

THE SHARI'AH AND THE CHALLENGE AND OPPORTUNITY OF EMBRACING FINANCE “WITHOUT INTEREST”

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I. INTRODUCTION

It is perhaps safe to assume that after the recent credit crisis, more Americans would prefer an interest free Shari'ah-compliant mortgage over a conventional variable rate mortgage. But for over 300 years, a commercial alternative to interest-based banking has never been available in the United States.¹ America's population now includes nearly six million Muslims, all of whom are morally prohibited from entering into financing arrangements involving interest.² The active participation of Muslims in the U.S. financial system depends, in part, on how current law responds to their need for a system of finance that does not require interest. U.S. regulators and legal professionals have taken notice of the growing salience of Islamic financial concepts, but their response has been ambivalent.³ Despite demonstrated interest from consumers within the United States, there are no statutes or administrative regulations allowing for the creation of banks that provide interest free financing for U.S. residents. Meanwhile, U.S. law firms have opted to make Shari'ah-sanctioned profit abroad, sending attorneys to serve wealthy commercial clients in the Middle East.⁴ Domestic financial institutions and legal professionals

¹ The removal of federal restrictions on interest rates paid on bank deposits in the 1980s only amplified this trend. See Arthur E. Wilmarth, Jr., *The Expansion of State Bank Powers, the Federal Response, and the Case for Preserving the Dual Banking System*, 58 *FORDHAM L. REV.* 1133, 1133 (1990).

² The sweep of this statement is hotly contested by a minority of scholars that find this formulation to be too reductionist. See generally MAHMOUD A. EL-GAMAL, *ISLAMIC FINANCE: LAW, ECONOMICS, AND PRACTICE* (2006). For further discussion of the internal academic debate surrounding Islamic Finance, see *infra*, Part IV.C.

³ See *infra* Part III.C.

⁴ See, e.g., Claire Spencer, *Funding Corporate Strategies Through Islamic Finance*, *FINANCIER WORLDWIDE*, May 2006, available at <http://www.pattonboggs.com/files/News/e3913f8a-8965-423f-824d-007a8dfb>

are generally unprepared to service the basic banking and financing needs of the six million Muslims living within the United States. For these Muslims, ensuring that their finances are managed in a way that is consonant with their belief structure is essential to the free exercise of their religion, a right that is arguably guaranteed under the First Amendment of the U.S. Constitution.

This Note argues that the current U.S. regulatory framework should allow for an alternative retail financing option and bank deposit scheme for American Muslims who choose to observe Islam's prohibition against interest. This requires *de minimis* banking regulation that would allow both conventional banks and new institutions to serve observant Muslims. These changes will integrate more Americans into the U.S. financial system without compromising the policies behind the laws and regulations of the United States. Part II begins the analysis with a brief discussion of the roots of Islamic finance, detailing the basic religious prohibitions in Islam relevant to economic transactions and describing four of the most common "interest free" financing modes approved by the majority of Islamic scholars thus far. Part III then analyzes Muslim demographics and population growth within the United States to demonstrate the need for U.S. regulators to consider accommodating Islamic financial law. This section also describes the institutional status quo and the inadequacy in both the breadth and scope of the currently available Shari'ah-compliant financial offerings. Part IV, the core of the Note, suggests one regulatory proposal and one minor amendment to current U.S. banking law, particularly the FDICIA, which would allow for the development of Shari'ah-based alternatives in the United States while leaving traditional banking options unaffected. Part IV also addresses the limitations of the proposed approach and responds to potential critiques. Part V concludes by reiterating the need to consider the legal and economic

integration of observant Muslims in the United States through legal reform and describes the benefits that can be realized through such a change.

II. WHAT IS "ISLAMIC FINANCE"?

A. The Ethical Mandate: Faith and Finance in Islam

Islam is a religion that governs life based on moral obedience and compliance with the Qur'an, as well as the words and actions of the Prophet Muhammad, known as the *Sunnah*.⁵ Through centuries of careful interpretation and exegesis, the scholarly tradition of Islam has derived legal principles from these primary sources⁶ to create a body of law known as the *Shari'ah*, which literally means "The Way."⁷ Since the vast majority of Muslims are not scholars, the *Shari'ah* represents a vital connection to authentic sources of Muslim faith and practice. The scholars who exposit the *Shari'ah* are individuals who have, *inter alia*, years of formal legal training in the science of *fiqh*, or the fundamental principles of Islamic jurisprudence.⁸ Using

⁵ FARAZ FAREED RABBANI, *THE ABSOLUTE ESSENTIALS OF ISLAM* 9 (2005).

⁶ The primary sources of Islamic Law are, in order of authority, from greatest to least: the Qur'an, the *Sunnah*, *ijma* (consensus of the scholars), and *qiyas* (analogical reasoning). The Qur'an is believed to be the literal word of God conveyed to the Prophet Muhammad. CHRIS ROEDERER & DARREL MOELLENDORF, *JURISPRUDENCE* 465–66 (2004).

⁷ The development of the *Shari'ah* is akin in both purpose and method to the codification of the Civil Law in modern European countries. The aim was to compile the principles of Islam from the authentic sources of the religion, which were the QUR'AN and the *Sunnah*. In the European case, these authentic sources were either the Roman commentaries of Justinian, or the natural law tradition. *See, e.g.*, RENE DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 22–27 (3d ed. 1985).

⁸ This is the foundation of Islamic jurisprudence. *See* WAEL B. HALLAQ, *A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNI USUL AL-FIQH* 1 (1999).

well-settled methods of derivation,⁹ these scholar-jurists have steadily developed a corpus of legal opinions that is intended to meet the unique needs of Muslims in various times and places.¹⁰ Muslims are free to consult jurists *sua sponte* and examine various legal opinions on a given issue that concerns them.¹¹ Indeed, with the exception of the immutable principles contained within the Qur'an, a Muslim is never bound to accept any legal opinion or new juristic rule that he or she does not agree with.¹² By the same token, since the tradition is self-referencing and cumulative, a consensus by a majority of jurists on an issue constitutes a type of legal proof in and of itself, which can carry a significant amount of spiritual weight.¹³ Hence, to the extent that the Shari'ah can be followed,¹⁴ observing it is just one

⁹ The process of interpreting positive law within a systematic body of rules and principles is elaborated by the discipline of *usul al-fiqh* (principles of *fiqh*). See *id.*

¹⁰ Based on its reliance on precedent and analogy, some have noted that Islamic jurisprudence is a common law tradition. See EL-GAMAL, *supra* note 2, at 27. Some scholars have gone further and have noted the influence of Islamic law on the development of English common law. See *id.* at 194 n.23.

¹¹ *Id.* at 176.

¹² Liaqat Ali Khan, *Free Markets of Islamic Jurisprudence*, MICH. ST. L. REV. 1487, 1489 (2006) (describing how this feature of personal acceptance is what has caused some to describe Islamic Law as a "personal law" rather than a tribal or territorial law).

¹³ EL-GAMAL, *supra* note 2, at 145 (stating that an opinion that has received a vast majority consensus is raised to the level of canon).

¹⁴ The Shari'ah, as a derivation of principles from the Qur'an, contains within it, *inter alia*, criminal legislation, rules on inheritance, divorce, contract, alimony and war. However, it is clear that Muslims living in non-Muslim lands cannot and are not expected to adhere to these principles of Shari'ah because Muslims must obey the law of the lands in which they reside and live peacefully amongst the people. Therefore, the idea is to follow the Shari'ah to the extent possible while following the laws of one's domicile where necessary. Shaykh Abdullah bin Bayyah, Address at Santa Clara Convention Center: Muslims Living in Non-Muslim Lands, July 31, 2009, http://www.sunnah.org/articles/muslims_in_nonmuslim_lands.htm. "In the issuance of the visa and my signing of it, a legally binding contract occurred which was a *sulih*. It was an agreement that when I came into this country, I would obey the laws and

step in the process of living a “god conscious” life,¹⁵ or in a manner that is consistent with the Qur’an and the Sunnah.

The source of modern Islamic Finance is in a branch of the Shari’ah addressing economic activity known as *Fiqh al-Mu’amalat* (the law of transactions).¹⁶ The Fiqh al-Mu’amalat developed its Shari’ah principles from the two major prohibitions found in the Qur’an, namely the prohibitions on interest (*riba*) and on speculative behavior (*gharar*). Two other important general prohibitions are the prohibitions on investing in illicit industries and illicit products, including tobacco, pornography, alcohol, and gambling (*maisir*).¹⁷ These four prohibitions establish the basic boundaries for any financial instrument that may be created in the future.¹⁸ Hence, even though a financial instrument may not be pulled from the text of the Qur’an itself, the validity of the instrument truly rests on whether it

would follow the restrictions that this visa demanded that I follow. This was a contractual agreement that is legally binding according even to the divine laws.” *Id.*

¹⁵ In Islam, external acts of piety are not necessarily ends in themselves but rather serve to develop a sense of “God Consciousness,” or *taqwa* within an individual. See KAREN ARMSTRONG, A HISTORY OF GOD: FROM ABRAHAM TO THE PRESENT, THE 4000-YEAR QUEST FOR GOD 160 (Ballantine Books 1994). To the extent that the Shari’ah is a legal elaboration of the permissible and prohibited, observing its rules can also serve to develop *taqwa*.

¹⁶ See FRANK E. VOGEL & SAMUEL L. HAYES, III, ISLAMIC LAW AND FINANCE: RELIGION, RISK, AND RETURN 299, 304 (1998) (defining “mu’amalat” as “dealings or transactions among human beings”).

¹⁷ See Shahzad Q. Qadri, *Islamic Banking: An Introduction*, BUS. L. TODAY, July/Aug. 2008, at 59.

