

Comment,
LIVING HAPPILY EVER AFTER IN A LAND
OF SEPARATE CHURCH AND STATE:
TREATMENT OF ISLAMIC MARITAL
CONTRACTS

Love is patient and kind; it is not jealous or conceited or proud; love is not ill-mannered or selfish or irritable; love does not keep a record of wrongs; love is not happy with evil, but is happy with the truth. Love never gives up; and its faith, hope, and patience never fail.¹

Marriage laws in the United States have their origins deeply rooted in England, where common law and Christian ecclesiastical law shaped family law jurisprudence.² For the most part, in America, Christian traditions still shape marriage,³ with the story unfolding in some variation of the following: a girl and boy meet and start to date, they fall in love, he proposes and she accepts, and then a lavish wedding is planned, often with a religious officiator overseeing the ceremony. At some point in the process, the couple does have to obtain a marriage license or certificate, but this only requires the parties' signatures and that of a person licensed to perform a marriage ceremony.⁴ After the parties are married, the person performing the marriage ceremony must return the license to the Recorder of Deeds within a specified number of days after the ceremony, and a filing fee is paid.⁵ The act of obtaining the marriage certificate or license is not the focus of marriage in America, but an inconvenient legality detached from

¹ 1 *Corinthians* 13:4-7 (Good News Translation).

² WILLIAM BLACKSTONE, COMMENTARIES *433-45, *446-57 (2009); HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 21-25 (2d ed. 1998).

³ Nathan B. Oman, *Judge Shari'a Contracts: a Guide to Islamic Marriage Agreements in American Courts*, 2011 UTAH L. REV. 287, 291-92 (“[The] Christian legacy reveal itself in our law’s special concern with matters of religious belief, and the tripartite structure of the act of marriage as consisting of bride, groom, and an officiator performing the marriage”) (citing to JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (1997)).

⁴ MO. REV. STAT. §§ 451.010-.080 (2011) (Missouri’s statute is similar to those enacted nationally).

⁵ *Id.* §§ 451.130, 451.150.

the main event—the wedding ceremony. The wedding ceremony itself represents the solidifying union and is viewed by Christians as a holy sacrament,⁶ without which the couple would not genuinely be married.

Remnants of Christianity in family laws are particularly evident through the prohibition of polygamy,⁷ states' enactments of covenant marriage statutes,⁸ and non-recognition of same-sex marriages by the federal government and the majority of states.⁹ In the late 1990s and early 2000s, Louisiana,¹⁰ Arkansas,¹¹ and Arizona¹² enacted covenant marriage statutes encouraging long-term marriage as counter-measures to the enactment of no-fault divorce statutes.¹³ Twenty-six other state legislatures also unsuccessfully introduced covenant marriage statutes.¹⁴ Covenant marriage statutes directly stem from the Code of Canon Law, which describes marriage as between a man and woman, “a part-

⁶ WAEL B. HALLAQ, *SHARIA: THEORY, PRACTICE, TRANSFORMATION* 271 (2009).

⁷ See *infra* notes 39-43.

⁸ See *infra* notes 11-15.

⁹ See Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (1996) (“In determining the meaning of any Act of Congress . . . the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife”). On May 31, 2012, the First Circuit Court of Appeals unanimously held that DOMA discriminates against same-sex couples by denying them the benefits given to heterosexual couples. The Supreme Court is expected to hear its appeal in 2013. See *Gill et al. v. Office of Personal Management*, 682 F.3d (1st Cir. 2012).

¹⁰ LA. REV. STAT. ANN. §§ 9:237 to :275.1, :293 to :298, :307 to :309 (2011) (effective 1997).

¹¹ ARK. CODE ANN. §§ 9-11-202, -11-215, -11-220, -11-801 to -811, 12-301, -12-324 (2011) (effective 2001).

¹² ARIZ. REV. STAT. ANN. §§ 25-111, 25-312 to -314, 25-901 to -906 (2012) (1998).

¹³ See generally Joal A. Nichols, *Religious and Legal Pluralism in Global Comparative Perspective: Religion, Marriage, and Pluralism*, 25 EMORY INT'L L. REV. 967, 985 (2011) (Discussing the future of the institute of marriage as a form of religious expression through civil statute).

¹⁴ These states include Alabama, California, Colorado, Georgia, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin. Peter Hay, *The American “Covenant Marriage” in the Conflict of Laws*, 64 LA. L. REV. 43, 44 n.2 (2003).

nership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children, has, between the baptized, been raised by Christ the Lord to the dignity of a sacrament.”¹⁵

Despite traces of Christianity, over time, America’s secular laws have loosened ties to Christian principles through the recognition of no-fault divorce¹⁶ and the growing usage of birth control.¹⁷ Courts have also increasingly recognized spousal autonomy within marriage, which has spawned significant popularity in intraspousal contracting, primarily antenuptial and prenuptial agreements, hereinafter “premarital agreements.”¹⁸ Historically, premarital agreements were barred for public policy reasons and potential encouragement of divorce, but premarital agreements are now legal in every state.¹⁹ What is now presenting a more pressing issue for courts in the area of family law is how to address family dynamics that are contrary to a one-size-fits-all approach.²⁰ Families today no longer reflect, nor perhaps have they ever, identical norms.

In 1800, around 5.3 million people lived in the United States.²¹ In 1900, 76 million people lived in the United States.²² Over the course of a century, America’s open door policy on im-

¹⁵ Katherine Shaw Spaht, *Covenant Marriage: An Achievable Legal Response to Inherent Nature of Marriage and Its Various Goods*, 4 AVE MARIA L. REV. 467 (2006) (quoting 1983 Code c. 1055, § 1).

¹⁶ National Conference of Commissioners on Uniform State Laws, *Unif. Marriage and Divorce Act*, Prefatory Note (1970) (eliminating fault grounds in determining the dissolution or separation of marriage).

¹⁷ Editorial, *Birth Control and Teenage Pregnancy*, N.Y. TIMES, Apr. 19, 2012, at A26, available at <http://www.nytimes.com/2012/04/19/opinion/birth-control-and-teenage-pregnancy.html>; see also Nicholas Bakalar, *Well: Teenage Birth Rates Continue to Drop*, N.Y. TIMES, Apr. 16, 2012, available at <http://well.blogs.nytimes.com/2012/04/16/teenage-birth-rates-at-a-low/?ref=opinion>.

