TAKING RELIGION OUT OF CIVIL DIVORCE

Julia Halloran McLaughlin∗

∗ Julia Halloran McLaughlin is a Professor of Law at Florida Coastal School of Law where she teaches a variety of family law classes. She has previously published in the areas of premarital agreements, mandatory arbitration, and children's rights. She presented this Article at the 2011-12 South Eastern Association of Law Schools conference. The author thanks those who attended her presentation and assisted her in refining her ideas for the Article. She is also grateful to Christopher Roederer for his insightful comments on an earlier draft of this Article. She also thanks Rebekah Gleason for her comments, support, and encouragement.

I. INTRODUCTION

In the United States, the question of the role of Islamic religious tribunals[1] in relation to family law matters is an emerging one.[2] While scholars have explored the validity and enforceability of Religious Tribunal Awards ("RTAs") under state and federal arbitration law generally,[3] few have focused exclusively on such awards related to family law issues.[4] The role of RTAs in relation to issues involving divorce and child custody raises important policy questions related to gender equality, personal autonomy, and religious freedom and thus demands that courts and legislators confront the complex issue of how to protect Muslim religious freedom[5] without sacrificing the basic tenets of gender equality that

1. The observations in this Article apply equally to any religious arbitration tribunal, not just Islamic religious tribunals. Thus, awards rendered by Jewish religious tribunals and Christian religious tribunals are included in any reference to religious tribunal divorce awards; however, this Article focuses primarily upon Islamic tribunal divorce awards due to the recent struggles encountered by Canada, Great Britain, and other nations in resolving how best to treat such awards and given the recent spate of anti-Islamic legislation proposed across the United States.

2. While Great Britain and Canada have a network of well-developed Islamic religious tribunals determining matters related to family law, less is known about the prevalence of such tribunals in the United States. *See infra* notes 102,120-23 and accompanying text.

3. *See, e.g.*, Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231 (2011); Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the* Beth Din *Precedent*, 25 J.L. & RELIGION 379 (2010); Mona Rafeeq, *Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional American Notions of Justice?*, 28 WIS. INT'L L.J. 108 (2010); Michael C. Grossman, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169 (2007); Charles P. Trumbull, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609 (2006); Caryn Litt Wolfe, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM L. REV. 427 (2006).

4. *See, e.g.*, Robin Fretwell Wilson, *Privatizing Family Law in the Name of Religion*, 18 WM. & MARY BILL RTS. J. 925 (2010); Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law,* 9 THEORETICAL INQUIRIES L. 573 (2008).

5. In writing about this topic, I have struggled to follow the cautionary warning of Leila Ahmed:

> In the context of the contemporary structure of global power, then, we need a feminism that is vigilantly self-critical and aware of its historical and political situatedness if we are to avoid becoming unwitting collaborators in

have evolved over time in the United States.

The tension is most obvious in cases of divorce in which the parties are Muslim and have obtained a RTA relating to divorce and seek to enforce or invalidate the award. This scenario raises important questions related to gender equality, freedom of religion, and state action. This Article explores these tensions and proposes a legal framework to resolve them.

Family law scholars have cautioned states to proceed circumspectly before ceding authority over family law matters to religious tribunals.[6] Even in instances in which a woman "'opt[s] out of a jurisdiction's generally applicable norms . . . to precommit to' their own ethical conceptions of the good" states retain oversight in matters related to divorce.[7] Canada, Great Britain, the Federal Democratic Republic of Ethiopia, and Pakistan have each been called upon to respond to the challenges presented by Islamic religious tribunals operating independently of civil courts, with each resolving the respect to be accorded such awards based upon controlling law and cultural norms.[8]

The intersection between Sharia, or Islamic law, and U.S. family law is most likely to arise in two ways. First, one party may seek specific enforcement of an Islamic religious tribunal family law award in a U.S. civil court under an applicable federal or state arbitration act. Secondly, a party may seek to rely upon a family law ruling of a religious tribunal as an affirmative defense to bar the other spouse's claim to civil relief under state law. Both scenarios, different sides of the same coin, present serious policy and constitutional issues that suggest enforcement should be denied on the basis of First Amendment entanglement precedent, Fourteenth Amendment state action precedent, and public policy concerns.

This Article is divided into six parts. The first part examines the tension between cultural autonomy and gender equality when members of a Muslim minority population seek to enforce religious awards related to family law matters in civil courts. The second part examines how several countries have dealt with this challenge. The third part examines existing U.S. precedent regarding judicial

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> racist ideologies whose costs to humanity have been no less brutal than those of sexism.

LEILA AHMED, WOMEN AND GENDER IN ISLAM: HISTORICAL ROOTS OF A MODERN DEBATE 247 (1992).

6. Wilson, *supra* note 4, at 952.

7. *See id.* at 946 (quoting Mohammad H. Fadel, *Political Liberalism, Islamic Family Law and Family Law Pluralism: Lessons from New York on Family Law Arbitration*, *in* MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: RECONSIDERING THE BOUNDARIES OF CIVIL LAW AND RELIGION 63 (Joel A. Nichols ed., 2010)).

8. *See infra* Part III.A-B.

enforcement of RTAs related specifically to divorce. The fourth part examines the existing scholarship discussing the legal and policy concerns raised by RTAs. The fifth part examines the constitutional issues a U.S. court confronts when a party seeks to enforce or invalidate a RTA. The final part of this Article proposes a legal framework to address RTAs.

II. U.S. CONSTITUTIONAL CONCEPTS CREATE TENSION BETWEEN RELIGIOUS FREEDOM AND GENDER EQUALITY

Religious tribunals pose a significant challenge to the ideals of multiculturalism[9] and tolerance in a diverse society. In a recent article, Michael Helfand explores the distinction between old multiculturalism and new multiculturalism.[10] According to him, the old approach focused on how best to incorporate the "meaning embedded in symbols, language, and history . . . into the liberal nation-state's pantheon."[11] New multiculturism seeks not to promote inclusion, but to create separate communities, each with its own set of rules and practices to promote the community's core shared values.[12]

Democratic principles are strained when insular minorities seek to exercise self-governance according to religious law as one aspect of their autonomy.[13] The tension becomes almost unbearable when the rules of the minority culture violate the civil rights of members of the

9. For the purposes of this Article, I am adopting the following definition of multiculturalism: "[T]he claim, made in the context of basically liberal democracies, that minority cultures or ways of life are not sufficiently protected by the practice of ensuring the individual rights of their members, and as a consequence these should also be protected through special *group* rights or privileges." Susan Moller Okin, *Is Multiculturalism Bad for Women?*, *in* IS MULTICULTURALISM BAD FOR WOMEN? 9, 10-11 (Joshua Cohen et al. eds., 1999). Thus, I am addressing whether the Muslim community within the United States enjoys a group right to reject U.S. divorce law and opt to have economic and other issues resolved under Sharia law by an Islamic religious tribunal. With respect to custody determinations, this question has been resolved through litigation, resulting in the rule that a court retains jurisdiction to determine custody and applies the best interests of the child standard. Linda Jellum, *Parents Know Best: Revising Our Approach to Parental Custody Agreements*, 65 OHIO ST. L. J. 615, 626-27 (2004) ("But most states that use the best interest standard recognize that parents make these agreements and permit or encourage, but do not require, judges to award custody consistent with the parents' agreement. Also, these states require judges to reject these agreements when they are not in the best interest of the child." (footnote omitted)). This Article argues that the custody exception should be extended to include all divorce issues decided by any religious tribunal applying religious law.

10. Helfand, *supra* note 3, at 1274.

11. *Id.*

12. *Id.* at 1275.

13. *See id.* at 1276.

minority culture itself.[14] Thus, affording independence to a minority culture within the United States may allow that culture to use the pressures of conformity and belonging to limit both the ability to argue for cultural change or tolerance within the community and to limit exit options through ostracism. This tension is illustrated by examining the uneasy relationship between multiculturalism and feminism, and then comparing U.S. divorce law to Islamic divorce law with a focus upon the disparate treatment of wives and mothers under the latter approach.

A. Gender Equality Precepts Challenge Multicultural Values

Susan Moller Okin comments "that there is [a] considerable likelihood of tension between . . . feminism and multicultural[ism]."[15] In her essay, *Is Multiculturalism Bad for Women?*, she traces the patriarchal roots of sexism to "the founding myths of Greek and Roman antiquity, and of Judaism, Christianity, and Islam."[16] She recalls the archetypal tales: women are born from men, men are seduced by women, women bear children, men sacrifice them.[17] From these traditions, a patriarchal society emerged and spread. Okin identifies persistent examples of patriarchal customs, including "clitoridectomy, polygamy, the marriage of children" before they reach the age of consent, and rules "requiring a rape victim to marry [her] rapist."[18] Clearly, these traditions are gender biased and force women into social and economic subservience. Therefore, when a minority culture seeks to avoid assimilation and demands the right to remain separate and apart from the laws of the state, it threatens the very foundations of a society valuing equality without regard to gender.

Okin's essay triggered a series of responses. In an essay entitled *Liberal Complacencies*, Will Kymlicka distinguishes between at least two types of "group rights."[19] One type restricts members of the minority group from challenging, changing, or abandoning the group and is characterized as "internal restrictions."[20] This type of restriction is intolerable in a liberal society according to Kymlicka.[21] In contrast, some group rights, referred to as "external restrictions," protect minority cultures from economic and political subjugation by

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14. *See id.* at 1277.

15. Okin, *supra* note 9, at 10.

16. *Id.* at 13.

17. *See id.* at 13-14.

18. *Id.* at 14-15.

19. Will Kymlicka, *Liberal Complacencies*, *in* IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 9, at 31, 31.

20. *Id.*

21. *Id.*

the majority culture.[22] Kymlicka writes, "Group rights are permissible if they help promote justice between ethnocultural groups, but are impermissible if they create or exacerbate gender inequalities within the group."[23] Thus, Kymlicka embraces multiculturalism only to the extent that diverse ethnocultural groups embrace gender equality.

In another responsive essay, Bhikhu Parekh agrees in principle with Okin's substantive conclusions.[24] However, he suggests that Okin's critique of Islam is itself patriarchal because it forces certain "fundamental liberal values"[25] upon members of a minority theocratic group in a very illiberal manner.[26] Parekh comments, "To insist that they must abide by our fundamentals is to expose ourselves to the same charge of fundamentalism that we make against them, and to rely solely upon our superior coercive power to get our way."[27] Thus, Parekh posits that secular liberalism, with its focus upon individual fundamental rights, is simply one cultural approach to the organization of human life, as is the theocratic approach of Islam. Parekh questions whether liberals can, in good conscience, assert a "monopoly of moral good."[28] Thus, Parekh concludes that liberal feminism should evolve to "provide[] a framework of thought and action in which different cultures can cooperatively explore their differences and create a rich and lively community based on their respective insights."[29]

While Parekh's critique is thoughtful and the ideals of communication, tolerance, and greater understanding between Muslims and feminists may be achieved eventually, legal issues as to the interrelationship of Islamic law and the otherwise applicable state and federal family law rules will arise with more regularity as the Muslim population within the United States increases.[30] Therefore, a practical legal response is needed.

The tension between feminism and Islam is exacerbated by the lack of division between civil law and religious law that characterizes

22. *Id.*

23. *Id.*

24. *See* Bhikhu Parekh, *A Varied Moral World*, *in* IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 9, at 69, 70.

25. *See id.* at 72.

26. *See id.* at 69, 72.

27. *Id.* at 72.

28. *See id.* at 74.

29. *Id.* at 74-75.

30. According to a 2011 report issued by the PEW Forum on Religion and Public Life, "[i]f current trends continue, the Muslim population in the United States is projected to more than double in the next 20 years, from 2.6 million in 2010 to 6.2 million in 2030." *The Global Muslim Population*, PEW F. ON RELIGION & PUB. LIFE (Jan. 27, 2011), http://www.pewforum.org/future-of-the-global-muslim-population-regional-americas.aspx#4.

Islam.[31] Thus, the feminist demand for gender equality under civil law is confounded by the gender discrimination embodied in Sharia law.[32]

B. Sharia Law Reflects Gender Inequalities

The disparate treatment of men and women under Sharia law results in the "legal and social subservience of women."[33] Sharia law determines the rights of married men and women who divorce and treats individuals differently based solely upon stereotypes associated with gender differences,[34] a type of distinction typically deemed unconstitutional by the Supreme Court when embodied in state and federal laws.[35] In order to better understand the role of Sharia law in divorce matters, it is helpful to consider its origin.

The Prophet Muhammad was born in Mecca[36] in the year of AD 570 or AD 571[37] and lived on the Arabian Peninsula.[38] "Islam . . . identified itself as a monotheistic faith in the tradition of Judaism and Christianity."[39] Muhammad enjoyed a prophetic status[40] and received the final revelation from God,[41] between AD 610 and AD 632,[42] in the form of the Quran, which serves as the foundation of Islamic law.[43] Muslims view Muhammad as the last of the line of Old and New Testament prophets including Adam, Noah, Abraham, Moses, and Christ.[44] Islam views pre-Islamic history as barbarian

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31. *See* MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION 44 (2004), *available at* http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/ (follow "Full Report" hyperlink).

32. See text accompanying *infra* notes 61-81 for an explanation of Sharia law as it relates to marriage and divorce.

33. Adrien Katherine Wing, *Custom, Religion, and Rights: The Future Legal Status of Palestinian Women,* HARV. INTERN'L LAW J. 149, 163 (1994)).

34. RAJ BHALA, UNDERSTANDING ISLAMIC LAW (SHARI'A) 879, 882-84 *(2011).* .

35. *See* Orr v. Orr, 440 U.S. 268, 281, 283 (1979) (citing Craig v. Boren, 429 U.S. 190, 202-03 (1976)) ("Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex."); Reed v. Reed, 404 U.S. 71, 75-76 (1971) (holding that "to give a mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment").

36. BHALA, *supra* note 34, at 8.

37. *Id.* at 4.

38. *Id.* at 5.

39. AHMED, *supra* note 5, at 36.

40. BHALA, *supra* note 34, at 9.

41. *See id.*

42. *Id.* at 34.

43. *Id.* at 289.

44. *See* Qur'an 3:84 (Majid Fakhry trans., 2002) ("Say: 'We have believed in Allah and in what has been revealed to us and has been revealed to Abraham, Isma'il, Isaac,

and refers to this period as "the Age of Ignorance."[45]

Following the death of Muhammad, a successor was chosen and the religion continued to spread and flourish. The law of Islam developed through application of the Quran and reference to the *Sunnah*, the practices and words of the Prophet.[46] If the matter raised a question upon which both were silent, the *Caliphs* (or heads of state) and *qadis* (or judges) exercised some discretion in implementing the Sacred Law.[47]

Sharia, meaning "the way" or "path to the water source," regulates conduct both public and private.[48] The vast majority of the Muslim population identify themselves as Sunnis.[49] Within this group, there are four schools ranging in opinion as to how best to interpret the Quran.[50] Sharia law, derived directly from the Quran,[51] formed "the cornerstone of the rule of law, no matter what form of government existed."[52]

Until the mid-AD 800s individual scholars exercised the right to analyze and resolve legal issues independently.[53] By AD 900, Islamic scholars concurred that "all essential questions had been thoroughly discussed and finally settled," and all future analysis must be "confined to the explanation, application, and, at the most, interpretation of the doctrine as it had been laid down once and for all."[54] Thus began the "closing of the door" of independent reasoning by Muslim scholars, freezing the source of all Islamic law based upon laws in existence as of AD 900.[55]

At the time the Quran was received by Muhammad, it improved the position of women by establishing their legal personhood and granting them the economic rights of dower and inheritance.[56] However, following the "closing of the door," the law was effectively frozen in time and could not evolve to address social and

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Jacob and the Tribes, and in what Moses, Jesus and the Prophets have received from their Lord. We do not discriminate between any of them . . . .").