¹⁸ See, e.g., Global Fund Media Ltd., *Dow Jones Indexes to Launch Dow Jones Islamic Market China Offshore Index*, HEDGEWEEK (Jan. 6, 2006), available at <http://www.hedgeweek.com/2006/06/01/dow-jones-indexes-launch-dow-jones-islamic-market-china-offshore-index>. “Dow Jones Indexes launched its Islamic Index family in 1999. Excluded from the Islamic Index series are stocks of companies that operate in alcohol, tobacco, pork-related products, financial services, defense/weapons, and entertainment.” *Id.*

comports with the basic ethical precepts advocated by the Shari'ah.¹⁹

1. The Prohibition of Interest

One of the central features of Islamic transactional law is that it completely prohibits interest (*riba*).²⁰ Several verses in the Qur'an denounce interest as contravening God's design for humanity: "Those who devour interest (*riba*) will rise up on the day of Resurrection as those tormented by Satan's touch. That is because they say that 'Trade and usury' are the same. However, God permits trade, and prohibits usury" ²¹ Elsewhere, the Qur'an states: "God condemns usury (*riba*), and blesses charities . . . O you who believe, be mindful of God and refrain from all kinds of

¹⁹ As will be seen, the particular terms for modern Islamic Financial concepts such as *mudharaba*, *ijarah*, and *musharaka* are not found in the Qur'an or the Sunnah; nevertheless, their *raison d'être* is to accord with the prohibitions and ethical considerations presented in the Qur'an and the Sunnah.

²⁰ Although the term *riba* is used in the Qur'an, it is never precisely defined in relation to finance. The word *riba* is derived from the Arabic verb *raba*, which literally means to "exceed" or "increase," and all scholars agree that it covers both interest and usury. Hence, the one-to-one relationship between *riba* and interest alone is slightly misleading. For an extended analysis of the term and the scholarly debate surrounding its definition (the analysis of which is beyond the scope of this Note) see M. KABIR HASSAN & MERVYN K. LEWIS, HANDBOOK OF ISLAMIC BANKING 43 (Edward Elgar Publishing 2007). Nevertheless, many have attempted to cabin the meaning of *riba* to mean engaging in the charging of "exploitative interest" only. See Ariel Berschadsky, *Innovative Financial Securities in the Middle East: Surmounting the Ban on Interest in Islamic Law*, 9 U. MIAMI BUS. L. REV. 107, 108 (2001). However, the definition of the term that will be used by this Note, which represents the consensus of the commercial sector and numerous scholars, is that *riba* refers to the payment/collection of any type of interest *per se*, whether fixed or floating, simple or compound, excessive or nominal. See HSBC.com, Amanah, <http://www.assetmanagement.hsbc.com/uk/institutions/investment-capabilities/amanah.html> (last visited Mar. 9, 2010).

²¹ M.A.S. ABDEL HALEEM, THE QUR'AN 2:275 (Oxford Univ. Press 2008) [hereinafter QUR'AN].

interest, if you are truly believers”²² To understand the rationale behind these prohibitions,²³ it may be helpful to illustrate a conventional lending agreement and then describe how a lending agreement governed by Islamic principles differs in its approach.

Under a conventional lending agreement, a lender loans money to a borrower in exchange for a fixed rate of return over the principal amount due at some point in the future. The borrower’s purpose in obtaining the loan is not relevant to the lender as long as the principal plus the interest is paid on time. The interest payments do not depend on whether the borrower succeeds or fails in the venture he has undertaken or whether the borrower will be capable of repayment in the future. In contrast, under Islamic finance principles, a lender acts as an equity investor and provides financing in a profit-loss sharing (“PLS”) scheme whereby his or her fortune tracks that of the borrower. Therefore, if the borrower is unable to repay, the lender receives nothing, while if the borrower succeeds and makes a profit, the lender obtains a proportion of that gain. If a borrower needs a loan to purchase a specific item, then the lender must acquire ownership of the desired good and allow the borrower to purchase the good in installments with a certain value added to each installment to reflect the lender’s reward. Although the “value added” looks like pseudo-interest, there is a subtle difference in that the lender shoulders some of the burden by incurring the risks of ownership until all installments are

²² *Id.* at 2: 276–280. Compound interest is, perforce, forbidden: “O you who believe, you shall not take interest (*riba*), compounded over and over. Be aware of God, so that you may prosper.” *Id.* at 3:130.

²³ Islam is not unique in its prohibition of interest. All three Abrahamic faiths (Judaism, Islam and Christianity) have, at one point, prohibited “usury” while an outright ban on it can be traced back to the Code of Hammurabi. See Scheherazade S. Rehman, *Globalization of Islamic Finance Law*, 25 WIS. INT’L L.J. 625, 632 (2008); see also Wayne A.M. Visser & Alastair McIntosh, *History of Usury Prohibition: A Short Review of the Historical Critique of Usury*, 8 ACCT. BUS. & FIN. HIST. 175, 179 (1998) (discussing how the prohibitions in Judaism and Christianity were abandoned after much philosophical and theological debate in the wake of accelerating commercialism in the 15th century onward).

paid.²⁴ Furthermore, the lender in this instance does not "rent" the money itself based on the scarcity of money (i.e. the interest rate) but instead charges a fee for the use of a good based on the prevailing market-defined rental value of the tangible asset/property actually being financed.²⁵

The preceding example shows two critical Islamic financial principles at work.

First, Islam places a premium on equal risk distribution. From the perspective of the Shari'ah, traditional financing arrangements precipitate a morally vexing state of affairs—the lender's benefit is certain while the borrower's benefit is uncertain.²⁶ The borrower's efforts can potentially yield nothing while the lender's return is usually secured via collateral; this situation is seen as being fundamentally

²⁴ Some have referred to this phenomenon as "Shari'ah arbitrage," or forbidding a certain transaction and then permitting it in a slightly altered form. See EL-GAMAL, *supra* note 2, at 148–49. Although it correctly characterizes the motives of those individuals seeking to make a quick profit off of nominal "Shari'ah compliance," it fails to see the larger substantive value in the "slight alterations" that make the transaction jurisprudentially permissible. Beyond recasting the transaction in Islamic terms of art, the alterations are an attempt to demonstrate a respect for the precedential value of canonical interpretations of the law that have survived centuries of scholarly reflection. Whether a less formalist and more evolutionary "standards based" approach should be adopted is addressed in Part IV.C.

²⁵ Lariba American Finance House, *What is Interest/Riba*, <http://www.lariba.com/dev/knowledge-center/faqs.htm> (last visited Mar. 9, 2010).

²⁶ Some argue that this notion ignores the credit, interest rate, liquidity, and operational risks conventional financing providers are exposed to when they extend credit. See EL-GAMAL, *supra* note 2, at 147. It is also true that creditors are exposed to the prospect of debtor bankruptcy in traditional financing arrangements. However, even in this situation, creditors usually stand to gain something from a debtor's estate by resorting to a variety of state law remedies including liens, garnishments and levies as well as recourse to the federal bankruptcy law. See generally DOUGLAS G. BAIRD ET AL., *BANKRUPTCY: CASES, PROBLEMS AND MATERIALS* 6-30 (4th ed. 2007) (detailing the rights of unsecured creditors an secured creditors under State Law; as well as the federal remedies available under the Bankruptcy Code).

unfair to borrowers.²⁷ Accordingly, lenders are required to accept more of the downside potential in order to evenly distribute the risk arising from the transaction.²⁸ Hence, prohibiting interest establishes greater parity in financial transactions by making lenders either equity partners in the ventures they choose to finance,²⁹ or in the case of leasing agreements, temporary owners that must bear risks up front.³⁰

Second, Islam prohibits predetermined payments over the principal amount of a loan.³¹ In other words, one should not be able to earn “money on money.” The Shari’ah treats money as a medium of exchange that does not possess intrinsic value apart from its ability to assign value to goods.³² Money only acquires real value when it is converted

²⁷ Furthermore, a creditor’s ability to gain over his or her principal by simply waiting is contrary to Islam’s preference for hard work and labor. *See QUR’AN, supra* note 21, at 53:39–40 (stating that a person can truly have nothing but what he/she strives for).

²⁸ This is not to say that the lender does not sacrifice anything in a conventional lending agreement; indeed, as stated earlier, the lender takes a risk that the money will not be repaid, forgoes personal consumption, and ties up his or her assets in an illiquid form. Islam believes that lenders should be compensated, but it qualifies this notion with the idea that the borrower should not suffer a loss while the lender profits off of the same individual.

²⁹ As Judge Cardozo famously put it, this is akin to the notion of individuals undertaking a business transaction as “co-adventurers” in American partnership law. *See, e.g., Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

³⁰ In the case of a lease or buy back arrangement, “bearing the risks up front” would entail taking immediate ownership of the desired asset, and therefore incurring risks and costs incidental to that ownership, including the buyer’s refusal to accept the good.

³¹ *See BRIAN KETTEL, INTRODUCTION TO ISLAMIC BANKING & FINANCE* 40 (Harriman House, Mar. 1, 2008).

