THE ANTI-SHARI’A MOVEMENT AND OKLAHOMA’S SAVE OUR STATE AMENDMENT—UNCONSTITUTIONAL DISCRIMINATION OR HOMELAND SECURITY?

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I. INTRODUCTION .................................. ..... 347
II. THE FIRST AMENDMENT’S ESTABLISHMENT AND FREE EXERCISE CLAUSES ........................... ............ 352
III. THE SUPREMACY CLAUSE ............................. 354
IV. THE FULL FAITH AND CREDIT CLAUSE ................... 358
V. THE CONTRACTS CLAUSE .............................. 359
VI. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT ........................................... 363
VII. PUBLIC POLICY COMMERCIAL CONCERNS ................. 366
VIII. CONCLUSION ......................................... 368

I. INTRODUCTION

Legislation by statute or state constitutional amendment prohibiting the application in state courts of an ill defined “Shariah Law” and/or “international law” has passed or is in the process in over twenty states.¹

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Mr. Michael thanks the NYCBA for permitting the extended use of The Unconstitutionality of Oklahoma Referendum 755 – The “Save Our State Amendment,” Report of its Committee on Foreign and Comparative Law (December 2010), http://www2.nycbar.org/Publications/reports/reportsbycom.php?com=62, of which he was the principal author.

1. See, e.g., Aaron Fellmeth, International Law and Foreign Laws in the U.S. State Legislatures, AM. SOC’Y OF INT’L L. INSIGHTS (Vol. 15, Iss. 13, May 26, 2011) (“Beginning in 2010, legislators in half of the U.S. states proposed—and in two states adopted—a series of bills or state constitutional amendments designed to restrict the use of international law and foreign laws by state (and sometimes federal) courts.”).
The expressed purpose is usually to oppose the infiltration of terrorist Islamic groups bent upon creating a worldwide Caliphate in the United States (U.S.) through the imposition of Islamic law.\(^2\) Is this unconstitutional racism cloaked as national security or a proper response to modern asymmetric warfare?

On one side, there are those, and I admit to being in this camp, who believe this legislative effort is a misguided and uninformed, at best, movement of American domestic politics aimed at imposing an isolationist and harshly unconstitutional reactionary view of the Rule of Law; with the sheep's clothes here being homeland security.\(^3\) There is, after all, a sweeping array of principles of common law, international law, natural law and U.S. Constitutional law, to name the most obvious, which permit, or even require, U.S. courts to consider whether, for example, a will is properly subject to admission to probate if it provides that all distributions should be made in accordance with the distribution rights provided for by the Maliki School of Law as followed in Morocco.\(^4\) Equally importantly, as part of that judicial consideration it would be necessary for any such court to determine that the application of such choice of law would not result in the violation of any legal right of any party before it, or of any applicable Federal or National law or public policy.\(^5\) In other words, that this application of a tenet of law derived from classical Islamic law would be in no way different from the application of any choice of foreign law, whether French, Russian or Botswanan; or Catholic Canonical, Protestant Ecclesiastical, Jewish, or Hindu law—with the possible exception of any law which the United States is bound to apply by treaty.\(^6\) To do otherwise, simply because the underlying source is a religion some of whose practitioners are leading or pursuing a political and/or military opposition to this country—is hard to differentiate legally from the internment of

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4. See, e.g., FLA. STAT. § 734.104 (2011) for a statute that requires admission of a will that is valid in another jurisdiction. (2) A petition to admit a foreign will to record may be filed by any person and shall be accompanied by authenticated copies of the foreign will, the petition for probate, and the order admitting the will to probate... (4) When admitted to record, the foreign will shall be as valid and effectual to pass title to real property and any right, title, or interest therein as if the will had been admitted to probate in this state.)

5. See discussion *infra* of the Due Process Clause.

6. See discussion *infra* of the Supremacy Clause.
Japanese-Americans during World War II because the country of their forebears was at war with us.

The other view is perhaps most cogently expressed in a very thoughtful and well-researched jeremiad from the Center for Security Policy, an organization whose members include at least one former Director of the CIA, and forthrightly entitled “Shariah—The Threat to America.” As stated in a key portion of its opening section:

Those who today support shariah and the establishment of a global Islamic state (caliphate) are perforce supporting objectives that are incompatible with the U.S. Constitution, the civil rights the Constitution guarantees and the representative, accountable government it authorizes. In fact, shariah’s pursuit in the United States is tantamount to sedition. Whether pursued through the violent form of jihad (holy war) or stealthier practices that shariah Islamists often refer to as “dawa” (the “call to Islam”), shariah rejects fundamental premises of American society and values:

a) The bedrock proposition that the governed have a right to make law for themselves;

b) The republican democracy governed by the Constitution;

c) Freedom of conscience; individual liberty (including in matters of personal privacy and sexual preference);

d) Freedom of expression (including the liberty to analyze and criticize shariah);

e) Economic liberty (including private property);

f) Equal treatment under the law (including that of men and women, and of Muslims and non-Muslims);

g) Freedom from cruel and unusual punishments; an unequivocal condemnation of terrorism (i.e., one that is based on a common sense meaning of the term and does not rationalize barbarity as legitimate “resistance”); and

h) An abiding commitment to deflate and resolve political controversies by the ordinary mechanisms of federalism and democracy, not wanton violence.

