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Rethinking the Law, Not Abandoning It: A Comment on Overlapping Jurisdictions Articles from the Faulkner Law Review Symposium on Overlapping Jurisdictions: What Role for Conscience and Religion

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RETHINKING THE LAW, NOT ABANDONING IT: A COMMENT ON "OVERLAPPING JURISDICTIONS"

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INTRODUCTION

In an extraordinary outpouring of work, John Witte and Joel Nichols have offered students of law and religion a careful, nuanced examination of the relationship between marriage, religion, and the law.[1] It is, Witte rightly notes, a close and complex relationship, in which marriage serves "as both a legal and a spiritual institution—subject at once to special state laws of contract and property, and to special religious canons and ceremonies."[2] For a variety of reasons—including the degree to which marriage has traditionally been woven into the legal framework of society without losing its religious roots, and the shift of marriage as a legal construct to a more privatized and contract-based status[3]—a close look at marriage and the law reveals just how complex the relationship between law and religion can be.

In their contribution to this Symposium, Witte and Nichols examine these questions through the lens of one particular issue: the place of *shari'a*, or Islamic law, within the broader Western legal framework, and specifically the relationship between Muslim family law and general marriage law. Despite their superficial plausibility, Witte argues, none of the standard arguments in favor of allowing some form of Muslim law to govern marriages in the

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[*] Gordon Rosen Professor, University of Alabama School of Law. I am grateful to the organizers of the Faulkner Law Review Symposium on overlapping jurisdictions, to John Witte and Joel Nichols for this and other opportunities to learn from their work, and to my fellow commentators.

[1] *See* John Witte, Jr. & Joel A. Nichols, *Who Governs the Family? Marriage as a New Test Case of Overlapping Jurisdictions*, 4 FAULKNER L. REV. 321 (2013) (citing various works by Witte and Nichols, written separately and together).

[2] John Witte Jr., *The Future of Muslim Family Law in Western Democracies*, *in* SHARI'A IN THE WEST? 279, 281 (Rex Ahdar & Nicholas Aroney eds., 2010) [hereinafter Witte, *Future*].

[3] *See id.* at 282.

West—"religious freedom, non-discrimination, political liberalism, and religious autonomy"—fully explains or justifies this result.[4] The issues raised in this area, he concluded, are deep and intractable. In the long run, these issues might be better addressed through the same complex process of negotiation, compromise, and mutual influence and accommodation that characterized, and continues to characterize, the relationship between mainline Christianity and the Western state over the past half-century, with respect to marriage as well as many other subjects.[5]

I do not disagree with this broad conclusion. As a descriptive matter, it seems true that the relationship between law and religion is just that: a *relationship*, one that is mutual and evolving and cannot be characterized with rigidity or finality. As a normative matter, I am also sympathetic to the view that no single value or argument is likely to succeed at providing a comprehensive "solution" to the problem of church-state relations.[6]

A symposium would be of little use without a little disagreement, however. So let me focus on a couple of areas—one narrow and one much broader—in which I depart from Witte's finely delivered views.

I deal with the narrower issue in the first part of this commentary. Despite my skepticism about "value monism" in law and religion, as a practical and doctrinal matter, sometimes a single value can actually be quite powerful in addressing a particular law and religion dispute. So it is with the *shari'a* debate. In an important recent case, *Awad v. Ziriax*,[7] the United States Court of Appeals for the Tenth Circuit upheld an injunction against the so-called "Save Our State Amendment," an Oklahoma state constitu-

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[4] Much of what follows is based on the speech delivered at the Symposium by Professor Witte, a copy of which was made available to the participants and is on file with the author. The final published piece by Witte and Nichols is different from, but not inconsistent with, those remarks. My remarks can stand on their own, but they are more responsive to the initial Symposium presentation than to the final, published version. *See* John Witte, Jr. Address at the Faulkner Law Review Symposium (October 26, 2012) (hereinafter "Witte Address").