³² Under Islamic economic theory, bonds are specifically prohibited for the reason that they entail earning money upon money; in essence one is paying not for a real asset but for the mere passage of time. Absent interest, the time-value of money is rendered moot. *See generally* ACADEMY FOR INTERNATIONAL MODERN STUDIES, TIME VALUE OF MONEY IN ISLAMIC BANKING, <http://www.learnislamicfinance.com/images/Free-Study-Notes/Time%20Value%20of%20Money%20in%20Islamic%20Banking.pdf>.

into a commodity or a capital asset that can directly fulfill human needs.³³ Therefore, according to the Shari'ah, in order to legitimately earn income from money, there must be a conversion of that money into a commodity or a capital asset which can then be rented out, leased, or sold for a margin of profit.³⁴ This critical "second step" of converting money into something tangible is what makes any income derived from its re-sale religiously sound; the lender is acquiring the rental value of an intrinsically valuable good and is not "earning money on money itself."³⁵

Hence, Islamic finance expresses a marked preference for equity over debt, and it seeks to always deal in tangibles. These two principles explain why loan arrangements take the form they do: if a borrower needs money for a profit-seeking venture, then the borrower and the lender enter into a PLS scheme (the "equity preference") and if the borrower needs money for an asset, rather than simply loaning the money, the lender purchases the asset outright and sells it back in for a profit (the "tangibility preference").³⁶ In short,

³³ *Id.*

³⁴ A potential counter argument to this line of reasoning is that by loaning money, the lender is providing a valuable service, and that any interest charged is simply a fee for that service and not for the opportunity cost of the money he/she lends. However, in Islam, "money lending" itself is not a service since it does not fully comprehend the level of risk demanded of the lender by the Shari'ah; rather, an active or passive partnership is seen as a service that can be properly compensated. See IBRAHIM WARDE, ISLAMIC FINANCE IN THE GLOBAL ECONOMY 26-27 (2000). In other words, simply foregoing consumption is not seen as a justifiable means to earn money.

³⁵ Huda Ahmed, *Not Interested in Interest? The Case for Muslim Entrepreneurs*, 2 ENTREPRENEURIAL BUS. L.J. 479, 490 (2007).

³⁶ One question that might naturally arise is how the Shari'ah deals with the purchase of intangible goods, such as a college education. The Islamic Bank of Britain ("IBB") has adopted a system integrating the tangibility preference of the Shari'ah by selling the prospective student commodities that the bank actively deals in (such as metals) at a cost-plus basis. After acquiring the commodities, the borrower immediately sells them on the open market for their fair market value and then eventually pays the bank back in installments. Some critics feel that although formally permissible, this arrangement evades the spirit of partnership

the aim of the prohibition on interest is to maintain balance between the parties and to require the lender to earn a profit from the use of a good rather than from money itself.³⁷

Apart from economic reasons, Islam also prohibits the charging of interest out of a concern for social justice. One of the five pillars of the Islamic faith is the annual payment of a certain percentage of one's disposable income as *zakaat* or "alms for the poor."³⁸ Even beyond *zakaat*, individuals are commanded to give charitably at regular intervals to over five distinct classes of individuals within society including relatives, beggars, orphans, and the destitute.³⁹ In light of these positive duties to actively disseminate wealth throughout society, prohibiting interest preempts its use as an exploitative and oppressive tool throughout the course of executing one's moral and social obligations.⁴⁰ Hence, Islam's preoccupation with interest ultimately reflects both

inherent in Islamic finance. As an alternative, these critics suggest a loan in which the bank provides money to the student as a "joint-venture" whereby the bank's profit or loss is determined by the success or failure of the student. *See Sharia Student Loans* (American Public Media Mar. 17, 2008) available at http://marketplace.publicradio.org/display/web/2008/03/07/meaw_money_sharia_student_loans (comments of Junaid Abbas Bhatti, Islamic Bank of Britain).

³⁷ See Qadri, *supra* note 17, at 61.

³⁸ Linguistically, *zakaat* has two meanings: "purification" and "growth." In essence, paying *zakaat* means to purify one's wealth by distributing a prescribed amount to those in need. For a detailed treatment of this concept in Islam, see MAMOUN SAKKAL, *THE ZAKAT HANDBOOK: A PRACTICAL GUIDE FOR MUSLIMS IN THE WEST* (2008).

³⁹ See QUR'AN, 2:177 ("The truly good are those who believe in God and the Last Day, in the angels, the Scripture, and the prophets; who give away some of their wealth, however much they cherish it, to their relatives, to orphans, the needy, travelers and beggars, and liberate those in bondage.")

⁴⁰ See QUR'AN, 4:161 ("They took *riba*, though they were forbidden and that they devoured men's substance wrongfully – We have prepared for them a grievous punishment."); see also QUR'AN, 2:280 ("If a debtor is unable to pay, than wait for a better time [before collecting]. [However] if you give up the loan as a charity, it would be better for you, if you only knew.")

economic and social concerns,⁴¹ and careful observance of the prohibition is an essential part of Muslim spiritual and economic life.

2. The Prohibition of Speculation

The second major prohibition in Islamic finance is on speculation, or *gharar*.⁴² *Gharar* refers to transactions which resemble gambling due to their risky and speculative nature.⁴³ In trade, it refers to the sale of a "probable good," or a good whose existence or characteristics are not certain due to particular contingencies that cannot be accounted for in the present. Islam's aversion to speculation stems from the belief that individuals should bargain upon certainties to the extent possible⁴⁴ in order to avoid conflict over the quality of goods or the precise object of the bargain.

In contemporary financial transactions, the two areas where *gharar* most profoundly affects common banking practice are insurance and financial derivatives. Jurists often argue against traditional insurance schemes because they provide an individual with an intangible good that may never arrive. For example, with term insurance, it is possible for one individual to make one premium payment and collect insurance proceeds while another individual may also make many monthly payments without ever collecting any money from his/her insurance company. Conventional insurance also is subject to the prohibition on interest since insurance companies tend to invest significant portions of consumer premiums in government bonds which earn interest.⁴⁵ Despite these restrictions, several forms of

⁴¹ See Chian Wu, *Islamic Banking: Signs of Sustainable Growth*, 16 MINN. J. INT'L L. 233, 236-7 (2007).

⁴² See HASSAN & LEWIS, *supra* note 20, at 119.

⁴³ *Id.*

⁴⁴ Indeed, since complete contract language is impossible and some amount of unknown information will always exist in a transaction, there is a *de minimis* exception to *gharar*, excusing its presence in transactions in order to conduct everyday business. See EL-GAMAL, *supra* note 2, at 58.

⁴⁵ EMMETT J. VAUGHAN, *FUNDAMENTALS OF RISK AND INSURANCE* 135 (9th ed., 2002).

cooperative or mutual insurance, known as *takaful* contracts, are available under the Shari'ah.⁴⁶ The final set of relevant contracts which are rendered invalid because of *gharar* are forwards, futures, options, and other derivative securities. Forwards and futures involve *gharar* since the object of the sale may not exist at the time the trade is to be executed. Although Shari'ah does permit certain exceptions to this rule,⁴⁷ the conditions of those contracts make it very clear that contemporary forwards and futures are not permitted under Islamic law. Hence, the trading of credit and risk as unbundled commodities is a practice that is firmly seen as being beyond the pale of Islamic financial principles, even amongst scholars critical of the mainstream prohibition-based approach.⁴⁸

⁴⁶ Vogel and Hayes, *supra* note 16, at 151-52. (Pursuant to *takaful*, a group of Muslims agrees to protect one another in the case of casualty or loss by pooling their resources and making regular payments in the form of premiums for investment in commercial products deemed permissible under the Shari'ah. When a casualty or loss occurs the participants each "gift" a portion of the premiums already collected, including undistributed profits, to the bearer of the loss.)

⁴⁷ Islamic forward contracts, known as *salam* and *'istisna*, are forms of financing used for certain types of industry which predominately deal with sales with advanced payment or for contracts to manufacture. In these contracts, the price for the item is prepaid and the item is delivered at a definite point in the future. There are a host of conditions which must be met in the formation of these contracts, and foremost amongst them is the establishment of a definite date of delivery. Nevertheless, the challenge still remains to create Shari'ah compliant products. See generally Marc L. Ross, *Working with Islamic Finance*, INVESTOPEDIA, http://www.investopedia.com/articles/07/islamic_investing.asp? (last visited Mar. 9, 2010); see also UBS Investment Bank, *Sharia Principles*, http://www.ubs.com/mc/islamicfinance/sharia_principles.shtml (last visited Mar. 9, 2010).

⁴⁸ See EL-GAMAL, *supra* note 2, at 47-48 ("As many observers and practitioners in financial markets will testify, trading in credit and risk (perfected through derivative securities) is as dangerous as twirling a two-edged sword. Although those vehicles can be used judiciously to reduce risk and enhance welfare, they can easily entice otherwise cautious individuals to engage in ruinous gambling behavior. [In this sense] Islamic jurisprudence introduces injunctions that aim also to protect individuals from their own greed and myopia."); see also Martin Taylor, *Innumerate bankers were ripe for a reckoning*, FINANCIAL TIMES, (Dec. 15,

To summarize, a Muslim is forbidden from dealing with interest (*riba*), engaging in speculative behavior (*gharar*), gambling (*maisir*), and investing in illicit industries and products. These four spiritual principles constitute what this Note dubs Islam's "ethical mandate" for its adherents vis-à-vis financial transactions. However, to be clear, through its prohibitions and commandments, Islam does not seek to discourage or stultify enterprise. As the prior exceptions and rules demonstrate, earning a return on capital or benefitting from a lending arrangement is clearly not forbidden.⁴⁹ Islam's only concern is that the manner in which wealth is earned and is eventually disposed be legitimate as viewed by the Qur'an and Sunnah.⁵⁰ Within these boundaries, Muslims are allowed to engage in all manner of activity with any counterparty. Seen in this light, the aim of "riba-free" financing tools is to provide a way in which Muslims can profitably engage in their life projects without incurring the perceived spiritual and societal costs associated with interest or excessive speculation.

B. "Interest Free" Financial Instruments

The major modes of Shari'ah-compliant financial products cover a broad range of retail activity that most individuals engage in with conventional banks such as purchasing property and durables, leasing goods, depositing money, and obtaining loans. The major tools used are: passive partnerships (*mudharabah*), active partnerships (*musharaka*), cost-plus financing (*murabaha*), and leasing (*ijarah*). None of these financing tools formally use interest,

2009) available at <http://www.ft.com/cms/s/0/fe462a30-e9af-11de-9f1f-00144feab49a.html> (former CEO of Barclay's Capital discussing the incredibly damaging role of excessive speculation in the recent financial crisis).