45. *See* AHMED, *supra* note 5, at 36-37. "Consequently, Christians and Jews are 'people of the book,' or '*ahl al kitāb*' and the Qu'rān refers to them as such. They are to be respected . . . . But the earlier revelations to them were insufficient, perhaps even incomplete." BHALA, *supra* note 34, at 19.

46. *Id.* at 289.

47. *Id.* at 157.

48. *Id.* at 388 (internal quotation marks omitted).

49. *Id*. (noting that approximately eighty-five percent of Muslims are Sunni).

50. *Id.*

51. JOHN L. ESPOSITO & NATANA J. DELONG-BAS, WOMEN IN MUSLIM FAMILY LAW 131 (2d ed. 2001).

52. BHALA, *supra* note 34, at 159.

53. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 70 (1964).

54. *Id.* at 70-71.

55. *Id.* at 71.

56. ESPOSITO & DELONG-BAS, *supra* note 51, at 133.

technological changes.[57] Like the values of other sacred texts, Quranic values can be identified to advance either the equality of women and men or women's subservience to men, depending upon the chosen passage and its interpretation.[58]

This minimalistic background demonstrates that Islam incorporates civil law as a part of religious law. There is no civil side to Islam. There is no concept of separation of church and state. According to Islam, "the individual state is irreconcilable and incompatible with Shari'a. According to traditional Islamic theory, the world is divided not by borders and territories of the sovereign but by territorial acceptance of Islam."[59] Additionally, there is a tradition of resisting the modernization of Islamic law.[60]

With this background in mind, Islamic family law concepts take on an importance that is unfamiliar to many adherents to other religions. Marriage is a contract between the groom and his bride or her representative.[61] A woman's right to rescind the contract, while recognized by law, is likely to depend upon her financial status and ability to support herself.[62] The contract requires the groom to make a nuptial gift to the wife.[63] Upon marriage the wife is entitled to support from her husband, and her husband may forbid her from leaving the home or seeing her relatives.[64] Disobedience during the marriage may forfeit a wife's right to support.[65] Islam "permits a man to marry" as many as four women at one time.[66] While women must

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57. *See supra* note 55 and accompanying text.

58. *Compare, e.g.*, *Genesis* 2:18 (demonstrating that God made women as helpers to men), *with Genesis* 1:27 (stating that men and women are created equally in God's image).

59. Meghan E. Tepas, Note, *A Look at Traditional Islam's General Discord with a Permanent System of Global Cooperation*, 16 IND. J. GLOBAL LEGAL STUD. 681, 683 (2009) (footnote omitted).

60. *See, e.g.*, Khaled Abou El Fadl, *The Culture of Ugliness in Modern Islam and Reengaging Morality*, 2 UCLA J. ISLAMIC & NEAR E.L. 33, 50 (2003) (discussing the "gross misuse of the doctrines and traditions of Islamic law in the contemporary age").

61. BHALA, *supra* note 34, at 866-67.

62. *Id.* at 874.

63. *Id.* at 867. The legal validity and enforceability of a *mahr* as a premarital agreement is beyond the scope of this Article. *See generally* Chelsea A. Sizemore, Comment, *Enforcing Islamic* Mahr *Agreements: The American Judge's Interpretational Dilemma*, 18 GEO. MASON L. REV. 1085 (2011); Nathan B. Oman, *Bargaining in the Shadow of God's Law: Islamic* Mahr *Contracts and the Perils of Legal Specialization*, 45 WAKE FOREST L. REV. 579 (2010).

64. BHALA, *supra* note 34, at 867. In addition to Islamic RTAs related to custody, any award related to the support of a subsequent wife, absent the entry of a valid divorce decree and based upon the religious precepts of polygamy, is arguably void as against public policy. *See, e.g.*, State v. Green, 99 P.3d 820 (Utah 2004) (citing Reynolds v. United States, 98 U.S. 145 (1878)).

65. BHALA, *supra* note 34, at 867.

66. *Id.* at 890.

marry a Muslim, under some schools, a man may marry a non-Muslim, so long as she is Christian or Jewish.[67]

A divorce may be granted, according to the terms of the *mahr*, by returning the nuptial gift or by establishing one of the following five grounds: "(1) [r]epudiation . . . , (2) [o]ath of abstention . . . [,] (3) [s]eparation . . . [,] (4) [u]nchastity . . . [,] (5) [a]postasy."[68] Theoretically, repudiation is available to both spouses.[69] Abstention "is available only to the husband."[70] Separation by seeking court order is available to either party.[71] Unchastity is a grounds available only to the husband and results in the revocation of the unpaid *mahr*, if any.[72] The marriage is automatically terminated if either party rejects Islam or becomes an apostate.[73]

Unlike U.S. law, Islam does not recognize marital property or community property. Each party owns his or her assets individually according to a title scheme, similar to the scheme recognized in the United States until the advent of divorce reform.[74] The wife is entitled to keep her *mahr*, which is the only contribution that her husband will be obligated under classic Sharia law to make to her in the form of property distribution.[75]

Unlike U.S. law, a wife's right to maintenance following separation is highly contingent.[76] A poor husband is not obligated to pay any support.[77] There is no obligation to pay if the wife is a minor.[78] A woman who performs the *Hajj*[79] without her husband

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67. *Id.* at 896.

68. *Id.* at 878.

69. *See id.* at 879 (explaining that while a wife cannot repudiate her husband, she can "repudiate herself to her husband (*zawj*) and thereby terminate [the] marriage") .

70. *Id*. at 881.

71. *Id.* at 882.

72. *Id.* at 884.

73. *Id.* at 878-79.

74. Id. at 916. *See generally* Reva B. Siegal, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings*, *1860-1930*, 82 GEO. L. J. 2127, 2130 (1994) (discussing "how litigation under the statutes granting wives rights in their labor gave modern social content to the common law doctrine of marital service").

75. BHALA, *supra* note 34, at 916. *But see* JULIE MACFARLANE, ISLAMIC DIVORCE IN NORTH AMERICA: A *SHARI'A* PATH IN A SECULAR SOCIETY 188-89 (2012) ("Some imams are clear that the classical view on spousal support is simply outdated . . . . Aware that the traditional principles no longer reflect the economic and social reality of the place of women in the family and the workplace . . . many imams are searching for more appropriate alternatives.").

76. ESPOSITO & DELONG-BAS, *supra* note 51, at 25-26.

77. BHALA, *supra* note 34, at 921.

78. *Id.*

79. *Id.* Because the *Hajj* is one of the Five Pillars of Islam, denying a wife the right to perform it without her husband allows the husband to completely control this religious obligation. *See id.*

forfeits her right to maintenance.[80] The period of support is quite limited and "is intended to protect women who may be pregnant" by establishing the child's paternity.[81]

Unlike U.S. law,[82] child custody rules are expressly gendered. The father alone bears the financial obligation to maintain the child until the child reaches adulthood.[83] Although the mother has no similar obligation of maintenance, she does enjoy a right to care for her young children.[84] Typically, this means that she has custody of her son until he is between the ages of seven and nine.[85] Custody of a daughter extends longer and is until she reaches maturity or marries.[86] Throughout the period of childhood, the father is the legal guardian of his children to the exclusion of the mother.[87] A mother may forfeit her limited custody rights in four ways: (1) committing apostasy, (2) remarrying outside a limited group of men, (3) abusing the child, or (4) moving far away from the father without his permission.[88]

Additionally, not only is the underlying law sexist, the application of the law by the tribunal also differs from the civil approach in the United States. The Islamic religious tribunal is not concerned with uniformity, equity, or the best interests of the child but rather with reaching the result that God would reach under the same circumstances.[89] Likewise, procedural rules limit the wife's right to testify, and it is given only one-half of the weight afforded to the husband's testimony.[90]

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80. *Id.* at 919-21.

81. ESPOSITO & DELONG-BAS, *supra* note 51, at 20-21, 25-27.

82. Under U.S. law, custody is determined under the "best interests of the child" standard. *See, e.g.*, Julia H. McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS U. L.J. 113, 130-32 (2009).

83. BHALA, *supra* note 34, at 993.

84. *Id*. at 995.

85. *Id*.

86. *Id.*

87. *Id.* at 995-96.

88. *Id.* at 997-98.

89. Trumbull, *supra* note 3, at 633 ("[Sharia law] draws no distinction between the religious and the secular, between the legal, ethical, and moral questions, or between the public and private aspects of a Muslim's life." (quoting Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatable?*, 44 AM. U. L. REV. 1949, 1964 (1995))). Moreover, Sharia law lacks definitive rulings and "[t]he goal . . . is to draw as near as possible to God's true evaluation of each particular event." *Id.* at 632.

90. Kristin J. Miller, *Human Rights of Women in Iran: The Universalist Approach and the Relativist Approach,* 10 EMORY INT'L L. REV. 779, 796 (1996) ("A second example of human rights abuses against women under the Islamic Penal Code is the Code's valuation of a woman's worth as only half that of a man's. For example, a woman's testimony in court is given half the weight of a man's testimony . . . .").

There can be no monolithic restatement of Islamic law, given its tradition of individual interpretation, regional differences, and situational focus;[91] nevertheless, the foregoing survey identifies numerous specific examples of the disparate treatment of marrying and divorcing women in relationship to men. These distinctions have prompted some Muslim women to advocate for reform in the name of gender equality.[92] These examples of facial disparity are troubling because of the Islamic focus on the received word and the decision to reject reinterpretation of the law in light of modernization, further entrenching gender disparity.

The Quranic values, while progressive when introduced in the sixth century, are unhelpful to women of the twenty-first century, absent the ability of Islamic jurists to modernize the rules to reach just and fair results under contemporary conditions.[93] Women in the United States worked tirelessly to eliminate facially discriminatory statutes and the common law disparate treatment of women in the event of divorce, particularly with respect to the absence of community or marital property[94] and the fault bar to maintenance.[95]

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91. *See, e.g.*, John Hursh, *Advancing Women's Rights Through Islamic Law: The Example of Morocco,* 27 BERKELEY J. GENDER L. & JUST. 252, 257-58 (2012).

92. Nilanjana S. Roy, *Equalizing Marriages Across India*, INT'L HERALD TRIB, Apr. 25, 2012, at 2.

93. *See* ESPOSITO & DELONG-BAS, *supra* note 51, at 157-58.

94. *See* Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1361, 1398 (1983). The first wave of reform advancing women's rights was embodied in the married women's property acts, which were individually adopted by the several states beginning in the nineteenth century. According to Richard Chused:

> In fact, the acts were passed in at least three waves, beginning in 1835, and each wave arose for somewhat different reasons. The first group of statutes, passed almost entirely in the 1840's, dealt primarily with freeing married women's estates from the debts of their husbands. By and large these statutes left untouched the traditional marital estate and coverture rules. The second wave of legislation, the most frequently discussed, established separate estates for married women. These statutes appeared over a long period of time beginning in the 1840's and ending after the Civil War. The third set of statutes took the important step of protecting women's earnings from the institution of coverture. These laws generally did not appear until after the Civil War, although Massachusetts enacted an early statute in 1855.

Id at 1398 (citations omitted). Over a century after these reforms, divorce became available on the basis of fault and property was divided by title. In the 1970s, no-fault divorce reform was introduced, and marital property was defined as all property acquired by the parties during the marriage without regard to title. *See* Herma Hill Kay*, Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath,* 56 U. CIN. L. REV. 1, 1, 7-8 (1987).

95. While alimony had traditionally been available only to wives, in *Orr v. Orr*, 440 U.S. 268 (1979), the Supreme Court invalidated the sex-based classification obligating only husbands to pay alimony to wives and demanded the state undertake individualized hearings to determine need and ability to pay without regard to sex. *Id.* at 282-84.

If married women's economic rights are based entirely upon Sharia law, it is as if the clock has been turned back almost 1500 years.

Clearly, when state civil courts are called upon to recognize and enforce arbitration awards rendered by religious tribunals applying Sharia law, these courts face a dilemma: can the court honor the democratic commitment to multiculturalism without undermining its constitutional duty to reject state-sponsored sexism?

III. INTERNATIONAL RESPONSE TO SHARIA COURT AWARDS

This section examines the experience of several countries, each of which is facing the issue of how the state should interact with religious tribunals. While RTAs are rarely reviewed by courts in the United States, the experience of Canada and Britain suggests that, as the Muslim population within the United States grows, this population is likely to rely upon Islamic religious tribunals to resolve issues related to divorce.[96] Both Canada and Great Britain have confronted this reality and have reached similar legal responses.[97] This section next examines the approaches of Ethiopia, a country attempting to maintain a dual legal system in which civil and religious courts operate in a parallel manner, and Pakistan, a democracy incorporating religious law.[98] Finally, this section examines reactionary legislation within the United States, some pending and some enacted, dealing with Islamic law. In summary, this section of the paper examines the uneasy coexistence of civil and religious tribunals in countries with sizeable Muslim populations.

A. Western Responses

1. Canada's Experience

Most Canadian provinces have passed legislation affording recognition to arbitration awards, including awards related to family law matters, except for Quebec and Ontario,[99] the two provinces accounting for approximately sixty-two percent of the Canadian population.[100] In 2005, Ontario charged former Attorney General Marion Boyd to conduct an investigation[101] regarding the use of

96. There are numerous websites offering the services of Islamic religious mediation. *See, e.g.*, *IMAC: International Islamic Mediation & Arbitration Centre*, ARAB CHAMBER OF COM. & INDUS., http://www.arabcci.org/IMAC_aboutus.htm (last visited Mar. 5, 2013).

97. *See infra* Part III.A.

98. See *infra* Part III.B.

99. Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501, 534 & n.242 (2012).

100. *See Population by Year, by Province and Territory*, GOV'T OF CAN., http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo02a-eng.htm (last modified Sep. 27, 2012).

101. *See* BOYD, *supra* note 31, at 1-5.