[5] *See id.*; Witte, *Future*, *supra* note 2, at 291.

[6] *See, e.g.*, PAUL HORWITZ, THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION xxv (2011) [hereinafter HORWITZ, THE AGNOSTIC AGE]; Paul Horwitz, *Law, Religion, and Kissing Your Sister*, *in* LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS 228, 247 (Austin Sarat ed., 2012).

[7] 670 F.3d 1111 (10th Cir. 2012).

tional initiative "prevent[ing] Oklahoma state courts from considering or using Sharia law."[8] I argue that *Awad* represents one of those church-state disputes in which equality is a well-suited analytic tool. Equality, by itself, may not be a sufficient or even coherent tool for every circumstance. But it did appropriate work in this case.

More broadly, I want to voice my discomfort with the way in which Witte, in his initial take at the Symposium, framed the dispute between the state and adherents of the use of *shari'a* in Western marriage law. "*Shari'a* advocates," he asserted, "have given up on the state and its capacity to reform its laws of sexuality, marriage, and family life—and they want to become a law unto themselves."[9] This is a strong statement,[10] and a disquieting one—particularly in the United States, which is not much given to Islamic extremism and has been very successful on the whole in managing religious pluralism.

Although there are some grounds for Witte's description, this is not the only way to see things. Thinking of the champions of *shari'a* as having "given up on the state," or as desiring "to become a law unto themselves," depends a great deal on how we understand those protean concepts, "the state" and "the law." In the second part of this commentary, I argue that we need not think of religious arbitration panels and other mechanisms of religious law as an utter abandonment of the state or the law. Rather, we might understand them as a challenge to what we mean by those terms. They invite us to adopt a different and broader view of what constitutes the "law"—and, perhaps, a more skeptical view of the dominance of the "state."

I. WHEN EQUALITY WORKS: *AWAD*

A key trend in First Amendment law over the past several decades has been the increasing prominence of equality as a central justification for, and doctrinal tool in, the freedoms of speech and religion. This understanding of the First Amendment dates back at

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[8] *Id.* at 1116.

[9] Witte Address, *supra* note 4.

[10] And one, in fairness, that is not repeated in Witte and Nichols' joint paper.

least to Kenneth Karst's path-setting article on the subject,[11] although there were traces of this idea in the decisions of the United States Supreme Court for some time before that. Although a good deal of the scholarly literature has focused specifically on the relationship between equality and free speech,[12] a substantial literature has found the same trend with respect to the Religion Clauses. On this view, both the Free Exercise Clause and the Establishment Clause were once understood primarily in terms of liberty, or separationism, or other values, but are now understood, by the courts and others, as centering on whether a law affecting religion violates principles of equality.[13] Equality lies at the heart of one of the most influential theoretical treatments of the Religion Clauses in recent years, the "equal liberty" approach advanced by Chris Eisgruber and Larry Sager.[14]

The equality-centered view of law and religion has been subject to important challenges and critiques.[15] In particular, scholars have argued that such an approach falters because religion itself is constitutionally distinct, and thus cannot be fully and soundly dealt with through a leveling value like that of equality.[16] They have also argued, in keeping with a longstanding argument

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[11] *See* Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

[12] *See, e.g., id.*

[13] *See, e.g.*, Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 11-12 (2004); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673 (2002); Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & RELIGION 187, 189 (2001); Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 10 (2000).

[14] *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 51-77 (2007).

[15] *See, e.g.*, Christopher C. Lund, *Exploring Free Exercise Doctrine: Equal Liberty and Religious Exemptions*, 77 TENN. L. REV. 351 (2010); Thomas C. Berg, *Can Religious Liberty Be Protected as Equality?*, 85 TEX. L. REV. 1185 (2007); Kent Greenawalt, *How Does "Equal Liberty" Fare in Relation to Other Approaches to the Religion Clauses?*, 85 TEX. L. REV. 1217 (2007); Abner S. Greene, *Three Theories of Religious Equality . . . And of Exemptions*, 87 TEX. L. REV. 963 (2009); Ira C. Lupu & Robert W. Tuttle, *The Limits of Equal Liberty as a Theory of Religious Freedom*, 85 TEX. L. REV. 1247 (2007); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000).