¹⁸ Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CAL. L. REV. 1479, 1495 (2001).

¹⁹ *Id.* at 1496.

²⁰ *Id.* at 1482 (“Marriage law has become a bizarre variation on the proverbial sausage factory: rather than all manner of ingredients going in and everything coming out ‘sausage,’ everything is considered ‘sausage’ going in but comes out in inexplicably—and unpredictably—different forms.”).

²¹ 1800 Census by Census Research for Genealogists, http://www.1930census.com/1800_census.php (last visited Apr. 19, 2012).

²² 1900 Census by Census Research for Genealogists, http://www.1930census.com/1900_census.php (last visited Apr. 19, 2012).

migration influenced it being known as the “melting pot,” expanding its population not only in numbers, but also with divergent cultures. Over the next one hundred years, the population of the United States spiked to 281.5 million, and that number grew another twenty-seven million in 2010.²³ Globalization and increased mobility are allowing people to easily relocate anywhere in the world. As people they do so, immigrants are transporting with them their cultures, belief systems, and religious convictions. Although Thomas Jefferson likely expected America’s population to increase exponentially, could he, or anyone for that matter, have foreshadowed the conflicting intersection between religious laws, separate from Christianity, and America’s surprisingly Christian-based legal system?

Currently in the United States, only 0.7% of the population is Muslim. Although, at first, this number might seem too trivial to amount to any real legal peril, increased globalization and mobilization highlight changing trends deserving of the law’s immediate attention. Over the next twenty years, the world’s Muslim population is expected to increase by approximately 35%, rising from 1.6 billion in 2010 to 2.2 billion by 2030.²⁴ In the United States, the number of Muslims will more than double over the next two decades, rising from 2.6 million in 2010 to 6.2 million in 2030 because of immigration and higher-than-average fertility among Muslims.²⁵ Such a population growth would make Muslims roughly as numerous as Jews or Episcopalians are in the United States today.²⁶ It is time for society and the law to recog-

²³ U.S. DEP’T OF COMMERCE, ECON. AND STATISTICS ADMIN., POPULATION DISTRIBUTION AND CHANGE 2000 TO 2010 (Mar. 2011), available at http://www.census.gov/prod/cen2010/briefs/c_2010br-01.pdf.

²⁴ Pew Research Center, Forum on Religion & Public Life, Executive Summary, *The Future of the Global Muslim Population Projections for 2010-2030* (2011), available at <http://pewresearch.org/pubs/1872/muslim-population-projections-worldwide-fast-growth>.

²⁵ *Id.* Although Muslim populations have higher fertility rates than non-Muslim populations because more Muslim children are born per woman, generally the growth rate is declining in Muslim populations because more women in these countries are now obtaining secondary educations, living standards are rising, and people are migrating from rural areas to cities and towns.

²⁶ *Id.* Despite this projected increase in the United States, Russia and France are expected to see higher percentages of Muslims by 2030 than any other non-Muslim country.

nize that the current Muslim population is not going anywhere and will inevitably increase substantially over time.

With this recognition lies a demand for reevaluation of society's perceptions of Muslim culture. Society needs to appreciate the differences and acknowledge the similarities to ascertain what necessary steps should be taken moving forward, especially in the area of family law. Family dynamics are so inherently intertwined with religion that it is almost impossible to expect any area of family law to be entirely separate from religion, however hard courts might try to be neutral. Instead, in moving forward, the law must be abreast to shifting ideologies rather than clinging to a belief that the current law is void of religious influence. Perhaps courts have overlooked the influence religion was intended to have on America's laws:

The community we live in today is vastly different from the community of the late 1700's when our Constitution was drafted by the founding fathers. At that time, our founding fathers were concerned with state sponsored church such as existed in many European community that they had sought to escape when they came to this country. Today's community is not as concerned with issues of a state sponsored church. Rather, the challenge faced by our courts today is in keeping abreast of the evolution of our community from a mostly homogenous group of religiously and ethnically similar members to today's diverse community. The United States has experiences a significant immigration of diverse people . . . Can our constitutional principles keep abreast of these changes in the fabric of our community?²⁷

This article will look at the current treatment of religious marital agreements, specifically Islamic, and courts' treatment of these agreements as premarital agreements under the "neutral principles of law" doctrine or approach. In doing so, it aims to reveal that courts are undermining the integrity of Islamic marital traditions and fashioning a patchwork of confusion for lower courts and Muslim couples subject to American courts. Eventually, legislatures and courts will have to acknowledge the close ties religion has played in America's marital traditions and discover how to appreciate new religious marital customs in America while upholding those already in place.

Part I provides an overview of America's relationship with religion, seen through separation of church and state. Part II explains the religious doctrines behind Muslim marital traditions

²⁷ See *infra* note 82.

and the influence *mahr* agreements have on Muslim couples. Part III looks at courts' interpretations of these agreements as premarital agreements and under the neutral principles of law approach. In conclusion, Part IV demands resolution from legislatures and courts to cure the lack of uniformity applied to Islamic marital agreements so that the current, and future Muslim populations in the United States are able to preserve their religious traditions while living in the land of the free.

I. Separation of Church and State Through the Establishment Clause and Free Exercise Clause

[R]eligion is a matter which lies solely between man and his God; that he owes no account to none other for his faith or his worship; that the legislative powers of government reach actions only and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should make "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between Church and State.²⁸

To understand courts' treatment of religious marital contracts, one must first look at American law's religious origins. At the inception of America's independence from Great Britain, the colonists retained a fierce commitment to freedom from religious persecution. In Colonial America, fledgling legislatures enacted laws requiring religious tolerance, which was a foreign concept at this time. In 1649 the Maryland Toleration Act, also known as the Act Concerning Religion, required religious tolerance in the British North American colonies and created the first legal limitations on hate speech in the world.²⁹ The Act permitted freedom of worship for all Trinitarian Christians in Maryland, but permitted the persecution of anyone who denied the divinity of Jesus Christ.³⁰ Over the next century, the dichotomy of religious ideologies and secular law continued to evolve, eventually

²⁸ THOMAS JEFFERSON, XVI WRITINGS 281-82, to the Danbury Baptist Association on January 1, 1802.