Sharia law in family law matters under the auspices of the Islamic Institute of Civil Justice and in accordance with Ontario's Arbitration Act ("AA").[102] Former Attorney General Boyd recognized the gender inequalities under Sharia law; nevertheless, she recommended that private arbitration religious tribunals, including Islamic religious tribunals, be included among the legally permitted arbitration tribunals under Ontario law.[103]

Boyd's recommendation was based upon her in-depth research, conducted during the summer of 2004, during which she identified the stakeholders involved and met with them in order to prepare her recommendation.[104] She also reviewed the correspondence from individuals and groups setting forth a wide variety of opinions and viewpoints.[105] Opponents of permitting Muslim tribunals to decide family law issues argued that these rights could not be arbitrated under the AA, and even if the scope of the AA embraced family law disputes, the Muslim rules relating to divorce were gendered and sexist, thus violating the rights contained in "sections 2, 7, and 15 of the Canadian Charter of Rights and Freedoms as enunciated by the Supreme Court of Canada with respect to any differential treatment not specifically set out in the Constitution Act, 1867."[106]

Proponents of religious arbitration focused on the importance of personal autonomy and choice envisioned under the AA as ensuring alternative dispute resolution. In addition to favorable submissions from proponents of Jewish and Christian faith-based arbitration, Boyd received a submission from the Ismaili National Conciliation and Arbitration Board for Canada ("CAB"), "the most sophisticated and organized structure in the Muslim community,"[107] which embraces the following policy goals in its preamble to the "Rules of Arbitration" governing the Board: "when differences of opinion or disputes arise between them, these should be resolved by a process of mediation, conciliation and arbitration within themselves in conformity with the Islamic concepts of unity, brotherhood, justice,

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102. Arbitration Act, S.O. 1991, c. 17 (Can.).

103. BOYD, *supra* note 31, at 133. *See generally* Farrah Ahmed & Senwung Luk, *Religious Arbitration: A Study of Legal Safeguards*, 77 ARB. 290 (2011); Bilal M. Choksi, *Religious Arbitration in Ontario—Making the Case Based on the British Example of the Muslim Arbitration Tribunal*, 33 U. PA. J. INT'L L. 791 (2012) (arguing in favor of recognition); Arsani Williams, *An Unjust Doctrine of Civil Arbitration: Sharia Courts in Canada and England,* 11 STAN. J. INT'L REL. 40 (2010) (arguing against recognition).

104. *See* BOYD, *supra* note 31, at 5.

105. *Id.*

106. *Id.* at 30.

107. *Id.* at 57. The Shi'a Imami Ismaili Muslims, generally known as the Ismailis, belong to the Shi'a branch of Islam of which the Sunnis comprise the other. Azim Nanji, *Ismaili Philosophy*, INST. OF ISMAILI STUD., http://www.iis.ac.uk/siteAssets/pdf/ismailiphilosophy.pdf (last visited Mar. 5, 2013).

tolerance and goodwill."[108] This group reported that between 1998 and 2003, it handled 769 cases with a success rate of sixty-nine percent.[109]

Boyd concluded that she found no "evidence to suggest that women are being systematically discriminated against as a result of arbitration of family law issues."[110] Therefore, she recommended the continued use of religious arbitration to resolve family law matters.[111] However, she did make a detailed recommendation setting forth in excess of forty steps the government should take to address concerns raised by the various stakeholders.[112] For example, she recommended changes to the AA to ensure knowing and voluntary participation in the arbitration process,[113] expansion of the court's oversight of the arbitration agreement to mirror the court's oversight of other domestic contracts,[114] and creation of a domestic violence screening process.[115]

Her recommendations were controversial and no further action on the matter was taken until Ontario's then-Premier Dalton McGuinty refused to afford state recognition to any arbitration award entered by a religious tribunal, thus proclaiming "one law for all Ontarians" on September 11, 2005.[116] Formal legislation was later passed in support of this declaration on February 14, 2006.[117]

2. Great Britain's Experience

Great Britain recognizes the Anglican Church as the official church in England, while according to all citizens' religious choice and the right to be free from religious persecution, securing these rights through a civil judicial system.[118] On February 7, 2008, during an interview with the BBC, Dr. Rowan Willams, the former Archbishop of Canterbury caused political controversy.[119] According

108. BOYD, *supra* note 31, at 57 (quoting Letter from His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board of Canada, to Marion Boyd (Sept. 10, 2004)).

109. *Id.* at 59. The group defined success as not opting out of the process. *Id.*

110. *Id.* at 133.

111. *Id.*

112. *Id.* at 133-42.

113. *See id.* at 134-35.

114. *See id.* at 134.

115. *Id.* at 136.

116. *Ontario Will Ban Shariah Arbitrations*, N.Y. TIMES, Sept. 12, 2005, at A6.

117. *See* Walter, *supra* note 99, at 539; Anna C. Korteweg, *The Sharia Debate on Ontario*, ISIM REV., Autumn 2006, at 50, 50, *available at* http://korteweg.files.wordpress.com/2010/12/isim-review_18-501.pdf.

118. GILLIAN DOUGLAS ET AL., SOCIAL COHESION AND CIVIL LAW: MARRIAGE, DIVORCE AND RELIGIOUS COURTS 7-8 (2011), *available at* http://www.law.cf.ac.uk/clr/Social%20Cohesion%20and%20Civil%20Law%20Full%20Report.pdf.

119. *Williams Under Fire in Sharia Row*, BBC NEWS (Feb. 8, 2008),

to the BBC, Dr. Rowan said he believed the adoption of some Sharia law in the United Kingdom seemed "unavoidable."[120] He further commented that "adopting parts of Islamic Sharia law could help social cohesion. For example, Muslims could choose to have marital disputes or financial matters dealt with in a Sharia court."[121] His comments caused Gordon Brown's spokesman to state that the Prime Minister "believes that British laws should be based on British values."[122] These comments were perhaps triggered due to reports that Islamic religious tribunals were operating independently of the judicial system in Great Britain.[123]

In 2011, a study examining the role of religious tribunals in Great Britain was released by researchers associated with Cardiff University. The study, entitled *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* [hereinafter "Cardiff Report"], reviewed the role of the *Beth Din*, the Sharia Council, and the National Tribunal for Wales, each a religious body offering private dispute resolution services to parties according to Jewish, Muslim, and Christian tenets.[124]

The Cardiff Report focused on the relationship between the religious tribunals and the civil courts with respect to matters related to marriage and divorce. The authors observed that:

> None of the tribunals studied has a "legal status" in the sense of "recognition" by the state. They derive their authority from their religious affiliation, not from the state, and that authority extends only to those who choose to submit to them. However, as far as marriage/divorce is concerned, they are not "arbitrators." Their authority to rule on the validity/termination of a marriage does not derive from the parties' agreement to submit their "dispute" to them (indeed, there may be no dispute) in the same way as an arbitration clause in a contract (for which the Beth Din and some Shariah tribunals would also qualify to rule on civil disputes). Rather, adherents to the particular faith must make use of the religious tribunal if they are to obtain sanction to remarry within their faith.[125]

The authors stressed that the tribunals served a religious purpose only. The tribunals in each instance encouraged the parties to have

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http://news.bbc.co.uk/2/hi/7233335.stm.

120. *Id.*

121. *Id.*

122. *Id.*

123. In 2009, one survey suggested that approximately eighty-five Islamic tribunals were operating in Great Britain. *See* Steve Doughty, *Britain Has 85 Sharia Courts: The Astonishing Spread of Islamic Justice Behind Closed Doors*, MAILONLINE (June 29, 2009, 4:25 PM), http://www.dailymail.co.uk/news/article-1196165/Britain-85-sharia-courts-The-astonishing-spread-Islamic-justice-closed-doors.html.

124. *See generally* DOUGLAS ET AL., *supra* note 118.

125. *Id.* at 44.

ancillary matters, including custody support and asset division, determined by a civil court.[126]

> "Ancillary" matters are those relating to the consequences of the ending of the marriage in relation to arrangements for the parties' children, or money and property. The National Tribunal has no role in relation to dealing with such consequences. Under Jewish law, it is possible for the parties to agree at the time of the marriage a) that they will agree to a *get* and b) that they will ask the Beth Din to resolve any ancillary disputes. Such agreements would not amount to binding arbitration contracts, **since the jurisdiction of the civil courts on such matters may not be ousted** by the parties' agreement and in such cases, they are advised to seek a consent order in the family courts.[127]

Each religious authority expressly acknowledged that it lacked authority to render legally enforceable family law orders in light of the controlling law limiting jurisdiction over family law matters to civil courts and prohibiting arbitration of such matters.[128] Additionally, one observer of the process wrote,

> [S]everal women had reluctantly agreed to attend the meetings and felt that they had little choice but to do so if they were to be issued with a divorce certificate. Of the ten women I observed in these sessions a staggering four had informed the religious scholar that they were party to civil injunctions issued against their husbands on the grounds of violence and threatening behaviour.[129]

Thus, despite the availability of an alternative forum to determine divorce disputes, the process may be infused with "subliminal and covert forms of power and coercion [thus] rendering the parties unequal and the process unfair."[130] The Cardiff Report authors concluded:

> None of the tribunals has any legal status afforded to them by the state or the civil law, and their rulings and determinations in relation to marital status have no civil recognition either. They derive their authority from their religious affiliation, not from the state, and that authority extends only to those who choose to submit to them."[131]

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126. *Id.* at 47-48.

127. *Id.* at 47 (emphasis added) (citation omitted).

128. *Id.* (citing Matrimonial Causes Act, 1973, c. 18, § 34 (U.K.); Children Act, 1989, c. 41, § 10 (U.K.)).

129. Samia Bano, *Islamic Family Arbitration, Justice and Human Rights in Britain*, LAW SOC. JUST. & GLOBAL DEV., 20 (Dec. 6, 2007), http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2007_1/bano/bano.pdf.

130. *Id.*; *cf.* Urfan Khaliq, *The Accommodation and Regulation of Islam and Muslim Practices in English Law*, 6 ECCLESIASTICAL L.J. 332, 332, 344-46 (2002) (noting that a substantial number of British Muslims enjoy access to an unrecognized and unregulated quasi-judicial system to resolve family law matters).

131. DOUGLAS ET AL., *supra* note 118, at 48.

Thus, the authors stressed throughout the Report that parties voluntarily submit to religious tribunal arbitration of family law matters and the awards lack the backing of state enforcement.

This is so even though under the Arbitration Act of 1996, British courts recognize and enforce religious tribunal awards resolving other legal matters entered according to valid arbitration agreements.[132] Under the act, parties are expressly prohibited from transferring jurisdiction over ancillary family law issues related to divorce from the civil courts to a religious tribunal.[133]

Thus, in both Ontario and Great Britain, the role of an Islamic religious tribunal is limited in scope and extends only to religious matters. Islamic RTAs in Ontario are not subject to civil enforcement.[134] In Great Britain, civil divorce and ancillary issues related to divorce, likewise, remain within the sole jurisdiction of the civil court.[135]

B. North African and South Asian Responses

1. Federal Democratic Republic of Ethiopia's Experience

In contrast to the unitary legal systems existing in Canada and the United Kingdom, some countries have implemented a plural legal system, recognizing both civil courts employing state law and minority ethnic courts operating according to Islamic law. For example, the Federal Democratic Republic of Ethiopia ("FDRE") has approximately twenty-eight million Muslims, living as a minority population and comprising approximately thirty-four percent of its population.[136] The FDRE adopted a new constitution in 1994

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132. Arbitration Act, 1996, c. 23 (U.K.). On June 7, 2011, Baroness Cox introduced a new bill in the House of Lords to outlaw the use of Sharia law in Great Britain if it conflicts with English law. *See* Arbitration and Mediation Services (Equality) Bill, 2010-12, H.L. Bill [72] (U.K.) (applying "equality legislation" to arbitrations). Thus, like Canada, Great Britain is considering legislation prohibiting the religious arbitration of family law related matters. *See supra* Part III.A.1.

> The aim of the Bill, which was introduced to the House of Lords last year, is to make arbitration services in the UK subject to equality laws and to bar any arbitration where parties are of unequal standing; for example, it would disallow arbitration providers placing greater weight on the testimony of one party over another, as is the case with sharia law where a wife's word is worth only half of her husband's.

Alan Lake, *Update on Baroness Cox's Equality Bill*, THE 4 FREEDOMS LIBRARY (June 1, 2012, 3:23 PM), http://4freedoms.ning.com/group/women/forum/topics/one-law-for-all-progress-reports.

133. *See* DOUGLAS ET AL., *supra* note 118, at 48.

134. *See supra* Part III.A.1.

135. *See* Matrimonial Causes Act, 1973, c. 18, § 34 (U.K.); Children Act, 1989, c. 41, § 10 (U.K.).

136. *See* PEW FORUM ON RELIGION & PUB. LIFE, MAPPING THE GLOBAL MUSLIM POPULATION 7 (2009), *available at* http://www.pewforum.org/newassets/images/

identifying a variety of fundamental human rights and provides that "[t]he law shall guarantee to the persons equal and effective protection without discrimination on grounds of race, color, sex, language, religion, political or other opinion, national or social origin, wealth, birth or other status."[137]

The FDRE balanced its constitutional guarantees of equality among citizens and religious pluralism by passing the Proclamation to Consolidate Federal Courts of Sharia of 1999, allowing Sharia courts, under the new Constitution, to determine personal status according to Islamic religious precepts.[138] Because Sharia courts apply Sharia law, gender bias concerns are raised.[139] However, the FDRE Constitution is silent regarding whether the Constitution preempts contradictory Sharia law.[140] Appellate review by the House of Federation is limited to procedural questions related to consent and whether the Sharia courts have exceeded their mandated jurisdiction.[141] Thus, the FDRE appears to treat final decisions of the Sharia courts as outside of the human rights protections in the Constitution and beyond its supremacy clause.[142] Seemingly, the FDRE is pursuing a course of cultural pluralism by allowing the ethnic minority Muslim population to reject assimilation.

2. Pakistan's Experience

Pakistan has a Muslim majority of 96.4% with an estimated Muslim population of over 178 million.[143] Despite the potential for internal contradiction, the Pakistan Constitution incorporates both Islamic law and gender equality guarantees.[144] Pakistani Sharia courts have worked to resolve the tension between the guarantees of gender equality and the sexist divorce rules associated with Islam. For example, the divorce approach of *khula* had been interpreted to require mutual consent for the wife to obtain a divorce.[145] In an attempt to ameliorate the divorce inequity, Pakistani courts have reinvigorated the concept of *khula* to grant to women a "no-fault,

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reports/Muslimpopulation/Muslimpopulation.pdf.

137. CONSTITUTION OF ETHIOPIA, 1994, art. 25.

138. *See* Mohammed Abdo, *Legal Pluralism, Sharia Courts, and Constitutional Issues in Ethiopia*, 5 MIZAN L. REV. 72, 73, 86 (2011).

139. *See id.* at 96-97.

140. *See id.* at 91-92, 97.

141. *See id.* at 100.

142. *See id.* at 104.

143. *The Future of the Global Muslim Population*, THE PEW FORUM ON RELIGION & PUB. LIFE (Jan. 27, 2011), http://features.pewforum.org/muslim-population.

144. *See* Karin Carmit Yefet, *The Constitution and Female-Initiated Divorce in Pakistan: Western Liberalism in Islamic Garb*, 34 HARV. J. L. & GENDER 553, 556 (2011).

