Center for American Progress

BRENNAN CENTER FOR JUSTICE
at New York University School of Law

AP PHOTO/ERIK SCHELZIG

Foreign Law Bans

Legal Uncertainties and Practical Problems

Faiza Patel, Matthew Duss, and Amos Toh May 2013

Center for American Progress

BRENNAN CENTER FOR JUSTICE
at New York University School of Law

Foreign Law Bans

Legal Uncertainties and Practical Problems

Faiza Patel, Matthew Duss, and Amos Toh May 2013

COVER PHOTO
The Rev. Daniel Rosemergy, a minister with the Greater Nashville Unitarian Universalist Congregation and a board member of the Middle Tennessee Interfaith Alliance, speaks on Tuesday, March 1, 2011, at a press conference in Nashville, Tenn., in opposition to a legislative proposal that would make it a felony in Tennessee to follow some versions of the Islamic code known as Shariah.

Contents

Introduction and summary

Over the past two years, a number of state legislatures have moved to ban the use of foreign or international law in legal disputes. As of the date of this report, lawmakers in 32 states have introduced and debated these types of bills.[1] Foreign law bans have already been enacted in Oklahoma, Kansas, Louisiana, Tennessee, and Arizona, while a related ban on the enforcement of "any religious code" has been enacted in South Dakota.[2] Most recently, intensive campaigning by the Anti-Defamation League and religious freedom groups resulted in the defeat of a proposed foreign law ban in Florida.[3] But at least five states are poised to pass similar measures in 2013 and 2014: Missouri, Texas, Alabama, South Carolina, and Iowa.[4] Table 1 below illustrates the anti-foreign law movement across the country.

Foreign law bans have already been enacted in Oklahoma, Kansas, Louisiana, Tennessee, and Arizona, while a related ban on the enforcement of "any religious code" has been enacted in South Dakota.

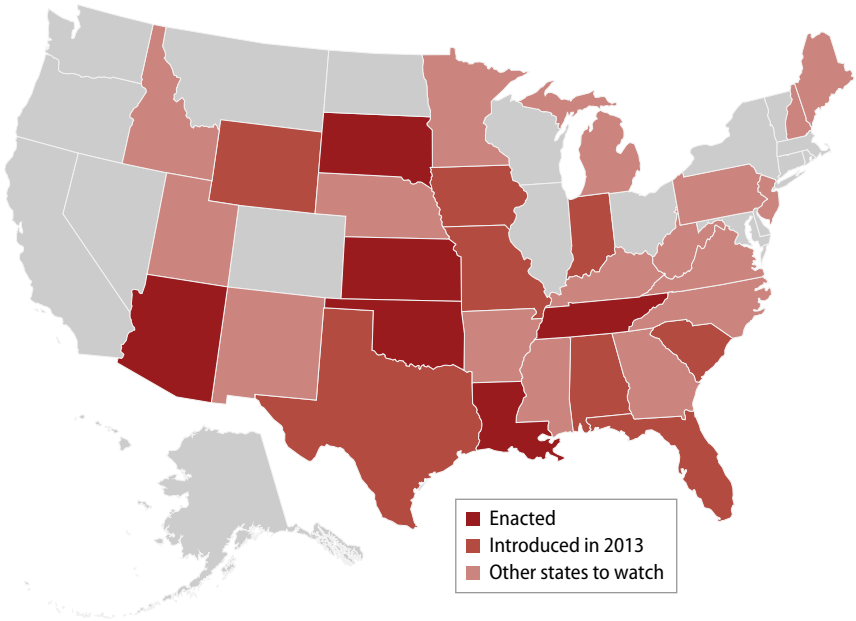
Although packaged as an effort to protect American values and democracy, the bans spring from a movement whose goal is the demonization of the Islamic faith. Beyond that, however, many foreign law bans are so broadly phrased as to cast doubt on the validity of a whole host of personal and business arrangements. Their enactment could result in years of litigation as state courts struggle to construe what these laws actually mean and how they interact with well-established legal doctrines. The legal uncertainties created by foreign law bans are the reason why a range of business and corporate interests as well as representatives of faith communities have mobilized against them. The American Bar Association, the country's largest and most respected association of legal professionals, has also passed a resolution opposing the bans.[5]

The most vociferous proponents of foreign law bans are a small network of activists who cast Muslim norms and culture, which they collectively and inaccurately labeled as Sharia law, as one of the greatest threats to American freedom since the Cold War.[6] Ground zero for this effort was Oklahoma, and the lessons learned there provided a template for anti-Sharia efforts in other states. On Election Day 2010 Oklahoma voters overwhelmingly approved the Save Our State referendum, a ballot initiative that banned the use of Sharia in the state's courts.[7] While the Oklahoma measure was immediately challenged in court, and ultimately struck

down as unconstitutionally discriminatory toward American Muslims,[8] its proponents launched a nationwide movement to recast anti-Sharia measures as bans on foreign and international law. This involved removing specific references to Islam in order to help the measures pass legal muster and successfully tapping into deep-rooted suspicions about the influence of foreign laws over the American legal system. While the intent of foreign law bans is clear,[9] proponents of these bans hope that the foreign law veneer will save the measures from being invalidated on constitutional grounds.

FIGURE 1

Foreign law bans across the United States



Source: Various news media.

Most foreign law bans are crafted so that they seem to track the rules normally followed by courts when considering whether to apply foreign law. State courts consider drawing upon foreign law in situations ranging from contract disputes where the parties have selected the law of another nation as controlling, to cases where the validity of a marriage or custody arrangement concluded in another country are questioned. And state courts routinely apply foreign law *provided* it does not violate U.S. public policy. State courts, for example, will not recognize polygamous marriages, which are permitted in some Muslim countries, and most of them will not recognize marriages between same-sex couples, which are permitted in many European countries. While cases involving foreign law occasionally impinge upon American public policy concerns, most are quite uncontroversial. A typical case involving foreign law—described by U.S. Supreme Court Justice Antonin Scalia in a recent speech—would be one where the Court, for example, was called on to decide whether a corporation organized in the British Virgin Islands was a citizen or subject of a foreign state.[10] The answer to the question depended on English law, and so the Court naturally looked to that body of law, said Justice Scalia.

The very premise of foreign law bans, however, is that law that comes from outside the United States is something to be feared. The bans depart sufficiently from current practice and jeopardize well-established rules regulating the application of foreign law in American courts. Several of the bans suggest that the use of foreign law is prohibited not only when the law at issue in a particular case is at variance with constitutional values, but also when the legal *system* of the country from which the law emerges is itself not in conformity with these values. That is to say laws from countries that do not protect rights in the same way that the United States does should be prohibited in U.S. courts. Kansas, for example, prohibits state courts from relying on foreign laws from any system that does not grant the same measure of rights provided under the U.S. and Kansas constitutions. The anti-foreign law bill that was recently signed into law in Oklahoma,[11] as well as bills under consideration in Missouri[12] and Iowa,[13] are similar in scope. By essentially engaging state courts in wholesale evaluations of foreign legal systems, these bans open up the type of broad inquiry that is inimical to the case-by-case approach typically applied by American courts.

Through a detailed examination of the anti-Sharia movement and a look at how U.S. courts have traditionally approached foreign and religious law, this report shows that the foreign law bans are both anti-Muslim in intent and throw into question the status of a range of contractual arrangements involving foreign and religious law. The report begins by explaining how the anti-Sharia movement

evolved into an anti-foreign law campaign in order to avoid the patently unconstitutional practice of explicitly targeting Muslims.

It next explains the role of foreign and international law in American courts and the difference between the two. The international law to which the United States subscribes—for example, treaties ratified by the Senate—is part of the law of the land by virtue of the Supremacy Clause of the Constitution. Foreign law, on the other hand, is the domestic law of other countries and is used by American courts only where its application does not violate public policy. This section explains that while the use of foreign sources in *constitutional interpretation* is hotly contested, the consideration of foreign law in everyday disputes—such as those involving contracts—is largely uncontroversial and that courts have long used carefully calibrated tools to ensure that application of foreign laws does not violate U.S. policy.

We then turn to the specifics of the foreign law bans and demonstrate that some bans are inconsistent with the practice of U.S. courts and that all bans create uncertainty about how non-U.S. legal sources will be treated. The foreign law bans also raise serious questions under separation of powers principles, as well as the Full Faith and Credit and Contract clauses of the Constitution. The report next details the possible disruptive consequences of foreign law bans, particularly for American families and businesses, and then uncovers the true purpose of foreign law bans. Simply put, it is to target Muslims. Based on this context, we argue that the bans are vulnerable to challenge under the First Amendment and several state constitutions as unduly burdening the free exercise of religion.

The report concludes by recommending that state legislatures considering such bills should reject them, and those that have passed foreign law bans should repeal them. The bans set out to cure an illusory problem but could create a myriad of unintended real ones. These bans, moreover, send a message that a state is unreceptive to foreign businesses and minority groups, particularly Muslims. And, as this report details, these bans sow confusion about a variety of personal and business arrangements. The issues raised by foreign law bans may lead to decades of litigation as state courts examine their consequences and struggle to interpret them in ways that avoid constitutional concerns and discrimination against all minority faiths.

From anti-Sharia measures to foreign law bans

The anti-Sharia movement

The anti-Sharia movement is the brainchild of a small group of anti-Islam activists led by Arizona-based lawyer David Yerushalmi who argue that Sharia is a "totalitarian" ideology that undermines constitutional values.[14] They cite the most draconian interpretations of Sharia to stoke fears that, should Sharia ever infiltrate American courts, women will be forced to wear veils, thieves will have their hands cut off, and women will be stoned to death for adultery.[15]

These claims grossly mischaracterize both the meaning and practice of Sharia. Sharia encompasses the teachings of the Koran, the Sunnah—the behavior and sayings of the Muslim Prophet Mohammed—and the interpretations of Muslim scholars over centuries.[16] The basic tenets of Sharia would be familiar to any Christian or Jew: faith in a single god, prayer, charitable giving, and fasting. But, as explained in a recent report by the Institute for Social Policy and Understanding, Sharia, similar to any other religious tradition, is deeply contested and interpreted and practiced in different ways.[17] While certain versions of Sharia are undoubtedly inimical to American constitutional values, treating these versions as the *only* authentic understanding of Islam—the religion of more than a billion people around the world—both ignores the diversity of interpretations of Islam and casts suspicion on all Muslims.[18]

The anti-Sharia movement also distorts how U.S. courts treat Sharia and other religious codes such as Catholic canon law and Jewish law. Many persons of faith—including Muslims, Jews, and Catholics—arrange their everyday lives according to religious laws and customs. These arrangements include family matters such as marriages, divorces, and adoptions, as well as commercial affairs such as personal- and business-financial transactions.

Disputes arising from such contractual arrangements are routinely settled by U.S. courts as long as they can do so according to neutral principles of law.[19] No

U.S. court, f or example, will enforce an agreement stating that upon divorce, one spouse is to pay the other a sum of money to be calculated according to the principles of the Torah or the Koran. An agreement specifying the payment of $100,000 upon divorce is another matter, however. And even if it reflects a religious obligation, such an agreement will be enforced if it fulfills the requirements that apply to all premarital agreements.[20] Likewise, when individuals choose to take family and property disputes to religious arbitration instead of the courts, they may ask for the courts' help to enforce an arbitration agreement or award.[21] Although U.S. courts take extra care not to be involved with the doctrinal merits of the underlying religious dispute, they largely "treat religious arbitration courts as they treat any other arbitration panel."[22]

Despite this longstanding approach to handling contracts based on religious law, the anti-Sharia movement has strained the bounds of truth in its effort to demonstrate that the religious traditions of Muslims in particular threaten America.[23] In June 2011 the Center for Security Policy—a group founded by anti-Muslim activist Frank Gaffney and where Yerushalmi serves as general counsel—issued a report asserting that, "Shariah law has entered into state court decisions, in conflict with the Constitution and state public policy."[24] The report listed the "Top 20" such cases as proof that "some judges are making decisions deferring to Shariah law even when those decisions conflict with Constitutional protections."[25]

Fortunately, none of this is true.

Reviewing the anti-Sharia movement's purported evidence, including its list of the so-called "Top 20" cases, Matthew Franck, a legal analyst at the conservative *National Review*, concluded:

> *Thirty-five years' worth of American law, and we have a whopping seven cases in which some 'foreign law' was honored (not even Sharia in every case), and not enough information even to tell if something truly unjust happened in any of the seven. In the other thirteen cases, Sharia-law principles were rejected either at trial or on appeal.*[26]

The two cases most frequently cited by the anti-Sharia movement illustrate Franck's conclusions. The first involved a Moroccan couple living in New Jersey. The wife alleged that her husband had repeatedly raped her and sought a restraining order. A state court judge denied her request partly based on the view that under Sharia law there was no concept of sexual assault within a marriage—a doc-

trine that a handful of U.S. states accept as valid still today.[27] The appellate court promptly reversed the ruling, firmly rejecting the defendant's reliance on religious beliefs as a justification for his acts.[28] The second case involved an Iraqi man residing in Arizona who murdered his daughter because she was living with a man who was not her husband. While the media and the prosecutors characterized the case as an "honor killing,"[29] the defendant never raised such a defense.[30] He was found guilty and duly sentenced to nearly 35 years in prison.[31]

Undeterred by the facts and spurred on by the network of anti-Muslim activists, lawmakers across the country have devoted significant public time and resources to addressing this nonexistent threat. One of the first instances was in Oklahoma where on November 2, 2010, 70 percent of voters approved the Save Our State referendum amending the state constitution by requiring that Oklahoma 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.*[32]

The amendment was challenged under the Establishment Clause of the First Amendment to the Constitution, which forbids the government from discriminating against any religion.[33] On November 29, 2010, a federal district court enjoined the amendment, finding that the plaintiff had made a strong showing of likelihood of success on the merits of his claim that the amendment unconstitutionally discriminates against Islam.[34] The federal court of appeals reaffirmed this conclusion in its decision to strike down Oklahoma's anti-Sharia measure as unconstitutional. In doing so, the court noted that the parties defending the ban "did not know of even a single instance where an Oklahoma court had applied Sharia law or used the legal precepts of other nations or cultures, let alone that such applications or uses had resulted in concrete problems in Oklahoma."[35]

Foreign law bans

The Oklahoma constitutional amendment is the most frank and unadorned statement of the intent of anti-Sharia measures. In a bid to avoid the constitutional problems that Oklahoma faced, state constitutional amendments and legislative bills motivated by the same agenda have taken a different course. Instead of referring explicitly to Islam or Sharia, these initiatives now prohibit state courts from enforcing foreign law where it conflicts with federal and state constitutional rights.

This shift from specific anti-Sharia measures to foreign law bans is also strategic. In a 2011 interview with *The New York Times*, David Yerushalmi revealed that the new measures were designed to appeal to "a broader constituency that had long opposed the influence of foreign laws in the United States."[36] While U.S. courts have used foreign and international law for centuries, in recent years the use of these sources in constitutional interpretation has become the subject of controversy.[37] In particular, references to foreign and international sources in court decisions involving socially divisive issues such as the death penalty, affirmative action, and gay rights have raised concerns about foreign influence,[38] including a failed attempt to make it a criminal offense for federal judges to rely on foreign and international law in interpreting the U.S. Constitution.[39]

In reality, courts use international and foreign law without much fanfare in ordinary cases, such as when a dispute involves a right under a treaty or when the parties choose the law of another country to govern a business dispute. When it comes to interpreting the Constitution or U.S. law, however, courts have steadfastly refused to treat these sources as precedent, referring to them only to gain insight about a common legal problem.[40]

The latest slew of foreign law bans ignores this centuries-long practice of judicial restraint, reviving unwarranted fears that foreign and international law is threatening to infiltrate the U.S. legal system.

Foreign law bans are considered innocuous by some because they seem similar to a rule already followed by U.S. courts. But their unambiguous hostility to the law of other countries and their ambiguous phrasing threaten to disrupt routine uses of foreign and international law in state courts and arbitrations. This raises a host of questions about their scope and applicability that will have to be adjudicated by state courts, potentially creating manifold problems for American businesses and families.

International and foreign law in American courts

While the terms "international law" and "foreign law" are sometimes used interchangeably, they refer to very different bodies of law, which have different standing in our legal system. Under the Supremacy Clause of the U.S. Constitution, international law that is accepted by the United States becomes part of American law. Foreign law, in contrast, is never considered to be part of U.S. law and may only be used if it does not violate public policy. A short description of the two types of law will help to clarify the issue.

International law traditionally consists of "rules and principles governing the relations and dealings of nations with each other."[41] A main source of international law is treaties, which are agreements that the president negotiates with foreign governments. Under the Constitution a treaty becomes part of the "supreme law of the Land" when it is approved by a two-thirds majority of the Senate and ratified by the president.[42] Some treaties are considered automatically binding on U.S. courts,[43] while others must be implemented into law by Congress.[44] Often, but not always, the latter type of treaty is incorporated into domestic law through federal legislation.[45]

Treaties have long governed U.S. relations with the rest of the world in areas as diverse as commerce, shipping, and the protection of diplomats. In fact, one of the first U.S. treaties was responsible for *establishing* American sovereignty: The Treaty of Paris, ratified by Congress in 1784,[46] officially ended the American Revolutionary War and delineated the boundaries of U.S. territories.

The Supreme Court has also recognized another category of international agreements as having the same binding force as treaties: executive agreements.[47] These are agreements that the executive branch enters into without the advice and consent of the Senate. A famous example is the agreement that former President Franklin D. Roosevelt signed with the British at the beginning of World War II, which exchanged 50 U.S. warships for control over certain British naval and air bases in the Atlantic. The Congressional Research Service estimates that between 1939 and 2012 the United States has "concluded roughly 17,300 published executive agreements."[48]

In fact, one of the first U.S. treaties was responsible for *establishing* American sovereignty: The Treaty of Paris, ratified by Congress in 1784,[46] officially ended the American Revolutionary War and delineated the boundaries of U.S. territories.

