"Unveiling" Kansas's Ban on Application of Foreign Law*

I. INTRODUCTION

In January 2012, the Tenth Circuit Court of Appeals in *Awad v. Ziriax* upheld an injunction granted by the Western District of Oklahoma barring the implementation of Oklahoma's Save Our State Amendment, which "forb[ade] courts from considering or using Sharia" or international law.[1] Despite the decision in *Awad*, the Kansas Legislature passed a similar bill a few months later intended to ban Sharī'a law from "creeping" into the Kansas judiciary.[2] On May 21, 2012, Kansas Governor Sam Brownback signed into law Senate Bill 79,[3] codified at article 51 of the Kansas Statutes, concerning the protection of "rights and privileges granted under the United States or Kansas constitutions."[4] Article 51 plainly prohibits "any law, legal code or system of a jurisdiction outside of any state or territory of the United States."[5] And, under the law, "[a]ny court, arbitration, tribunal or administrative agency ruling or decision" basing a ruling "in whole or in part on any foreign law, legal code or system" is void and unenforceable as against the public policy of Kansas.[6] Article 51 bans the application of international law in state court proceedings. The law's language veils the true intent of article 51. Although not explicit in article 51, the legislative intent behind the law was to ban Sharī'a law, otherwise known as Islamic law.[7]

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* *Ryan H. Boyer*. J.D. candidate 2013, University of Kansas School of Law; M.A. 2009, Southern Methodist University; B.A. 2007, Baker University. I would like to thank the entire board and staff of the Kansas Law Review, especially Kimberly Condon, Ashley Dillon, Rachel Nelson, and Joe Schremmer for their thoughtful edits and suggestions. I would also like to thank Professor Raj Bhala for his invaluable feedback, encouragement, and course in Islamic Law. Finally, I would like to thank my parents and sister for their love and support.

1. 670 F.3d 1111, 1117–18, 1132 (10th Cir. 2012).

2. Andy Marso, *Bill Aimed at Stopping Sharia Law Passes Senate*, TOPEKA CAP.-J., May 11, 2012, http://cjonline.com/news/2012-05-11/bill-aimed-stopping-sharia-law-passes-senate.

3. KAN. STAT. ANN. §§ 60-5101 to -5108 (Supp. 2012).

4. *Id.* § 60-5101.

5. *Id.* § 60-5102.

6. *Id.* § 60-5103.

7. *See* Marso, *supra* note 2 (noting that legislators hoped to protect Kansans from Islamic law); Andy Marso, *Mast Makes Last Pitch for Sharia Law Bill*, TOPEKA CAP.-J., May 10, 2012,

The fear that international or Sharī'a law is infiltrating the American judicial system is not novel. Congress proposed several bills banning federal courts from considering foreign law from 2004 to 2009.[8] These measures have been driven largely by the fear that the judicial system is turning toward international law rather than the Constitution.[9] However, the cases that spurred this fear were controversial.[10] The Supreme Court has used foreign law "not because those norms are binding or controlling" but to ensure "respected reasoning to support" the Court's decision "with basic principles of decency."[11]

After September 11, 2001, fears of international influence have become an unjustifiable fear of Muslims.[12] Some Americans have unjustly used the terms "Arab," "Muslim," and "terrorist" synonymously, and relied on pictures of veiled women, bearded men, and other false generalizations to demonize the Islamic faith.[13] During the 2012 Republican presidential primary, candidates Newt Gingrich and Michele Bachmann signed a pledge to fend off the "totalitarian control" of Islamic law.[14] David Yerushalmi, a New York lawyer, has initiated proposals in several states to ban Islamic law, attempting to use malleable state legislatures to pass anti-Muslim measures.[15] Yerushalmi

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http://cjonline.com/news/2012-05-10/mast-makes-last-pitch-sharia-law-bill [hereinafter Marso, *Mast Makes Last Pitch*].

8. *See* Martha F. Davis & Johanna Kalb, *Oklahoma and Beyond: Understanding the Wave of State Anti-Transnational Law Initiatives*, 87 IND. L.J. SUPP. 1, 3 (2011) (stating that initiatives to ban judicial consideration of foreign or international law have been introduced several times in the United States Congress and in several states); *see, e.g.*, H.R. Res. 473, 111th Cong. (2009); H.R. Res. 372, 110th Cong. (2007); H.R. Res. 97, 109th Cong. (2005); Constitution Restoration Act of 2004, S. 2323, 108th Cong. (2004); Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. (2004); Constitution Restoration Act of 2004, S. 2082, 108th Cong. (2004).

9. *See* Davis & Kalb, *supra* note 8, at 7–8 (discussing how courts' citations to international law causes some to fear that international law will undermine national sovereignty).

10. *See id.* (citing Graham v. Florida, 130 S. Ct. 2011 (2010) (life imprisonment for juvenile offenders); Roper v. Simmons, 534 U.S. 551 (2005) (juvenile death penalty); Lawrence v. Texas, 539 U.S. 558 (2003) (gay rights)).

11. *Id.* (quoting Justice Kennedy in *Graham*, 130 S. Ct. at 2034).

12. *See generally* Yaser Ali, *Shariah and Citizenship—How Islamophobia Is Creating a Second-Class Citizenry in America*, 100 CALIF. L. REV. 1027 (2012) (providing an excellent background of Islamophobia and its origins and impacts within the Muslim—and those who "appear Muslim"—community).

13. *See* Tariq A. Shah, *Islam, Muslims and Terrorism: Secret Evidence and Guilt by Association*, 10 MICH. ST. U.-DETROIT C. L. J. INT'L L.589, 596–97 (2001) (discussing the "ominous turn" of the rise of Islamophobia in America).

14. Andrea Elliott, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES, July 30, 2011, http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all&_r=0.

15. *Who's Behind The Movement to Ban Shariah Law?*, NPR (Aug. 9, 2011, 9:30 AM), http://www.npr.org/2011/08/09/139168699/whos-behind-the-movement-to-ban-shariah-law.

has started two organizations—ACT! for America[16] and the Center for Security Policy[17]—to disseminate incorrect messages about Sharī'a law.[18] Indeed, the *exact language* used in article 51 is listed on the Center for Security Policy's website as an example for state legislatures to utilize during drafting.[19]

This Note argues that article 51 is unconstitutional under the federal and state constitutions. While article 51 is not facially discriminatory, the intent to discriminate against the practice of Muslims is evident in the legislative history. Article 51 is unconstitutional under multiple clauses in the United States Constitution and section 7 of the Kansas Bill of Rights. Furthermore, this Note contends that article 51, with its broad and sweeping language, places an unnecessary burden on Kansas courts, citizens, and businesses.

Part II.A provides a brief introduction to Islamic law. Next, it explores the progression of Oklahoma's Save Our State Amendment, *Awad*, and article 51. Part III scrutinizes the legislative history and ultimate passage of article 51 in the Kansas Legislature and then examines its constitutionality. Part III.C discusses the impact of article 51 on existing Kansas laws and the resulting burdens on the state's citizens and businesses. Finally, Part III.D briefly addresses public policy concerns.

II. BACKGROUND

A. Sharī'a Law

The history of the life of the Prophet Muhammad, Peace Be Upon Him (PBUH),[20] the rise of Islam, and the development of Sharī'a law are fascinating and complex. However, only a brief background of Islam and Sharī'a law is necessary here. Sharī'a law, or the Sharī'a, is the

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16. *See generally About ACT! for America*, ACT! FOR AMERICA, http://www.actforamerica.org/index.php/learn/about-act-for-america (last visited Mar. 13, 2013).

17. *See generally About the American Public Policy Alliance*, AM. PUB. POL'Y ALLIANCE, http://publicpolicyalliance.org/about/ (last visited Mar. 13, 2013).

18. *Who's Behind The Movement to Ban Shariah Law?*, *supra* note 15; Elliott, *supra* note 14.

19. *American Laws for American Courts*, AM. PUB. POL'Y ALLIANCE, http://publicpolicyalliance.org/legislation/american-laws-for-american-courts/ (last visited Mar. 13, 2013).