145. *Id.* at 587.

unilateral divorce right."[146] Despite granting to women this right, the courts often continue to enforce the return of dower to the husband.[147] Thus, Pakistan's civil courts are working to liberalize the divorce rights of women while adhering to the Quran. This example demonstrates that gender equality reform could conceivably come from civil changes to the Sharia framework from within and over time. Nevertheless, it is difficult to envision the introduction of marital property and best interests custody determinations within the context of Sharia law, thereby limiting the potential reach of internal reform.[148]

The foregoing survey examined four approaches to RTAs in relationship to the State. In Quebec and Ontario, the role of religious tribunals has been limited to religious matters only, and no recognition is afforded even to arbitrated awards.[149] In Great Britain, Islamic RTAs may be enforceable under the 1996 Arbitration Act related to marital status and *mahr* only, with all ancillary matters subject to judicial determination and oversight.[150] In FDRE, the state recognizes the right to opt out of the civil court and to resolve matters through religious tribunals despite the existence of a constitutional guarantee against sex discrimination.[151] In Pakistan, civil courts, applying Sharia law, are working to eliminate gender bias through judicial reform.[152]

Other countries are charting creative ways to balance the tension between gender equality and religious freedom.[153] The forgoing comparison of approaches demonstrates several important points. First, Islamic law is best suited to a theocracy in which there is one religious law governing all matters of public and private rights. In countries with a Muslim majority population, given the

146. *Id.* at 586-87.

147. *See id.* at 589.

148. One problem with this approach is that by requiring the return of the *mahr* to permit divorce, the wife forfeits her right to keep the original amount of the *mahr* and to demand payment of the delayed *mahr*, if any. *See id.* at 589-90. In slight contrast, Saudi Arabia is structured as a theocracy controlled by Islamic law. *See* Trumbull, *supra* note 3, at 628-29. The process empowers the *qadi*, or judge, to resolve the matter based upon conscience and guided by the will of Allah. *See id.* at 629-30. Thus, the *qadi*'s ruling is by definition subjective, rather than objective, applicable only to the parties involved and has no precedential value. *See id.* Therefore, in systems such as Saudi Arabia's, the potential for internal reform is lessened.

149. *See supra* notes 99, 115-17 and accompanying text.

150. *See supra* notes 132-33 and accompanying text.

151. *See supra* notes 136-39 and accompanying text.

152. *See supra* notes 149-45 and accompanying text.

153. Yefet, s*upra* note 144, at 609 ("The courts have thus proven to be highly conducive to protecting gender equality and women's rights in various rulings, with the divorce jurisprudence standing out as a shining star amidst the constellation of marital relations cases.").

"closing of the door" with respect to the modification and reform of Islam, the fate of women's rights and the movement towards gender equality devolves upon the judiciary. In countries with large Muslim minorities, such as FRDE, the government is currently experimenting by permitting the operation of entirely separate minority ethnic courts, whose determinations are reviewed for procedural fairness only, without regard to a constitutional demand for gender equality.[154] Conversely, in Great Britain and at least in Ontario, if not all of Canada, the tension between gender equality and religious freedom has been resolved in favor of gender equality in family law matters.[155] This is due, perhaps, to the settled proposition that religious freedom is not a justification for otherwise illegal conduct. This is certainly the controlling rule in the United States.[156]

C. U.S. Legislative Response

Despite the supremacy of U.S. constitutional law, some state legislators have introduced legislation to prohibit the judiciary from considering "foreign law" or laws from outside of the United States.[157] The genesis of this movement is rooted in the discriminatory concern for the Islamization of U.S. law.[158] Both Kansas and Oklahoma have passed broad prohibitory laws.[159]

On May 21, 2012, Kansas governor Sam Brownback signed a law making it illegal for a court or an arbitration panel to apply religious law that violates constitutional rights under the state and federal

154. *See* Abdo, *supra* note 138, at 100.

155. *See supra* Part II.A.

156. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

157. *See, e.g.*, S. 62, 2011 Leg., Reg. Sess. (Ala. 2011); H.R. 88, 27th Leg., 2d Sess. (Alaska 2011); H.R. 2064, 50th Leg., 1st Reg. Sess. (Ariz. 2011); S.B. 97, 88th Gen. Assemb., Reg. Sess. (Ark. 2011); S. 1294, 2011 Leg., Reg. Sess. (Fla. 2011); H.R. 45, 2011-2012 Leg., Reg. Sess. (Ga. 2011); S.J. Res. 16, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011); H.R.J. Res. 14, 84th Gen. Assemb., Reg. Sess. (Iowa 2011); H.R. 2087, 2011 Leg. (Kan. 2011); H.R. 1076, 125th Leg., 1st Reg. Sess. (Me. 2011); H.R. 301, 2011 Leg., Reg. Sess. (Miss. 2011); S. 308, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011); Leg. 647, 102d Leg., 1st Sess. (Neb. 2011); Assemb. 3496, 214th Leg., 2010 Legis. Sess. (N.J. 2010); S.J. Res. 18, 50th Leg., 1st Sess. (N.M. 2011); H.R. 640, 2011-2012 Leg., 2011 Sess. (N.C. 2011); H.R. 1552, 53d Leg., 1st Sess. (Okla. 2011); H.R. 3490, 119th Gen. Assemb., 1st Reg. Sess. (S.C. 2011); S. 201, 86th Legis. Assemb., 2011 Sess. (S.D. 2011); H.R. 79, 82d Leg., Reg. Sess. (Tex. 2011); H.R.J. Res. 8, 2011 Leg. (Wyo. 2011).

158. Such laws reflect the second wave of anti-Muslim animus. Aziz Z. Huq, *Private Religious Discrimination, National Security, and the First Amendment*, 5 HARV. L. & POL'Y REV. 347, 350 (2011) ("National polling data from the past five years suggests that a majority of Americans have categorically negative views of Islam and their Muslim cocitizens.").

159. KAN. STAT. ANN. § 60-5103 (2012); H.J.R. Res. 1056, 52d Leg., 2d Sess. (Okla. 2010), *available at* https://www.sos.ok.gov/documents/questions/755.pdf.

laws.[160] The law expressly provides:

> Sec. 3. Any court, *arbitration*, tribunal or administrative agency ruling or decision shall violate the public policy of this state and be void and unenforceable if [it] . . . *bases its rulings or decisions in the matter at issue in whole or in part on any foreign law, legal code or system that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights and privileges granted under the United States and Kansas constitutions*, including, but not limited to, equal protection, due process, free exercise of religion, freedom of speech or press, and any right of privacy or marriage.[161]

Without expressly addressing the issues raised by the application of Sharia law to resolve family law-related disputes, the law clearly forbids judicial enforcement of such an award. This statute has not been constitutionally challenged to date.

In another example, Oklahoma recently passed this constitutional amendment by voter ballot:

> [State and Municipal courts,] when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States *provided the law of the other state does not include Sharia Law*, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. *Specifically, the courts shall not consider international law or Sharia Law*. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.[162]

The Oklahoma constitutional amendment differs from the Kansas statute because it expressly prohibits courts from considering Sharia law.

A challenge to the Oklahoma amendment soon followed when Muneer Awad filed a lawsuit in the Western District of Oklahoma seeking to enjoin the implementation of the law on First Amendment grounds.[163] Awad argued that the statute violated the First Amendment because it singled out the Muslim legal framework of Sharia for negative and disparate treatment in violation of the

160. Kevin Murphy, *Kansas Governor, Sam Brownback, Signs Anti-Sharia Bill, Effectively Banning Islamic Law*, HUFFINGTON POST (May 26, 2012, 12:09 AM), http://www.huffingtonpost.com/2012/05/25/kansas-governor-signs-bil_n_1547145.html.

161. KAN. STAT. ANN. § 60-5103 (2012) (emphasis added).

162. H.R.J. Res. 1056, 52d Leg., 2d Sess. (Okla. 2010) (emphasis added).

163. *See* Awad v. Ziriax, 754 F. Supp. 2d 1298, 1302 (W.D. Okla. 2010), *aff'd*, 670 F.3d 1111 (10th Cir. 2012).

Establishment Clause of the First Amendment.[164] The district court granted the injunction and the defendant appealed.[165]

On appeal, Awad successfully argued that the proposed Oklahoma statute violated the United States Constitution.[166] He argued that "[t]he First Amendment provides in part that 'Congress shall make no law respecting an establishment of religion.'"[167] Like other First Amendment provisions, the Establishment Clause is applicable to the states through the Due Process Clause of the Fourteenth Amendment.[168] In determining whether the plaintiff had established that his petition was likely to succeed on the merits, the court applied the *Larson* test[169] and affirmed the district court's grant of injunctive relief on January 10, 2012.[170] With the injunction in place, the constitutionality of the amendment now depends on the district court's determination on the merits.

Given the strong language of the Tenth Circuit, it is unlikely that other pending or recently enacted legislation singling out Sharia law as invalid and unenforceable will satisfy constitutional review.[171] In addition to establishment concerns, such legislation also raises free exercise concerns to the extent the legislation impermissibly interferes with the individual's right to practice his or her religion. The government may regulate conduct related to religious belief only if the legislation is "a 'valid and neutral law of general applicability.'"[172] Thus, to the extent the amendment is deemed to be motivated out of hostility rather than a legitimate governmental interest, it will be deemed unconstitutional.

Not only does this amendment and similar legislation single out the law of one minority religious group for disparate treatment,[173] this legislation harkens back to other examples of facially discriminatory legislation presenting to courts important opportunities to correct majoritarian impulses, which, if missed,

164. *See id.*

165. *Id.*

166. *See Awad*, 670 F.3d at 1131.

167. *Id.* at 1126 (quoting U.S. CONST. amend. I).

168. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

169. *See Awad*, 670 F.3d at 1129-31. The test is derived from Larson v. Valente, 456 U.S. 228, 246 (1982), which held that if a law discriminates among religions it must satisfy strict scrutiny.

170. *Id.* at 1133.

171. States that have or are considering pending legislation expressly identifying and barring judicial application of Sharia law include: Tennessee, Iowa, Missouri, and New Mexico. Asma T. Uddin & Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST AMENDMENT L. REV. 363, 372 (2012).

172. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring)).

173. Some scholars have characterized the discrimination against Muslims as "Islamaphobia." *See, e.g.*, Uddin & Pantzer, *supra* note 171, at 364-65.

could result in an opinion reflecting "serious moral error."[174] It reveals an anti-Islamic stereotype that fails to distinguish between religious tenets and civil law. Such legislation hopelessly blurs the line between individual religious freedom and political persecution. Thus, a more refined and thoughtful approach to the role of Islamic law and Islamic religious tribunals is demanded to remain true to the fundamental guiding principles of our Constitution including religious toleration and principles of equal protection.

The Oklahoma legislation and other attempts to identify and marginalize Sharia law reflect the deep anti-Islamic bias that exists in the United States. Thus, in addressing the relationship between religious tribunals and the civil courts, it is vital to guard against animus and preserve the individual's right to free exercise. Such legislation is far too blunt an instrument to deal with the policy issues raised by Islamic RTAs related to divorce. There may be times when parties wish to have a RTA subject to judicial enforcement, and this type of contract should be recognized and enforced. However, in matters of family law, Sharia law reflects a degree of gender bias that renders any determination thereunder subject to public policy and constitutional vulnerability.[175]

The question facing the United States is how best to treat the family law rulings of religious tribunals given the experience of other secular, pluralistic, and theocratic legal systems abroad.

IV. FAITH-BASED ARBITRATION IN THE UNITED STATES

The U.S. Constitution expressly rejects theocracy and demands strict neutrality from government to permit individual worship without state interference and to prohibit state sponsorship of one religion.[176] Ideally, religious law should be construed solely by religious tribunals and be irrelevant in civil court.

A. Federal and State Arbitration Acts

174. Michael A. Olivas, *Governing Badly: Theory and Practice of Bad Ideas in College Decision Making*, 87 IND. L.J. 951, 953 (2012) ("Richard Delgado and Jean Stefancic examined a series of legal decisions that they consider to be 'serious moral errors,' 'embarrassingly inhumane decisions,' and 'moral abominations.' Such cases include now-discredited decisions in racial matters, Indian law, Chinese immigration, Japanese internment, women's suffrage, forced sterilization, and gay rights." (quoting Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1930 n.2 (1991))).

175. See *supra* notes 33-34 and accompanying text.

176. *See* Michael G. Weisberg, Note, *Balancing Cultural Integrity Against Individual Liberty: Civil Court Review of Ecclesiastical Judgments*, 25 U. MICH. J.L. REFORM 955, 958 (1992) ("The Free Exercise Clause prohibits civil courts from intruding into religious societies' internal affairs, and the Establishment Clause limits religious authority over secular issues. To meet the requirements of both religion clauses, civil courts must refuse to rule on wholly internal, wholly religious issues, but must defend parties' secular rights.").

However, one way in which the rulings of religious tribunals might come before a civil court is through the Federal Arbitration Act[177] and its state counterparts.[178] These arbitration statutes set forth the minimum procedural requirements necessary to ensure the validity and enforceability of arbitration awards.[179] The federal statute is silent as to the choice of law that will control disputes, presumably because this is a matter left to the parties.

The largest commercial arbitration association in the United States is the American Arbitration Association ("AAA").[180] The AAA posts its procedural rules online.[181] These rules also are silent as to choice of law. Typically, standard commercial contracts that contain a provision mandating arbitration will also contain a choice of law provision designating the state or federal law that will apply. In addition to choice of law concerns, the arbitration process results in a final ruling that cannot be appealed and may be only be overruled by a civil court on very limited grounds set forth by state and federal arbitration statutes.[182]

Arbitration of civil issues in religious tribunals raises serious questions about the voluntariness of the arbitration agreement, the choice of law, the procedure that will be followed, and the validity and enforceability of any RTAs based upon religious law due to free exercise and entanglement concerns. These concerns are reflected in legislation considered, but not enacted, by the United States Senate in 2009. This legislation was entitled the Arbitration Fairness Act of 2009 ("AFA").[183] This legislation, sponsored by Senator Russ Feingold and others, identified a variety of abuses under the existing act: (1) arbitration, as envisioned by Congress, was for parties with fairly equal bargaining power, not between powerful, sophisticated merchants and their substantially less powerful customers and employees who must accept nonnegotiable arbitration agreements if they want to either purchase goods or work; (2) the "repeat player" aspect of arbitration is biased in favor of corporate defendants; (3) because of limited judicial review and no reversal for a mere misinterpretation of the law, "arbitration undermines the development of public law for civil rights and consumer rights"; (4)

177. Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2006).

178. *See infra* note 187 and accompanying text.

179. *See, e.g.*, 9 U.S.C. §§ 10-11 (setting forth grounds and procedure for vacation, rehearing, or modification of award).

180. *See Dispute Resolution Services*, AM. ARB. ASS'N, http://www.adr.org/drs (last visited Apr. 6, 2013).

181. *See AAA Court- and Time-Tested Rules and Procedures*, AM. ARB. ASS'N, http://adr.org/aaa/faces/rules (last visited Apr. 6, 2013).

182. *See, e.g.*, 9 U.S.C. §§ 10-11.

