THE RELATIVE RELEVANCE OF *LARSON*: *AWAD V. ZIRIAX* AND THE *LARSON* APPROACH TO ANTI-SHARIA PROVISIONS+

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In 2010, the Oklahoma voters amended their state constitution to preclude state courts from considering or applying Sharia law. Sharia law is unique among the world's legal systems because of its religious and secular origin and application. Immediately after the Save Our State Amendment (hereinafter "SOS Amendment") was adopted by referendum, it was challenged as violating the Free Exercise and Establishment Clauses. After the district court in *Awad v. Ziriax* struck down the SOS Amendment under *Lemon*, the Tenth Circuit voided the law under *Larson*. The oft-invoked *Lemon* test serves as the default analysis among the fractured panoply of Establishment Clause jurisprudence, while *Larson v. Valente* survives at the margins. This Comment will argue that the *Larson* analysis remains relevant and, because of the unique nature of Sharia law, serves as the proper framework under which to analyze the SOS Amendment's "compound discrimination."

THE ESTABLISHMENT CLAUSE FRAMEWORKS

The Establishment Clause occupies a unique niche among constitutional doctrines. As a "jurisprudence in shambles,"[1] ascertaining the boundaries of that niche can be a tricky proposition.[2] In *Lemon v. Kurtzman*,[3] the Court articulated the uneasy analysis that would serve as the "signpost" for Establishment Clause

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1. Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 12, 13 (2011) (Thomas, J., dissenting from denial of certiorari).

2. *See* Rupal M. Doshi, *Note, Nonincorporation of the Establishment Clause: Satisfying the Demands of Equality, Pluralism, and Orignialism*, 98 GEO. L.J. 459, 460 n.2 (2010) (listing ten distinct standards for analyzing Establishment Clause questions embraced by sitting Supreme Court Justices).

3. 403 U.S. 602 (1971).

litigation.[4] While jurists and commentators alike have called for an end to the *Lemon* era,[5] the test remains the standard by which courts determine whether government action impermissibly aids a religious group.[6] Alternatively, *Larson* applies when a provision subjugates a particular sect.[7]

In the late 1960's, several states enacted programs that distributed public funds to failing religious schools. When the ensuing litigation reached the Supreme Court, Chief Justice Burger articulated the three-pronged standard by which courts may determine whether state action unconstitutionally advances religion. In order for a law to pass muster, the provision must have a secular purpose, the primary effect of the provision must neither advance nor inhibit religion, and the provision must not create an excessive entanglement between the state and religion.[8] The *Lemon* test served as the basis for reviewing cases involving tax breaks for parents paying for religious schools,[9] federal funding for religion-based adolescent counseling,[10] and Christmas decorations on public property.[11] As the most frequently applied analysis, *Lemon* retains a prominent position among Establishment Clause jurisprudence.

All the while, *Larson* lurked. Not long after *Lemon*, the Court heard a challenge to a Minnesota provision that effectively decertified a particular sect from enjoying tax-exempt status. The Court held that *Lemon* applies to "laws affording a uniform benefit to *all* religions [but not to laws] that discriminate *among* religions."[12] The Court employed a markedly different framework by adopting the strict scrutiny analysis native to equal protection jurisprudence. Specifically, the *Larson* Court held that, under the Establishment

4. *See* Hunt v. McNair, 413 U.S. 734, 741 (1973).

5. *See, e.g.,* Lambs Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., dissenting) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . ."); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools – An Update*, 75 CALIF. L. REV. 5 (1987).

6. *See* Marci A. Hamilton, *First Amendment, Lost and Found: The Establishment Clause During the 2004 Term: Big Cases, Little Movement*, 2004-05 CATO SUP. CT. REV. 159, 159 (2004).

7. Larson v. Valente, 456 U.S. 228 (1982).

8. *Lemon*, 403 U.S. at 612-13.

9. Mueller v. Allen, 463 U.S. 388, 394-403 (1983) (applying the *Lemon* prongs to tax deductions for parents of children in religious schools).

10. Bowen v. Kendrick, 487 U.S. 589, 618 (1988) (upholding the Adolescent Family Life Act).

11. Lynch v. Donnelly, 465 U.S. 668, 679-85 (1984) (finding a legitimate secular purpose, secular primary effect, and lack of excessive entanglement regarding Pawtucket, Rhode Island's annual Christmas display).

