own law.[179] Here, the Lebanese court had focused narrowly on the mother's unauthorized removal of the child from Lebanon, and the Massachusetts court found "no indication in the documents put before the probate judge that the Lebanese law governing custody disputes takes into consideration all the relevant factors bearing on the child's best interests as that standard is understood under the laws of the Commonwealth."[180] The court stressed that, although Lebanon had made *some* reference to the child's best interests, "it does not necessarily follow that the substantive law applied by the foreign court is reasonably comparable to our own law."[181] For this proposition, the *El Chaar* Court cited another Massachusetts appellate decision, issued just one month earlier, *Charara v. Yatim*, which is also included in the CSP report.[182] This case, too, involved a Lebanese custody decree, though issued in a Shīʿī rather than Sunnī court, and here, too, the Massachusetts court found that the Lebanese court had not performed an adequate best interests analysis in conformity with Massachusetts law. It had considered only the father's fitness, in rebuttal to his presumed custody for children over certain ages.[183] Even though the wife in this case, Hiba Charara, had agreed to grant the father custody, the Massachusetts court refused to see this grant as a bar to her claims for custody, because she had

177 *Id.* at 424.
178 *See* El Chaar v. Chehab, 941 N.E.2d 75 (Mass. App. Ct. 2010).
179 *Id.* at 79 (quoting Mass. Gen. Laws ch. 209B, § 14).
180 *Id.* at 80–81.
181 *Id.* at 80.
182 937 N.E.2d 490 (Mass. App. Ct. 2010).
183 *Id.* at 496–99.

returned to Lebanon from the United States for the divorce based on an earlier, informal agreement that she *would* receive custody. Moreover, the court observed that the wife's later agreement to grant the father custody had been reached in the shadow of the Lebanese court's inadequate custody rules.[184]

Several other cases cited by the CSP reached similar conclusions. In 2001, the Louisiana Supreme Court explicitly cited Henderson's article in upholding a lower court's refusal of comity to an Egyptian custody decree, which the court found had been based on "strict guidelines, irrespective of the best interests of the child."[185]

Several other courts, in addition to concerns about the substantive law applied by foreign courts enforcing Islamic or Muslim law, have also raised due process concerns. In *State ex rel. Rashid v. Drumm*,[186] a Missouri appellate court overturned a lower court's decision to decline jurisdiction in a custody case between an American-citizen wife, resident in Missouri, and a Saudi-citizen husband, resident in Saudi Arabia. Instead, the court ordered further fact-finding to determine whether a Saudi court would "afford minimum due process" or "decide custody on the best interests of the child."[187] A Washington appeals court reached a similar conclusion in *Noordin v. Abdullah* (cited by the Louisiana Supreme Court in *Amin*), reversing and remanding a lower court's deference of jurisdiction to a Philippine court applying Muslim personal law, and requiring the lower court to determine whether the Philippine court's standards afforded due process and considered the best interests of the child.[188] Without these factors, the court noted, both the UCCJA and the public policy exception to comity, drawn from the *Restatement (Second) of Conflicts*, would counsel in favor of Washington jurisdiction.[189] Another Washington appellate

184 *Id.* at 499–501.

185 Amin v. Bakhaty, 798 So. 2d 75, 85 (La. 2001).

186 824 S.W.2d 497 (Mo. Ct. App. 1992).

187 *Id.* at 504–05.

188 Noordin v. Abdulla (*In re* Custody of R.), 947 P.2d 745 (Wash. Ct. App. 1997).

189 *Id.* at 752–53; Restatement (Second) of Conflict of Laws § 90 (1971).

panel applied a similar standard in 2005, despite an intervening change in the Washington custody jurisdiction statutes, in declining to recognize an Iranian custody determination on the grounds that it had been entered without an opportunity for the mother to be heard, and that it conflicted with Washington's "strong public policy." The court came to this conclusion because the Iranian court "did not consider the best interests of the child but rather awarded custody on the sole consideration of the child's age."[190] A New Jersey trial court likewise refused to grant comity to a Gaza *sharīʿa* court's custody order, finding that the mother had not been afforded due process in being given notice, and that the *sharīʿa* court's "mechanical formula" for determining custody conflicted with New Jersey public policy.[191]

