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Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts

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I. INTRODUCTION

Muslims living in a secular, liberal democratic state face a fundamental dilemma: reconciling the obligation to live according to *Shari'a*¹ with their civic duty to follow secular laws.² Muslims attempt to resolve this dilemma in a number of ways. Some enter public office and try to influence the generally applicable laws of their country. Others advocate greater legal pluralism, thus allowing Muslims to settle certain disputes under Islamic law. In Canada, for example, the Islamic Institute for Civil Justice ("IICJ") announced plans to create *Shari'a* tribunals and claimed that it would begin arbitrating family and commercial disputes according to Islamic law.³ Other Muslims incorporate the laws of *Shari'a* into their daily affairs and attempt to structure their private and professional lives in accordance with the values of their faith.⁴ Through contract law, Muslims can arrange marriages, divorces, child custody disputes, financial investments, wills, and professional relationships in accordance with Islamic law. In this way, Muslims can accomplish their dual obligation: to abide by *Shari'a* and to help ensure that other Muslims do so as well.

1. *Shari'a* is the will of God and is manifested in Islamic law.

2. Khaled Abou El Fadl, *The Religious Voice in the Public Square: Muslim Minorities and Self Restraint in Liberal Democracies*, 29 LOY. L.A. L. REV. 1525, 1530–31 (1996).

3. For a description of these *Shari'a* tribunals, see DeNeen L. Brown, *Canadians Allow Islamic Courts to Decide Disputes*, WASH. POST, Apr. 28, 2004, at 14A. These tribunals are possible due to the passage of the Arbitration Act that allows individuals to settle their disputes according to religious law. The Ontario Arbitration Act, 1991 S.O., ch. 17 (Can.). Muslims may take advantage of these tribunals to settle issues such as inheritance, divorce, and commercial contract disputes. Religious tribunals, however, may not hear criminal matters or disputes involving third parties. Although the IICJ has not officially started arbitrating cases, it has started training arbitrators in both *Shari'a* and Canadian law. The IICJ's proposal to create *Shari'a* tribunals has generated a nation-wide controversy on whether the laws of *Shari'a* are compatible with the liberal Western values. Opponents of these tribunals claim that these tribunals will discriminate against Muslim women. Although the arbitration process is voluntary, many Muslim women may be coerced into unfavorable arbitration by religious leaders or family members. On the other hand, proponents of arbitration argue that the law should afford Muslims the same opportunity to adjudicate disputes according to religious law as other religious minorities currently have. Jews, for example, have been quietly arbitrating similar cases for a number of years. Supporters of arbitration argue that *Shari'a* is compatible with Western values and that this Arbitration Act will allow Western minded Muslims in Canada to develop a more liberal form of *Shari'a* than is currently practiced in many countries of the Middle East. For more information, see Natasha Bakht, *Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women*, 1 MUSLIM WORLD J. HUM. RTS. Art. 7 (2004), available at <http://www.bepress.com/mwjhr/voll1/iss1/art7/>.

4. The rapidly expanding field of Islamic finance is evidence of the emerging desire to live in accordance with *Shari'a*. The current level of *Shari'a* compliant investment is about \$260 billion, and the Islamic finance industry is growing at a rate of 15 to 20 percent a year. James Hume, *Islamic Finance: Provenance and Prospects*, 2004 INT'L FIN. L. REV. 48, 48 (May 2004).

Judicial interpretation and enforcement of contracts that incorporate religious law, however, can raise constitutional problems, especially when the religious law is unfamiliar to most U.S. judges. Consider the following two examples. Two parties draft a contract in which the buyer agrees to purchase ten bushels of wheat from a farmer. The contract authorizes the farmer to deliver the wheat in two months time, and the buyer agrees to pay the market price for the wheat at the time of delivery. The contract stipulates that Shari'a governs the rights and obligations of the two parties. A month before the anticipated wheat harvest, the price of wheat increases and the buyer wishes to void the contract, arguing that the contract violated the prohibition of *gharar*⁵ (uncertainty) because it did not specify the price for the wheat. The seller disagrees and sues the buyer for breach of contract.

A judge presiding over this dispute would first turn to state contract law to determine whether there is a valid contract and what the precise terms of the contract are. Assuming a contract exists, the judge must ascertain the intent of the parties. Since the two persons explicitly stated that they wish Islamic law to govern their contractual obligations, the judge would then determine whether the existence of *gharar* would allow one party to void the contract under Islamic law. Finally, the judge would have to decide whether the slight uncertainty created by the small fluctuations in wheat prices would violate the prohibition of *gharar*, thus allowing the buyer to void the contract. This is a difficult task for judges who may be unfamiliar with Islamic law. More significantly, as argued in this Note, such a task may require a judge to overstep her First Amendment constraints.

In the second example, a Muslim man and woman sign a prenuptial agreement stating that upon the husband's divorce of his wife under Islamic law, the husband will pay the wife a certain amount of money. The contract further clarifies that a divorce shall be binding under Islamic law upon the declaration of the triple *talaq*.⁶

5. Islamic law prohibits uncertainty in contracts because uncertainty creates an imbalance in the benefits that each party will receive. If the price of wheat, for example, goes up, then the seller will receive a benefit at the cost of the buyer. Likewise, if it goes down, the buyer will receive an additional benefit. Shari'a seeks to maintain a strict balance of benefits between the contracting parties. NAYLA COMAIR-OBEID, *THE LAW OF BUSINESS CONTRACTS IN THE ARAB MIDDLE EAST* 55-64 (Mark S. W. Hoyle ed., Kluwer Law International 1996).

6. Under Islamic law, the man lawfully divorces his wife by pronouncing the *talaq* ("I divorce you") three times. Jurists disagree, however, whether this statement uttered three times consecutively amounts to a single or a triple *talaq*. MOHAMMED HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* 391 (The Islamic Texts Society, 3d ed. 2003) (1989). In India, for example, local Islamic jurists took an extreme position on this question, declaring that a man who uttered the *talaq* three times in his sleep lawfully divorced his wife. The jurists told the couple that if they wished to remarry, the woman would have to marry another man, spend a

Five years later, in a state of rage, the husband declares: "I divorce you; I divorce you; I divorce you." After the husband calms down, he apologizes and asks for forgiveness. The woman, believing that her husband has lawfully divorced her under Islamic law, divorces him in state court and sues for specific performance of the contract. The judge must decide whether the condition precedent to the contract, the declaration of a triple talaq, had occurred. Ultimately, the judge would have to decide whether the excited utterances of the phrase "I divorce you" count as a single talaq or as a triple talaq under Islamic law.

Adjudicating these contract disputes raises significant constitutional and pragmatic concerns, which courts and the academy have not adequately recognized. This Note argues that the First Amendment limits courts' ability to interpret contracts that contain Islamic legal terms or stipulate that Islamic law governs the performance of the contract. Although judges must heed the First Amendment restraints when interpreting contracts that incorporate religious terms or law, First Amendment concerns are especially prevalent with Islamic legal contracts for several reasons. Islam, unlike other major religions, does not distinguish between the divine and the secular, making it difficult for judges to avoid examination of religious terms. Moreover, there is no single authoritative interpretation of Islamic law or doctrine, which creates problems for judges attempting to interpret Islamic law.

This Note concludes that judges should be cautious in interpreting disputed Islamic legal terms or in applying Islamic law for two reasons. First, the interpretation of an Islamic legal term may necessarily entail a determination of religious doctrine, which the First Amendment prohibits.⁷ Muslims who incorporate Islamic legal terms into contracts often desire those terms to be interpreted in accordance with Shari'a. Therefore, a judge cannot merely look to the parties' understanding of the terms or to the terms' plain (or secular) meaning. Instead, a judge must look to their religious meaning, which is often uncertain or disputed by Muslim jurists.

Second, judicial determinations of the meaning of Islamic legal terms may frustrate the intent of the parties and impose obligations

night with him, and then obtain a lawful divorce. This decision has been widely criticized. *Sleep 'Divorce' Counts*, CNN, March 26, 2006 at <http://edition.cnn.com/2006/WORLD/asiapcf/03/27/india.religion.reut/index.html>.

7. See discussion *infra* Part III.A. A religious contract includes any contract that: (1) stipulates that a religious law will determine the rights and obligations under the contract; (2) requires a party to perform a religious function; or (3) requires the interpretation of religious terms.

that the contracting parties did not contemplate. Muslims often do not share a mutual understanding of the laws of Shari'a or the precise definitions of religious terms. Indeed, under Islamic law, the parties' will or intent does not determine their rights under the contract. Once the contract has been formed Shari'a defines their rights,⁸ and Muslims depend on religious scholars, not judges, to clarify these rights.

Part II of this Note provides a brief summary of contract law and summarizes the canons of construction that judges may use to ascertain the intent and mutual understanding of the parties when the contract was formed. Part III discusses the Supreme Court's First Amendment jurisprudence and the limits that it places on judges as they attempt to interpret religious contracts. This Part describes the development of the "neutral-principles" doctrine and examines how courts have applied this doctrine to three different types of religious contract disputes. Part IV addresses whether judges can successfully apply the neutral-principles doctrine to resolve controversies regarding Islamic law. This Part first provides some background information on Islamic law and jurisprudence. Next, it examines how courts have attempted, and failed, to apply the neutral-principles doctrine to Islamic contract disputes. Part V suggests that, although judges may not interpret Islamic law, they may imply an arbitration clause into these disputed contracts. Such an approach helps enforce the parties' original intent and reconciles the states' interest in adjudicating disputes with the First Amendment's prohibition against excessive state entanglement with religion.

II. CONTRACT INTERPRETATION

A judge's primary goal in interpreting a contract is to ascertain the intention of the parties as expressed in the contract. The Second Restatement of Contracts states that the "objective of interpretation in the general law of contracts is to carry out the understanding of the parties rather than to impose obligations on them contrary to their understanding."⁹ Words, however, are often susceptible to varying interpretations. The meaning of a word depends on its verbal context and the surrounding circumstances.¹⁰ A judge may not always be able

8. See COMAIR-OBEID, *supra* note 5, at 5 (noting that "[o]nce the contractual process has been set in motion, the effects of the contract . . . are produced immediately, as the *shari'a* has provided and not as the parties have agreed").

9. RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. c (1978).

10. Even the so called "plain meaning" of the word is subject to extrinsic factors such as education, experience, and common usage of the speaker or interpreter. See Pac. Gas & Elec. Co.

to discover the intent of the parties from the mere words themselves and their arrangement within the contract.

Judges have thus developed canons of construction for interpreting contracts. If the language of the contract is plain and unambiguous, judges may give effect to the prevailing meaning of the language unless another intention is manifested in light of the circumstances of the contract.¹¹ If a term is ambiguous, or fairly susceptible to different interpretations, judges may look to the course of performance between the two parties, the course of dealing, and the general usages of trade.¹² If the intent of the parties is still unascertainable, judges can resort to statutory or common law rules to fill in the gaps of the contract. Although judges should strive to give effect to the mutual intent of the contracting parties, they may never be able to discern the subjective intent of each party. Thus, the party urging an interpretation different from the plain meaning, or the meaning indicated from the context of the contract, bears the burden of proof in showing she intended such a meaning.

