Denver Law Review

Volume 90 | Issue 3 Article 9

January 2012

Awad v. Ziriax: The Tenth Circuit's Defense against the Power of Religious Majority Factions

Renee Sheeder

Awad v. Ziriax: The Tenth Circuit's Defense against the Power of Religious Majority Factions

AWAD V. ZIRIAX: THE TENTH CIRCUIT'S DEFENSE AGAINST THE POWER OF RELIGIOUS MAJORITY FACTIONS

ABSTRACT

The Establishment Clause of the First Amendment creates a wall of separation between church and state and ensures government neutrality concerning religious beliefs and practices. The Supreme Court has developed the *Lemon* and *Larson* tests to analyze Establishment Clause violations but has not clearly articulated when either test should be applied. The Tenth Circuit grappled with this problem in *Awad v. Ziriax* and, under the heightened *Larson* standard, struck down an anti-Sharia law ballot initiative passed in Oklahoma's 2010 election. More importantly, however, the case raises broader questions about the social movements supporting anti-Sharia law sentiment and how a religious majority can wield power in a democratic system.

This Comment utilizes James Madison's theory regarding representative government as a safeguard against a majority political faction in order to explore religious majority efforts to dictate the morals and behaviors of non-adherents. Madison's cure of a democratic republic largely fails in the context of the modern majority religious faction due to increased communication through technology and a shrinking political sphere. The First Amendment must be understood as protecting the people from religion as much as it protects religious liberties in order to guard unpopular religious and non-religious minorities from the power of a religious majority. Consequently, the *Larson* "strict scrutiny" standard should be extended to laws designed to establish mainstream religious values while burdening non-adherents in order to protect against the establishment of a national religion.

TABLE OF CONTENTS

INTRODUCTION

The case of *Awad v. Ziriax*[1] emerges from the growing movement by states to enact legislation aimed at preventing the use or consideration of Sharia law in U.S. courts. Hearing a challenge to Oklahoma's Save Our State Amendment, which specifically prohibited state courts from considering international law or Sharia Law in making judicial decisions, the U.S. Court of Appeals for the Tenth Circuit held that such enactments clearly violate the First Amendment's Establishment Clause.[2] Although the opinion is well reasoned and thoughtful, that is not why this case holds great interest. The social movements leading up to and surrounding the opinion reveal deeper issues within Establishment Clause jurisprudence and shed light on the dynamics of minority oppression and majority power.

Concerns surrounding the potential dangers of majority rule inherent in democratic societies have existed since the founding of this nation and are addressed by James Madison's musings on the "faction" in *The Federalist Papers*.[3] Madison theorized that the effects of a majority faction could be controlled through a representative government, providing checks and balances on any majority vote that is inconsistent with long-term constitutional rights and protections. But many aspects of Madison's cure have failed the *Awad* case.

Part I of this Comment provides background on how courts interpret and apply the religious protection conferred by the First Amendment's Establishment Clause. Part II summarizes the facts, procedural history, and majority opinion in *Awad*. Part III provides an analysis of why the State of Oklahoma attempted to institute a clearly unconstitutional amendment, explains Madison's theory of the democratic republic as a safeguard against the majority political faction and why the theory large-

1. 670 F.3d 1111 (10th Cir. 2012).
2. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").
3. THE FEDERALIST NO. 10 (James Madison).

ly fails in this case, and offers some alternative solutions to continue the Tenth Circuit's work in upholding protection for unpopular minorities against a moral majority. The Comment concludes that the First Amendment protections provided to unpopular religious minorities must necessarily be expanded to include any unpopular minority being oppressed by legislation motivated by a moral majority agenda. First Amendment freedom of religion includes freedom *from* the majority religious group attempting to impose its particularized morality through a secular government.

I. BACKGROUND

This portion of the Comment will provide background on the legal doctrine used by the Tenth Circuit in determining the *Awad* case. First, it will broadly describe the Establishment Clause jurisprudence developed by the Supreme Court in analyzing government and religion interactions. Second, it will describe the *Lemon* test and the *Larson* test, and explain the different applications of the tests.

