

STATE CONSTITUTIONS AS INTERACTIVE EXPRESSIONS OF FUNDAMENTAL VALUES

*Justin R. Long**

Given the terrifying attack in their recent history,¹ it must be comforting for Oklahomans to imagine that terrorism comes at them from afar. False, but comforting. So perhaps we should not be surprised to learn that when Oklahoma voters ratified a state constitutional amendment² barring their courts from “look[ing] to the legal precepts of other nations or cultures” or “consider[ing] international law or Sharia law,” they did so by an overwhelming majority.³ In fact, some journalists attribute the amendment in part to a partisan hope that its inclusion on the ballot would drive up Republican voters’ turnout at the polls—presumably because ordinary Oklahomans were even more enthused by this bigoted proposal than they were by the local politicians.⁴

* Assistant Professor, Wayne State University Law School. A.B., Harvard University; J.D., University of Pennsylvania School of Law. I thank Peter Hammer, Steve Winter, and Chris Lund for helpful discussions at early stages of this essay.

¹ For a description of the Oklahoma City terrorist bombing, see J.C. Oleson, “*Drown The World: Imperfect Necessity and Total Cultural Revolution*,” 3 UNBOUND 19, 61–65 (2007) (describing the 1995 attack on the Murrah Federal Building); see generally *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998).

² The amendment, which would add two new sections to Article VII, section 1 (the judicial power section) of the Oklahoma constitution, comprises the following text:

B. Subsection C of this section shall be known as the “Save Our State Amendment”.

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

Okla. CONST. art. 7, § 1, available at <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=84948> (last visited June 28, 2011).

³ *Id.* Over seventy percent of voters approved State Question 755. See Barbara Hoberock, *Injunction Issued on 755*, TULSA WORLD, Nov. 30, 2010, at A1.

⁴ See James C. McKinley, Jr., *Oklahoma Surprise: Islam as an Election Issue*, N.Y. TIMES, Nov. 15, 2010, at A12 (asserting that the ballot question helped increase Republican voter

While the amendment itself is obviously a poisonous stew of stupidity, fear, and hate, it cannot be blamed on the irrationalities of state constitutional popular initiatives.⁵ The question was placed on the ballot by Oklahoma legislators, who voted for it by 82-10 in the House and 41-2 in the Senate.⁶ With such strong support for the proposal in the legislature, a statute to the same effect would likely have succeeded easily. So what did Oklahomans hope to achieve by placing the text in the state constitution?

In this essay, I argue that the Oklahoma amendment offers an example of the use of state constitutions to express and contest the national community's identity and defining values. In Part I, I consider those values and their cultural context.⁷ Among the values implicit in the amendment's text is a profound ambivalence toward American courts and the federal Constitution; ironically, the extremism of the amendment all but guaranteed that courts would play a central role as a forum for the debate on American identity the amendment seeks to provoke. The amendment's status as a state constitutional text is crucial to both this court-denigrating purpose and its court-elevating effect. In Part II, I show that the political community at stake is national, as contemporary state constitutional scholarship has argued.⁸ The state constitution works here as a tool for the majority of Oklahomans to enact—that is, to perform—their vision of what it means to be American, and simultaneously to challenge their fellow citizens to adopt the same values. Finally, I conclude that Oklahoma's amendment echoes an historic use of state constitutions to contest national values while

turnout).

⁵ See Sherman J. Clark, *The Character of Direct Democracy*, 13 J. CONTEMP. LEGAL ISSUES 341, 352 (2004) (suggesting that “direct democracy may encourage narrow and selfish decision-making”). See also Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 MONT. L. REV. 35, 39–44 (2003) (describing, among other things, how slight differences in wording—but not meaning—can account for the success or failure of initiatives, how initiatives leave voters in a binary bind with no opportunity to vote for a middle way, how initiatives need not reflect voters' actual priorities at the time, and how petition signature-gathering can hide the true supporters of a proposed initiative).