Canons of construction aid judges in interpreting secular contracts. With religious contracts, however, several factors may hinder judicial interpretation. First, judges may be unfamiliar with the common meaning of religious terms, or a religious term may not have a prevailing meaning due to the diversity of religious beliefs. Second, and more importantly, judges are bound by the constraints of the First Amendment. Judges are required to maintain the separation between church and state, and therefore may not be able to make determinations regarding the meaning of religious language or law as requested by the contracting parties. The next Part will discuss in depth the First Amendment constraints on the interpretation of religious contracts. It will also analyze the methods that judges have employed to interpret and enforce such contracts.

v. G.W. Tomas & Drayage Rigging Co., 69 Cal. Rptr. 561, 564 (Cal. 1968) (stating that “[t]he meaning of particular words or groups of words varies with the verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers”). Justice Holmes commented, “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” *Town v. Eisner*, 245 U.S. 418, 425 (1918).

11. EDWARD J. MURPHY ET AL., *STUDIES IN CONTRACT LAW* 647 (Foundation Press, 6th ed. 2003) (1970).

12. *Id.*

III. THE FIRST AMENDMENT

A. *General Constraints on Government Action*

Judicial enforcement of religious contracts raises important First Amendment questions and concerns. The religion clauses of the First Amendment are commonly referred to as the "Establishment Clause" and the "Free Exercise Clause."¹³ The Establishment Clause forbids the government from establishing or supporting any religion, and the Free Exercise Clause forbids the government from interfering with an individual's liberty to practice his or her religion of choice.¹⁴ Although some religious advocates view the Establishment Clause as an impediment to religion, the drafters of the Constitution incorporated both clauses into the First Amendment to preserve the sanctity and freedom of religion.¹⁵ The framers of the Constitution believed that the separation of church and state was essential to preserve religious "liberty for themselves and for their posterity" and to allow for the growth and development of religion.¹⁶ More recently, Justice Blackmun stated that the Establishment Clause is based on the belief that "religious freedom cannot thrive in the absence of a vibrant religious community and that such a community cannot prosper when it is bound to the secular."¹⁷

The Supreme Court's jurisprudence regarding the Establishment Clause is in a state of disarray.¹⁸ Despite the importance of the Establishment Clause, the Court only started to clarify its meaning in the past half-century, beginning with *Everson v. Board of Education*¹⁹ in 1947. In this case, Justice Black proclaimed

13. STEVEN H. SHIFFRIN & JESSE H. CHOPER, *THE FIRST AMENDMENT: CASES-COMMENTS-QUESTIONS* 643 (West Group, 3d ed. 2001) (1991). The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. 1. Although the Constitution only refers to Congress, the Supreme Court has historically viewed the First Amendment as a restraint on all government action. See *Waston v. Jones*, 80 U.S. 679 (1872) ("Any other than [ecclesiastical courts] must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt which would do anything but improve either religion or good morals.").

14. SHIFFRIN & CHOPER, *supra* note 13, at 643-45.

15. *Id.* at 644-45.

16. *Id.* at 644.

17. *Lee v. Weisman*, 505 U.S. 577, 609 (1992).

18. See Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 782 (1998).

19. 330 U.S. 1 (1947).

the need for strict separation: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."²⁰ In subsequent cases, the Court acknowledged that strict separation is not feasible in a country deeply rooted in religious tradition, and that some relationship between government and religion is inevitable. Thus, the Establishment Clause only requires that the government maintain "a course of neutrality among religions, and between religion and nonreligion."²¹

In the 1971 decision of *Lemon v. Kurtzman*, the Court adopted a three-prong approach to evaluate the constitutionality of state or federal action under the Establishment Clause.²² Under the "*Lemon* Test," state action is permissible only if it: (1) has a secular purpose; (2) does not have a primary effect of promoting or inhibiting religion; and (3) does not excessively entangle the government with religion.²³

Although the Court has never overruled *Lemon*, a majority of the current Justices have expressed their dissatisfaction with the test and prefer a more nuanced, case-by-case approach for evaluating state action under the Establishment Clause.²⁴ In recent years, the *Lemon* Test has undergone several important changes. First, the Court has de-emphasized the "purpose" prong and has generally deferred to a state's articulated secular purpose.²⁵ Second, the Court has collapsed the second and third prongs, viewing "excessive entanglement" as one criterion in assessing whether the statute has the primary "effect" of advancing or inhibiting religion. Justice O'Connor explained this shift by noting that "the factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect'."²⁶

20. *Id.* at 18.

21. *Sch. Dist. v. Ball*, 473 U.S. 373, 382 (1985). The requirement for government neutrality in religion is firmly established in the Court's First Amendment jurisprudence. *See, e.g.*, *Gillette v. United States*, 401 U.S. 437, 452 (1971) (stating that the "Establishment Clause forbids subtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses"); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (stating that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest"); *Rosenberger v. Rectors of Univ. of Va.*, 515 U.S. 819, 839-40 (1995) (discussing and applying the requirement of religious neutrality); *Mitchell v. Helms*, 530 U.S. 793, 810-13 (2000) (same).

22. 403 U.S. 602, 612-13 (1971).

23. *Id.*

24. Greenawalt, *supra* note 18, at 784. In *Lynch v. Donnelly*, Justice Burger wrote that the Court has "repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." 465 U.S. 668, 679 (1984).

25. Justice Scalia has repeatedly criticized the first prong of the test, arguing that "discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task." *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

26. *Agostini v. Felton*, 521 U.S. 203, 232 (1997).

She concluded that it is best to “treat [entanglement] as an aspect of the inquiry into a statute’s effect.”²⁷

Thus, the Court now focuses primarily on whether the state action has the effect of advancing or inhibiting religion. One of the primary concerns under the “effects” inquiry is whether the state action endorses religion. In *Lynch v. Donnelly*, Justice O’Connor wrote that state endorsement of religion is unconstitutional because it “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”²⁸ In *Capitol Square Review & Advisory Board v. Pinnete*, O’Connor added that the state can violate the Establishment Clause even when the endorsement is unintended: “Where the government’s operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, the Establishment Clause is violated.”²⁹ The Establishment Clause not only prohibits the endorsement of religion in general, but also the endorsement of one sect’s beliefs over another’s. In *Larson v. Valente*, the Court reaffirmed that the “government must be neutral when it comes to competition between sects.”³⁰

Although the Court has largely focused on the “effects” prong in evaluating the constitutionality of legislative and executive acts, judicial action poses unique concerns regarding state entanglement with religion. As one commentator noted, “judicial resolution of theological or ecclesiastical disputes, even when necessary to resolve litigation, would impermissibly entangle the government in the affairs of religion.”³¹ In *Employment Division v. Smith*, Justice Scalia expressed similar concerns, stating that judges must abstain from evaluating both the “validity of particular litigants’ interpretations of [religious beliefs]” and the “relative merits of differing religious claims.”³² He added that “in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.”³³

Aside from these First Amendment restraints, the Supreme Court has recognized a pragmatic reason for refraining from

27. *Id.* at 233.

28. 465 U.S. at 688.

29. 515 U.S. 753, 777 (1995).

30. 456 U.S. 228, 246 (1982).

31. See Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 132.

32. 494 U.S. 872, 887 (1990).

33. *Id.*

adjudicating religious disputes: courts are generally not competent to resolve religious questions, which are better left to religious bodies. Justice Souter once noted that he could “hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible.”³⁴ In light of these concerns, many lower courts have simply “dismissed a wide range of otherwise ordinary disputes, whenever their resolution would require examination of religious matters.”³⁵

Despite these constitutional and pragmatic concerns, the First Amendment does not bar all judicial involvement in religious disputes. In the 1970s, a series of church property disputes forced the Court to articulate an approach for adjudicating controversies that concern religion or religious organizations. In these cases, the Court consistently held that civil courts may not determine ecclesiastical questions in the process of resolving property disputes³⁶ but may apply “neutral principles” of property and contract law.³⁷

In *Presbyterian Church v. Hull Church*, the first of this series of cases, the Court held that civil courts could not lend their enforcement power to one side of a debate over religious doctrine or dogma.³⁸ In this case, a dispute arose when two local churches voted to withdraw from the Presbyterian Church on the grounds that it had departed from its original doctrine.³⁹ The two local churches then sued in Georgia state court to enjoin the general church from trespassing on their property. The trial court instructed the jury to determine whether the actions of the Presbyterian Church amounted to a “fundamental or substantial abandonment of the original tenets and doctrines of the [Presbyterian Church] so that the new tenets and doctrines are utterly variant from the purposes for which the

34. *Lee*, 505 U.S. at 616–17.

35. Jared A. Goldstein, *Is There a “Religious Question” Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 498 (2005) (noting that courts have dismissed a broad array of cases, including contract disputes, child custody, negligence claims, consumer fraud, and employment discrimination, because the resolution of these disputes would require the examination of religious matters). Several commentators have compared courts’ reluctance to adjudicate religious disputes to the judiciary’s political question doctrine: “[T]he prohibition on judicial inquiry into religious questions is understood to be a justiciability doctrine—once it becomes apparent that the resolution of a case would require a court to undertake an examination of religious matters, the court has no choice but to dismiss the case.” *Id.* at 499; Gedicks, *supra* note 31, at 132.

36. *Jones v. Wolf*, 443 U.S. 595, 602 (1979); *Serbian E. Orthodox Diocese of the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 710 (1976).

37. *Jones*, 443 U.S. at 602.

38. *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969).

39. *Id.* at 442.

[Presbyterian Church] was founded.”⁴⁰ The jury found in favor of the local church, and the Georgia Supreme Court upheld the decision.⁴¹

The United States Supreme Court reversed the state court’s decision. First, it acknowledged that states do have “a legitimate interest in resolving property disputes, and that a civil court is the proper forum for that resolution.”⁴² It added, however, that this interest is subject to the constraints of the First Amendment. The Court noted that the separation of church and state provides religious bodies with the freedom from having their doctrines and beliefs judged or defined by civil courts and that this freedom is clearly jeopardized when litigation turns on a court’s resolution of controversies over religious practice or doctrine. Consequently, the Court found that civil courts have “no role in determining ecclesiastical questions in the process of resolving property disputes.”⁴³

In *Serbian Eastern Orthodox v. Milivojevich*, the Court reaffirmed the approach it took in *Hull Church*.⁴⁴ Milivojevich, a church bishop, sued the diocese claiming that it had improperly suspended and defrocked him.⁴⁵ The Illinois Supreme Court found that the bishop’s removal was arbitrary and in violation of the church’s constitution and penal code.⁴⁶ In 1976, the Supreme Court reversed this decision on the grounds that it constituted unconstitutional judicial review of a religious controversy. The Court held that the First Amendment mandates that courts accept the decisions of a church’s ecclesiastical tribunal “where resolution of the disputes cannot be made by the civil courts without extensive inquiry into religious law and polity”⁴⁷

The neutral-principles doctrine, adopted in 1979 in *Jones v. Wolf*, serves as the modern approach to judicial resolution of religious disputes.⁴⁸ In *Jones*, a dispute arose after the Vineville Presbyterian Church (“VPC”) voted to separate from the Presbyterian Church of the United States (“PCUS”). The PCUS refused to recognize the schism, and a dispute broke out over who controlled the church and its property. A Georgia state court found in favor of VPC after

40. *Id.* at 444–45.