²⁹ See "Maryland Toleration Act," Yale University Avalon Project, Lillian Goldman Law Library (2008), available at http://avalon.law.yale.edu/18th_century/maryland_tolerantion.asp.

³⁰ *Id.*

reemerging into the doctrine of “separate church and state.”³¹ Founding Father and the third President of the United States, Thomas Jefferson, is principally credited for the phrase, which he stated in 1802 in a letter written to the Danbury Baptist Association, that there must be a “wall of separation between church and state.”³²

Jefferson’s shorthand was eventually codified through the Establishment Clause and the Free Exercise Clause in the First Amendment, which together read, “Congress shall make no law respecting an establishment of religion, *or* prohibiting the exercise thereof.”³³ The Establishment Clause forbids the government from establishing an official religion or unduly favoring one religion over another. The Free Exercise Clause, in comparison, mandates and safeguards the free exercise of the chosen form of religion. Before the enactment of the Fourteenth Amendment in 1868, the Establishment Clause did not apply to states,³⁴ which manifest the most power over family law matters. Incorporation of the Establishment Clause was, and still is, a contentious topic among legal scholars because of the presence of one word, “Congress.”³⁵ Regardless, the Establishment Clause is incorporated and applies to all state actions.³⁶

³¹ U.S. CONST. amend. I.

³² JEFFERSON, *supra* note 29. Fellow Founding Father and fourth President of the United States, James Madison, also pioneered the establishment of separate church and state. *See, e.g.*, Jefferson & Madison on Separation of Church and State: Writings on Religion and Secularism (Lenni Brenner ed., 2004). *See also* *Everson v. Board of Educ.*, 330 U.S. 1, 16, (1947) (discussing the wall of separation between church and state); *C.F. v. Capistrano Unified Sch. Dist.*, 615 F. Supp. 2 1137, 1144 (C.D. Cal. 2009) (“The Supreme Court has held that the separation of church and state mandated by the First Amendment ‘rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere’”).

³³ U.S. CONST. amend. I (emphasis added).

³⁴ *Everson*, 330 U.S. at 51-58 (holding that the Establishment Clause of the First Amendment is binding upon states through the Due Process Clause).

³⁵ *Utah Highway Patrol Ass’n v. American Atheists, Inc.*, 132 S. Ct. 12 (2011) (Thomas, J., dissenting). *See also* Kathryn Elizabeth Komp, *Unincorporated, Unprotected: Religion in an Established State*, 58 VAND. L. REV. 301 (2005).

³⁶ *Everson*, 330 U.S. at 51-58.

Despite the seemingly straightforward bright line of Jefferson's church and state separation, courts are continually grappling with questions intertwined with religion. While the Supreme Court has never actually comprehensively spoken on the framework for analyzing religious contracts under the Establishment Clause, it has provided several cases indicative of what the Court would apply.³⁷ One of the earliest cases addressing freedom of religion was in 1878, in *Reynolds v. United States*.³⁸ In this case, Reynolds, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, was accused and convicted of bigamy after marrying a second woman.³⁹ Reynolds challenged the constitutionality of Utah's anti-polygamy statute to the Supreme Court, arguing that an accepted doctrine of the Mormon Church is the practice of polygamy and:

[T]hat the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God . . . the failing or refusing to practice polygamy by such male . . . would be punished, and that the penalty for such failure and refusal would be damnation in the life to come.⁴⁰

The Court affirmed the Utah Supreme Court's conviction of Reynolds, which reaffirmed the government's power to regulate social relations, obligations, and duties, regardless of their sacred nature.⁴¹ Furthermore the Court acknowledged that certain practices should never be condoned solely because they are religious practices *per se*, especially if those practices are contrary to public policy.⁴²

³⁷ Brian Sites, *Religious Documents and the Establishment Clause*, 42 U. MEM. L. REV. 1, 10 (2011).

³⁸ 98 U.S. 145 (1878). Interestingly, the stars of the TLC show *Sister Wives*, four wives, recently brought a federal lawsuit challenging Utah's anti-bigamy statute. On February 3, 2012, a U.S. district court judge held that these women have standing to challenge the constitutionality of Utah's law. *Brown v. Herbert*, No. 2:11-CV-0652-CW, 2012 WL 380110 (D. Utah 2012).

³⁹ *Id.* at 161.

⁴⁰ *Id.*

⁴¹ *Id.* at 166.

⁴² *Id.* ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship . . . could [the government] not interfere to prevent a sacrifice?")

Thereafter, in 1979, the Supreme Court heard a dispute over ownership of church property affiliated with a hierarchical church organization.⁴³ The church congregation had divided into two groups, both of which believed they controlled ownership of the property. One of the groups brought the dispute to Georgia civil court, and the other group objected on the grounds of separation of church and state.⁴⁴ The Court affirmed the Georgia Supreme Court's decision to apply the neutral principles of law approach to the property dispute. The neutral principles of law approach is simply a requirement that courts not consider religious influences in determining a property or contract dispute, but instead apply traditional, unbiased legal theories.⁴⁵ This approach means that states "may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith," rather than deferring these disputes to an authoritative church tribunal.⁴⁶ In favor of the neutral principles of law approach, the Court added, "that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity . . . [and] promises to free civil courts completed from entanglement in questions of religious doctrine polity and practice."⁴⁷

Over the last forty years, the neutral principles of law approach set forth in *Jones* has been applied to religious marital contracts, including those marital contracts entered into by members of the Islamic and Jewish faith. In interpreting these contracts, courts attempt to detach religious ideologies as the neutral principles of law approach provides. By doing so, courts are incapable of truly understanding the nature of the marital contracts being entered into.

⁴³ *Jones v. Wolf*, 443 U.S. 595 (1979).

⁴⁴ *Id.* at 602.

⁴⁵ *Id.* (citing to *Maryland & Virginia Eldership of Churches of God v. Church of God, Inc.*, 396 U.S. 367, 368 (1970)) (finding that when construing dispute regarding church deeds "neutral principles of law should be applied without engagement in theological or ecclesiastical speculation or determination and, therefore, the First Amendment [will] not [be] violated").

⁴⁶ *Id.*

⁴⁷ *Id.* at 606.