A. The Establishment Clause

As interpreted by federal courts, the Establishment Clause has given rise to a complex and layered doctrine that applies to a wide range of government conduct.[4] The original intent of the Founders when enacting the Establishment Clause was "to erect 'a wall of separation between Church and State.'"[5]A broad principle of the Establishment Clause is complete, official neutrality by the government,[6] although some scholars have argued that complete neutrality is impossible and the Establishment Clause requires only that the government give no official religious mandate.[7] The Supreme Court has stated that the Establishment Clause primarily protects against governmental "sponsorship, financial support, and active involvement of the sovereign in religious activity."[8] The Establishment Clause is applicable if the government action involves aid to religious institutions or entanglement between religion and government.[9]

---

4. *See generally* Richard F. Duncan, *The "Clearest Command" of the Establishment Clause: Denominational Preferences, Religious Liberty, and Public Scholarships that Classify Religions*, 55 S.D. L. REV. 390 *passim* (2010).

5. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

6. Robert A. Sedler, *Understanding the Establishment Clause: The Perspective of Constitutional Litigation*, 43 WAYNE L. REV. 1317, 1338–39 (1997).

7. *See, e.g.*, Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 148 (1986) ("To insist on strict neutrality in all cases arising under the religion clauses would be wholly inconsistent with the demands of free exercise and, as the separationists would emphasize, nonestablishment as well. Protections for religious liberty are no more 'neutral' toward religion than freedom of the press is 'neutral' toward the press").

8. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)) (internal quotation marks omitted).

9. Russell W. Galloway, Jr., *Basic Establishment Clause Analysis*, 29 SANTA CLARA L. REV. 845, 850 (1989).

In *Everson v. Board of Education*,[10] the Supreme Court considered a New Jersey law that provided taxpayer funds to parochial schools to cover bus fares for children commuting to and from school.[11] The Court held that, because the primary nature of parochial schools is to teach children through a religious lens, any state funding going to parochial schools is a violation of the Establishment Clause. Government funding of schools teaching a particular religious view gave the appearance of government support of a religious institution,[12] despite the fact that the funding was aimed at the secular purpose of providing bus fares.[13] Although New Jersey could not make a special provision just for parochial schools, the state would not have been precluded from sponsoring bus fares for all students, public and private.[14] In *Colorado Christian University v. Weaver*,[15] the Tenth Circuit considered a Colorado statute that subsidized higher education costs for in-state students but excluded funds to universities that were deemed "pervasively sectarian" based on certain factors.[16] The court held that the law discriminated among higher educational institutions in determining which ones would receive state aid based upon the level of sectarianism within the institution, thereby violating the Establishment Clause's command of government neutrality concerning religious sects.[17]

The purpose of preventing entanglement between government and religion is "to prevent, as far as possible, the intrusion of either into the precincts of the other."[18] Elements to consider when determining whether "excessive entanglement" exists are the character and purpose of the benefited institution, the nature of the state aid, and the resulting relationship between government and the religious entity.[19] One underlying concern of entanglement is that a law may involve government in religious contexts that are better resolved within the religious institution itself.[20] The Supreme Court considered the excessive entanglement standard in the context of a government Christmas display with a Christian nativity scene in *Lynch v. Donnelly*.[21] The Court was reluctant to create a bright-line test for determining entanglement in "this sensitive area"[22] but ultimately found that the nativity scene did not cause government entanglement with religion because there was no government

10. 330 U.S. 1 (1947).
11. *Id.* at 3.
12. *Id.* at 16.
13. *Id.* at 17.
14. *Id.*
15. 534 F.3d 1245 (10th Cir. 2008).
16. *Id.* at 1250.
17. *Id.* at 1257–58.
18. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).
19. *Id.* at 615.
20. Sedler, *supra* note 6, at 1410–11.
21. 465 U.S. 668, 671 (1984).
22. *Id.* at 679.

contact with any particular religious entity, a minimal amount was spent on the display, and it caused very little interaction between any church and state organizations.[23]

B. The Lemon *and* Larson *Tests*

1. The *Lemon* Test

In *Lemon v. Kurtzman*,[24] the Supreme Court developed a three-part test for Establishment Clause analysis: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[25] The case combined challenges to similar statutes passed in Pennsylvania and Rhode Island that provided state aid to nonpublic schools, most of which were affiliated with the Roman Catholic church.[26] The state statutes provided that state support would go towards secular aspects of the school's needs, specifically the salaries of teachers of secular subjects.[27]