41. *Id.* (citing *Presbyterian Church in the U.S. v. Eastern Heights Presbyterian Church*, 224 Ga. 61 (1968)).

42. *Id.* at 445.

43. *Id.* at 446.

44. *Serbian E. Orthodox Diocese of the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 709–10 (1976).

45. *Id.* at 697–98.

46. *Serbian E. Orthodox Diocese of the U.S. & Can. v. Milivojevich*, 387 N.E.2d 285 (1979).

47. *Serbian E. Orthodox Diocese of the U.S. & Can. v. Milivojevich*, 426 U.S. at 709.

48. 443 U.S. 595 (1979).

determining that it could employ neutral principles of law to resolve the dispute.⁴⁹ The Supreme Court affirmed that a state court could use the neutral-principles approach, or any other approach, as long as it involves "no consideration of doctrinal matters."⁵⁰ The Court added that the "primary advantages of the neutral-principles approach are that it is completely secular in operation and yet flexible enough to accommodate all forms of religious organization and polity."⁵¹ Furthermore, it "promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice."⁵² The Court warned, however, that civil courts must be extremely careful to examine and interpret documents in purely secular terms, and to avoid relying on religious meanings or precepts.⁵³

After *Hull Church, Serbian Eastern Orthodox*, and *Jones*, it is clear that civil courts cannot independently interpret religious terms when such interpretation requires consideration or determination of religious doctrine.⁵⁴ Nevertheless, courts do have an interest in settling certain religious disputes and may adjudicate these disputes by using one of two methods. First, courts can defer to religious institutions that have the authority to decide the underlying doctrinal issues. Second, courts can apply neutral principles of law to adjudicate the secular aspects of the dispute, so long as this does not entail consideration of religious doctrine. Although the neutral-principles approach helped clarify the extent to which lower courts could adjudicate certain disputes, this approach has generated some confusion, especially when applied to Islamic contracts.

B. Applying Neutral Principles to Private Contract Disputes

The neutral-principles approach was created as a tool for courts to use in adjudicating church property disputes. In recent years, states have extended the doctrine to resolve other religious

49. *Id.* at 600. Neutral principles of law include the sources of law and methods of legal analysis that courts use to adjudicate secular disputes. In this case, the Court stated that the "approach entails settling property disputes on the basis of the language of the deeds, the terms of the local church charters, [and] the state statutes governing the holding of church property. *Id.* at 603.

50. *Id.* at 602.

51. *Id.* at 603.

52. *Id.*

53. *Id.* at 604.

54. Goldstein, *supra* note 35, at 513 (noting that "[c]ases following *Presbyterian Church* . . . eliminate any residual authority for courts to construe religious terms, however clearly expressed").

contract disputes. Using the neutral-principles doctrine, courts can adjudicate religious disputes in three different circumstances.

1. Purely Secular Obligations

Courts can constitutionally enforce the secular obligations in contracts between religious organizations or individuals. If religious persons or organizations dispute the secular provisions of a contract, the court may apply neutral principles of contract law and resolve the dispute in accordance with state contract law. Using neutral principles, the court applies well-defined, objective, and secular rules of law, thereby avoiding any impermissible inquiry into religious doctrine. The fact that the contract involves religious entities or the rendering of religious duties does not preclude enforcement of its secular provisions.

In *Reardon v. Lemoyne*, for example, the New Hampshire Supreme Court found that it could assert jurisdiction over a contract dispute between four nuns and Sacred Heart School, a school administered by the Catholic Church.⁵⁵ After the school informed the nuns that it did not plan to renew their contract for the following year, the nuns filed a petition for declaratory judgment requesting that the court construe their employment contracts.⁵⁶ Although certain provisions of the contract referenced canonical law and matters of religious doctrine, the court found that other parts of the contract, including the procedures for employee dismissal, were purely secular.⁵⁷ It concluded, "We believe [the interpretation of the contract] can be facilitated by keeping in mind the distinction between non-doctrinal matters, wherein jurisdiction lies, and matters involving doctrine, faith, or internal organizations, which are insulated from judicial inquiry."⁵⁸

2. Parties Agree on Religious Terms

Courts can enforce the terms of a contract when neither party disputes the meaning of the religious terms. In this scenario, the court may apply neutral principles of contract law to enforce the secular terms as well as the undisputed religious terms. Since the parties agree on the meaning of the religious terms or the application of religious law, the judge does not have to make a determination of

55. 454 A.2d 428, 432-434 (N.H. 1982).

56. *Id.* at 429-30.

57. *Id.* at 432-33.

58. *Id.* at 433-34.

religious doctrine. The judge merely enforces what the parties previously agreed upon. Thus, the court does not entangle itself in religion or unconstitutionally endorse one view of religion over another.

This theory was first expounded in 1983, in *Avitzur v. Avitzur*. In *Avitzur*, a Jewish couple signed a *Ketubah* (a Jewish marriage document) as part of their wedding ceremony.⁵⁹ The *Ketubah* expressed the couple's desire to live "in accordance with the Jewish law of marriage throughout [their] lifetime."⁶⁰ The couple divorced twelve years later, and the wife sought specific performance of the *Ketubah* agreement, which required the husband to appear before the *Bet Din* (a rabbinical court) and receive a *Get* (a Jewish divorce). The husband refused to obtain the *Get* and argued before the state court that specific performance of the religious agreement would excessively entangle the state and religion.

The court found that although the contractual obligations were grounded in religious belief, this did not "preclude enforcement."⁶¹ It added that because the relief sought by the plaintiff was merely to compel the defendant to perform a contractual obligation, it did not need to decide any doctrinal issues.⁶² The court found that requiring specific performance of the *Ketubah* was constitutional because the matter could be "decided solely upon the application of neutral principles of contract law, without any reference to any religious principle."⁶³

3. Parties Agree to Have Meaning Supplied by Religious Authority

Courts may enforce contracts where the parties disagree on the meaning of religious terms or on the application of religious law, but agree to adopt the meaning supplied by a religious authority or arbitrator.⁶⁴ The Supreme Court laid the foundation for religious

59. *Avitzur v. Avitzur*, 446 N.E.2d 136, 137 (N.Y. 1983).

60. *Id.*

61. *Id.* at 139.

62. *Id.*

63. *Id.* The dissent argued that specific performance of the contract would violate the First Amendment. The judge noted that judicial intervention in disputes with respect to religious law is constitutionally proscribed, unless the issue can be resolved without any reference to religious dogma or doctrine. The controversy before the court, however, could not be resolved without making such references. The judge emphatically argued that "determination of the content and particulars of rights of the wife or the obligations of the husband under the contract cannot be made without inquiry into and resolution of questions of Jewish religious law and tradition." *Id.* at 141.

64. Parties may contractually agree to resort to religious arbitration if any dispute arises over the performance of a contract, or they may contractually agree to religious arbitration of an

arbitration in *Serbian Orthodox Diocese* by stating that questions of discipline or faith, ecclesiastical rule, custom, or law must be decided by church authorities, and that such decisions are binding on the courts.⁶⁵ This opinion clearly implied that courts may give effect to determinations of religious law as long as the court itself does not make the determination.

Religious arbitration is gaining popularity in the United States, and courts have generally enforced arbitration clauses in contracts.⁶⁶ In most religious arbitration cases, the parties contractually agree to refer contractual disputes to a religious authority or arbitrator.⁶⁷ The parties can also contractually agree to the laws, including religious law or scripture, that govern any dispute over the contract. The arbitrator has the authority to apply the specified religious law and grant whatever remedy or relief is within the scope of the parties' agreement.⁶⁸ A party can then seek judicial enforcement of the arbitration award if the opposing party does not comply with the relief granted by the arbitrator. A civil court must enforce the award unless a party presents grounds to vacate the award, such as evidence that the parties did not intend the dispute to go to arbitration, evidence of a procedural defect in the arbitration process, evidence that the award violates state or federal law, or evidence that the award is unconscionable or against public policy.⁶⁹

existing dispute. In both cases, the court may be requested to enforce the decision of the arbitrator if one party refuses to comply with the terms of the award.

65. *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 709 (1976).

66. Although Muslims have been informally arbitrating religious claims for years, only recently have they sought judicial enforcement of Islamic arbitration clauses. For an example of an Islamic arbitration clause, see *Abd Alla v. Mourssi*, 680 N.W.2d 569, 570 (Minn. Ct. App. 2004):

Any dispute, controversy or claim arising out of or in connection with or relating to this Agreement or any breach or alleged breach hereof shall, upon the request of any party involved, be submitted to and settled by arbitration before the Arbitration Court of an Islamic mosque located in the State of Minnesota pursuant to the laws of Islam (or at any other place or under any other form of arbitration mutually acceptable to the parties so involved). Any award rendered shall be final and conclusive upon the parties.

The court in *Abd Alla* enforced the arbitration award and stated that “[a]rbitration awards are strongly favored and a reviewing court must exercise [e]very reasonable presumption’ in favor of the arbitration award’s finality and validity.” *Id.* at 573 (quoting *State Office of State Auditor v. Minn. Ass’n of Prof’l Employees*, 504 N.W.2d 751, 754 (Minn. 1993)).

67. Religious arbitration generally mirrors other forms of alternative dispute resolution but requires application of religious law instead of secular law.

68. Glenn G. Waddell & Judith M. Keegan, *Christian Conciliation: An Alternative to “Ordinary” ADR*, 29 CUMB. L. REV. 583, 592–93 (1999).

69. *Id.* at 604.

One federal district court recently addressed the First Amendment concerns in enforcing religious arbitration awards, and determined that judicial enforcement is, in fact, constitutional.⁷⁰ In *Encore Productions v. Promise Keepers*, Encore Productions ("EP") contractually agreed with Promise Keepers ("PK"), a Christian evangelical organization, to provide production and consulting services for a number of PK's religious meetings and conferences.⁷¹ The contract contained an arbitration provision stating that any dispute would be settled by mediation and, if necessary, legally binding arbitration. The contract also stated that the arbitration would be conducted in accordance with the Rules of Procedure for Christian Conciliation, and thus the "Holy Scriptures shall be the supreme authority governing every aspect of the conciliation process."⁷²

A dispute arose, and the parties sought arbitration. After the completion of the arbitration, EP challenged the outcome, arguing that the religious arbitration violated the First Amendment. The Federal District Court for the District of Colorado held that the arbitration award was enforceable because it was a secular contract right.⁷³ The court acknowledged that it must "diligently avoid impermissible First Amendment entanglement" but found that it could employ neutral principles to enforce the arbitration award since the arbitration clause itself did not require inquiry into or a determination of religious doctrine.⁷⁴ The court added that although it could not force parties to settle disputes through religious tribunals, if parties agreed to do so, then it would be proper for the court to enforce the agreement.⁷⁵

4. Impermissible Enforcement and Interpretation: Parties Disagree on Terms

Courts may not enforce religious contracts when the contracting parties disagree on the meaning of a religious term, the

70. See *Encore Prods., Inc., v. Promise Keepers*, 53 F. Supp. 2d 1101 (D. Colo. 1999) (holding that enforcement of religious arbitration awards is constitutional); see also *Prescott v. Northlake Christian School*, 244 F. Supp. 2d 659 (E.D. La. 2002) (same), *vacated and remanded on other grounds*, 369 F.3d 491 (5th Cir. 2004).