⁴⁹ QUR'AN 2:148 ("Everyone has some course he steers by, so compete in [doing] good deeds. Wherever you may be, God will bring you all together; God is Capable of everything.")

⁵⁰ As one commentator put it, "In short, Islamic banking is a form of banking with a conscience." Michael Silva, *Islamic Banking Remarks*, 12 L. & BUS. REV. AM. 201, 203 (2006).

but they do reward lenders for risk-sharing through the use of profit mark-ups which normally track the prevailing interest rate.⁵¹ This fact may lead one to believe that the difference between Shari'ah-compliant financial products and interest bearing products is merely nominal. Although this concern is worthy of debate, this Note assumes that the currently sanctioned financing modes aim to embody the principles of even risk allocation and the preference for tangible goods discussed earlier.⁵² It will therefore assume that making a transaction religiously permissible is more than just a matter of form, but in fact, one of substance.⁵³

1. *Mudharabah*—Passive Partnerships

Mudharabah is a contract conducted between two parties that resembles an investment partnership. A capital owner (*rabb al-mal*) loans a principal amount to an investment manager (*mudarib*).⁵⁴ In lieu of interest, the *mudarib* shares in any profit derived through their activity at a pre-determined ratio⁵⁵ and in the event of a loss, the capital

⁵¹ See Qadri, *supra* note 17, at 59.

⁵² For example, in a Shari'ah-compliant lease transaction, although the lease payments contain a markup, the owner, which is usually a bank, is still responsible for insurance, repairs, and maintenance of the leased asset. See Shameela Chinoy, *Interest-Free Banking: The Legal Aspects of Islamic Financial Transactions*, 10 J. INT'L BANKING L. 517, 521 (1995). Therefore, prevailing interest rates being used as a proxy for the market rate of return is substantively different than profit and loss sharing or the secured lending encouraged by the Shari'ah.

⁵³ This Note acknowledges that there is a debate within the scholarly community regarding whether the current breed of Islamic financial tools represents the elevation of form over substance. For a survey of this debate, see generally Haider Ala Hamoudi, *Jurisprudential Schizophrenia: On Form and Function in Islamic Finance*, 7 CHI. J. INT'L L. 605 (2007). However, the majority of the scholarly community has yet to make a marked shift towards a more functionalist understanding. This Note, while acknowledging the validity of these philosophical differences, will nonetheless respect the precedential value of the current consensus standard and analyze current law on its terms.

⁵⁴ HASSAN & LEWIS, *supra* note 20, at 119.

⁵⁵ *Id.*

owner loses his/her capital while the investment manager loses time and effort. As for control of the venture, the capital owner is at all times a sleeping partner and the investment manager is the general partner.⁵⁶ The *mudharabah* financing model can be used by banks (as capital owners) lending to entrepreneurs (as "investment managers") or by consumers (as capital owners) and banks (as "investment managers" for consumer deposits).⁵⁷ Hence, as opposed to conventional savings accounts where the principal is secured and interest is paid on that principal, cash balances in Shari'ah-compliant deposit accounts can rise and fall with the bank's investment activities as the bank's investments fail or succeed (since the bank must avoid interest). However, a customer can always opt out of a *mudharabah* arrangement by requiring the bank to maintain the principal of his or her deposit and not use it for investing purposes (*wadiah*).⁵⁸

2. *Musharaka*—Active Partnerships

In a *musharaka* transaction, the lending arrangement is similar to a *mudharabah* transaction except that the losses are borne in proportion to the capital invested by both the borrower and the lender.⁵⁹ While every partner in a *musharaka* transaction has the right to participate actively in the affairs of the enterprise, they can choose to waive that right without repercussions and essentially become a passive investor as in a *mudharabah* transaction.⁶⁰ This form of

⁵⁶ *Id.*

⁵⁷ See e.g., MALAYSIA INTERNATIONAL ISLAMIC FINANCE CENTER, SHARIAH RESOLUTIONS IN ISLAMIC FINANCE 13-14, available at http://www.mifc.com/publication/srif/04_mudharabah.pdf.

⁵⁸ See Rehman, *supra* note 23, at 648-49.

⁵⁹ See Hesham M. Sharawy, *Understanding the Islamic Prohibition of Interest: A Guide to Aid Economic Cooperation Between the Islamic and Western World*, 29 GA. J. INT'L & COMP. L. 153, 170 (2000).

⁶⁰ Yasaar Limited, *Glossary of Islamic Financial Terms*, http://www.yasaar.org/glossary_4.htm (last visited Mar. 9, 2010) ("All partners have a right to participate in the management of the project.

financing is most akin to a partnership with two general partners.

3. *Murabaha*—Cost-plus Sale

A *murabaha* transaction involves the purchase and resale of a commodity. In a typical transaction, a bank purchases a good on behalf of the customer, after which the bank resells the good to the customer for the cost of the asset plus a pre-stated profit margin.⁶¹ The customer, in turn, purchases the asset from the bank in installments. The profit margin earned by the bank is not deemed interest because the bank acquires full ownership of the asset before resale to the customer, which entails bearing certain risks of ownership such as the goods being damaged before delivery or the client refusing to accept the commodity.⁶² Furthermore, the additional mark up is charged on the actual use of the asset and not on the use of money, avoiding the prohibition on acquiring “money on money.”

4. *Ijarah*—Leasing

An *ijarah* transaction is a common lease agreement, with the profit margin built into each lease payment over the term of the lease.⁶³ As the lease term approaches its end, the customer obtains greater and greater ownership over the asset (and therefore pays less with time) and at the end of the lease, the customer has the option to purchase the asset outright.⁶⁴ Until the final payment is received, ownership rights and possessory rights are divided between the bank and the customer, respectively, and the bank is responsible

However, they can waive the right of participation in favour of any specific partner or person.”).

⁶¹ Barbara L. Seniawski, *Riba Today: Social Equity, the Economy, and Doing Business under Islamic Law*, 39 COLUM. J. TRANSNAT'L L. 701, 723 (2001).

⁶² Wu, *supra* note 41, at 239.

⁶³ Seniawski, *supra* note 61, at 724.

⁶⁴ *Id.*

for all maintenance and repair that is incidental to ownership.⁶⁵

III. MUSLIMS IN AMERICA: MARKET DEMAND FOR RELIGIOUS VALUES

A. The Demographic Data and Why Shari'ah Matters in Twenty-First Century America

The modes of financing discussed earlier are more relevant now than ever before because of the swelling American Muslim population due to increased immigration and high rates of conversion over the past three decades.⁶⁶ Although the U.S. Census does not collect data on religious affiliation, various commentators estimate that the domestic Muslim population is anywhere from one to seven million individuals.⁶⁷ However, the most credible number appears to be six million individuals, based on the 208 page report released by the Woodrow Wilson International Center for Scholars in Washington, D.C.⁶⁸ Islam is also said to be the

⁶⁵ Wu, *supra* note 41, at 238.

⁶⁶ Jodi Wilgoren, *A Nation Challenged: American Muslims; Islam Attracts Converts By the Thousand, Drawn Before and After Attacks*, N.Y. TIMES, Oct. 21, 2001, at B10.

⁶⁷ Questionable polling methodology, political or religious agendas, and limited sample sizes are just some of the many factors responsible for the production of over and under-inflated figures. See generally Zahid M. Bukhari, *Demography, Identity, Space: Defining American Muslims*, MUSLIMS IN THE UNITED STATES: DEMOGRAPHY, BELIEFS, INSTITUTIONS 7 (Phillip Strum & Danielle Tarantolo, eds., 2003), available at http://www.wilsoncenter.org/topics/pubs/DUSS_muslims.pdf.

⁶⁸ Philippa Sturm, Woodrow Wilson International Center for Scholars, *Executive Summary*, MUSLIMS IN THE UNITED STATES 1, 6.

This figure confirms the rough average provided by the scattered statistical data available through other studies: 6.7 million (1997) (J. Ilyas Ba-Yunus [2.2% of national population]); 2.0 million (2000) (Hartford Institute for Religious Research [0.7% of national population]); 4.1 million (2001) (Britannica book of the Year [1.4% of national population]); 6.0 million (2001) (Council on American-Islamic Relations [2% of national population]); 1.9 million (2002) (University of Chicago, Public Opinion

fastest growing religion in America.⁶⁹ To obtain a rough sense of comparative scale, there are roughly 5.3 million individuals of the Jewish faith within the United States.⁷⁰

Aside from their growing numbers, Muslims are also financially and socially integrated into the fabric of American society. Geographically, the vast majority of Muslims are concentrated in major metropolitan centers, mostly in the Midwest and the Northeastern corridor of the United States. The most recent data suggest that the following 12 states have the highest concentration of Muslims (from greatest to least): California, Illinois, New York, Texas, New Jersey, Michigan, Florida, Virginia, Maryland, Ohio, Pennsylvania, and Minnesota.⁷¹ Three-fourths of adult American Muslims are less than 50 years old while the percentage of Muslim college graduates is more than double the national average (58% versus 25%). Half of American Muslims report an annual family income of more than \$50,000 while over 45% describe their occupation as professional/technical, medical, or managerial.⁷² A recent marketing study by one of the nation's largest advertising firms also estimated the purchasing power of Muslims in the United States to total roughly \$170 billion.⁷³

To be sure, this demographic analysis does not aim to treat American Muslims as a homogenous group that has a uniform perception of faith, let alone a uniform view

Quarterly 66, 404–17 (2002)); 7.0 million (2002) (Cornell University Study).