20. In the Muslim faith, references to the Prophet Muhammad are generally followed with the phrase "Peace Be Upon Him"—shortened to "PBUH" in some texts. *See, e.g.*, RAJ BHALA, UNDERSTANDING ISLAMIC LAW (SHARĪ'A), at xi (2011). For brevity's sake, and for respect of those reading, any references to the Prophet or Muhammad refer to the full respectful conveyance of the Prophet Muhammad, PBUH.

essence of the Islamic faith and where the tenants of the religion are encapsulated into the law of a particular state.[21] Thus, unlike the American legal system, the concept of separate, different religious faiths under a secular legal code does not exist in states under the Sharī'a.[22] Sharī'a law is considered a gift from God[23] and an instruction for his followers' daily lives.[24]

Four sources comprise Islamic law: (1) the sacred text of Islam, the Holy Qur'an; (2) *sunnah*[25]—traditions, teachings, and practices of the Prophet Muhammad—including to some extent, *hadiths*;[26] (3) *ijmā'*, or the consensus of the scholarly community; and (4) *qiyās*, which are analogical deductions and reasoning. The Qur'an and *sunnah* are the primary sources of Islamic law.[27] These two are intertwined primarily because of the meaning of the word Qur'an, "to recite."[28] God delivered his message—the Qur'an—to Muhammad through Jabreel (Gabriel), the Archangel.[29] Jabreel would instruct Muhammad to "recite!" and Muhammad, although frightened at first, repeated the message back.[30] Muhammad then recited the message to anyone who would listen, for many were skeptical of him being a "true" prophet of God.[31] Muhammad found opportunities throughout his life to spread God's message by applying it to everyday life situations,[32] the battlefield,[33] and

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21. *Id.* at xi–xxi.

22. *Id.*

23. "Allah," translated from Arabic, means God. *Id.* at 1391. Muslims refer to Allah as the One True God, the God of the People of the Book (Christians, Muslims, Jews, and perhaps Hindus and Shiks). *Id.* at 105–08.

24. *See id.* at 288 (explaining that *fiqh*, meaning "understanding," of the divine law found in the Qur'ān "is the science of the Sharī'a"); *see generally id.* at xi–xxii (discussing the "incomplete" equation of Sharī'a and Islamic law).

25. "Generally, practice or tradition . . . a precedent, legal custom, legal norm that is established by practice, example, decision, dicta, or tradition of the Prophet Muhammad." *Id.* at 1445–46.

26. "The prophetic tradition, in particular, a saying or account of an action of the Prophet Muhammad." *Id.* at 1403. These formal traditions are narrower than the *sunnah*. *Compare id.* at 302, *with id.* at 1145–46; *see also* JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 34, 69–75 (1964) (discussing how the Traditionalist movement relied on the *hadith* of the Prophet).

27. BHALA, *supra* note 20, at 289.

28. *Id.* at 292.

29. *Id.*

30. *Id.* at 35–36, 292–93.

31. *Id.* at 36–39.

32. *See generally id.* at 302–03 (explaining that Muhammad taught through his example, his word, and the traditions of his close companions and successors, all of which broadly comprise the *sunnah*).

33. *Id.* at 42–53.

even racism.[34] Muhammad's teachings in the Qur'an and his actions—*sunnah*—are the "fundamental," or "classical," traditions of Islam and are considered its primary sources.[35]

There is some disagreement regarding the secondary sources of Islamic law.[36] Not only do different Sunni Muslim schools within the Islamic faith (somewhat analogous to the various denominations of the Christian Protestant faiths) interpret *ijmā'* and *qiyās* independently, but Shiite Muslims do as well.[37] Furthermore, a debate over renewed interpretation, or *ijtihād*, has been growing in the Islamic faith.[38] *Ijtihād* would allow for Islamic scholars to analogize modern problems arising in Islam to the primary sources of Islam.[39] This option was "closed" in the late 900s.[40] However, there is increasing debate that *ijtihād* should be "reopened" to allow Islamic law to become less rigid.[41]

Sharī'a law is a guide for how practicing Muslims should live their lives.[42] Muslims should first follow the teachings of the Qur'an, then the *sunnah*.[43] Islamic law is still being codified today based on the past authority of the Sharī'a.[44] However, it could continue to adjust to changing circumstances if Islamic schools were to embrace *ijtihād*.[45] While codification still exists, the application of Sharī'a law is still debated in Islamic countries.[46] The Sharī'a can be practiced through many different facets, such as marriage customs, charitable giving,

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34. *See id.* at 874–76 (providing an account of Bilal, a black African who was subject to racism and the Prophet Muhammad's subsequent "reprimand").

35. *See* SCHACHT, *supra* note 26, at 34 ("[F]ormal 'traditions' . . . deriving from the Prophet superseded the living tradition of the school.").

36. *See generally* BHALA, *supra* note 20, at 313–22 (discussing the secondary sources of Islamic law and the differences among the schools of Islam).

37. *Id.* at 391, 325–28.

38. *Id.* at 335.

39. *Id.*

40. *Id.* at 336; *see also* SCHACHT, *supra* note 26, at 69–75 (detailing how the transition of "closing" *ijtihad* impacted the development of Sharī'a law).

41. *See* BHALA, *supra* note 20, at 338 (providing argument from Islamic scholar Tariq Ramadan on why the gate to *ijtihad* must be reopened to allow Muslims living in western societies to desegregate themselves).

42. *See* Yasir Qadhi, *A Proud, Patriotic, Shariah Practicing American*, FAITH IN MEMPHIS (Mar. 10, 2011), http://faithinmemphis.com/2011/03/10/a-proud-patriotic-shariah-practicing-american ("The word 'shariah' literally means 'path,' and for all Muslims, the shariah is a set of ethics and laws they believe will lead them to God's mercy.").

43. BHALA, *supra* note 20, at 304.

44. *Id.* at 306.

45. *Id.* at 338.

46. Elliott, *supra* note 14.

inheritance, fasting, and prayer.[47] Contrary to what anti-Islamists would claim, adhering to any of these practices does not embrace the "medieval rules of war or political domination."[48]

B. Oklahoma's "Save Our State Amendment" and Awad v. Ziriax

On November 2, 2010, Oklahomans passed the Save Our State Amendment (SOSA),[49] which provided that:

> [Oklahoma] Courts . . . shall . . . if necessary [uphold and adhere to] the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law.[50]

Shortly thereafter, Muneer Awad, a citizen of Oklahoma and a Muslim, filed a restraining order and sought a preliminarily injunction in the Western District of Oklahoma to prevent the certification of the election results.[51] The court granted the temporary restraining order on November 9, 2010, and after an evidentiary hearing, granted the preliminary injunction.[52]

The Tenth Circuit's discussion focused on the SOSA's

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47. *Id.*

48. *See id.* (discussing how following Sharī'a principles does not equate to violence and misogyny). Americans generally are not knowledgeable of the practice of the Muslim faith or its relation to Christianity. In fact, Islam is similar to Christianity. *E.g.*, BHALA, *supra* note 20, at 9–19 (exploring the similarities and differences of Islam and Christianity). Both Jesus Christ and the Virgin Mary are revered in the Qur'an, which also includes a foretelling of the second coming of Christ. *See id.* at 13, 14–15 (providing a comparative table of Islam and Christianity as well as explaining the reverence that Islam has for the Virgin Mary and her son, Jesus Christ).

> [He] said: 'I am a servant of God. He has granted me the Scripture; made me a prophet; made me blessed wherever I may be. He commanded me to pray, to give alms as long as I live, to cherish my mother. He did not make me domineering or graceless. Peace was on me the day I was born, and will be on me the day I die and the day I am raised to life again.'

Qur'an, *Mary*, 19:30–33, at 192 (M.A.S. Abdel Haleem trans., 2004). Muhammad also valued the beliefs and religion of Christians, as evidenced in his "Promise to Saint Catherine's Monastery." BHALA, *supra* note 20, at xxv–xxvi. The Promise allied Christians with Muslims and Muhammad and "equated ill treatments of Christians with violating God's covenant." *Id.* at xxvi.

49. *Summary Results: General Election—November 2, 2010*, OKLA. ST. ELECTION BD. (Nov. 2, 2010), http://www.ok.gov/elections/support/10gen.html (indicating that Oklahoma's Save Our State Amendment passed with 70.08% of the vote).

50. Awad v. Ziriax, 670 F.3d 1111, 1117–18 (10th Cir. 2012).

51. Complaint Seeking a Temporary Restraining Order & Preliminary Injunction, Awad v. Ziriax, 754 F. Supp. 2d 1298 (W.D. Okla. Nov. 4, 2010) (No. CIV-10-1186 M.), 2010 WL 4455350.