⁶ See *Bill Information for H.J.R. 1056 (2009–2010)*, OKLA. ST. LEG., <http://newlsb.lsb.state.ok.us/BillInfo.aspx?Bill=HJR1056&Session=1000> (last visited June 28, 2011). Both the Senate sponsor, Senator Anthony Sykes, and the House sponsor, then-Representative Rex Duncan, are law school graduates; Duncan is now a local prosecutor, recently deployed to Afghanistan by the Oklahoma National Guard. See *Senator Anthony Sykes—District 24*, OKLA. ST. LEG., http://www.oksenate.gov/Senators/biographies/sykes_bio.aspx (last visited June 28, 2011) (noting Sykes holds a J.D. from Oklahoma University); Louise Red Corn, *New DA Gets Orders to Deploy to Afghanistan*, TULSA WORLD, Feb. 16, 2011, at A11 (describing Duncan's departure from his district attorney position).

⁷ See *infra* Part I.

⁸ See *infra* Part II.

reflecting the power and potential of state constitutions today.⁹

PART I

The supporters of Oklahoma's amendment seek to reflect and install a particular conception of American identity; they seek to define who is *us* and who is *them*, while asserting that that definition has already been accomplished.¹⁰ The most telling illustration of this comes from the two core sentences of the text: "The courts [of Oklahoma] shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia law."¹¹

These sentences require judges to understand what "other . . . cultures"¹² are (non-white? non-Christian?), and if they do not, it informs them that Sharia law is an example of legal precepts from an "other" culture.¹³

In this way, Muslim Americans who observe principles of Sharia in Oklahoma are defined as fundamentally outside the political community that authors the state constitution. By coincidence, the lead plaintiff opposing enforcement of the amendment, Muneer Awad, is a native-born American citizen and a graduate of the University of Georgia Law School.¹⁴ For him, Sharia does not come from an "other" culture—it is his own, and therefore as American as anything else about him.¹⁵ After all, as President George W. Bush once explained, "if you're a Jew or a Christian or a Muslim, you're equally American."¹⁶ Not only the text, but also the authors' subjective intent, marginalizes Muslim Americans. One of the amendment's authors, for example, has explained that the amendment demonstrates "an awakening of people concerned about Christian values in our nation, and they are starting to express themselves."¹⁷ Another legislative author of the amendment, Rex

⁹ See *infra* Part II.

¹⁰ See OKLA. CONST. art. 7, § 1(c).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ See Donna Leinwand, *More States Enter Debate on Sharia Law*, USA TODAY, Dec. 9, 2010, at 3A, available at <http://content.usatoday.com/dist/custom/gci/InsidePage.aspx?cId=mycentraljersey&sParam=41613068.story> (providing biographical details on Awad).

¹⁵ See *id.*

¹⁶ Press Release, White House, President Holds Press Conference (Nov. 4, 2004), (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2004/11/20041104-5.html>).

¹⁷ McKinley, *supra* note 4.

Duncan, defended the proposal on national television by positing that America is a “Judeo-Christian” nation.¹⁸ For these elected officials, Sharia is not only apart from the religious values that define “our” nation, it is in opposition to them. Awad and Duncan hold theologically incompatible religious views, which is common enough in a pluralist society. Duncan, however, seeks to constitutionally define the political community not in terms of “public reason,”¹⁹ but in terms that exclude Awad and others who do not share Duncan’s own social and theological identity. The “farmer and the cowman should be friends”²⁰ in Duncan’s Oklahoma, but not with the imam.

My purpose here is not to defend, or even to examine, the merit of Sharia legal principles (although their requirement that Muslims obey the secular law of the land²¹ might present a paradox for a Muslim judge under the amendment). I make no claim as to whether any parts of Sharia are compatible or incompatible with contemporary American legal principles. In practice, if a particular precept of Sharia is lawful under American law, then by definition there is no law to prohibit its application; if a precept conflicts with American law, then its application is plainly unlawful and judges acting in good faith will reject it. Entangling myself in Islamic law, therefore, is not my project. Rather, I suggest here that the Oklahoma amendment’s supporters are using their state constitution to construct a political identity that rejects Muslim and non-Christian participation.

The amendment also excludes foreign and international law from a legitimate place in the political community; certainly, a classic method for a group to define itself is by opposition to other groups. This isolationism, bred of American exceptionalism, provokes reasonable arguments about policy and positive law. But placing a religious and cultural schema like Sharia in the same category as foreign and international law (which the amendment’s authors

¹⁸ See Interview by Contessa Brewer with Rex Duncan, State Rep., (R) Oklahoma, MSNBC (June 11, 2010), available at http://www.youtube.com/watch?v=Ybvivrs_MH0 (last visited June 23, 2011).