12. *Larson*, 456 U.S. at 252 (emphases in original).

Clause, state action that discriminates against a particular sect requires that the government demonstrate a compelling government interest, and that the law be narrowly tailored to address that interest.[13]

If *Lemon* is to be understood as the applicable test in the instance of state approval of a particular sect, *Larson* applies when that sect is subjugated.[14] Accordingly, *Larson* functions as the Establishment Clause protection against religious discrimination. As *Awad v. Ziriax* demonstrates, *Larson* remains relevant.

AWAD V. ZIRIAX

In late 2010, the nation experienced a creeping outbreak of anti-Sharia sentiment throughout state legislative bodies. Several states proposed provisions aimed at curbing a perceived invasion of Islam and its precepts into their legal systems.[15] Motivating factors may have included a New Jersey court's recognition of Sharia law as an affirmative defense to rape,[16] stories of corporal punishment in Bangladesh,[17] and the uprisings of the Arab Spring.[18] Whatever the cause, the reaction was swift.

Oklahoma's SOS Amendment became the first such provision ratified, which, on Election Day 2010, the voters passed by referendum. The relevant portion reads as follows:

> The Courts [of the State of Oklahoma] when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another

13. The doctrine of "denominational neutrality" embodies the Establishment Clause's mandate that "one religious denomination cannot be officially preferred over another." *Id.* at 244; *see also* Bd. of Educ., Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 725 (1994); Gillette v. United States, 401 U.S. 437, 449-50 (1971).

14. *C.f.* Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 18 ARIZ. L. REV. 1291, 1304 (1996) (arguing that *Larson* is best understood as supplement to *Lemon*, operating as an application of the entanglement prong).

15. Andrea Elliott, *Behind an Anti-Shariah Push*, N.Y. TIMES, July 31, 2011, at A1.

16. *See* S.D. v. M.J.R., 2 A.3d 412, 427-28 (N.J. Super Ct. App. Div. 2010) (overturning a lower court's finding that, due to the husband's understanding of his wife's role pursuant to Sharia law, he could not have formed the requisite intent for marital rape).

17. Farid Ahmed & Moni Basu, *Only 14, Bangladeshi Girl Charged with Adultery Was Lashed to Death*, CNN, Mar. 19, 2011, http://articles.cnn.com/2011-03-29/world/bangladesh.lashing. death_1_alya-lashes-elders?_s=PM:WORLD.

18. Lorenzo Vidino, *Five Myths about the Muslim Brotherhood*, WASH. POST, Mar. 4, 2011, at B02.

> state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law.[19]

The ballot also provided that "Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed."[20]

Days after the referendum, Muneer Awad filed suit to enjoin Oklahoma from certifying the election results.[21] The challenger argued that the SOS Amendment violated the Free Exercise and Establishment Clauses of the First Amendment. As a Muslim, Awad's Last Will and Testament stipulated that his estate be executed in accordance with Sharia law. Arguably, the SOS Amendment would preclude an Oklahoma court from probating that will or recognizing an extraterritorially probated will where those proceedings applied Sharia law.[22]

In a bifurcated analysis, the district court found that the SOS Amendment was doubly unconstitutional. Based on a controversial determination, the court concluded that the SOS Amendment failed the second and third prongs of *Lemon*.[23] Applying Justice O'Connor's endorsement test, the court found that the primary effect of the SOS Amendment conveyed a message of disapproval of a particular religion.[24] Also, the court decided that, since Sharia law wasn't actually "law," it was the only nonlegal criteria that courts would be prohibited from considering.[25] Accordingly, *Lemon*'s effects prong was triggered. Finally, the court found that the provision would force courts to determine the bounds of Sharia law in order to avoid it, thereby implicating *Lemon*'s entanglement prong.[26]

The court also held that the SOS Amendment violated the Free Exercise Clause. The SOS Amendment singles out Sharia law, a doctrine particular to Islam. Citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[27] the court held that the SOS

19. H.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010).

20. *Id.*

21. Awad v. Ziriax, 754 F. Supp. 2d 1298 (W.D. Okla. 2010).

22. *See* H.J. Res. 1056; *Awad*, 754 F. Supp. 2d at 1304.