[16] *See, e.g.*, Lupu & Tuttle, *supra* note 15; McConnell, *supra* note 15. *But see, e.g.*, Micah Schwartzman, *What if Religion is Not Special?*, 79 U. CHI. L. REV. 1351 (2012); Brian Leiter, *Why Tolerate Religion?* (2013).

about the "emptiness" of equality,[17] that a rule of equal treatment or nondiscrimination cannot stand on its own bottom, because it depends on a host of contested questions about what constitutes equal treatment or discrimination.[18]

Witte's argument that legal deference to Islamic family law finds no absolute defense in an argument from religious equality is similar to the latter argument, although it is grounded more on history than on abstract principle. The equality-based argument for respect for Islamic law in marriage, among other contractual arrangements, contends that Islamic law and legal bodies ought to be accommodated on an equal basis with other religious systems that are given legal recognition, such as the system of rabbinical courts to which some religious Jews turn in dealing with marriage issues. As Witte has argued elsewhere, however, "[t]he current accommodations made to the religious legal systems of Christians, Jews, First Peoples, and others in the West were not born overnight. They came only after decades, even centuries of sometimes hard and cruel experience, with gradual adjustments and accommodations on both sides."[19] On this view, one can argue that Islamic law is entitled to be treated the same as other religious systems within Western law, *if* it is like those other religious systems—but they are *not* necessarily alike, because there has already been a long period of mutual influence and accommodation between Western legal regimes and those other religious systems. Islamic law will have to earn its own unique place in relation to the governing law of the United States and other western legal regimes. It cannot simply show up and claim equal status with other religious legal systems that have a long and unique relationship with the secular legal regime.[20]

Insofar as Witte is arguing that an equality argument depends on the particular salient similarities and differences between

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[17] *See generally* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

[18] *See, e.g.*, Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm, in* Sarat, *supra* note 6, at 195-201; Robin Charlow, *The Elusive Meaning of Religious Equality*, 83 WASH. U. L.Q. 1529, 1529 (2005).

[19] Witte, *Future*, *supra* note 2, at 288.

[20] *See id.* at 289 ("The hard-won accommodations that modern Jewish law and culture now enjoy are not fungible commodities that Muslims or any others can claim with a simple argument from equality. They are individualized, equitable adjustments to general laws that each community needs to earn for itself based on its own needs and experiences.").

the objects being compared, and that—even if we could agree on what constitute morally relevant similarities or differences—we would still have to dig beneath the surface to determine whether Islamic law truly is relevantly similar to or different from other religious legal regimes, I agree. The mere invocation of equality is not enough. Even so, there are cases in which equality is both a powerful and an appropriate tool. As it turns out, *shari'a* is one of them.

Consider the Tenth Circuit's decision in *Awad v. Ziriax*. In the November 2010 elections, Oklahoma's voters approved a state constitutional amendment called the "Save Our State" amendment. The amendment stated, in part, that Oklahoma courts "shall not look to the legal precepts of other nations and cultures. Specifically, the courts shall not consider international law or Sharia law."[21] A federal district court enjoined the amendment's operation, on Establishment Clause grounds; the Tenth Circuit affirmed the injunction, using slightly different reasoning.