A modern example of a treaty that is commonly interpreted and enforced by the courts is the Hague Convention on the Civil Aspects of International Child Abduction. The Convention seeks to secure the prompt return of children who have been kidnapped and taken abroad. Congress enacted the International Child Abduction Remedies Act, or ICARA, in 1988 to implement the nation's obligations under the Convention. Although the Convention is now the "law of the land," it is also an agreement between 88 countries that reflects their shared understanding of the rights and duties they owe under international law when it comes to matters of child custody.

Finally, it is well settled that American law includes customary international law—the portion of international law that is developed through what countries do and say that suggests there is a binding international rule on a particular issue. While this may sound somewhat vague, customary law is a relatively limited set of rules that must be sufficiently well defined and widely accepted to be enforced in American courts.[49] Many of the rules covered by customary international law, such as the recognition that piracy is an international crime and the protection of diplomats, date back centuries.

Similar to any other federal law, international law may be challenged for violating rights protected under the U.S. Constitution.[50] International law, on the other hand, is generally considered superior to state law in the event of a conflict. In other words, state courts cannot refuse to apply international law simply because it violates individual rights granted by a *state* constitution.[51]

Foreign law, on the other hand, is not part of U.S. law. The term is most commonly understood to refer to the laws of a foreign country.[52] Foreign law is honored in both federal and state courts as long as it does not conflict with public policy. This approach is driven by practical considerations: The United States gives due regard to the laws and judgments of other countries[53] in order to maintain healthy international relations and "peace between nations."[54] Our courts do not sit in judgment of the laws and values of other countries because we do not want foreign nations to pass judgment on our own. [55]

That does not mean, however, that U.S. courts will enforce *all* foreign laws. They will not enforce foreign laws that conflict with public policy of which the U.S. Constitution—and in the case of state courts, the constitution of the relevant state—is surely a part. The distinction here is in the details. In considering whether to enforce a foreign law, courts will ensure that it meets fundamental constitutional requirements. But U.S. courts have never expected foreign laws to conform to every detail or particularity of American constitutional law.[56] Litigants cannot, for example, challenge the validity of a foreign judgment simply because there was no jury trial—a right protected under the Seventh Amendment but absent in nearly every other country[57]—or if witnesses were examined by a magistrate rather than cross-examined by opposing counsel—a widely accepted practice in continental Europe,

but one considered incompatible with American due process.[58] On the other hand, courts have consistently rejected judgments arising from proceedings that are fundamentally unfair or patently incompetent or corrupt.[59]

Under this rubric, foreign law is routinely used in U.S. courts. American businesses frequently enter into investments and transactions that are organized according to foreign laws or that designate foreign law as the law that governs any dispute arising out of a contract. If a dispute arises under these types of contracts, an American court may be called upon to construe foreign law in order to decide the case. The use of foreign law is also common in family matters. Courts are often called upon to recognize foreign marriages, divorce decrees, premarital agreements, custody arrangements, and adoptions. Both corporate and family arrangements are generally respected so long as they do not violate U.S. public policy.

As noted by Professor Aaron Fellmeth of Arizona State University, the foreign law bans currently in vogue in state capitals tap into an ongoing debate in "Congress, academia, and civil society, and between the justices [of the Supreme Court] themselves" about "the occasional citations to international law and foreign laws" by the Supreme Court.[60] This debate has centered on the use of international and foreign law in interpreting the provisions of the U.S. Constitution, not on the routine use of these bodies of law where a court is called on to adjudicate a run-of-the-mill contract dispute. Citation to the almost universal rejection of the death penalty in Europe in interpreting the contours of the Eighth Amendment's prohibition on cruel and unusual punishment has raised objections, for example.[61]

But even those who criticize the use of foreign law in constitutional interpretation acknowledge that its use is absolutely appropriate in a wide variety of circumstances. Supreme Court Justice Antonin Scalia—who is known for his very public criticism of citations to foreign law in interpreting the U.S. Constitution[62]—explained in a 2004 address to the American Society of International Law some of the appropriate uses of foreign law:

- **To interpret a treaty to which the United States is a party:** Justice Scalia explained that the "whole object" of a treaty was to "establish a single, agreed-upon regime governing the action of all the signatories." In these circumstances U.S. courts "should give considerable respect to the interpretation of the same treaty by the courts of other signatories."[63]

- **Where a federal statute directly or indirectly refers to a foreign law:**[64] The point made by Justice Scalia is amplified by an example that Heritage Foundation fellow Andrew Grossman highlighted during a recent congressional hearing:[65] a prosecution for a violation of the Lacey Act, which criminalizes the "importation, possession or transfer of any wildlife in violation of … any foreign law,"[66] would naturally require a court to ascertain whether another country's law actually prohibited the act in question.[67]

- **Empirical evidence of how a particular rule functions in practice:** Foreign experience in implementing a rule may provide American courts with useful information about the possible consequences of a particular interpretation. The Supreme Court, for example, established the famous Miranda warning after finding that similar warnings in other countries had "no marked detrimental effect on criminal law enforcement."[68]

State court judges have also found that their dockets are increasingly filled with cases that involve cross-border transactions.

In addition, for more than a century, U.S. courts have applied foreign law for a wide variety of purposes other than constitutional interpretation in areas as diverse as family law, contract law, and employment law. A few examples suffice to demonstrate such routine and uncontroversial uses of foreign law:

- State courts are regularly called upon to determine the validity of a marriage entered into abroad and will typically do so in accordance with the law of the country where the marriage took place.[69]

- In transnational business transactions a contract may specify the laws of other nations as governing.[70]

- Courts may rely on foreign law in settling disputes relating to employment with a foreign company that are governed by the laws of that company's home country.[71]

The number of cases that require U.S. courts to consider foreign law has risen in recent years due to the expansion of global trade and commerce. This development is not limited to the federal courts. State court judges have also found that their dockets are increasingly filled with cases that involve cross-border transactions.[72]

In these types of cases, U.S. courts have always subjected foreign law to an additional test that does not apply to international law: whether the foreign law violates public policy. Courts apply this test rigorously so as not to jeopardize comity between the United States and other nations. A court will usually apply a

foreign law even if it is inconsistent with local law,[73] unless it, for example, sanctions criminal conduct[74] or the termination of a contract without just cause.[75] But courts also consistently refuse to recognize foreign laws or judgments that violate our basic notions of justice, fairness, and morality.

In sum, international legal norms that the United States has acknowledged are binding on it are part of the law of the land and are often codified in federal legislation. With regard to foreign law, courts have developed a carefully calibrated system that ensures respect for such law and at the same time prevents enforcement of laws contrary to our nation's public policy. While the use of international and foreign law in constitutional interpretation has been the subject of debate, this flexible approach has allowed courts to use international and foreign law in everyday disputes where appropriate.

New wave of foreign law bans: Legal uncertainties

The foreign law bans that have been adopted or are under consideration generally attempt to mimic the rule that is currently followed by American courts, which has led some commentators, and presumably lawmakers as well, to conclude that these bans are innocuous. While the bans vary somewhat in their precise formulations, they generally do two things: prohibit courts, government agencies, and arbitral tribunals from applying or enforcing foreign law if doing so would violate state or federal constitutional rights;[76] and specify that contractual provisions stipulating that foreign law is governing will not be respected if doing so would result in the violation of rights guaranteed by the state or U.S. constitutions.[77] The latter rule also applies when parties to a contract choose a foreign venue for resolving disputes, and such a choice would result in the violation of rights guaranteed by the state or U.S. constitutions.[78]

A closer examination of the bans, however, shows that several of them are broader in scope than the current rule and are therefore both constitutionally suspect and likely to create uncertainty and litigation about the application of foreign law.

Wholesale evaluation of fairness of foreign systems, not relevant foreign law

Several foreign law bans require state courts and tribunals to evaluate the general fairness of foreign legal systems, extending far beyond the current rules under which a court will consider whether the particular law at issue violates U.S. public policy.

The model legislation drafted by anti-Sharia activists would prohibit courts from looking at foreign law in two situations: when applying foreign law would clash with constitutional rights; and when the national *system* from which a foreign law emanates does not protect rights in the same way as the U.S. Constitution. The core provision of the model legislation states:

> *Any court, arbitration, tribunal, or administrative agency ruling or decision shall violate the public policy of this State and be void and unenforceable if the court, arbitration, tribunal, or administrative agency bases its rulings or decisions in the matter at issue in whole or in part on any 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 U.S. and [State] Constitutions.*[79]

In other words, a court decision is invalid if it is based in whole or in part on a legal system that would not grant the parties the same fundamental rights as the U.S. Constitution and the relevant state constitution.

This is a far cry from examining whether applying a particular foreign law would violate a particular constitutional provision. Instead, the model provision being pushed by proponents of these bans would require state court judges to conduct a wholesale evaluation of foreign systems that are unfamiliar—based on precepts different from the Anglo-American common law system—and where relevant materials may often be in a different language.

The model provision being pushed by proponents of these bans would require state court judges to conduct a wholesale evaluation of foreign systems that are unfamiliar—based on precepts different from the Anglo-American common law system—and where relevant materials may often be in a different language.

The foreign law ban adopted by Kansas mimics the model language, replicating the uncertainties described above:

> *Any court, arbitration, tribunal or administrative agency ruling or decision shall violate the public policy of this state and be void and unenforceable if the court, arbitration, tribunal or administrative agency 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.*

If a Kansas court were to find that it could only honor the laws of countries that respect the same constitutional rights as the United States, this could drastically curtail trade with foreign nations such as China, America's second-largest trading partner.[80] The impact on the use of religious law of all stripes would be equally sweeping. As journalist Matthew Schmitz pointed out in *National Review*:

> *Sharia, of course, does not grant all the rights that the U.S. Constitution does; neither does Christian canon law or Jewish Halakhic law (or English or French law, for that matter). But why should this fact prevent a court from honoring a contract*

made under the provisions of one of these "foreign" legal systems if the contract does not itself violate any U.S. or state regulations, laws, or constitutional provisions? Under one reading of the Kansas law, a contract that makes reference to canon law or sharia — but is otherwise perfectly legal — would be thrown out, while an identical one that makes no such reference would be upheld.[81]

One might posit that there is sufficient ambiguity in the Kansas ban that a court applying it would focus on whether constitutional rights would be violated in the particular case before it. But a recent decision concerning the enforceability of a Muslim marriage contract shows that this ambiguity may be cold comfort. In *Soleimani v. Soleimani* a Kansas district court indicated that under the state's foreign law ban, it may not recognize any premarital agreement that *originates* from a "legal system which is obnoxious to equal rights based on gender."[82] Although the case was ultimately decided on other grounds, the court's reasoning suggested that the foreign law ban superseded the traditional case-by-case consideration of the validity of a premarital agreement and instead required the court to evaluate the fairness of the legal system from which the premarital contract emanated.

It is also unclear what it means for a court to *base* its decisions on an offending foreign law. Take, for example, a court trying to decide when a right to prevent a child from leaving the country is considered a "right to custody."[83] If the court cites foreign decisions to show that its interpretation of the right to custody is widely shared by other countries, would that be a violation of the ban? Or does the ban merely prevent the court from treating these decisions as binding? What if the court refers to foreign experiences to show that too broad an interpretation of the right to custody would have negative consequences?[84]

The foreign law bans enacted in Louisiana[85] and Tennessee[86] and introduced in South Carolina[87] and Indiana[88] are narrower in scope. First, they state that courts cannot *enforce* the offending foreign "law, legal code or system,"[89] suggesting that simply referencing such laws may be permissible. Second, they seem to say that a court cannot enforce foreign law if doing so would violate a federal or state constitutional right in the *particular* case under consideration.[90] Nonetheless, the reference to foreign "system"—as opposed to foreign law—creates the possibility that courts may refuse to apply the law of foreign countries that do not embrace distinctly American notions of fundamental freedoms. This introduces an element of uncertainty that is detrimental to the stability and predictability of the U.S. legal system.

Multiple variations of the foreign law ban have been introduced across the country,[91] creating the possibility of chaos in the settlement of transnational disputes. Notably, the most recent wave of anti-foreign law measures that have been introduced in Oklahoma, Missouri, and Iowa follow the broader Kansas-Yerushalmi model rather than the more restrained versions of the ban.[92] This increases the risk that courts in several states may be required to conduct a wholesale evaluation of the fairness of foreign systems of law rather than just looking at the case or controversy with which they are faced.

TABLE 1

Types of foreign law bans

State	States with similar bills	What does the law do?	What is the scope of the law?
Kansas; Oklahoma	Missouri,* Iowa,* Pennsylvania, Georgia, Nebraska, Arkansas, Minnesota, Mississippi	BANS reliance on foreign law unless the foreign system grants parties the equivalent of federal or state constitutional rights	Widest: bans mere reliance on—as opposed to enforcement of—foreign law; can only rely on a foreign law if the system from which it originates grants the same protections as federal and state constitutions
Arizona	Alabama,* New Hampshire	BANS enforcement of foreign law unless consistent with federal or state law	Very wide: application of foreign law rejected not only on constitutional grounds but as long as it conflicts with American law
Louisiana	Indiana,* South Carolina,* Florida,* Michigan, North Carolina, Alaska, Kentucky, Mississippi, New Jersey, Utah, Virginia	BANS enforcement of foreign law unless consistent with federal or state constitutional rights	Wide: most common formulation of the ban
Tennessee	West Virginia, Maine	MUST CONSIDER as a primary factor whether foreign law violates constitutional rights	Unclear: primary factor approach seems to leave courts with some room, but it is unclear how such discretion will be exercised

* Introduced or reintroduced in 2013.

Not all states that have introduced anti-foreign law bills are featured in table. Why?

A small number of the bills introduced across the country are different from the four models illustrated in our table. Bills introduced in Florida, for example, confusingly adopt the language used in both the Kansas and Louisiana bans, creating considerable uncertainty about how they will be interpreted and applied. Another notable outlier is Texas, where one of the two bills introduced prohibits the use of foreign law that does not "guarantee" state or federal constitutional rights in cases concerning a "marriage relationship" or a "parent-child relationship." It also bears mention that South Dakota has enacted a related law banning the enforcement of "religious codes." The Appendix provides a detailed breakdown of the features and status of the bills introduced so far.

Why do the differences in the wording of the bans matter?

These differences affect how courts will interpret and apply the bans, which in turn impacts how cases involving foreign parties and arrangements are resolved. Take, for example, a Jewish couple that seeks recognition of their marriage, which was officiated by a rabbi in Israel. If they live in Louisiana, the state's foreign law ban may not affect the validity of their marriage contract since the contract in question does not violate the constitutional rights of either spouse. They may, however, run into problems if they move to Kansas. A court there may find that the religious system on which their contract is based does not afford women the same protections granted by the U.S. and Kansas constitutions.

Disrupting the enforcement of international law

As previously explained, international law is part of the supreme law of the land and must be enforced by both federal and state courts, while courts only apply foreign law if it is consistent with public policy. Three of the four bans that have been passed thus far, however, seem to include international law within the rubric of foreign law and may be read to require courts to conduct an exhaustive constitutional review of every international rule that they are called upon to enforce. Kansas, Louisiana, and Tennessee define foreign law—which their courts are prohibited from applying—as "any law, legal code or system of a jurisdiction outside … the United States."[93] As Fellmeth has observed,[94] it is unclear whether international law, as opposed to foreign law, would be covered by this definition. It is equally unclear whether U.S. laws that rely on international law—such as the hundreds of laws implementing treaties—would be included in the definition.[95]

Some of the bans go even further by prohibiting courts from applying the laws, codes, and systems of "*international organizations and tribunals*."[96] The United States has signed on to treaties that establish such organizations and tribunals and has committed to abiding by their rules. The World Trade Organization, for example, was set up under the Marrakesh Agreement, which Congress approved and

implemented in 1994.[97] As a member of the World Trade Organization, or WTO, the United States is bound by its judgments when it comes to trade disputes with other nations. While private trade disputes are not litigated before the WTO, the principles articulated in these cases are commonly cited by U.S. courts in resolving cases. But under the foreign law bans, it appears that these principles may not be relied on without a constitutional analysis because they constitute foreign law.[98]

Perhaps to avoid such an outcome, Arizona and Oklahoma explicitly exclude U.S. treaties from their definition of foreign law.[99] While the treaty exemption is a useful innovation, these measures would nevertheless prohibit the consideration of other sources of international law, which are also part of the nation's supreme law and binding in all states. As noted by the Congressional Research Service, the "great majority of international agreements that the United States enters into are not treaties but executive agreements," which are not expressly exempt from any ban.[100] The bans may also interfere with the ability of courts to interpret customary international law and general principles of international law, which are based on the practices of other countries. In the past, U.S. courts have relied on these types of international law to resolve a wide range of issues such as the nature of liability for piracy offenses,[101] the scope of the right of extradition,[102] and the rules of corporate-civil liability that govern international disputes.[103]

There will also be considerable uncertainty about whether state courts acting under the bans will be able to enforce international law norms that draw upon foreign law. As Justice Scalia explained,[104] when courts are called upon to interpret an ambiguous treaty provision, they give "considerable weight" to the judgments and practices of other signatories for an interpretation that gives effect to the "original shared understanding of [all] contracting parties."[105] To underscore this point, consider the fact that foreign law is a routine part of child custody disputes regulated by the Hague Convention on the Civil Aspects of International Child Abduction,[106] and that personal injury claims against aircraft carriers fall under the Montreal Convention.[107] Refusing to consider the views of other signatories—and potentially ignoring international consensus on how a treaty should be interpreted—may provoke a backlash from foreign governments, creating difficulties for Americans seeking to enforce rights protected by treaty law in other countries.[108]

Anti-foreign law bills introduced in 2013 would raise similar uncertainties regarding their applicability to international law, with the Wyoming version explicitly forbidding courts "from considering international law when deciding cases."[109] When state courts are called upon to interpret foreign law bans, they will have to

consider a myriad of these types of questions as they struggle to abide by the constitutional command that treaties must be treated as part of the "supreme Law of the Land." As the American Bar Association, or ABA, has pointed out, uncertainty created by the relationship of foreign law bans to the application of international law in state courts "is likely to have an unanticipated and widespread negative impact on business."[110] It could also jeopardize a wide range of personal arrangements regulated by international law.