The subversion campaign known as “civilization jihad” must not be confused with, or tolerated as, a constitutionally protected form of religious practice. Its ambitions transcend what American law recognizes as the sacrosanct realm of private


8. Id.

9. Id. at 6–7
conscience and belief. It seeks to supplant our Constitution with its own totalitarian framework.\textsuperscript{10}

However, if you read the above passage from The Threat closely, you see that this is in a critical way classic advocacy legerdemain, since the introductory major premise of the syllogism is a logical duality: “those who today support shariah and the establishment of a global Islamic state (caliphate) . . .”\textsuperscript{11}

In other words, simply supporting the occasional, and by all accounts extremely infrequent,\textsuperscript{12} use of Islamic law precepts in American court cases by itself is not enough to be culpable of undermining the Constitution. However, the two are conflated into sedition—a theme that then runs throughout the remainder of The Threat.\textsuperscript{13}

The explanation is simple. Whether it is the condemnation of business transactions that are designed to not violate rules based upon Islamic religious beliefs—notably the prohibitions of interest (riba) and unquantified risk and speculation (gharar), as described in the Appendix attached to The Threat\textsuperscript{14}—or the application of any aspect of law that conforms to the system developed in the Islamic world from the early Seventh Century through about the year 1400, as prohibited by Oklahoma’s “Save Our State” Amendment,\textsuperscript{15} it is the unwarranted joining of unequivocally benign financial and legal principles with practices that are equally unequivocally medieval (and much older), and in many ways reprehensible by Western Post-Enlightenment standards, that is the manifest error of The Threat and the many much less well-presented arguments of the proponents of the Anti-Shari’a movement. As the old law school maxim says, your freedom to swing your arms around wildly ends when they approach my nose.\textsuperscript{16} So it is with fundamentalist Islam. The rights and freedoms of believers of any religion, lodge, social club, cult or New Age ersatz philosopher in the United States is as absolute and

\textsuperscript{10} Id. at 7.

\textsuperscript{11} Id.


\textsuperscript{13} THE THREAT, supra note 7, at 8.

\textsuperscript{14} E.g. SHARIAH FINANCE WATCH | EXPOSING THE RISKS OF SHARIAH FINANCE available at http://www.shariahfinancewatch.org/blog/ (last visited Feb. 29, 2012).

\textsuperscript{15} Enrolled H.R.J. 1056, 52d Leg. (Okla. 2010).

unfettered as any other citizen's—as long as not exercised to violate the very same laws that apply to everyone else.

However, this nuance seems to have escaped the draftspersons of the more than twenty proposed statutes and constitutional amendments that seek to prohibit the use of “Shariah Law” throughout the United States.\(^7\) At present, the most important such omission is in the Oklahoma “Save Our State” Amendment to its Constitution, that was approved in a referendum last November by over a 70% vote (would you vote AGAINST Saving Your State?).\(^8\)

Technically, the voters approved a Referendum Question\(^9\) (Question 755) to add the “Save Our State Amendment.”\(^20\) Once certified by the Oklahoma Board of Elections, the Amendment would prohibit Oklahoma courts from considering or using both “international law” and “Sharia Law.” The U.S. District Court for the Western District of Oklahoma, per Vicki Miles-LaGrange, Chief Judge, issued a preliminary injunction barring certification of the referendum, based on its finding of the likelihood of success on the merits of the argument that allowing such certification would necessarily lead to violations of the Establishment and Free Exercise Clauses of the First Amendment of the U.S. Constitution.\(^21\) As of this

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19. State Question No. 755, Enrolled H.R.J. 1056, 52nd Leg. (Okla. 2010): Courts to rely on federal and state laws when deciding cases forbidding courts from looking at international law or Sharia Law. This measure amends the State Constitution. It changes a section that deals with the courts of this state. It would amend Article 7, Section 1. It makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. It forbids courts from considering or using Sharia Law. International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons. The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties. Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed. Available at https://www.sos.ok.gov/gov/questions.aspx (last visited Feb. 19, 2012).

20. Id.

writing, the appeal thereof by the State of Oklahoma is pending before the United States Court of Appeals for the Tenth Circuit. 22

While not addressed in the arguments or the decision with respect to the preliminary injunction proceedings, it also seems clear beyond doubt that the implementation of Question 755 would violate not only the Establishment and Free Exercise Clauses, but also the Supremacy Clause of Article VI, the Full Faith and Credit Clause of Article IV, the Contracts Clause of Article I, and the Due Process Clause of the Fourteenth Amendment. Furthermore, it seems unquestionable that the Save Our State Amendment is discriminatory, counterproductive, and will make conducting business and personal affairs more difficult for not only people who may choose to observe rules or principles based upon Shari’a, 23 but for all who have personal or business relationships with those people, including the more than 1.6 billion Muslims worldwide. 24 As drafted, Question 755 will also needlessly reject the use of the law of other states by Oklahoma courts even in cases with no relation to “Sharia law.” 25 Finally, Question 755’s prohibition against consideration of “international law” will confuse and complicate legal matters in Oklahoma for all those whose personal and business affairs relate to international trade or other private or commercial dealings with entities in other countries. After all, in our globally connected world, many of us have foreign and international involvements we may even be entirely unaware of, including the entity that may indirectly control our own business or hold our mortgage. No state should so disadvantage its entire population, and denigrate a segment of its population that is entitled to the full protection of U.S. and state law.