The appeals court relied on the principle found in *Larson v. Valente*,[22] a decision invalidating a Minnesota statute that involved the imposition of reporting and registration requirements on religious fundraising organizations that sought more than half their funds from non-members, while imposing lesser requirements on religious groups whose fundraising came mostly from members. The core holding of *Larson* was simple enough: "laws discriminating among religions are subject to strict scrutiny."[23] As the Tenth Circuit rightly noted, that principle is an egalitarian one, and it is the same non-discrimination rule that governs much of the law of free speech.[24]

The Tenth Circuit held that *Larson*'s non-discrimination rule applied perfectly to the Save Our State amendment.[25] The amendment not only discriminated between religions, it actually

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[21] *Awad*, 670 F.3d at 1117-18.

[22] 456 U.S. 228 (1982).

[23] Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 339 (1987) (quoted in *Awad*, 670 F.3d at 1127).

[24] *See Awad*, 670 F.3d at 1128 n.13 (quoting, *inter alia*, John H. Garvey, *The Architecture of the Establishment Clause*, 43 WAYNE L. REV. 1451, 1463 (1997) (*Larson* is "the Establishment Clause counterpart to the rule against content discrimination . . . in free speech law")).

[25] *Id.* at 1128.

"specifically name[d] the target of its discrimination."[26] It clearly barred courts from considering "only one form of religious law—Sharia law."[27] To justify doing so, the state must satisfy the demanding standard of strict scrutiny, and the court concluded that the state had failed to meet this burden.[28]

It is a tired truism that strict scrutiny is generally "fatal in fact."[29] Strict scrutiny is not *necessarily* fatal, however.[30] In a case like *Awad*, it might, in theory, be possible to argue that there is a compelling reason to treat *shari'a* differently than other religious legal systems that Oklahoma courts are already accustomed to. Presumably, such an argument would turn on the kinds of issues that Witte raises: the particular features of Islamic (marriage) law, its potential harms to women and children in particular, and the degree to which the religious laws of faiths such as Christianity or Judaism have already negotiated a stable balance of interests with the state through long negotiation. So Witte might be in a position to argue that *Awad*'s invocation of equality, although superficially attractive, does not ultimately resolve any questions. For two distinct reasons, both of which are relevant to Witte's project, I think the equality argument in *Awad* was stronger and more important than that,

First, the application of *Larson*'s non-discrimination rule in *Awad* serves a valuable *information-forcing* purpose. A strict scrutiny requirement in cases involving discrimination forces the lawmaker to justify the distinctions drawn between different groups or behaviors in clear and narrow terms.[31] Strict scrutiny analysis forces the lawmaker to provide something more than vague fears

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[26] *Id.*

[27] *Id.* at 1128-29.

[28] *See id.* at 1129-31.

[29] Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[30] *See, e.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010); Grutter v. Bollinger, 539 U.S. 306 (2003). *See also* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

[31] *See, e.g.*, Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2111-12 (2005) (noting that "[t]he Equal Protection Clause stands for a commitment to public reason-giving that puts traditions to the test.").

or overbroad generalities to justify its classification of particular groups or behaviors, in order to "smoke out" invidious motives.[32]

Oklahoma could not come anywhere near meeting that burden.[33] The state's only justification for the law was the generalized statement that it had "a compelling interest in determining what law is applied in Oklahoma courts."[34] The state could not identify "even a single instance where an Oklahoma court had applied Sharia law or used the legal precepts of other nations or cultures, let alone [any evidence] that such applications or uses had resulted in concrete problems in Oklahoma."[35] Absent any such evidence, there was no good reason—including the reasons adduced by Witte—to impose an absolute bar on the use of *shari'a* law in Oklahoma courts. Even if Oklahoma had been able to show the presence of real and immediate concerns regarding *shari'a*, the law was not narrowly tailored to that end. It singled out *shari'a* in all its applications, harmful or harmless, rather than specifying particular policy concerns, such as the fair treatment of divorced women, and attempting to address such concerns for all similarly situated women.[36]

None of this means that the kinds of concerns raised by Witte are invalid, or that he is wrong to suggest that other faiths have had some time to negotiate a reasonable compromise with the Western legal system. He raises reasonable concerns on the first point although I am less certain with respect to the second point that those compromises are as stable and settled as he suggests.[37] Rather, my point is that the equality-oriented test the Tenth Circuit adopted, drawing on *Larson*, forced the state to justify itself carefully before acting—and the state could not, or did not. As an information-forcing tool, equality proved to be a powerful instrument in *Awad*.