183. Arbitration Fairness Act of 2009, S. 931, 111th Cong. § 2 (2009).

there is a lack of transparency in private arbitration proceedings, which are not open to public review; and (5) some arbitration agreements contain provisions that strip consumers and employers of class action and other remedies.[184] Thus, some members of Congress also recognize the need for arbitration reform.[185]

Religious arbitration of family law matters raises similar concerns, particularly with respect to equality of bargaining position, limited judicial review, and transparency. Women lack equal bargaining power because the controlling law denies equal protection to women. Additionally, arbitration undermines the evolution of gender equality rights because it shields matters of important public policy from judicial review. Finally, the private nature of the arbitration process shields the process from public scrutiny and debate.

Following the enactment of the FAA, a drafting committee finalized the Uniform Arbitration Act ("UAA").[186] In the comments, the application of the public policy exception is expressly discussed.[187] The UAA, like its federal counterpart, lacks a public policy grounds for vacatur.[188] Nevertheless, a public policy grounds

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184. *Id.*

185. On April 29, 2009, Russ Feingold introduced the AFA. *See* S. 931. In relevant part, this proposed revision provided: "(a) In General– Notwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, franchise, or civil rights dispute." *Id.* at § 3. The bill died. *See Arbitration Fairness Act of 2009*, GOVTRACK, http://www.govtrack.us/congress/bills/111/s931 (last visited Apr. 6, 2013).

186. UNIF. ARBITRATION ACT §§ 1-25, 7 U.L.A. 99 (1956). In 2000, a new uniform act was adopted. UNIF. ARBITRATION ACT §§ 1-33, 7 U.L.A. 1 (2000). Jurisdictions adopting the 2000 Act include: Alaska, Arizona, Arkansas, Colorado, District of Columbia, Hawaii, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington. *Legislative Fact Sheet – Arbitration Act (2000)*, UNIF. LAW COMM'N, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20(2000) (last visited Apr. 6, 2013). Jurisdictions still using the 1956 version include: Delaware, Georgia, Idaho, Iowa, Kansas, Kentucky, Maine, Missouri, Montana, Nebraska, South Carolina, South Dakota, and Virginia. *Arbitration Act (1956)*, UNIF. LAW COMM'N, http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20%281956%29 (last visited Apr. 6, 2013).

187. UNIF. ARBITRATION ACT § 23 cmt. C, 7 U.L.A. 83 (2000).

188. Comment C:

> The Drafting Committee . . . considered the advisability of adding two new subsections to Section 23(a) sanctioning vacatur of awards that result from a "manifest disregard of the law" or for an award that violates "public policy." Neither of these two standards is presently codified in the FAA or in any of the state arbitration acts. However, all of the federal circuit courts of appeals have embraced one or both of these standards in commercial arbitration cases.

Id. (citing Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 734 (1996)).

for vacatur has been recognized by federal[189] and state courts.[190]

The United States has had some experience with religious arbitration arising from determinations made by the *Beth Din* according to Jewish law,[191] by Christian conciliation organizations according to the precepts associated with Christianity,[192] and by Islamic religious tribunals according to Islamic law.[193]

B. Religious Arbitration in the United States

1. Jewish Arbitration of Family Law Issues

The *Beth Din* has been operating for over four thousand years.[194] For religious reasons, modern Judaic schools maintain that "[a] central principle of *halacha* is that disputes between Jews should be adjudicated in duly-constituted rabbinical courts."[195] Jewish law incorporates patriarchal laws that are gendered.[196] The jurisdiction of the *Beth Din* extends to divorce.[197] A *kethuba*[198] may require the parties to consult the *Beth Din* in the event of marital strife.[199] In one

189. *See, e.g.*, Seymor v. Blue Cross/Blue Shield, 988 F.2d 1020, 1023-24 (10th Cir. 1993); PaineWebber, Inc. v. Agron, 49 F.3d 347, 350-52 (8th Cir. 1995).

190. *See, e.g.*, Faherty v. Faherty, 477 A.2d 1257, 1263 (N.J. 1984) (refusing to defer to arbitrator's award affecting child support because of the court's "nondelegable, special supervisory function in the area of child support" that warrants de novo review whenever an arbitrator's award of child support could "adversely affect the substantial best interests of the child"); Rakoszynski v. Rakoszynski, 663 N.Y.S.2d 957, 958-59 (N.Y. Sup. Ct. 1997) (concluding that child support is subject to arbitration but child custody and visitation is not); Miller v. Miller, 620 A.2d 1161, 1166 (Pa. Super. Ct. 1993) (stating that arbitrator's child custody determination was not binding on the court, but it must ascertain whether the arbitral award is "adverse to the best interests of the children").

191. *See infra* Part IV.B.1 and accompanying text.

192. *See infra* notes Part IV.B.2 and accompanying text.

193. *See infra* notes Part IV.B.3 and accompanying text.

194. *See* Ginnine Fried, *The Collision of Church and State: A Primer to* Beth Din *Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633, 634 (2004).

195. *Id.* at 637 (quoting Dov Bressler, *Arbitration and the Courts in Jewish Law,* 9 J. HALACHA & CONTEMP. SOC'Y 105, 109 (1985)).

196. Adam H. Koblenz, *Jewish Women Under Siege: The Fight for Survival on the Front Lines of Love and the Law*, 9 U. MD. L.J. RACE RELIGION GENDER & CLASS 259, 263-70 (2009) (discussing gender disparity created by traditional Jewish law in the context of domestic violence).

197. *See* Fried, *supra* note 194, at 640.

198. A *kethuba* is a Jewish marital contract. *See* Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 570 (2004).

199. For example, one *kethuba* was translated as follows:

> [T]he parties declared their 'desire to . . . live in accordance with the Jewish law of marriage throughout [their] lifetime' and further agreed as follows: '[W]e, the bride and bridegroom . . . hereby agree to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives, as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other

instance the *Beth Din* included a clause in its award that conditioned the husband's obligation to give the *get* (the Jewish term for a divorce document) upon the wife's agreement not to seek civil court involvement. The clause was deemed unenforceable because it chilled the wife's right to pursue civil relief, including the adjudication of custody and child support.[200] In another case, *Hirsch v. Hirsch*, the court refused to enforce a *Beth Din* award of child support, custody, and property based upon public policy grounds.[201] The court held that

> [t]he remaining provisions of the award addressed issues, inter alia, of marital property, separate property, maintenance, and educational costs for the children, which are intertwined with the issues of the husband's child support obligation and the disposition of the marital residence. Accordingly, under the circumstances of this case, the [New York] Supreme Court properly vacated the entire award.[202]

Thus, civil courts apply special procedural rules to *Beth Din* family related awards to ensure voluntariness. Typically, child custody[203] and child support[204] awards are unenforceable as a matter of public policy and subject to de novo review.[205] This is because the former determination is based upon a best interest determination and remains subject to the court's review,[206] and the latter must be determined in accordance with state promulgated child support guidelines.[207]

> complete love and devotion, and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime. We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision.

Avitzur v. Avitzur, 446 N.E.2d 136, 137 (N.Y. 1983). Notably absent from the *kethuba* is any language expressly waiving divorce rights arising under civil law.

200. Fried, *supra* note 194, at n.113.

201. Hirsch v. Hirsch, 774 N.Y.S.2d 48, 49-50 (App. Div. 2004).

202. *Id.* at 50.

203. Bambach, *supra* note 3, at 399.

204. *Id.*

205. Schechter v. Schechter, 881 N.Y.S.2d 151, 152 (App. Div. 2009) (citing *Hirsch*, 774 N.Y.S.2d 48, Hom v. Hom, 704 N.Y.S.2d 885, 885 (App. Div. 2000); Cohen v. Cohen, 600 N.Y.S.2d 996, 997 (App. Div. 1993)) (stating that custody and visitation suits are not subject to arbitration); *In re* Marriage of Popack, 998 P.2d 464, 469 (Colo. App. 2000) (rejecting historical authority for confirmation of child support awards made through an arbitration process, which does not employ the principles established under current state law due to the strong public policy of this state set forth in that statute).

206. *See generally* McLaughlin, *supra* note 82.

207. *See, e.g.*, Knorr v. Knorr, 588 A.2d 503, 505 (Pa. 1991) ("Parties to a divorce action . . . . have no power . . . to bargain away the rights of their children [regarding child support] . . . .").

2. Christian Arbitration of Family Law Issues

While the *Beth Din* has been successfully arbitrating matters in the United States for decades and applying *halacha* law,[208] the arrival of Christian religious arbitration is more recent. Peacemakers Ministries, founded as the Christian Conciliation Service in 1980 and renamed in 1982, is the largest Christian dispute resolution organization in the country.[209] This group offers Christian conciliation to individuals interested in resolving their disputes outside of court according to biblical principles.[210] If mediation fails, the parties are channeled into arbitration.[211] Christian conciliation cannot be used to resolve issues dedicated solely to the civil courts, such as child custody and child support.[212] This exclusion should be extended to include all issues related to divorce, including divorce and property distribution, because equally strong policy concerns justify judicial determination of marital property rights and spousal support.

Unlike Sharia law, which is very detailed regarding the private law of divorce,[213] Christian canonical law deals largely with church matters and is silent as to private law related to divorce.[214] Thus, any

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208. "[*Halacha*,] though implying a legal order and often used to denote Jewish religious law, suggests a broader range of ideas than those included in legal rules. A more literal translation of *halacha* would evoke a path of life; to inhabit the *halacha* is, by definition, to live in it." Samuel J. Levine, Halacha *and* Aggaada*: Translating Robert Cover's* Nomos and Narrative, 1998 UTAH L. REV. 465, 484 (1998) (internal quotation marks omitted).

209. Glenn G. Waddell & Judith M. Keegan, *Christian Conciliation: An Alternative to "Ordinary" ADR*, 29 CUMB. L. REV. 583, 585-87 (1999).

210. Wolfe, *supra* note 3, at 439. An example of an arbitration clause designating Christian arbitration follows:

> The parties to this agreement are Christians and believe that the Bible commands them to make every effort to live at peace and to resolve disputes with each other in private or within the Christian church (see Matthew 18:15-20; Corinthians 6:1-8). Therefore the parties agree that any claim or dispute arising from or related to this agreement shall be settled by biblically based mediation and, if necessary, legally binding arbitration in accordance with the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation, a division of Peacemaker Ministries.

Margaret Graham Tebo*, Dispute Resolution Clauses Keep the Faith Many Clients Asking for Mediation Under Christian Principles*, PRIVATE DISPUTE RESOLUTION SERVICES, http://www.privatedisputeresolutionservices.com/christianmediation.html (last visited Apr. 6, 2013); Mark L. Movsesian, Fiqh *and Canons: Reflections on Islamic and Christian Jurisprudence*, 40 SETON HALL L. REV. 861, 876 (2010) ("Canon law, by contrast, has a much more limited compass. It deals overwhelmingly with matters of church administration rather than personal behavior and moral judgment.").

211. Wolfe, *supra* note 3, at 439.

212. *Id*.

213. ESPOSITO & DELONG-BAS, *supra* note 51, at 45-46.

214. *See* Movsesian, *supra* note 210, at 876-77.

determination of divorce-related issues by a Christian arbitrator is controlled by more general precepts under Matthew 18:15-20, dealing with resolving disputes within the Christian community,[215] and under First Corinthians 6:1-8, promoting settlement of differences.[216] These concepts, although far more general than those applicable upon divorce under Sharia law, remain subject to a gender disparity critique.[217]

In the only case seeking enforcement of a Christian conciliation arbitration award dealing with family law matters, the Pennsylvania Superior Court reviewed the validity and enforceability of a custody award entered by a Christian arbitration group.[218] The mother asked to enforce it, and the father asked to have the award treated as unenforceable. The Superior Court remanded the issue of the enforceability of a child custody determination to the trial court to determine if the award was in the best interests of the child.[219] Thus, this case further illustrates the principle that custody awards remain subject to judicial oversight and approval. It appears that few appellate courts have been called upon to determine the validity and enforceability of arbitration awards entered according to specific passages in the Christian Bible.

3. Islamic Arbitration of Family Law Issues

Religious arbitration in the United States has not been limited to Jewish and Christian tribunals. Research revealed one case dealing with Islamic religious arbitration of family law issues decided by courts in Texas.[220] In 2003, the Court of Appeals of Texas enforced an arbitration agreement providing,

> The Parties agree to arbitrate all existing issues among them in the above mentioned Cause Numbers in the appropriate District Court, which includes the Divorce Case, the child custody of the [sic] Noor Qaddura and Farah Qaddura, the determination of each party's responsibilities and duties according to the Islamic rules of law by Texas Islamic Court.[221]

The agreement was signed on September 25, 2002,[222] well after the filing of the parties' divorce decree on October 19, 1999,[223] and the trial court's grant of partial summary judgment favoring the

215. *Matthew* 18:15-20.
216. 1 *Corinthians* 6:1-8.
217. *See infra* notes 234-36 and accompanying text.
218. Miller v. Miller, 620 A.2d 1161, 1162 (Pa. Super. Ct. 1993).
219. *Id.* at 1166.
220. Jabri v. Qaddura, 108 S.W.3d 404, 406-07 (Tex. App. 2003).
221. *Id.* at 408.
222. *Id.* at 407.
223. *Id.*

husband.[224]

Subsequently, the parties disagreed regarding the scope of the issues to be determined through arbitration.[225] The wife argued that the agreement was to arbitrate all issues related to the divorce, while the husband argued that the issues previously determined by the trial court's grant of summary judgment remained to be determined.[226] The trial court decided that because the parties disagreed regarding the scope of the agreement, it was invalid and unenforceable, presumably due to the lack of evidence of a meeting of the minds.[227]

On appeal, the Texas Court of Appeals reversed on the grounds that the agreement was not ambiguous and clearly reflected the intent of the parties to submit all the marital issues raised by all of the pleadings filed up until that date to arbitration.[228] Thus, all that we can conclude is that Texas courts may uphold arbitration agreements to present family law issues to Islamic religious tribunals.[229] The Texas court did not address the appropriate standard of review to apply in cases seeking enforcement of such an award. Although no civil court in the United States has addressed the enforceability of an Islamic religious tribunal related to divorce rights, this issue is likely to arise in the future as the Islamic population grows and Islamic religious tribunals become more numerous.

Some imams prefer to operate in a parallel system and remain unconcerned with civil enforcement. In fact, the availability of adjudication under civil law may afford to imams the ability to promote a fair and just result by bargaining in the shadow of civil law.[230] Thus, maintaining complete separation between the civil and religious sides of divorce promotes the goals of both civil and religious institutions.

Like Judaism and Christianity, Islam reflects patriarchal rules.[231] Thus, to the extent that applying Jewish or Christian principles to resolve disputes through arbitration results in gender disparity, the same concerns as those raised against Islamic religious

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224. *Id.*

225. *Id.* at 408.

226. *Id.* at 409.

227. *See id.* at 411.

228. *Id.* at 411-12.

229. *See id.* Nevertheless, the arbitration never took place. *See also In re* N.Q., No. 2-09-159-CV, 2010 WL 2813425, at *2 (Tex. App. July 15, 2010) (noting trial court's grant of husband's motion to set aside the arbitration on February 10, 2004).