II. THE FIRST AMENDMENT’S ESTABLISHMENT AND FREE EXERCISE CLAUSES

The District Court’s decision to issue a preliminary injunction was based on a First Amendment challenge to Question 755. The First Amendment of the Federal Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free

22. Subsequently, the Tenth Circuit upheld the preliminary injunction, relying exclusively, as did the lower court, on First Amendment grounds. Awad v. Ziriax, No. 10-6273, 2012 WL 50636 (10th Cir. Jan. 10, 2012).

23. As discussed below, the term “Sharia Law” is either inaccurate or a tautology. The Shari’a or Shariah, the preferred transliterations from Arabic, includes both law (fiqh, in Arabic), jurisprudence (usul al-fiqh), and moral and religious tenets that are generally not part of civil or criminal codes in either the common law or civil law jurisdictions that are not theocracies.


exercise thereof." The District Court found that the plaintiff made a "strong showing of a substantial likelihood of success" in demonstrating that Question 755 violates both the Establishment and Free Exercise Clauses of the First Amendment. The Court held that Question 755's language singles out Sharia Law, "conveying a message of disapproval of the plaintiff's faith." Question 755 would not only bar Oklahoma courts from considering "Sharia Law," but would allow Oklahoma courts to use or consider the law of any other state only if "the other state does not include Sharia Law." The Court correctly noted that "Sharia Law" to a substantial extent "lacks a legal character" and rather comprises religious traditions that "provide guidance to plaintiff and other Muslims regarding the exercise of their faith." The Court therefore found that a prohibition on "Sharia Law" has the effect of inhibiting plaintiff's religion.

The singling out of the law of one religion for prohibition similarly violates the Free Exercise Clause. The plaintiff's will could not be fully probated in Oklahoma if Question 755 were to become law, the Court noted, because the will "incorporates by reference specific elements of Islamic prophetic traditions." The court also said that Muslims would "be unable to bring actions in Oklahoma state courts for violations of the Oklahoma Religious Freedom Act and for violations of their rights under the United States Constitution if those violations are based upon their religion."

Question 755 is clearly designed to inhibit, and would have the effect of inhibiting, members of a particular religion from utilizing or relying on any aspect of the religious law and tradition that underpins their faith if there is a possibility that such an action would eventually be a part of a case.

28. Id. at 1306.
31. U.S. CONST. amend. I.
in the Oklahoma courts.\textsuperscript{35} No other religion would be subject to this stricture,\textsuperscript{36} and I am not aware of any other religion having been (successfully legally) so burdened since the founding of this country. Question 755 clearly tramples on the religious freedom of individuals who have the full right to conduct their lives in Oklahoma free from that interference.

Though the District Court case was brought on First Amendment grounds and focused on the prohibition relating to “Sharia Law,” as noted above, there are other grounds upon which to find Question 755 unconstitutional both with regard to its treatment of Islamic law and international law. These are the issues that were addressed by the \textit{Amicus Curiae Brief in Support of Plaintiff-Appellee Submitted by the Association of the Bar of the City of New York and the Islamic Law Committee of the American Branch of the International Law Association} filed in the 10th Circuit Appeal.\textsuperscript{37}

\section*{III. THE SUPREMACY CLAUSE}

While there is an ongoing dispute in the highest levels of judicial and academic thought as to the proper use of non-U.S. law in U.S. courts, as exemplified in the conflicting opinions in \textit{Roper v. Simmons},\textsuperscript{38} Question 755 is not framed to reflect the bona fide issues of such dispute. The critical distinction it ignores is that between “foreign law” and “international law.” Question 755 expressly prohibits the use or

\begin{itemize}
\item \textsuperscript{35} Enrolled H.R.J. 1056, 52d Leg. (Okla. 2010).
\item \textsuperscript{36} \textit{Id.}
\item \textsuperscript{38} \textit{Roper v. Simmons}, 543 U.S. 551 (2005). In \textit{Roper}, the Court, per Justice Kennedy, over a strong dissent by Justice Scalia, held it was a violation of the Eighth Amendment to execute an offender who was under eighteen years old at the time he committed a capital crime. Justice Kennedy reasoned that the Court had, at least since its decision in \textit{Trop v. Dulles}, 356 U.S. 86 (1958), referred to the law of other countries and international authorities as “instructive” for its interpretation of the Eighth Amendment’s prohibition on cruel and unusual punishment. Justice Kennedy also looked to Article 37 of the United Nations Convention on the Rights of the Child, and the fact that only seven countries in the world, other than the United States, executed juvenile offenders. However, Justice Scalia accused the majority of asserting that American law should conform to the laws of the rest of the world. He pointed out that many fundamental principles of Constitutional law, such as the Exclusionary Rule, have, in fact, been rejected by courts of other countries. He also pointedly accused the majority of the “sophistry” of relying on foreign law when it suits it, but rejecting it in other instances when it does not. \textit{Roper}, 543 U.S. at 627.
\end{itemize}
consideration of “international law” and “Sharia Law.” In addition, the full Amendment language precedes that with a more general prohibition that “[t]he courts shall not look to the legal precepts of other nations or cultures.” Notwithstanding this language, the official pronouncements by the Attorney General and Governor of Oklahoma that explain Question 755 ignore the general statement and focus exclusively on “international law” and “Sharia Law.” The Attorney General’s letter to the Oklahoma Legislature claimed to have corrected the inadequacies of the Enrolled House Joint Resolution and produced the final language used in the official referendum Ballot:

International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons. . . . The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties.