II. Understanding Islamic Law

Among His proofs is that He created for you spouses from among yourselves, in order to have tranquility and contentment with each other, and He placed in your hearts love and care towards spouse. In this, there are sufficient proofs for people who think.⁴⁸

A. Governance by Shari'a Law

To understand American courts' treatment of Islamic marital contracts, one first has to understand Islamic marriage, which is governed by Shari'a law. Unlike in America, where society tends to understand and expect a fixed set of governing laws, Shari'a law "is a lot more fluid than that, in part because there's no governing authori[ty] in Islam."⁴⁹ Shari'a law is the code of law based on the Qur'an.⁵⁰ Shari'a generally translates as "path" in Arabic, is intended to guide Muslims to connect with God, and is rooted in mercy and compassion.⁵¹ Historically, and certainly in recent years, this definition has not been embraced or recognized by Western societies at large.⁵² Since the terrorist attacks on September 11, 2001, a generalized stigma has been placed on an entire culture based on the actions of a few. Contrary to popular belief, Muslim women do not lose their legal identity upon marriage and in many countries even keep their surname after

⁴⁸ THE MESSAGE OF THE QUR'AN at 30:21 (Mohammad Asad trans., The Book Foundation 2004) [hereinafter "QUR'AN"].

⁴⁹ Interview by Terry Gross with Andrea Elliot, National Public Radio—Fresh Air, *Who's Behind the Movement to Ban Shariah Law?*, available at <http://www.npr.org/2011/08/09/139168699/whos-behind-the-movement-to-ban-shariah-law> (Aug. 9, 2011).

⁵⁰ Nathan B. Oman, *Bargaining in the Shadow of God's Law: Islamic Mahr Contracts and the Perils of Legal Specialization*, 45 THE WAKE FOREST L. REV. 579, 588-89 (2010). Shari'a law incorporates and expands upon the spiritual, civil, and military teachings of Prophet Muhammad, during his pinnacle years circa 622 C.E. Later generations of Muslims added to the initial passages recounting the Prophet's teachings and actions, establishing the current elaborate system of religious law.

⁵¹ AMERICAN HERITAGE DICTIONARY (2011), available at <http://ahdictionary.com/word/search.html?q=sharia&submit.x=0&submit.y=0>.

⁵² See, e.g., LORI PEEK, *BEHIND THE BACKLASH: MUSLIM AMERICANS AFTER 9/11* (2011).

marriage.⁵³ There is also nothing in Shari'a law analogous to community or marital property or, upon divorce, the equitable distribution of marital assets.⁵⁴

Rather, when a Muslim couple divorces, each walks away with his or her individual property, with the husband typically owing all of the debt.⁵⁵ Unfortunately for most Islamic women this means they are left with nothing at divorce as most Muslim women are pressured not to work outside the home before and during the marriage and therefore do not own individual or separate property.⁵⁶ Shari'a law, however, protects Muslim women's financial interests through the execution of marital agreements.

B. Execution of Mahr Agreements

When someone enters into an Islamic marriage, the relationship is contractual and governed by law, but it is also simultaneously concomitant with religion.⁵⁷ Under Islamic tradition when two people want to get married, they enter into a contract called a *nikah* agreement.⁵⁸ To execute the *nikah* there are three requirements: mutual agreement by the parties, two male witnesses, and the *mahr* provision. The agreement, as seen in basic contract law, requires an offer and its acceptance, and the name

⁵³ Public Broadcasting Service, *Global Connections the Middle East: What Factors Determine the Changing Roles of Women in the Middle East and Islamic Societies?* (2002), <http://www.pbs.org/wgbh/globalconnections/mideast/questions/women/>. The article debunks common misperceptions regarding treatment of Islamic women by their religion and poignantly states:

It is true that Muslim women, like women all over the world, have struggled against inequality and restrictive practices in education, work force participation, and family roles. Many of these oppressive practices, however, do not come from Islam itself, but are part of local cultural traditions. (To think about the difference between religion and culture, ask yourself if the high rate of domestic violence in the United States is related to Christianity, the predominant religion.)

⁵⁴ Oman, *supra* note 51, at 590 (citing to Halaq, *supra* note 6, at 279).

⁵⁵ *Id.* at 591.

⁵⁶ *Id.* at 590; See also Tracie Rogalin Siddiqui, *Interpretation of Islamic Marriage Contracts by American Courts*, 41 FAM. L.Q. 639, 643 (2007).

⁵⁷ *Id.* at 642.

⁵⁸ Asisah Y. Al-Hibri, *Minaret of Freedom Banquet: The Muslim Marriage Contract in American Courts* (May 20, 2000), available at <http://www.minaret.org/azizah.htm>.

of the owner to whom the specific property is vested.⁵⁹ More recently, these agreements might additionally include detailed terms regarding what each spouse expects from the marriage, including living arrangements, to requirements that one of the parties learn Arabic or enroll in cooking lessons.⁶⁰

Prior to the marriage, negotiations take place by the parties and their relatives, normally a male who is supposed to represent their interests called a *wali*. The husband must give something of value to his wife called the *mahr* or *sadaq*, which is often referred to by Americans as a bride price, a marriage gift, or a dowry.⁶¹ Interpretations of the *mahr* provision as equivalent to “bride price” are highly criticized by Islamic scholars because the *mahr* provision is intended as a financial interest for the wife, and wife alone. The Qur’an’s literal objective in requiring the *mahr* provision is as a gift from the husband to the bride, not as a transaction whereby the family sells off their daughter in exchange for money.⁶² The wife may receive the *mahr* provision at the time of the marriage, at divorce, or at her husband’s death.⁶³ The reasoning behind the *mahr* provision is to ensure the wife will be protected financially throughout the marriage and afterward.

Divorce in Islamic societies is looked upon as the least desirable or acceptable action but is permitted under the Qur’an.⁶⁴ It is debatable by translators whether the wife has the right to initiate divorce and what effect her initiation has on the *mahr* provision. Some translators argue that without a finding of fault on the part of the husband, the wife will sacrifice her *mahr* provi-

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² QUR’AN, *supra* note 48, at 4:24 (“And unto those with whom you desire to enjoy marriage, you shall give the dowers *due* to them.”) (emphasis added).

⁶³ Siddiqui, *supra* note 56, at 644.