71. *Encore Prods.*, 53 F. Supp. 2d at 1106.

72. *Id.* at 1106, 1111 (quoting Rules of Procedure for Christian Conciliation ¶ 4).

73. *Id.* at 1112.

74. *Id.*

75. *Id.* The court added that it might be unconstitutional to not enforce such an arbitration award because a party could claim "impedance of the practice of religion or creation of an unjust bias against religion, thereby depriving the [party] of its free exercise rights." *Id.* at 1113.

application of religious law, or an issue of religious doctrine.⁷⁶ As one commentator noted, "Cases following *Presbyterian Church* ... eliminate any residual authority for courts to construe religious terms, however clearly expressed"⁷⁷ because this would require courts to consider⁷⁸ or make a determination of religious doctrine. Such a task deviates from the neutral-principles approach and unconstitutionally entangles the state and religion.⁷⁹ When asked to construe a disputed religious term or apply disputed religious law, the court must either dismiss the suit or, when possible, defer to the religious institution with the authority to decide the underlying doctrinal dispute.

IV. APPLYING NEUTRAL PRINCIPLES TO ISLAMIC CONTRACTS

The neutral-principles doctrine has helped clarify which sorts of disputes courts may adjudicate without excessively entangling church and state. Although this doctrine was first used to adjudicate church property disputes, several courts have extended the neutral-principles doctrine to resolve religious-based contract disputes between individuals. It may not be possible, however, to successfully apply neutral principles of law to interpret contracts that contain Islamic legal terms. The interpretation of Islamic legal terms raises unique constitutional concerns. First, as explained in more depth *infra*, there is no separation between the secular and the religious in Islamic law, making it difficult for a court to only examine the "purely secular terms"⁸⁰ of the contract. Second, when interpreting Islamic legal terms, courts must necessarily make determinations of religious doctrine because there is no single authoritative opinion in Islam. This determination may also unconstitutionally endorse one school's interpretation of Islamic law over another's. To better understand these concerns, it is important to briefly look at the theory and development of Islamic law.

76. See *McEnroy v. St. Meinrad Sch. of Theology*, 713 N.E.2d 334 (Ind. Ct. App. 1999) (finding that the court did not have jurisdiction over a contract dispute between a religious school and a teacher because the court would have to determine whether the teacher's actions violated canonical law).

77. Goldstein, *supra* note 35, at 513.

78. *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 369 (1970) (stating that only "express terms" that "may be effected without consideration of doctrine are civilly enforceable").

79. See, e.g., *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (holding that courts may apply neutral principles of law to resolve contract disputes but may not determine matters of religious doctrine); *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 709 (1976).

80. *Jones v. Wolf*, 443 U.S. 595, 604 (1979).

A. Overview of Islamic Law

1. Shari'a: God's Law

Islam encompasses two primary spheres of study: theology and Shari'a. The former teaches Muslims what to believe while the latter instructs Muslims how to behave. Literally, "shari'a" means "the path or the way." In the religious sense, it means the path of God or the path that God has created for man to follow.⁸¹ Shari'a is not simply a body of law; it is a moral code and a way of life. The famous Islamic scholar Joseph Schacht wrote, "The sacred Law of Islam is an all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all its aspects."⁸² Despite its importance, there is no single, comprehensive understanding of Shari'a. The Shari'a is not specifically set forth in the Qur'an, and there is no ecclesiastical authority in Islam.⁸³ Accordingly, Shari'a is best understood as the elusive and abstract concept of God's will.⁸⁴

Knowledge of Shari'a comes from both revealed and nonrevealed sources. Muslims look primarily to the Qur'an and the *Sunna*, the oral tradition of the Prophet Muhammad documented in the *hadith*.⁸⁵ These two sources alone do not explicitly provide guidance for all of the problems that Muslims encounter, and thus

81. The religious sense of the term Shari'a comes from verse 5:48 in the Qur'an: "To each among you have We prescribed a law and an open way."

82. JOSEPH SCHACHT, INTRODUCTION TO ISLAMIC LAW 1 (1964).

83. There is no single religious authority in Sunni Islam. Likewise, no person or religious organization can provide a comprehensive understanding of Islamic law. Instead, Islam charges each Muslim with the obligation to live according to his understanding of God's will. Individuals, however, must abide by two stipulations in forming their understanding of Shari'a. First, their "personal understanding must be consciously and reflectively held." El Fadl, *supra* note 2, at 1527. Second, they must adhere to and adopt *ijma*, or understandings of Shari'a that have been unanimously agreed upon by the Muslim community. *Id.* Legal authority among the minority Shi'a will not be addressed in this Note.

84. *Id.*

85. SCHACHT, *supra* note 82, at 202. The Sunna is the example set forth by Mohammed and is known through his acts and his sayings regarding the details of daily life. Although all law ultimately comes from God, the Sunna plays a prominent role in Islamic law because Mohammed was God's spokesperson in the secular world, and thus Muslims believe that his actions and beliefs were divinely inspired. Mohammed's sayings are called the *hadith*. The *hadith* was originally transmitted orally, but was recorded in the middle of the 8th century in order to limit falsification and provide a degree of uniformity throughout the empire. The Sunna is the primary source of Islamic law because of its breadth and its focus on the details and issues that confront Muslims in every day life. CAESAR E. FARAH, ISLAM 186 (6th ed. 2000).

Muslims also turn to *ijma*⁸⁶ (the unanimous agreement of the community) and *qiyas*, (a systemized process of analogical reasoning regarding matters that are not specifically covered by the Qur'an or the Hadith) to ascertain Shari'a.⁸⁷ Finally, some schools of thought believe that *urf* (custom), *istihsan* (juristic preference), *istihsab* (presumption of continuity in juristic reasoning), and *maslaha* (public welfare) are all permissible tools of reasoning.⁸⁸ The entire process of attempting to gain knowledge of God's will by applying the jurisprudential tools to the sacred sources is known as *ijtihad* (striving).⁸⁹

Islamic law, or *fiqh*,⁹⁰ is the body of law derived from the religious sources according to these methods and procedures. *Fiqh* is the "knowledge of the practical rules of Shari'a acquired from the detailed evidence in the sources."⁹¹ It embodies the results of over 1,400 years of Islamic jurisprudence and represents the Muslim community's attempt to extract God's will through analysis of the sacred sources.⁹² Essentially, *fiqh* sets forth the concrete expressions of Shari'a, or God's will.

Throughout the history of Islam, Islamic jurists have disagreed as to the appropriate interpretations of the rules of Shari'a and as to the methods of deriving those rules from the sacred sources.⁹³ In the formative period of Islamic law, hundreds of *madhabs* (schools of thought) sprang up across the Islamic empire, all with divergent versions of *fiqh*. The vast majority of these schools eventually expired, leaving only four remaining schools: Maliki, Hanbali, Hanafi, and Shafi.⁹⁴ Although these schools have reached consensus on many of

86. Support for *ijma* comes principally from the following hadith: "My community shall never agree on an error." KAMALI, *supra* note 6, at 2 (citing Ibn Majah, Sunan, II, 1303, hadith no. 3950).

87. DAVID WAINES, AN INTRODUCTION TO ISLAM 83–84 (2d ed. 2003).

88. *Id.*

89. *Id.* at 65.

90. Joseph Schacht writes that the "term *fiqh* 'knowledge', shows that early Islam regarded knowledge of the sacred Law as the knowledge par excellence." SCHACHT, *supra* note 82, at 1.

91. KAMALI, *supra* note 6, at 2.

92. *Id.*

93. SCHACHT, *supra* note 82, at 3.

94. These schools exert influence over separate regions of the world, although Muslims are free to subscribe to any one of the schools. The Maliki school, predominant in northwestern Africa, adopts a strict reliance on the Sunna of the prophet, but also regards the public interest in decisionmaking. The Hanbali school, predominant in the Gulf states, is known for a strict interpretation of the Qur'an. The Al-Shafi school, predominant in Egypt, is famous for limiting the scope of the Sunna to the practice of the Prophet himself. Al-Shafi, however, was also famous for adopting analogical reasoning and restricting the use of independent reasoning. The Hanafi school, also predominant in Egypt, relies on analogical reasoning as well as *istihsan* where strict application of analogy would yield harsh results. WAINES, *supra* note 87, at 65–74.

the fundamental principles of Islamic law, they employ slightly different theories of *usul al-fiqh* (jurisprudence) thus yielding different interpretations of Shari'a. Since there is no ultimate religious authority in Sunni Islam, these schools' interpretations of Islamic law are considered equally valid.⁹⁵

The four schools of law developed the corpus of Islamic law through the compilation of questions and advisory answers.⁹⁶ Throughout the history of Islam, a Muslim seeking a solution to a problem or advice on the religious value of an action would present his question to a *mufti* (religious scholar). The mufti would then perform independent *ijtihad* or consult the established legal opinions in his school of law before issuing an opinion on the legality of such action. These opinions, or *fatwas*, are only advisory and thus do not bind the individual seeking the solution to the problem.⁹⁷ Well-established fatwas are incorporated into the school's *fiqh* and are often adopted by subsequent muftis when asked to address similar questions.⁹⁸ By this process, Islamic law has developed primarily from legal opinions issued (by non-state actors) to help Muslims evaluate their actions through God's eyes rather than from a series of laws designed to address social concerns or alter behavior *ex ante*.⁹⁹

2. Islamic Law in Practice

Saudi Arabia presents the best example of the application of classical Islamic law, which is enshrined in the Saudi constitution as the law of the land,¹⁰⁰ in a contemporary legal system.¹⁰¹ The Saudi

95. SCHACHT, *supra* note 82, at 211. The existence of these schools underscores the difference between Shari'a and *fiqh*. While Shari'a is immutable and infinite, *fiqh* may vary slightly from school to school and even changes over time.

96. WAINES, *supra* note 87, at 86.

97. *Id.* If the individual believes that this fatwa accurately represents God's will in the given circumstances, however, then he or she is likely to follow it.

98. Jurists within a school of thought will often pronounce similar fatwas, since the answers to most problems are found within the accepted doctrine of that school. However, some modern problems may yield differing opinions because of the inherent difficulty in applying past doctrine to modern circumstances. Although a fatwa may become binding if adopted by a state judge, the judge's pronouncement applies only to the case before him, and not to subsequent cases.

99. Joseph Schacht notes that the goal of Islamic law is to "provide concrete and material standards, and not to impose formal rules on the play of contending interests, which is the aim of secular laws." SCHACHT, *supra* note 82, at 203.