This exposition seems to ignore the explicit reference to “legal precepts of other nations,” which must be understood to be foreign law. Foreign law is simply the law in effect in non-U.S. jurisdictions, including:

a) Foreign legislation;
b) Jurisprudential law of the highest courts of the country concerned, and/or lower courts, if lower court decisions are considered significant or there is an absence of jurisprudential law from the court of last resort of the country concerned;
c) Law as interpreted by the multinational tribunals of which the United States is NOT a party, such as the European Court of Justice; and
d) International conventions to which the United States is NOT a party to the extent those conventions are

40. ATTORNEY GENERAL OF OKLAHOMA, LETTER APPROVING QUESTION 755 (June 24, 2010).
41. Id.
42. Id.
43. GOVERNOR OF OKLAHOMA, EXECUTIVE PROCLAMATION APPROVING QUESTION 755 (Aug. 10, 2010).
incorporated into domestic law of a foreign nation or interpreted or construed by the courts of foreign nations.\textsuperscript{44}

If the Question 755 prohibition only covered the general statement in the Amendment about "legal precepts of other nations" and did not refer to "international law," it could arguably be construed to apply only to foreign law. In that event, its repugnance to the Constitution might be limited to 1) the issue of the ambit of the Contracts Clause to choice of foreign law provisions, as discussed below; and 2) finite Supremacy Clause\textsuperscript{45} issues with respect to those relatively few treaties that require U.S. courts to give effect to foreign law judgments and arbitral awards.\textsuperscript{46} Since there is a wide and longstanding body of law that imposes limits on exactly those foreign law obligations, primarily over due process and other public policy concerns,\textsuperscript{47} by itself it might not be patently unconstitutional. However, neither the proposed Amendment nor, a fortiori, Question 755 permit any such interpretation. As noted above, the official explanatory text unambiguously defines "international law" explicitly as the "law of nations" and expressly identifies "treaties" as a principal source thereof.\textsuperscript{48}

Thus, Question 755 expressly includes treaties within the scope of "international law" that Oklahoma courts are barred from considering or


\textsuperscript{45} U.S. CONST. art. VI, §1, cl. 2.

(t)his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

(emphasis added).


\textsuperscript{47} See, e.g., Small v. U.S., 544 U.S. 385 (2005) (Court refused to consider conviction by Japanese court as within the phrase "convicted in any court" in a Congressional Statute); Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197 (1958) (failure of company to produce records for fear of violating foreign law was insufficient basis for non-production as such a result would undermine the policy behind the Trading with the Enemy Act).

\textsuperscript{48} Enrolled H.R.J. 1056, 52d Leg. (Okla. 2010).
using. However, treaties are expressly made “the supreme Law of the Land” by Article VI, Section 1, Clause 2 of the Federal Constitution.

The United States is party to many treaties that have impact domestically. A strong example of the immediate conflict between a treaty and Oklahoma law, should Question 755 become law, is the United Nations Convention on Contracts for the International Sale of Goods (CISG). CISG, art. 1 differentiates it from all other treaties establishing obligations between or among states:

1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
   a) When the States are Contracting States; or
   b) When the rules of private international law lead to the application of the law of a Contracting State.

Therefore, by its terms, the CISG applies directly to all of the citizens and residents of Oklahoma who enter into contracts for the sale or purchase of goods with a party in another Contracting State—which includes such likely trading partners as Canada, Mexico, and China. In addition, the CISG’s application is mandatory unless the parties expressly opt out of it.

Accordingly, any and all disputes between, for example, an Oklahoma purchaser of goods and a supplier from Mexico, brought in an Oklahoma Court, would be required by the Supremacy Clause to apply the CISG—a quintessential part of “international law.”

Therefore, it is inescapable that Question 755, if it becomes law in Oklahoma, would constitute a violation and direct affront to the Supremacy Clause.

49. GOVERNOR OF OKLAHOMA, EXECUTIVE PROCLAMATION APPROVING QUESTION 755 (Aug. 10, 2010).

50. See generally the U.S. Department of State website listing all the treaties to which the United States is a member, available at http://www.state.gov/s/treaty/ (last visited Feb. 29, 2012).


52. Id. art. I.


54. CISG, supra note 53, art. IV.
IV. THE FULL FAITH AND CREDIT CLAUSE

Article IV, §1 of the U.S. Constitution provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”\(^{55}\) It is unquestionably one of the cornerstones of the U.S. Constitution.\(^{56}\)

The Full Faith and Credit Clause, *inter alia*, requires that “[a] judgment entered in one State *must be respected* in another provided that the first State had jurisdiction over the parties and the subject matter.”\(^{57}\)

Accordingly, Question 755 unconstitutionally limits Oklahoma's duty to give full faith and credit to the judicial decisions of the other states.

Question 755’s direction to “uphold and adhere to . . . the law of another state of the United States” applies *only as long as* “the law of the other state does not include Sharia Law.”\(^{58}\) The Full Faith and Credit Clause does not allow state courts to pick and choose which decisions they will “uphold” and “adhere to.”\(^{59}\) As the Supreme Court held:

Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. . . . [O]ur decisions support no roving “public policy exception” to the full faith and credit due judgments. . . . “[The] Full Faith and Credit Clause ordered submission . . . even to hostile policies reflected in the judgment

\(^{55}\) U.S. CONSt. art. VI, § 1.