⁶⁴ JOHN L. ESPOSITO, WHAT EVERYONE NEEDS TO KNOW ABOUT ISLAM 143 (2002). Conversely, the divorce rate in America has surged over the past twenty years, by more than fifty percent, and more recently, even among the older, baby boomer population. In 1970, only thirteen percent of adults ages forty-six through sixty-four were divorced. In 2010, that number shot to around thirty-three percent. See Rachel L. Swarns, *More Americans Rejecting Marriage in 50s and Beyond*, N.Y. TIMES, Mar. 1, 2012, at A12, available at <http://www.nytimes.com/2012/03/02/us/more-americans-rejecting-marriage-in-50s-and-beyond.html?pagewanted=all>.

sion.⁶⁵ But again, this is a complex and controversial issue and not consistent among Muslim countries or schools of thought.⁶⁶ In contrast, husbands may unilaterally divorce their wives through a device called a *talaq*.⁶⁷ Husbands do not have to show cause for wanting a divorce, but must pay the deferred portion of the *mahr* provision to their wives. Recently, Muslim feminists have advocated marriage contracts where the husband assigns the power of *talaq* to his wife, providing both parties access to unilateral divorce.⁶⁸

The complex nature of Muslim marital traditions is concentrated on a contractual arrangement fixed in Shari'a law rather than theology as in Christianity.⁶⁹ Courts should be prepared to face serious challenges in their separation of church and state as more Muslims marry in America and divorce after migration.

III. American Courts' Interpretation and Enforcement of *Mahr* Agreements

Over the last several decades, courts have repeatedly addressed how to resolve *mahr* agreements, with no unanimous interpretation emerging.⁷⁰ Instead, two interpretations have

⁶⁵ QUR'AN, *supra* note 48, at 61 n.218.

⁶⁶ Siddiqui, *supra* note 56, at 645.

⁶⁷ Lindsey E. 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) (“[B]ecause the typical Muslim woman lives in constant fear of being repudiated at-will by her husband [through his power in the *talaq*], the deferred *mahr* is akin to a security deposit”) (citations omitted).

⁶⁸ See Kathleen A. Portuan Miller, *Who Says Muslim Women Don't Have the Right to Divorce?—A Comparison Between Anglo-American Law and Islamic Law*, 22 N.Y. INT'L L. REV. 201, 225-26 (2009) (discussing how marriage contracts may enhance a woman's access to divorce).

⁶⁹ Oman, *supra* note 3, at 291-92.

⁷⁰ See, e.g., *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863 (Cal. Ct. App. 2001); *In re Marriage of Dajani*, 251 Cal. Rptr. 871 (Cal. Ct. App. 1988); *Akileh v. Elchahal*, 666 So. 2d 246 (Fla. Dist. Ct. App. 1996); *Aleem v. Aleem*, 931 A.2d 1123 (Md. Ct. Spec. App. 2007); *Odatalla v. Odatalla*, 810 A.2d 93 (N.J. Super. Ct. Ch. Div. 2002); *Chaudry v. Chaudry*, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978); *Habibi-Fahnrich v. Fahnrich*, No. 46186/93, 1995 WL 507388, at *1 (N.Y. Sup. Ct. July 10, 1995); *Aziz v. Aziz*, 488 N.Y.S.2d 123, 124 (N.Y. Sup. Ct. 1985); *Zawahiri v. Alwattar*, No. 07-AP-925, 2008 WL 2698679 (Ohio Ct. App. July 10, 2008); *Mir v. Birjandi*, Nos. 2006 CA 63, 2006 CA 71, 2006 CA

emerged as the frontrunners—interpretation as either a premarital agreement or under the neutral principles of law approach. Although application of the neutral principles of law approach provides a closer balance of Muslim marital traditions and American ideals of equitable distribution than interpreting *mahr* agreements as premarital agreements, neither approach adequately adheres to or respects both. More importantly, the divergence among courts provides no direction or consistency for Muslim couples.

A. *Interpreting Mahr Agreements as Premarital Agreements*

Interpreting *mahr* agreements as prenuptial or antenuptial agreements (hereinafter “premarital agreements”) applies a specialized body of contract law.⁷¹ While specialized, premarital agreements are still governed by and subject to the principles of contract law.⁷² In 1983, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Premarital Agreement Act (hereinafter “UPAA”) in an attempt to combat inconsistencies of these agreements.⁷³ Since then, twenty-six states have adopted the Act or have similar statutes in place.⁷⁴ Correspondingly, in 2000, the American Law Institute promulgated its Principles of the Law of Family Dissolution, which covers a broader scope than the Uniform Act, including: premarital, postmarital, cohabitation, and separation agreements.⁷⁵ Although prenuptial agreements and *mahr* agreements are similar in the timing of their execution, when courts interpret *mahr* agreements as premarital agreements, critical disparities are

72, 2007 WL 4170868 (Ohio Ct. App. Nov. 21, 2007); *Ahmad v. Ahmad*, No. L-00-1391, 2001 WL 1518116 (Ohio Ct. App. Nov. 30, 2001); *Ahmed v. Ahmed*, 261 S.W.3d 190 (Tex. App. 2008).

⁷¹ Oman, *supra* note 50, at 580.

⁷² 41 AM. JUR. 2D *Husband and Wife* § 89 (2012).

⁷³ National Conference of Commissioners on Uniform State Laws, Uniform Premarital Agreements Act, Prefatory Note 1 (1983), available at <http://www.law.upenn.edu/bll/ulc/fnact99/1980s/upaa83.htm> [hereinafter *UPAA*]. See also, e.g., CAL. FAM. CODE § 1615 (2012).

⁷⁴ Margaret F. Brinig, *Feminism and Child Custody Under Chapter Two of the America Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 301, 301 n.3 (2001).

⁷⁵ A.L.I., Principles of the Law of Family Dissolution: Analysis and Recommendations § 7.01-7.12 (2000).

overlooked, leaving Muslim couples with unintended outcomes: when “specialized bodies of law embed in judges’ minds a particular script about transactions, and once this script is entrenched, it may be difficult for judges to recognize and apply the law to fact patterns that diverge from it.”⁷⁶ This artful critique is all too often a reality for Muslim couples who find themselves in American courts.