100. Article I of the constitution states that "God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution." Article 48 states, "The courts will apply the rules of the Islamic Shari'ah in the cases that are brought before them."

legal system plays a dual role in Saudi society. On one hand, it is a religious body that makes determinations of Shari'a. Muftis issue fatwas and advise Saudi citizens on how to live in accordance with Shari'a. On the other hand, the legal system acts as an arm of the state to resolve disputes. *Qadis* (judges) apply Islamic law to resolve individual disputes, adding finality to cases that require a determination of varying legal opinion. Although a qadi's determination of a legal matter may not be any more religiously accurate than a mufti's fatwa, it becomes binding on the parties in the dispute. In other words, "once the qadi has ruled then the act's valuation is fixed."¹⁰²

Saudi judges are required to have extensive religious training and must be equipped with the tools of *ijtihad*.¹⁰³ Saudi qadis generally adhere to the Hanbali school of law, although theoretically they are free to adopt the *fiqh*, or even jurisprudential methods, of another school of law.¹⁰⁴ Qadis often consider fatwas from respected muftis prior to making their determination on legal matters, but qadis have the additional responsibility of discerning the facts of a given dispute. A qadi's determination is only binding on the parties involved in the dispute and does not purport to state any generally applicable rule.

The Saudi legal system requires judges to search for their own understanding of God's will and accordingly removes all obstacles, such as precedent and appellate review, that might hinder a judge from performing this subjective and religious function. Ibn Qayyim, one of the most influential Islamic legal thinkers, noted that the judge's role is to have an "understanding of what is obligatory in that factual situation, that is, understanding of God's ruling that He adjudged in His Book or upon the tongue of His Messenger for that concrete circumstance."¹⁰⁵

101. Saudi Arabia has a contemporary Islamic legal system. Professor Frank Vogel writes that "Islamic law is constitutionally the law of the land, the general jurisdiction is held by traditionally trained judges who apply exclusively the Islamic law, and traditional Islamic legal learning is still good professional training for practice." FRANK E. VOGEL, *ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA* XIV (2000).

102. *Id.* at 17. Although God may judge the act differently, the qadi's determination binds the parties in this world.

103. *Id.* at 81 (describing the training and education of Saudi judges). Vogel notes that Saudi qadis often perform "relative *ijtihad*." *Id.* In assessing the *fiqh* of the schools of thought, they may weigh the various proofs before adopting a ruling. For a description of *ijtihad* in the Saudi legal system, see *id.* at 118-165.

104. *Id.* at 94 (noting that a Saudi king issued an order that judges be bound by the Hanbali school's opinion but issued a subsequent order clarifying that opinions may be made according to alternate authoritative books).

105. *Id.* at 138 (quoting IBN AL-QAYYIM, *I'LAM* 1:87-88).

Saudi judges enjoy a significant degree of freedom in adjudicating cases and are constrained solely by their own conscience in determining the will of God. A Saudi judge is "guided . . . not only by fiqh doctrine, but . . . by his own understanding of the texts from the Qur'an and sunna that support these rules; he believes his judgment comes directly from these texts, not from the Hanbali books."¹⁰⁶ Saudi judges also see themselves as moral guardians and "often appear as concerned with the present moral state of the parties as with their past acts or with legal outcomes."¹⁰⁷ Nevertheless, the judicial decisions of Saudi judges are valid law and are not overturned unless they clearly conflict with a plain meaning of the Qur'an or Sunna.

3. Islamic Law and Western Law

Islamic law differs from Western secular law in three central aspects. First, Islamic law derives its legitimacy from God¹⁰⁸ and not from the enforcement power of the state.¹⁰⁹ The violation of a law is not merely an infringement on the social order, but a transgression against God which warrants punishment in the afterlife. Thus, Muslims do not view Islamic law through the eyes of Justice Holmes's "bad man,"¹¹⁰ whose only concern is predicting the sanctions that a court might impose on an act or omission. Islamic law is normative, even in the absence of state enforcement, because it appeals to the religious conscience of the individual.

Second, because Islamic law derives its authority from God, it is discerned and interpreted by religious scholars rather than by state officials. As a result, Islamic law has evolved independent from, and often in opposition to, the state.¹¹¹ Religious scholars do not purport to

106. *Id.* at 141.

107. *Id.*

108. *See id.* at 5 (describing how Saudi Arabian law, for example, "consists of the opinions of scholars who by their piety and learning have become qualified to interpret the scriptural sources and derive laws"). Frank Vogel describes Islamic law as "inner-directed justification." *Id.* at 25. The validation of law "arises solely from the individual conscience, as it contemplates the revelation." *Id.*

109. A state that adopts Islamic law as the law of the land cannot enforce all of its provisions because it is potentially infinite in scope and regulates private affairs that are beyond control of the state. Even when unenforceable, however, Islamic law is still normative because it appeals to the inner conscience of the individual. *Id.*

110. Oliver Wendell Holmes, Jr., *The Path of Law*, 10 HARV. L. REV. 457, 459 (1896).

111. *See* SCHACHT, *supra* note 82, at 209 (stating that "Islamic law represents an extreme case of a 'jurists' law'; it was created and further developed by private specialists"). Under Islamic law, secular authorities have the authority to issue rules (*siyasa*) in order to promote the general welfare and the efficient administration of the state. *Id.* at 54. These rules are binding on Muslims as long as they do not contradict Shari'a. Rulers may also create

create law but only offer their understanding of God's will based on analysis of the religious texts. As such, Islamic law consists of a series of scholarly opinions intended to help the individual conscience determine the value of each and every act.¹¹² These scholarly opinions often differ and sometimes even contradict each other. Nevertheless, Muslims consider these opinions to be equally valid or plausible interpretations of law so long as they are based on the sacred sources and employ generally accepted methods of jurisprudence.¹¹³

The final difference between Islamic and Western law is that, unlike Western legal traditions, Islamic law does not consist of generally applicable, compulsory laws.¹¹⁴ Instead, Islamic law assigns legal and moral value to particular acts.¹¹⁵ Professor Vogel describes this as "instance-law," or law that "comes into being only as it is applied to a particular concrete event."¹¹⁶ Thus, Islamic law generally does not force people to act or refrain from acting. It merely helps people evaluate their actions in God's eyes.

Considering these differences, one could argue that Islamic law is not really "law" in the Western sense because it lacks many of the characteristics that we deem essential to law.¹¹⁷ Generally speaking, Western law is formulated by a state-controlled monopoly and is backed by the enforcement power of the state. It is generally

adjudicative bodies in order to provide finality to secular disputes. These adjudicative bodies, however, rely on Islamic law as articulated by the religious scholars.

112. There are very few laws that bind all Muslims. Only laws that are explicitly stated in the Qur'an, or have been reached by the consensus of the Muslim community are considered binding on all Muslims. The prohibition of pork, for example, is an explicitly stated rule that is unanimously recognized by the Muslim community. The waiting period between divorces, on the other hand, is a question that is open to varying "laws" because there is no explicit ruling in the Qur'an, and is thus subject to interpretation. See VOGEL, *supra* note 101, at 5-9.

113. See KAMALI, *supra* note 6, at 229, 231 (stating that the varying opinions of jurists are tolerated and regarded as "different manifestations of the same divine will").

114. VOGEL, *supra* note 101, at 23 ("[A]part from what is known of a certainty from the Qur'an and sunna, law remains indeterminate, and no generally applicable statements of law can bind.").

115. Muslims believe that God evaluates every act and that Muslims must account for all of their actions in the afterlife. SCHACHT, *supra* note 82, at 200. In order to help Muslims evaluate their own behavior through God's eyes, Islamic law assigns five values to behavior. Jurists refer to obligatory acts as *wajib*, and forbidden acts as *haram*. All obligatory commands and prohibitions are clearly established in the sacred sources, and usually entail punishment in the secular world, as well as in the afterlife. Islamic law categorizes all other acts as *mandub* (recommended), *mubah* (permissible), or *makruh* (discouraged). WAINES, *supra* note 87, at 78-79.

116. VOGEL, *supra* note 101, at 25.

117. See SCHACHT *supra* note 82, at 200-01 (noting that it might "seem as if it were not correct to speak of an Islamic law at all," and cautioning that "[t]he term must indeed be used with the proviso that Islamic law is part of a system of religious duties, blended with non-legal elements").

accessible, generally applicable, and consistent.¹¹⁸ Furthermore, the legitimacy of Western law is determined by state actors, not by the individuals whom it governs.

Islamic "law", on the other hand, does not strive for stability, predictability, or consistency. The goal of Islamic law is to draw as near as possible to God's true evaluation of each particular event.¹¹⁹ Since humans have an imperfect and incomplete understanding of God's will, Islamic law accepts the necessity of uncertainty and values the search for divine truth over stability and predictability.¹²⁰ More significantly, there is no system or rule (apart from those rules that have been adopted through *ijma*) that determines which laws are valid or legitimate. Islamic law's legitimacy appeals to the inner conscience of the individual; thus, the individual is free to choose which laws to obey.¹²¹ The state only intervenes in a limited number of situations (such as criminal prosecutions) where there is a need to add finality to disputed opinions concerning an act's legal value. Even in these cases, however, the judge does not purport to recognize the validity of a generally applicable law but only makes a legal determination of a particular act in the particular circumstances. Finally, unlike Western law, Islamic law is interpreted primarily by religious scholars without regard to its enforcement. Islamic scholars arduously defend their right to define and articulate *Shari'a* and thus resist any attempts to codify law or make it accessible to the general public.

Ascribing the term "law" to both the Western secular model and to the Islamic model obfuscates many of these fundamental differences and perpetuates a misunderstanding of *fiqh* and *Shari'a*.¹²² Judges who are unfamiliar with the nature of Islamic law¹²³ may assume that it shares many of the characteristics of Western secular law—*i.e.*, that it is accessible, generally applicable, consistent, etc. The tendency to ascribe the characteristics of Western secular law to

118. See LON L. FULLER, *THE MORALITY OF LAW* 46–94 (2nd ed. 1969) (discussing the essential characteristics of law).

119. VOGEL, *supra* note 101, at 15–17 (noting that Muslims believe that God judges each person's actions and that the role of Islamic law is to determine how God evaluates these acts).

120. *Id.* In a letter purportedly from the second Caliph, Umar bin al-Khattab, he instructed the governor of Basra on the function of the judge: "Do not let a judgment which you judged yesterday and then reconsidered, and about which you were guided to a wiser opinion, prevent you from returning to the truth . . ." *Id.* at 15.

121. *Id.* at 22–25 (stating that much of Islamic law is not enforced by the state and therefore appeals only to the conscience of the individual).

122. I do not argue that Western law is better or more effective than Islamic law, only that it makes little sense to ascribe the same word to two concepts that have different, and often conflicting, characteristics.