\(^{57}\) *Nevada v. Hall*, 440 U.S. 410, 421 (1979); *Case law does differentiate between the credit owed to laws (legislative measures and common law) and to judgments*. As the Supreme Court said in *Baker*, 522 U.S. at 232:

“In numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded.” The Full Faith and Credit Clause does not compel “a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.”

\(^{58}\) Enrolled H.R.J. 1056, 52d Leg. (Okla. 2010).

\(^{59}\) U.S. CONSt. art. VI, § 1.
of another State, because the practical operation of the federal system, which the Constitution designed, demanded it.\textsuperscript{60}

The Tenth Circuit Court of Appeals, which is hearing the appeal of \textit{Awad v. Ziriax}, has been equally clear and firm. In a case with striking similarities to the case under appeal, \textit{Finstuen v. Crutcher},\textsuperscript{61} the Tenth Circuit applied the Full Faith and Credit Clause to hold unconstitutional an Oklahoma statute that prohibited Oklahoma courts from enforcing out-of-state adoption decrees in favor of same sex couples.\textsuperscript{62} The Court noted that the statute at issue in \textit{Finstuen} "is a state statute providing for categorical non-recognition of a class of adoption decrees from other states."\textsuperscript{63} "Categorical non-recognition" is also a perfect description of the offending clause of Question 755.

Question 755's plain text brooks only two possible interpretations, both clearly unconstitutional. The literal reading compels the conclusion that Oklahoma courts may never "uphold" or "adhere" to the law of another state, if that state has ever used "Sharia Law" either in a judicial decision or explicitly or implicitly in legislation (e.g., requiring public schools or prisons to provide for religious dietary rules in their cafeterias).\textsuperscript{64} However, even the more restrictive interpretation of Question 755 would be that Oklahoma courts are not empowered to enforce a judgment duly entered in another state if the decision in question is based in any way on an application or inspection of the rules or requirements of a Muslim's religious beliefs. Even the latter is unquestionably within the purview of the holdings in \textit{Baker} and \textit{Finstuen}.

Question 755 therefore is a patent violation of the mandatory provisions of the Full Faith and Credit Clause of the U.S. Constitution.

\textbf{V. THE CONTRACTS CLAUSE}

Article I, §10 of the U.S. Constitution states: "No State shall... pass any... [l]aw impairing the Obligation of Contracts."\textsuperscript{65} This elevation of the freedom of private parties to contract to a constitutionally protected right obviously includes the right to choose what law governs the

\textsuperscript{60} \textit{Baker}, 522 U.S. at 233.
\textsuperscript{61} \textit{Finstuen v. Crutcher}, 496 F.3d 1139 (10th Cir. 2007).
\textsuperscript{62} \textit{Id}. at 1141.
\textsuperscript{63} \textit{Id}. at 1156.
\textsuperscript{64} Enrolled H.R.J. 1056, 52d Leg. (Okla. 2010).
\textsuperscript{65} US Const. Art. I, §10, Cl. 1.
contract.\textsuperscript{66} This raises two issues under Question 755: 1) whether contracts, which choose to apply “Sharia,” are valid, and 2) the impact on choice of law clauses that choose the law of foreign nations whose law includes international law.\textsuperscript{67}

It is indisputable that a substantial portion of contracts entered into in the United States, and presumably also in Oklahoma, contain choice-of-law clauses that provide that interpretation of the contract will be governed by the law of a particular state, foreign country or international convention.\textsuperscript{68} It is also indisputable that it is customary for contracts to contain choice-of-forum or mandatory arbitration clauses in which parties agree to submit disputes under the contracts to a particular federal, state or foreign forum or to arbitration.\textsuperscript{69}

Furthermore, it is not uncommon in religiously observant communities for its members to wish to have their internal disputes, primarily but not exclusively familial and matrimonial, governed by religious law and adjudicated by a religious tribunal.\textsuperscript{70} While on its face Question 755 does not apply to religious courts, since they are not enumerated in the Oklahoma Constitution as Courts of the State,\textsuperscript{71} it

\begin{itemize}
\item \textsuperscript{66} See, e.g., Educ. Emp. Credit Union v. Mut. Guaranty Corp., 50 F.3d 1432, 1438 (8th Cir. 1995).
\item \textsuperscript{67} Enrolled H.R.J. 1056, 52d Leg. (Okla. 2010).
\item \textsuperscript{68} E.g., Restatement (Second) of Conflict of Laws §187 (1971). In pertinent part:
  The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless . . . application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of §188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
\item \textsuperscript{69} E.g., SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 15:15 (4th ed. 1993).
\item \textsuperscript{70} New York City Bar Brief, supra note 38, at 7.
\item \textsuperscript{71} OKLA. CONST. art. VII, § 1. “Courts in which judicial power vested:”
The judicial power of this State shall be vested in the Senate, sitting as a Court of Impeachment, a Supreme Court, the Court of Criminal Appeals, the Court on the Judiciary, the State Industrial Court, the Court of Bank Review, the Court of Tax Review, and such intermediate appellate courts as may be provided by statute District Courts, and such Boards, Agencies and Commissions created by the Constitution or established by statute as exercise adjudicative authority or render decisions in individual proceedings. Provided that the Court of Criminal Appeals, the State Industrial Court, the Court of Bank Review and the Court of Tax Review and such Boards, Agencies and Commissions as have been established by statute shall continue in effect, subject to the power of the Legislature to change or abolish said Courts, Boards, Agencies, or Commissions Municipal Courts in cities or incorporated towns shall continue in
certainly would appear to apply to any such dispute brought into a state court, or any arbitral award sought to be enforced in such a court. This certainly raises freedom of religion issues, but also Contract Clause concerns.