Preventing enforcement of judgments from other states

A potential corollary effect of anti-foreign law measures is that they may conflict with the duty of state courts to give full faith and credit to the judgments of sister states in cases where the judgments have considered foreign laws, international norms, or religious-legal traditions.

The ABA noted that, "a state's refusal to respect the judicial decisions of another state is a serious matter that may in many cases give rise to a constitutional violation."[111] Under the Full Faith and Credit Clause of the Constitution, a state is obliged to recognize the judgments of a sister state so long as the latter has jurisdiction over the parties and the subject matter. The Supreme Court has made clear that there is no "roving 'public policy exception'" to the full faith and credit due judgments."[112] This exacting obligation ensures that states are "integral parts of a single nation," and not simply an "aggregation of independent, sovereign [entities]."[113] The Kansas ban is the most emphatic in this regard. It appears to bar *any* judgment based on incompatible foreign law, even if it was rendered by the court of a sister state.[114] The language of other foreign law bans is more qualified but may also be plausibly read to bar sister state judgments.[115] Such a reading would undermine a core principle of federalism and cast enormous doubt on the rights and obligations of parties across state lines: Money judgments arising from international business disputes would be enforceable in some states but not others, as would marriages solemnized according to religious principles or wills probated according to the laws of the testator's home country.

Violation of separation of powers

Restrictions on the power of state courts to consider foreign and international law may also interfere with their core judicial function, violating the separation of

When bills seeking to restrict judicial reliance on foreign law were introduced in Congress, Justice Scalia issued a stern rebuke to their proponents: It's none of your business. … No one is more opposed to the use of foreign law than I am, but I'm darned if I think it's up to Congress to direct the court how to make its decisions.

powers. The U.S. government is divided into three independent branches of power, each with its own duties and responsibilities: a legislature that makes law, a judiciary that decides what the law means, and an executive that applies the law. This power-sharing arrangement checks government abuse by preventing the concentration of too much power in any one person, group, or agency. Lawmakers, for example, cannot apply the law they make, while courts cannot make the law they interpret.

These power-sharing principles are also very much part of state law. The constitutions of Arizona,[116] Louisiana,[117] and Tennessee,[118] for example, expressly prohibit any branch of government from exercising the powers that "properly belong" to another. The Kansas Supreme Court has recognized that the "very structure" of the state's system of government "gives rise to the [separation of powers] doctrine."[119]

As far back as *Marbury v. Madison*, it has been accepted that while the legislature has the power to write and enact laws, it is "emphatically the province and duty of the judicial department to say what the law is."[120] Determining what sources of law to look at and how they should be applied are part of figuring out what the law is and thus also quintessential judicial acts.[121] The Louisiana Supreme Court, for example, has exclusive authority to decide how much weight it should give to restatements of French law when interpreting the state's Civil Code, a statute rooted in the French civil law system.[122] The Louisiana legislature may alter the provisions of the Civil Code to establish a new legal standard that governs subsequent cases, but it cannot dictate the types of law or materials that the Louisiana Supreme Court may or may not consider in its future decisions.

By forbidding judges from looking at foreign and international law, state legislatures have effectively arrogated to themselves this power by enacting sweeping rules on how judges may or may not use foreign and international law in deciding cases. Previous attempts to pass similar laws have unsurprisingly drawn the ire of judges across the ideological spectrum, including none other than Justice Scalia himself. When bills seeking to restrict judicial reliance on foreign law were introduced in Congress, Justice Scalia issued a stern rebuke to their proponents:

> *It's none of your business. … No one is more opposed to the use of foreign law than I am, but I'm darned if I think it's up to Congress to direct the court how to make its decisions.*[123]

Impeding freedom to contract

The Contract Clause of the U.S. Constitution states that, "No State shall … pass any … Law impairing the obligation of Contract."[124] This rule is violated when a "change in state law" substantially impairs any agreement that was entered into before the change.[125] Foreign law bans—especially the version adopted in Kansas and Oklahoma and the bans being considered in Missouri and Iowa—are likely to have precisely this type of effect.

In personal and family matters, foreign law bans could call into question the validity of existing wills, adoption papers, and child custody agreements that are arranged according to religious or foreign law principles. Christians, Jews, and Muslims who have agreed to arbitrate personal and family disputes before faith-based tribunals may also find their agreements and awards in jeopardy.

American businesses that participate in international business transactions are also not spared. Take, for example, a Kansas entrepreneur who buys electronic goods from a Mexican businessman with several stores and business accounts in the United States. They both agree that Mexican law will govern, but that any dispute arising from the sale will be resolved in Kansas. When the entrepreneur receives the goods, he finds that they are defective and sues in a Kansas court to recover his money. The state's foreign law ban may complicate what would have otherwise been a straightforward claim for damages and may require the Kansas court to scrutinize whether Mexico's legal system is consistent with U.S. and state constitutional law. As a result, the entrepreneur may experience difficulties, delays, and higher costs trying to enforce the contract simply because he has chosen foreign law to govern his business arrangements.

The narrower formulation of the ban, which prohibits courts from enforcing foreign laws that violate state or federal constitutional rights,[126] may not commission a wholesale evaluation of foreign-legal systems but may be disruptive in other ways. These bans, for example, could potentially upset the well-established practice of recognizing judgments from foreign courts that do not provide for jury trials. These judgments could be regarded as violating the Seventh Amendment of the U.S. Constitution and most state constitutions,[127] which protect the right to a jury trial in cases involving money damages. U.S. courts, however, have long enforced foreign judgments that were reached without jury deliberation, provided the proceedings are fundamentally fair.[128] Foreign law bans, even in their narrow-

est form, jeopardize this flexible rule, forcing courts to reject foreign judgments that are inconsistent with the specifics of American due process.

Any of the scenarios identified above thwarts the parties' expectations under valid contracts. The substantial impairment of these contracts can only be justified by "a significant and legitimate public purpose," such as "the remedying of a broad social and economic problem."[129] Although some of the bans have been justified on the ground that Americans need protection from foreign law, this claim seems unlikely to withstand judicial scrutiny. There is no evidence that Americans need this type of protection because, as previously discussed, the courts already have a flexible tool to refuse enforcement of foreign law on public policy grounds. Any serious examination of the issue shows that the foreign law bans address a nonexistent problem rather than a legitimate public purpose.[130]

The legal and constitutional questions described above demonstrate that foreign law bans stray from well-established rules governing how foreign and international law should be applied in transnational disputes. They not only undermine the powers of the federal government and state courts but they also interfere with the freedom of Americans to arrange their personal and commercial affairs as they see fit. These legal infirmities mean that these bans will almost inevitably be challenged in court, with taxpayers bearing the cost defending them.

New wave of foreign law bans: Practical problems

The legal and constitutional infirmities of the bans also translate into a slew of practical problems for American families and businesses, which are detailed below.

Problems for American families_

Perhaps the greatest risk of foreign law bans is that they will upend the lives of Americans who have entered into family arrangements overseas. They will particularly hurt the thousands of Americans who live and work in foreign countries, including executives sent abroad by U.S. companies and U.S. troops stationed overseas.

Marriage, divorce, and prenuptial agreements

Marriages that are legally performed and valid abroad are generally presumed to be binding in the United States.[131] So are foreign divorce decrees provided that certain jurisdictional conditions are satisfied.[132] The legality of these arrangements is typically litigated in state courts.[133]

Foreign law bans throw this established practice into disarray. Under the broadest version of the foreign law ban passed in Kansas and Oklahoma and under consideration in Missouri and Iowa, foreign marriages could be challenged on the basis that the governing law or code in the country where the marriage was performed conflicts with the fundamental rights and liberties protected under the U.S. and state constitutions. The difficulties that women may experience in obtaining divorce under Jewish law,[134] for example, could lead courts to construe Jewish marriages as "product[s] of a legal system which is obnoxious to equal rights based on gender."[135] The same could be said for other foreign marriages between Protestants, Catholics, Hindus, and Muslims that are officiated under religious law but recognized as legally valid in large swathes of Europe, Latin America, and

South Asia.[136] Such an outcome, the National Council for Jewish Women has observed, would send "a very unwelcoming" message "to the Jewish population and other minorities."[137]

A court's refusal to recognize a foreign marriage could lead Americans and their foreign spouses to lose a wide range of benefits. These include lower tax rates,[138] immigration benefits for the foreign partner,[139] and the ability to make life-and-death decisions on behalf of a spouse during medical emergencies.[140] Indeed, people trying to avoid paying a foreign spouse his or her fair share of marital assets could well rely on broad foreign law bans to invalidate marriages that they had entered into freely.[141]

The bans also have a far-reaching impact on foreign divorcees and their families. In Florida, which has a large Jewish population, the legislature's consideration of a foreign law ban brought these issues into stark relief. The ban was opposed by Jewish groups for their potential to upend a variety of family arrangements. In particular, the Anti-Defamation League pointed out that nonrecognition of foreign divorce decrees under the bans would undermine related decisions concerning "alimony and child custody," and "serve as a barrier to remarriage in Florida for any Jewish person who divorced in Israel."[142]

Foreign law bans such as the one in Kansas may also disrupt the enforcement of foreign and religiously based prenuptial contracts, which are fairly common among the Jewish community. Under traditional Jewish law, only the husband can end a marriage.[143] To avoid hardship to women, Jewish couples sometimes enter into prenuptial agreements that provide "for the husband's payment of a certain amount of support (or liquidated) damage per day for each day that he refuses" to end the marriage after the wife requests him to do so.[144] This intricate framework of traditions and protections could be upended by a categorical prohibition of any foreign or religious *system* that is perceived as inconsistent with American notions of fundamental liberties. A court in Kansas or Oklahoma, for example, may overturn a Jewish prenuptial agreement because its religious context—the traditional rules and customs of Jewish divorce—is perceived as discriminatory toward women.[145] This would be the case regardless of whether the parties were actually trying to enforce specific discriminatory rules. Such a practice would ironically harm Jewish women by undermining the very tools they use to protect themselves.

What is a prenuptial agreement?

A prenuptial agreement is a written contract between two people who are about to marry. In many cases it sets out how their assets and property will be divided if the marriage is dissolved.

Is a prenuptial agreement motivated by religious principles enforceable in a court of law?

Such agreements may be enforced provided that they comply with the requirements of the state's family laws. A valid prenuptial agreement generally must be executed voluntarily and with adequate disclosure of its terms and conditions. It also cannot be made under any unconscionable circumstances.

Why do foreign law bans disrupt the recognition of such agreements?

Under a ban as broad as that enacted in Kansas, a court may refuse to enforce a premarital agreement if it was signed in a country that does not grant the same fundamental liberties as the United States. In Soleimani a Kansas state court refused to enforce a Muslim marriage contract, commonly known as a mahr agreement, that obliged the husband to pay his wife a lump sum upon divorce. Soleimani turned primarily on the court's dissatisfaction with the evidence presented in support of the mahr agreement. But the court also extensively analyzed the agreement under the state's foreign law ban, indicating that the mahr could also be void because it originates from a legal system that does not respect women's rights. The agreement invalidated by the court would ironically have provided the wife with more money than Kansas divorce law.

Even foreign law bans that do not require a court to evaluate foreign systems of law could have substantially deleterious effects. Arizona's foreign law ban, for example, prohibits courts from enforcing foreign laws that conflict with federal or state law. Marriage and divorce laws vary widely from country to country. It is therefore highly likely that Arizona's law differs from that of many foreign countries and this provision could be used to invalidate a marriage or divorce solemnized in a foreign country. Take, for example, an American soldier who thinks he has divorced his wife in Japan using the standard registration procedure for mutually agreed divorces.[146] When the soldier returns to his home state of Arizona and attempts to marry someone else, he may find that the courts refuse to recognize his divorce and prevent him from remarrying. Japan's purely administrative regime of divorces by mutual consent stands in stark contrast to the more elaborate rules for no-fault Arizona divorces.[147] The court's refusal to recognize the Japanese divorce could disrupt any arrangements of child custody and support that the soldier may have entered into as part of the no-fault divorce in Japan. Agreements on division of marital property could also be in jeopardy.[148]

Religious arbitration

A little-known but frequently used means of settling family disputes is recourse to faith-based arbitration tribunals, which may also be disrupted by foreign law bans.[149] Religious arbitrations share many qualities with commercial arbitrations. They require a valid agreement to arbitrate.[150] The parties choose their own religious law as governing, as well as the religious authority who will serve as the arbitrator. The decision of the arbitrator, if valid on public policy grounds, is binding under U.S. law.

If courts are required to investigate the overall soundness of the religious law applied in a dispute—as suggested by bans such as the one adopted by Kansas—this entire system will be disrupted. To be sure, courts should not enforce agreements or awards that are, for example, discriminatory,[151] totally irrational,[152] or unconscionable.[153] But they don't need to analyze the entire religious system to decide on fairness in a particular case. Asking them to do so would jeopardize the certainty of religious arbitrations, which would contradict federal policy,[154] and cast doubt on a popular option for settling family disputes. Asking courts to evaluate the overall fairness of a religious system would of course also put them in a position of having to parse questions of religious doctrine, violating the constitutional command that they must remain neutral toward all religions and avoid excessive entanglement in religion.[155]

Disadvantages to American business

The potential problems that foreign law bans create for American business—no matter how limited in scope—are reflected in the concerted efforts by the business community to oppose them in state legislatures.[156] These efforts are no doubt responsible for the corporate exemptions included in several of the bans. The five states that have passed foreign law bans so far have added exceptions for companies to alleviate the restrictions that the laws would place on international business transactions. Oklahoma, Kansas, Arizona, Tennessee, and Louisiana exempt "juridical persons" such as corporations, partnerships, and other business associations from the provisions of the law.[157] Five of the eight states that introduced anti-foreign law bills in 2013 are also seeking to exempt corporations from these measures.[158]

Uncertainties about the applicability of the corporate exemption increase the costs and risks of conducting international business operations, making states with foreign law bans an unattractive venue for foreign commerce.[161] Equally important, foreign law bans create the perception that the states that pass them are hostile to international trade. It's one thing for state courts to, as a matter of course, evaluate contractual provisions for consistency with American public policy. It is quite another to pass a law suggesting that a state's citizens need protection from foreign laws, positioning the state as unreceptive to international commerce. These laws could discourage overseas firms from entering into relationships with local companies or establishing lucrative projects that require both local and overseas personnel.[162]

For the roughly 75 percent of U.S. businesses that are unincorporated, foreign law bans create a variety of practical uncertainties. The following two examples serve to illustrate these problems.

These exemptions do not fully resolve the potential problems that foreign law bans pose for corporations. To begin with, exempting corporations from the scope of the laws does not account for the three-quarters of American businesses that are unincorporated and employ half of the nation's private workforce.[159] The pervasive use of the Internet, in particular, has greatly increased the ability of even small, unincorporated businesses to operate across borders and engage in transnational transactions that implicate foreign law.[160] It is also unclear how such exemptions would work in cases involving a corporation and an individual, such as a dispute concerning an employment contract.

Choice of law clauses

Bans on foreign law could thwart the choice of law in litigation and arbitral proceedings of contracting parties. According to the American Law Institute, "Contracts are entered into for serious purposes and rarely, if ever, will the parties choose a law without good reason for doing so."[163] In international commercial transactions American businesses may find themselves restricted in their ability to rely on their chosen law, frustrating a core aspect of their bargain. As the American Bar Association has pointed out, foreign parties may also be encouraged to either avoid the United States as a venue for dispute resolution or to "impose a high price in connection with some other term of the business deal in exchange for agreeing to resolve future disputes in the U.S."[164]

State courts generally defer to the parties' choice of law as long as there is a reasonable basis for that choice—for example, if the chosen country is substantially related to the parties or the transaction—and as long as applying the chosen law would not be contrary to a fundamental policy of the state.[165] Although there is no precise definition of *fundamental policy*, there are generally two limiting principles. First, a court may not refuse to apply the chosen law merely because it would lead to a different result than would be obtained under local law. Second, it

should show greater deference to the parties' choice when the state of the chosen law is more closely related to the contract and the parties than the forum state.[166] In sum, although public policy concerns vary widely, objections based on public policy can only be raised under very limited circumstances in order to ensure the "predictability and security of international commercial transactions."[167]

Foreign law bans, however, are likely to increase the grounds on which choice of law clauses may be invalidated, threatening to disrupt the fine balance between the interests of the contracting parties and those of the state. Take, for example, a contract dispute between a Saudi Arabian party and one in Kansas[168] in which the case comes before a court in Kansas and the claimant seeks to disavow the choice of Saudi law because it does not allow claims for future damages. The claimant could argue that the Saudi legal system is based on Sharia law and is inimical to American constitutional values.