By contrast, four other cases identified by the CSP for the *SLASC* Report *did* involve a final decision to accord comity to foreign custody decrees (though one case was decided on other grounds).[192] Two of these cases involved unusual circumstances that seemed to determine the outcome. An Iowa appeals court in 2005 upheld a lower court's decision to recognize a Jordanian custody order, noting that the mother in the case, Manal Makhlouf, had repeatedly lied to Iowa courts in her quest for an Iowa custody decree in her favor.[193] The appeals court found that Iowa courts were bound by a statutory requirement to decline jurisdiction "if a court of this state has jurisdiction under this chapter because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct." The appeals court further determined that Ms. Makhlouf had "blatantly" met that standard, "subject[ing] both Samantha [the child] and her father, Ahmad, to mistreatment and abuse."[194] In making this decision, the Iowa appeals court ap-

190 *In re* Marriage of Donboli, 128 Wash. App. 1039, at *17–18 (Wash. Ct. App. July 18, 2005).

191 *See* Ali v. Ali, 652 A.2d 253, 259 (N.J. Super. Ct. Ch. Div. 1994).

192 Malak v. Malak (*In re* Marriage of Malak), 227 Cal. App. 3d 1018 (Cal. Ct. App. 1986); *In re* Makhlouf, 695 N.W.2d 503 (Iowa Ct. App. 2005); Hosain v. Malik, 671 A.2d 988 (Md. Ct. Spec. App. 1996); Ivaldi v. Ivaldi, 672 A.2d 1226 (N.J. Super. Ct. App. Div. 1996).

193 *See In re* Makhlouf, 695 N.W.2d 503 (Iowa Ct. App. 2005).

194 *Id*. at *3–4.

parently sidestepped, without comment, an exception in the Iowa Uniform Child Custody statute allowing it to decline application of a foreign custody decree "if the child-custody law of a foreign country violates fundamental principles of human rights."[195]

The 1996 New Jersey case *Ivaldi v. Ivaldi*[196] presented a mirror image of *Makhlouf*, again turning on questions of jurisdiction but with the parties' actions reversed. Jean Jacques Marcel Ivaldi, a dual French-U.S. citizen resident in New Jersey, sought custody of his daughter, Lina, in that state after her mother, Lamia Khribeche Ivaldi, took her to Morocco and filed for divorce there. The appellate court reversed a lower court's decision to restrain Lamia from pursuing custody proceedings, because the parents' prior agreement, to be interpreted under New Jersey law, expressly granted Lamia permission to take Lina to Morocco, thereby removing any statutory grounds for New Jersey jurisdiction.[197] The court noted in dicta, and without explanation, that, even if the lower court had properly taken jurisdiction, "[i]n our view, the court would have been obliged to abstain and defer to the jurisdiction of the Moroccan court under recognized principles of international comity."[198]

Thus, in both cases, U.S. state courts passed over, without actually reviewing, the merits of the foreign custody law in question. In *Makhlouf*, the court did so because procedural rules denied jurisdiction and the court declined without discussion to find any human rights violations. In *Ivaldi*, the court did so because it had no jurisdiction so it did not need to reach that question.

The last two cases, by contrast, involved direct decisions on the merits to grant comity. In 1986, a California appellate court carefully analyzed the law applied by a Lebanese Sunnī *sharīʿa* court before granting comity to that court's custody decree.[199] The couple, originally from Lebanon, had lived in the United Arab Emir-

195 Iowa Code Ann. § 598B.105(3) (West 2014).

196 672 A.2d 1226 (N.J. Super. Ct. App. Div. 1996).

197 *Id.* at 1229, 1231.

198 *Id.* at 1233.