52. *Awad*, 670 F.3d at 1119.

Establishment Clause violations.[53] The First Amendment of the United States Constitution mandates that "Congress shall make no law respecting an establishment of religion."[54] The court's first task was to determine what test applied to SOSA. While the district court applied the *Lemon*[55] test to evaluate Awad's initial petition, the record was "sufficiently developed" to allow the Tenth Circuit to determine if Awad had met his burden using the *Larson v. Valente*[56] standard.[57] Application of *Larson* provided a better analysis because the SOSA discriminated "among religions," in contrast with application of the *Lemon* standard, which examines whether the law provided a "uniform benefit to *all* religions."[58] SOSA's language singled out Sharī'a law and "the legal precepts of other nations and cultures."[59] The "domestic or Oklahoma culture," conversely, was protected.[60] However, both the specific mention of Sharī'a and the use of the word "other" discriminated among religions.[61] Thus, the court applied strict scrutiny.[62] The *Lemon* and *Larson* tests are more fully discussed below in Part III.A.

The court applied strict scrutiny, which requires that the state have a compelling interest and the law have a "close fit" with the state's interest.[63] Oklahoma could not identify "*any* actual problem" that SOSA sought to address.[64] Nor could Oklahoma provide "a single instance where an Oklahoma court had applied Sharī'a law or used the legal precepts of other nations or cultures, let alone that such applications or uses had caused problems in Oklahoma."[65] Because the state did not have a compelling interest, the Tenth Circuit affirmed the district court's injunction.[66]

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53. *Id.* at 1124–32.
54. U.S. CONST. amend. I.
55. 403 U.S. 602 (1971); *see also infra* Part III.A.
56. 456 U.S. 228 (1982); *see also infra* Part III.A.
57. *Awad*, 670 F.3d at 1127 n.14, 1128.
58. *Id.* at 1126–27 (quoting *Larson*, 456 U.S. at 252).
59. *Id.* at 1129.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 1130.
65. *Id.*
66. *Id.* at 1132.

C. Kansas's Article 51

More state legislatures are considering anti-Sharī'a measures.[67] The American Public Policy Alliance advocates these measures under the catchphrase "American Laws for American Courts" (ALAC), and has posted model legislation on its website.[68] The Florida ALAC provision—although not enacted—is almost identical to the model legislation and article 51.[69] The American Public Policy Alliance, ACT! For America, and Center for Security Policy all have pressured state legislatures to pass Sharī'a bans.[70] While this is reminiscent of the Federal Constitution Restoration Acts that Congress tried to pass early last decade,[71] article 51 passed and is now law.

Momentum in Kansas to pass a law to effectively ban Sharī'a found a spokesperson in Representative Peggy Mast, a Republican from the town of Emporia.[72] Although not as explicit as SOSA, article 51 caused the same worry among Muslim groups when Governor Sam Brownback signed it into law on May 21, 2012.[73] The bill's stated purpose was to "protect and promote the rights and privileges" of the citizens of Kansas.[74] Any foreign law, legal code, or system that does not grant "the same fundamental liberties, rights and privileges granted under the United States and Kansas constitutions" is void and unenforceable under the law.[75] However, article 51 is inapplicable to legal business entities that contract with others and are subject to foreign choice-of-law provisions.[76] Thus, article 51 only applies to individuals exercising legal rights within the state of Kansas.

The word "Sharī'a" is not used in article 51, nor is there any mention

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67. *See generally* Bill Raftery, *Bans on Court Use of Sharia/International Law: Showdown Vote in Michigan Set for After November Election*, GAVEL TO GAVEL (Oct. 4, 2012), http://gaveltogavel.us/site/2012/10/04/bans-on-court-use-of-shariainternational-law-showdown-vote-in-michigan-set-for-after-november-election/ (providing a state-by-state breakdown of the anti-Sharī'a measures and outcomes).

68. *American Laws for American Courts*, *supra* note 19.

69. *Compare* S. 1294, 2011 Leg., Reg. Sess. (Fla. 2011), *with American Laws for American Courts*, *supra* note 19, *and* KAN. STAT. ANN. §§ 60-5101 to -5108 (Supp. 2012).

70. *See* Elliott, *supra* note 14.

71. *See supra* notes 8–11 and accompanying text.

72. Marso, *Mast Makes Last Pitch*, *supra* note 7.

73. Andy Marso, *Brownback Signs Bill That Caused Sharia Flap*, TOPEKA CAP.-J., May 25, 2012, http://cjonline.com/news/2012-05-25/brownback-signs-bill-caused-sharia-flap.

74. KAN. STAT. ANN. §§ 60-5101 to -5108.

75. *Id.* § 60-5103.

76. *Id.* § 60-5108.

of religion, unlike Oklahoma's SOSA.[77] But several legislators have stated that a statutory ban on Sharī'a law was the goal.[78] State Senator Chris Steineger, a Republican from Kansas City, said that he was "inundated [by a marketing campaign of supporters] . . . with materials that 'explain why sharia law is coming and Muslims are trying to take over America.'"[79] Floor debates drew supporters to "specifically single[] out Islamic law, or sharia, as a threat."[80] Proponents of article 51 told The *Wichita Eagle* that article 51 was about "American Law, American Courts" and stated in the explanation of the vote in the conference committee report that article 51 is "a vote for the maintaining of *American laws for American courts*."[81] This catchphrase and the boilerplate bill text indicate the legislature's purpose for the law.[82] There is no mystery surrounding where the text of article 51 originated—the American Public Policy Alliance. The anti-Sharī'a purpose of the bill was how the group marketed the bill "all session long," and Senator Steineger "[has] all the e-mails to prove it."[83]

III. ANALYSIS

While the neutral language of article 51 seemingly may not affect a majority of citizens, it will affect Kansas Muslims wishing to have aspects of Sharī'a law incorporated into their marriage contracts or foreign divorce decrees. Further, the freedoms of individuals to use alternative dispute resolution, in particular arbitration, will be hindered. Businesses will be unable to utilize Sharī'a-compliant financial services. And most importantly, article 51 will preclude Kansas courts from understanding all aspects of certain cases when making a decision.

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77. *See id.* §§ 60-5101 to -5108.

78. *See* Andy Marso, *Lawmakers Urged to Address Sharia*, TOPEKA CAP.-J., April 14, 2012, http://cjonline.com/news/2012-04-14/lawmakers-urged-address-sharia (discussing how state senators were sent numerous out-of-state emails urging them to pass article 51 and protect Kansas from "Islamization").

79. Marso, *supra* note 2.

80. Marso, *supra* note 78.

81. Dion Lefler, *Senate Oks Bill to Ban Foreign Laws*, WICHITA EAGLE, May 12, 2012, http://www.kansas.com/2012/05/11/2332324/senate-oks-bill-to-ban-foreign.html (emphasis added); S. JOURNAL, 2011–12, Reg. Sess., at 2700 (Kan. 2012), http://www.kslegislature.org/li/b2013_14/chamber/senate/journals/2012/5/.

82. *See supra* notes 71–73 and accompanying text.

83. Lefler, *supra* note 81.

A. Article 51's Constitutionality After Awad

Under the United States Constitution, Congress can make no laws "respecting an establishment of religion or prohibiting the free exercise thereof."[84] The Establishment Clause provides the basis for finding article 51 unconstitutional. While Kansas may have escaped an obvious Establishment Clause violation by not including the word "Sharī'a" in article 51, the law's discriminatory intent is well documented and sufficient to violate the Establishment Clause.[85] The main purpose of article 51 is to prohibit the application of Sharī'a law by Kansas courts.[86]

The Supreme Court primarily uses two tests—*Lemon* and *Larson*—to determine whether government action violates the Establishment Clause.[87] The Tenth Circuit in *Awad* applied the test set forth in *Larson* to analyze Oklahoma's SOSA.[88] The court found that the *Lemon* test was inapplicable because "the Oklahoma Amendment specifically name[d] the target of its discrimination."[89] However, the *Lemon* test can apply, instead of *Larson*, to legislation that is not blatantly discriminatory or unconstitutional.[90] For instance, in *Hernandez v. Commissioner*, the Supreme Court held that when a law does not facially discriminate among religions, the reviewing court should apply the *Lemon* test.[91] A facially neutral law invokes Establishment Clause review when the law intends to discriminate or target a certain religion.[92]

The Tenth Circuit has adopted Justice O'Connor's modified *Lemon*

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84. U.S. CONST. amend. I.