Classifying *mahr* agreements as premarital agreements and subsequent application of the UPAA, means that *mahr* agreements are held to the same formation standards as premarital agreements. The UPAA provides that premarital agreements must be conscionable, entered into voluntarily, and executed only after both parties fully disclose their financial assets.⁷⁷ Most *mahr* agreements do not meet these requirements and for couples in courtrooms that interpret Muslim marital agreements as such this creates unfortunate consequences.⁷⁸ For example, in *Ahmad v. Ahmad*, the Ohio court would not uphold the couple’s *mahr* agreement because “at the time the agreement was entered into, [the wife] was not represented by counsel, there was no disclosure of [husband’s] assets, and the agreement did not take into consideration the assets subsequently acquired in Ohio during the eight-year marriage.”⁷⁹ When these requirements are applied to *mahr* agreements, courts are not considering the differences in how Muslim marriages are formed. When a couple in America signs a prenuptial agreement, they are often doing so to protect assets as a protective measure in contemplation of potential divorce. Religion does not come into play. As stated above, for a Muslim couple, entering into a *mahr* agreement is a cultural

⁷⁶ Oman, *supra* note 50, at 586-87 (arguing that new bodies of law controlling certain kinds of transactions—law of sale of goods codified by the Uniform Commercial Code, labor law, law at state and federal level governing employment contracts—has complicated contract law. Instead, courts should divert back to the generality of contract law which “promotes innovation in transactional structure by remaining largely agnostic about how parties should order their contracts”).

⁷⁷ UPAA, *supra* note 73.

⁷⁸ Oman, *supra* note 3, at 334 (“Such requirement insures that the parties to a traditional prenuptial agreement understand the value of what they are bargaining over. Such claims on property, however, simply are not part of what the parties to an Islamic marriage contract are bargaining over.”).

⁷⁹ No. L-00-1391, 2001 WL 1518116, at *4 (Ohio Ct. App. Nov. 30, 2001).

and religious device that honors and protects the wife as she enters into marriage. Ideologically, these two agreements are not as similarly categorized as courts are attempting to interpret them.

An additional, and perhaps more pressing, concern for Muslim women living in the United States,⁸⁰ is when courts fail to equitably distribute marital assets when a *mahr* agreement is in place. In 1978, a New Jersey court dissolved the marriage of an Islamic couple from Pakistan.⁸¹ The parties were married in Pakistan and had subsequently moved to New Jersey where the husband was a successful doctor. At some point, the wife had returned to Pakistan with the children. Prior to marriage, the couple entered into a *mahr* agreement in which the wife at any time during or after the marriage, on demand could obtain around \$1,500 from her husband.⁸² The agreement did not speak to any additional rights she might have to her husband's property or whether she would be entitled to alimony or support. In deciding whether to uphold the *mahr* agreement the court first looked at whether there was a "sufficiently strong nexus between the marriage and this State e.g. where the parties have lived here for a substantial period of time a claim for alimony and equitable distribution may properly be considered."⁸³ After finding that the parties had lived in New Jersey for a substantial amount of time, the court then examined the *mahr* agreement. The court concluded that the wife was not entitled to equitable distribution by treating the *mahr* agreement as a premarital agreement and found no public policy reason that would justify refusing to enforce the *mahr* agreement in accordance with Shari'a law, where it was freely negotiated when marriage took place.⁸⁴ As a result, the wife was left with \$1,500, no maintenance, and no equitable distribution of assets or alimony.⁸⁵

⁸⁰ See, e.g., Lindsey E. Blenkhorn, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. REV. 189 (2002) (arguing that courts should override *mahr* agreements and apply ordinary property dissolution rules to Muslim divorces).

⁸¹ *Chaudry v. Chaudry*, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978).

⁸² *Id.* at 1004.

⁸³ *Id.* at 1006.

⁸⁴ *Id.*

⁸⁵ *Id.* at 1008.

Courts seem to be sideswiping interpretation of Shari'a law and problems with enforcement of religious principles by only applying secular contract laws associated with premarital contracts. The outcome in *Chaudry* exposes courts' confusion over *mahr* provisions and premarital agreements in America. The court tried to understand the intentions of the party as framed by their particular culture and religion by assuming the *mahr* provision was an attempt at bargaining away rights in divorce, as done in premarital agreements.⁸⁶ The *mahr* provision of their *nikah* agreement was intended for something entirely different—a set of social concerns resting in Shari'a law which does not translate easily into American law, and especially by American courts that do not have any uniform guidance-lending direction.⁸⁷ Because of this, parties to *mahr* provisions are able to use the law of premarital agreements to avoid liability imposed by states with equitable distribution or community property theories of division of marital property.

In a similar case, *Akileh v. Elchaheal*, the couple were immigrants from Syria and Lebanon, but met and married in the United States.⁸⁸ Prior to marriage, the parties executed a *nikah* agreement with a *mahr* provision providing the wife around fifty thousand dollars immediately and fifty thousand dollars delayed. After the husband contracted a sexually transmitted disease acquired through an extramarital affair, the marriage deteriorated and the wife filed for divorce. The trial court held that the *mahr* provision was unenforceable for lack of consideration and no meeting of the minds because the court interpreted the *mahr* as protection for the wife from an unwanted divorce and she was the one who pursued the divorce.⁸⁹ On appeal, the husband argued that the wife's pursuit of divorce disqualified her right to the delayed *mahr* provision, despite the fact that he was arguably at fault for infidelity. The court did not agree with this argument, and enforced the delayed *mahr* provision, stating that marriage itself was adequate consideration to amount to a meeting of the minds, despite their differing interpretations of the *mahr*.⁹⁰

⁸⁶ Oman, *supra* note 50, at 580.

⁸⁷ *Id.* at 581.

⁸⁸ 666 So.2d 246 (Fla. Dist. Ct. App. 1996).

⁸⁹ *Id.* at 248.

⁹⁰ *Id.*

When courts interpret *mahr* agreements as premarital agreements two outcomes emerge: first, there is a possibility that the couple's *mahr* agreement will not be upheld because it does not fulfill the necessary requirements controlling premarital agreements, and second, if the couple's *mahr* agreement is upheld, then equitable distribution of marital assets is not permitted. Neither one of these outcomes are proper solutions for Islamic couples living in America.