⁶⁹ See Wilgoren, *supra* note 66.

⁷⁰ JEWISH VIRTUAL LIBRARY, THE JEWISH POPULATION IN THE WORLD (2006), <http://www.jewishvirtuallibrary.org/jsource/Judaism/jewpop.html>.

⁷¹ EILEEN BRAMAN & ABDULKADER SINNO, CAN A MUSLIM REPRESENT YOU? AN EXPERIMENTAL INVESTIGATION OF CAUSAL ATTRIBUTIONS FOR THE POLITICAL BEHAVIOR OF MUSLIM CANDIDATES 1, 4 (2006), *available at* http://www.allacademic.com/meta/p_mla_apa_research_citation/1/5/2/2/0/pages152203/p152203-1.php.

⁷² Bukhari, *supra* note 67, at 12.

⁷³ Qadri, *supra* note 17, at 59; *see also* Michael Hastings-Black, *The Overlooked \$170 Billion of American-Muslim Spending Power*, THE HUFFINGTON POST, Jan. 28, 2009, http://www.huffingtonpost.com/michael-hastingsblack/the-overlooked-170-billio_b_162018.html.

regarding the relationship between their faith and financial matters. As discussed earlier,⁷⁴ Muslims are encouraged to reflect upon their beliefs⁷⁵ and have substantial latitude in determining what they choose to follow with regards to legal opinions. Indeed, there is substantial diversity within Islam between Muslims that follow different schools of legal thought.⁷⁶ Furthermore, as with any religion, each adherent's awareness and level of connection to the sources of sacred law is distinct.⁷⁷ Part of the practical difficulty in accessing the Shari'ah is a lack of access to scholars.⁷⁸ To mitigate this issue, several "Fiqh Councils" have emerged in North America⁷⁹ and in Europe⁸⁰ that serve as institutions that can answer questions for the local Muslim community as well as serve as centralized repositories for legal opinions. However, there is no central authority that can declare a universal legal opinion applicable to all Muslims.

Nevertheless, despite these internal variances and difficulties with access to Islamic Law, the empirical data strongly indicate that there is a growing demand for

⁷⁴ Discussed *supra* in Part II.A.

⁷⁵ See QUR'AN 2:256 ("There is no compulsion in religion."); *Id.* at 10:24 ("We explain the signs in detail for those who reflect.") (emphasis added).

⁷⁶ See Donald Brown, *A Destruction of Muslim Identity: Ontario's Decision to Stop Shari'a-Based Arbitration*, 32 N.C. J. INT'L L. & COM. REG. 495, 516 (2007).

⁷⁷ See PEW RESEARCH CENTER, *MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM* 3 (2007), available at <http://pewresearch.org/assets/pdf/muslim-americans.pdf>. The report also asserts that as compared to Muslims in European countries such as the U.K., Germany, and France, American Muslims are less concerned with their identity as Muslims and more concerned with assimilation into modern Western culture. *Id.* at 2-3.

⁷⁸ Rachel Zoll, *U.S. Scholars Planning Islamic College*, THE ASSOCIATED PRESS (May 17, 2009), available at <http://abcnews.go.com/US/WireStory?id=7609335&page=2>.

⁷⁹ Fiqh Council of North America, <http://www.fiqhcouncil.org/AboutUs/tabid/175/Default.aspx> (last visited Mar. 9, 2010).

⁸⁰ European Council for Fatwa and Research, <http://www.e-cfr.org/en/> (last visited Mar. 9, 2010).

financial services in accordance with Islamic financial law.⁸¹ The rise of a Muslim middle class in America combined with increased interest by the business community in Shari'ah compliant products has led some to estimate that demand for products that are compatible with Islamic law will grow by twelve percent annually over the next decade.⁸² At a more normative level, a financial product offered by a Shari'ah-compliant banking institution can serve to foster greater trust between consumers desiring such products and the relevant banks, leading to longer banking relationships.⁸³ Lastly, providing Shari'ah compliant banking alternatives could help observant, lower class Muslims, who would otherwise not interact with many facets of the mainstream banking sector, to establish credit and enter the middle class.

Therefore, Shari'ah compliant interest-free alternatives to conventional banking merit consideration by U.S. regulators in light of the size, geographic concentration, level of education and potential interest in Shari'ah-compliant products from Muslim citizens. Aside from the positive social implications, increasing citizen participation in the U.S. financial system increases liquidity in the nation's capital markets while promoting financial activity

⁸¹ See Wu, *supra* note 41, at 254; see also Rehman, *supra* note 23, at 645 (noting that recent polls indicate nearly one-third of respondents would opt to use Shari'ah-compliant instruments over conventional banking).

⁸² See Press Release, Aranca Newstrack, Demand for Shariah-compliant finance to soar (Feb. 21, 2008), <http://www.prlog.org/10053017-demand-for-shariah-compliant-finance-to-soar.pdf>; see also Phil Thornton, *Cash to Splash*, COMPLETION: GETTING DEALS DONE WITH BAKER TILLY CORPORATE FINANCE, Issue 3, Autumn 2008, at 8, <http://www.bladonmore.com/assets/pdfs/Custom/Completion.pdf> (stating that "[t]he global Muslim population is growing quickly and the middle-class portion of that population is a key component. They are becoming more and more sophisticated and their demand for financial products is rising").

⁸³ See THE PONEMON INSTITUTE, 2009 PRIVACY TRUST STUDY FOR RETAIL BANKING 2, available at <http://www.ponemon.org/local/upload/fckjail/generalcontent/16/file/2008%20PTS%20Banking%20Report%20FINAL%201.pdf>.

throughout several key sectors of the economy.⁸⁴ Amidst the economic downturn currently facing the nation, it is difficult to argue against the proposition that greater economic participation and financial activity from Muslims is a salutary prospect.⁸⁵

B. The Status Quo Underserves the Muslim American Market

Nevertheless, despite the data on the American Muslim population, there is very little institutional support for their financial needs. Only nine institutions provide Islamic financial services in the United States, resulting in a per capita distribution of 670,000 Muslims per bank.⁸⁶ In contrast, there are over 8,067 banks serving nearly 300 million American citizens,⁸⁷ a per capita distribution of about 33,000 individuals per bank. Of the banks that do offer Shari'ah-compliant financial services, all focus exclusively on the real estate sector or limited scale small business financing.⁸⁸ In 2002, there was only one Islamic Finance operation approved by Fannie Mae and Freddie Mac.⁸⁹ The range of services currently available does not encompass the banking needs of an average citizen, which range from savings accounts, retirement planning, revolving lines of credit, and educational loans. Although these products are available through conventional banks, the services inevitably deal with interest.⁹⁰

⁸⁴ Shirley Chiu et. al., *Islamic Finance in the United States: A Small But Growing Industry*, 214 CHI. FED LETTER, May 2005, at 1–4.

⁸⁵ It also bears mentioning that several non-Muslims might also find the Islamic style of lending attractive. By increasing financial options for everyone, the potential base for Shar'iah based products might not be limited to the 6 million Muslims in this country.

⁸⁶ *Id.*

⁸⁷ FDIC Institution Directory, <http://www2.fdic.gov/idasp/index.asp> (last visited Mar. 9, 2010). Note that this "per capita distribution" includes Muslims.

⁸⁸ Chiu, *supra* note 84, at 214.

⁸⁹ See Lariba American Finance House, *supra* note 25.

⁹⁰ *Id.*

One counter-argument to this critique of the status quo is that Muslims are currently not forced to use interest. Indeed, there are no legal barriers preventing them from not using it. More specifically, the argument relies on the premise that one does not have to use a commercial bank. Although this is true, the argument severely understates the costs of the alternative. No citizen in the United States can reasonably be expected to self-finance everything from his/her education, to his/her purchase of a home, car, or other consumer durable. Assuming *arguendo* that this were possible, the argument stills suggests that the millions of individuals that cannot accomplish such a feat should simply bow out of the retail financial system, reducing market liquidity, stifling entrepreneurship, and financially ostracizing a swathe of the American public. Instead, this Note urges for the economic integration of individuals through the law. Indeed, this suggestion, unlike the one before it, has economic as well as social benefits.

Experts have posited various causes for the lack of Shari'ah-compliant institutions in the United States. At the outset, the Islamic financial industry is quite young—the first modern Islamic financial institutions emerged in the late 1960s and 1970s in Egypt and Bahrain.⁹¹ Most of this early growth was a direct result of the economic development of the Middle East, fueled primarily by oil wealth.⁹² As the Muslim middle class has grown in various countries throughout the world, the modern financial principles initially developed in the mid-twentieth century have undergone a process of innovation and revision that is far from complete.⁹³ Aside from the nascent state of modern Islamic finance principles, any modern bank is inherently difficult to establish due to regulatory concerns and the

⁹¹ HSBC Amanah, The Islamic Finance Industry, <http://www.hsbcamanah.com/amanah/about-amanah/islamic-banking/industry.html> (last visited Mar. 9, 2010).

⁹² *Id.*

⁹³ *Id.*

initial capital investments needed.⁹⁴ A potential, short-term solution to this issue would be to allow Islamic banking windows to exist within established, conventional banks.⁹⁵ The viability of this process, however, is ultimately constrained by various legal challenges, including the lack of regulatory approval for Islamic financial tools.⁹⁶ Specifically, these tools require banks to buy, sell, and hold title to real property, something that is against long standing U.S. policy of prohibiting banks from making equity investments.⁹⁷ Islamic financial tools also require the substitution of profit-loss sharing in place of fixed-interest income for savings accounts. This presents a problem for banks that are FDIC insured since one of the requirements of the FDIC is for capital security, or that savings accounts not be subject to loss.⁹⁸ In short, domestic banks are hampered by banking legislation which, although well intentioned when enacted, has the unintended effect of making the Islamic lending style very cumbersome and unattractive.⁹⁹

Facing such limited options, Muslims wishing to observe their religion in financial matters face a rather stark choice: they can either sacrifice opportunities in order to stay within

⁹⁴ AUSUF AHMED, MUNAWAR IQBAL & TARIQULLAH KHAN, CHALLENGES FACING ISLAMIC BANKING 66 (1998).