199 *See* Malak v. Malak (*In re* Marriage of Malak), 227 Cal. App. 3d 1018 (Cal. Ct. App. 1986).

ates before the wife, Laila Sawaya Malak, took the children to the United States and filed for separation in California. The husband, Abdul Latif Malak, invoked two foreign custody decrees in his favor, one from Lebanon and the other from the U.A.E. The California trial court refused to grant comity to the U.A.E. decree, reasoning that it was issued without a proper opportunity for Laila Malak to be heard. (The appellate court also noted, in dicta, that a U.S. Embassy report called into question the adequacy of the U.A.E.'s substantive custody laws.)[200] The trial court applied the same decision to the Lebanese decree, finding that it violated due process and did not consider the best interests of the children.[201] The appellate court, however, disagreed. In its review of the record, it determined that Laila Malak had been given "reasonable notice and opportunity to be heard" in the Lebanese proceedings, and that the four factors that the court then had considered sufficed as "tak[ing] the best interests of the children into consideration."[202]

Thus the California court in *Malak* directly differed with the Massachusetts appellate courts' rulings in *Charara* and *El Chaar* that Lebanese legal standards *were* sufficient to be entitled to comity. Both the Massachusetts and the California courts recognized significant barriers to granting comity, but they simply differed in their legal analysis of whether Lebanon's substantive and procedural rules met those standards.

Ten years after *Malak*, the Maryland Court of Special Appeals likewise granted comity to a Pakistani custody decree.[203] Joohi Hosain (the wife) and Anwar Malik (the husband) had married in Pakistan and began raising a child there before they separated. After Hosain moved to the United States with their child in 1990 or 1991, a Pakistani court awarded Malik custody. Upon Malik locating her in Maryland in 1992, Joohi Hosain filed there for custody and a restraining order, which was granted temporarily. However, the lower court was reversed by the Maryland Court

200 *Id.* at 1022, 1028–29.
201 *Id.* at 1025.
202 *Id.* at 1025, 1027.
203 *See* Hosain v. Malik, 671 A.2d 988 (Md. Ct. Spec. App. 1996).

of Special Appeals, which relied on Maryland's UCCJA to rule that Maryland should decline jurisdiction, "unless persuaded that the Pakistani court either...did not apply the best interest of the child standard...or appl[ied] a law (whether substantive, evidentiary, or procedural) so contrary to Maryland public policy as to undermine confidence in the outcome of the trial."[204]

On remand, the trial court concluded that the testimony of the husband's expert witness, which stated that the Pakistani proceedings did not fall into either exception, was controlling. The trial court granted comity on that basis. The Court of Special Appeals affirmed, concluding that the trial court could have reasonably concluded that Pakistan did apply the best interests formula, even though it also considered "the customs, culture, religion, and mores of the community and country of which the child and—in this case—her parents were a part, i.e., Pakistan."[205] The court also noted that Pakistani law included formulas for assigning custody based on gender and age, but it noted that these were only some factors, that those factors were rooted in British colonial legislation, that it was "only more doctrinaire in degree" than the preference for maternal custody in American law (which had been long-lived), and finally that the formulas would have favored Hosain, but had not been applied because she had abducted the child and allegedly renounced Islam.[206] The court also discounted Hosain's claims that her due process rights were violated because, having been accused of adultery, she could not return to Pakistan for the custody proceedings without risking execution. Declining to consider this claim did not render the lower court clearly erroneous, the appeals court held, because Hosain's own expert witness claimed that "punishment for adultery was extremely unlikely and...proving the crime was extremely difficult."[207] More broadly, the court seemed to dismiss any concerns about the substantive content of Pakistani law as being attacks on Islam more generally,

204 Malik v. Malik, 638 A.2d 1184 (Md. Ct. Spec. App. 1994); *see also Hosain*, 671 A.2d at 991 (noting the 1994 decision).

205 *Hosain*, 671 A.2d at 1000.

206 *Id.* at 1003–05.

207 *Id.* at 1006.

because "we are simply unprepared to hold that this longstanding doctrine [formulas for custody] of one of the world's oldest and largest religions practiced by hundreds of millions of people around the world and in this country...is repugnant to Maryland public policy."[208]

The court's ruling in favor of Malik attracted a strong dissent from two judges. They argued that the majority had misread several of the lower court's factual findings, including on the critical question of whether the Pakistani court had *actually* applied the best interests standard, or simply *would have* done so if Hosain had appeared. "We were clear in *Malik*," the dissent noted, "that, unless the Pakistani courts applied the best interests standard, comity was not appropriate."[209] Sounding much like the California courts in *El Chaar* and *Charara*, the dissent continued by arguing that "[t]he Pakistani courts' use of phrases such as the 'welfare of the minor' does not constitute the application of the best interests of the child standard."[210]

Taken together, these custody cases show that courts in many states have been guided by the same general principles—of comity, public policy, and the UCCJA—when called upon to enforce foreign custody decrees, but have nonetheless come to sharply differing conclusions. The greatest uncertainty, manifested in the contrast between cases like *El Chaar* and *Charara* on one side, and those like *Hosain* and *Malak* on the other, seems to revolve around exactly how closely foreign law must resemble the American best interests of the child standard to be entitled to comity and "substantial conformity" under public policy and UCCJ(E)A analyses.