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[32] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995).

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

[34] *Id.*

[35] *Id.*

[36] *See id.* at 1130-31.

[37] *See, e.g.*, Witte & Nichols, *supra* note 1, at 326 (noting that Catholic and Jewish Americans both, and fitfully, reached different accommodations with the state concerning marriage than did Protestant Americans), 327 (noting the gradual erosion of even the Protestant relationship with the state).

The second value of equality arguments in Religion Clause jurisprudence is one that has been given less treatment in Religion Clause scholarship, although it has been covered more fully in discussions of the relationship between equality and free speech.[38] This value has to do with the political economy of the Religion Clauses. In modern free speech jurisprudence, the central rule is that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[39] Content-based laws, even if they cover a narrow amount of expression, are highly suspect. By contrast, content-neutral laws, even if they block a large amount of expression, are much more likely to pass constitutional scrutiny. Thus, content-neutral laws may actually limit public discussion more than content-based laws.[40] Why give stricter scrutiny to the *less* speech-restrictive law? One possible reason[41] is that, the narrower the restriction on speech, the smaller the political constituency it affects, and the less likely it is that that group will find any political traction in opposing the law. Conversely, a broad, content-neutral restriction on speech ought to muster more effective political opposition, making it less likely that the government can succeed in passing such a law for invidious reasons.

Similar reasoning applies to the Religion Clauses. The narrower and more specific a restriction on religious conduct is, the less likely it is to provoke serious, effective political opposition. Laws that, by virtue of their neutrality, affect a larger number of religious groups are more likely to breed political coalitions that will unite to fight the law[42]—or that will agree that some particular

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[38] *See, e.g.*, PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 54 (2013) [hereinafter HORWITZ, FIRST AMENDMENT INSTITUTIONS]; Mark Tushnet, *The Supreme Court and its First Amendment Constituency*, 44 HASTINGS L.J. 881, 892 (1993).

[39] Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

[40] *See, e.g.*, Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 197 (1983); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 128 (1981).

[41] But not, to be sure, the only one. *See generally* Stone, *supra* note 40, at 197.

[42] That is one lesson of the history of the Religious Freedom Restoration Act, or RFRA, a legislative response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that neutral, generally applicable laws that burden religious exercise will not give rise to successful Free Exercise claims. It was passed by overwhelming majorities in Congress at the behest of a broad coalition of religious liberals and conservatives of various faiths as well as civil libertarians. *See, e.g.*, Douglas

restriction on religious conduct is actually justified for reasons of sound public policy.

Awad's use of the nondiscrimination rule in *Larson* served this second, political economy-oriented purpose as well. Muslims are not, to put it mildly, a strong or numerous political constituency in Oklahoma. To the contrary, the prospect of a judicial decision relying on *shari'a* likely proved worrisome to the state's voters precisely *because* it was so unfamiliar. By requiring the equal treatment of religion, the Tenth Circuit served the interests of the state's Muslim minority by forcing the state either to leave it alone, or to lump it together with every other religious group in the state and thus create a powerful coalition of opponents to the law. Again, equality served as a powerful tool here.

To this point, Witte, if he were inclined to sound a note of caution,[43] might offer two responses. The first is that *shari'a*, at least in some forms and contexts, offers different dangers than the use of religious law by other faiths. That may (or may not) be so. But even if it were, the equality argument forces the state to justify its restrictions by showing that it has a compelling interest in restricting particular kinds of *conduct*, no matter who engages in that conduct. The equality argument does not prevent the state from addressing specific harms that the invocation of *shari'a* may cause. But it does require the state to focus on those actual harms, and to broaden the reach of its regulations to cover most instances of those harms. Faced with such a prospect, the state will have to convince a much wider constituency of voters and interest groups that those harms genuinely demand political and legal action, even if they too will feel the law's bite.