230. *See* MACFARLANE, *supra* note 75, at 216.

231. *See generally* Lynne Marie Kohm et al., *Christianity, Feminism, and the Paradox of Female Happiness*, 17 TRINITY L. REV. 191, 239-41 (2011) (discussing the successes and failures of religious Christianity regarding gender equality).

tribunals arise and equity demands consistent treatment.[232] Simply calling upon the courts to make a determination regarding gender equality raises entanglement issues and precludes judicial involvement.[233] Thus, the subsequent analysis applies to any RTA regarding rights in the event of a divorce presented to a U.S. civil court for enforcement.

V. POLICY CONCERNS RELATED TO RELIGIOUS TRIBUNAL ARBITRATION AWARDS

As previously mentioned, the "new multiculturalism" debate revolves around the degree to which the state is obligated to accommodate minority practices that conflict with state law.[234] In his recent article, Michael Helfand uses the term "new multiculturalism"[235] to explore the question of whether the civil courts within the United States should recognize and enforce RTAs.[236] He focuses specifically on the enforceability of "arbitration awards issued by religious" tribunals under religious law.[237] According to Helfand, these tribunals afford to religious adherents a "law-like autonomy that has been withheld under public law."[238] The public's substantial interest in promoting gender-neutral divorce rules is strained by the potential that the controlling religious law embodies tenets of male hegemony.

A. Policy Arguments Supporting Judicial Review of RTAs

Instead of forbidding enforcement of RTAs, Helfand suggests a robust application of the "public policy and unconscionability" doctrines.[239] In part, this approach requires the court to determine whether both parties participated in the arbitration process voluntarily to ensure the fairness of the process.[240] In order to ensure that both parties voluntarily and knowingly agreed to arbitration, the court must examine the circumstances surrounding the contract to arbitrate.[241] Determining the question of voluntariness of the agreement to arbitrate requires special attention to the religious and cultural consequences growing out of the decision not to arbitrate

232. Canada resolved this issue by refusing to enforce at civil law faith-based arbitration awards. *See supra* notes 99-117 and accompanying text.

233. *See infra* notes 296-300 and accompanying text.

234. *See* Helfand, *supra* note 3, at 1235-36.

235. Helfand, *supra* note 3, at 1231.

236. *Id.* at 1235-36.

237. *Id.* at 1236.

238. *Id.* at 1237.

239. *Id.* at 1241.

240. *Id.* at 1244 & n.57.

241. *Id.* at 1244 n.57 (providing examples of cases where an agreement to enter a RTA was void due to the circumstances surrounding the agreement).

within the religious tribunal.[242] Such a decision might incur shunning by the other members of the religious community, if not excommunication, known as apostasy.[243] Therefore, it may in fact be impossible to secure truly volitional participation in the process.[244]

With regard to the public policy exception, under some but not all arbitration rules, Helfand observes that courts can vacate arbitration awards that violate substantive public policy.[245] Helfand uses the example of Jewish religious laws that prohibit "certain types of competitive business practices," including the "principle of *Hasagath Gevul*," which "prohibits an individual from opening a second business identical to an existing business in such close proximity that doing so would lead to the financial ruin of the existing business."[246] This protection may undermine existing fair competition laws. Thus, arbitration awards enforcing *Hasagath Gevul* undermine public policy favoring free competition and are arguably unenforceable.[247] Likewise, in RTAs based upon facially discriminatory rules in the divorce rights of men and women, the court will, in every instance, face a public policy dilemma: undermine free exercise principles or undermine gender equality precepts.

In addition to substantive law concerns, Helfand also acknowledges procedural public policy concerns may form a basis to set aside arbitration awards, particularly when the religious "procedural law does not necessarily advance standard conceptions of equity."[248] This inequity arises with respect to gender-biased rules regarding the admissibility of evidence.[249] Specifically, some religious tribunals may bar the testimony of female witnesses.[250] Others may afford lesser weight to it.[251] Thus, existing provisions of the AAA offer

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242. *Id.* at 1286-87. This inquiry alone raises entanglement concerns. *See infra* notes 291-300 and accompanying text.

243. BHALA, *supra* note 34, at 1259-61.

244. Truly voluntary waiver is difficult to determine. *See* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice,* 47 UCLA L. REV. 949, 1019-21 (2000).

245. Helfand, *supra* note 3, at 1254. This basis for vacatur is not expressly included in the FAA or the UAA; however, it has been expressly incorporated as part of some state arbitration statutes and remains a common law defense. *Id.* at 1256-58; *see also supra* notes 157, 183-84 and accompanying text.

246. Helfand, *supra* note 3, at 1259.

247. *Id.* at 1259-60.

248. *Id.* at 1267.

249. *Id.* at 1267-68.

250. *Id.*

251. Kristin J. Miller, Comment, *Human Rights of Women in Iran: The Universalist Approach and the Relativist Response,* 10 EMORY INT'L L. REV. 779, 796 (1996) ("A second example of human rights abuses against women under the Islamic Penal Code is the Code's valuation of a woman's worth as only half that of a man's. For example, a woman's testimony in court is given half the weight of a man's testimony . . . ." (footnote omitted)).

some protection against religious arbitration awards that violate public policy in the United States. However, there is no guarantee that a religious tribunal will adhere to minimum AAA procedural rules. This concern is relevant in relationship to the Islamic rules affording disparate weight to the testimony of men and women.[252]

According to Helfand, a final public policy ground of vacatur arises when the state refuses to enforce religious arbitration awards that undermine special statutory protections afforded to parties impacted by the award.[253] For example, Helfand notes that courts will not enforce custody awards based upon the court's special interest in protecting the best interests of the child.[254] Arguably, the court's special interest in promoting gender equality affords to courts a similar basis to deny enforceability of RTAs related to divorce grounds, support, alimony, and property division.[255]

In addition to public policy, courts might also rely upon unconscionability to set aside an arbitration award. Courts typically require evidence of both procedural and substantive unconscionability before setting aside an arbitration award.[256] Helfand notes that the unconscionability doctrine has been applied more readily by courts in relationship to arbitration awards than in other contract cases.[257]

Helfand concludes that robust use of public policy exceptions and substantive and procedural due process defenses to monitor the fairness of religious arbitration awards is the best way "to protect individual rights while remaining sensitive to the religious and cultural differences that inhabit the public square."[258] While this approach may be successful in many instances, arguably, the gender disparity at the root of Jewish, Christian, and Islamic religious law permeates the foundation of any forthcoming award in relationship to family law matters, compromising the award in every instance.

In reviewing the relative success of the *Beth Din* in arbitrating family disputes within the FAA framework, another scholar, Lee Anne Bambach, suggests that any religious arbitration tribunal follow four guidelines to protect the enforceability of its awards. These guidelines include: (1) the agreement to arbitrate must be voluntary, (2) the tribunal must follow basic written procedures, (3) these ground rules must be followed, and (4) the award may not be

252. *Id.*

253. *See* Helfand, *supra* note 3, at 1293.

254. *See id.* at 1293-94.

255. *See infra* notes 261-64 and accompanying text.

256. Helfand, *supra* note 3, at 1297.

257. *Id.* at 1295.

258. *Id.* at 1305. Helfand notes that not all public policy arguments justify nonenforcement, only those in which the third-party interests outweigh the interest of the first party seeking enforcement. *See id.* at 1258.

irrational or contrary to public policy.[259] Bambach's approach is subject to the same critique: in matters of divorce grounds and economic awards of property, support, and alimony, the gendered religious precepts favoring man render the award contrary to the public policy underlying U.S. marital dissolution law.

B. Policy Concerns Related to Judicial Review of RTAs

One public policy goal underlying U.S. divorce law is to achieve a fair and just economic resolution between the parties following divorce. This policy was achieved through substantial divorce reform over the past two hundred years, reform which was designed to eliminate gender discrimination embodied in our divorce laws.[260] Thus, our existing divorce law is designed to value both economic and noneconomic contributions to the marital estate and divides marital property without regard to title based upon this principle.[261]

The state may not lend enforcement power to purely private agreements that violate fundamental rights. In this instance, the gender imbalance that characterizes the Islamic law related to marriage and divorce violates public policy and renders any award predicated upon these rules inherently flawed and unenforceable in state court. These policy concerns related to gender equality outweigh policy concerns related to multiculturalism and legal pluralism. Therefore, U.S. civil courts should refuse to enforce RTAs related to marriage dissolution.

When parties seek court enforcement of divorce rights based on patriarchal rules, the private party seeking state enforcement stands in the precarious position of relying upon the power of the state to enforce a gender-biased, and thus illegal, award—an award that violates both the laws and the aspirations of this country. This is even more apparent in divorce cases because the state is a third party to the proceeding.[262] When both parties are willing to adhere to

259. Bambach, *supra* note 3, at 399-401, 403.

260. *See* Milton C. Regan, Jr., *Divorce Reform and the Legacy of Gender*, 90 MICH. L. REV. 1453, 1462 (1992) (reviewing MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991)) (discussing changes to property division upon divorce).

261. *Id*. at 1462-63 ("Even when no presumption of equality has been adopted, and even when a statute explicitly includes need as a factor to be considered as part of an equitable distribution, Fineman maintains that the symbolic and practical appeal of equal division is considerable. Symbolically, the widely influential partnership model of marriage naturally leads to the assumption that the fairest way to allocate assets is to divide them equally. As a practical matter, equality offers 'easily grasped contribution factors' that are more accessible to courts than less clear and less well-developed need factors.").

262. *See, e.g*., Vandervort v. Vandervort, 134 P.3d 892, 895 (Okla. Civ. App. 2005) ("'[T]he State is a silent third party in every divorce proceeding.' The State is an interested party because 'the rights of the plaintiff and defendant are not isolated from

a private and gender-biased agreement, there is arguably sufficient freedom of religion to permit them to do so; however, when either seeks state support to achieve this goal, the state must deny relief on the basis of public policy.[263]

In addition to procedural fairness and public policy precepts that are available to the courts when they are called upon to enforce RTAs dealing specifically with matters related to dissolution of marriage and custody, the court is also faced with competing constitutional concerns.

VI. CONSTITUTIONAL CONCERNS ARISE WHEN CIVIL COURTS ENFORCE RELIGIOUS TRIBUNAL AWARDS

These constitutional concerns are interrelated and difficult to isolate. The right to free exercise, including the judicial enforcement of a religious tribunal award, must be balanced against the prohibition of government entanglement in religion under the First Amendment.[264] Likewise, one individual's right to free exercise must be balanced against another individual's right to be free from state-sponsored sexism, thus raising equal protection and state action issues.[265]

The relationship between the church and state is dictated by the First Amendment to the Constitution. The concept of separation between church and state can be traced to the writings of John Locke, described as "one of the most influential Enlightenment

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the general interest of society in preserving the marriage relation as the foundation of the home and the state.'" (alteration in original) (citation omitted) (quoting Williams v. Williams, 543 P.2d 1401, 1403 (Okla. 1975))).

263. Transparent Value, L.L.C. v. Johnson, 941 N.Y.S.2d 96, 97 (App. Div. 2012) ("When a court is asked to vacate an arbitral award on public policy grounds, [t]he focus of inquiry is on the *result*, the award itself. [W]here the final result creates an *explicit* conflict with other laws and their attendant policy concerns, a court will vacate the award." (alterations in original) (citation and internal quotation marks omitted)); Weiner v. Commerce Ins. Co., 78 Mass. App. Ct. 563, 566 (2011) (stating that arbitration may not award relief that "offends public policy" or "requires a result contrary to" statute); Robinson v. Robinson, 778 So.2d 1105, 1117 (La. 2001) ("To choose a state's law that would unfairly benefit one spouse over another, absent some significant connection to that state[,] is not just, and more importantly, against the public policy of [Louisiana]."); Bear Stearns & Co. v. Int'l Capital & Mgmt. Co., 926 N.Y.S.2d 826, 829 (Sup. Ct. 2011) ("In order for a court to vacate an arbitration award, the court must find that the award violates public policy, is totally irrational, or exceeds a specifically enumerated limitation on the arbitrator's power."); Goldberger v. Gansburg, 926 N.Y.S.2d 116, 117 (App. Div. 2011) ("An arbitration award may be vacated, inter alia, on the ground that it is clearly violative of a strong public policy." (internal quotation marks omitted)).

264. *Cf.*, *e.g.*, Ofer Raban, *Conflicts of Rights: When the Federal Constitution Restricts Civil Liberties*, 64 RUTGERS L. REV. 381, 390-92 (2012) (discussing inherent conflict between Free Exercise Clause and Establishment Clause).

265. *Cf. id.* at 386-89.

philosophers."[266] While Locke could not have anticipated the passage of the FAA and state counterparts to relieve the overburdened court system, nor could he have anticipated the rise in the number of divorces or the use of religious tribunals to arbitrate dissolution proceedings, the principles set forth in *A Letter Regarding Religious Toleration* are surprisingly relevant.[267]

In writing about religious toleration, John Locke eloquently described the ideal relationship between church and state as follows:

> I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bound that lie between the one and the other. If this be not done, there can be no end put to the controversies that will be always arising between those that have, or at least pretend to have, on the one side, a concernment for the interest of men's souls, and, on the other side, a care of the commonwealth.[268]

In distinguishing between matters of civil concern and of religious concern, Locke observed:

> Civil interests I call life, liberty, health and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like.
>
> It is the duty of the civil magistrate, by the impartial execution of equal laws, to secure unto all the people in general, and to every one of his subjects in particular, the just possession of these things belonging to this life.[269]

Locke suggests that the most important distinction between civil and religious law is the civil enforcement power of the state, a power unavailable to enforce religious mandates:

> Now that the whole jurisdiction of the magistrate reaches only to these civil concernments, and that all civil power, right, and dominion, is bounded and confined to the only care of promoting these things; and that it neither can nor ought in any manner to be extended to the salvation of souls, these following considerations seem unto me abundantly to demonstrate.[270]

According to Locke, religion deals in the realm of saving souls while the state deals with protecting the people's right to life, liberty, and property in the temporal world. Although dated and subject to a variety of criticisms, including a limited definition of tolerance,[271]

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266. John A. Powell & Stephen Menendian, *Remaking Law: Moving Beyond Enlightenment Jurisprudence,* 54 ST. LOUIS U. L.J. 1035, 1051 (2010).

267. JOHN LOCKE, *A Letter Concerning Toleration*, in THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 125, 128 (J.W. Gough ed., 1956).

268. *Id.*

269. *Id.*

270. *Id.* at 129.