According to established case law, this "generalized argumen[t]" that Saudi law incorporates Islamic religious doctrine would not provide a valid basis for rejecting the application of Saudi law.[169] But a foreign law ban, particularly a broad ban such as the one adopted by Kansas, could well lead courts to refuse to enforce the choice of Saudi law because the foreign *system* as a whole may violate state or federal constitutional rights, regardless of whether the foreign laws relevant to the dispute would raise constitutional issues.[170]

The same result could follow under the Arizona version of the foreign law ban, which disallows the use of foreign law that conflicts with federal or state law. Because both federal and Arizona[171] law allow claims for future damages, a claimant that had previously agreed to waive this claim by agreeing to Saudi law could seek to undo the initial contractual bargain through the foreign law ban.

The bans may also prove disruptive in arbitrations where parties have chosen foreign law to govern the dispute but selected state law to regulate procedural matters.[172] In these cases foreign law would govern substantive issues such as whether there was a breach of contract and the type of damages that should be awarded, and state law would cover procedural matters such as how arbitrators are selected and whether the parties' choice of foreign law should be respected in the first place.[173] An arbitral tribunal applying state procedural law in the context of a foreign law ban may be compelled to override the parties' choice of law for the same reasons that arise in a litigation context.[174]

Such complications would be litigated at great cost to the parties and significantly delay proceedings, undermining the very purpose of arbitration, which is to achieve a more efficient means of resolving commercial disputes. The possibility that foreign law bans will frustrate the parties' choice of law is also likely to deter the resolution of international commercial disputes in the United States. American businesses may be forced to agree to adjudicate disputes in other nations rather than at home. Worse still, the uncertainties these bans create may complicate cross-border business dealings so much that they deter international commerce that is vital to the U.S. economy.

Enforcement of foreign money judgments and arbitral awards

Foreign law bans may also thwart the enforcement of foreign money judgments and arbitral awards in state courts, which have become increasingly common in a global business environment. Consider, for example, an Arizonan rancher who obtains judgment against an international livestock company for breach of a loan agreement in a Mexican court. The livestock company operates out of Mexico and Arizona and has important assets in both jurisdictions. The rancher may therefore seek to enforce the judgment in his home state of Arizona.[175] State courts are generally in favor of recognizing foreign money judgments as long as certain jurisdictional and procedural requirements are met.[176] In order for a court to do so, the procedures of a foreign court must be compatible with fundamental notions of decency and fairness,[177] but they need not "comply with the traditional rigors of American due process."[178] But the Arizona foreign law ban invalidates the use of foreign law that does not comply with federal or state law, throwing into jeopardy the ability of the Arizona rancher to collect on a money judgment in a convenient court.

The same problem would arise if the dispute had been decided by an arbitral tribunal in Mexico. Federal and international law[179] require state courts to enforce foreign awards as long as the arbitration meets "the minimal requirements of fairness — adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator."[180] Since parties have freely consented to a less formal means of dispute resolution, they should not "expect the same procedures they would find in the judicial arena."[181]

But state courts acting under a foreign law ban may adopt an unduly stringent approach, refusing enforcement when foreign proceedings deviate from specific procedures that are considered constitutionally necessary to satisfy the require-

ments of due process in the United States.[182] This would not only undermine the goal of certainty in commercial relations but could result in hostility to the enforcement of U.S. judgments and awards in foreign countries. The very reason for commercial arbitration—speedier, less costly, and more flexible resolution of disputes—would also be defeated.

The range of practical problems described above will hurt American families and businesses the most. Family members may be displaced from their homes, children may be unfairly separated from their parents, and spouses may experience grave unfairness in already fraught divorce proceedings. In the commercial arena the legal uncertainty surrounding foreign law bans will create complications in resolving cross-border disputes and may even deter foreign clients and investors from doing business in certain states.

Discriminatory impact of foreign law bans

The previous sections outlined the constitutional infirmities and practical difficulties created by foreign law bans even if there is no indication of discriminatory effect. But, as the history of these bans shows, anti-foreign law measures have been pushed, in large part, by those who openly advocate an anti-Islamic agenda. Although this report does not attempt to analyze the bans under the complicated jurisprudence that governs claims under the First Amendment and Equal Protection Clause of the U.S. Constitution, it is worth noting that the discriminatory purpose of foreign law bans makes them susceptible to constitutional challenge. The frequently broader religious-freedom protections afforded by state laws provide an additional avenue for challenging these bans.[183]

There is significant evidence that foreign law bans are meant to target Muslim religious observance despite the removal of specific references to Islam.

As noted previously, these bans are based on model legislation drafted by David Yerushalmi,[184] the founder of the anti-Sharia movement, and lobbied for by anti-Muslim groups such as the Center for Security Policy and ACT! For America.[185] When federal officials rejected these concerns about Sharia as unfounded, Yerushalmi and his fellow activists changed tactics. "If you can't move policy at the federal level, well, where do you go?" asked Yerushalmi in a *New York Times* article. "You go to the states," he responded, answering his own question.[186] Aware that laws explicitly targeting Islam would be viewed as an unconstitutional attack on religious liberty, Yerushalmi sought to craft legislation that would provoke controversy and suspicion about Muslims without referring to Sharia directly.[187] Drawing inspiration from the anti-foreign law movement, he broadened the model law to cover foreign law more generally.[188]

According to a *New York Times* article, Yerushalmi's allies in the states "drummed up interest in the law" among Tea Party and Christian groups and began recruiting "dozens" of lawyer-legislators.[189] These efforts culminated in the early versions of the ban, which passed in Tennessee in May 2010 and a month later in Louisiana.

Although these two bans and subsequent ones are carefully drafted to avoid any reference to Sharia, state legislators have been less circumspect in their language about the intent of the foreign law ban:

- **Kansas:** During the legislative debate in Kansas, Sen. Susan Wagle (R-Wichita), a key supporter of the law, declared that she endorsed the law because, as she put it, Sharia law deprived women of their rights.[190] The *Topeka Capital Journal* reported that, "Rep. Janice Pauls, D-Hutchinson, told her colleagues it was important to vote for it [the bill] to stave off Sharia—a view shared by Rep. Peggy Mast, R-Emporia."[191] Sen. Chris Steineger (R-Kansas City), an opponent of the bill, noted that supporters of the bill inundated him with materials that explained how Muslims are trying to take over the United States through the imposition of Sharia.[192]

- **Tennessee:** When the foreign law ban came before the state legislature, its sponsor, Sen. Dewayne Bunch (R-Cleveland), officially credited Joanne Bregman as its key architect.[193] Bregman, who testified in state legislative hearings in support of the ban, is an attorney for the Tennessee Eagle Forum, which is an affiliate of the eponymous organization led by longtime conservative activist Phyllis Schlafly.[194] Both Bregman and the conservative advocacy group Tennessee Eagle Forum are credited in a recent CAP Foreign Law Bansd "Fear, Inc." as being responsible for anti-Sharia efforts[195] and anti-Muslim hysteria in the state.[196] After the foreign law ban passed in June 2010, Bregman boasted that Tennessee was leading the country in "preventing Shariah from creeping into our legal system."[197] Indeed, the foreign law ban set the stage for the state's most high-profile anti-Sharia initiative to date: a bill that makes adhering to Sharia a felony punishable by 15 years in jail.[198] Rep. Judd Matheny (R-Tullahoma), who introduced the bill in February 2011, said that it was given to him by the Tennessee Eagle Forum.[199]

- **Louisiana:** The co-authors of the ban, former Rep. Ernest Wooton (R-Belle Chase) and Sen. Daniel Martiny (R-Jefferson Parish), "cite the attempts by Muslim immigrants to cite tenets of Shariah law in courts across the nation as the impetus for enactment of the new legislation."[200] The Center for Security Policy declared that the ban, which was signed into law in 2010, placed Louisiana "at the forefront of the fight against Sharia."[201]

- **Florida:** The current anti-foreign law bill in Florida is co-sponsored by State Sen. Alan Hays (R-Umatilla), who likened Sharia to a "dreadful disease."[202] In

campaigning for a similar bill in 2012, Hays distributed flyers and booklets to fellow lawmakers entitled "Shari'ah (sic) Law: Radical Islam's threat to the U.S. Constitution."[203]

These types of statements by legislators and supporters of foreign law bans certainly raise the possibility that the laws will be invalidated as intended to discriminate against Islam. Much will depend, of course, on how courts apply these laws and whether the hostility to Islam that motivated them is reflected in how the bans are applied. At the very least, courts faced with foreign law bans should exercise the greatest care in ensuring that the discriminatory purpose underlying these bans does not infect their judgments in individual cases.

Conclusion

Efforts to pass foreign law bans around the country are part of a broader movement to spread misconceptions and stereotypes about Muslims and their faith. In service of their stated anti-Muslim objectives, supporters of these bans have distorted how U.S. courts treat foreign and religious law in transnational commercial disputes and family law cases.

Foreign law bans undermine the carefully calibrated mechanisms that courts have developed to deal with foreign and international law. The broad sweep of these measures threatens to create numerous practical problems, particularly for American families and businesses. Prohibitions against the use of foreign law could disrupt the routine enforcement of foreign laws and judgments in divorce, adoption, and child custody cases, and could introduce considerable uncertainty into religious arbitration proceedings.

The bans also cast doubt on the rights and duties of commercial parties in international business disputes, potentially leading to excessive litigation and unnecessary business costs. The mere presence of foreign law bans signals to the rest of the world that at least some parts of the United States are hostile to international commerce, which could potentially deter foreign customers and investors. The United States has already slipped down the ranks of global competitiveness,[204] and anti-foreign law measures threaten to isolate the nation even further.

State legislators faced with pressure to pass these bans should reject them because of the discriminatory message they convey and the practical problems they create. The bans should also be repealed in the five states where they have passed. Foreign law bans are a solution in search of a problem, but if these bans become law, states may soon be searching for solutions to the problems they have created.

About the authors

Faiza Patel serves as co-director of the Brennan Center's Liberty and National Security Program, which works to advance effective national security policies that respect Constitutional values and the rule of law. She is also a member of the U.N. Human Rights Council's Working Group on the Use of Mercenaries, and was its chair from 2011 to 2012. Before joining the Brennan Center, Patel was a senior policy officer at the Organization for the Prohibition of Chemical Weapons at The Hague, and clerked for Judge Rustam S. Sidhwa at the International Criminal Tribunal for the former Yugoslavia. She is author of "A Proposal for an NYPD Inspector General" with Andrew Sullivan, a proposal for systematic, ongoing oversight to bring transparency and accountability to police operations, and *Rethinking Radicalization*, a critical analysis of law enforcement theories that suggest that Muslim religious behavior can be considered a proxy for terrorist leanings. Patel is also a frequent national security commentator for media outlets such as MSNBC, Al Jazeera, *The New York Times*, *The Economist*, and *The Guardian*. Born and raised in Pakistan, Patel is a graduate of Harvard College and the New York University School of Law.

Matthew Duss is a Policy Analyst at American Progress. Duss received a master's degree in Middle East studies from the University of Washington's Jackson School of International Studies, and a B.A. in political science from the University of Washington. His writing has appeared in the *Los Angeles Times*, *The Boston Globe*, *The Baltimore Sun*, *The Nation*, *The American Prospect*, *The Forward*, and *The Guardian*. He has appeared as a commentator on CNN, MSNBC, BBC, Fox News, and Al Jazeera, as well as numerous radio programs.

Amos Toh serves as a legal fellow at the Brennan Center. His work examines how foreign and international law may be used to advance civil rights reforms across a wide range of issues, from counterterrorism to mass incarceration to campaign finance. Toh received his bachelor of laws with first class honors from the National University of Singapore Law School, ranking first in his class. He also graduated top of the traditional LL.M. program at the New York University School of Law.

Acknowledgements

The authors would like to thank Rudy deLeon, Elizabeth Goitein, Seth Hoy, Rachel Levinson-Waldman, Jim Lyons, Tara McGuinness, Tom Perriello, Jeanine Plant-Chirlin, Michael Price, Desiree Ramos Reiner, Sidney Rosdeitcher,

Frederick A.O Schwarz, and Sally Steenland for their invaluable input and support, and Sadia Ahsanuddin, Emmanuel Arnaud, Jeremy Carp, Jack Jenkins, Shannon Parker, Marissa Ram and Dana Roizen for their dedicated research assistance. We appreciate the guidance and support of Michael Waldman and John Kowal. In addition, the authors benefited greatly from conversations and correspondence with Chandra Bhatnagar, Aaron Fellmeth, Glenn Hendrix, Douglas Laycock, Hussein Rashid, Barbara Stark, David Stewart and Heather Weaver. The authors would also like to thank the Editorial and Art teams at CAP for their work in putting this report together.

The Center for American Progress would like to thank the Open Society Foundations for its support for this work.

The Brennan Center is grateful to The Atlantic Philanthropies, CS Fund / Warsh-Mott Legacy, Democracy Alliance Partners, The Herb Block Foundation, Open Society Foundations, and Security & Rights Collaborative, a Proteus Fund initiative, for their generous support of our Liberty & National Security Program.

This report has been jointly prepared by the Brennan Center for Justice at New York University School of Law, but does not purport to present the school's institutional views, if any.

States that introduced foreign law bans in 2013

State	Bill	Status	bill is closest to ban in …	Wording of ban	Applies to treaties?	Applies to CorpNS?	Other exceptions
Oklahoma	Act of Apr. 18, 2013, § 58, 2013 Okla. Sess. Laws.	April 19, 2013: signed by governor and will take effect on Nov 1, 2013 April 11, 2013: passed by House April 9, 2013: passed by Senate	Kansas	Bans decisions "based" on foreign laws, codes, or systems that "would not grant … the same fundamental liberties" provided for under the U.S. and Oklahoma constitutions	No, provided they are "superior to state law on the matter at issue"	No	None
Missouri	S. 267, 97th Gen. Assembly, Reg. Sess. (Mo. 2013).	May 8, 2013: passed by House; sent to governor for signature April 11, 2013: passed by Senate	Kansas	Bans decisions "based" on foreign laws, codes, or systems that are "repugnant or inconsistent with the Missouri and United States constitutions"	No, provided they are "superior to state law on the matter at issue	No	Ban cannot be interpreted to limit right to "free exercise of religion" protected under the U.S. and Missouri constitutions
	H.R. 757, 97th Gen. Assembly, Reg. Sess. (Mo. 2013).	April 17, 2013: consideration of bill indefinitely postponed	Kansas	Bans decisions "based" on foreign laws, codes, or systems that "would not grant … the same fundamental liberties" provided for under the U.S. and Missouri constitutions	No, provided they are "superior to state law on the matter at issue	No	None

State	Bill	Status	bill is closest to ban in …	Wording of ban	Applies to treaties?	Applies to CorpNS?	Other exceptions
Texas	S. 1639, 83rd Leg., regular session (Tex. 2013)	April 23, 2013: awaiting consideration of Senate April 10, 2013: passed by Business and Commerce Committee	No comparable legislation	Bans decisions and foreign judgments "applying" foreign law that does not "guarantee" U.S. constitutional rights in cases concerning a "marriage relationship" or a "parent-child relationship"	No	No	Does not apply to business transactions
	H.R. 288. 83rd Leg., Reg. Sess. (Tex. 2012)	February 11, 2013: referred to House Judiciary and Civil Prudence Committee December 14, 2012: filed before House		Bans decisions based on foreign and nonbinding international law except for the following purposes: Recognizing any document "issued or certified by a [U.S.] governmental entity" "Determining a person's identification" Providing "expository evidence for the purpose of recognizing the adoption of a child" "Enforcing a business contract or arrangement that lists [Texas] as a venue for disposition"	No	Depends on whether any of the four exceptions applies	None

State	Bill	Status	bill is closest to ban in …	Wording of ban	Applies to treaties?	Applies to CorpNS?	Other exceptions
Alabama	S. 4, 2013 Leg., Reg. Sess. (Ala. 2013)	April 4, 2013: scheduled for third reading before House March 20, 2013: passed by Senate	Arizona	Would amend state constitution to: Ban application or enforcement of foreign law in decisions if "doing so would violate any state law" or rights under Alabama and U.S. constitutions Ban choice of law clauses that violate rights under the Alabama and U.S. constitutions Ban giving "full faith and credit" to sister state judgments that apply prohibited foreign law	Yes	No	Allows for waiver of constitutional rights by contract
	S. 44, 2013 Leg., Reg. Sess. (Ala. 2013).	February 5, 2013: bill referred to House Judiciary Committee		Wording is the same as S.B. 4, but bill proposes ordinary legislation rather than state constitutional amendment	Yes	No	Allows for waiver of constitutional rights by contract
Iowa	H.R. 76, 85th Gen. Assembly, Reg. Sess. (Iowa 2013)	May 3, 2013: legislative session adjourned for 2013, but bill likely to be carried over to 2014 session January 28, 2013: bill introduced and referred to Judiciary Committee	Kansas	Bans decisions "based" on foreign laws, codes, or systems that "would not grant … the same fundamental liberties" provided for under the U.S. and Iowa constitutions	No, provided they are "superior to state law on the matter at issue	No	Ban does not allow judicial intervention in ecclesiastical matters

State	Bill	Status	bill is closest to ban in …	Wording of ban	Applies to treaties?	Applies to CorpNS?	Other exceptions
South Carolina	S. 60, 120th Gen. Assembly, Reg. Sess. (S.C. 2013)	January 8, 2013: introduced and read for the first time; referred to Committee on Judiciary	Louisiana	Bans decisions that "enforce" foreign laws, codes, or systems that would violate U.S. and Indiana constitutional rights Applies only to "actual or foreseeable violations"	Yes	Yes	None
	S. 81, 120th Gen. Assembly, Reg. Sess. (S.C. 2013)	January 8, 2013: introduced and read for the first time; referred to Committee on Judiciary					
Wyoming	H.R.J. Res. 0004, 62nd Leg., Reg. Sess. (Wyo. 2013)	February 27, 2013: 2013 legislative session adjourned; bill must be re-filed during next session for reconsideration January 24, 2013: indefinitely postponed	No comparable legislation	Courts "shall not consider the legal precepts of other nations or international law"	Yes	Yes	None
	H.R.J. Res. 0005, 62nd Leg., Reg. Sess. (Wyo. 2013)	February 25, 2013: died in committee					
Indiana	S. 460, 118th Gen. Assembly, Reg. Sess. (Ind. 2013)	April 29, 2013: 2013 legislative session adjourned; bill must be re-filed during next session for reconsideration March 12, 2013: first Reading before House; referred to House Committee on Judiciary February 26, 2013: passed by Senate	Louisiana	Bans decisions that "enforce" foreign laws, codes or systems that would violate U.S. and Indiana constitutional rights	Yes	Yes	None

State	Bill	Status	bill is closest to ban in …	Wording of ban	Applies to treaties?	Applies to CorpNS?	Other exceptions
Florida	S. 58, 2013 Leg., 115th Reg. Sess. (Fla. 2013)	May 3, 2013: died in Senate	Louisiana	Bans decisions "based" on foreign laws, codes or systems that do "not grant … the same fundamental liberties … guaranteed by the State constitution or the U.S. Constitution" Applies only to "actual or foreseeable violations" Applies only to real estate and family law proceedings	No, provided they are "superior to state law on the matter at issue	Depends	Ban does not allow judicial intervention in ecclesiastical matters Allows for waiver of constitutional rights by contract
	H.R. 351, 2013 Leg., 115th Reg. Sess. (Fla. 2013)	May 3, 2013: died in Senate April 18, 2013: passed by House					

Accurate as of May 14, 2013.