85. *See, e.g.*, Marso, *Mast Makes Last Pitch*, *supra* note 7 (discussing Senator Mast's concern about Islamic law negatively impacting Kansans). Senator Mast brought in "experts" to discuss article 51—an ex-terrorist and a former Marine. *Id.* If article 51 is to really protect the influence of foreign laws, then these "experts" are unqualified.

86. *See id.* Senator Mast stated she was concerned that, among other things, Sharī'a law would dictate custody of minor children in a divorce between Muslims.

87. Larson v. Valente, 456 U.S. 228 (1982); Lemon v. Kurtzman, 403 U.S. 602 (1971).

88. Awad v. Ziriax, 670 F.3d 1111, 1126–27 (10th Cir. 2012). *Larson* held that a law that "discriminates among religions, [] can survive only if it is 'closely fitted to the furtherance of any compelling interest asserted.'" *Id.* at 1127 (quoting *Larson*, 456 U.S. at 252).

89. *Id.* at 1128. *Lemon* is applicable to instances where a law provides "a uniform benefit to *all* religions, and not to provisions . . . that discriminate *among* religions." *Id.* at 1126 (quoting *Larson*, 456 U.S. at 252).

90. Indeed, "*Larson*'s rare use likely reflects that legislatures seldom pass laws that make 'explicit and deliberate distinctions between different religious organizations.'" *Id.* at 1127 (quoting *Larson*, 456 U.S. at 247 n.23).

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

92. *See* McCreary Cnty. v. ACLU, 545 U.S. 844, 861 (2005) ("Examination of purpose is a staple of statutory interpretation . . . and governmental purpose is a key element of a good deal of constitution doctrine . . . .").

test, or "endorsement test," to measure if the government conduct has the purpose or "the effect of conveying a message that religion or a particular religious belief is favored or preferred."[93] This modified *Lemon* test further dictates that if the government's "actual purpose is to endorse or disapprove of religion" the government's action is unconstitutional.[94] While "a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."[95]

Lemon is probably the appropriate test to apply to article 51 because its legislative purpose, although not its stated purpose, is to advance all religions except for Islam.[96] The true legislative intent of article 51 has been well documented in the press,[97] in emails between legislators,[98] and even in awards handed out to legislators.[99]

Senator Mast nurtured the bill in the legislature and was its biggest supporter.[100] During a news conference about the bill, it appeared that Mast's motivation was to stem the harm caused by Islamic law.[101] Shortly after passing the bill, Senator Mast published a press release that gives contradictory explanations of the bill's purpose.[102] In one place, the press release states that due to the growing evidence and "concern regarding an active campaign to gain public acceptance to Sharia law . . . [Mast] decided to act proactively in seeking legislation which would guarantee constitutional rights . . . ."[103] But, in the next paragraph, the press release states that the bill was not a "move against any religion . . . but actually a guarantee . . . *they* have the same protections as every other

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93. O'Connor v. Washburn Univ., 416 F.3d 1216, 1224 (10th Cir. 2005).

94. Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

95. *McCreary Cnty.*, 545 U.S. at 864.

96. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (noting that a bill's purpose must not be to advance or inhibit religion); *see also Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) ("The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion.").

97. *See, e.g.*, Matthew Schmitz, *Fears of 'Creeping Sharia'*, NAT'L REV. ONLINE (June 13, 2012, 4:00 AM), http://www.nationalreview.com/articles/302280/fears-creeping-sharia-matthew-schmitz?pg=2.

98. Lefler, *supra* note 81.

99. Press Release, Peggy Mast, Kansas State Rep., Peggy Mast Awarded 2012 ACT! For American National Security Eagle Award, *available at* http://www.peggymast.com/newsroom.html (last visited Mar. 11, 2013).

100. *See* Marso, *Mast Makes Last Pitch*, *supra* note 7.

101. *See id.* (stating that Mast's concern was the wellbeing of women and children under Islamic law).

102. Press Release, Peggy Mast, Mast Leads on SB 79; Upholds American Law, *available at* http://www.peggymast.com/mast79.html (last visited Mar. 11, 2013).

103. *Id.*

religion or culture in our country."[104] Mast and many of her peers[105] contend that this is a bill for women's rights, and "women will come to Kansas and the U.S. and seek equal protection" because of it.[106]

Some other legislators were not persuaded. Senator Chris Steineger, a Kansas City Republican, stated that "the original pitch wasn't about protecting the Constitution, but that Muslims were trying to use sharia law to take over the United States and had to be stopped."[107] Senator Tim Owens, an Overland Park Republican, believed article 51 to be "unconstitutional [and] intolerant."[108]

Further, article 51 avoids an Establishment Clause violation only if there is a compelling government interest and article 51 is narrowly tailored to that interest.[109] Kansas does not have a compelling interest because there is no legitimate concern and any concern expressed is merely "fictitious."[110] Kansas Senator John Vratil, a Leawood Republican, best explained the nonexistence of an Islamic Law infiltration in Kansas when he called article 51, "a solution in search of a problem."[111] Proponents of article 51 cited a pending divorce case from Wichita as proof that Sharī'a law is infiltrating the Kansas courts and that the government has an interest in stopping it.[112] However, the issue in the Wichita case stems from the classification of the nuptial gift of *mahr*,[113] a dowry in an Islamic marriage from the groom to the bride, as marital or separate property. Simply, it is a fight over money in a divorce proceeding. Given that the only evidence presented for the necessity for the law is a single pending divorce case, a court could easily find, as the Tenth Circuit did in *Awad*, that the law is based on "a fictitious governmental interest found nowhere."[114]

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104. *Id.* (emphasis added).

105. Several state representatives and senators have voiced concerns about "stoning" and other atrocities against women and children. *See generally* Lefler, *supra* note 81 ("[Muslims] stone women to death in countries that have sharia law.").

106. Marso, *supra* note 2.

107. Lefler, *supra* note 81.

108. *Id.*

109. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

110. *See* Awad v. Ziriax, 670 F.3d 1111, 1130 n.15 (10th Cir. 2012) ("[T]his court has emphasized that '[w]e cannot and will not uphold a statute that abridges an enumerated constitutional right on the basis of a fictitious governmental interest found nowhere but in the defendant's litigating papers." (quoting Colo. Christian Univ. v. Weaver, 543 F.3d 1245 at 1268–69 (10th Cir. 2008)).

111. Marso, *supra* note 2.

112. *Id.*

113. BHALA, *supra* note 20, at 1421.

114. *Awad*, 670 F.3d at 1130 n.15 (quoting *Weaver*, 543 F.3d at 1268–69).

Even if the government has an interest in regulating application of foreign law in Kansas courts, article 51 is not narrowly tailored to achieve this interest, but rather is "broadly written."[115] For instance, suppose a Muslim man sets up a will to incorporate principles of the Sharī'a with the intention to provide adequately for his daughter.[116] Article 51 would invalidate the will, leaving a grieving family to find a more "American" standard by which to distribute assets, even though to invalidate the will does nothing to further the government's purported interest of stemming harm caused by application of foreign law in Kansas courts. This indicates that article 51 is not narrowly tailored to achieve the government's interest.

B. Article 51's Constitutionality Under the Kansas Bill of Rights

Section 7 of the Kansas Bill of Rights provides that "nor shall any preference be given by law to any religious establishment or mode of worship."[117] The Kansas Constitution provides a greater amount of protection than the United States Constitution pertaining to the exercise of religious beliefs.[118] Kansas courts apply the following analysis to claims brought under the Kansas Constitution:

> To determine whether government action violates an individual's right to religious freedom we ask: (1) whether the belief is sincerely held; (2) whether the state action burdens the exercise of religious beliefs; (3) whether the state interest is overriding or compelling; and (4) whether the state uses the least restrictive means.[119]

The Plaintiff proves her case by proving the first two prongs of the inquiry, and then the burden switches to the government to prove that the last two prongs are satisfied.[120] This test is analogous to the U.S. Constitution's Free Exercise Clause,[121] which allows for "freedom to

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115. Lefler, *supra* note 81; Liaquat Ali Khan, *Kansas Legislature Does Harm in Barring Islamic Law*, HUFFINGTON POST (May 15, 2012), http://www.huffingtonpost.com/liaquat-ali-khan/kansas-sharia-law_b_1518144.html.