The second possible response is one that Witte adverted to early in his remarks at the Symposium: try, try again.[44] If a law that refers specifically to *shari'a* fails to pass constitutional muster, then Oklahoma's voters can simply draft a seemingly more neutral law—one that bars courts from referring to *any* religious law at all.

Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210-11 (1994).

[43] To be clear, Witte and Nichols agree that the Save Our State Amendment was unconstitutional. *See* Witte & Nichols, *supra* note 1.

[44] Witte Address, *supra* note 4; *see also* Witte & Nichols, *supra* note 1, at 273 (describing second-generation anti-*shari'a* laws).

And, indeed, such laws have been proposed by state legislators in the second round of attacks on *shari'a*.[45]

This is where my point about political economy enters in. The broader the terms of such a law, the more likely it is to upset a much larger constituency of politically powerful religious groups.[46] Unsurprisingly, those laws have shown little political vitality. It is much more difficult to pass a law barring judicial reference to *any* religious legal system than one that bars the use of Islamic law alone. In the Religion Clause context, equality thus serves an important dual purpose. When the state wishes to explicitly treat one religious group differently from others, leaving that group at the mercy of its minority status, it must provide powerful reasons to do so. That is what Oklahoma tried to do in *Awad*, and its reasons were correctly found to be wanting. The state's other option would be to focus on particular harms without reference to religion and without any hint of an underlying discriminatory purpose. Such an approach brings more groups, religious and otherwise, within the possible operation of the law. It may succeed in regulating such conduct, but it will first have to convince a much broader constituency of affected voters and interest groups.

Again, none of this is meant to deny two of Witte's central points: that there may be specific causes for concern about some effects of the application of *shari'a* within the western legal sys-

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[45] *See, e.g.*, Bill Raftery, *Bans on Court Use of Sharia/International Law: Introduced in Mississippi and Kentucky, Advancing in Florida & South Dakota, Dying in Virginia*, GAVEL TO GAVEL (Feb. 13, 2012), http://gaveltogavel.us/site/2012/02/13/bans-on-court-use-of-shariainternational-law-introduced-in-mississippi-and-kentucky-advancing-in-florida-south-dakota-dying-in-virginia/.

[46] And not just religious groups. The second generation of laws barring reference to *shari'a* by courts have also generally barred the consideration of any "foreign" law at all. As a result, such laws have also engendered the opposition of business interests within those states, whose contacts and contracts often involve the laws of other nations. Those laws are often honeycombed with exceptions, precisely in order to blunt this problem. *See, e.g.*, S. 4, 2013 Leg., Reg. Sess. (Ala. 2013) (proposing to amend Alabama state constitution to "prohibit the application of foreign law in violation of rights guaranteed by the United States and Alabama constitutions" and laws, making clear that the amendment "would not apply to a corporation, partnership, limited liability company, business association, or other legal entity that contracts to subject itself to foreign laws"). But the more exceptions there are, the less likely such laws are to pass constitutional scrutiny, because the courts will be more likely to see them as instances of unjustifiable discrimination. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3rd Cir. 1999).

tem, and that equality alone may not fully suffice to justify treating *shari'a* the same as other religious legal traditions. Whether one shares those conclusions or not, however, the Tenth Circuit's decision in *Awad*, and its powerful use of *Larson v. Valente*, suggests that in the right cases we can give at least two cheers for equality.

II. BEYOND "THE STATE" AND "THE LAW"

My second concern with Witte's remarks has to do with the rather stark binary he presented in setting up the question of how western legal systems should deal with shari'a. "*Shari'a* advocates," he said, "have given up on the state and its capacity to reform its laws of sexuality, marriage, and family life—and they want to become a law unto themselves."[47] There are shades here, as I'm sure Witte recognizes, of the Supreme Court's language in cases such as *Reynolds v. United States* and *Employment Division v. Smith*,[48] cases that sounded ominous notes about the dangers of positive religious liberty.