271. For example, Locke's plea for toleration excludes atheists and Catholics. *See,*

Locke's essay, nevertheless, offers a clear demarcation of the role of religion in a secular society as opposed to a theocracy. It attempts to identify and enforce the concept of separation of church and state embodied in the First Amendment.[272]

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[273] This clause secures religious freedom by restricting the government's ability to pass legislation interfering with the individual's right to free exercise or establishing a state religion. Through these restrictions protecting the individual's rights and limiting the state's legislative power, the First Amendment to the Constitution provides the controlling demarcation within which all state statutes must operate to survive constitutional attack.[274]

If religious law is defined to address matters of the soul, and civil law to address matters related to life, liberty, and property, then economic issues related to divorce are rights of civil origin and must be resolved according to the applicable rules of law. Arguably, religious divorce law and civil divorce law are entirely separate and independent, and civil courts and religious courts share entirely separate and independent spheres of jurisdiction. Therefore, religious tribunals should not be approved as state-sanctioned divorce arbitrators in order to preserve the division between church rules and civil law. However, religious tribunals, particularly Islamic religious tribunals, remain vital to afford to adherents access to a

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e.g., Mark Goldie, *Introduction* to JOHN LOCKE, A LETTER CONCERNING RELIGIOUS TOLERATION AND OTHER WRITINGS, at ix, xviii-xix (Mark Goldie ed., 2010) ("Given the powerful nature of Locke's case for religious tolerance, it comes as a shock that, near the close of the Letter, he excludes atheists and Catholics from toleration. There is no gainsaying that he rejects the possibility of tolerating atheists, whom he claims have no motive for keeping rules, since they lack fear of divine punishment. 'Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist.'").

272. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

> The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be "no law *respecting* an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

Id.

273. U.S. CONST. amend. I.

274. *See Lemon*, 403 U.S. at 612.

religious divorce in order to finalize the divorce in the eyes of God.[275]

When confronted by any family law issue involving the intersection of Islamic family law and civil family law, a U.S. court must clearly identify the constitutional limitations imposed upon state actors under the First Amendment and the Fourteenth Amendment. This section summarizes the existing legal understanding of the constitutional right to free exercise and government neutrality and further explores the concept of state action in relationship to gender equality.

A. Free Exercise Concerns

The Free Exercise Clause of the First Amendment has been applied to the states through the Fourteenth Amendment[276] and provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[277] In determining the scope of the constitutional protection surrounding the free exercise of religion, the Supreme Court has held that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[278] The elements of "[n]eutrality and general applicability are interrelated."[279] "[F]ailure to satisfy one requirement is a likely indication that the other has not been satisfied."[280] Moreover, "[a] law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."[281] Absent a compelling state interest,[282] there can be no law prohibiting parties from voluntarily seeking counsel and advice from religious tribunals regarding divorce. However, the Establishment Clause and other policy arguments arguably prohibit civil enforcement of RTAs.

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275. *See* MACFARLANE, *supra* note 75, at 145 ("The use of Islamic divorce as complimentary to rather than as a substitute for legal divorce . . . challenges the widespread public misconception that North American Muslims who seek a religious divorce are choosing it 'over' state divorce . . . .").

276. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

277. U.S. CONST. amend I.

278. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 885 (1990)).

279. *Id.*

280. *Id.*

281. *Id.* at 531-32.

282. Recently, state statutes barring the consideration of foreign law have been proposed and at least one declared unconstitutional as a violation of First Amendment religious freedoms. *See supra* Part III.C.

B. Establishment Concerns

The Constitution also expressly provides that "Congress shall make no law respecting an establishment of religion."[283] In construing the intent of the drafters to properly apply the First Amendment, scholars take a variety of different positions. Some argue the founders intended a strict "wall of separation between Church and State."[284] Others conclude that they intended to create a standard of neutrality:

> The *Everson* Court was correct in concluding that the founding fathers intended the first amendment to require separation between church and state. The more difficult question, however, is whether the framers intended separation to be an end, or instead, merely a means to some other desired goal such as neutrality. The answer is significant because in today's modern society, in which the administrative state touches the lives of its citizens in numerous and diverse ways, separation has become an obstacle to the achievement of neutrality. Consequently, an establishment doctrine premised on the goal of separation is by its nature fundamentally ill-suited to achieve the ultimate goal of neutrality.[285]

Arguably, the neutrality test reflects the balance between free exercise and necessary government regulation captured in the language of the Constitution.[286]

Neutrality is determined first by examining the text of the statute at issue. At a minimum, the law must not be facially discriminatory.[287] A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context. The Supreme Court has observed "three main evils against which the Establishment Clause was intended to afford

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283. U.S. CONST. amend. I.

284. *See, e.g.*, DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 17-21 (2002) (comparing Jefferson's original use of "wall" metaphor to its use in modern political discourse).

285. Christopher S. Nesbit, County of Allegheny v. ACLU*: Justice O'Connor's Endorsement Test*, 68 N.C. L. REV. 590, 610-11 (1990) (footnotes omitted).

286. *See, e.g.,* Bd. of Educ. v. Mergens, 496 U.S. 226, 248 (1990) (O'Connor, J., plurality opinion); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 389 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997); Wallace v. Jaffree, 472 U.S. 38, 60 (1985); Epperson v. Arkansas, 393 U.S. 97, 106-07 (1968); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225 (1963); Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947).

287. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993). For example, in *Lukumi,* the petitioners argued unsuccessfully that statutory references to "sacrifice" and "ritual" are religious in nature. *Id.* at 534; *see also Mergens*, 496 U.S. at 238; *Cantwell*, 310 U.S. at 303-04; *Sch. Dist. of Grand Rapids*, 473 U.S. at 390; *Wallace*, 472 U.S. at 56; *Epperson*, 393 U.S. at 106–07; *Sch. Dist. of Abington*, 374 U.S. at 231; *Everson*, 330 U.S. at 15-16.

protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"[288] The *Lemon* Court adopted a three-prong test that has been reformulated over the years, but never overruled. The Court observed that:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."[289]

The first two prongs of this test, known as the *Lemon* test, are often described as the "purpose and effect prongs."[290] While federal and state arbitration statutes are secular in purpose and neutral in application, when the arbitration panel is composed of religious scholars applying religious law, the third prong of *Lemon* is implicated if the parties seek judicial enforcement of a religious ruling.[291] Thus, a facially neutral arbitration statute may, nevertheless, raise entanglement concerns when religious tribunals apply religious law to resolve matters of civil dispute.

For example, Justice O'Connor described the First Amendment as requiring neutrality rather than strict separation. She observed:

> Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.[292]

Justice O'Connor suggested an "endorsement test," in which the court must first determine whether the government intended to "convey a message of endorsement or disapproval of religion," and then determine whether the government actually conveyed this message;[293] she characterized the endorsement test as a clarification

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288. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

289. *Id.* at 612-13 (citation omitted) (quoting *Waltz*, 397 U.S. at 674).

290. *See* Lynch v. Donnelly, 465 U.S. 668, 690 (1984).

291. *See Lemon*, 403 U.S. at 612-14.

292. *Lynch*, 465 U.S. at 687-88 (O'Connor, J., concurring) (citations omitted).

293. *Id.* at 690-91.

of the *Lemon* test.[294] However, one scholar has suggested that Justice O'Connor gave the endorsement theory a "stronger independent status" in *Wallace v. Jaffree*.[295]

According to her interpretation, the Establishment Clause does not require total separation but merely requires the government to remain neutral towards religious organizations.[296] Government endorsement of one religious organization over another, or *of religion over no religion*, violates the principle of neutrality and is unconstitutional. The crucial question is not whether the government activity in question has achieved the proper degree of separation, but instead, whether it sends a message of endorsement.[297]

According to the Court in *Watson v. Jones*:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.[298]

Arguably, by the simple act of reviewing a RTA in the context of an enforcement action or an action to set aside the RTA, the court violates a law of "morality and property," which infringes "personal rights."[299] Thus, the principle of neutrality is compromised and entanglement occurs whenever a civil court is called upon to review a RTA. If enforced, it is as if the state has endorsed the religious law underlying the RTA, and if set aside, it is as if the state has rejected the underlying religious law. The favorable attitude toward religious arbitration has insulated religious tribunals from constitutional review.[300]

In essence, entanglement concerns arise at the moment the issue

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294. *See id.* at 691.

295. Matthew W. Foster, *The Parsonage Allowance Exclusion: Past, Present, and Future,* 44 VAND. L. REV. 149, 170 (1991) (discussing Wallace v. Jaffree, 472 U.S. 38 (1985)).

296. *See Lynch*, 465 U.S. at 687-88, 690-91 (O'Connor, J., concurring).

297. *See id.*

298. Watson v. Jones, 80 U.S. 679, 728 (1871).

299. *See id.*

300. Matthew F. Steffey, *Redefining the Modern Constraints of the Establishment Clause: Separable Principles of Equality, Subsidy, Endorsement, and Church Autonomy*, 75 MARQ. L. REV. 903, 973-74 (1992) ("The Establishment Clause disables government from resolving religious questions, and thereby leaves a zone where religious organizations retain autonomy. The Establishment Clause renders nearly all decisions as to a church's creed, governance, or discipline nonjusticiable. Similarly, the Establishment Clause can forbid offensive regulatory supervision by administrative officials. At a minimum, government may not enforce regulations when to do so would require administrative resolution of religious issues and mandate extensive, ongoing oversight." (citations omitted)).

of enforcing a RTA is presented to the civil court for determination. The contours of religious freedom exist within a democratic framework, imposing constitutional duties and limitations upon individuals and the state. The judiciary polices this boundary and is prohibited from taking any position regarding religious law and religious rulings.

C. Religious Question Concerns

In addition to entanglement concerns, the religious question doctrine raises concerns regarding institutional competence.[301] In *Watson*, the Supreme Court held:

> Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian churches), has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.[302]

When courts are called upon to enforce arbitration awards based upon religious doctrine, a civil court must examine issues of underlying religious law, including the determination of matters of procedural fairness and public policy, which falls outside of the expertise and competency of a civil court.[303]

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301. *See* Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 132 ("The Court has developed a religion clause analogue to the political question doctrine that disposes of many of these cases."); Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 499 (2005) ("Like the political question doctrine, the prohibition on judicial inquiry into religious questions is understood to be a justiciability doctrine.").

302. *Watson*, 80 U.S. at 729; *see also* Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696, 709 (1976) ("To permit civil courts to probe . . . religious law . . . would violate the First Amendment . . . ." (quoting Md & Va. Eldership v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 369 (1970) (Brennan, J., concurring))); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 447 (1969) ("[C]ivil courts [have] no role in determining ecclesiastical questions . . . .").

303. *But see* Grossman, *supra* note 3, at 208 (arguing in favor of a limited application of the religious question doctrine to permit judicial review of religious arbitration awards).

D. State Action Concerns

The State Action Doctrine, as developed by the United States Supreme Court, is something of a quagmire and seems fact-driven rather than rule-driven.[304] Scholars have attempted to wrestle this body of case law into a coherent and logical outline. State action occurs in three discrete instances: (1) "when the government becomes excessively [involved in] private behavior";[305] (2) when a private actor performs a traditionally public function;[306] and (3) when the state and the private actor have a "symbiotic relationship."[307] Arguably, the most relevant of these three types of state action are the first and the second examples, when the action can fairly be treated as that of the state and when the private actor performs a public function.

Following the successful growth of commercial arbitration, religious groups have sought formal recognition to arbitrate civil disputes in religious tribunals.[308] This transfer of civil family law determinations to religious tribunals raises difficult legal questions that are not at issue in private commercial contractual disputes resolved according to civil law chosen by agreement of the parties. The state is an interested third party to all marriage and dissolution proceedings.[309] It acts in its *parens patriae* role in custody disputes and child support.[310] The religious tribunal assumes the traditionally public function of unwinding the marriage.

This public interest and traditional state involvement manifests itself through the historical evolution of U.S. family law. The transition of state property law from a title regime to either a community property regime or an equitable distribution regime reflects the state's interest in recognizing and valuing the

304. *See* Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967) (describing state action as "a conceptual disaster area").

305. Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. REV. 1, 7 (2005).

306. *Id.* (citing Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621 (1991)).

307. *Id.* (citing Rendell-Baker v. Kohn, 457 U.S. 830, 843 (1982)).

308. *See supra* Part IV.A.

309. *See* Nick Tarasen, *Untangling the Knot: Finding a Forum for Same-Sex Divorces in the State of Celebration*, 78 U. CHI. L. REV. 1585, 1608-10 (2011); Carolyn Counce, *Family Law*—Cary v. Cary*: Antenuptial Agreements Waiving or Limiting Alimony in Tennessee*, 27 U. MEM. L. REV. 1041, 1043 (1997) (citing Posner v. Posner, 233 So. 2d 381, 383 (Fla. 1970)).

310. Aaron E. Zurek, *All the King's Horses and All the King's Men: The American Family After* Troxel*, the Parens Patriae Power of the State, a Mere Eggshell Against the Fundamental Right of Parents to Arbitrate Custody Disputes*, 27 HAMLINE J. PUB. L. & POL'Y 357, 370-404 (2006); McLaughlin, *supra* note 82, at 119-23; Daniel B. Griffith, *The Best Interests Standard: A Comparison of the State's Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients*, 7 ISSUES L. & MED. 283, 283-95 (1991).

noneconomic contributions of both spouses to the acquisition of property during the marriage.[311] Additionally, all states now reject fault grounds as the only basis of divorce, thus ushering in the no-fault divorce approach available in every state.[312] With respect to the duty to pay support and alimony, marital misconduct is irrelevant in some states and remains one of a variety of factors in other states.[313] Most importantly, the state is a third-party to every divorce action, representing the state's *parens patriae* interest in protecting the well-being of those unable to do so without state protection.

Thus, the reintroduction of male hegemony and fault into divorce proceedings through a RTA based upon gender-biased religious law undermines the important state interest to eliminate gender discrimination.[314] So long as entry into the arbitration process satisfies voluntariness requirements and other procedural protections,[315] mutual cooperation to implement the arbitrated award poses no legal threat to state family law precepts and policy. However, if either party deviates from the award and one party seeks judicial recognition and enforcement of the award, then serious state action concerns arise. This part argues that if a civil court enforces a RTA, the court engages in illegal state action due to our constitutional commitment to gender equality.

Except with respect to the Thirteenth Amendment, the Constitution prohibits both the federal government and state

311. *See* Regan, *supra* note 260, at 1462.

312. Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts,* 79 U. CIN. L. REV. 207, 223-34 (2010).

313. Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 296, 312-13 (1997) ("Even among jurisdictions that have adopted 'pure' no-fault, some have retained consideration of fault in property division and alimony. (Of seventeen state courts that considered whether fault should be a factor in property division and alimony, eleven held it permissible and only six rejected it out-right.)" (citing Kristine Cordier Karnezis, Annotation, *Fault as a Consideration in Alimony, Spousal Support, or Property Division Awards Pursuant to No-Fault Divorce,* 86 A.L.R.3d 1116 (1978))).

314. Premarital agreements executed pursuant to the Uniform Premarital Agreement Act ("UPAA") are comparable to RTAs because both results may reject the state default rules controlling dissolution, such as equitable distribution of property, support, and alimony. *See* Amberlynn Curry, Comment, *The Uniform Premarital Agreement Act and Its Variations Throughout the States*, 23 J. AM. ACAD. MATRIMONIAL LAW. 355, 356-57 (2010). While this analogy is reasonable, it is important to note that states do not recognize as controlling any agreements related to child custody or support as matter within the scope of a premarital agreement. *See id.* at 363 (stating that by failing to address child custody issues, the UPAA permits the inference that those issues cannot be the subject of a premarital agreement). Additionally, all states impose procedural protections, and many also incorporate substantive protections to ensure the validity and enforceability of premarital agreements, restrictions lacking in the religious arbitration context. *See generally id.* at 359-83 (providing a state-by-state summary of the adoption of UPAA protections).