116. The daughter is given first preference of inheritance under Sharī'a law. *See* SCHACHT, *supra* note 26, at 170–71.

117. KAN. CONST. bill of rights, § 7.

118. Stinemetz v. Kan. Health Pol'y Auth., 252 P.3d 141, 161 (Kan. Ct. App. 2011).

119. *Id.* at 160 (quoting Shagalow v. State Dep't of Human Servs., 725 N.W.2d 380, 390 (Minn. Ct. App. 2006) (internal quotation marks omitted)).

120. *Id.*

121. U.S. CONST. amend. I.

believe and the freedom to act,"[122] and the Establishment Clause.[123] Certainly a petitioner who challenged article 51 would satisfy the first requirement of a sincerely held belief, as there is little doubt in the sincerity of the belief of Muslims. The second prong, whether the action burdens the exercise of religious beliefs, is discussed below in Part III.C, particularly regarding Islamic marriages, business and financial development, and arbitration.

The more difficult part of the analysis is whether the state could prove that article 51 has a compelling interest and uses the least restrictive means. As stated above, several state senators were skeptical about the necessity of the law. And one Kansas court has called the act "superfluous."[124] The court notes "the judiciary [is] already charged with protecting constitutional rights."[125] The government cannot demonstrate a compelling interest because to do so it must show a necessity for the law. Article 51's purpose is to promote and protect guaranteed constitutional rights.[126] But if the judiciary is already charged with this task, there is no necessity for an additional law.

The state also cannot prove that article 51 uses the least restrictive means possible. Even if the government has an interest in regulating application of foreign law in Kansas courts, article 51 is not narrowly tailored to achieve this interest.[127] The law forbids application of "any law, legal code or system . . . outside any state or territory of the United States" in a court decision.[128] Further, any judgment entered by "any court" that relies on "any foreign law, legal code or system" that does not "protect and promote" the same rights found in the Kansas Constitution is invalid.[129] Contractual provisions that allow for a foreign law to govern disputes between parties invalidate the contract, or provision.[130] Such sweeping language that invalidates court judgments, arbitrations, and contracts based on a nonexhaustive list of guaranteed rights found in the Kansas and United States Constitutions cannot be the "least restrictive" means.

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122. *See* Cantwell v. Conn., 310 U.S. 296, 303–04 (1940) (explaining that the Free Exercise Clause protects conduct that is religiously motivated).

123. *See supra* notes 106–16 and accompanying text.

124. Soleimani v. Soleimani, No. 11CV4668, 30 n.11 (Johnson Cnty. Kan. 2012), *available at* www.volokh.com/wp-content/uploads/2012/09/soleimani.pdf.

125. *Id.*

126. KAN. STAT. ANN. § 60-5101 (Supp. 2012).

127. Lefler, *supra* note 81; Ali Khan, *supra* note 15.

128. KAN. STAT. ANN. § 60-5102 to -5103.

129. *Id.* § 60-5103.

130. *Id.* § 60-5104.

C. *Article 51's Impact on Islamic Practices and Traditions Within the United States and Kansas*

Article 51's potential legal impact on common Islamic practices is significant. As already noted, Muslims incorporate the Sharī'a as a guide to how to live their everyday lives.[131] Article 51 unfairly impacts the way Muslims can incorporate the tenants of the Sharī'a into their marriages and in their personal and professional finances. Further, article 51 usurps federal law pertaining to Islamic arbitrations of business or financial disputes. The following examples illustrate the potential legal consequences of the law.

1. Marriage and Divorce

Generally, Kansas courts recognize as valid marriages contracted for outside of the state.[132] However, Kansas does not recognize marriages that violate the public policy of the state.[133] Under Sharī'a law, however, a marriage is a contract between the wife and husband.[134] It is an open question whether article 51's declaration that contracts based in whole or in part on foreign law "violate the public policy of this state"[135] invalidates foreign marriages.

It is also uncertain whether and to what extent a court would determine a marriage contract or contract between individuals is based on a "foreign law, legal code or system,"[136] and then how fundamental liberties compare between the two legal systems.[137] To begin, a court would have to investigate and compare several constitutional provisions of the country where the foreign contract was made to determine the validity of the marriage. The court would then have to decide if that particular country's laws grant the same "fundamental liberties, rights and privileges granted under the United States and Kansas constitutions, including but not limited to, equal protection, due process, free exercise of religion, freedom of speech or press, and any right of privacy or

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131. *See supra* note 21 and accompanying text.

132. KAN. STAT. ANN. § 23-2508.

133. *See id.*

134. BHALA, *supra* note 20, at 866.

135. KAN. STAT. ANN. §§ 60-5104.

136. *Id.* § 60-5104.

137. *See* AM. BAR ASS'N, RES. 113A, at 9 (2011), http://www.americanbar.org/content/dam/aba/directories/policy/2011_am_113a.pdf (discussing the absence of a standard for courts to compare laws between jurisdictions).

marriage."[138] The court would then apply Kansas law if this nonexhaustive list is not satisfied. And then the court could perhaps find the marriage invalid.

For example, suppose H and W marry in Malaysia or Saudi Arabia, or any country that incorporates Sharī'a. Under Sharī'a law, a marriage is a contract between the wife and husband.[139] H and W then move to Kansas and want a divorce. Under article 51, "the contract mutually agreed upon shall violate the public policy of this state and be void and unenforceable."[140] Because both countries are "jurisdiction[s] outside of any state or territory of the United States,"[141] the deciding court must examine the laws of the foreign country to ensure the same rights granted to Kansas citizens are present in the foreign system.[142] Alternatively, the court could simply find that the country incorporates aspects of Islam into its laws and determine therefore that the marriage is invalid as a violation of public policy.

Kansas courts should be able to determine the validity of marriages regardless of whether foreign law is incorporated into the marriage contract. The Sixth Circuit examined an Islamic marriage in *Hassan v. Holder*,[143] in which a Muslim emigrated from Israel on a visa and had to prove his marriage status to obtain citizenship.[144] The court addressed whether a valid Islamic marriage occurred in Israel before the Muslim entered the country.[145] The evidence did not convince the court that a valid marriage occurred.[146] Rather, the court found that the "steps" required for a valid Islamic marriage were not satisfied.[147] Article 51 would prohibit a Kansas court from holding similarly. Any court decision that bases its decision, in whole or in part, on foreign law will be void and unenforceable.[148] Marriages "are often conducted via religious means and ceremonies,"[149] That these are foreign or religiously

138. KAN. STAT. ANN. § 60-5104.
139. BHALA, *supra* note 20, at 866.
140. KAN. STAT. ANN. § 60-5104.
141. *Id.* § 60-5102.
142. *Id.* § 60-5104.
143. 604 F.3d 915 (6th Cir. 2010).
144. *Id.* at 925.
145. *Id.*
146. *Id.* at 925–26.
147. *Id.*
148. KAN. STAT. ANN. § 60-5103 (Supp. 2012).
149. ACLU, NOTHING TO FEAR: DEBUNKING THE MYTHICAL "SHARIA THREAT" TO OUR JUDICIAL SYSTEM 3 (May 2011), *available at* http://www.aclu.org/religion-belief/nothing-fear-debunking-mythical-sharia-threat-our-judicial-system.

based marriages does not preclude the right to have courts determine their validity.[150]

To complicate matters, the Kansas Constitution affords more protection to religious freedom than the First Amendment of the United States Constitution.[151] Suppose a Kansas court, researching a foreign legal system, finds the foreign law grants religious freedoms tantamount to those granted by the United States' Constitution but not to those granted by the Kansas Constitution. What is the court to do? Certainly the language, "same fundamental . . . rights and privileges granted under the United States *and* Kansas constitutions"[152] seems to mandate that both constitutional thresholds must be met to satisfy the requirement of article 51. Further, the list is not exhaustive.[153] Suppose a case is decided correctly in a Kansas state district court utilizing a foreign legal code, then appealed to the Kansas Court of Appeals. The appealing party then points to a constitutional ruling in the foreign system that has yet to be decided in the United States Supreme Court and the Kansas Supreme Court. Do the "same privileges" granted under the United States and Kansas Constitutions have to perfectly match the foreign judgments? If a foreign law has a right to privacy that is interpreted by that jurisdiction as the right to assisted suicide, but which the Constitution of the United States precludes,[154] is the fact that there is a "fundamental liberty" or "right" of privacy—although not precisely the "same"—provided by the foreign jurisdiction enough to satisfy article 51's requirements?[155] There is no standard.