However, under Question 755 if parties choose the law of any state that might in some fashion “include Sharia Law,” the law of “other nations or cultures” or “international law or Sharia Law,” Oklahoma courts will be forbidden from interpreting or enforcing the contract in the manner to which the parties agreed. Similarly, if parties have agreed to a particular forum that, in its determination of the dispute under the contract, refers to or enforces the prohibited areas of law, Oklahoma courts will have to decline to enforce the adjudications of those forums.

Thus, by singling out certain types of law or forums, Question 755 substantially impairs the constitutionally protected freedom parties would otherwise have to contract as they choose. As the United States Supreme Court has noted, American courts have allowed substantial intrusion on that right only when “the State, in justification, [has] a significant and legitimate public purpose behind the [law] . . . such as the remedying of a broad and general social or economic problem.” In its opposition to the Order, the State has made absolutely no showing to support the proposition that

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72. N.Y. CITY BAR, supra note 72, at 7.
73. Enrolled H.R.J. 1056, 52d Leg. (Okla. 2010).
74. Oklahoma follows the Restatement rule. Courts there normally enforce the parties’ choice of law or forum, unless the results of application of the law are repugnant to Oklahoma’s public policy, a determination that must be made on a case-by-case basis. See, e.g., Oliver v. Omnicare, Inc., 103 P.3d 626, 628 (Okla. Civ. App. Div. 1 2004): The general rule is that a contract will be governed by the laws of the state where the contract was entered into unless otherwise agreed and unless contrary to the law or public policy of the state where enforcement of the contract is sought. Telex Corporation v. Hamilton, 1978 OK 32, 576 P.2d 767; Williams v. Shearson Lehman Brothers, Inc., 1995 OK CIV APP 154, 917 P.2d 998. Because the parties “otherwise agreed” to being governed by Ohio law, the issue becomes whether its application to the Employment Agreement’s non-competition provision would violate the law or public policy of Oklahoma. As to the general treatment of choice of forum clauses in Oklahoma courts, see, e.g., Adams v. Bay, Ltd., 60 P.3d 509, 510 (Okla. Civ. App. Div. 3 2002): A forum selection clause acts as a stipulation wherein the parties ask the court to give effect to their agreement by declining to exercise its jurisdiction. Absent compelling reasons otherwise, forum selection clauses are enforceable. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991). See also The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, (1972) (party resisting the forum selection clause must “clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching”).
Oklahoma is dealing with any "general social or economic problem." In *Energy Reserves*, the Supreme Court found that the Kansas Act at issue qualified, in large part because it was promulgated "in direct response to" the passage by Congress of the Natural Gas Policy Act of 1978. This result was the opposite of that reached in the case it relied on, *Allied Structural Steel Co. v. Spannaus*.

The *Spannaus* decision includes a detailed analysis of the historical precedents and the essential elements of a Contracts Clause violation. Most significantly:

> [A]lthough the absolute language of the Clause must leave room for "the 'essential attributes of sovereign power,' . . . necessarily reserved by the States to safeguard the welfare of their citizens," . . . that power has limits when its exercise effects substantial modifications of private contracts. Despite the customary deference courts give to state laws directed to social and economic problems, "[legislation] adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption."

It is important to note that any valid concerns reflected in Question 755 as to the importation into Oklahoma jurisprudence by private contracting parties of precepts accepted in classical Islamic law, assuming, *arguendo*, that they were still valid in some Islamic societies, are unquestionably clearly and fully protected by existing law. A marriage contract that, for example, allows for polygamy, is no less valid today in Oklahoma than it would be were Question 755 to become law. In other words, any valid, i.e., constitutional, application of Question 755 would be meaningless.

On the other hand, the adverse impact on constitutional rights of Question 755 is evident. For example, a hypothetical Oklahoma company specializing in curing meats may be eager to hire a French marketing company to market its products to high-end specialty retailers throughout Europe. After lengthy negotiations, the parties might well agree that French law will govern their contract but that claims against the Oklahoma company must be brought in Oklahoma state courts. Under Question 755,

76. New York City Bar Brief, *supra* note 38.
79. *Id.* at 244.
80. Brief for the Ass’n, *supra* note 78, at 22.
the Oklahoma courts apparently cannot apply French law since it constitutes both “the legal precepts of [another] nation” and, based on the EU Treaties, “international law,” thus impairing the obligation of a key contractual term.\textsuperscript{81} Further, suppose that the meat curing company is also eager to sell domestically to members of religious communities that have special dietary laws. Under Question 755, an Oklahoma court could not enforce a provision in sales contracts providing that the meat will conform to all Islamic halal and Jewish kosher restrictions, since the restrictions would require an Oklahoma court to not only “look to the legal precepts of other . . . cultures” but also look to “Sharia Law,” once again impairing the contractual obligations of the parties.\textsuperscript{82} Nor could an Oklahoma court adjudicate a dispute between that company and an employee it fired over the employee’s alleged breach of an employment agreement that required him or her to comply with Muslim dietary rules in handling their products.\textsuperscript{83}

It is precisely this kind of unreasonable interference with parties’ contractual expectations that the U.S. Constitution prohibits. It is also the reason that all of the similar proposed laws are nonsensical—if they are severe enough to have an impact that exceeds present Constitutional and other legal protections, they would be UN-constitutional.