IV. The Effect of Legislation

This review has analyzed the fifty cases that, according to the CSP report, justify and necessitate the enactment of state-level bans on the recognition of Islamic law. As we have seen, U.S. state

208 *Id.* at 1005.
209 *Id.* at 1021 (Hollander, J., dissenting).
210 *Id.*

courts already apply the law or judgments of Islamic countries only after considering a number of possible bars. But in the remaining cases, where foreign law *was* recognized as applicable through U.S. laws of comity, would the proposed or passed laws banning *sharīʿa* or foreign law make a difference? A brief analysis will suggest that the answer, for the most part, is no. Next we can consider whether and how other legal approaches *could* make a difference.

a. Blocking Laws

To understand how blocking bills could or could not affect the cases described in the CSP report, it helps to move systematically through Professor Nersessian's three categories of 1) "full," 2) "reciprocal," and 3) "rights-based" bills and, finally, the fourth category of "public policy" legislation.

i. "Full" Blocking Laws

"Full" blocking bills would clearly prevent courts from enforcing any foreign law, and would thus change the outcome in the cases here in which courts granted comity. Oklahoma's "Save Our State" state-constitutional amendment, most notably, would have blocked courts from considering "international law or Sharia Law," or foreign law if that state "include[d] Sharia Law," or more broadly, "the legal precepts of other nations or cultures."[211] But these bills' very breadth raises profound concerns about how they would interfere with American courts' ability to adjudicate any case with transnational dimensions.[212] Moreover, as the Tenth Circuit has decided, laws like Oklahoma's are unconstitutional violations of the First Amendment, as they single out a particular

211 *Awad*, 670 F.3d at 1118.

212 *See, e.g.*, Fallon, *supra* note 41; Aaron Fellmeth, *U.S. State Legislation to Limit Use of International and Foreign Law*, 106 Am. J. Int'l L. 107 (2012); Nersessian, *supra* note 10; Eugene Volokh, *Foreign Law in American Courts*, 66 Okla. L. Rev. 219 (2014).

religion.[213] Probably for that reason, few states have recently considered "full" blocking bills. One such bill was introduced in the Oregon State Senate in 2017, but did not make it out of committee.[214]

ii. "Reciprocal" Blocking Laws

The effect of "reciprocal" laws is a bit more ambiguous than that of "full" blocking bills. The Kansas bill, for example, which precisely tracks the model ALAC legislation,[215] prevents the enforcement of foreign judgments based 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." It also bans the recognition of foreign law or arbitral awards that would apply "any substantive or procedural law, *as applied to the dispute at issue*, that would not grant the parties" the same rights. And it prevents courts from declining jurisdiction "if the courts of this state find that granting a claim of *forum non conveniens* or a related claim violates or would likely violate" such rights "with respect to the matter in dispute."[216]

Some scholars have interpreted these provisions as blocking *any* foreign law that does not precisely comport with American standards.[217] In particular, they note that in a whole host of proceedings, the United States, but not any other country, would require a jury trial.[218] They also point out that different state constitutions accord somewhat different sets of rights.[219]

213 *See generally Awad*, 670 F.3d 1111.

214 S.B. 479, 2017 Leg. (Or. 2017), https://olis.leg.state.or.us/liz/2017R1/Measures/Overview/SB479 [https://perma.cc/58GA-JKLT].

215 *See Awad*, 670 F.3d at 1068–69.

216 Kan. Stat. Ann. § 60-5104, 5105(a)–(b) (2013) (emphasis added).

217 *See generally* Boyer, *supra* note 20; Fellmeth, *supra* note 212; Nersessian, *supra* note 10.

218 *See* Volokh, *supra* note 212, at 238–40 (raising jury trial concerns).