However, even if a court finds a marriage valid, Islamic women may still encounter legal hurdles. The Kansas Constitution states, "The legislature shall provide for the protection of the rights of women, in acquiring and possessing property, real, personal and mixed, separate and apart from the husband."[156] Women married in the Islamic tradition need assurance that their marriage contracts and divorces are valid and incorporate important principles of Sharī'a law so that a court will

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150. *Id.*

151. Stinemetz v. Kan. Health Pol'y Auth., 252 P.3d 141, 161 (Kan. Ct. App. 2011).

152. KAN. STAT. ANN. § 60-5104 (emphasis added).

153. *See id.* (stating that the list is "including, but not limited to").

154. *See* Washington v. Glucksberg, 521 U.S. 702 (1997) (holding that there is no right to assisted suicide in the U.S. Constitution).

155. My thanks to Professor Thomas Stacy for pointing out that the courts could emphasize the "fundamental liberty" found even though it may not be "the same fundamental liberty."

156. KAN. CONST. art. 15, § 6.

adequately and fairly divide the property upon their divorce.[157]

In Islam, it is an essential aspect of the contract to marriage that the husband gives the wife *mahr*,[158] a nuptial gift. This can be a substantial amount of money.[159] And the *mahr* remains with the wife regardless of divorce.[160] If a divorce does occur, the wife may use this money to support herself and pay for necessary expenses.[161] Because this is the wife's separate property, hers for as long as she lives, it should be treated as such in the divorce proceeding.[162]

Article 51 was explored in a recent divorce case in Johnson County, Kansas. In *Soleimani v. Soleimani*, a man filed for divorce from his wife of two years who, after the marriage, emigrated from Iran.[163] The *mahr* agreement provided that she was to be paid an equivalent of $677,000.[164] However, the court lacked a valid English translation of the contract and therefore could only interpret it by incorporating Iranian and Islamic law.[165]

The *Soleimani* court struggled to find a fair solution. The wife knew little English, lived in a shelter, did not have a job, and was ashamed to return to Iran.[166] Before marrying and signing the *mahr* agreement, the husband owned $7 million in assets.[167] Subsequently, during the divorce proceeding, he denied signing the agreement.[168] The court did not believe him. But because the court was precluded from interpreting the contract by applying Islamic law, which would grant the wife a substantial portion of the marital, it awarded the wife only temporary

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157. *See* AM. BAR ASS'N, *supra* note 137, at Sec. II.C (stating that banning laws of marriage and divorce from being used will prevent the court from deciding if there was evidence of a marriage or divorce at all).

158. SCHACHT, *supra* note 26, at 161.

159. BHALA, *supra* note 20, at 916.

160. *Id.*

161. *Id.*

162. *See generally id.* (discussing how the *mahr* is the wife's property for her life).

163. Soleimani v. Soleimani, No. 11CV4668 (Johnson Cnty. Kan. 2012), *available at* www.volokh.com/wp-content/uploads/2012/09/soleimani.pdf. This decision was publicized by the American Public Policy Alliance as "the first application of American Laws for American Courts." *American Laws for American Courts Applied in Kansas for the FirstTime!*, AM. PUB. POL'Y ALLIANCE (Sept. 14, 2012), http://publicpolicyalliance.org/2012/09/american-laws-for-american-courts-applied-in-kansas-for-the-first-time/. This statement indicates that while there has been ALAC enacted in many states, there is little need for them.

164. *Soleimani*, No. 11CV4668, at 15.

165. *Id.* at 15.

166. *Id.* at 20.

167. *Id.* at 5, 20.

168. *Id.* at 13.

maintenance $692 per month for two years.[169]

Even if the contract were permitted to be interpreted, the court could not have honored the *mahr* agreement because of article 51.[170] The court's concern pertains to the fact that foreign jurisdictions, which enforce *mahr* agreements, do not separate church from state and allow for discrimination.[171] The court looked only to an Indian divorce case from an unpublished panel decision of the Michigan Court of Appeals for this information.[172] However, in a recent opinion from Connecticut, an Iranian *mahr* agreement was upheld based on "neutral principals of law" and found to be a valid contract.[173] If the *Soleimani* court did find a valid contract, it would be forced to invalidate it under article 51.[174] Courts should be permitted to consider neutral principals of law to determine if a valid contract is formed and to interpret its provisions.[175]

Kansas courts should be especially aware of *mahr* when deciding divorces between Muslims. Other peculiarities in Sharī'a law might impact the decisions of Kansas family courts. Most notably, under Sharī'a, there is no martial property; all assets belong either to the wife or to the husband.[176] Second, a wife is entitled to maintenance, *nafaka*, during the marriage.[177] She is not required to provide any maintenance for her husband, nor is she required to give any of her earnings to him.[178] And the maintenance does not end at divorce—a husband is required to provide for his ex-wife and children, so long as the wife is not at fault.[179] However, if the husband is poor, maintenance is not an absolute right.[180]

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169. *Id.* at 13–14, 21.

170. *See id.* at 29–31 (discussing article 51's recent passage as a way to effectively protect fundamental rights that may be disguised as being protected under the Establishment Clause).

171. *Id.* at 29 (citing Tarikonda v. Pinjari, No. 287403, 2009 WL 930007, at *3 (Mich. Ct. App. April 7, 2009)).

172. *Id.* at 29–30.

173. Light v. Light, No. NNHFA124051863S, 2012 WL 6743605, at *6 (Conn. Super. Ct. Dec. 6, 2012) ("In the present case, the trial court may apply well-established principles of contract law and Connecticut's Premarital Agreement Act to enforce the agreement made by the parties.")

174. KAN. STAT. ANN. § 60-5104 (Supp. 2012).

175. *See Light*, 2012 WL 6743605, at *4–6 (discussing decisions of *mahr* agreements from other jurisdictions and applying principals of established contract law to the dispute).

176. SCHACHT, *supra* note 26, at 167.

177. *Id.*

178. BHALA, *supra* note 20, at 919.

179. *Id.* at 920–21.

180. *Id.* at 921.

2. Business and Financial Development

Section 8 of article 51 exempts business entities from the prohibitions of article 51 if the entity contracts to subject itself to foreign law.[181] The freedom to negotiate with foreign businesses is a "critical" bargaining chip.[182] However, article 51 will hinder the development of Kansas businesses, particularly in the fields of finance and personal banking, regardless of the business exemption.

Article 51 inhibits the freedom to contract. The Contract Clause of the United States Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."[183] Use of Sharī'a-compliant financial tools is on the rise.[184] Under Sharī'a law, banks and other lenders are not allowed to charge interest—*riba*— on principal loaned.[185] Rather, a fee for the privilege of using the money for the loan is assessed on the principal, divided by the number of payments, and then added to the interval payment amount.[186] Typically, a business loan may be repaid by paying the principal of the loan and a percentage of profits over time.[187] With a successful business, a lending agent could make much more by assessing a fee on the profits collected rather than collecting interest on the loan amount.[188]

Some U.S. investors have realized the potential profit.[189] One such investor, University Bank, is "the first subsidiary of its kind in the United States and plans to offer mortgage[s]" that are Sharī'a compliant.[190] The

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181. KAN. STAT. ANN. § 60-5108 (Supp. 2012).

182. AM. BAR ASS'N, *supra* note 137, at Sec. I.

183. U.S. CONST. art. 1, § 10, cl. 1.

184. *See, e.g.*, Kimberly J. Tacy, *Islamic Finance: A Growing Industry in the United States*, 10 N.C. BANKING INST. 355 (2006) (providing a history of Islamic finance and its successes and challenges within the United States).