The main issue in *Lemon* was whether the statutes created "excessive government entanglement with religion."[28] To determine the level of entanglement, a court must "examine the character and purposes of the institutions that are benefited" by the statute, the nature of the state benefit provided, and the resulting relationship between government and the benefited institution.[29] The Court found that the institutions receiving aid were clearly religious and the aid was directed at teacher salaries.[30] The resulting relationship created excessive entanglement because it is difficult for teachers of even secular subjects to be sufficiently religiously neutral while working in a religiously affiliated school of their own faith.[31] Although purely secular teaching materials like textbooks can be provided by the state, a teacher of a secular subject within a religious environment is likely unable to remain religiously neutral[32]; therefore,

---

23. *Id.* at 684.
24. 403 U.S. 602 (1971).
25. *Id.* at 612–13 (citation omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 667 (1970)) (internal quotation marks omitted).
26. *Id.* at 606, 609–10.
27. *Id.* at 607, 609.
28. *Id.* at 613–14 (quoting *Walz*, 397 U.S. at 674) (internal quotation marks omitted) (finding the first two prongs of the test to be satisfied).
29. *Id.* at 615.
30. *Id.* at 616, 641.
31. *Id.* at 618.
32. *Id.* at 618, 626. The Court explained that a teacher in a parochial school of even a purely secular subject likely cannot remain religiously neutral because he or she is employed by the religious organization, is subject to direction and discipline by that employer, and works in a system designed to rear children in a particular faith. *Id.* at 618. This immersion in the religious organization obstructs a clear separation of a secular-subject teacher from the established tenants of the religion. *Id.* at 618–19.

government aid for teachers' salaries is a violation of the Establishment Clause.[33]

In later cases, the Court began to carve out and refine the *Lemon* prongs.[34] In her concurring opinion in *Lynch v. Donnelly*, Justice O'Connor introduced the endorsement test as an extension of the *Lemon* test.[35] This clarification focused on avoiding excessive entanglement of government and religion that would create the appearance of the government endorsing or disapproving of religion.[36] Justice O'Connor explained that the *Lemon* test's prongs are about the message communicated to the public by the government action at issue—Does the government have a "purpose" to endorse or disapprove a religion and does the conveyance of that message have an "effect" on the community?[37] If the answer is yes to either question, there is excessive entanglement due to the government endorsement of religion; therefore, the action is invalid.[38] Justice O'Connor viewed the avoidance of government endorsement of religion as the basic principle of the Establishment Clause because endorsement caused non-believers to feel like outsiders in the political community and indicated that believers were the favored insiders.[39] She later clarified in *Wallace v. Jaffree*[40] that the determination of when a government action communicates government endorsement of a particular religion is based upon "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement . . . ."[41] The *Lemon* test and its modifications remain pivotal to the analysis of Establishment Clause cases involving government action that advances or burdens a particular religious group.[42]

2. The *Larson* Test

In *Larson v. Valente*,[43] the Supreme Court held that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[44] The Court held that statutes that discriminated among religious groups are per se unconstitutional unless they are justified by a compelling governmental interest and

33. *Id.* at 618–19.

34. Jeffrey R. Wagener, *A Survey of the Supreme Court's Approach to the Establishment Clause in Light of* County of Allegheny v. American Civil Liberties Union, 35 ST. LOUIS U. L.J. 169, 169 (1990).

35. *See* Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

36. *Id.* at 688–89.

37. *Id.* at 690.

38. *Id.*

39. *Id.* at 688.

40. 472 U.S. 38 (1985).

41. *Id.* at 76.

42. Stephanie E. Russell, Note, *Sorting Through the Establishment Clause Tests, Looking Past the Lemon*, 60 MO. L. REV. 653, 676 (1995).

43. 456 U.S. 228 (1982).

44. *Id.* at 244.