\section*{VI. The Due Process Clause of the Fourteenth Amendment}

Question 755 is patently too vague to be the basis of governmental action that qualifies as due process of law.\textsuperscript{84} This is because it would deprive the citizens, residents and any others with personal and property rights subject to enforcement in Oklahoma courts with any ability to have their rights adjudicated in a fair and consistent manner. Due process requires that a statute “provide a person of ordinary intelligence fair notice of what is prohibited.”\textsuperscript{85} However, Question 755 provides no meaningful guidance to judges or the public as to what “Sharia Law” is. Due process mandates that a statute not be “so standardless that it authorizes or encourages seriously discriminatory enforcement.”\textsuperscript{86} As the District Court duly pointed out, this issue is not only a matter of contract and personal property law, as in the probate of a will distributing property, but enters the

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  \item \textsuperscript{81} Hannes Hofmeister, \textit{Goodbye Euro: Legal Aspects of Withdrawal From the Eurozone}, 18 COLUM. J. EUR. L. 111, 122 (2010).
  \item \textsuperscript{82} Enrolled H.R.J. 1056, 52d Leg. (Okla. 2010).
  \item \textsuperscript{83} New York City Bar Brief, Supra note 38.
  \item \textsuperscript{84} U.S. CONST. amend. XIV, § 1. In pertinent part: “nor shall any State deprive any person of life, liberty, or property, without due process of law.”
  \item \textsuperscript{85} United States v. Williams, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008).
  \item \textsuperscript{86} Id.
\end{itemize}
realm of criminal law when such matters as the violation of the Oklahoma Religious Freedom Act arise.\textsuperscript{87}

As discussed in the District Court decision,\textsuperscript{88} there is no judicially cognizable body of law that is Shari’a. Shari’a literally means the “way” or the “path,” and is a process of ascertaining divine will so as to provide guidance to Muslims as to conduct that will comply with the divine will.\textsuperscript{89} Shari’a applies in all aspects of life—whether a commercial transaction, a divorce settlement or one’s relationship with parents and children.\textsuperscript{90} It is the compendium of multiple sources accumulated in various societies and polities over nearly 1400 years, from at least seven different Islamic legal subdivisions.\textsuperscript{91} In practice, it was overlaid with different national laws in each country in which Muslims lived for the majority of the past 600 years.\textsuperscript{92} Accordingly, the law under which even a wholly observant Muslim lives in any country may have some aspect of some version of classical Islamic law, or Shari’a, but with very few exceptions like the Kingdom of Saudi Arabia,\textsuperscript{93} most, if not all, of the law, that governs his or her life will be the law of the geographical polity based on some mix of English common law or French or German civil law.\textsuperscript{94} In that regard, it is comparable to Protestant Ecclesiastical, Catholic Canonical, and Jewish Halakhic law.\textsuperscript{95} However, unlike Jewish and Christian law, there is not now, nor has there ever been, either a single authoritative compilation (no Justinian Code, for example, of Roman law) of Shari’a; nor any judicial or legislative body with jurisdiction over a majority of Muslims—no Supreme Court, Cour de Cassation, Privy Council, Papal Curia, or Sanhedrin; nor any Parliament, Congress, Politburo, College of Cardinals or Synod of Bishops.\textsuperscript{96}

As a legal matter, therefore, there is no such body of law as “Sharia Law,” nor has there been since there has been a United States of America.\textsuperscript{97} In fact, what is properly referred to as Shari’a has not been a true body of

\begin{thebibliography}{99}
\bibitem{87} Awad, 745 Fed. Supp. 2d at 1307.
\bibitem{88} Id. 1306.
\bibitem{90} WAEEL HALLAQ, SHARI’A: THEORY, PRACTICE, TRANSFORMATIONS ? (2009)
\bibitem{91} New York City Bar Brief, supra note 38.
\bibitem{92} Id.
\bibitem{93} N. Calder & M.P. Hooker, supra note 91, at 321–28.
\bibitem{94} Id.
\bibitem{95} Id.
\bibitem{96} Id.
\bibitem{97} New York City Bar Brief, supra note 38.
\end{thebibliography}
law for over six centuries. The official explanatory text of the Referendum Question describes it as: “Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed.” That is analogous to saying that American law is based on the Constitution, the Federalist Papers and the Judiciary Act of 1789—true, but sufficiently incomplete to be of no use in determining how to conduct oneself consistent with law today.

While no U.S. court has addressed this precise issue in any reported opinion, the Court of Appeal in the United Kingdom has ruled on this exact question in *Shamil Bank of Bahrain v. Beximco Pharmaceuticals Ltd.* As that court held:

Finally, so far as the “principles of . . . Sharia” are concerned, it was the evidence of both experts that there are indeed areas of considerable controversy and difficulty arising not only from the need to translate into propositions of modern law texts which centuries ago were set out as religious and moral codes, but [also] because of the existence of a variety of schools of thought with which the court may have to concern itself in any given case before reaching a conclusion upon the principle or rule in dispute. . . . [I]f the Sharia law proviso were sufficient to incorporate the principles of Sharia law into the parties’ agreements, the defendants would have been likely to succeed. However, since I would hold that the proviso is plainly inadequate for that purpose, the validity of the contract and the defendants’ obligations thereunder fall to be decided according to English law.