185. *See* MURAT ÇIZAKÇA, ISLAMIC CAPITALISM AND FINANCE 11–12 (2011) (providing a brief summary on interest prohibition in Islamic finance); *see also* Qur'an, *The Cow*, 2:275–281, at 31–32, *The Family of 'Imran*, 3:130–132, at 44, *Women*, 4:160–161, at 65, *The Byzantines*, 30:39, at 259 (M.A.S. Abdel Haleem trans., 2004); BHALA, *supra* note 20, at 679 ("These passages easily explain acceptance among the *fukaha*' [jurists] of the prohibition of *riba*.").

186. BHALA, *supra* note 20, at 732–33.

187. *Id.* at 728–29.

188. *See id.* at 711 (stating that under a Sharia-compliant loan, the lender is a partner in the business venture and thus entitled to a percentage of the profits, "not a return fixed contractually as a percentage of the principal value of the initial loan").

189. *See* Abdi Shayesteh, *Analysis: Islamic Banks in the United States: Breaking Through the Barriers*, NEWHORIZON (Apr. 1, 2009), http://www.newhorizon-islamicbanking.com/index.cfm?action=view&id=10776&section=features (discussing the advantages of Islamic finance in America).

190. Tacy, *supra* note 189, at 355, 366.

bank believes it could double its assets.[191]

However, banks and financial transactions must be structured differently to capitalize on this trend. If a banking institution is to offer Sharī'a-compliant investments and financial services, it must satisfy several conditions. In addition to the general rules of corporate governance, a religious board—consisting mostly of Islamic scholars—must scrutinize transactions, loans, and investments to ensure that these are in compliance with Sharī'a investment principles.[192]

Typically, large lending agreements between an Islamic bank and a borrower are a *sharikah al-mudarabah*, a "sleeping partnership."[193] This is the classical way in which most large-scale purchases are financed under Sharī'a law for finance and business purposes.[194] Smaller, consumer purchases are contracted in a *murabaha* contract.[195] Under a *murabaha* contract, a bank and an individual enter into a "cost-plus-profit" agreement.[196] First, the bank buys the asset in its own name.[197] The bank then calculates its profit mark-up in agreement with the individual.[198] This represents the risk the bank undertakes in the transaction.[199] The consumer then purchases the asset at the cost-plus price as a fixed price or as scheduled payments.[200] While this transaction may seem unnecessary, it is essential under Islamic financing to avoid interest being paid.[201] A religious board within the bank reviews all transactions and contracts entered into by the bank to ensure Sharī'a law compliance.[202] If investment and lending practices are not Sharī'a law compliant, the banks could lose their Islamic banking credentials and business.[203]

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191. *Id.*

192. Todd Williams, *Islamic Legal Authority in a Non-Muslim Society: Designing The Islamic Credit Union of Bellevue, Washington*, 12 J. ISLAMIC L. & CULTURE 15–16 (2010).

193. BHALA, *supra* note 20, at 634.

194. *Id*. at 634, 728.

195. *See id.* at 728–29.

196. DENA H. ELKHATIB, THE ABA PRACTICAL GUIDE TO DRAFTING BASIC ISLAMIC FINANCE CONTRACTS 33 (2012).

197. *See* BHALA, *supra* note 20, at 729 (providing an example of a bank buying an apartment).

198. *Id.* at 728–29.

199. ELKHATIB, *supra* note 196, at 33.

200. *Id.*

201. BHALA, *supra* note 20, at 728 (explaining that the *murabaha* is structured to avoid the problem of interest).

202. ELKHATIB, *supra* note 196, at 11.

203. *See id.* (stating that, depending on the jurisdiction, the advisor or advisory board helps assure the consumer that the bank is complying with Islamic banking practices). While there is no official body that regulates the Islamic banking industry, indices like the Dow Jones Islamic Indices

If Bank enters into a Sharī'a-compliant mortgage contract with A and A defaults on the mortgage, Bank would not have a valid contract. Section 4 of article 51 mandates that if a foreign legal code is "to govern some or all of the disputes between the parties," the contract is void and unenforceable.[204] And if the contract utilizes any foreign law that "includes or incorporates any substantive or procedural law . . . that would not grant the parties the same" constitutional rights Kansas citizens have, the contract is void.[205] Section 8 of article 51, the business exemption, is inapplicable in this instance. Business entities are exempt only if they are contracting to be subject to foreign law or courts outside the United States.[206] Here, Bank is subjecting itself to the location where the contracting took place: Kansas.

But an Islamic finance contract must adhere to the principles of Sharī'a, much like how a common law contract must pertain to lawful subject matter.[207] Article 51 would invalidate the mortgage contract described above because of the substantive aspects of Sharī'a law it incorporates.

Further, suppose that Corp—an Islamic company expanding into Kansas—wants to buy land and begin operations. If Bank offers Corp a Sharī'a-compliant loan, the amount of the loan will surely require Bank and Corp to enter into a *sharikah al-mudarabah*.[208] If Corp's account defaults, or Corp engages in practices that are not Sharī'a compliant, the contract is breached.[209] The Bank's religious board may then convene an arbitration panel to decide the dispute.[210] The board may apply a "mixture of national law and Shariah principles."[211] The problem now arises whether the *sharikah al-mudarabah* is a partnership subjected to foreign law. Arguably, this arrangement is a domestic agreement

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have a Sharī'a law advisory board that ensures included securities comply with certain Islamic financing standards. *Id.* at 12; *see also Shari'ah Supervisory Board*, S&P DOW JONES, https://www.djindexes.com/islamicmarket/?go=supervisory-board (last visited Mar. 18, 2013) (describing the Islamic Supervisory Board and giving a brief biography of its members).

204. KAN. STAT. ANN. § 60-5104 (Supp. 2012).

205. *Id.*

206. *Id.* § 60-5108.

207. *See* ELKHATIB, *supra* note 196, at 15, 16 ("[T]he subject matter of the contract must be legal and not prohibited under Shariah law.").

208. *See* BHALA, *supra* note 20, at 634 (explaining that *sharikah al-mudarabah* partnerships are commonplace in Muslim countries and is the most common lending transaction that is Sharī'a compliant).

209. *See* ELKHATIB, *supra* note 196, at 62 (noting that businesses must not do business that is forbidden by Sharī'a law).

210. Julio C. Colon, *Choice of Law and Islamic Finance*, 46 TEX. INT'L L.J. 411, 419 (2011).

211. *Id.*

utilizing aspects of Sharī'a' law. This is similar to the hypothetical mortgage contract between A and Bank. The contract formed between Corp and Bank is also a domestic agreement. Bank is a corporation, but it is not subjecting itself to foreign laws or courts. Bank needs the application of Kansas's laws to exhaust its remedies to collect the debt. Article 51 would then void the contract under section 4 because terms of the mortgage and loan with Corp were Sharī'a based. And finally, complications arise because of the arbitration board utilized by Bank.

3. Arbitration Agreements and Provisions

Religious-based arbitration is not a novel concept. Islamic-compliant financial transactions often include an arbitration provision.[212] Frequently, courts within the United States have allowed arbitrations to proceed under religious rules such as the Rules of Procedure for Christian Conciliation, where disputing parties agree to mediate disputes guided by Holy Scriptures.[213] A Texas Court of Appeals found that state and federal law favor arbitration, even if the arbitration is before a Sharī'a tribunal.[214] Nevertheless, article 51 invalidates all contracts and financial agreements that allow for alternative dispute resolution because the business entity is allowing this provision to govern a dispute in the contract.[215]

Legislating away Islamic arbitration provisions, agreements, or awards, is not a simple task. One complication is article 51's relationship with the United States Constitution's Supremacy Clause, which provides that the United States Constitution "shall be the supreme Law of the Land."[216] This includes treaties.[217] Article 51 bans "international law," which encompasses treaties made by the United States that are self-executing and directly applicable to state courts.[218] Kansas residents are not removed from international affairs or treaties. For example, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) is an

212. *Id.* at 411, 413.

213. *See* Charles P. Trumbull, *Islamic Arbitration: A New Path For Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 623–24 (2006) (discussing the increasing frequency of enforcement of religious-based alternative dispute resolution clauses).