As in the last section, I do not deny that Witte's description carries some force. Again, however, I want to offer a different, and perhaps cheerier, picture here, albeit one that may be no less difficult to apply in practice. I do so both because I think there is some truth in my alternative vision (and some error in Witte's), and because I think putting things in the way that Witte does may ultimately lead to some unfortunate results.

It is common enough to see binary oppositions of this sort, to be sure. Religious individuals or groups that seek special accommodations for their beliefs, or that argue for some realm of autonomy for religious organizations, are routinely described as seeking to be placed outside or "above the law."[49] And "the law," in such descriptions, is closely identified with the positive law of "the state." To argue that there are realms in which the state ought to or must defer to the customs and practices of religious individu-

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[47] Witte Address, *supra* note 4.

[48] *See* Employment Division v. Smith, 494 U.S. 872, 885 (1990) (worrying that a constitutional right to a religious exemption from neutral, generally applicable laws would allow the religious claimant "'to become a law unto himself'") (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).

[49] For a well-argued example in the context of religious organizations, *see* Caroline Mala Corbin, *Above the Law?: The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965 (2007).

als and groups is to reject the state, and to become, literally, an "outlaw." One either accepts the state and its legal regime altogether, or one falls outside it. Law without the state becomes something like lawlessness.

That is not the only way to frame the issue, however. Religious employers, like other employers, comply with countless legal requirements imposed on them by the state. They have also argued that they are constitutionally entitled to some exemptions from positive law, such as the application of federal antidiscrimination laws in cases involving so-called "ministerial" employees. They might be wrong to make such an assertion—although the Supreme Court has agreed with them.[50] But that hardly makes them outlaws, or requires that they be understood as having "given up on the state."

Things are no different with *shari'a*. Those who argue, for example, that a marriage contract might be interpreted with reference to *shari'a* where that contract provides for its use,[51] have not rejected the operation of the secular law in all things. Even with respect to family law, it would be an unjustified exaggeration to say that every advocate of *some* use of *shari'a* has abandoned the secular law entirely. There may be genuinely illiberal individual groups or individuals among those who have advocated for the greater use of *shari'a* in the West, just as there surely are genuinely illiberal Jewish and Christian groups and individuals. But it would be wrong to tar Muslim advocates of some role for *shari'a*, in family law or elsewhere, with such a broad brush.

There is a broader point to be made here as well, albeit it must be made more briefly than it deserves.[52] In thinking about "what the law is,"[53] we need not—and perhaps *ought* not—think solely in terms of the positive law of the state. No matter how vital the role of the state is, we should not think of the state as the only

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[50] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012).

[51] *See generally* Nathan B. Oman, *How to Judge Shari'a Contracts: A Guide to Islamic Marriage Agreements in American Courts*, 2011 UTAH L. REV. 287 (2011).

[52] I expand on the point, in various ways, in HORWITZ, FIRST AMENDMENT INSTITUTIONS, *supra* note 38; Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. 973 (2012); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009) [hereinafter Horwitz, *Churches as First Amendment Institutions*].

[53] Marbury v. Madison, 5 U.S. 137, 177 (1803).

or primary governing institution, or as the sole source of everything we identify with the "law." Rather than picture our social and legal domain in a more or less hierarchical fashion, with the state dominating other institutions and maintaining sole responsibility for forming and enforcing what we think of as the law, we might more fully appreciate that our social world contains multiple communities or *nomoi*. Each of these communities or *nomoi* is, in some genuine sense, at least potentially a lawmaking community of its own.[54] Similarly, we might see our social structure as a genuine infrastructure, supported not only by the state but also by a host of other institutions. Each of these institutions in turn plays a fundamental role in organizing and governing our collective life.[55]

On that view, it would be a mistake to conclude that every advocate of respect for *shari'a*—or every church that argues for the ministerial exception, or university that argues for academic freedom, and so on—has "given up" on the state or has moved "outside the law." Advocates who take this position may *challenge* the state, and the extent of what Robert Cover called its "jurispathic" reach.[56] They may argue that there are meaningful sources of "law" other than the state itself.[57] But they are not, at least as they see it, irreparably outside either the state or the law.