219 *See* Boyer, *supra* note 20; Fellmeth, *supra* note 212, at 116 ("Many state constitutions include extensive rights that would be unfamiliar to non-citizens of the state."); Nersessian, *supra* note 10.

However, the language of these types of bills seems to leave open an alternate, more limited reading, that would prevent the recognition of foreign law or judgments only when such application would *actually* violate the constitutional rights of a party in the case at bar. (See the emphasized portions of the quotations above.) This reading is more persuasive for the second clause, on the recognition of foreign law, since it refers specifically to laws "as applied to the dispute at issue." This interpretation may be a route courts will prefer. Professor Aaron Fellmeth has suggested that "state legislatures and federal courts alike can be expected to minimize" the laws' "unpredictable consequences."[220]

Minimization of unforeseen consequences seems to have resulted from Kansas's blocking law. In 2012 a Kansas trial court refused to enforce a Muslim marriage contract during a divorce on the grounds that it was incomplete; the contract did not specify an amount for the dowry, and no certified translated copy of the agreement had been entered into evidence.[221] In dicta, the court analyzed the anti-foreign law legislation, noting on one hand that it could block the application of any premarital agreement that was "the product of a legal system which is obnoxious to equal rights based on gender," but also that "[i]n one respect, this recent enactment appears to be superfluous" because "[t]he judiciary already is charged with protecting constitutional rights."[222]

This is the crux of the matter: the judiciary must protect constitutional rights. As has been seen from the very cases presented in the CSP report, courts frequently discuss constitutional

220 Fellmeth, *supra* note 212, at 116–17. *See also* Volokh, *supra* note 212, at 239, 242.

221 Soleimani v. Soleimani, No. 11CV4668 (Kan. Cir. Ct. 2012), http://www.volokh.com/wp-content/uploads/2012/09/soleimani.pdf [https://perma.cc/2RPZ-5AB7]. For further discussion of this case, see Eugene Volokh, *Court Refuses to Enforce Islamic Premarital Agreement That Promised Wife $677,000 in the Event of Divorce*, Volokh Conspiracy (Sept. 10, 2012), http://volokh.com/2012/09/10/court-refuses-to-enforce-islamic-premarital-agreement-that-promised-wife-677000-in-the-event-of-divorce [https://perma.cc/4G9W-5X5A]. *See also* Abbas, *supra* note 20; Boyer, *supra* note 20, at 1078–79. Others have, I believe, over-emphasized the court's reliance on the new law, which did not serve as the basis for its decision; even concerns about gender equality would have stemmed from existing constitutional law.

222 *Soleimani*, at 30–31.

questions, even when parties have not raised them. Even facially non-constitutional grounds for denying comity or refusing to enforce a contract, like the public policy exception and the *Jones v. Wolf* "neutral principles" approach, are in fact based on constitutional concerns (about due process and equal protection in the former case, and about freedom of religion in the latter). To the extent that "reciprocal" blocking laws are interpreted narrowly, they may be entirely superfluous, simply instructing the judiciary to do what it already does. If they are interpreted broadly, they risk creating chaos, as Professors Fellmeth, Nersessian, and Volokh have suggested.

iii. "Rights-Based" Blocking Laws

"Rights-based" blocking laws, such as those enacted in Arizona, Louisiana, Tennessee, and North Carolina, and under consideration in Montana and Wisconsin, would prevent courts from recognizing foreign law or enforcing foreign judgments if this would result in an "actual violation[] of the constitutional rights of a person or actual conflict with the laws of this state[.]"[223] As Volokh notes, these laws are even more likely than "reciprocal" legislation to be superfluous. After all, "[c]ourts already may not do things that actually violate constitutional rights or conflict with other laws. And while courts sometimes indeed erroneously violate constitutional rights or other laws, the new rules wouldn't prevent such errors."[224]

Indeed, such laws would probably not have changed the outcome in any of the cases discussed above. Even in the few cases where courts actually enforced Muslim law on U.S. law comity grants, and in the even fewer cases where such grants raised plausible normative or legal concerns (for example, in *Hosain*, *Chaudry*, or *Mansour*), it is highly doubtful that the courts would have

223 *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-3102 (2014); S.B. 97, 65th Leg. (Mont. 2017), https://legiscan.com/MT/text/SB97/2017 [https://perma.cc/PPF4-Q4JN]; A.B. 401, 2017–2018 Leg. (Wis. 2017–2018), http://docs.legis.wisconsin.gov/2017/related/proposals/ab401 [https://perma.cc/268G-NMA8].