123. For lack of a better, widely accepted word, I will continue to refer to *fiqh* as "Islamic law."

Islamic law creates a problem when judges attempt to interpret Islamic law in contract disputes.¹²⁴

B. Problems for Neutral Principles

From this brief discussion of Islamic law, one can see that a judge faces three First Amendment problems when applying the neutral-principles doctrine to Islamic contracts. First, in Islamic contracts, it is often impossible to distinguish secular terms from religious terms.¹²⁵ One scholar noted that the Shari'a "draws no distinction between the religious and the secular, between legal, ethical, and moral questions, or between the public and private aspects of a Muslim's life."¹²⁶ Because Muslims believe that God judges every action,¹²⁷ Islamic law governs all matters ranging from prayer, to inheritance, to dietary regulations. Accordingly, many Arabic terms have a common, everyday meaning but also a slightly different meaning under Islamic law.¹²⁸ These legal meanings may also vary among the four schools of Islamic jurisprudential thought.¹²⁹ Thus, any attempt to scrutinize an Islamic contract in "purely secular terms" will most likely fail, violating the neutral-principles doctrine.

The second problem that arises stems from the fact that the interpretation of an Islamic legal term requires a judicial determination of religious doctrine. In adjudicating Christian or Jewish disputes, courts have avoided First Amendment problems by deferring to hierarchical authorities within the church or synagogue on certain questions of religious doctrine or interpretation, or by

124. See discussion *infra* Part III.B-C.

125. Even if a court can separate secular legal terms and religious terms, it may be difficult to extract legal obligations from religious documents. Such documents may only be intended to confer religious obligations, not secular obligations. See *Avitzur v. Avitzur*, 446 N.E.2d 136, 141 (N.Y. 1983) (Jones, J., dissenting) (arguing that the court should not enforce a Ketubah, a document created as part of a Jewish wedding ceremony, because doing so would require it to interpret Jewish law and tradition).

126. Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?*, 44 AM. U. L. REV 1949, 1964 (1995). Joseph Schacht notes that Islamic law "regulate[s] the life of every Muslim in all its aspects; it comprises on an equal footing ordinances regarding worship and ritual, as well as political and (in the narrow sense) legal rules." SCHACHT, *supra* note 82, at 1.

127. VOGEL, *supra* note 101, at 25 (noting that the goal of Islamic law is to "draw as near as possible to God's true evaluation for each particular event").

128. Using one Islamic jurisprudential tool, for example, an Islamic jurist may substitute the plain meaning of a word for a more obscure meaning of that word in order to promote the social welfare.

129. VOGEL, *supra* note 101, at 43-45 (describing the differences in the schools of law).

referring to authoritative interpretations. In Islamic law, however, there is no preeminent canonical court to make definitive rulings on religious doctrine or policy. Furthermore, because the concept of precedent does not exist in Islamic law, judges cannot merely apply the rulings of other Muslim judges.¹³⁰ Nor can a U.S. judge defer to the advice of expert witnesses because no witness can say what the correct binding interpretation is (unless the matter has been resolved by *ijma*).¹³¹

Finally, judicial interpretation may unconstitutionally endorse one school's interpretation of Islamic law over another. Islam is a pluralistic religion, and no single authority can speak on behalf of the faithful; ultimate authority rests with God alone. The four main schools—Maliki, Hanafi, Hanbali, and Shafi—have reached *ijma* on many of the fundamental points of Islamic law, but they also disagree on many of its more complex aspects. Thus, any judicial resolution on the meaning of Islamic law may involve the adoption of one school's interpretation of Islamic law. Such an adoption would unconstitutionally endorse one school's view over the others' view.¹³² This determination might also frustrate the intent of the contracting parties, especially if there is evidence that they desired the contract to be interpreted in accordance with a particular school's *fiqh*.

C. Case Studies

Several courts have not heeded these First Amendment constraints and have adjudicated disputes concerning Islamic law. The following three case studies highlight some of the constitutional problems that courts encounter when applying the neutral-principles approach to contracts that incorporate Islamic law.

1. Commercial Contracts That Request Application of Saudi Law

U.S. courts may have to make determinations of Islamic law when parties contractually agree to be bound by the law of Saudi

130. *Id.* at 15 (noting that an Islamic jurist "must strive for the divine truth for each case that confronts him, without being bound by past opinions, even his own").

131. Unless the issue has been resolved by *ijma* (consensus).

132. See *Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337 (4th Cir. 1995). In this case, the Fourth Circuit struck down a city ordinance enforcing Orthodox kosher laws as unconstitutional. Judge Luttig, concurring with the judgment, stated that the law violated the Establishment Clause because it unconstitutionally favored one sect's definition of kosher over all others. He noted that "various branches of Judaism define kosher differently . . . and . . . these differences are significant to adherents of the various sects of faith." *Id.* at 1347. By using the Orthodox Jewish definition of kosher for the basis of enforcing its kosher laws, the city "unquestionably expressed an impermissible intrafaith denominational preference." *Id.* at 1348.

Arabia (which has adopted the uncodified, classical Islamic law as the law of the land). In such a case, when a party files suit in the United States, the law of the forum state governs the interpretation of the contract, but Saudi law, and therefore Islamic law, governs the obligations of the parties to the contract.

In *National Group for Communications & Technology v. Lucent Technology Int'l*, National Group for Communications and Computers Ltd., (“NGC”) filed suit against Lucent Technologies International (“LTI”) in a U.S. district court for breach of a telecommunications contract.¹³³ Several years before, NGC, a Saudi company, entered into a contract with LTI to assist in the completion of a multi-billion dollar project that LTI had undertaken for the government of Saudi Arabia. Under the contract, NGC agreed to perform design and engineering services, and install emergency and pay telephones along Saudi Arabia’s highways. LTI and NGC agreed to a four-year relationship at a fixed value of \$75,460,902. LTI subsequently terminated its contract with NGC, forcing NGC to liquidate the Projects Department that it had created in order to carry out its telecommunications contracts. As a result, NGC brought suit requesting actual and expectation damages for breach of contract.

At trial, both NGC and LTI agreed that Saudi law governed the terms of the contract. The district court agreed and noted that its role in resolving the contractual dispute was to ascertain how a Saudi judge would resolve the dispute if it were brought in a Saudi court. The court acknowledged that Saudi judges apply classical Islamic law¹³⁴ and thus turn to the “aforementioned Qur’an, the Sunna, and fiqh” in making legal determinations.¹³⁵ Furthermore, the court noted, “Saudi Arabian judges are not bound by judicial precedent . . . and the concept of stare decisis does not exist. Instead, judges ‘must strive for the divine truth for each case that confronts him, without being bound by past opinions, even his own.’”¹³⁶

The court found that LTI had breached the contract and then turned to Islamic law to determine whether LTI was liable for

133. *National Group for Commc'ns & Computers v. Lucent Techs. Int'l*, 331 F. Supp. 2d 290, 292 (D.N.J. 2004). The facts of this case are summarized on pages 290–293.

134. The court wrote that Article I of the “Basic Regulations of the Kingdom of Saudi Arabia” states in pertinent part . . . [t]he religion of [Saudi Arabia] is Islam, its constitution is the book of God Most High and the Sunna of His Prophet, may God hless him and give him peace.” Article 48 adds, “The courts shall apply in cases brought before them the rules of the Islamic Shari’a in agreement with the indications in the Book and the Sunna.” *Id.* at 294–95.

135. *Id.* at 295.

136. *Id.* (citation omitted).

expectation damages.¹³⁷ The court stated that “[a]dhering to the principles of Shari’a, when the [Saudi court] faces a breach of contract action, the quantum of damages recoverable will ‘fall short of the mark which might reasonably be anticipated under English law.’”¹³⁸ This is due largely to the fact, the court noted, that Shari’a prohibits *gharar* (risk or uncertainty) in contracts because only God can predict future activity. The court went on to cite several statements by the Prophet Muhammed as evidence of the prohibition of *gharar*.¹³⁹ Thus, reasoned the court, Islamic law does not recognize damages for losses beyond what is actual and direct.

NGC argued that awarding expectation damages in this case would not violate the prohibition of *gharar* because “only when *gharar* inheres within a separate entity is it forbidden.”¹⁴⁰ The court rejected this argument, stating that the plaintiffs “lack meaningful supporting religious. . . authority.”¹⁴¹ It added that “[t]his Court does not accept the suggestion that the conservative highly-religious Saudi Arabian courts would find significance in superficial differences in the presentation of *gharar* sufficient to overcome the dictates of the Shari’a.”¹⁴²

The judge’s resolution of this contract dispute violated the First Amendment. In applying Saudi law (and thus Islamic law) to determine the parties’ rights under the contract, the judge had to conduct an extensive inquiry in to Islamic law and make an independent determination of religious doctrine: the precise scope of the prohibition of *gharar*. The judge could not rely on secular tools to make this determination because Saudi law is not codified¹⁴³ and judicial decisions are not reported. Rather, the judge took on the role of a Muslim qadi, rejecting the plaintiff’s argument because it lacked “supporting religious authority.”¹⁴⁴ This inquiry into religious

137. *Id.* at 298–301. The court relied heavily on expert testimony from several Islamic legal scholars in its description of the Saudi legal system and application of Islamic law. *Id.* at 294.

138. *Id.* at 297.

139. The court noted the following hadith: “Do not buy fish in the sea, for it is *gharar*; The Prophet forbade sale of what is in the wombs, sale of the contents of the udders, sale of a slave when he is runaway ...; The Messenger of God forbade the [sale of] the copulation of the stallion. He who purchases food shall not sell it until he weighs it.” *Id.* at 296.

140. *Id.* at 298.

141. *Id.*

142. *Id.*

143. There are a few generally applicable laws in Saudi Arabia, but Saudi judges often disregard these regulations in favor of classical Islamic law or their own subjective interpretation of God’s will. *See* discussion *supra* Part IV.A.

144. *National Group for Commc’ns & Computers v. Lucent Techs. Int’l*, 331 F. Supp. 2d 290, 298 (D.N.J. 2004).

doctrine is precisely the type of judicial action that concerned Justice Souter and that is prohibited by the First Amendment.

2. Islamic Marriage Contracts

In the United States, state courts frequently oversee divorce proceedings and therefore must interpret marital contracts. Because marriage is both a religious and civil union, many marital contracts incorporate religious and secular rights and obligations. Courts may enforce religion-based marriage contracts as long as their interpretation does not require the court to determine matters of religious doctrine.¹⁴⁵ Thus, when adjudicating divorce proceedings, courts must sift through the marriage contract and separate the purely secular obligations from the religious ones.¹⁴⁶ This determination is particularly difficult, however, when judges confront religions with which they are unfamiliar, such as Islam.

As in many cultures, marriage plays a central role in Islamic society. It serves as the foundation for the family unit, provides legal and moral sanction for sexual intercourse, helps guard against promiscuity, and generally promotes social harmony.¹⁴⁷ Due to its social importance, the Qur'an regulates the proper procedures for marriage, divorce, division of assets, and re-marriage. More significantly, Islamic law dictates the rights and obligations that each party must undertake throughout the marriage. The man takes on the obligation of financially providing for his wife and children. The woman must recognize her husband's authority over the family, and contribute to the upbringing of the children and the maintenance of the household. These duties are both civic and religious.

Like all other contracts, a marriage contract is completed upon offer and acceptance. Typically, the groom and the bride's representative sign the marriage contract before two witnesses on the day of the marriage. The parties are free to negotiate the terms of the marriage such as the amount of the *mahr* or *sadaq* (dowry), the rights of the groom to take other brides, and the right of the bride to initiate divorce. The *mahr* is essential to every Muslim marriage. It is a symbol of the man's commitment to the marriage and acts as an economic safeguard for the woman and children in case of divorce.