This is a cursory way of putting a complex set of ideas. It leaves unresolved the many valid concerns that Witte raises in his paper about the concrete circumstances and disputes that might arise under a western legal system that gave some interpretive force to *shari'a*, the inequalities it might create or exploit, and the harms it might work. I do not mean to obscure or diminish those concerns, and Witte's broader body of recent work explores them with care and detail. I agree that they *are* concerns—concerns that are often grouped together by political theorists as the problem of "minorities within minorities."[58] I agree, too, that if these concerns

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[54] *See generally* Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983).

[55] *See generally* HORWITZ, FIRST AMENDMENT INSTITUTIONS, *supra* note 38; *see also* Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 445, 480-82 (2012).

[56] Cover, *supra* note 54, at 40-44.

[57] *See, e.g.*, ABNER S. GREENE, AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY (2012).

[58] *See, e.g.*, MINORITIES WITHIN MINORITIES: EQUALITY, RIGHTS AND DIVERSITY (Avigail Eisenberg & Jeff Spinner-Halev eds., 2005).

are capable of resolution at all, it will only be through long and careful negotiation.

Still, one might make two additional points about these concerns. The first is that they are shared by those, like myself, who are inclined to question or reject too easy an identification of the "state" with the "law," and who believe that there is a greater role for non-state law and institutions than we often suppose. When the law has recognized some scope for legally meaningful autonomy on the part of religious and other institutions, it has done so "within constitutionally prescribed limits"[59] and with respect for the distinction—however difficult it might be to draw, in theory or in practice—between "outward" and "internal" actions by those institutions.[60] Those who take seriously the view that the state is not all there is, that it is not the only meaningful source of law, still generally display both a genuine concern for the rights of individuals within those separate institutions or *nomoi*, and a belief that the state has a crucial role to play in safeguarding individual rights, even if it requires intervention into those institutions.[61]

Second, even if Witte and I share concerns about abuse, minorities within minorities, exit rights, and so on, it may still matter whether we frame those concerns in terms of being "for" or "against" the state, or operating "within" or "outside" the law, or whether we can find different and less stark language with which to address these issues. It matters because, as Witte notes, these kinds of issues are, in the long run, a matter for negotiation and mutual influence rather than a single, final pitched battle. If that is the case, and particularly given Witte's concerns, we ought to avoid the kind of Manichaean language that could stall that dialogue. If anything, that approach could encourage illiberal groups to become even more adamantly illiberal.[62]

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[59] Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

[60] *Hosanna-Tabor*, 132 S. Ct. at 707.

[61] *See, e.g.*, Horwitz, *Churches as First Amendment Institutions*, *supra* note 52, at 96-97 (summarizing the neo-Calvinist writer Abraham Kuyper's arguments that the state has a role to play in protecting individuals against abuse within other sovereign spheres such as churches).

[62] *See, e.g.*, HORWITZ, THE AGNOSTIC AGE, *supra* note 6, at 205-08 (discussing Sikh case); Lucas Swaine, *A Liberalism of Conscience*, *in* Eisenberg & Spinner-Halev, *supra* note 58, at 47.

It is neither a light step nor an encouraging one to describe one party to that discussion as having given up on the state or taken itself outside the law. I doubt that the groups themselves would agree with that description. If anything, those groups would see such labels as an attempt to get them to cede the very ground that is in dispute. If we want to get negotiations off the ground—and I take it that both Witte and I do—we may want to find different language in which to do so.