224 Volokh, *supra* note 212, at 243.

come to a different conclusion had they been statutorily required to note that their decision did not operate to deprive any party of constitutional rights.

Perhaps some observers believe Jooha Hosain or Parveen Chaudry were in fact subjected to violations of their right to due process. But it is absurd to imagine that the courts that granted comity thought so. The parties could have appealed either decision on constitutional grounds *regardless* of whether there were a specific statute on the subject. As noted above, every court that enforced a foreign law on comity grants had to pass through several filters, such as the public policy exception to comity, the "substantial conformity" provisions of the UCCJ(E)A, and more basic concerns about due process and equal protection, which inherently guard against unconstitutional decisions. If the courts in *Hosain* and *Chaudry* did not see these requirements as bars to their decisions, it is implausible that they would have changed their minds if faced with an even less clear, and normatively less stringent, statutory test for "violations of...constitutional rights."

iv. "Public Policy" Blocking Laws

Blocking laws based on "public policy"—such as the law enacted in Florida in 2014—seem even less meaningful than "reciprocal" or "rights-based" legislation. Florida's law, in fact, began the legislative process as a "rights-based" bill but was completely overhauled after opposition from the Anti-Defamation League and the Florida Bar.[225] The final bill was "largely a product of the International Law Section of the Florida Bar, which had previously opposed the action."[226] The text, as enacted, explicitly codifies the holdings of several Florida Supreme Court and appellate decisions, and one legislator commented that it "only simplifies current law.... You can go to one statute and find the answer to a

225 Miller, *supra* note 97. For the earlier version, see S.B. 58, 2014 Leg. (Fla. 2014), http://www.flsenate.gov/Session/Bill/2013/0058/BillText/c2/HTML [https://perma.cc/BK24-VL94].

226 Miller, *supra* note 97.

(legal) question. Right now you have to search through cases and have a lawyer synthesize that, and articulate that to a judge."[227] The law's provisions essentially track the "public policy" exception to comity, as clearly established in case law.[228] It establishes that foreign laws and foreign judgments, in several different contexts, cannot be enforced if doing so would conflict with Florida's "strong public policy."[229] While the bill does define "public policy," the definition is circular and appears meaningless: "As used in this section, the term 'strong public policy' means public policy of sufficient importance to outweigh the policy of protecting freedom of contract."[230]

As a result of these changes, Florida's law likely would have had no effect on any of the cases discussed in this Article. If adopted in various states, it would simply provide the courts with another ground for the public policy holdings they would have otherwise reached.

b. Legislators' Real Tools

While the main goal of this Article is to examine both the evidence for the claim that *sharīʿa* or Islamic or Muslim law challenges the U.S. legal system and the effectiveness of existing responses, it is worth briefly discussing what tools legislators actually have. It is clear that, even though Islamic and Muslim law provisions are rarely enforced (through comity rules) and never produce clear constitutional violations, state courts have reached different conclusions on enforcement as they reason through the tangled thicket of contract, choice of law, comity, and religious freedom. Some of their conclusions may be troubling to observers or, more relevantly, to state legislatures. None of the existing or proposed anti-*sharīʿa* bills, however, would clear this thicket. Instead, they would only make it more complicated, either by forcing

227 *Id.* (quoting Fla. State Rep. Larry Metz).

228 *See* S.B. 386, 2014 Leg. (Fla. 2014), http://www.flsenate.gov/Session/Bill/2014/0386/BillText/er/HTML [https://perma.cc/NSX5-E452].

229 *Id.*

230 *Id.*

courts to undertake frivolous layers of constitutional review, or by forcing them to reinvent their conflict of laws jurisprudence entirely. So to the extent that legislators do have real concerns about these cases, not motivated by religious bigotry or fear—particularly about cases that have drawn criticism, like *Chaudry*, *Hosain*, *Mansour*, or *Ghassemi*—what can they do?