In the United States, an unpublished opinion in a case involving hundreds of millions of dollars, and two of the leading experts on Islamic finance and law in the West, *Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co., Inc.*, did discuss the difficulties of determining a provision of Saudi law because of the undefined nature of Islamic law. Thus, even without controlling precedent in this country, any governmental prohibition of “Sharia Law” *per se* should be found to be too vague to be of any valid application as a matter of due process.

An additional vagueness concern emanates from Question 755’s provision that Oklahoma courts may use or consider the law of another of

98. *Id.*
100. *Id.* at [55].
the United States "provided the law of the other state does not include Sharia Law." How can an Oklahoma court, faced with a question involving the law of a sister state, determine that another state's law "does not include Sharia Law," barring that state's passage of a constitutional amendment similar to Question 755? As all states' law includes statutes, regulations and judicial decisions and administrative determinations, some aspect of Shari'a—including as it does traditions Muslims are required to use to guide the conduct of their entire lives—may well have become incorporated or suggested in a law, rule, case or administrative action, and often might not have been labeled Shari'a, or Islamic, at all. In other words, the necessary and direct conclusion from the clear and express language of the "Save Our State Amendment" to be added to the Oklahoma State Constitution by Question 755 is that once any American state adopts any law that recognizes a Muslim's rights (separately or as part of the rights of all religious groups) to follow any part of his or her religious obligations under Shari'a, or arguably even issues a divorce decree which incorporates a settlement involving a Shari'a tradition, thenceforth and forever more and for any purpose whatsoever, regardless of whether the Oklahoma case in point has anything to do with "Sharia Law," all of the Oklahoma courts would be precluded from looking to the law of that state. As noted above, this is clearly a violation of the Full Faith and Credit Clause, but it also adds to the violation of the Due Process Clause of the Fourteenth Amendment.

VII. PUBLIC POLICY COMMERCIAL CONCERNS

In addition to these constitutional law issues, we must also consider as a matter of public policy the potentially enormous impact on our international trade caused by a widespread adoption, or the adoption by only a single commercially important state, of laws like the Save Our State Amendment.

As the Supreme Court has warned: "If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements." Question 755 would seriously damage the health of international commerce for parties doing business in Oklahoma and of Oklahomans engaged in international commerce.

102. New York City Bar Brief, supra note 38, at 9.
103. Id.
Question 755's turn-away from consideration of other forums' laws violates the long-recognized principle of international comity and reciprocity. "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."\textsuperscript{105} As the Supreme Court observed more than a century ago: "The general comity, utility, and convenience of nations have . . . established a usage among most civilized states, by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into execution."\textsuperscript{106} This principle is also part of the supreme law of the land.\textsuperscript{107}

Consequently, when Oklahoma (and any other state that passes a similar law) throws comity aside, it risks its residents' international business partners reciprocating by disregarding choice of law and forum agreements that select Oklahoma (or such other state's) law. This stalemate could cause confusion over legal rights, increased multi-forum litigation, and even decreased international trade as actors no longer have the certainty needed to conduct cross-border transactions. Many of our trading partners have a reciprocity requirement for honoring foreign judgments, including countries in the Middle East.\textsuperscript{108} Customarily, these countries, including some of the largest exporters of oil to the United States, accept the choice of U.S. law and U.S. courts in all major contracts.\textsuperscript{109} Since these countries generally incorporate at least some elements of Shari'a in their law,\textsuperscript{110} they could reasonably refuse to accept U.S. law and courts going forward. This would result in a costly breakdown of the existing mechanism for the resolution of cross-border trade disputes.

The courts have encouraged respect for choice-of-law and choice-of-forum clauses as a way to lend certainty to commercial dealings, including among international parties. As the United States Supreme Court has stated, the alternative is chaos and, potentially, the breakdown of international commerce:

A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore,

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  \item[105.] The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972); see also Vimar Seguros y Reaseguros, 515 U.S. at 538.
  \item[106.] Hilton v. Guyot, 159 U.S. 113, 166 (1895).
  \item[108.] See, e.g., MOHAMMED HASSOUNA, EGYPT—THE ENFORCEMENT OF MONEY JUDGMENTS? (Juris Publishing 2008).
  \item[109.] Id.
  \item[110.] Id.
\end{itemize}
an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction . . . . A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate [orderliness and predictability], but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. . . . [T]he dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.\[111\]

The Supreme Court is also our supreme arbiter of public policy. Therefore, it is clear that Question 755 and its copies, clones and counterparts in other states would violate both the United States Constitution and essential public policy.

VIII. CONCLUSION

An analysis of the overwhelming legal flaws of Question 755 and the Anti-Shari'a Movement it represents leads to an inescapable conclusion. At the heart of American patriotism is support for the Rule of Law. Laws like this are so patently unconstitutional, and so worthless if framed to be constitutional, that they simply cannot be justified by any actual, perceived, or illusory concern for homeland security. Unfortunately, that means they are not only unconstitutionally discriminatory, but downright un-American as well.