⁹⁵ With regard to conventional banks offering Shari'ah-compliant products, some scholars hold that it is not possible since conventional bank charters and statute are not Shari'ah compliant. This presents the possibility that the funds drawn from these banks are not ethically sound for Muslims to use. However, the majority opinion on this issue is that as long as funds are completely segregated, the bank has a Shari'ah supervisory board, and it has a commitment to provide Islamic financial products, that is enough to ensure spiritual legitimacy. See Sheikh Nizam Yaquby, *Sharia Requirements for Conventional Banks*, http://www.islamic-banking.com/iarticle_7.aspx (last visited Mar. 9, 2010).

⁹⁶ See generally J. Michael Taylor, *Islamic Banking—The Feasibility of Establishing an Islamic Bank in the United States*, 40 AM. BUS. L.J. 385 (Winter 2003).

⁹⁷ See *Nat'l Bank v. Matthews*, 98 U.S. 621, 625–26 (1878).

⁹⁸ Christine Walsh, *Ethics: Inherent in Islamic Finance Through Shari'ah Law; Resisted in American Business Despite Sarbanes-Oxley*, 12 FORDHAM J. CORP. & FIN. L. 753, 759 (2007).

⁹⁹ See Part III for a more detailed discussion.

the bounds of the ethical mandate or they can engage in behavior that contravenes a credible interpretation of the divine decree.¹⁰⁰ Anecdotal evidence seems to indicate that this choice is often split down generational lines. Many first generation Muslim immigrants report assimilating into an interest-based system in order to secure a foundation for their families while younger, more upwardly mobile, second generation Muslims, report greater demand for religious accommodation from society.¹⁰¹ In order to prevent overstating the argument, banks such as Citibank and Chase Manhattan Bank do provide limited Islamic finance operations for interested customers.¹⁰² Nonetheless, for many American Muslims without access to such institutions or opportunities, living in a manner inconsistent with religious law incurs spiritual costs they would rather avoid, not the least of which is a betrayal of one's conscience.¹⁰³

C. Government and the Private Sector Are Taking Notice but Have Not Taken Action

Despite the apparent hurdles, there is substantial interest in Islamic finance from both the government and the private sector. Following the terrorist attacks of September 11, 2001, Islamic finance attracted increasing levels of interest from the Federal Government. Then Secretary of Treasury Paul O'Neill and Under Secretary John Taylor met

¹⁰⁰ See Ahmed, *supra* note 35, at 481–82.

¹⁰¹ Susan Sachs, *Pursuing an American Dream while following the Koran*, N.Y. TIMES, July 5, 2001, available at <http://www.islamfortoday.com/americandream.htm>.

¹⁰² World Bank, *Islamic Finance: A Significant and Growing Industry* (2005), <http://siteresources.worldbank.org/EXTISLAMF/Resources/ASignificantandGrowingIndustryRevised.pdf>.

¹⁰³ Much in the same way individuals buy organic foods or purchase “green” products, individuals can be motivated to make certain decisions not because of the threat of any external retribution but rather because of certain deeply held ethical principles. See generally Ethical Consumer, *Why Buy Ethically?*, <http://www.ethicalconsumer.org/ShoppingEthically/WhyBuyEthically.aspx> (last visited Mar. 11, 2010) (discussing how consumption behavior can express moral preferences).

with various leading practitioners of Islamic finance in the Middle East to learn some of the basics about Islamic financial practices and regulation.¹⁰⁴ Upon their return, the U.S. Treasury organized an "Islamic Finance 101" workshop in April 2002 to educate Government as well as Capitol Hill staffers about this fast-growing industry. Soon thereafter, the Treasury decided to create a post of "Scholar in-Residence on Islamic Finance."¹⁰⁵ The Treasury has also either hosted or attended over six major conferences and colloquia from 2001–2006, all involving U.S. regulators, Shari'ah scholars and major participants from the banking and finance sectors.¹⁰⁶ Bank supervisors, from state and local governments, have also met regionally to discuss prospects for serving Muslim customers in their local service areas.¹⁰⁷ Therefore, at an informal and educational level, there has been relatively impressive participation by both high and low-level government officials via these working group engagements.¹⁰⁸ In terms of the private sector, international law firms such as Latham & Watkins, Shearman & Stearling, Gibson Dunn & Crutcher, Baker Botts, King & Spalding, Allen & Overy, and Clifford Chance have already established offices abroad in the Middle East hoping to get a share of the high volume of Islamic Finance

¹⁰⁴ *Money Laundering and Terror Financing Issues in the Middle East: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs, 108th Cong. 2 (2005)* (testimony of Dr. Mahmoud El-Gamal, Chair of Islamic Economics, Finance, and Management, Rice University) [hereinafter Gamal Testimony].

¹⁰⁵ *Id.*

¹⁰⁶ Abdi Shayesteh, *USA Regulation: American Justice*, ISLAMIC BUS. & FIN., July 2007 (noting the Federal Reserve Bank of Minneapolis hosting a public working group on Islamic Finance in 2001; the participation of U.S. regulators at the Abana Conference on Islamic Finance in New York and the Conference on Corporate Governance and Islamic Finance in Qatar in 2005 and several others).

¹⁰⁷ See Chiu, *supra* note 84.

¹⁰⁸ *Id.* But cf. Gamal Testimony, *supra* note 104 ("[n]eedless to say, the primary concern that prompted interest was fear that Islamic finance may invite disproportionate participation of terrorist financiers, and/or exhibit particular vulnerabilities to abuse thereby").

work being done.¹⁰⁹ With worldwide Shari'ah-compliant assets growing by twenty-nine percent over the past year to \$822 billion,¹¹⁰ many large law firms are gaining experience with Shari'ah-compliant investment vehicles and with the nomenclature of Islamic finance.¹¹¹

Despite these developments, no U.S. law firm currently provides services to individual Muslim clients with respect to financial transactions, in part because of the lack of relevant law, domestic Islamic financial institutions and transaction volume that would make such legal work worthwhile. To be fair, this is a regulatory challenge *sui generis*. As a result of the rapid rise of the Muslim population in the past thirty years, it is understandable that the law has nothing beyond basic constitutional guarantees to address these unique issues. But leveraging the aforementioned momentum behind Islamic finance is critical for future regulatory efforts: it is a subject that is, for one reason or another,¹¹² on the government's mind.

IV. THE CASE FOR REGULATORY REFORM

"The First Amendment contains two principles affecting religion: that there neither be a government establishment of religion nor a law prohibiting the free exercise thereof. A corollary principle of religious freedom enshrined in our Constitution is that the secular law should adapt, as much as possible, to accommodate differing religious practices to ensure that, as much as possible, our secular law does not burden the religious practice of observant Muslims."

¹⁰⁹ See Sara Stefani, *Law Firms Go Abroad For Booming Global Business*, ENERGY L.J., Jan. 1, 2008.

¹¹⁰ *Islamic Finance in France: Sharia Calling*, ECONOMIST, Nov. 12, 2009, available at http://www.economist.com/world/europe/displaystory.cfm?story_id=14859353.

¹¹¹ Julian Walker, *Law Firms Rush to Open in Dubai*, HEDGE FUNDS: THE VOICE OF THE ALTERNATIVE INVESTMENT INDUSTRY, Dec. 2005.

¹¹² See Stefani, *supra* note 109.

Michael Silva, Chief of Staff & Senior V.P., Executive
Group, Fed. Reserve Bank of New York¹¹³

This Note proposes a two pronged solution to help make interest free alternatives more accessible in America. The proposed solution aims to make two things possible: (1) allow banks to own real estate for the limited purpose of financing, and (2) allow profit-and-loss-sharing deposit products to be approved and insured within the currently regulatory framework. These proposals have the dual purpose of removing some of the impediments to the creation of Islamic banks in America while simultaneously enabling conventional banks to expand their current offerings to Muslim consumers.¹¹⁴ The proposals are intended to be narrow; this Note does not propose to suggest a comprehensive solution, but rather a starting point that will achieve the greatest effect with the least possible change. Hence, this approach does not attempt to foreclose further exploration and development of the numerous issues present in this area.

A. An Informal Rulemaking Procedure to Allow Banks to Engage in Limited Equity Investing

The first step in accommodating Islamic banking is to allow banks to acquire real estate for the limited purpose of financing. Commercial banks in the United States are generally restricted from owning real property, apart from their own premises.¹¹⁵ These restrictions have potential implications for some of the most common Shari'ah-compliant, asset-backed loan products such as the *mudharaba* and *ijarah*. Nevertheless, due to the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"), banks are strictly prohibited from making equity

¹¹³ Silva, *supra* note 50, at 204.

¹¹⁴ Wu, *supra* note 41, at 253.