¹⁹ See Martin Rhonheimer, *The Political Ethos of Constitutional Democracy and the Place of Natural Law in Public Reason: Rawls’s “Political Liberalism” Revisited*, 50 AM. J. JURIS. 1, 2 (2005) (defining “public reason” as the sort of political arguments that could obtain consensus among people with differing philosophical commitments).

²⁰ Richard Rogers & Oscar Hammerstein, OKLAHOMA! (1943).

²¹ See Muhammad ibn Adam, *Obeying the Law of the Land in the West*, DARUL IFTAA, Apr. 3, 2004, http://www.daruliftaa.com/question.asp?txt_QuestionID=q-18270572 (stating “it is necessary by Shariah to abide by the laws of the country one lives in, regardless of the nature of the law, as long as it does not contradict Shariah”).

seem not to understand as distinguishable) cannot be supported by any reasonable argument. Americans do not drive on the left or vote for prime ministers; we simply are not constituted by those expressions of foreign legal identity. On the other hand, some of us do abstain from pork or pray five times daily, without ever shedding the full status of citizenship.

With the ratification of this clause, a supermajority of Oklahomans sought to encode a set of values in the constitution defined by its antithesis in Sharia. One could read this approach as an attempt to conserve the values already held by the people of the state. In that light, the attempt is a failure because it inaccurately mirrored the existing real community to the extent it ignored the diversity of religious identities held by Oklahomans. On this reading, Robert Schapiro's critique of the plausibility of independent state communities,²² paired with James Gardner's contemporaneous work on the same theme,²³ would apply. The Oklahoma amendment's supporters may have viewed their state as an autonomous, coherent culture that their amendment would preserve. But this view is wrong. As Schapiro and Gardner explain—and the very existence of an Oklahoma chapter of the Center for American Islamic Relations confirms—all American states are too diverse internally, and too similar externally, to claim a unique culture of their own.

Read differently, however, the Oklahoma amendment is not a descriptive project, but a prescriptive one. The amendment's description of Sharia as “other” is thus aspirational and emotional, rather than descriptive or rational. It reflects the majority of Oklahomans' hope that the day will come when Muslims are recognized as not authentic participants in the political community. “Save our [s]tate,”²⁴ they say, and everything hinges on the “our.”²⁵

²² See Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 411–13 (1998) (arguing that the use of state identity in constitutional interpretation is flawed due to the difficulty of identifying a distinct state identity).

²³ See James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219, 1227 (1998) (arguing that differences between southerners and Americans in general are irrelevant to constitutional interpretation).

²⁴ OKLA. CONST. art. VII, § 1(B).

²⁵ The illiberalism and oppression inherent in this hope explains why a Federal District Judge had no trouble enjoining the amendment's certification. See *Awad v. Ziriax*, No. Civ-10-1186-M, 2010 WL 4814077, at *3, *9 (W.D. Okla. Nov. 29, 2010) (stating that “the amendment conveys an official government message . . . [that the Muslim plaintiff] is an outsider, not a full member of the political community,” and prohibiting state election officials from certifying, and thereby giving effect to, the amendment).

By characterizing the Oklahoma amendment as “aspirational,” I use Robert Schapiro’s term of art for a constitution that expresses communal values that the community itself has not fully achieved.²⁶ In this view, state constitutions do not merely mirror the existing philosophical commitments of an authentic political community; nor do they impose value-neutral rules that simply structure the political relations of de-situated selves.²⁷ Instead, the expressive power of the norms embedded in the constitutional text itself draws a state polity together, creating a community of shared commitments to the values in the text.²⁸ Schapiro’s description of aspirational constitutions includes the insight that the constitutional values might be consistent with the values currently dominant in the state, but they also might be an extension of those values, or even at odds with them.²⁹

To give practical effect to an aspirational constitution, the courts play the most important role. Schapiro’s development of the concept presents it foremost as a theory of state constitutional interpretation, and the judiciary stands out as the dominant interpretive institution.³⁰ The judiciary is well-situated to the task of interpreting aspirational constitutions because the judges’ independence permits them to decide cases in line with the constitutional text, but against temporary political majorities. An aspirational view of the Oklahoma amendment is consistent with its content because the amendment targets courts and their interpretive practices, just as Schapiro’s scholarship would suggest. The amendment’s proponents could surely have included the legislature and governor among the institutions prohibited from relying on Sharia if the judiciary can be thus restricted.