Other states to watch

States where foreign law bans are: pending before various legislative committees, but have not been reintroduced in the 2013 session; or effectively dead, but may be revived.

State	Bill	Status	Bill closest to ban in…	Remarks
Idaho	H.R. Con. Res. 044, 60th Leg., 2d Reg. Sess. (Idaho 2010).	Approved by Senate 53-17 on March 4, 2010, and sent to U.S. secretary of state on March 29, 2010	No comparable legislation	Nonbinding resolution: not clear what effects it will have, if any, on judicial decision making in transnational disputes
Michigan	H.R. 4769, 96th Leg., Reg. Sess. (Mich. 2011)	Pending before Committee on Judiciary since November 27, 2012; motion to discharge committee was postponed	Louisiana	None
New Hampshire	H.R. 1422, 2011 Gen. Ct., 162nd Sess. (N.H. 2011)	Pending before Senate Judiciary Committee since May 3, 2012	Arizona	None
Pennsylvania	H.R. 2029, 195th Gen. Assembly, Reg. Sess. (Penn. 2011).	Referred by the House to the state government on September 25, 2012	Kansas	None

State	Bill	Status	Bill closest to ban in…	Remarks
Georgia	H.R. 242, 151st Gen. Assembly regular session (Ga. 2011)	Pending before House committee since February 24, 2012	Kansas	None
Nebraska	Leg. B. 647, 102nd Leg., Reg. Sess. (Neb. 2011).	Indefinitely postponed on April 18, 2012	Kansas	None
West Virginia	H.R. 3220, 80th Leg., Reg. Sess. (W. Va. 2012).	Pending before Committee on the Judiciary since January 11, 2012	Tennessee	None
Kentucky	H.R. 386, 2012 Leg., Reg. Sess. (Ky. 2012).	Introduced to the House February 9, 2012, then forwarded to Judiciary Committee on February 13, 2012	Louisiana	None
Alaska	H.R. 88, 27th Leg., Reg. Sess. (Alaska 2011).	Pending before House Financial Committee since April 4, 2011	Louisiana	Effectively dead
North Carolina	H.R. 640, 2011 Gen. Assembly, Reg. Sess. (N.C. 2011).	Pending before Judicial subcommittee since April 6, 2011	Louisiana	Effectively dead
Arkansas	S.J. Res. 10, 88th Gen Assembly, Reg. Sess. (Ark. 2011).	Senate Sine Die adjournment on April 27, 2011	Kansas	None
	S. 97, 88th Gen. Assembly. Reg. Sess. (Ark. 2011).	Senate Sine Die adjournment on April 27, 2011.	Kansas	None
Maine	H.R. 811, 125th Leg., Reg. Sess. (Me. 2011).	Died in the judiciary committee on May 24, 2011	Tennessee	None
Minnesota	S. 2281, 87th Leg., Reg. Sess. (Minn. 2012).	Withdrawn and returned to author on March 5, 2012	Kansas	None
Mississippi	H.R. 2, 127th Leg., Reg. Sess. (Miss. 2012).	Died in Judiciary Committee on March 6, 2012	Kansas	None
	H.R. 698, 127th Leg., Reg. Sess. (Miss. 2012).	Died in Judiciary Committee on March 6, 2012	Louisiana	None
New Jersey	H.R. 3496, 214th Leg., Reg. Sess. (N.J. 2010).	Withdrawn from consideration on May 10, 2012	Louisiana	None

State	Bill	Status	Bill closest to ban in…	Remarks
New Mexico	S.J. Res. 14, 50th Leg., 2d Reg. Sess. (N.M. 2012).	Died in Senate Rules Committee on February 16, 2012	No comparable legislation	Would have prevented courts from considering any foreign or international law that violated New Mexico's public policy
Utah	H.R. 296, 58th Leg., Gen. Sess. (Utah 2010).	Enacting clause struck down (bill effectively killed) on March 11, 2010	Louisiana	None
Virginia	H.R. 631, 2012 Gen. Assembly, Reg. Sess. (Va. 2012).	Continued to 2013 by Courts of Justice Committee voice vote on February 10, 2012	Louisiana	None
	H.R. 825, 2012 Gen Assembly, Reg. Sess. (Va. 2012).	Continued to 2013 by Courts of Justice Committee voice vote on February 10, 2012	No comparable legislation	Would have prevented courts from deciding any issue "based on the authority of foreign law" excepted to the extent required or authorized by federal or Virginia law including the U.S. and Virginia state constitutions

Endnotes

1 Foreign law bans have been introduced in Oklahoma, Kansas, Arizona, Louisiana, Tennessee, South Dakota, Missouri, Florida, Texas, Alabama, Iowa, Indiana, South Carolina, Wyoming, Idaho, Michigan, Pennsylvania, New Hampshire, Nebraska, Georgia, Kentucky, West Virginia, North Carolina, Alaska, Arkansas, Maine, Minnesota, Mississippi, New Jersey, New Mexico, Utah and Virginia. See Appendix.

2 D.C. Codified Laws § 19-8-6 (2012); Some of the legal and practical problems raised by foreign law bans are also likely to arise from the application of the South Dakota ban. The Congressional Research Service has warned that legislative restrictions on "religious law generally … [are] likely to create numerous unforeseen risks and potential unintended consequences." Cynthia Brougher, "Application of Religious Law in U.S. Courts: Selected Legal Issues" (Washington: Congressional Research Service, 2011), available at http://www.fas.org/sgp/crs/misc/R41824.pdf.

3 Rochelle Koff, "Bill to ban 'unconstitutional' foreign law dies on last day," *Miami Herald*, May 3, 2013, available at http://miamiherald.typepad.com/nakedpolitics/2013/05/bill-to-ban-unconstitutional-foreign-law-dies-on-last-day.html.

4 Accurate as of May 14, 2013. In Missouri the legislative session adjourns on May 30, 2013. The 2013 bills are not carried over to the 2014 session. In Texas the legislative session adjourns on May 27, 2013. The 2013 bills are not carried over to the 2014 session. Alabama's legislative session adjourns on May 20, 2013. The 2013 bills are not carried over to the 2014 session. South Carolina's legislative session adjourns on June 6, 2013. The 2013 bills will be carried over to the 2014 session. In Iowa the legislative session for 2013 has adjourned. The 2013 bills will, however, be carried over to the 2014 session.

5 Salli A. Swartz, "113A: Report" (Washington: American Bar Association, 2011), available at http://www.abanow.org/wordpress/wp-content/files_flutter/1313006833113aReport.pdf.

6 Andrea Elliott, "The Man Behind the Anti-Shariah Movement," *The New York Times*, July 30, 2011, available at http://www.nytimes.com/2011/07/31/us/31shariah.html; Wajahat Ali and others, "Fear Inc." (Washington: Center for American Progress, 2011), available at http://www.americanprogress.org/wp-content/uploads/issues/2011/08/pdf/islamophobia.pdf.

7 H.R.J. Res. 1056, 52nd Leg., 2d Reg. Sess. (Oklahoma, 2010), available at https://www.sos.ok.gov/documents/questions/755.pdf.

8 Awad v. Ziriax, 670 F.3d 1111, 1129-1131 (10th Cir. 2012).

9 Shortly before the passage of the foreign law ban in Kansas, State Sen. Susan Wagle (R-Witchita) warned her fellow legislators that "Sharia law… take[s] away all the rights of women." Dion Lefler, "Senate OKs Bill to Ban Foreign Laws," *Wichita Eagle*, May 12, 2012, available at http://www.kansas.com/2012/05/11/2332324/senate-oks-bill-to-ban-foreign.html; "Kansas Senate Passes Law Banning Sharia, Other Foreign Laws from State Courts," *New York Daily News*, May 11, 2012, available at http://www.nydailynews.com/news/politics/kansas-senate-passes-law-banning-sharia-foreign-lawforeign laws-state-courts-article-1.1076862; In Florida Sen. Alan Hays (R-Umatilla) hailed the state's anti-foreign law bill as a "vaccination" against Sharia and foreign law, which he likened to "dreadful diseases." Sabrina Siddiqui, "Florida State Senator: Sharia Law like Disease We Should Vaccinate Against," The Huffington Post, April 1, 2013, available at http://www.huffingtonpost.com/2013/04/01/alan-hays-sharia_n_2992532.html. Larry Metz, who sponsored the House companion bill, hailed the anti-foreign law bill as a safeguard against "offensive law invading our legal system." Dara Kam, "Bill Banning Shariah Law in Florida Family Cases Passes Senate Panel," *Palm Beach Post,* April. 8, 2013, available at http://www.mypalmbeachpost.com/news/news/state-regional-govt-politics/bill-banning-sharia-law-in-florida-family-cases-pa/nXGXF/?icmp=pbp_internal-link_textlink_apr2013_pbpstubtomypbp_launch.

10 Antonin Scalia, "Foreign Legal Authority in the Federal Courts," Keynote address at the American Society of International Law Proceedings, Washington, D.C., January 1, 2004, available at http://www.jstor.org/discover/10.2307/25659941?uid=3739584&uid=2129&uid=2&uid=70&uid=4&uid=3739256&sid=21102268452617; In the case JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., the court found that British Virgin Islands corporation was a "citizen or subject" of a foreign state. JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88 (2002).

11 Oklahoma governor Mary Fallin signed H.B. 1060 into law on April 19, 2013. "Gov. Fallin Signs Legislation Banning Application of Foreign Law," News9, April 19, 2013, available at http://www.news9.com/story/22026259/gov-fallin-signs-legislation-banning-application-of-foreign-lawforeign law; Similar to Kansas, Oklahoma prohibits courts from basing their decisions on foreign laws, codes, or systems that "would not grant the parties the same fundamental liberties, rights, and privileges granted under the United States and [the state's] constitutions." 2013 Okla. Sess. Laws § 58.

12 In Missouri two bills have been introduced: one in the House and another in the Senate. The wording of H.B. 757 is materially similar to that of the Kansas ban: it bans any decisions or rulings "based" on foreign laws, codes, or systems that "would not grant … the same fundamental liberties" provided for under the U.S. and Missouri constitutions." H.R. 757, 97th Gen. Assemb., Reg. Sess. § 4 (Mo. 2013) (perfected version). S.B. 267 is also modeled after the Kansas ban but is potentially wider in its scope: it bans decisions "based" on foreign laws, codes, or systems that is "*repugnant or inconsistent*" with the U.S. and Missouri constitutions. S. 267, 97th Gen. Assemb., Reg. Sess. § 4 (Mo. 2013) (emphasis added). As of the date of this report, S.B. 267 has been passed by the Senate and is now before the House, while consideration of H.B. 757 has been indefinitely postponed. S. 267, 97th Gen. Assemb., Reg. Sess. (Mo. 2013). H.R. 757, 97th Gen. Assemb., Reg. Sess. (Mo. 2013).

13 H.R. 76, 85th Gen. Assemb., Reg. Sess. (Ind. 2013).

14 Center for Security Policy, "Shariah: The Threat to America" (2010), available at http://www.centerforsecuritypolicy.org/upload/wysiwyg/article%20pdfs/shariah%20-%20The%20Threat%20to%20America%20(Team%20B%20Report)%2009142010.pdf.

15 The authors of "Shariah: The Threat to America" claim that Sharia commands or condones "abhorrent behavior" like "underage and forced marriage, honor killing, female genital mutilation, polygamy and domestic abuse." Ibid.

16 Brougher, "Application of Religious Law in U.S. Courts."

17 Asida Quraishi-Landes, "Sharia and Diversity: Why Some Americans are Missing the Point" (Detroit: Institute for Social Policy and Understanding, 2013), available at http://www.ispu.org/pdfs/ISPU_Report_ShariaDiversity_Final_web.pdf.

18 Wajahat Ali and Matthew Duss, "Understanding Sharia Law: Conservatives' Skewed Interpretation Needs Debunking" (Washington: Center for American Progress, 2011), available at , http://www.americanprogress.org/wp-content/uploads/issues/2011/03/pdf/Sharia_law.pdf.

19 The constitutional commitment to secularism prohibits courts from enforcing any religious law or custom including Sharia. Courts, however, are allowed to enforce agreements that are drafted with religious principles in mind, provided they meet the requirements of secular law such as contract law or family law. Jones v. Wolf, 443 U.S. 595, 603 (1979).

20 Courts follow the same approach in resolving agreements concerning religious property. *Jones*, 443 U.S. at 603.

21 Caryn Litt Wolfe, "Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts," *Fordham Law Review* 75 (1) (2006): 442–447, available at http://ir.lawnet.fordham.edu/flr/vol75/iss1/11.

22 Michael A. Helfand, "Religious Arbitration and The New Multiculturalism: Negotiating Conflicting Legal Orders," *New York Law Review* 86 (5) (2011): 1231–1305, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1773928##.

23 These efforts are reflected in the September 2010 report by the Center for Security Policy titled "Shariah: The Threat to America," which identified Sharia as a "legal-political-military doctrine" that is "the preeminent totalitarian threat of our time. Center for Security Policy, "Shariah: The Threat to America."

24 Center for Security Policy, "Shariah Law and American State Courts: An Assessment of State Appelate Court Cases" (2011), available at http://shariahinamerican-courts.com/wp-content/uploads/2011/06/Sharia_Law_And_American_State_Courts_1.4_06212011.pdf.

25 Ibid.

26 Matthew Franck, "A Solution in Search of a Problem," National Review Online, June 15, 2012, available at http://www.nationalreview.com/content/solution-search-problem; Abed Awad, "The True Story of Sharia in American Courts," *The Nation*, June 13, 2012, available at http://www.thenation.com/article/168378/true-story-Sharia-american-courts; Ali and Duss, "Understanding Sharia Law.".

27 As of the date of this report, a handful of states continue to permit some degree of marital immunity for rape and/or other sexual offenses. S.D. v. M.J.R., 415 N.J. Super. 417, 2 A.3d 412 (App. Div. 2010); Alaska Stat. § 11.41.432; Md. Code Ann. Crim. Law § 3-318 (LexisNexis 2013); Cal. Penal Code § 262; Minn. Stat. §609.349; S.C. Code Ann. §16-3-615; VA. Code Ann. §18.2-61(C).

28 S.D. v. M.J.R., 415 N.J. Super. 417, 2 A.3d 412 (App. Div. 2010).

29 Nadya Labi, "An American Honor Killing: One Victim's Story," *Time,* February 25, 2011, available at http://www.time.com/time/nation/article/0,8599,2055445,00.html.

30 While official records of the trial do not appear to be publicly accessible, multiple media accounts indicate that during the trial the defendant characterized the victim's death as an "accident" not an honor killing. Rudabeh Shahbazi, "Defense Calls Death Accident, Not 'Honor Killing,'" ABC 15, January 24, 2011, available at http://www.abc15.com/dpp/news/region_phoenix_metro/central_phoenix/'honor-killing'-trial-starts-in-phoenix; Bob Christie, "Defense Calls Death Accident, Not 'Honor Killing,'" Boston.com, January 24, 2011, available at http://www.boston.com/news/nation/articles/2011/01/24/honor_killing_trial_starts_monday_in_phoenix/; The defendant also did not raise the defense of "honor killing" on appeal. State v. Almaleki, 1 CA-CR 11-0320, 2013 WL 817309 (Ariz. Ct. App. Mar. 5, 2013).

31 "Iraqi Immigrant Gets 34 Years for Killing 'Too Westernized' Daughter," CNN, April 15, 2011, available at http://articles.cnn.com/2011-04-15/justice/arizona.honor.killing_1_faleh-hassan-almaleki-amal-edan-khalaf-traditional-iraqi-values.