State legislatures in fact have a variety of simple and effective tools at their disposal. First, they could enact narrowly targeted laws to overturn individual cases. If the New Jersey legislature wants to overrule *Chaudry*, it could simply overrule *Chaudry*. A statute could explicitly state, for example, that a divorce obtained at a foreign consulate without granting the other spouse a chance to respond is contrary to public policy, or that any agreement seeking to depart from the default of equitable distribution must say so in unambiguous terms and must provide consideration that is reasonable under state law. Likewise, the Louisiana legislature could easily overturn *Ghassemi* by passing a simple statute stating that first-cousin marriages conflict with the strong public policy of the state (although doing so would have other negative consequences).[231] These measures would be far more effective than blocking bills. Legislatures could also see fit to codify other interpretive approaches—for example, to dowries or marriage contracts—that commentators have suggested.[232]

Likewise, if a state legislature is truly troubled by *Mansour* (in which a court indicated it would cite Islamic law to determine the enforceability of an arbitral award), it could pass a statute reiterating existing law, that courts may use only neutral principles to determine the enforceability of religious arbitration under religious law. If a state legislature wishes to go beyond that, to affect the arbitration itself—perhaps by mandating substantive judicial review of arbitral decisions reached under religious principles—it might face First Amendment Free Exercise Clause problems. Moreover, efforts to interfere with arbitration might also conflict

231 *See* Volokh, *supra* note 212, at 230–31.

232 *See, e.g.*, Blenkhorn, *supra* note 38; Henderson, *supra* note 38; Oman, *supra* note 140; Sizemore, *supra* note 38; Thompson & Yunus, *supra* note 38.

with the 1925 Federal Arbitration Act,[233] or with state law on arbitration. If such efforts were directed solely at Muslims, they would again run afoul of the First Amendment's Establishment Clause.

As the *Aleem* case shows, states can also create new constitutional rights. Equal Rights Amendments, prohibiting all discrimination on the basis of sex, are an example of one such approach. The Federal ERA, of course, fell three states short of ratification decades ago, but some states, including Maryland, adopted their own versions.[234] As we saw, the Maryland Court of Appeals relied partly on that amendment when it found *ṭalāq* divorce to be contrary to public policy in *Aleem*.

Conclusion

The preceding analysis of the most substantive evidence adduced by those who fear *sharīʿa* in the United States, and advocate special laws guarding against it, illustrates that there is little reason for concern. Many cases in the CSP's report do not even deal with the recognition of Islamic or Muslim law, while in the plurality of them, courts used existing legal tools to *decline* to enforce that law based on constitutional and public policy concerns. In the few cases where state courts have enforced Islamic or Muslim law or enforced foreign judgments, they have done so only after deciding that the existing legal tools do not bar the enforcement of some foreign judgments or the recognition of Muslim countries' laws. Some lower courts have erred, of course, and they have been reversed on appeal. And of those appellate court opinions that affirmed or required the enforcement of foreign and Islamic law, there are only a few that might be plausibly attacked on constitutional grounds.

This analysis suggests that there is little cause for the type of alarmism that seems to motivate the campaign for blocking bills.

233 9 U.S.C. § 1. For the questions surrounding religious arbitration, see Helfand, *supra* note 42; Volokh, *supra* note 212; Walter, *supra* note 42.

234 *See The ERA in the States*, Equal Rights Amendment, http://www.equalrightsamendment.org/states.htm (last visited Apr. 18, 2020) [https://perma.cc/Z22A-7DZN].

The cases in the CSP report, far from demonstrating that "some judges are making decisions deferring to Shariah law [*sic*] even when those decisions conflict with Constitutional protections,"[235] show no such thing. The report's research is slipshod, it is entirely lacking in analysis, and, as this Article has shown, a proper analysis does more to undermine its conclusions than to support them. There is no evidence in the report to suggest that courts have been using Islamic or Muslim law to reach decisions that violate constitutional rights. Even the few decisions here that might raise plausible normative concerns are unlikely to have come out differently if a blocking bill had been in effect. To the extent that state courts are confused about how to approach aspects of Islamic or Muslim law, particularly family law, state legislatures have a variety of more precise tools available to address these issues. If they choose instead to pass ineffective or entirely meaningless blocking bills, and especially if they express a particular fear of Muslims while doing so, this suggests that those laws deserve further First Amendment scrutiny.

235 SLASC, *supra* note 15, at 8.