Focusing the amendment on the judiciary causes several seeming inconsistencies that further illustrate the expressive importance of state constitutionalism to the amendment’s supporters. For example, the amendment on its face is designed to prohibit judges who would otherwise find Sharia principles persuasive—judges who the primary legislative sponsor inexplicably thinks would likely be

²⁶ See Schapiro, *supra* note 22, at 393–94 (defining the aspirational aspect of state constitutions).

²⁷ See *id.* at 393 (rejecting the notion of a state as an authentic normative community).

²⁸ See *id.*

²⁹ See *id.* at 393–94 (noting how state constitutions may be consistent with values held in the state, but also how constitution-drafters might use state constitutions to *reject* values otherwise dominant in the state).

³⁰ See *id.* at 429–30 (emphasizing the significance of judicial review in state constitutionalism).

“liberal activist[s]”³¹—from using that interpretive resource. At the same time, the amendment vests in the courts the sole power to enforce its aspirational values (who else could correct a court if it *did* apply legal precepts from “other” cultures?), trusting the same liberal activists who cannot be trusted to abide by conventional American law to obey the Oklahoma constitutional amendment.

Reliance on judges to be their own check and balance seems so incompatible with the purpose of the amendment that it provokes the question of whether the amendment’s supporters ever expected it to operate in real courts. The sponsors acknowledge that there has never been a citation to Sharia in the history of Oklahoma courts.³² Elsewhere, a New Jersey trial court decision that mistakenly interpreted a Muslim defendant’s mens rea in light of his interpretation of Sharia was reversed on appeal.³³ In these circumstances, even the most hysterical Islamophobe might realize that the Oklahoma amendment is entirely unnecessary *as a constraint on Oklahoma courts*. But the aspirational values embedded in state constitutions can serve a purpose beyond regulating state government. State constitutions can also function interactively in the national debate over American values.

PART II

“[T]his is a war for the survival of America. It’s a cultural war, it’s a social war, it’s a war for the survival of our country,” amendment sponsor Rex Duncan told MSNBC, plainly indicating his view of the anti-Sharia amendment as part of a national agenda.³⁴ Indeed, substantial support, in the form of radio advertising and automated telephoning, for the Oklahoma amendment came from the Florida-based “Act! for America,” a national group dedicated to opposing “radical” Islam.³⁵ The amendment won recognition in prominent national media, including

³¹ Michael McNutt, *Panel Set to Appeal Sharia Law Decision*, OKLAHOMAN, Dec. 1, 2010, at 5A (quoting former state Rep. Rex Duncan, R—Sand Springs).

³² See Nicholas Riccardi, *Oklahoma May Ban Islamic Law; Backers Say It Isn’t a Problem—but “Why Wait?” Muslims Call the Bid a “Scare Tactic*,” L.A. TIMES, Oct. 29, 2010, at A6 (reporting that amendment supporters knew Oklahoma courts had never cited Sharia).

³³ See *S.D. v. M.J.R.*, 2 A.3d 412, 27 (N.J. Super. Ct. App. Div. 2010) (reversing a trial court that had based its refusal to grant a restraining order on the perpetrator’s mistake of law due to what he perceived as Sharia).

³⁴ Interview with Contessa Brewer, *supra* note 18.

³⁵ See Riccardi, *supra* note 32. See also ACT! FOR AMERICA, <http://www.actforamerica.org> (last visited June 28, 2011).

Fox News,³⁶ MSNBC,³⁷ *The New York Times*,³⁸ *The Los Angeles Times*,³⁹ and *USA Today*,⁴⁰ among others. And at least six other states have pursued similar laws.⁴¹ Even the litigation challenging the amendment in federal court, whether ultimately successful or not, brings attention from federal officials to the Oklahoma amendment and its supporters' vision for America.