23. *Id.* at 1306-07 (citing Weinbaum v. City of Las Cruces, 541 F.3d 1017, 1030 (10th Cir. 2008) (applying the *Lemon* test)).

24. *Id.* at 1306.

25. This finding facilitated the somewhat clumsy sidestep of the clause that forbade courts from considering "legal precepts of other nations or cultures." Specifically, if Sharia law fell into this catchall, there would be no discrimination. *Id.*

26. *Id.* at 1306-07.

27. 508 U.S. 520 (1993).

Amendment's language discriminated against the plaintiff's religion on its face.[28] Accordingly, the Oklahoma provision was subject to strict scrutiny which the district court felt it was unlikely to survive.[29]

On review, the circuit court rejected the lower court's analytical framework. Because the provision discriminated against a particular religion and was not denominationally neutral, the court applied the *Larson* analysis.[30] The court held that, since the SOS Amendment disallows courts to look to "other" cultures and forbids interstate comity strictly on the basis of Sharia law, the provision was facially discriminatory against one specific religion.[31] Accordingly, the court applied the *Larson* analysis. The court found no compelling interest. In point of fact, the term "Sharia law" never appears in an Oklahoma state court reported decision.[32] Furthermore, the court determined that, even if the state could articulate a compelling interest, the SOS Amendment was too broad. Because state courts would not be able to "consider[]," much less "apply[]" Sharia law, the SOS Amendment was not "closely fitted" as required by strict scrutiny.[33] Consequently, Oklahoma remains enjoined from certifying the election results and thereby enforcing the amendment.

EVALUATION

As the disagreement between the district and circuit courts indicates, determining the proper Establishment Clause analysis can be tricky. However, the circuit court aptly parsed the jurisprudence and employed the correct framework. *Larson* requires that, when a legislative scheme subjugates a particular religion, the state action must satisfy heightened scrutiny. As discussed above, the SOS Amendment clearly singles out Islam for special treatment. Accordingly, *Larson* is appropriate.

Because the Free Exercise Clause is of little use in the present instance,[34] several justifications for incorporating a strict scrutiny

28. Awad v. Ziriax, 754 F. Supp. 2d 1298, 1307 (W.D. Okla. 2010).

29. Because this issue was heard during an application for a temporary restraining order, the court did not go so far as to decide the merits of the analysis. *Id*. at 1305 (outlining the analysis to be satisfied in order to grant a preliminary injunction).

30. Awad v. Ziriax, 670 F.3d 1111, 1126, 1128-29 (10th Cir. 2012).

31. *Id.* at 1128-29.

32. Penny M. Venetis, *The Unconstitutionality of Oklahoma's SQ 755 and Other Provisions Like it that Bar State Courts from Considering International Law*, 59 CLEV. ST. L. REV. 189, 191 (2011).

33. *Awad*, 670 F.3d at 1130-31.

34. The doctrine of institutional autonomy dictates that state courts may not adjudicate religious questions. *See* Jones v. Wolf, 443 U.S. 595, 599-600 (1979) (recognizing that a state court does not have the authority to determine whether a religious body has "'substantially abandoned' [their] tenets of faith and practice").

scheme into Establishment Clause jurisprudence have been proffered. Some commentators argue that *Larson* functions as the First Amendment counterpart to the Equal Protection Clause,[35] while others understand *Larson* as the Establishment Clause analogue to the Free Speech proscription against content-based regulations.[36] Though it may appear that other constitutional doctrines would envelop any *Larson* claim making the exercise unnecessarily academic, a key difference lies in the standing doctrine.[37] Unlike claims based on similar discrimination, the Court recognizes taxpayer standing for Establishment Clause claims. Accordingly, *Larson* may be understood as providing a jurisdictional hook in an area of litigation that the judiciary has found to be particularly sensitive.[38]

Arguably, the unique case of Sharia law provides an additional reason to employ the strict scrutiny approach. Undoubtedly, Sharia law is religious law. However, it is also national law. Starting in the late nineteenth century, various civil governments incorporated the religious law in different ways. Sharia law appears in the constitutions of several states, including Iran,[39] Afghanistan,[40] and Saudi Arabia.[41] Religious courts govern family and inheritance law elsewhere.[42] Aspects of *hudud, quisas,* and *ta'azir* have been codified or incorporated into criminal codes in Nigeria[43] and parts of

Therefore, if probating the defendant's will is a religious matter, then the court would be precluded from doing so. Alternatively, if probating the will is a civil matter, the Free Exercise Clause could not apply.