145. See *Avitzur v. Avitzur*, 446 N.E.2d 136, 138 (N.Y. 1983) (holding that a court could enforce a *Ketubah*, a document created as part of a Jewish wedding ceremony, if it contained "neutral principles of law").

146. *Id.*

147. JOHN L. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW* 16 (1st ed. 1982). I relied on pages 13-24 for the information in this and the following paragraph.

Not surprisingly, the payment of the mahr or sadaq is an issue that courts often have to deal with upon the dissolution of marriages in the United States.

The following two cases highlight the challenges courts face in interpreting Islamic marriage contracts. In these two similar cases the state court judges reached opposite conclusions about the legal significance of the mahr.

In *In re Marriage of Shaban*, a couple married in Egypt in 1974, and later filed for divorce in California in 1998.¹⁴⁸ The husband claimed that the couple had signed a prenuptial agreement in Egypt, and pursuant to this contract, the wife was not entitled to any of his assets.¹⁴⁹ The husband presented the Islamic marriage contract as evidence of their pre-marital agreement. The contract stipulated that the husband would pay his wife a mahr of 500 Egyptian pounds ("LE"). Twenty-five piasters¹⁵⁰ were due at the commencement of the marriage, while the remaining LE 499.75 would be due if the marriage ended in divorce. The contract also stated, "The above legal marriage has been concluded in Accordance with his Almighty God's Holy Book and the Rules of his Prophet to whom all God's prayers and blessings be, by legal offer and acceptance from the two contracting parties."¹⁵¹

The husband argued that this clause indicated that the parties intended Islamic law to govern the contract, and thus the wife was entitled to the mahr (about \$30) but not to any of his assets. The court ruled that under California contract law, the parties had failed to create a contract because the terms of the marriage contract were too vague.¹⁵² The court reasoned that the couple's intent to be governed by Islamic law did not entail a true meeting of the minds and was therefore unenforceable.¹⁵³ The court pointed out that any expert who opined on the parties' rights under Islamic law would also have to speculate as to which of the four schools of thought would govern the interpretation of the terms of the contract.¹⁵⁴ Thus, the court disregarded the terms of the Islamic marriage contract and divided the property according to California community property laws.

Conversely, in *Akileh v. Elchahal* a different court was willing to find an enforceable Islamic marital contract and awarded the wife

148. *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 865 (Cal. Ct. App. 2001).

149. *Id.* These facts are summarized on pages 865–867.

150. 1 piaster is 1/100 of an Egyptian pound.

151. *In re Marriage of Shaban*, 105 Cal. Rptr. 2d at 865, n.1.

152. *Id.* at 869.

153. *Id.*

154. *Id.*

the payment of the sadaq.¹⁵⁵ Shortly before the marriage at issue in this case, Akileh (the groom) and Elchahal's father discussed the terms of the marriage contract, including the amount of the sadaq. The father stated that he desired a sadaq of \$50,001, with an initial payment of \$1 and a deferred payment of \$50,000.¹⁵⁶ Akileh agreed to these terms, and the couple was married in the United States. Soon thereafter, the marriage began to deteriorate, and Elchahal filed for divorce.

The main issue in the divorce proceedings was whether Akileh was obliged to pay the deferred dowry of \$50,000.¹⁵⁷ Akileh testified that the term "sadaq" confers an obligation on the husband only if he initiates the divorce. Elchahal argued that the payment of a sadaq is not conditioned on who initiates the divorce and is the wife's absolute right. The court noted that it had the authority to require a party to "fulfill the secular obligations of a religious antenuptial agreement" using the neutral principles of law.¹⁵⁸ The court found that the term "sadaq" was a secular term and then looked to parole evidence to determine the subjective intent of the parties. The court concluded that the sadaq agreement was intended to "protect the wife in case of divorce" and held that Akileh was obliged to pay the \$50,000 to his ex-wife as stipulated in the contract.¹⁵⁹

Although the court purported to rely on neutral principles, it ignored the religious significance of the sadaq. Moreover, the court could not successfully rely on neutral principles of contract law to determine the intent of the parties because the parties intended their contractual obligations to conform to Islamic law.¹⁶⁰ The term "sadaq" is not merely a secular term; the payment of the sadaq is a religious obligation, determined by Islamic law. Thus, in order to enforce the intent of the parties (who desired to abide by Islamic law) the judge had to determine whether the husband was required to pay the sadaq under Islamic law.

There is no clear answer to this question. Islamic legal scholars debate whether a man is obliged to pay the sadaq if the

155. *Akileh v. Elchahal*, 666 So. 2d 246 (Fla. Dist. Ct. App. 1996). A sadaq is merely a postponed mahr that is meant to provide the wife with additional economic protection in case of divorce.

156. *Akileh*, 666 So. 2d at 247. The facts of this case are summarized on pages 247-48.

157. *Id.*

158. *Id.* at 249.

159. *Id.*

160. Parties often do not carefully and explicitly state their subjective intent in such religious contracts. Compliance with Islamic law is more important than enforcement of the explicit provisions of a contract. Thus, contracts are deliberately vague, and parties rely on the religious advice of muftis or qadis in case of dispute.

woman initiates the divorce because, in such cases, the original reasons for providing the sadaq no longer apply. The sadaq or mahr was originally intended to restrict the man's power of divorce by imposing a financial burden on him. Payment of the sadaq was also meant to protect the woman—who was often financially dependant on her husband—in case of divorce, and to compensate her for the man's unilateral right to divorce in many circumstances.¹⁶¹ Under some schools of thought, the woman waives her right to the unpaid portion of the sadaq if she initiates divorce.¹⁶² Other schools have devised certain conditions under which the woman is still entitled to the remaining portion of the sadaq, such as when the husband is abusive or commits apostasy. Thus, the judge's decision in *Akileh* may have had support in Islamic law. Yet, in determining that the man was obliged to pay the sadaq, the judge made a determination of religious doctrine and expressed a preference for one school's interpretation of Islamic law over other equally valid interpretations.¹⁶³

These three cases evidence the problems that might arise when interpreting contracts that contain Islamic legal terms or are governed by Islamic law. In *Lucent Technologies*, the court departed significantly from the neutral-principles doctrine as it made an independent determination of Shari'a to resolve a telecommunications dispute. Likewise, in *Akileh*, the court ignored the religious aspects of the contract. The court in *Shaban* realized the difficulty in interpreting Islamic legal contracts, and simply ignored the contract altogether. This Note argues that none of these three courts resolved their respective disputes in a way that complies with both the First Amendment and the intent of the parties. Yet, as this Note argues, there is a way to accomplish both goals.

V. A POSSIBLE SOLUTION: ISLAMIC ARBITRATION

As seen in the last Part, courts unintentionally violate the First Amendment when interpreting Islamic legal contracts. Despite the

161. Lindsey Blenkhorn, Note, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189, 201 (2002).

162. DAVID PEARL, A TEXTBOOK ON MUSLIM PERSONAL LAW 44, 102–03 (1979).

163. Compare this decision to state laws that prohibit fraud in the sale of kosher foods and impose criminal liability on any food vender that falsely claims meat containing pork is Kosher. See, e.g., Ariz. Rev. Stat. Ann. § 36-942 (2006). Kent Greenwalt suggests that one could object to such a law on the grounds that the state must decide whether someone violates religious law. He argues that this objection would fail, however, because it is beyond all doubt that pork is prohibited under Jewish law. Thus, the state does not have to settle any question or controversy of religious law. Greenwalt, *supra* note 18, at 791–92.

harm caused by these constitutional violations, states have a legitimate interest in adjudicating contractual disputes that involve secular rights and obligations. Moreover, denying individuals or religious organizations the opportunity to adjudicate their contract disputes might raise a different set of concerns under the Free Exercise Clause.¹⁶⁴ Therefore, courts need an approach that reconciles the First Amendment constitutional concerns with the states' (and individuals') interest in peacefully resolving disputes. This Note argues that Islamic arbitration is the best way to reconcile these interests. This Part will describe how courts can use Islamic arbitration and why doing so is consistent with contract law. Finally, it will discuss some problems that courts might encounter while appealing to Islamic arbitration.

A. The Proposal

In order to satisfy the competing interests of abiding by the First Amendment and providing a forum for relief, judges should infer an arbitration clause into Islamic contracts in order to give full effect to the intent of the parties. The inferred arbitration clause would require the parties to seek arbitration to determine the meaning of the disputed Islamic legal term or the correct application of Islamic law. After the arbitrator makes the religious determination, the judge can then enforce the contract without violating the First Amendment. Although judges have not taken such action in the past, the accepted practice of supplying gap-fillers lends support to this possibility. The Second Restatement of Contracts states that a judge may supply an omitted term if it is "essential to a determination of [the parties'] rights and duties . . ." ¹⁶⁵ Since a judge may supply a term, such as the price of the goods, essential to the enforcement of the contract, it stands to reason that a judge could imply an arbitration clause into the contract when the contract would otherwise be unenforceable due to the First Amendment.

Implying an arbitration clause does not change or alter the parties' rights and obligations under the contract; it merely helps the state enforce them. If, as this Note suggests, judicial interpretation of Islamic terms or Islamic law violates the First Amendment, then the addition of such a clause would be the sole way for a judge to determine the rights and duties of the parties. Even if a judge does not

164. *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244, 1248 (9th Cir. 1999).

165. RESTATEMENT (SECOND) OF CONTRACTS § 204.

go so far as implying an arbitration clause into the contract, the judge could strongly urge the litigants to seek arbitration and explain the court's ability to enforce the contract after the arbitrator makes his or her determination.

1. Arbitration Avoids First Amendment Problems

Arbitration avoids conflict with the Establishment Clause. As explained above, when judges confront a religious contract, they must apply state contract law to interpret it.¹⁶⁶ The First Amendment only restricts judicial interpretation of contracts when the parties dispute the meanings of the terms of the contract or the application of religious law.¹⁶⁷ If parties assign the same meaning to the terms of the contract, or the arbitrator resolves the dispute, then the court can enforce the contract without overstepping its First Amendment bounds.¹⁶⁸

By deferring the determination of Islamic law to a mutually agreed arbitrator, the court would avoid entangling itself with religion. Furthermore, the court would not unconstitutionally endorse one school's interpretation of Islamic law over another school's interpretation. The court, in fact, would not endorse any particular view because the parties choose the arbitrator, and in effect, the school of thought. The court would merely enforce the original intent of the parties with the arbitrator's determination serving to clarify certain terms that the court is not capable of interpreting.

166. The judge's goal is to "carry out the understanding of the parties rather than to impose obligations on them contrary to their understanding." *Id.* § 201, cmt. C.

167. See discussion *supra* Part III (discussing the First Amendment constraints on judicial interpretation of religious contracts). The judge could interpret the disputed term if there was sufficient evidence that the parties arrived at a mutual understanding of that term. Such a mutual understanding would be difficult to ascertain, however, because under Islamic law promises change with the circumstances. Thus, the term "sadaq" might carry a certain meaning in some circumstances, but a different meaning in other circumstances. Since it is incredibly difficult to foresee the circumstances of the future, it is difficult to reach a mutual understanding of a legal term. As a result, parties rely on religious scholars to define the legal term in light of the circumstances of the dispute.