Oklahoma's use of its state constitution to contest Sharia adherents' status as full members of the American national community is a vivid illustration of James Gardner's theory of interactive federalism.⁴² As demographic and cultural patterns shift, Americans discomfited by the changes convert their sense of loss and frustration into engagement with national values. Can we really trust the federal Constitution to protect us from any vices associated with the shifting cultural landscape? Can we trust our institutions, especially the courts, to enforce the rights and conventions we expect from the federal Constitution? Having seemingly concluded that the answer to these questions is no, Oklahomans adapted their state constitution to provide the additional protection. The amendment they adopted sounds in opposition to a conventional understanding of the national prohibition on the establishment of religion, but altering that conventional understanding would be a salutary effect for the amendment's supporters. With Islam marginalized, the supporters—in Oklahoma and across the country—could relax from the fight to retain their (unacknowledged) privileged social status. They can use their control of public institutions to confirm their own sense of normative community.

The specific use of a state constitution for this purpose recalls a similar project pursued in the 1800s.⁴³ As waves of new immigrants

³⁶ See Interview Transcript, *Oklahoma Lawmaker Wants Sharia Law Banned*, FOX NEWS (June 21, 2010), available at <http://www.foxnews.com/story/0,2933,595026,00.html>.

³⁷ See Interview with Contessa Brewer, *supra* note 18.

³⁸ See McKinley, *supra* note 4.

³⁹ See Riccardi, *supra* note 32.

⁴⁰ See Leinwand, *supra* note 14.

⁴¹ See *id.* (listing Arizona, Florida, Louisiana, South Carolina, Tennessee, and Utah as having proposed similar laws).

⁴² See James A. Gardner & Jim Rossi, *Dual Enforcement of Constitutional Norms*, in JAMES A. GARDNER & JIM ROSSI, *NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS* 8–9 (2011) (describing the mutual capacity of state and federal governments to develop national constitutional norms). See generally JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* (2005) (describing interactive federalism).

⁴³ The story of the Blaine amendments described in this passage is derived primarily from Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72

with an alien-seeming religion reached America, old-guard Protestants felt their privileged status slipping away. Where today Oklahomans, like Rex Duncan, view the courts as the iconic battleground institution, for nineteenth century cultural conservatives it was the schools. Public schools were under native Protestant control, so the new immigrants responded by opening and maintaining private religious schools where their own religious traditions (traditions perceived as quite threatening to American values) could be taught. In response, a paroxysm of xenophobic and anti-Catholic bigotry swept the country. After a proposed federal Constitutional amendment to ban the use of public funds for any “sectarian” schools failed, states pursued the matter in their state constitutions. Today, thirty-seven states include clauses (known as “Blaine amendments” after their federal progenitor) barring the use of public funds for any aspect of religious schooling.⁴⁴

While the origins of Blaine amendments lay in bigotry, they did not explicitly single out Roman Catholic parochial schools for treatment any worse than other religious schools.⁴⁵ And today, public schools are federally protected from explicit domination by a religious agenda, including that of Protestants.⁴⁶ However, the Blaine amendments remain as a stark example of how state constitutions can serve as a weapon for electoral majorities frightened of change in the American polity. Federal and state governments influenced each other as competing social groups jockeyed to use constitutional law alternately as a sword and a shield for their own understanding of fundamental values. Lawrence Sager has observed that “there are simple and obvious features of federalized governance that make it quite natural for change of all kinds to originate in a minority of states, and if successful, to propagate throughout the nation.”⁴⁷ This fluidity, which comes from the mutually generative interaction of state and federal constitutionalism, opens the door to moral progress for an optimist like Sager. Even when the same interactivity permits moral regression, state constitutions remain a vital legal resource for the People to contest national values.

FORDHAM L. REV. 493, 493–96 (2003).

⁴⁴ *Id.* at 493. Oklahoma’s Blaine Amendment is at OKLA. CONST. art. II, § 5.

⁴⁵ *See id.*

⁴⁶ *See, e.g.,* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000) (holding that prayers at a public school football game violated the Federal Establishment Clause).

⁴⁷ Lawrence G. Sager, *Cool Federalism and the Life Cycle of Moral Progress*, in GARDNER & ROSSI, *supra* note 42.