B. *Enforcement of Mahr Provisions Under a Neutral Principles of Law Approach*

As discussed in Part I, the neutral principles of law approach originated as a way of interpreting religious contracts generally. This more general framework was then applied to Jewish marital contracts, otherwise known as *ketubah* agreements, and then subsequently applied to *mahr* agreements. In 1985, in *Aziz v. Aziz*, the couple's *nikah* consisted of a *mahr* of \$5,032, \$5,000 of which was to be a deferred payment and \$32 immediate payment.⁹¹ In deciding whether to uphold the *mahr*, the court applied neutral principles of contract law, which it had previously applied to a *ketubah* in *Avitzar v. Avitzar*.⁹² The couple in *Avitzar*, were married in a ceremony conducted in accordance with Jewish tradition, which involves execution of a *ketubah* that reflects the groom's "intention to cherish and provide for his wife as required by religious law and tradition and the bride's willingness to carry out her obligations to her husband in faithfulness and affection according to Jewish law and tradition."⁹³ In addition, the couple agreed to recognize and authorize a *beth din*, a rabbinical tribunal or more specifically arbiter, in the event that the couple divorced. Although the majority upheld the *ketubah* and applied neutral principles of contract law to the religious agreement, the dissenters were not pleased with the outcome. The three dissenters argued that effectively upholding the *ketubah* requires "constitutional impermissible interjection of the court into matters of religious and ecclesiastical content."⁹⁴ Nonetheless, the New

⁹¹ 488 N.Y.S.2d 123 (N.Y. Sup. Ct. 1985).

⁹² 459 N.Y.S.2d 572 (N.Y. Sup. Ct. 1983).

⁹³ *Id.* at 573.

⁹⁴ *Id.* at 576.

York Superior Court upheld the *ketubah* and in turn upheld the *mahr* in *Aziz*, under the neutral principles approach.

When applying neutral principles of contract law, courts are not only able to uphold the *mahr*, but also to distribute marital assets. In 2002, a New Jersey court in *Odatalla v. Odatalla* was able to do exactly that.⁹⁵ The couple married in the state of New Jersey through a traditional Islamic marriage, which included a *mahr* agreement giving the wife one golden pound coin and ten thousand dollars delayed.⁹⁶ The wife sought enforcement of the *mahr* agreement, alimony, and equitable distribution of the marital assets and debt. In applying a neutral principles of law approach, the court looks to see whether the contract “is a set of promises for the breach of which the law gives a remedy, or performance of which the law in some way recognizes as a duty.”⁹⁷ Conveniently, the couple videotaped the marriage proceedings, including the negotiations and signing of the *mahr* agreement. The court was then able to see evidence that the parties freely and voluntarily entered into the agreement, understanding and accepting its terms. Additionally, the court upheld the delayed portion of the *mahr* agreement, ten thousand dollars, after admitting the wife’s testimony through the parol evidence rule, which under basic contract law can be employed as an interpretative aide to deduce the meaning of the written words of a contract.⁹⁸ In concluding, the court went so far as to state that *mahr* agreements are:

[N]othing more and nothing less than a simple contract between two consenting adults. It does not contravene any statute or interests of society. Rather, the Mahr Agreement continues a custom and tradition that is unique to a certain segment of our society and is not at war with any public morals.⁹⁹

Although the court did not publish the portion regarding the distribution of alimony and marital assets, the opinion implies that it did not uphold the *mahr* agreement in substitution for a division of marital assets.¹⁰⁰

⁹⁵ 810 A.2d 93 (N.J. Super. Ct. Ch. Div. 2002).

⁹⁶ *Id.* at 95.

⁹⁷ *Id.* at 97 (citing REINSTATEMENT (SECOND) OF CONTRACTS § 1 (1979)).

⁹⁸ *Id.*

⁹⁹ *Id.* at 98.

¹⁰⁰ Siddiqui, *supra* note 57, at 649.

In a more recent New Jersey case, following the reasoning laid out by the court in *Odatalla*, the appellate court did affirm the trial court's equitable distribution of the marital assets, consisting primarily of jewelry given to the parties as a wedding present, along with upholding, in part, the *mahr* agreement.¹⁰¹ Other states have subsequently followed *Odatalla* and the neutral principles of law approach, but the decisions are convoluted as to whether the *mahr* agreement is still a premarital agreement and are usually completely silent as to equitable division of marital assets. This is exactly what happened in a case out of Washington, *In re Marriage of Obaidi and Qayoum*.¹⁰² The couple immigrated to America from Afghanistan, where they resided prior to and during their marriage.¹⁰³ Their *mahr* agreement was executed in Farsi, which the husband did not speak, read, or write, and he was unaware of the *mahr* agreement until fifteen minutes before signing it.¹⁰⁴ The provision included an immediate payment of \$100 and a delayed payment of \$20,000.¹⁰⁵ Although the court of appeals applied a neutral principles of law approach to the *mahr* agreement, throughout the opinion, repeated declarations are made stating that *mahr* agreements are prenuptial agreements.¹⁰⁶ The approach applied in *Odatalla* separates *mahr* agreements from the realm of premarital agreements, where equitable distribution is unlikely. The Washington court seems to have overlooked that essential distinction, or at

¹⁰¹ *Rahman v. Hossain*, No. FM-20-964008G, 2010 WL 4075316, at *2-3 (N.J. Super. Ct. App. Div. 2010) (analyzing the short-lived, arranged marriage of a Bangladeshi couple married with a *mahr* provision awarding the wife \$12,500 at the time of marriage). The court admitted parol evidence from a New Jersey attorney knowledgeable in Islamic law, who opined that, "under Islamic law and customs, the court would have the authority to order the \$12,500 initial payment . . . if it made a finding that the ex-wife was "at fault" in precipitating the divorce." *Id.* at 1. The court awarded the husband repayment of the initial *mahr* provision because the wife failed to disclose a mental illness, refused to engage in marital relations, and did not adequately attend to her personal hygiene.

¹⁰² 226 P.3d 787 (Wash. Ct. App. 2010).

¹⁰³ *Id.* at 788.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 789.

¹⁰⁶ *Id.* at 788 ("A *mahr* is a prenuptial agreement based on Islamic law that provides an immediate and long-term dowry to the wife").

the very least, does not go so far as to acknowledge that distinction in its opinion.