168. "Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning." RESTATEMENT (SECOND) OF CONTRACTS § 201(1).

2. Arbitration Enforces the Parties' Original Intent

Given the indeterminacy of Islamic law, parties cannot ascribe precise meanings to Islamic legal terms when drafting contracts.¹⁶⁹ The parties may have a general understanding of the terms or the relevant law, but they cannot arrive at a complete meeting of the minds.¹⁷⁰ Moreover, since Shari'a, and not the parties themselves, determines their contractual rights and obligations, the parties depend on religious scholars to define these terms and identify these rights if a dispute arises.¹⁷¹ Such a determination can only be made by an Islamic scholar trained in Islamic jurisprudence. Thus, ordering the parties to seek arbitration is necessary to give effect to the parties' original intention to abide by Shari'a in the performance of their contract.

Consider the intent of the parties in the three contracts previously examined in this Note. In *Lucent Technologies*, the parties agreed to be bound by Saudi law. When parties contractually agree to be governed by Saudi law, they intend to be governed by Islamic law, which is accessible only to qualified Islamic jurists. The parties cannot reach a mutual understanding of the specific, generally applicable rules to be applied because Saudi law is uncodified, and definitive determinations of law are made only in concrete cases, reflecting the personal conscience of a single judge.¹⁷² Thus, a judicial determination of Saudi law by a U.S. judge, who is not trained in Islamic jurisprudence, may defeat the intent of the parties to the contract.

Similarly, in *Akileh*, there is no evidence that the married couple had a meeting of the minds with respect to the precise meaning of the term "sadaq." The four schools of thought disagree on the

169. Muslims can only have definite knowledge of Islamic law if the rule is "stated categorically and clearly in a Qur'anic verse or in an authentic hadith." VOGEL, *supra* note 101, at 22. The number of such known laws, however, is relatively small, and most modern legal issues cannot be clearly determined from the Qur'an or from a hadith.

170. In Islamic law, the terms of a private contract will not be enforced unless they are in accordance with Shari'a. Under the laws of Shari'a, the circumstances control the promise. BALLANTYNE, *ESSAYS AND ADDRESSES ON ARAB LAWS* 274 (2000). As the circumstances change, the legal obligations may change as well. This unique construction of promises is due to the indeterminate nature of Islamic law. Islamic law is "instance-law"; it is indeterminate until it fuses with a particular event. VOGEL, *supra* note 101, at 25. Therefore, the precise meaning of an Islamic legal term, or the legality of a proposed act, cannot be definitively determined prior to the events that give rise to the dispute.

171. See COMAIR-OBEID, *supra* note 5, at 5 (1996) (noting that the Shari'a, not the parties, determines their respective rights once the contract has been formed).

172. VOGEL, *supra* note 101, at 117.

circumstances in which a woman may forfeit her sadaq or mahr.¹⁷³ Lay Muslims cannot be presumed to have knowledge of these complex Islamic legal issues and most likely do not comprehend the full significance of such terms. When the couple incorporated a Qur'anic term into their marriage contract, they implicitly understood that a religious scholar would resolve any dispute over the meaning of that word in accordance with Islamic law.

In *In Re Shaban*, the judge recognized the inherent difficulty in discerning the intent of the contracting parties. Although the judge correctly refrained from determining the circumstances in which Islamic law requires payment of a mahr, the court frustrated the parties' original intent by declaring that no contract had been formed, and dividing the property under California common law. In all three of these cases, the court could more effectively enforce the parties' intent by deferring the matter to arbitration.

B. Problems

There are three potential problems with implying arbitration clauses into contracts that contain Islamic law. First, this approach assumes that Muslims incorporate Islamic legal terms into their contract because they desire to act in accordance with Shari'a. This assumption may not always be accurate. Muslims may incorporate Islamic legal terms for a variety of reasons: custom, ignorance of Western legal systems, family pressure, etc. Thus, if Muslims do not desire to act in accordance with Shari'a, then they might intend to attach a fixed meaning to the terms of the contract.

Contract law can help solve this problem. The terms of a contract are interpreted in "light of all the circumstances."¹⁷⁴ A judge can look at the circumstances of the contract and attempt to determine whether the parties intended the terms of the contract to be determined in accordance with Islamic law. If there is evidence that the parties intended the term to be interpreted in accordance with Shari'a, then the court can order arbitration. Likewise, if there is evidence that the parties reached a concrete understanding regarding the terms of the contract, regardless of its conformity with Shari'a, then the judge can interpret the meaning that the parties had

173. Blenkhorn, *supra* note 161, at 201 (providing examples of the various circumstances in which a man may avoid paying the mahr upon divorce, but noting that the four schools of thought do not agree on all of these circumstances).

174. RESTATEMENT (SECOND) OF CONTRACTS § 202(1).

originally agreed upon without resorting to arbitration.¹⁷⁵ Judges must not, however, rely on the advice of expert witnesses to provide the meaning of the disputed term.

The second problem is that parties may frustrate judicial enforcement by intentionally failing to agree on an arbitrator. The court may not appoint an arbitrator because it is unconstitutional for a judge to delegate her civic authority to another group or individual chosen according to a religious criterion.¹⁷⁶ Courts can enforce an implied arbitration clause, but the parties must mutually agree on the arbitrator in order for the arbitration to be successful. As a result, one or both parties can frustrate judicial enforcement by refusing to agree on an arbitrator. In such cases, one party could sue for breach of contract if there is evidence that the other party is acting in bad faith. Such a claim, however, would be difficult to substantiate.

Parties may not be so reluctant to seek arbitration.¹⁷⁷ Parties who contractually agree that Saudi law, and thus Islamic law, will govern their contractual disputes often file in the United States because of the backlog of cases and inefficiency of the Saudi court system.¹⁷⁸ Individuals who incorporate Islamic terms into their contract might also willingly comply with arbitration because of the desire to abide by Shari'a. A ruling by a religious authority is more likely to yield a result that is in accordance with Shari'a than a ruling by a non-Muslim judge.

Finally, courts might be reluctant to order arbitration for fear that the arbitration would result in an outcome that would be unjust or unconscionable. Many Westerners believe—rightly or wrongly—that Islamic law, especially family law, does not adequately protect women's interests.¹⁷⁹ In *In Re Marriage of Shaban*, for example, the court might have been reluctant to find that the parties had formed a contract because, under the disputed prenuptial agreement, the wife

175. The specificity with which the parties define the terms may imply that the parties reached a mutual understanding regarding their meaning.

176. *Bd. of Educ. v. Grumett*, 512 U.S. 687, 698 (1994).

177. Arbitration has become an accepted form of dispute resolution in the Middle East. One commentator noted that "ADR has become increasingly important as a vehicle for settling disputes involving Middle East parties." David N. Kay, *Practical Aspects of Arbitration with Middle Eastern Parties*, in *ARAB COMMERCIAL LAW: PRINCIPLES AND PERSPECTIVES* (William Ballantyne ed., 2002).

178. See George Sayen, *Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia*, 24 U. PA. J. INT'L ECON. L. 905, 909 (2003) (noting that although Saudi judges "have a reputation for fairness and impartiality . . . [t]here is a serious backlog of cases aggravated by lack of sophisticated administrative support").

179. As the current controversy in Canada suggests, opponents of Islamic arbitration in the United States might argue that Islamic arbitration would prejudice women. See Brown, *supra* note 3.

would receive only thirty dollars after more than two decades of marriage. Again, contract law can solve this problem. A judge may refuse to enforce an arbitration award that is unconscionable or against public policy.¹⁸⁰ Thus, even though a judge defers a matter to arbitration, she can still protect the parties' and society's interests.

VI. CONCLUSION

Courts must remember their constitutional limits when resolving contractual disputes that require interpretation of a disputed Islamic legal term or application of Islamic law. A better understanding of Islamic law will help judges adjudicate these contractual disputes while complying with the constraints of the First Amendment. The three cases examined in this Note represent just a small sample of the different types of Islamic contracts that courts may be asked to interpret. Naturally, Islamic contracts will vary greatly with respect to their purpose, specificity, and complexity. In many circumstances, judges may adequately be able to use the tools of contract law to discern the intent of the drafters without any reference to religious doctrine. Nevertheless, these three case studies are useful because they represent fairly common contracts and illustrate some of the problems that courts confront in interpreting them.

When asked to interpret Islamic legal contracts, judges should keep in mind several guidelines. First, judges themselves should not apply Saudi law to a contract dispute. Saudi law is generally inaccessible to U.S. judges, except perhaps to a Muslim judge.¹⁸¹ U.S. judges cannot look to statutes, case law, or precedent to determine the Saudi law to be applied to the case. Furthermore, they do not have the requisite knowledge of the sacred sources, nor are they capable of performing the *ijtihad* that Saudi judges must perform in making legal determinations under Saudi law.

Second, judges should not determine the meaning of disputed Islamic legal terms.¹⁸² Islamic legal terms do not have a single, commonly accepted meaning known to all Muslims. The precise

180. "The law has a long history of recognizing the general rule that certain contracts, though properly entered into in all other respects, will not be enforced, or at least will not be enforced fully, if found to be contrary to public policy." CORBIN ON CONTRACTS § 79.1 (2004). See also Waddell & Keegan, *supra* note 68, at 604.

181. A Muslim judge, of course, would still be bound by the First Amendment even if he were qualified to make the religious determination.

182. The meaning of some Islamic legal terms is definitively known through *ijma*. The Muslim community may unanimously agree on their meaning because they are clearly stated and defined in the Qur'an or in an authentic hadith. The number of these cases of *ijma*, however, is relatively small.

meaning of Islamic legal terms can be known only to God. Religious scholars strive to approximate God's understanding of these terms, but they may disagree on their respective conclusions. The indefinite nature of Islamic law is accepted in Islam, and the varying meanings are regarded as equally valid.¹⁸³

Finally, judges should defer the interpretation of Islamic legal terms to a religious arbitrator. Given the indeterminacy of Islamic law, judges may find that the parties mutually understood that an Islamic legal scholar would resolve the precise meaning of disputed terms. Arbitration is consistent with contract law since the goal of the judge is to enforce what the parties mutually understood when drafting the contract and to avoid imposing obligations on the parties that were not contemplated.¹⁸⁴ By incorporating Islamic law into contracts, many Muslims express a desire to act according to Shari'a. A secular court's resolution of the dispute may hinder this objective.

These guidelines will help judges adjudicate contractual disputes while staying within the constitutional limits imposed by the First Amendment. Even though parties may not object to judicial interpretation of religious contracts, it is prudent (and constitutionally mandated) to maintain a wall of separation between state and religion. Deferring the determination of Islamic legal terms and Islamic law to religious arbitrators provides a forum for relief and upholds the intent of the contracting parties. Most importantly, such an approach protects the sanctity and authenticity of Islamic law.

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183. See discussion *supra* Part IV.A.

184. See discussion *supra* Part II.

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