"closely fitted to further that interest" under a "strict scrutiny" test.[45] *Larson* concerned the Minnesota Charitable Solicitation Act, which required charitable organizations to disclose detailed fundraising information.[46] The Act contained an exception for religious organizations but only if the organizations received more than half of their contributions from members or affiliated groups.[47]

The Court found that the statute facially discriminated among religious groups based on their charitable funding sources and therefore must satisfy the "compelling interest" standard to be upheld.[48] The State argued that it had a compelling interest in ensuring that its charities were properly soliciting funds in order to prevent fraud.[49] Organizations in which less than 50% of the funds came from third parties were believed to be more in control of the funds because the organization's members acted as safeguards for proper fund uses, whereas organizations with less than 50% from its own members lack this safeguard and needed public disclosure of the funds to prevent fraud.[50] The Court ruled that the State failed to show that the statute had a compelling interest because there was nothing in the record to suggest that a religious organization receiving more than half of its contributions from third parties would need any more state supervision of funding records through public disclosure than organizations receiving less than half.[51] There was no reason to believe that members supervised their organizations' funds any differently depending on the mix of funding sources.[52] Because there was no compelling state interest for the arbitrary standard of 50%, the Court held the statute was unconstitutional.[53]

In *Larson*, the Court took the opportunity to delineate the differences in applicability between the newly prescribed *Larson* test and the previously established *Lemon* test. The Court explained that "the *Lemon v. Kurtzman* 'tests' are intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions . . . that discriminate *among* religions"[54] for which the Court developed the *Larson* standard. However, the *Larson* Court went on to say that "[a]lthough application of the *Lemon* tests is not necessary to the disposition of the case before us, those tests do reflect the same concerns that warranted the application of strict scrutiny."[55] The Court also applied *Lemon*'s prongs despite just

45. *Id.* at 246–47.
46. *Id.* at 230–31.
47. *Id.* at 231–32.
48. *Id.* at 246–47.
49. *Id.* at 248.
50. *Id.*
51. *Id.* at 249.
52. *Id.*
53. *Id.* at 251.
54. *Id.* at 252.
55. *Id.*

having created the heightened *Larson* standard. The Court's language distinguishing *Lemon*'s application to "all" religions and *Larson*'s to "among" religions did not clarify when either standard should be used[56] and in many instances, both tests are arguably applicable.[57] Ultimately, the *Larson* test created a strict scrutiny standard for government actions that discriminate among religious groups, whereas the *Lemon* test is a lower scrutiny standard reserved for government action that favors a religion over non-religion.[58]

II. *AWAD V. ZIRIAX*

A. Facts

In May 2010, the Oklahoma legislature passed House Joint Resolution 1056, placing a proposed amendment to the state constitution, known as the Save Our State Amendment, on the 2010 mid-term election ballot.[59] The Amendment provided that "courts shall *not look to* the legal precepts of other nations or cultures. Specifically, the courts *shall not consider international law or Sharia Law*."[60] The Amendment defined international law as "the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states, and tribes"[61] and defined Sharia law as "Islamic law . . . based on two principal sources, the Koran and the teaching[] of Mohammed."[62]

The Save Our State Amendment was placed on the Oklahoma ballot as State Question 755 (SQ 755).[63] The Amendment was approved by a 70% majority of the voters.[64]

---

56. Daniel W. Evans, Note, *Another Brick in the Wall: Denominational Preferences and Strict Scrutiny Under the Establishment Clause*, 62 NEB. L. REV. 359, 378 (1983).

57. *See* Jeremy Patrick-Justice, *Strict Scrutiny for Denominational Preferences:* Larson *in Retrospect*, 8 N.Y. CITY L. REV. 53, 105 (2005) ("Laws that would warrant strict scrutiny under *Larson* because they create denominational preferences will frequently lack a primarily secular purpose under *Lemon*. More importantly, a denominational preference almost by definition endorses the religious beliefs of that denomination, rendering the practice invalid under the endorsement inquiry of the 'effects' prong of *Lemon*. Other laws creating denominational preferences will also create an excessive government entanglement with religion under *Lemon*, such as the law at issue in *Larson* itself." (footnotes omitted)).

58. *Id.* at 86–87.

59. Awad v. Ziriax, 670 F.3d 1111, 1117 (10th Cir. 2012).

60. *Id.* at 1118 (quoting H.R.J. Res. 1056, 52nd Leg., 2d Reg. Sess. (Okla. 2010)) (internal quotation marks omitted).