32 Okl. Enr. H.J.R. Res. 1056, 52nd Leg., Reg. Sess. §1(C) (Okla. 2010).

33 U.S. Const. amend. I.

34 Awad v. Ziriax, 754 F. Supp.2d 1298, 1307 (2010).

35 Awad v. Ziriax, 670 F.3d 1111, 1130 (10th Cir. 2012).

36 Elliott, "The Man Behind the Anti-Shariah Movement."

37 Sarah Cleveland, "Our International Constitution," *The Yale Journal of International Law* 31 (1) (2006): 2–125, available at *http://www.yale.org/yjil/PDF/Cleveland.pdf.*

38 Ibid.

39 Aaron Fellmeth, "U.S. State Legislation to Limit Use of International and Foreign Law," *American Society of International Law* 106 (1) (2012): 107–117, available at http://www.jstor.org/discover/10.5305/amerjintelaw.106.1.0107?uid=3739584&uid=2129&uid=2&uid=70&uid=4&uid=3739256&sid=21102268844677.

40 "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty. … The opinion of the world community, *while not controlling our outcome*, does provide respected and significant confirmation for our own conclusions." (emphasis added) Roper v. Simmons, 543 U.S. 551, 578 (2005). Opinions of world community "by no means dispositive" but "lends further support … that there is consensus among those who have addressed the issue." Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002). Considering U.N. surveys of nationality laws of member nations in determining whether denationalization is a cruel and unusual punishment under the Eighth Amendment. Trop v. Dulles, 356 U.S. 86, 102 (1958). "[N]ational, multinational, and international human rights charters and courts today play a prominent part in our world. The U.S. judicial system will be the poorer … if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own." Note that the phrase "international sources" here refers to international legal materials that are not binding on the United States; for example, treaties that the U.S. have not signed or ratified or nonbinding U.N. resolutions or declarations. Ruth Bader Ginsburg, "A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication," Address at The International Academy of Comparative Law, Washington, D.C., July 30, 2010, available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_07_30_10.html.

41 Note that international law has recently been expanded to include rules and principles governing the "relations between states and individuals," particularly in the areas of international human rights law and international criminal law. "Legal Information Institute: International Law," available at http://www.law.cornell.edu/wex/international_law (last accessed May 2013).

42 For Supremacy Clause, U.S. Const., art. VI. For procedure of ratifying a treaty in the U.S., U.S. Const., art. II, § 2, cl. 2.

43 For a list of Supreme Court decisions considering a treaty provision to be self-executing, see Medellin v. Texas, 552 U.S. 491, 568-70 (2008) (Breyer, J., dissenting).

44 552 U.S., 504-05 (2008).

45 Ibid. at 504-506, 513, 516-520.

46 Treaty of Paris, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80.

47 United States vs. Belmont, 301 U.S. 324, 330 – 33 (1937).

48 Michael John Garcia, "International Law and Agreements: Their Effect Upon U.S. Law" (Washington: Congressional Research Service, 2013), available at http://www.fas.org/sgp/crs/misc/RL32528.pdf.

49 "[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized [namely, offenses against ambassadors, violations of safe conduct and piracy]." Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

50 A treaty "must withstand essentially the same tests as would domestic legislation against a claim that it denies rights guaranteed by the Constitution." Note that in such cases, international law, similar to all other federal laws, is entitled to a presumption of constitutionality. Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301, 1309 (9th Cir. 1982); "[D]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." This presumption of constitutionality, however, may have "narrower scope for operation" where legislation "appears on its face to be within a specific prohibition of the Constitution," such as those protections provided under the Bill of Rights. United States v. Morrison, 529 U.S. 598, 607 (2000); United States v. Carolene Products Co., 304 U.S. 144, 152 fn. 4 (1938).

51 "[S]tate law must yield when it is inconsistent with or impairs the policy of provisions of a treaty or of an international compact or agreement." United States v. Pink, 315 U.S. 203, 230-31 (1942). Customary international law is part of federal common law, which "generally has the same preemptive effect as federal statutes and constitutional provisions." Ernest A. Young, "Sorting Out the Debate Over Customary International Law," *Virginia Journal of International Law* 42 (365) (2002): 366–400, available at *http://scholarship.law.duke.edu/faculty_scholarship/1880/*.

52 In some instances, it may refer to the laws of a group of foreign countries that share a common legal system, such as those within the European Union or the African Union. It may also refer to international rules that are binding on foreign countries but not the United States, such as treaties that the United States has not ratified.

53 Comity is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

54 Oetjen v. Cent. Leather Co., 246 U.S. 297, 304 (1918).

55 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 424-425 (1964).

56 Holding that foreign legal system need not adopt "every jot and tittle of American due process" before foreign judgment can be enforced. Even legal experts who argue that foreign judgments should only be enforced if they protect specific requirements of due process concede that such judgments must still be recognized even if they "depart from some procedures that we have grown accustomed to" and regard as important, such as "cross-examination of witnesses by a party's lawyer rather than examination by a magistrate; jury trial; and discovery." Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 478 (7th Cir. 2000). Geoffrey C. Hazard Jr. and Michael Traynor, "Foreign Judgment: Is 'System Fairness' Sufficient or Is 'Specific Fairness' Also Required for Recognition and Enforcement?", *Berkeley Journal of International Law,* June 15, 2012, available at http://bjil.typepad.com/publicist/2012/04/foreign-judgments-is-system-fairness-sufficient-or-is-specific-fairness-also-required-for-recognition-and.html.

57 The Seventh Amendment protects the right to a jury trial in certain civil cases. U.S. federal courts, however, have held that a foreign judgment may be enforced "irrespective of whether [the foreign court] offers a right to a jury trial" but provided that the foreign court provides "a fair hearing." U.S. Const. amend. VII.; Samyang Food Co., Ltd. v. Pneumatic Scale Corp., No. 5:05-CV-636, 2005 WL 2711526, at *6 (N.D. Ohio Oct. 21, 2005); Foreign law bans have "one pretty substantial potential problem" because the U.S. considers the right to civil jury trial a "fundamental" right while "[n]early all foreign countries do not provide for a civil jury trial." Eugene Volokh, "'American Laws for American Courts' and Civil Jury Trials," The Volokh Conspiracy Blog, August 16, 2012, available at http://www.volokh.com/2012/08/16/american-laws-for-american-courts-and-civil-jury-trials/.

58 Hilton, 159 U.S. 113 upholds enforcement of a French judgment despite the fact that parties were not subject to cross-examination by the opposite party.

59 Liberian judgment unenforceable because country was "embroiled in a civil war" and "it is difficult to imagine any judicial system functioning properly in these circumstances." Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276, 287 (S.D.N.Y. 1999) *aff'd*, 201 F.3d 134 (2d Cir. 2000). Iranian judgment could not be enforced because defendant could not personally appear before Iranian courts, could not obtain proper legal representation and could not even obtain local witnesses on her behalf. Bank Melli Iran v. Pahlavi, 58 F.3d 1406 (9th Cir. 1995). Mexican judgment against U.S. citizens held not to have been rendered after a full and fair trial and not entitled to credit in the United States. Banco Minero v. Ross, 106 Tex. 522, 172 S.W. 711 (1915).

60 Fellmeth, "U.S. State Legislation to Limit Use of International and Foreign Law."

61 Atkins v. Virginia, 536 U.S. 304, 324-325 (2002) (Renhquist, C.J., dissenting); Roper v. Simmons, 543 U.S. 551, 622-628 (2005) (Scalia, J., dissenting). Government officials, such as former Attorney General Alberto Gonzales, several academics, and members of the press, have also criticized judicial reliance on foreign constitutional law and experiences. Cleveland, "Our International Constitution" at 3–5.

62 Scalia, "Foreign Legal Authority in the Federal Courts," at 114–124.

63 Ibid. at 110–111.

64 Ibid. at 111–112.

65 Andrew M. Grossman, Testimony before the Subcommittee on the Constitution, "Judicial Reliance on Foreign Law," December 14, 2011, available at http://judiciary.house.gov/hearings/printers/112th/112-73_71624.PDF.

66 16 U.S.C. § 3372 (1981).

67 Another federal law that incorporates foreign law is § 109 of the 1991 Civil Rights Act, which exonerates U.S. persons from liability for statutory violations based on their compliance with foreign laws. Fellmeth, "U.S. State Legislation to Limit Use of International and Foreign Law."

68 Miranda v. Arizona, 384 U.S. 436, 489 (1966).

69 D'Agostino v. Johnson & Johnson, Inc., 133 N.J. 516 (1993):.notes 131–148.

70 D'Agostino v. Johnson & Johnson, Inc., 133 N.J. 516 (1993): notes 163–173.

71 The case determined whether Swiss law applied to a wrongful termination suit arising from employment with Swiss subsidiary of New Jersey corporation. D'Agostino v. Johnson & Johnson, Inc., 133 N.J. 516 (1993).

72 New York State Unified Court System, "First of Its Kind Memorandum of Understanding Signed Between U.S. State Court and Australian Court," Press release, October 28, 2010, available at http://www.courts.state.ny.us/press/pr2010_14.shtml; Thomas R. Phillips, "State Supreme Courts: Local Courts in a Global World," *Texas International Law Journal* 38 (557) (2003): 557–564, available at *http://www.tilj.org/content/journal/38/num3/Phillips557.pdf*.

73 TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 939 (D.C. Cir. 2007).

74 Toft, 453 B.R. 186, 190-91 (Bankr. S.D.N.Y. 2011).

75 S. Int'l Sales Co. v. Potter & Brumfield Div. of AMF Inc., 410 F. Supp. 1339 (S.D.N.Y. 1976).

76 2013 Okla. Sess. Laws § 58(B) Kan. Stat. Ann. § 60-5103 (2012); La. Rev. Stat. Ann.§ 9:6001(C) (2012); Tenn. Code Ann. § 20-15-103(a) (2012); Ariz. Rev. Stat. § 12-3103 (2012).

77 Although the Arizona ban does not explicitly apply to contracts, it nonetheless affects disputes involving contracts that rely on foreign law. 2013 Okla. Sess. Laws § 58(C); Kan. Stat. Ann.. § 60-5104 (2012); La. Rev. Stat. Ann. § 9:6001(D) (2012), Tenn. Code Ann. § 20-15-103(a) (2012).

78 The strength of the prohibition varies from statute to statute. An offending provision would be considered void and unenforceable in Kansas, but will be "interpreted, modified, amended or construed to the extent necessary to preserve … constitutional rights" in Louisiana. 2013 Okla. Sess. Law § 58(D)(2); Kan. Stat. Ann. § 60-5105(b) (2012); La. Rev. Stat. Ann. § 9:6001(D) (2012). In Tennessee the preservation of constitutional rights is a "primary factor" in the interpretation of the provision, leaving courts with some flexibility. Tenn. Code Ann. § 20-15-104(a) (2012).

79 "CLE Course on Draft Uniform Act: American Laws for American Courts," available at http://www.davidyerush-almilaw.com/CLE-Course-on-Draft-Uniform-Act--American-Laws-for-American-Courts-b25-p0.html (last accessed May 2013).

80 U.S. Bureau of the Census, *Top Ten Countries with which the U.S. Trades* (Department of Commerce, 2013), available at http://www.census.gov/foreign-trade/top/dst/current/balance.html.

81 Matthew Schmitz, "Fears of 'Creeping Sharia;'" National Review Online, June 13, 2012, available at http://drupal6.nationalreview.com/articles/302280/fears-creeping-Sharia-matthew-schmitz.

82 Soleimani v. Soleimani, No. 11CV4668, slip op. at 31 (D. Kan. Aug. 28, 2012), available at http://www.volokh.com/wp-content/uploads/2012/09/soleimani.pdf.

83 This example is adapted from the Supreme Court's decision in Abbott v. Abbott, 130 S. Ct. 1983 (2010). In that case the Court held that the right to prevent a child to leave a country is a "right to custody" under the Hague Convention on the Civil Aspects of International Child Abduction. In reaching its decision, the Court held that "the opinions of our signatories … are entitled to considerable weight." Ibid. at 1993.

84 "I suppose foreign statutory and judicial law can be consulted in assessing the argument that a particular construction of an ambiguous provision in a federal statute would be disastrous." Scalia, "Foreign Legal Authority in the Federal Courts," at 112.

85 La. Rev. Stat. Ann. § 9:6001 (2012).

86 Tenn. Code Ann. § 20-15-101 (2012).

87 The wording of both bills is materially similar. 60, 120th Gen. Assemb., Reg. Sess. (S.C. 2013); S. 81, 120th Gen. Assemb., Reg. Sess. (S.C. 2013).

88 S. 460, 118th Gen. Assemb., Reg. Sess. (Ind. 2013).

89 La. Rev. Stat. Ann.§ 9:6001(C) (2012); Tenn. Code Ann § 20-15-103(a) (2012); S. 60, 120th Gen. Assemb., Reg. Sess. (S.C. 2013); S. 460, 118th Gen. Assemb., Reg. Sess. (Ind. 2013).

90 "[T]he public policies expressed in this act shall apply only to actual or foreseeable violations of the constitutional rights of a natural person in this state from a foreign law, legal code or system." Tenn. Code Ann. § 20-15-106 (2012).

91 See Appendix.

92 Kan Stat. § 60-5102 (2012); La. Rev. Stat. § 9:6001(A) (2012); Tenn. Code Ann § 20-15-101 (2012): notes 11–13.

93 Interestingly, § 2 of Tennessee's previous Bill, which invalidated contracts based on offending foreign laws, codes or systems, was expressly "subject to provisions of superseding federal treaties." Kan Stat. § 60-5102 (2012); La. Rev. Stat. § 9:6001(A) (2012); Tenn. Code Ann § 20-15-101 (2012); H.R. 3768, 106th Gen. Assemb., Reg. Sess. (Tenn. 2010). The law that was passed, however, does not contain an exception for U.S. treaty obligations. It may be that the legislature believed that the exception is no longer necessary, since the consideration of offending foreign laws, codes, or systems is now only a "primary factor" in invalidating rulings, contracts, and choice of law/forum clauses. Tenn. Code Ann. § 20-15-103 (2012).

94 Fellmeth, "U.S. State Legislation to Limit Use of International and Foreign Law" at 108.

95 Ibid. at 113.

96 Tenn. Code Ann § 20-15-103 (2012); Kan. Stat. § 60-5102 (2012) (emphasis added).

97 Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4809 (2004).

98 U.S. law provides that domestic law prevails over conflicting provisions of WTO agreements and prohibits private remedies based on alleged violations of these agreements. Courts have nonetheless deemed WTO judgments to be *persuasive* in the resolution of international trade disputes. Some foreign law bans would curtail such a practice because they ban mere *reliance* on international law in judicial decision making. Jeanne J. Grimmett, "World Trade Organization (WTO) Decisions and Their Effect in U.S. Law" (Washington: Congressional Research Service, 2011), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1812&context=key_workplace.

99 "This section shall not be interpreted by any court to conflict with any federal treaty including … any treaty with any … nation, or other international agreement to which the United States is a party to the extent that such treaty or international agreement preempts or is superior to state law on the matter at issue." 2013 Okla. Sess. Laws § 58(G). The definition of foreign law excludes "ratified treaties of the United States and the territories of the United States" from its scope. Ariz. Rev. Stat. § 12-3101 (2012). The 2013 bills introduced in Missouri, Florida, and Iowa also do not apply to "any federal treaty or other international agreement to which the United States is a party to the extent that such federal treaty or international agreement preempts or is superior to state law on the matter at issue." S. 267, 97th Gen. Assemb., Reg. Sess. § A (Mo. 2013); H.R. 757, 97th Gen. Assemb., Reg. Sess. § A (Mo. 2013); S. 58, 2013 Leg., 115th Reg. Sess. § 1 (Fla. 2013); H.R. 351, 2013 Leg., 115th Reg. Sess. § 1 (Fla. 2013); H.R. 76, s. 537C.8, 85th Gen. Assemb., Reg. Sess. (Iowa 2013). The 2013 Senate bill in Texas is "inapplicable to the extent a statute or treaty of the United States requires the application of foreign law or the enforcement of a judgment rendered by a foreign tribunal." S. 1639, 83rd Leg., Reg. Sess. § 1A.007(3)(b) (Tex. 2013). Note that the 2013 House bill in Texas does not apply to all international laws that have "a binding effect on this state or the United States." H.R. 288, 83rd Leg., Reg. Sess. § 148.001 (Tex. 2013).

100 Apart from treaties, the Oklahoma ban exempts "other international agreement[s] to which the United States is a party." Garcia, "International Law and Agreements: Their Effect Upon U.S. Law"; It is unclear, however, whether this refers to executive agreements. Furthermore, the Oklahoma ban does not appear to exempt federal treaties and 'other international agreements' that concern matters traditionally within the power of the states to regulate. Ibid.

101 United States v. Smith, 18 U.S. (5 Wheat) 153, 163–180 (1820).

102 Factor v. Laubenheimer, 290 U.S. 276, 286–288 (1933).

103 Flomo v. Firestone National Rubber Co., LLC, 634 F.3d 1013, 1019 (7th Cir. 2011).

104 Antonin Scalia, "In Decent Respect to the Opinions of Mankind," Keynote address at the Annual Meeting on Foreign Legal Authority in the Federal Courts, Washington, D.C., April 2, 2004.

105 Olympic Airways v. Hussain, 540 U.S. 644, 658, 660 (2004) (Scalia, J., dissenting).

106 Convention on the Civil Aspects of International Child Abduction, Dec. 23, 1981, 102 Stat. 437, *reprinted in* 42 U.S.C. §§ 11601-11611 (1988) [hereinafter Hague Convention]; Abbott v. Abbott, 130 S. Ct. 1983 (2010).

107 Montreal Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106-45 (2000), 2242 U.N.T.S. 309; The Montreal Convention prevails over the 1929 Warsaw Convention. Ibid. art. 55; Air France v. Saks, 470 U.S. 392 (1985).