315. *See infra* notes 320-37 and accompanying text.

governments and their agents from depriving the individual of rights protected by the Constitution.[316] Any arm of the state, including the judiciary, may engage in state action. For example, the state action doctrine was applied to a private racially restrictive contract in *Shelley v. Kraemer*.[317] In this companion case, the Supreme Court refused to enforce racially restrictive covenants on the basis that to do so would violate the Fourteenth Amendment's Equal Protection Clause.[318] While Congress has failed to pass the Equal Rights Amendment,[319] the basis of state divorce reform is expressly based upon the desire of eliminating gender bias from the divorce process.[320] Thus, enforcing an arbitrated religious agreement decided by an entity that employs sexist laws raises difficult state action questions that have not been addressed by courts enforcing such awards in the past.

In *Shelley*, the Court refused to allow the white neighbors to use the enforcement power of the court—the magisterial power of civil law—to perpetrate racial discrimination;[321] the same principle demands that civil courts refuse to enforce gender-biased RTAs that would be considered unconstitutional if issued by a U.S. court. Although *Shelley* has been limited to its facts by subsequent courts,[322] the deprivation of the civil right of gender equality represented in a private award and presented to the court for enforcement is a close approximation of the *Shelley* facts, substituting gender discrimination in place of racial discrimination. Additionally, state action has been found to be present when a sheriff enforced a foreclosure order arising out of a claim by creditors, filed pursuant to Virginia state law, alleging a belief that appellant might dispose of property in which his creditors had an interest.[323]

Several courts have ruled generally that the mere enforcement of an arbitration award does not constitute state action; however, none have expressly addressed the argument that enforcing a RTA dealing with family law issues and based upon gender-biased religious rules

316. Shelley v. Kraemer, 334 U.S. 1, 14 (1948) ("[T]he action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment . . . ."). *But see* Cole, *supra* note 305, at 10-11 (indicating that *Shelley* has been strictly limited to race-based entanglements).

317. *Shelley*, 334 U.S. at 14-18.

318. *Id.* at 20-21.

319. *See, e.g.*, H.R.J. Res. 47, 112th Cong. (2011) (seeking to remove the ratification deadline imposed by Congress); S.J. Res. 39, 112th Cong. (2012) (same).

320. *See, e.g.*, Orr v. Orr, 440 U.S. 268, 280-81 (1979) (discussing the need to address disparities between men and women).

321. *Shelley*, 334 U.S. at 5-7, 20-22.

322. Cole, *supra* note 305, at 11.

323. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

constitutes unconstitutional state action.[324] This conclusion is reinforced by the state's third-party interest in all divorce actions. Research revealed one case in which a federal court addressed the question of whether the absence of women from the arbitration panel poisoned the award.[325] The petitioner filed an action alleging denial of equal protection based upon the following facts:

> It filed the claim with the American Arbitration Association's Chicago office, which responded by sending the parties a list of 15 arbitrators taken from the Association's roster for "Large and Complex Commercial Cases." The list contained 14 men and one woman. Pursuant to the Association's rules, the parties were asked to strike the names of any of the persons on the list whom they did not want to have on the arbitration panel and to rank the remaining ones. One of the names struck by Argenbright was that of the woman on the list (whom Smith had listed as her first choice), and as a result a panel of three male arbitrators was selected—whereupon Smith brought this suit in federal district court against Argenbright and the Association, complaining primarily that the lack of gender diversity of the list, coupled with Argenbright's action in excluding the only woman on it, was a breach of contract.[326]

Judge Posner rejected the assertion that the federal court's enforcement of an arbitration award, even if tainted by procedural gender bias, constitutes state action; rather, he characterized the court's enforcement powers in relationship to arbitration as enforcing private contracts between individuals.[327] Posner's analysis elevates the individual's right to contract above any other public interest. If applied to RTAs, Posner's conclusion (that judicial enforcement of arbitration awards does not constitute state action) ignores entirely the undeniable presence of state action, embodied in the court order itself, which throws the state's weight behind an award based upon sexist economic and custodial religious rules—rules that revert to the patriarchal conceptions about marriage, divorce, and custody, which this country continues to work diligently to eliminate. The argument is not that the arbitration process constitutes state action, although there are strong arguments to be made that it does.[328] Additionally,

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324. Parks v. "Mr. Ford," 556 F.2d 132, 156 (3d Cir. 1977) (Gibbons, J., concurring); *see also* MedValUSA Health Programs, Inc. v. MemberWorks, Inc., 872 A.2d 423, 434 (Conn. 2005) (citing Smith v. Am. Arbitration Ass'n, Inc., 233 F.3d 502, 507 (7th Cir. 2000)) (declining to extend *Shelley* and ruling that judicial enforcement of an arbitration award is not sufficient to turn the arbitrator into a state actor). Some scholars have reached the same conclusion. Grossman, *supra* note 3, at 200 (asserting there is uniformity in court rulings that arbitration lacks state action).

325. *Smith*, 233 F.3d at 507.

326. *Id.* at 504.

327. *Id.* at 507.

328. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative*

it is not the parties' independent choice to prefer Quranic divorce law to state divorce law but rather the state enforcement of the award, which runs afoul of the constitution. The determination of state action is "the Court's chosen manner of expressing the determination of whether the challenged nongovernmental act,"[329] religious arbitration of divorce issues, "is compatible with the substantive guarantees"[330] of the Bill of Rights and the Fourteenth Amendment.

The *Smith* case can be further distinguished in two determinative ways. First, the gender bias complained of was identified as a procedural injustice, rather than a substantive violation based upon facially discriminatory rules.[331] Second, the complaint pending before the court requested relief from the obligation to arbitrate, rather than relief from an unconstitutional award.[332] Thus, *Smith* is inapposite to the issue explored in this paper.

While dismissing the plaintiff's theory of recovery, Judge Posner recognized that state action can arise in private arbitration contracts when such agreements delegate state governmental powers to the individual. "The fact that the courts enforce these contracts [to arbitrate], just as they enforce other contracts, does not convert the contracts into state or federal action and so bring the equal protection clause into play. This is not *Shelley v. Kraemer* or *Marsh v. Alabama*, cases in which the enforcement of private contracts had the effect of establishing private governments exercising governmental power under delegation from the state."[333]

In religious tribunal arbitrations of family law matters, the Posner test for state action is arguably satisfied. By enforcing the private arbitration award, the court lends the power of the state to enforce the ruling of a parallel "private government" founded upon gender-biased laws—laws that would be deemed invalid and unenforceable under the Constitution. This argument becomes even more compelling because the state encourages parties to seek arbitration of family disputes, thus relieving the docket.[334] The

Dispute Resolution and Public Civic Justice, 47 UCLA L. REV. 949, 959 (2000).

329. 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 16.5 (5th ed. 2012).

330. *Id.*

331. *See Smith*, 233 F.3d at 506 (stating that the plaintiff's objection to the composition of the arbitration panel was a procedural right given up through agreement to arbitrate).

332. *Id.* at 504, 506 (recognizing plaintiff's claim to be for breach of contract and to be premature with respect to one of the defendants because it challenged the arbitration itself rather than the award).

333. *Id.* at 507 (citing Shelley v. Kraemer, 334 U.S. 1 (1948); Marsh v. Alabama, 326 U.S. 501 (1946)).

334. *See, e.g.,* Mason v. Mason, 256 S.W.3d 716, 717 (Tex. App. 2008) ("Texas strongly encourages alternative dispute resolution, particularly in family law

arbitrator takes on a formerly public function, another basis for finding state action.[335] Finally, when parties seek judicial support to enforce financial obligations between the parties, state action is clear.[336] Thus, the state's enforcement of a RTA provides a stamp of approval and brings to bear the civil enforcement authority of the magistrate, thus blurring the line between public and private conduct. Additionally, the tribunal is performing an action traditionally performed by the states, to which the state is a third party whose interests were never considered. Thus, state action clearly exists.[337]

This argument becomes compelling when the procedural and substantive rules that the religious arbitrator is relying upon are facially discriminatory. Thus, the inequity is both procedural and substantive in nature. Thus, without regard to voluntariness and principles of bargaining equality, the simple act of enforcing RTA family awards based upon gender-biased rules clearly constitutes state action and violates the Equal Protection Clause of the Fourteenth Amendment. Courts have historically enforced gender equality and women's rights in various rulings, with divorce jurisprudence leading the way.[338] Thus, the request to enforce a RTA related to family law places civil courts in the untenable position of violating constitutionally mandated precepts of neutrality and gender equality in order to honor freedom of contract precepts.

VII. CONCLUSION: PROPOSED RESPONSE TO ISLAMIC RELIGIOUS TRIBUNALS DECIDING FAMILY LAW MATTERS IN THE UNITED STATES

The foregoing discussion reveals the complexity of RTAs in relationship to divorce issues. The role of religious tribunals in divorce matters demands careful legal analysis and a considered response. From a legal perspective, basic tenets of Islamic dissolution law, as currently interpreted,[339] violate the precepts of gender

matters.").

335. Cole, *supra* note 305, at 47.

336. *Cf. Smith*, 233 F.3d at 506 (challenge to procedure rather than award was premature). *Contra* Cole, *supra* note 305, at 16, 46 (no state action in contractual arbitration).

337. *See* Larry J. Pittman, *Mandatory Arbitration: Due Process and Other Constitutional Concerns*, 39 CAP. U. L. REV. 853, 881-83 (2011) (concluding the enforcement of an arbitration award constitutes state action under *Shelley*).

338. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 555-56 (1996) (maintaining it is an equal protection violation to support an all male military academy); 2 LLOYD T. KELSO, NORTH CAROLINA FAMILY LAW PRACTICE § 18:2 (2012) (explaining the liberalization of divorce law in North Carolina).

339. There are efforts underway advocating an interpretation of Islamic law based upon equality of men and women according to the Quran. *See* BOYD, *supra* note 31, at 98-99; AHMED, *supra* note 5, at 91-92.

equality. Most clearly, the presumption of father custody after the child is beyond tender years, the adherence to a title regime of property, and the fault bar to alimony are all vestiges of gender discrimination that traditionally characterized the U.S. approach to family dissolution for many years until divorce reform began to take shape in the 1830s and culminated in the no-fault approach popularized in the 1970s.[340] Thus, maintaining a clear delineation between civil and religious law in the United States is understandably important to protect the advances toward gender equality that have been achieved in the United States as it works toward achieving a balance of shared power and equality in family relationships.

On the other hand, the values of religious tolerance and inclusion constitute an important foundation of our American society. Legislation targeting Sharia law for discriminatory treatment raises concerns regarding animus and persecution. Thus, legislators and policy makers face a post-modern dilemma: how should a democratic and secular society incorporate members of Islam who embrace a religious law as controlling in matters of personal law, including marriage and divorce?

It seems a minority group right to apply gendered and sexist law to divorce issues must accede to the majority constitutional commitment to gender equality. Supreme Court precedent rejects sexist stereotyping by the state—a third party to all marriage and dissolution claims.[341] The reasons are interrelated and self-reinforcing. Under the First Amendment, the court should not become involved in interpreting and enforcing religious law.

In marital dissolution cases, even in arbitration, procedural fairness review based upon civil law is required, thus providing the first reason that religious arbitration awards relating to family dissolution matters should be treated as invalid and unenforceable. The requisite standard of judicial review is constitutionally barred under both the entanglement precedent and the religious question doctrine. The second reason is related to the first. If a court entertained a public policy challenge, it would be obligated to undertake a substantive review of the underlying religious law and it would find that the gender bias reflected in the dissolution rules would render any award based upon such principles invalid as a matter of public policy. The state action doctrine, likewise, prohibits the court from becoming an agent of state-sanctioned gender bias.

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340. *See* Chused, *supra* note 94, at 1361 (explaining early American divorce laws and nineteenth century reforms); Kay, *supra* note 94, at 4-14 (explaining the development of the no-fault divorce movement).

341. *See, e.g.*, Orr v. Orr, 440 U.S. 268, 280-81 (1979); Craig v. Boren, 429 U.S. 190, 204 (1976); Reed v. Reed, 404 U.S. 71, 76 (1971).

Without regard to religious affiliation, courts do not treat religious arbitration awards dealing with child custody[342] or child support[343] as binding but rather retain best interests jurisdiction. For the reasons discussed above, this approach should be extended to all matters related to marriage dissolution submitted to religious tribunals for determination.

State legislatures should draft and pass legislation providing exclusive jurisdiction over all dissolution and custody matters to civil courts to be resolved according to applicable state and federal family dissolution and substantive and procedural rules. Until such legislation is passed, in order to avoid the constitutional and policy concerns discussed above, courts should deny enforcement of RTAs in all matters related to divorce, including grounds, property division, and alimony and support, recognizing that child support and custody already fall within the exclusive jurisdiction of state courts. Alternative dispute resolution programs reviewed and approved by the court could continue to provide relief to the overflowing docket.

In contrast to the strict division between church and state, some jurists argue that the establishment clause was never intended to "erect[] a 'wall' [of separation] between church and state" but rather to promote neutrality.[344] Some scholars have concluded that neutrality is the most rational approach[345] given the complexity of society and the expansion of government.

Perhaps the tension between feminism and multiculturalism demands an analysis beyond the post-modern framework to accord proper weight to both gender equality and the right of religious minorities to worship freely. The neutrality framework prefers the value of secular rule and separation of church and state over the individual's fundamental right to private religious worship, precisely because this right is best secured by the neutral secular state. Thus, because religious freedom interests conflict with constitutional rules demanding that the state adhere to rules regarding state neutrality and gender equality, the conflict should be resolved in favor of a

342. *See supra* notes 81-87,191, 201-06, 211, 219, 311, 315 and accompanying text.

343. *See supra* notes 82,191, 201-06, 206, 211, 311 and accompanying text.

344. Lynch v. Donnelly**,** 465 U.S. 668, 673 (1984).

345. Christopher S. Nesbit, *County of Allegheny v. ACLU: Justice O'Connor's Endorsement Test*, 68 N.C. L. REV. 590, 608-09 (1990) ("In today's complex and modern world, it is virtually impossible to prevent interaction between government and religion. During post-revolutionary times the level of government activity was minimal; government was therefore less likely to interfere with religion. Additionally, colonial America was a Protestant nation. Today, however, there are dozens of religious denominations, many regularly interacting with their communities. Consequently they are more likely to come into contact with the government. Unlike separation, neutrality does not require, or even encourage, total government noninvolvement. As a practical matter, then, in modern society neutrality provides a sounder foundation upon which to formulate an establishment doctrine.").

broad nonenforcement rule applicable to all RTAs. Such a rule protects the secular state from religious entanglement, furthers the important policy of securing gender equality, and respects the private individual's right of religious freedom. The state, in partnership with the people, must guard against the return of women in the United States to a position of social and economic subservience.