¹¹⁵ See 12 U.S.C. § 29 (2006).

investments.¹¹⁶ The purposes behind the long-standing U.S. restrictions on bank ownership of real property are still quite germane today: to hinder speculative activity, to ensure that the capital of banks is not tied up in static assets, and to prevent the accumulation of large tracts of land by financial institutions.¹¹⁷

However, these concerns are partially mitigated when considering the details of Shari'ah-compliant financing. Shari'ah-compliant mortgage transactions represent short term holdings of real estate. Property can never be monopolized because banks derive profit from actively transferring ownership to customers throughout the duration of the lending agreement.¹¹⁸

The underlying economics of *ijara* (leasing) and *mudharaba* (passive partnership) structures have also met with regulatory approval, albeit on a case-by-case basis. In 1997 and 1999 the Office of the Comptroller of the Currency (OCC) reviewed and approved both a residential *ijara* and residential *murabaha* product on a case-by-case basis.¹¹⁹ In each decision, the OCC considered the contractual features of each type of transaction in detail and focused on the economic substance of the transaction as opposed to its form. In its final approval, the OCC concluded that the products were the functional equivalent of residential secured lending and, as such, permissible activities for a national bank, even though they required equity investment.¹²⁰ While noting the general prohibition against the ownership of real property and the policy considerations behind them, the OCC

¹¹⁶ 12 U.S.C. § 1831 provides in relevant part: "(c) Equity investments by insured State banks.(1) In general. An insured State bank may not, directly or indirectly, acquire or retain any equity investment of a type that is not permissible for a national bank."

¹¹⁷ *Nat'l Bank v. Matthews*, 98 U.S. 621, 626 (1878).

¹¹⁸ EL-GAMAL, A BASIC GUIDE TO CONTEMPORARY ISLAMIC BANKING AND FINANCE 17, LARIBA Finance House (June 2000) *available at* www.ruf.rice.edu/~elgamal/files/primer.pdf.

¹¹⁹ OCC Interpretive Letter No. 806, 12 U.S.C. 24(7), 12 U.S.C. 371 (Oct. 17, 1997).

¹²⁰ *Id.*

determined that these policy concerns were not implicated by the Islamic products at issue. These interpretive rulings demonstrate that the banking community can theoretically accommodate Shari'ah-compliant transaction structures while staying within the boundaries of the statutes that govern the banking industry. However, without a more formal commitment to this effect, domestic banks would logically remain hesitant to engage in these transactions.

An informal OCC ruling on this issue has implications far beyond basic mortgage lending. As was described in Part II, a critical element of an Islamic financial transaction is to pass money through a tangible medium or something with intrinsic value in order for the lender to legitimately earn income on it. Allowing an equity exception for classes of Islamic financial products will therefore allow institutions to engage in "Islamic Style" lending, using land as an intermediary for the aforementioned range of transactions currently not available to American citizens.¹²¹ Therefore, permitting the critical "second step" in an Islamic lending transaction (of converting money to an asset) is arguably the single most important change regulators can make in order to facilitate interest free alternatives to conventional banking.

Therefore, absent a direct amendment to the FDICIA,¹²² a more formal statement by the OCC in the form of an

¹²¹ See *supra* Part III.B.

¹²² Practically, this would entail the addition to the language of the statute in subsection (c) to provide another exception to the prohibition of equity investments. For a detailed discussion and defense of this approach, see Ahmed, *supra* note 35. Ahmed suggests that the hypothetical amendment read as follows:

(5) Exception for accommodating certain religious groups.

(A) In general. An exception to the prohibition on equity investments shall be made for religious groups whose beliefs do not permit the use of interest-based financing. Banks shall provide equity-based financing options for the members of such religious groups. (B) These provisions are subject to relevant regulatory authority.

informal rulemaking procedure per § 553 of the Administrative Procedure Act to codify its reasoning would strongly encourage the active marketing of the approved financial products.¹²³ If a limited equity financing exception is allowed in the FDICIA, and the *murabaha* and *ijara* transactions are introduced into the mainstream banking community, they will enable banks to maintain their current role as financier and not thrust them into the role of private real estate managers.

B. Profit-and-Loss-Sharing Deposit Schemes Based on the British Model

In Islamic finance, profit-and-loss-sharing products are typically structured so that the bank has something akin to a joint investment with the depositor, with returns based on a portion of the profits earned at a floating rate.¹²⁴ Most importantly, and in contrast to a conventional deposit, if the bank loses money, so does the account holder.¹²⁵ For this reason, offering a profit-and-loss-sharing deposit becomes a particularly difficult proposition under a Western framework which takes the certainty of deposit principal as given.¹²⁶

The crux of the challenge with the profit-and-loss-sharing products is in designing a deposit account for an institution that is insurable by the Federal Deposit Insurance Corporation (FDIC) that will function as an investment or other interest bearing account, while also observing Islam's prohibition of either paying or receiving interest. As a practical matter, any bank seeking a new charter in the

¹²³ See 5 U.S.C. § 1003 (2006).

¹²⁴ See EL-GAMAL, *supra* note 2, at 146.

¹²⁵ Despite this, it is worth noting that some Islamic deposit products sit comfortably within U.S. statutes and regulations. Non-interest-bearing current accounts and checking accounts fully satisfy the mandates of both secular and religious law.

¹²⁶ William L. Rutledge, Executive Vice President, Fed. Reserve Bank of N.Y. Regulation and Supervision of Islamic Banking in the United States, Remarks at 2005 Arab Bankers Association of North America Conference on Islamic Finance (Apr. 19, 2005), *available at* <http://www.Ny.frb.org/newsevents/speeches/2005/rut050422.html>.

United States will almost invariably need to be a federally insured depository institution.¹²⁷ To do so, the bank will need to satisfy the requirements of the FDIC and the relevant chartering authority on the structuring of its investment accounts. In addition, the FDIC has yet to approve a bank as a depository institution whose deposit products will allow for the possibility of loss.¹²⁸

However, there is already a solution that has worked abroad that could effectively be applied to the current U.S. framework under the FDICA. In late 2005, after a long period of intensive consultation with the United Kingdom Financial Services Authority, the Islamic Bank of Britain (IBB) came up with a deposit product that satisfied both secular and religious imperatives. The scheme developed by the IBB nominally emulates the U.S. bank insurance scheme while still allowing for deposit accounts to be created on a profit-loss sharing arrangement.¹²⁹

IBB's investment accounts have the possibility of both profit and loss but the bank formally undertakes to make good any losses on the account. In case of a loss, the bank invites customers to sign a voluntary waiver of this offer, in order to comply with Shari'ah law. Depositors who sign this waiver would not be eligible to receive insurance of their deposit in accordance with Britain's insurance scheme.¹³⁰ In

¹²⁷ See 12 U.S.C. §§ 222, 1842(e) (2006) (banks that are or are part of bank holding companies). State law generally requires that banks be required to have federal deposit insurance. See MILTON R. SCHROEDER, *THE LAW AND REGULATION OF FINANCIAL INSTITUTIONS* § 2.01(5)(a) (Warren, Gorham & Lamont eds., 1995).

¹²⁸ *Id.*

¹²⁹ Tim Plews, *Establishing Islamic Banks in the West: The Case of the Islamic Bank of Britain*, in *ISLAMIC RETAIL BANKING AND FINANCE: GLOBAL CHALLENGES AND OPPORTUNITIES* 37–38 (Sohail Jaffer ed., 2005)

¹³⁰ The bank also undertakes that, in case of a shortfall: (i) it will forego receipt of fees, (ii) it will dip into a profit stabilization reserve to the extent of the shortfall, and (iii) its directors will not declare a distribution to shareholders until there is no shortfall. Islamic Bank of Britain, Consumer Banking Terms & Conditions Current Account & Savings Accounts, <http://www.islamic-bank.com/GetAsset.aspx?id=fAAxADgANwB8AHwAVABYAHUAZQB8AHwAMAB8AA2> (last visited Mar. 9, 2010).

this way, the bank formally operates within the deposit insurance framework but it has created an internal contract mechanism to allow the profit-and-loss-sharing arrangement. The British government made these legal changes despite having a total Muslim population of only 1.8 million individuals, which is less than third of that of the United States.¹³¹ Although nearly half of them are reported to reside in the London area, the demographic analysis *supra*, reveals a near 90% concentration of American Muslims in only twelve States.¹³² Furthermore, the desire to make these changes has come from the top down and not the bottom up. When questioned about why Britain decided to make the move, the official response from Duncan McKenzie, director of economics at International Financial Services London was: "The government simply sees it as another way to draw business to London, to bring investors to the U.K."¹³³ And thus far, the British experiment has worked.¹³⁴ During the credit crisis of 2008, the twenty five Islamic banking institutions in Britain have all posted profits. Many non-Muslim U.K. based businesses, such as Blue Ocean Telecommunications, have turned to Islamic banks such as the Bank of London and the Middle East (BLME) for business loans after being rejected by conventional financing houses.¹³⁵ The approach has been so successful that lawmakers in France, who previously banned the veil in state schools and remain unapologetic about their approach to Islam, have pushed for changes in their tax and legal codes to accommodate a limited range of Shari'ah compliant

¹³¹ Financial Services Authority, *Islamic Banking in the UK*, Briefing Note BN016/06, Mar. 9, 2006 [hereinafter *FSA Note*].

¹³² See Part III.A.

¹³³ *FSA Note*, *supra* note 131.

¹³⁴ Thomas K. Grose, *The Rise of Islamic Banking in a Time of Economic Crisis: How Some Financial Institutions Avoid Trouble by Following the Strict Rules of the Koran*, U.S. NEWS & WORLD REP., Dec. 15, 2008.

¹³⁵ *Id.*

products.¹³⁶ Hence, even with the current difficulties posed by Shari'ah-compliant products, the British experience is a good indicator that an informal OCC rulemaking would go a long way to encouraging the development Shari'ah-compliant deposit products.