108 Foreign law bans may lead to such backlash in cases that invoke the "grave risk" defense under the Hague Convention. Under the Convention, children that have been kidnapped are not returned only when there is a "grave risk" that the child's return would expose him or her to "physical or psychological harm" or "otherwise place the child in an intolerable situation." Hague Convention, Convention on the Civil Aspects of International Child Abduction, Dec. 23, 1981, 102 Stat. 437, *reprinted in* 42 U.S.C. §§ 11601-11611 (1988) [hereinafter Hague Convention]; Abbott v. Abbott, 130 S. Ct. 1983 (2010). In order to ensure that the 88 countries that have accepted the Convention do not use the "grave risk" defense to impose the particularities of their own laws, the defense has been limited to extreme circumstances such as if the child would be returned to a war zone, to a situation of famine or disease, or to conditions of serious abuse or neglect. Friedrich v. Friedrich, 78 F.3d 1060, 1069 (6th Cir. 1996). In particular, the defense does not "encompass situations where repatriation might cause inconvenience or hardship, eliminate certain educational or economic opportunities, or not comport with the child's preferences." Blondin v. Dubois, 238 F.3d 153, 162 (2d Cir. 2001). Foreign law bans could lead courts to adopt overly broad interpretations of the "grave risk" defense that undermine these well-established principles. Under the Kansas version of the law, for example, will a court be tempted to consider whether a foreign system treats children differently from the American system—for example, the affirmative action policies of South Africa, Brazil, and India, which explicitly give preference to certain minority races and historically underprivileged groups—and therefore refuse repatriation on the basis that a foreign system places the child in question at "grave risk" of "psychological harm" or in an "intolerable situation"? Such a broad reading would not only be inconsistent with federal law but also international consensus on the narrow meaning of grave risk. During the drafting of the Convention, representatives of other signatories agreed that the mere lack of economic or educational opportunities is not sufficient to trigger the defense. The resulting backlash would complicate the ability of Americans who are seeking the return of their children from other countries under the Convention. Merlene Weiner, "Intolerable Situations and Counsel for Children: Following Switzerland's Example in Hague Abduction Cases," *American University Law Review* 58 (335) (2008): 336–403, available at http://www.hcch.net/upload/expl28.pdf.

109 Anti-foreign law measures introduced in Alabama, South Carolina, and Indiana also appear to include international law within the scope of prohibited foreign law. H.R.J. Res. 0004, 62nd Leg., Reg. Sess. § 2 (Wyo. 2013). Foreign law defined in both bills as "any law, rule, or legal code, or system established, used, or applied in a jurisdiction outside of the states or territories of the United States." S. 4, 2013 Leg., Reg. Sess. § 1(b)(5) (Ala. 2013); S. 44, 2013 Leg., Reg. Sess. § 1(b)(5) (Ala. 2013). Foreign law defined in both bills as "any law, rule or legal code or system established and used or applied in or by another jurisdiction outside of the United States or its territories." S. 60, 120th Gen. Assemb., Reg. Sess. § 2(A) (S.C. 2013); S. 81, 120th Gen. Assemb., Reg. Sess. § 2(A) (S.C. 2013). Foreign law defined as "any law, rule or legal code or system" established, used, or applied

"in a jurisdiction outside the states of the United States, the District of Columbia or the territories of the United States." The Oklahoma ban, as well as 2013 bills introduced in Missouri, Florida, and Iowa, do not apply to "any federal treaty or other international agreement to which the United States is a party" provided that "such federal treaty or international agreement *preempts or is superior to state law on the matter at issue*." 2013 Okla. Sess. Laws § 58(G); S. 267, 97th Gen. Assemb., Reg. Sess. § A (Mo. 2013); H.R. 757, 97th Gen. Assemb., Reg. Sess. § A (Mo. 2013); S. 58, 2013 Leg., 115th Reg. Sess. § 1 (Fla. 2013); H.R. 351, 2013 Leg., 115th Reg. Sess. § 1 (Fla. 2013); H.R. 76, s. 537C.8, 85th Gen. Assemb., Reg. Sess. (Iowa 2013) (emphasis added). This suggests that state law overrides validly enacted treaties unless they concern matters that are within the federal government's enumerated powers under the Necessary and Proper Clause. The Supreme Court, however, has long held that "treaties made pursuant to [the federal government's treaty making] power can authorize Congress to deal with "matters" with which otherwise Congress could not deal." S. 460, 118th Gen. Assemb., Reg. Sess. § 1 (Ind. 2013). United States v. Lara, 541 U.S. 193, 201 (2004) (internal quotation marks omitted). Although the "great body of private relations usually fall within the control of the State," a treaty may override the power of the State. State of Missouri v. Holland, 252 U.S. 416, 434 (1920). Note, however, that the Supreme Court is poised to reconsider whether there are any limits on Congress's authority to implement a valid treaty that intrudes on traditional state prerogatives. Bond v. United States, 681 F.3d 149 (3d Cir. 2012), *cert. granted*, 133 S.Ct. 978 (Jan. 18, 2013) (No.12-158).

110 Salli A. Swartz, "113A: Report 3" (Washington: American Bar Association, 2011), available at http://www.abanow.org/wordpress/wp-content/files_flutter/1313006833113aReport.pdf.

111 Ibid at 8.

112 Baker v. GMC, 522 U.S. 222, 234 (1998).

113 Sherrer v. Sherrer, 334 U.S. 343, 355 (1948).

114 *"Any court … ruling* or *decision* shall violate the public policy of this state and be void and enforceable if the court … bases its rulings or decisions … in whole or in part on any foreign law, legal code or system that would not grant the parties … [the same fundamental liberties provided under the U.S. and Kansas constitutions]." There is nothing in the law that restricts the scope of courts covered by the ban. It could conceivably also extend to federal courts. Kan. Stat. Ann. § 60-51-2 (2012) (emphasis added).

115 In Tennessee, for example, the ban states that "[i]t is the public policy of this state that the primary factor which a court … acting *under the authority of state law* shall consider in granting comity to a decision rendered under [foreign law] … is whether the decision [would violate any state or federal constitutional right]." However, the fact that Tennessee courts are bound by the ban suggests that they will have to apply its prohibitions in enforcing a sister state judgment. Tenn. Code Ann. § 20-15-102 (2012).

116 Ariz. Const. art. III.

117 LA. Const. art. II, § 2.

118 Tenn Const. art. II, § 2.

119 State v. Ponce, 258 Kan. 708, 711, 907 P.2d 876, 879 (1995).

120 Although the U.S. Supreme Court's jurisprudence on the subject concerns the *federal* separation of powers, state courts have nonetheless found these cases applicable in state separation of powers cases. Marbury v. Madison, 5 U.S. 137, 177 (1803); Forty-Seventh Legislature of State v. Napolitano, 143 P.3d 1023, 1026 (Ariz. 2006); Unwired Telecom Corp. v. Parish of Calcasieu, 903 So.2d 392, 405 (La. 2005); Hoover Motor Exp. Co. v. R.R. & Pub. Utilities Comm'n, 195 Tenn. 593 (1953).

121 By prescribing "rules of decision," Congress has "inadvertently passed the limit which separates the legislative from the judicial power." United States v. Klein, 80 U.S. 128, 146 (1871); Linda D. Jellum, "'Which Is to Be Master,' The Judiciary or the legislature? When Statutory Directives Violate Separation of Powers," *UCLA Law Review* 56 (837) (2009): 838-897, available at *http://uclalawreview.org/pdf/56-4-2.pdf"*.

122 Comments of French authors interpreting articles adopted from French Civil Code are "entitled to great persuasive weight" in interpreting Louisiana Civil Code. Martin v. Louisiana Farm Bureau Cas. Ins. Co., 638 So.2d 1213, 1220.

123 In its report on the initial wave of bans on religious and foreign law, the Congressional Research Service concluded that such bans may be viewed as "unconstitutional infringement[s] on judicial authority" since they essentially "direct courts in how to exercise their judicial authority to determine the meaning and effect of various laws or judgments." Charles Lane, "Scalia Tells Congress to Mind Its Own Business," *The Washington Post*, May 19, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/05/18/AR2006051801961.html; Brougher, "Application of Religious Law in U.S. Courts: Selected Legal Issues" at 13–14.

124 U.S. Const. art. I, § 10, cl. 1.

125 "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." Gen. Motors Corp. v. Romein, 503 U.S. 181, 186 (1992). "The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978); "Under the Contract Clause, the contract in question must preexist the passage of the state law." Mabey Bridge & Shore, Inc. v. Schoch, 666 F.3d 862, 874 (3d Cir. 2012); Fabri v. United Techs. Int'l, Inc., 387 F.3d 109, 124 (2d Cir.2004).

126 See discussion infra at main text accompanying notes 85–90.

127 Except Louisiana and Wyoming, all the states that have enacted foreign law bans or introduced bans during the 2013 legislative session constitutionally guarantee the right to a jury trial in civil cases. James Fleming Jr., "Right to A Jury Trial in Civil Actions," *The Yale Law Journal* 72 (4) (1963): 655–693, available at http://www.jstor.org/discover/10.2307/794697?uid=3739584&uid=2129&uid=2&uid=70&uid=4&uid=3739256&sid=21102278740087; Okla. Const. § II-19; Kan. Const. § 5; Ariz. Const. art. 2, § 23; Tenn. Const. art I, § 6; S.C. Const. art. 1, § 14; Ind. Const. art 1, § 20; Fla. Const. art. I, § 22; Tex. Const. art. 1, §15; Mo. Const. art. I, § 22(a); Iowa Const. art. I, § 9; Ala. Const. §11.

128 *In re* Ephedra Products Liab. Litig., 349 B.R. 333, 336 (S.D.N.Y. 2006: Korean procedures "provided a fair hearing, irrespective of whether Korea offers a right to a jury trial." Samyang Food Co. Ltd. v. Pneumatic Scale Corp., 5:05-CV-636, 2005 WL 2711526 (N.D. Ohio Oct. 21, 2005); The fact that Japan lacks jury trials "does not render Japanese courts an inadequate forum." Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764, 768 (9th Cir. 1991). The absence of juries in India "would not deprive the claimants of an adequate remedy." *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 809 F.2d 195, 199 (2d Cir. 1987).

129 Energy Reserves Group v. Kan. Power & Light Co., 459 U.S. 400, 411 – 412 (1983).

130 Even assuming for the moment that states have an interest in preventing the "misuse" of foreign law, the bans must be a "reasonable" and "appropriate" means for advancing that interest. United States Trust Co. v. New Jersey, 431 U.S. 1, 22 (1977). As discussed above, the bans are superfluous because there is already a fixed and well-defined set of statutory laws and common law principles in place to regulate judicial reliance on foreign law. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978).

131 Jeremy Morley, *International Family Law Practice* (Eagan, MN: Thomson West, 2012).

132 The fundamental test of jurisdiction is domicile: "A U.S. court will usually find that a divorce judgment rendered by a foreign nation's court was not effective to end the marriage unless at least one spouse was a good-faith domiciliary of the foreign nation at the time the case was commenced." Ibid

133 Marriage and divorce are matters that have "long been regarded as a virtually exclusive province" of the individual states. Sosna v. Iowa, 419 U.S. 393 (1975). State law usually provides for the recognition of foreign marriages and divorce decrees. In Kansas, for example, "all marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state." Kan. Stat. Ann. § 23-2508 (2012).

134 Under Jewish law, a husband can apparently divorce his wife at will. To avoid inequitable results, it is common for Jewish couples upon marriage to execute a kethuba, "which represents the obligation of the husband under the Jewish faith to, inter alia, provide for his wife upon divorcing her." The kethuba is a "device created to provide economic security for the wife; but was also intended to discourage divorce by making it costly and undesirable for the husband." On the other hand, the wife is "not as free to divorce and [is] subject to loss or reduction of her rights should she divorce her husband on certain grounds." Marriage of Noghrey, 169 Cal. App. 3d 326, 332 n.2 (Ct. App. 1985).

135 This phrase was used in *Soleimani* to describe an Islamic premarital agreement. Soleimani v. Soleimani, No. 11CV4668, slip op. at 31 (D. Kan. Aug. 28, 2012). The *Soleimani* court indicated that it would treat Jewish premarital agreements with the same skepticism as it does with Islamic agreements. Ibid. at 27–29.

136 In Spain, Portugal, Italy, Latvia, Poland, and Slovakia, marriages contracted according to the rules of Catholic canon law have civil effects "from the moment of their religious celebration." Protestant, Jewish and Islamic marriages are also recognized once they are registered with the civil registry. Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (Oxford: Oxford University Press, 2011). In Brazil "church marriage has civil effects according to law." Constituicao Federal [C.F.] [Constitution] art. 226 (2) (Braz.). In other countries marriage is mainly, if not exclusively, within the purview of religious law. In Israel Jewish marriages and divorces may only be administered by the Chief Rabbinate of Israel and the Rabbinic courts. Marriages between Eastern Orthodox, Roman Catholics, Gregorian Armenians, Armenian Catholics, Syrian Catholics, Chaldean Uniates, Greek Catholics, Marionites, and Syrian Orthodox must be administered by a priest and follow the laws and regulations of the particular community involved. With very few exceptions, civil marriages are not permitted. Embassy of the United States Tel Aviv: Marriage Information," available at http://israel.usembassy.gov/consular/acs/marriage.html (last accessed May 6, 2013); Michele Chabin, "Israel to Allow Civil Marriages," The Huffington Post, November 4, 2010, available at http://www.huffingtonpost.com/2010/11/04/israel-to-allow-civil-mar_n_779183.html. In Bangladesh and India Christians, Hindus, and Muslims have separate laws on marriage, separation and divorce; the state officially recognizes all of them. Human Rights Watch, "Will I get my Dues…Before I die" (2012), available at http://www.hrw.org/reports/2012/09/17/will-i-get-my-dues-i-die-0; Hindu Marriage Act, No. 25 of 1955; Indian Christian Marriage Act, No. 15 of 1872; Muslim Personal Law (Shariat) Application Act, No. 26 of 1937.

137 Kam, "Bill Banning Shariah Law in Florida Family Cases Passes Senate Panel."

138 Spouses may enjoy lower rates when they file taxes jointly. Internal Revenue Service, *Exemptions, Standard Deduction, and Filing Information* (Department of Treasury, 2011), available at http://www.irs.gov/pub/irs-pdf/p501.pdf. In the event of the death of a spouse, the surviving spouse is also entitled to certain estate tax benefits. Deborah L. Jacobs, "Married Couple's Guide to the New Estate Tax Law," *Forbes,* December 23, 2010), available at http://www.forbes.com/2010/12/23/married-couples-guide-new-estate-tax-personal-finance-deborah-jacobs.html.

139 "Immigration Visa for a Spouse or Fiancé(e) of a U.S. Citizen," available at http://travel.state.gov/visa/immigrants/types/types_1315.html (last accessed May 2013).

140 In particular, there is a risk that a spouse's religious concerns—which the patient may well share—will not be appropriately reflected in the decision-making process. American Bar Association, "Default Surrogate Consent Status" (2009), available at http://www.americanbar.org/content/dam/aba/migrated/aging/PublicDocuments/famcon_2009.authcheckdam.pdf.

141 State courts are charged with dividing marital assets between the spouses. The broad version of the foreign law ban would allow for opportunistic claims that a marriage was not legally valid in the first place since it was officiated under religious laws that are inconsistent with American notions of liberty and autonomy. If a court were to accept this argument, spouses would have no recourse to state laws of equitable distribution., Kan. Stat, Ann, § 23-2802(a) (2012). He or she would stand to lose his or her share of joint assets acquired during the marriage and may also not be entitled to any award of maintenance. Kan. Stat, Ann, § 23-2902 (2012).

142 Kam, "Bill Banning Shariah Law in Florida Family Cases Passes Senate Panel."

143 Alexandra Leichter, "The Effect of Jewish Divorce Law on Family Law Litigation" (International Academy of Matrimonial Lawyers, 2009), available at http://www.iaml.org/cms_media/files/the_effect_of_jewish_divorce_law_on_family_law_litigation.pdf.

144 Ibid. at 10.

145 Marriage of Noghrey, 169 Cal. App. 3d 326, 332 n.2 (Ct. App. 1985).

146 Office of the Staff Judge Advocate, "Divorce In Japan" (2010), available at http://www.usarj.army.mil/cmdstaffs/sja/assist/Divorce_in_Japan.pdf; Civil Code art. 763 (Japan).

147 To effect a divorce, spouses must state "by petition or otherwise … under oath or affirmation that the marriage is irretrievably broken." Ariz. Rev. Stat. §25-316(A) (2012); The court will not consider an application for divorce until "sixty days after the date of service of process or the date of acceptance of process." Ariz. Rev. Stat. §25-329 (2012).

148 It is uncertain whether courts applying foreign law bans will enforce foreign money judgments relating to the division of matrimonial assets. Under the common law principles of comity, Arizona's courts may enforce these judgments as long as they meet basic jurisdictional and procedural requirements. In light of the foreign law bans, however, courts may feel compelled to delve into the minutiae of foreign divorce procedures to evaluate whether they comply with more rigorous American due process standards. Such analyses frustrate the very purpose of the rule of comity, which is to streamline the procedure for enforcing a foreign judgment on the division of marital assets. Alberta Sec. Comm'n v. Ryckman, 200 Ariz. 540, 545 - 550 (Ct. App. 2001).

149 R. Seth Shippee, "'Blessed Are the Peacemakers': Faith-based Approaches to Dispute Resolution," *ILSA Journal of International and Comparative Law* 75 (1) (2002): 426–469; The Beth Din, or Jewish rabbinical arbitration court, "is the most common religious arbitration in the United States, [and] Islamic and Christian institutions also provide for religious arbitration." Helfand, "Religious Arbitration and The New Multiculturalism: Negotiating Conflicting Legal Orders," at 1243.