Although application of the neutral principles of law approach allows courts to uphold the *mahr* agreement and still distribute the marital property accordingly, courts are also struggling with *mahr* agreements' vagueness and close resemblance to boilerplate contracts. The minimalism of *mahr* agreements often forces courts to admit and depend on parol evidence in interpreting their ambiguity. Admitting testimony from experts in Shari'a law allows the courts to understand religious doctrine inherently intertwined in *mahr* agreements and so fundamental to Islamic marriage custom.¹⁰⁷ But, courts' unfamiliarity and subsequent overreliance on expert testimony has the propensity to create dangerous precedent for lower courts and overall confusion for Muslim couples.¹⁰⁸ The perplexing nature of *mahr* agreements, and courts general confusion in interpreting them, will inevitably demand uniform reevaluation by the Supreme Court or legislatures.

IV. Conclusion: Where Should Courts Go From Here?

We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.¹⁰⁹

In 2010, Frank Gaffney, president and founder of the right-wing think tank American Center for Security Policy wrote an op-ed piece criticizing President Obama's recent nomination of

¹⁰⁷ *Id.* ("For instance, contracts without *mahr* provisions are automatically void in some Islamic schools of thought while, according to other schools, Islamic courts must infer a *mahr* amount into the contract according to a judicial determination of the brides fair worth").

¹⁰⁸ Chelsea A. Sizemore, *Enforcing Islamic Mahr Agreements: The American Judge's Interpretational Dilemma*, 18 *GEO. MASON L. REV.* 1085, 1096 (2011).

¹⁰⁹ William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 *S. TEX. L. REV.* 433, 438 (1986).

Elena Kagan to the Supreme Court.¹¹⁰ Gaffney's resentment towards Kagan went so far as to demand that the Senate "explore Ms. Kagan's attitude toward Shariah – an anti-constitutional, supremacist legal doctrine that is a threat not only to homosexuals, but also to our civil liberties and society more generally."¹¹¹ Even though the article was highly criticized,¹¹² Gaffney's sentiments towards Sharia law reflect negative perceptions of Shari'a law held by some faction of Americans that require attention and reevaluation.

Within the same year, Oklahoma amended its state constitution to prevent state courts from "look[ing] to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law."¹¹³ Alaska, Arizona, Arkansas, Georgia, Indiana, Louisiana, Mississippi, Missouri, Nebraska, South Carolina, South Dakota, Texas, Utah, and Wyoming are among the states that have or are attempting to introduce legislation to ban recognition of Shari'a law by state courts.¹¹⁴ In January of 2012, the Tenth Circuit Court of Appeals affirmed the U.S. District Court's unanimous decision preventing implementation of the voter-approved Oklahoma constitutional amendment.¹¹⁵ Despite this, the amendment's initial passage, and subsequent states' attempts at introducing similar amendments, reflect an unhealthy mindset toward America's current Islamic population, especially concerning family law matters where religious traditions are so closely held.

These attitudes prompt the question: is it possible for American law to recognize "the dual nature of marriage for many citizens in society, whereby they are bound not only to civil norms regarding marriage and divorce but also to religious norms[?]"¹¹⁶

¹¹⁰ Frank J. Gaffney, Jr., *Courting Shariah—Kagan Supported Islam at Harvard but not the U.S. Military*, WASH. POST, June 21, 2010, available at <http://www.washingtontimes.com/news/2010/jun/21/courting-shariah/>.

¹¹¹ *Id.*

¹¹² Interview by Terry Gross with Andrea Elliot, *supra* note 50.

¹¹³ Okla. House Joint Resolution No. 1056 § 1(C) (2d Sess. 2010). Oklahoma citizens approved the adopting the "Save Our State Amendment" with a seventy percent approval.

¹¹⁴ http://colorlines.com/archives/2011/02/13_states_introduce_bills_to_ban_sharia_law.html.

¹¹⁵ *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012).

¹¹⁶ Nichols, *supra* note 14, at 985.

Or will Muslim couples married in, or immigrating to, America be forced to abandon their religious traditions and conform to American legal norms? Enforcement of *mahr* agreements as premarital agreements and ignoring equitable distribution principles does exactly that. Application of a specialized body of law intended for Christian-influenced marriages disregards that *mahr* agreements were not intended to bargain away rights in divorce.¹¹⁷ Likewise, not upholding *mahr* agreements because they do not conform to the requirements of premarital agreements and only applying equitable distribution principles does exactly that. Although fairer outcomes are reached under the neutral principles of law approach, courts applying this approach are in effect overlooking the religious significance of *mahr* agreements.

The solution lies somewhere in the middle. Whether Muslim couples are from America or immigrants to it, they deserve the legal protections during and after marriage that are afforded to all Americans. Shari'a law does not entertain principles of equitable distribution of marital assets because *mahr* agreements are not intended to provide overall protection in the event of dissolution. The laws governing premarital agreements are ill equipped to grasp the nature of *mahr* agreements. Similarly, application of the neutral principles of law approach requires admission of parol evidence compelling judges to analyze religious principles that they do not uniformly understand or worse, that they do not introduce at all on grounds of separate church and state. Either of these outcomes disrespects and undermines religious customs that originated long before the United States' inception.

A new framework must be created for interpreting and resolving religious marital contracts. This framework should take into consideration the nature of why religious marital contracts are being entered into and the traditions within. In the end, this framework should effectuate outcomes that respect those traditions while leaving both parties on equal footing as equitable distribution attempts to achieve. Interpreting *mahr* agreements as prenuptial agreements does not consistently generate that outcome. A uniform framework specific to religious

¹¹⁷ Oman, *supra* note 51, at 580.

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marital contracts must be created in order to respect Islamic couples living in America.

America no longer consists of one-size-fits-all families, or one-size-fits-all marriages. The Islamic population in the United States is not going anywhere and will only continue to increase. With this increase, more confusing precedent will be formed and Muslim couples will continue to be left without any direction. Legislatures and courts need to address this lack of uniformity, and by doing so, perhaps, acknowledge that courts cannot, and likely have never, dissolved marriages without some recognition of religion. When society talks about the problem of separate “church and state,” there is a presupposition of Christianity, rather than a discussion of separate “mosque and state” or “synagogue and state.”¹¹⁸ Christianity is deeply woven in American laws, especially in the area of family law. Through accepting this, courts will be able to better focus on how to address religious marital contracts in a way that respects couples’ traditions along the way. Courts can no longer sideswipe the issue and cling to notions of separate church and state, but need to start recognizing the inherent interplay of religion and marital customs, and decide where to go from there.

Allison Gerli

¹¹⁸ Oman, *supra* note 4, at 292.