C. Dispute Resolution of Claims Involving Shari'ah

Even if the aforementioned solutions are adopted, a lingering question remains about dispute resolution between banks and depositors. Indeed, there are numerous enforceability issues in a contract that allows depositors who voluntarily assume the risks of their deposits fluctuating to waive their right to insurance. Courts have understandably shown resistance to deciding matters that skirt the borders of religious interpretation and have, out of necessity or practicality, deferred to the judgments of religious experts or impartial arbitrators. Indeed, recent case law with regards to Shari'ah-based marital contracts suggests that courts are willing to recognize Shari'ah based contracts so long as the contract can be evaluated from neutral secular legal principals. In evaluating a Shari'ah based dowry arrangement, the New Jersey Superior Court stated:

[T]he Mahr [dowry] Agreement is not void simply because it was entered into during an Islamic ceremony of marriage. Rather, enforcement of the secular parts of a written agreement is consistent with the constitutional mandate for a "free exercise" of religious beliefs, no matter how diverse they may be. If this Court can apply "neutral principles of law" to the enforcement of a Mahr Agreement, though religious in appearance, then the Mahr Agreement survives any constitutional implications. Enforcement of this Agreement will not violate the First Amendment proscriptions on the establishment of a church or the free exercise of religion in this country. "The primary advantages of the neutral principles approach are that it is completely secular

¹³⁶ *Islamic Finance in France: Sharia Calling*, ECONOMIST, Nov. 12, 2009, at 34.

in operation, and yet flexible enough to accommodate all forms of religious organization and polity.”¹³⁷

The New Jersey approach appears analytically sound and accords with prior Supreme Court rulings on analytically similar issues.¹³⁸ Essentially, if two parties enter into an agreement promising to perform a secular act (e.g., pay money) in the event of some secularly ascertainable event (e.g., a divorce), there does not appear to be any Establishment Clause barrier to enforcing such an agreement. Absent state law principles constraining such agreements, the religious motivation for the promise, and the religious event in which the promise was made, should not affect the analysis.¹³⁹ Other jurisdictions have adopted New Jersey’s approach,¹⁴⁰ Texas being the most recent. In *Jabri v. Qaddura*, the parties entered into a contract that provided for Shari’ah arbitration of any disputes to their marital contract; the court considered challenges to the arbitral process, and upheld the award provided by the Shari’ah arbitrator.¹⁴¹ Therefore, there does appear to be sound common law support for alternative avenues of dispute resolution between Islamic institutions and borrowers or depositors if and when the need arises. Some Shari’ah-based banks, in compliance with U.S. Truth in

¹³⁷ *Odatalla v. Odatalla*, 810 A.2d 93, 96-97 (N.J. Super. Ct. Ch. Div. 2002) (quoting *Jones v. Wolf*, 443 U.S. 595, 603 (1979)). *But cf. Zawahiri v. Alwattar*, No. 07AP-925, 2008 WL 2698679, ¶ 26 (Oh. App. July 10, 2008) (refusing to enforce a Mahr contract because the circumstances of its creation violated substantive Ohio contract law).

¹³⁸ *See Jones*, 443 U.S. at 595 (holding that church property disputes may be resolved by civil courts using “neutral principles” of contract and deed interpretation).

¹³⁹ Eugene Volokh, *Islamic Agreements in Civil Courts*, THE VOLOKH CONSPIRACY, July 17, 2008, http://volokh.com/archives/archive_2008_07_13-2008_07_19.shtml#1216332053.

¹⁴⁰ *Abd Alla v. Mourssi*, 680 N.W.2d 569 (Minn. Ct. App. 2004) (upholding Shari’ah arbitration agreement between two parties to a marital contract).

¹⁴¹ *See* 108 S.W.3d 404, 413 (Tex. App. 2003).

Lending Laws,¹⁴² have chosen to abandon the arbitration route altogether and openly disclose to their customers that in any civil case, the contract a customer signs with the bank will be treated as a standard financing contract.¹⁴³

Regardless of the varying judicial responses, from a policy perspective, the unprecedented nature of these banking problems should not hinder the development of a solution. Indeed, the alternative, one might argue, is to not recognize the First Amendment Rights of American Muslims seeking to peacefully observe the requirements of their religion. Therefore, the limited judicial acceptance of Shar'iah based contracts in the United States is a satisfactory starting point for constructing other contracts in the future.

D. Limitations of the Suggested Approach

Even if the solutions proposed above were adopted, there are several criticisms of Shari'ah compliant financing based on purely economic grounds. Among the leading criticisms is that the current breed of Shari'ah compliant financing structures have hidden agency costs which render them inefficient, even if they were legally possible. The *mudharaba* (passive partnership) and *musharaka* (active partnership) finance structures in particular have been criticized by some scholars as being incompatible with modern economies due to the fact that banks would have to exercise constant vigilance over the utilization of funds while constantly putting the banks' profits in jeopardy.¹⁴⁴ Further, these critics point to the misaligned incentives of entrepreneurs who would either be dissuaded by the prospect of sharing profits; or if they accepted that condition, would tend to take on higher than average risks because, in

¹⁴² See generally 12 U.S.C. § 3806; 15 U.S.C. §§ 1604, 1637(c)(5), 1639(1) (also known as "Regulation Z").

¹⁴³ See Lariba Finance House, FAQs, available at <http://www.lariba.com/dev/knowledge-center/faqs.htm> (referring to Guidanc Financial in the section entitled: "I heard that in your contract you have a term as interest. What does that mean?").

¹⁴⁴ See Walsh, *supra* note 98, at 760.

the case of mudharaba, the lending institution is supplying all of the capital.¹⁴⁵ Although these criticisms have merit, the problem of agency costs is a persistent one in any lending transaction. The mechanisms that most conventional banks use to assess the strength of borrowers, mainly credit checks and scores, can be effectively replicated in the Shari'ah-compliant world with ease. Furthermore, alternative incentive schemes can be developed to prevent the moral hazard introduced via mudharaba.¹⁴⁶

A second criticism that can be levied against this approach is that it does not account for how Islamic financial instruments would be taxed under Federal Regulations.¹⁴⁷ As described above, the legal form of many Islamic financial arrangements is different from conventional debt finance arrangements. Usually, however, the parties want these arrangements to be characterized as debt financing for U.S. tax purposes, rather than its technical characterization as a sale, sale and leaseback, lease, or otherwise.¹⁴⁸ To fully characterize an Islamic transaction as a debt, however, requires substantial modifications to standard tax documentation to include fields for "deferred purchase price," "base amount," "profit amount," and other unique Shari'ah concepts. Beyond the technical challenge, the IRS must be able to correctly characterize the transaction using a substance-over-form doctrine, similar to the OCC.¹⁴⁹ These administrative challenges may prove difficult to implement and will require a substantial measure of standardization going forward.

A third and final critique may be that Islamic banks will eventually face massive liquidity and risk management problems. With regard to liquidity, Islamic banks do not

¹⁴⁵ *Id.* at 761.

¹⁴⁶ It also must be stressed that these arguments can be overstated. Indeed, one would not want to sacrifice months of labor on a risky investment just because an individual's capital is not involved.

¹⁴⁷ Kevin Conway & Susan Feese, *The Tax Dilemma in Islamic Finance*, INT'L TAX REV., July/Aug. 2007, at 20.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

have access to conventional interest-based funding sources. Their inability to use the interbank and discount window severely limits their ability to access cash flow.¹⁵⁰ With regard to risk, Islamic banks are limited by the types of the investments they can hold, which may impact their asset and liability management options. Islamic banks cannot acquire treasury securities, municipal securities, and corporate bonds like conventional banks can.¹⁵¹ Furthermore, Islamic banks are prohibited from using conventional risk mitigation strategies such as conventional insurance and derivative market products, such as forwards, futures, and options.¹⁵² As of yet, it is unclear what alternative products are available for an Islamic bank to utilize in mitigating its portfolio risk. Nevertheless, these and other challenges are ideal subjects for further inquiry and the profitability of Islamic banks in London, Turkey, Pakistan, and Malaysia should be studied to understand how they plan to negotiate these issues in the long run.

V. CONCLUSION

"The demand for Shari'ah-compliant products is growing in the United States, in response to the demands of Muslim consumers. [Thus] it is imperative that U.S. [bank] supervisors understand and adapt as well. As public servants, we have a constitutional responsibility to ensure that our regulations and practices accommodate religious practice to the greatest extent that is possible consistent with our statutes, regulations, and supervisory objectives."¹⁵³

Between 1936 and 1948, with only one-million adherents, Jehovah's Witnesses managed to bring over twenty-three cases to the United State Supreme Court.¹⁵⁴ Laws providing for the inspection of Kosher meat have also been in existence

¹⁵⁰ See Shayesteh, *supra* note 106, at 23.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Silva, *supra* note 50, at 201.

¹⁵⁴ Hayden C. Covington, DEFENDING AND LEGALLY ESTABLISHING THE GOOD NEWS 73 (1950).

in America since 1909.¹⁵⁵ Throughout history, the law has demonstrated its ability to make accommodations for religious minorities. And legal reform is a necessary precondition for social inclusion. Granted, it is not the responsibility of the government to encourage or even enable individuals to follow their individual faith. However, societal accommodation of the beliefs of religious minorities is part of what makes America the diverse and tolerant society it is today. At many points in this nation's history, the Government has acted without legal compulsion to increase the freedom and opportunity of its citizens in the hopes of achieving a more perfect union. By encouraging the OCC to formalize its reasoning through informal rulemaking and by adopting the British method of handling profit- and loss-sharing depository accounts, the current administration can swiftly increase immigrant and minority participation in the U.S. Financial System, something the country needs in the current period of financial crisis. A respect for the views of religious minorities has been a hallmark of America's modern legal tradition. Simple, unobtrusive modifications to allow for Islamic Banking in the United States can economically and legally mobilize the more than six-million Muslims in this country while stimulating investment and growth in the nation's economy at a time when the nation desperately needs it.

¹⁵⁵ Rabbi Avi Shafran, *Jewish Law: Recent Developments*, <http://www.jlaw.com/Recent/kosherlawsruling.html> (last visited Mar. 9, 2010).