150 Religious arbitrations involving family disputes are governed by state statutes generally modeled after the Revised Uniform Arbitration Act, 7 U.L.A. 10-94 (2000).

151 If an arbitration agreement, for example, allowed an arbitrator to refuse to hear testimony of a woman, the agreement may be void on grounds of unconscionability. Helfand, "Religious Arbitration and The New Multiculturalism: Negotiating Conflicting Legal Orders," at 1299.

152 "An award is "irrational if there is 'no proof whatever to justify the award.'" The case found that Beth Din arbitration award was not totally irrational. Brisman v. Hebrew Acad. of Five Towns & Rockaway, 70 A.D.3d 935, 936 (2010).

153 Helfand, "Religious Arbitration and The New Multiculturalism: Negotiating Conflicting Legal Orders," at 1294–1298.

154 The case applied "strong federal policy favoring arbitration" to agreement referring dispute to Christian Conciliation. Ibid. at 1245; Encore Productions, Inc. v. Promise Keepers, 53 F. Supp. 2d 1101, 1109 (D. Colo. 1999). The case found that arbitration "is strongly favored under federal and state law" in a case involving an agreement to arbitrate before the Texas Islamic Court. Jabri v. Qaddura, 108 S.W.3d 404, 410 (Tex. App. 2003)

155 Indeed, the legislative sponsors of some of these bans have suggested that some religions are more worthy than others; Kansas Sen. Susan Wagle has justified the ban on the basis that it will protect women from Sharia, while Florida Sen. Alan Hayes has claimed that state anti-foreign law bill is a "vaccination" against Sharia. The implication is that some religions—in particular, Islamic principles and traditions—deserve more scrutiny than others under the ban. U.S. Const. amend. I.

156 Elliott, "The Man Behind the Anti-Shariah Movement"; Kathleen Baydala Joyner, "Lawyers Speak Against Ga. Bill That Bans Use of Foreign Laws in State Courts," Law.com, February 7, 2011), available at http://www.law.com/jsp/article.jsp?id=1202480459397&Lawyers_Speak_Against_Ga_Bill_That_Bans_Use_of_Foreign_Laws_in_State_Courts; Kathy Adams, "Bills to Ban Use of Foreign Laws Rile Groups," *Virginian Pilot*, February 12, 2012), available at http://hamptonroads.com/2012/02/bills-ban-use-foreign-laws-rile-groups.

157 2013 Okla. Sess. Laws § 58(E); Kan. Stat. Ann. § 60-5108 (2012); Ariz. Rev. Stat. §12-3102(B) (2012); La. Rev. Stat. Ann. § 9:6001(G) (2012); Tenn. Code Ann. § 20-15-105 (2012).

158 Bills introduced in Missouri, Iowa, and Alabama, as well as the Senate bill introduced in Texas, categorically exclude corporations from the scope of the ban. S. 267, 97th Gen. Assemb., Reg. Sess. § 7 (Mo. 2013); H.R. 757, 97th Gen. Assemb., Reg. Sess. § 7 (Mo. 2013); H.R. 76, s. 537C.7(1), 85th Gen. Assemb., Reg. Sess. (Iowa 2013); S. 4, 2013 Leg., Reg. Sess. § 8(h) (Ala. 2013); S. 44, 2013 Leg., Reg. Sess. § 8(h) (Ala. 2013); S. 1639, 83rd Leg., Reg. Sess. § 1A.007(1) (Tex. 2013); The bills introduced in Florida do not apply to corporations "[e]xcept as necessary to provide effective relief in actions or proceedings brought under, pursuant to, or pertaining to the subject matter of chapter 61 or chapter 88 [laws relating to family law and real estate proceedings]." S. 58, 2013 Leg., 115th Reg. Sess. § 3(b) (Fla. 2013); H.R. 351, 2013 Leg., 115th Reg. Sess. § 3(b) (Fla. 2013). The House bill introduced in Texas does not explicitly exempt corporations, but states that it does not apply to the recognition of foreign judgments and orders "for the purpose of … enforcing a business contract or arrangement that lists [Texas] as a venue for disposition." H.R. 288, 83rd Leg., Reg. Sess. § 148.002(b)(2)(B) (Tex. 2013).

159 Bureau of the Census, *Statistics about Business Size (including Small Business) from the U.S. Census Bureau*, (Department of Commerce, 2007), available at http://www.census.gov/econ/smallbus.html; Small Business Administration, *Frequently Asked Questions: What is a small business?* (Department of Commerce, 2012), available at http://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf.

160 Mathew J. Wilson, "Demistifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding," *Wake Forest Law Review* 46 (1) (2012): 887–888, available at http://wakeforestlawreview.com/wp-content/uploads/2012/02/w03_Wilson.pdf.

161 "Successful international business transactions require, and benefit from, a firmly established legal infrastructure that provides adequate comfort – legal certainty – for those who wish to participate in the global marketplace." Peter Krug, "State Question 755: An Unnecessary Harm to Oklahoma," *The Norman Transcript*, October 2, 2010, available at http://normantranscript.com/letters/x1760133151/State-Question-755-An-unnecessary-harm-to-Oklahoma.

162 The uncertainty created by these laws could, for example, jeopardize projects like the $5 billion assembly plant that German car manufacturer BMW established in South Carolina, threatening job creation. Betty Joyce Nash, "When South Carolina Met BMW" (Richmond, VA: Region Focus, 2011), available at http://www.richmondfed.org/publications/research/region_focus/2011/q2/pdf/feature2.pdf; BMW complex supports 23,050 jobs

and generates $1.2 billion in wages and salaries annually in the state. Douglas P. Woodward and Paulo Guimaraes, "BMW in South Carolina: The Economic Impact of a Leading Sustainable Enterprise" (Columbia: Moore School of Business, 2008), available at http://www.bbr.unl.edu/aubertest/documents/BMW_Economic_Impact.pdf .

163 Restatement (Second) of Conflict of Laws § 187 (1971) [hereinafter Restatement].

164 Salli A. Swartz, "113A: Report 3."

165 Restatement (Second) of Conflict of Laws.

166 Ibid.

167 Gary Born, *International Commercial Arbitration* (The Netherlands: Kluwer Law International, 2009).

168 This example is adapted from the facts of Communications & Computers, Ltd. v. Lucent Technologies International, 331 F. Supp. 2d 290 (D.N.J. 2004).

169 There appears to be only two situations where U.S. courts have refused to apply Saudi law: when the contract and the parties are not substantially related to Saudi Arabia or when the interest of the forum state in applying local laws specific to the dispute—for example, when the local law on contractual damages or defamation outweighs that of applying the Saudi laws. Godbey v. Frank E. Basil, Inc., 603 F. Supp. 775 (D.D.C. 1985); McGhee v. Arabian Am. Oil Co., 871 F.2d 1412 (9th Cir. 1989).

170 See Soleimani v. Soleimani, No. 11CV4668, slip op. at 31 (D. Kan. Aug. 28, 2012), available at http://www.volokh.com/wp-content/uploads/2012/09/soleimani.pdf.

171 "If liability is found in a trial conducted under this article, the trier of fact shall make separate findings for each claimant specifying the amount of any: 1. Past damages in a lump sum[;] 2. Future damages for noneconomic loss in a lump sum [and] 3. Future damages and the periods over which they will accrue, on an annual basis, for each of the following types: (a) Costs of health care [and] (b) other economic loss" Ariz. Rev. Stat..§12-584(A) (2012).

172 The foreign law bans also apply to arbitration proceedings. 2013 Okla. Sess. Laws § 58(B); Kan. Stat. Ann. § 60-5103 (2012); La. Rev. Stat. Ann. § 9:6001(C) (2012); Tenn. Code Ann. § 20-15-103(a) (2012); Ariz. Rev. Stat. § 12-3103 (2012).

173 Kan. Stat. Ann. §§ 5-401, 5-403 (2012); Ariz. Rev. Stat. §§ 12-1501, 12-1503 (2013).

174 Southwest Livestock & Trucking Co. v. Ramon, 169 F.3d 168–171.

175 This example is adapted from the facts of Southwest Livestock & Trucking Co. v. Ramon, 169 F.3d 317.

176 "Refusal to recognize a foreign nation's judgment for failure to comply with Arizona procedural law would go well beyond the limitations described in *Restatement* §§ 481 and 482 [restatements pertaining to enforcement of foreign judgments] and might encourage flight to Arizona to avoid legitimate obligations justly imposed by foreign nations› courts of competent jurisdiction." Alberta Sec. Comm›n v. Ryckman, 200 Ariz. 540, 545 - 550 (Ct. App. 2001).

177 "We must decline, absent *grave* procedural irregularities or allegations of fraud, to impugn the lawfulness of the judgments of that judicial system from which our own descended." The case reversed the decision of an Arizona bankruptcy court denying enforcement of an English judgment on due process grounds—emphasis added..Hashim, 213 F.3d 1169, 1172 (9th Cir. 2000).

178 The case enforced non-U.S. court judgment despite differences in procedures because "[w]e are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home." Soc'y of Lloyd's v. Turner, 303 F.3d 325 (5th Cir. 2002); Ackerman v. Levine, 788 F.2d 830, 841-42 (2d Cir. 1986). The case recognized that even though Romanian judicial system was "far from perfect," it was not wholly devoid of due process and Romanian judgment was therefore enforceable. S.C. Chimexim S.A. v. Velco Enterprises Ltd., 36 F. Supp. 2d 206, 214 (S.D.N.Y. 1999).

179 Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(b), Jun. 7, 1959, 21 U.S.T. 2517 (codified in 9 U.S.C. §§ 201-208 (1994)).

180 Sunshine Min. Co. v. United Steelworkers of Am., 823 F.2d 1289, 1295 (9th Cir. 1987).

181 Generica Ltd. v. Pharm. Basics, Inc., 125 F.3d 1123, 1130 (7th Cir. 1997).

182 This possibility is not merely theoretical since state courts have adopted precisely such an approach in the past. Asa William Markel, "International Litigation in Arizona: Litigating Foreign Country Judgments in Arizona," *Phoenix Law Review* 1 (117) (2008): 125–130, available at http://www.phoenixlaw.edu/lawreview/Latest%20Updates/Volume%20I/INTERNATIONAL%20LITIGATION%20IN%20ARIZONA%20-%20Asa%20Markel.pdf.

183 Oklahoma, Tennessee, Louisiana, and Arizona prohibit the government from enacting laws that 'substantially burden' a person's free exercise of religion, regardless of whether these laws impose that burden on everyone. Such laws are only valid if they are the least restrictive means of furthering a compelling governmental interest. Okla. Stat. tit. 51, § 253 (2012); 2009 Tenn. Pub. Acts 573 § 1(b), (c); La. Rev. Stat. Ann. § 13-5233 (2013); Ariz. Rev. Stat. Ann. § 41-1493.02 (2012). The courts in Kansas have established a materially similar approach to free exercise claims. In *Stinemetz v. Kansas Health Policy Auth.*, 45 Kann. App. 2d 818 (2011), the Court of Appeals held that Kansas residents have "even greater protections concerning the free exercise of religious beliefs under § 7 of the Kansas Constitution Bill of Rights [the Kansas equivalent of the Free Exercise Clause] than under the federal Constitution." Accordingly, whether a Kansas law violates an individual's right to religious freedom depends on: "(1) whether the belief is sincerely held; (2) whether the state action burdens the exercise of religious beliefs; (3) whether the state interest is overriding or compelling; and (4) whether the state uses the least restrictive means." Ibid. at 849.

184 Elliott, "The Man Behind the Anti-Shariah Movement."

185 Ibid.

186 Ibid.

187 Ibid.

188 Ibid.

189 Ibid.

190 "In this great country of ours and in the state of Kansas, women have equal rights," Wagle said during the Senate's debate. "They stone women to death in countries that have Shariah law." Kansas Lawmakers Pass Anti-Islamic Law Measure," Fox News, May 11, 2012, available at http://www.foxnews.com/us/2012/05/11/kansas-lawmakers-pass-anti-islamic-law-measure455125/.

191 Andy Marso, "Lawmakers Urged to Address Sharia," *Topeka Capital-Journal*, April 14, 2012, available at http://m.cjonline.com/news/2012-04-14/lawmakers-urged-address-sharia.

192 Faiz Shakir, "Kansas Legislature Passes Discriminatory Anti-Muslim Bill By Calling It A 'Women's Rights' Issue," ThinkProgress, May 13, 2012, available at http://thinkprogress.org/justice/2012/05/13/483278/kansas-legislature-passes-discriminatory-anti-muslim-bill-by-calling-it-a-womens-right-issue.

193 During the Senate Judiciary hearings on the bill, Sen. Dewayne Bunch (R-Cleveland) stated that, "I know that you [Bregman] have plenty of time to work on this and meet with interested parties to work everything out." Tennessee General Assembly, "Senate Judiciary Hearing on SB 3740" (2010), available at http://tnga.granicus.com/MediaPlayer.php?view_id=73&clip_id=2988 (from 2:58 onward).

194 "Eagle Forum: Phyllis Schlafly," available at http://www.eagleforum.org/about/bio.html (last accessed May 2013).

195 Joanne Bregman, "TN Leads Against Shariah," (Nashville: Tennessee Eagle Forum, 2011), available at http://www.tneagleforum.org/LEARN_ABOUT_THE_ISSUES/TN_Leads_Against_Shariah/

196 The Tennessee Eagle Forum chapter works closely with the Tennessee Freedom Coalition, which "galvanized anti-Muslim hysteria in 2010 by leading the protest of the proposed Islamic center in Murfreesboro." Ali and others, "Fear Inc." The Eagle Forum generally has "held multiple sessions on the threat of radical Islam," and partnered with ACT! for America and the Center for Security Policy "to push anti-Muslim issues, particularly anti-Sharia hysteria." Ibid.

197 "Bregman, "TN Leads Against Shariah."

198 Bob Smietana, "Tennessee Bill Would Jail Shariah Followers," *USA Today*, February 23, 2011, available at http://usatoday30.usatoday.com/news/nation/2011-02-23-tennessee-law-Shariah_N.htm. The bill also called Sharia a "legal-political-military doctrine and system" that requires its followers to support the overthrow of the United States government. Tanya Somanader, "Tennessee Bill Dubs Sharia Law 'Treasonous,' Would Punish Muslims With 15 Years In Jail," ThinkProgress, February 23, 2011, available at http://thinkprogress.org/politics/2011/02/23/145849/tennessee-bill-dubs-Sharia-law-treasonous-would-punish-muslims-with-15-years-in-jail/. The bill was subsequently amended to remove any references to Sharia or Muslims and became a general ban against material support for entities designated as foreign terrorist organizations. The ban was signed into law on June 16, 2011. *2011 Tenn. Pub. Acts 497*.

199 Smietana, "Tennessee Bill Would Jail Shariah Followers."

200 Joe Wolverton, "States Take Preemptive Strike Against Shariah," The New American, August 18, 2010, available at http://www.thenewamerican.com/usnews/politics/item/3285-states-take-preemptive-strike-against-shariah.

201 Christopher Holton, "Louisiana at Leading Edge in Fight Against Shariah," The Hayride, August 16, 2010, available at http://thehayride.com/2010/08/louisiana-at-leading-edge-in-fight-against-shariah/.

202 "Sen. Alan Hays … drew fire from Islamic groups two weeks ago when he likened Shariah law to a 'dreadful disease' requiring inoculation to protect Americans." Kam, "Bill Banning Shariah Law in Florida Family Cases Passes Senate Panel."

203 In the materials he urged lawmakers to pass the bill in order to "save us from an internal attack" and "protect our freedom." Brittany Davis, "Anti-Sharia Flyers Circulate Senate Hallways," *Miami Herald,* March 6, 2012, available at http://miamiherald.typepad.com/naked-politics/2012/03/anti-sharia-flyers-circulate-senate-hallways.html. State Rep. Larry Metz (R-Yalaha), who is sponsoring a companion House bill, echoed these sentiments, referring to the measure as a safeguard against "offensive law invading our legal system." Kam, "Bill Banning Shariah Law in Florida Family Cases Passes Senate Panel."

204 Ansuya Harjani, "U.S. Slips Down Ranks of Global Competitiveness," CNBC, September 5, 2012, http://www.cnbc.com/id/48905756/US_Slips_Down_the_Ranks_of_Global_Competitiveness.

About the Center for American Progress

The Center for American Progress is a nonpartisan research and educational institute dedicated to promoting a strong, just, and free America that ensures opportunity for all. We believe that Americans are bound together by a common commitment to these values and we aspire to ensure that our national policies reflect these values. We work to find progressive and pragmatic solutions to significant domestic and international problems and develop policy proposals that foster a government that is "of the people, by the people, and for the people."

Center for American Progress

About the Brennan Center for Justice

The Brennan Center for Justice at New York University School of Law is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. We work to hold our political institutions and laws accountable to the twin American ideals of democracy and equal justice for all. The Brennan Center's work ranges from voting rights to campaign finance reform, from racial justice in criminal law to constitutional protection in the fight against terrorism. A singular institution—part think tank, part public interest law firm, part advocacy group, part communications hub—the Brennan Center seeks meaningful, measurable change in the systems by which our nation is governed.

BRENNAN
CENTER
FOR JUSTICE
at New York University School of Law

1333 H STREET, NW, 10TH FLOOR, WASHINGTON, DC 20005 • TEL: 202-682-1611 • FAX: 202-682-1867 • WWW.AMERICANPROGRESS.ORG