214. Jabri v. Qaddura, 108 S.W.3d 404, 413 (Tex. Ct. App. 2003).

215. KAN. STAT. ANN. § 60-5104 (Supp. 2012).

216. U.S. CONST. art. VI.

217. AM. BAR ASS'N, *supra* note 137, at Sec. II.A.

218. *See, e.g.*, Medellin v. Texas, 552 U.S. 491, 504–05 (2008) (holding that self-executing treaties and treaties implemented by statute are binding on the states).

international treaty joined by the United States and many Muslim countries.[219] This treaty governs disputes between residents and parties outside the United States unless expressly disclaimed by both parties to the transaction.[220] A "state constitutional amendment or statutory provision that prohibited" applying the New York Convention in a proceeding before a state court would violate the Supremacy Clause.[221] Section 3 of article 51 requires that "[a]ny court [or] arbitration . . . ruling or decision shall violate the public policy of this state and be void and unenforceable if" the court's ruling is based "in whole or in part on any foreign law, legal code[,] or system."[222] Essentially, an arbitration award properly awarded pursuant to the terms of the New York Convention is enforceable.

However, ALAC legislation like article 51 could give state courts an opportunity to deny enforcement these provisions. State courts could broadly interpret what a "foreign law" is under ALAC legislation. Article 51 states that a "foreign law" is anything that is a "law, legal code or system of a jurisdiction outside of any state or territory of the United States, including, but not limited to, international organizations . . . and applied by that jurisdiction's courts, administrative bodies or other formal or informal tribunals."[223]

Arbitration decisions under the New York Convention cannot be overturned simply by citing a public policy exception or because the ruling was based on Islamic law. In *TermoRio S.A. E.S.P. v. Electranta S.P.*,[224] the Court of Appeals for the D.C. Circuit stated, "The test of public policy cannot be simply whether the courts of a secondary State would set aside an arbitration award if the award had been made and enforcement had been sought within its jurisdiction."[225] The court noted, however, that there is a "public policy gloss" on article V(1)(e) of the New York Convention.[226] But to be overturned the judgment must be "repugnant to fundamental notions of what is decent and just in the

219. Saad U. Rizwan, Note, *Foreseeable Issues and Hard Questions: The Implications of U.S. Courts Recognizing and Enforcing Foreign Arbitral Awards Applying Islamic Law Under the New York Convention*, 98 Cornell L. Rev. 493, 495 (2013).

220. AM. BAR ASS'N, *supra* note 137, at Sec. II.A.

221. *See id.* (explaining that a treaty entered into by the United States is applicable to state courts).

222. KAN. STAT. ANN. § 60-5103 (Supp. 2012).

223. *Id.* § 60-5102.

224. 487 F.3d 928 (D.C. Cir. 2007).

225. *Id.* at 938.

226. *Id.* at 939.

United States."[227] Indeed, while the New York Convention allows a public policy exception, the exception has been read "narrowly."[228]

An arbitration award made pursuant to the New York Convention is enforceable regardless of article 51's provisions. Federal laws supersede state law, and when state and federal laws conflict, federal law prevails.[229] State laws that prohibit arbitration enforcement because of the use of foreign laws essentially "have the effect of managing relations with another country because foreign relations is the exclusive province of the federal government—specifically the President and Congress."[230]

D. Public Policy Issues

Article 51 raises some public policy concerns. Namely, Kansans and United States citizens have the right to contract freely,[231] and the Kansas courts should have free and full discretion when deciding a case. Kansas courts have recognized the public policy right to contract freely.[232] And this right should not be interfered with "lightly."[233] Article 51 states that the right to contract can be circumvented when there is a "state[] interest to protect and promote rights and privileges" of the U.S. and Kansas Constitutions.[234] Senator Marci Francisco stated that she believed this provision to be unfair, and that article 51 provided corporations a greater freedom to contract than individuals.[235] It is unjust for courts to be permitted to interpret contracts incorporating foreign law for businesses but not for individuals. Courts should be available to people first, not business entities. Individuals are able to protect and promote their own rights—a business entity is no more intelligent, and no less vulnerable.

Several experts in Islamic and international law have signaled warnings about article 51's potential impact.[236] The most notable

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227. *Id.* (quoting Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981)).

228. Rizwan, *supra* note 219, at 506.

229. *Id.* at 509.

230. *Id.*

231. *See* U.S. CONST. art. I.

232. *See* Miller v. Foulston, Siefkin, Powers & Eberhardt, 790 P.2d 404, 413 (Kan. 1990) (stating that "public policy encourages the freedom to contract").

233. *Id.* (citing Foltz v. Struxness, 215 P.2d 133, 139 (Kan. 1950)).

234. KAN. STAT. ANN. § 60-5101 (Supp. 2012).

235. S. JOURNAL, 2011–12, Reg. Sess., at 2700 (Kan. 2012), http://www.kslegislature.org/li/b2013_14/chamber/senate/journals/2012/5/.

236. *See, e.g.*, Andy Marso, *ABA Advice Absent in Kansas Sharia Debate*, TOPEKA CAP.-J., July 1, 2012, http://cjonline.com/news/2012-07-01/aba-advice-absent-kansas-sharia-debate (discussing how senators disregarded an ABA report that warned of the dangers of ALAC measures).

warning is American Bar Association Resolution 113A.[237] The report cited two main concerns: (1) the ALAC acts have enormous constitutional concerns, and (2) the U.S. Constitution already protects individual rights and freedoms.[238] While article 51 does not explicitly name Sharī'a law, the intent behind the law is evident. Foreign countries will not want to negotiate or enter into contracts with Kansas companies. Though it could be argued that article 51 does not extend to business entities, foreign businesses do not have to do more than a simple Internet search to find the intent of the law and decide not to transact business in a discriminatory state. Those entities might further discover that legislators have urged that although article 51 does not apply to Sharī'a law *per se*, it does pertain to international law. Or, if a close business relationship is forged in the wake of article 51, the parties might be hesitant to bring foreign-domiciled workers to Kansas. As discussed, companies might worry that an employee's marriage, divorce agreements, or other contracts might be invalidated if challenged.[239]

The United States Constitution is not in danger of losing its ability to protect the citizens of the United States. There is no need for article 51 and ALAC provisions. Article 51 questions the integrity of the Kansas courts and instructs judges about what is appropriate law.[240] Article 51 dictates "the scope of [judges'] enforcement powers . . . [and] their ability to consider in their deliberations" certain laws and "potentially informative sources in order to reach the best outcomes in the cases before them."[241] Courts already will not follow a choice-of-law provision if it will violate the state or federal public policy.[242] And in several cases dealing with aspects of Sharī'a law, courts have declined to apply the decision of foreign courts because of violations to public policy.[243] It seems that the Kansas Legislature does not trust state courts to construe fair rulings, to find out what is equitable, or to follow

237. *See id.* (calling the ABA report "scathing").

238. *See, e.g.*, AM. BAR ASS'N, *supra* note 137, at Secs. II–III.

239. *See supra* Part III.C.1 (discussing the impact on marriage and divorce).

240. *See* Davis & Kalb, *supra* note 8, at 15 (noting that laws like article 51 instruct what law judges are supposed to consult for decisions).

241. *Id.*

242. AMERICAN BAR ASS'N, *supra* note 137, at Sec. III.

243. *See* ACLU, *supra* note 149, at 4 (citing two cases in which courts have rejected the decisions of foreign courts); *see also* Rizwan, *supra* note 219, at 506 ("The fact that certain aspects of Islamic law might be wholly contrary to U.S. ideals concerning individual rights and the administration of law . . . does not necessarily imply that any award applying Islamic law is automatically contrary to U.S. public policy. Indeed, substantive Islamic financial law seems entirely compatible with U.S. public policy.").

provisions the parties agreed to in a contract.

IV. CONCLUSION

Certainly, after the attacks of September 11, 2001, Americans felt a deep-rooted sense of patriotism emerge. Alongside this, Americans also felt a fear of the unknown. This fear has spurred wide instances of Islamophobia throughout the country.[244] While the Kansas Legislature may have felt threatened by radical Islamic terrorists or influence from Islamic culture when it passed article 51, such fears do not justify passing a bill that has such far-reaching potential to undermine the daily lives of Americans—regardless if they are Muslim or not. The law's broad and expansive language could have far more unintended consequences than were within the scope of this Note.

244. *See generally* Lee Tankle, Note, *The Only Thing We Have to Fear Is Fear Itself: Islamophobia and the Recently Proposed Unconstitutional and Unnecessary Anti-Religion Laws*, 21 WM. & MARY BILL RTS. J. 273 (2012); Ali Kahn, *supra* note 12; Shah, *supra* note 13.