35. Frederick Mark Gedicks, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States*, 19 EMORY INT'L L. REV. 1187, 1189-91 (2005); *see also* Patrick M. Garry, *An Equal Protection View of the First Amendment*, 28 QUINNIPIAC L. REV. 787, 813-25 (2010).

36. John H. Garvey, *The Architecture of the Establishment Clause*, 43 WAYNE L. REV. 1451, 1463 (1997).

37. *See* Jeremy Patrick-Justice, *Cutting-Edge Issues in Public Interest Lawyering: Strict Scrutiny for Denominational Preferences:* Larson *in Retrospect*, 8 N.Y. CITY L. REV. 53, 103-04 (2005) ("It appears that the primary difference between alleging a Larson violation and alleging an Equal Protection Clause violation is a procedural one . . . .").

38. *See id.*

39. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [CONSTITUTION], 1979, art. 4, ch. 1 (mandating that all "laws and regulations . . . be based on Islamic criteria.").

40. CONST. OF AFG., 2004, art. 3, ch. 1 ("[N]o law may be contrary to the beliefs and provisions of the sacred religion of Islam.").

41. CONST. OF THE KINGDOM OF SAUDI ARABIA, 1992, art. 1, ch. 1 ("The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book, and the Sunnah of His Prophet . . . are its constitution.").

42. Ester van Eijk *Sharia and National Law in Saudi Arabia*, *in* SHARIA INCORPORATED 139, 163-65 (Jan Michiel Otto ed., 2010).

43. Philip Ostien & Albert Dekker, *Sharia and National Law in Nigeria*, *in* SHARIA INCORPORATED 553, 589.

Indonesia.[44]

Accordingly, Oklahoma's anti-Sharia law can be thought of as a "compound discrimination." The SOS Amendment subjects Islam to unique burdens that clearly implicate the First Amendment's Religion Clauses. Additionally, litigants from the nations that have incorporated Sharia law are also vulnerable to the Oklahoma provision. This discrimination arguably raises equal protection issues relating to national origin. *Larson* provides the ideal method for dealing with this "compound discrimination." First, taxpayer standing provides easy access for judicial review of statutes that discriminate on dual bases. Also, the heightened scrutiny regime allows legislators some latitude in banning Sharia law. Clearly, there are compelling arguments against recognizing Sharia doctrines that seriously infringe upon basic human and civil rights. Assuming that strict in theory does not mean fatal in fact, *Larson* allows for some balancing.

CONCLUSION

Adopting the appropriate framework when religious discrimination overlaps other interests raises unique uncertainties.[45] Anti-Sharia provisions involve discrimination against religious as well as secular groups. Accordingly, the SOS Amendment presents a novel constitutional question. It would seem that the strict scrutiny analysis native to equal protection jurisprudence, as adopted in *Larson*, offers the appropriate framework for determining the constitutionality of this "compound discrimination." Also, *Larson*'s flexibility allows legislatures some leeway to proscribe religious law when necessary.[46] As such, *Larson* remains a relevant refraction among the kaleidoscopic jurisprudence of the Establishment Clause.

44. Jan Michiel Otto, *Sharia and National Law in Indonesia*, *in* SHARIA INCORPORATED 433, 473.

45. *See* Molly E. Schwart, Comment, *By Birth or By Choice? The Intersection of Racial and Religious Discrimination in School Admissions*, 13 U. PA. J. CONST. L. 229, 247-50 (2010).

46. Sharia law can and does manifest rules anathema to the U.S. Constitution, international norms, and notions of basic human rights. While legislatures are surely justified in addressing these issues, Oklahoma attempts heart surgery with a hatchet. The First and Fourteenth amendments' equality-mandates disallow the use of such blunt instruments.