61. *Id.* (quoting Okla. State Senate, *Issues to Be Referred to Oklahoma Voters for Approval or Rejection at the 2010 Elections*, LEGIS. BRIEF, July 2010, at 5, 5, *available at* http://www.oksenate.gov/publications/legislative_briefs/legis_brief_2010/state_questions_2010.pdf) (internal quotation marks omitted).

62. *Id.* (emphasis omitted) (quoting Okla. State Senate, *supra* note 61) (internal quotation marks omitted).

63. *Id.*

64. *Id.*

B. Procedural History

Two days after the election, Muneer Awad, a Muslim U.S. citizen and resident of Oklahoma, sued the Oklahoma State Election Board.[65] He sought a preliminary injunction to prevent the certification of the election results of SQ 755 and preclude the Oklahoma legislature from amending the state constitution to prevent state courts from considering international and Sharia law in their determinations.[66] Awad claimed that the proposed amendment violated his constitutional rights under the First Amendment's Establishment and Free Exercise Clauses for two reasons: (1) it negatively identified his religion specifically and, (2) it hindered his practice of Islam by preventing Oklahoma courts from probating his will, which contained references to Sharia law, and by providing inadequate relief in the judicial system for Muslims.[67] The district court granted the preliminary injunction, and the Oklahoma State Election Board appealed to the U.S. Circuit Court of Appeals for the Tenth Circuit.[68]

C. Majority Opinion

The Tenth Circuit voted unanimously to affirm the decision of the Oklahoma district court in granting the preliminary injunction.[69] Two issues were before the court: (1) whether Awad's claim was justiciable, and (2) whether the district court abused its discretion in granting the preliminary injunction.[70] The court of appeals addressed only Awad's Establishment Clause claim in determining these issues, finding sufficient cause to uphold without having to analyze the Free Exercise Clause claim.[71]

On the issue of whether the claim was justiciable, the court addressed Awad's standing to bring the claim and its ripeness.[72] The Oklahoma State Election Board argued that Awad did not have legal standing because he had not suffered any injury in fact and any condemnation of his religion was merely his own perception.[73] The court reviewed its precedent of injury in Establishment Clause cases and found that injury is not required to be physical or economic but must be a direct consequence of the alleged unconstitutional state action.[74] "[P]ersonal and unwelcome[d] contact" with the state-sponsored action is sufficient to establish standing in an Establishment Clause case.[75] The court then de-

65. *Id.* at 1118–19.
66. *Id.* at 1119.
67. *Id.*
68. *Id.*
69. *Id.* at 1132.
70. *Id.* at 1119.
71. *Id.*
72. *Id.* at 1119–20.
73. *Id.* at 1120.
74. *Id.* at 1121.
75. *Id.* at 1122 (quoting Am. Atheists, Inc. v. Davenport, 637 F.3d 1095, 1113 (10th Cir. 2010)) (internal quotation marks omitted).

termined that Awad had established standing because the explicit and public condemnation of his religion was personal and unwelcomed conduct by the state that inflicted adverse treatment of his religion in state courts.[76] The Oklahoma State Election Board also argued that Awad's claim was not ripe for review.[77] The court held that because Awad challenged the constitutionality of the amendment on its face, the court did not have to analyze the amendment in the context of a particular factual scenario.[78] In its determination, the court must balance the hardships of both parties against withholding review. Here, it held that Awad faced immediate injury without judicial review, whereas the Government did not face any injury, thereby making the claim ripe for review.[79]

Finding the claim justiciable, the court then applied the "rational basis" test to determine whether the district court abused its discretion in granting the preliminary injunction.[80] To obtain a preliminary injunction, a plaintiff must show that on balance the following factors weigh in his favor: (1) likely success on the merits of the claim; (2) if denied the injunction, he will suffer irreparable injury; (3) his injury outweighs any potential injury to the opposing party; and (4) the injunction is in the public interest.[81] In analyzing the merits of the claim, the court initially had to determine whether the case should be analyzed under the *Lemon* test, which addresses laws pertaining to all religions, or the *Larson* test, which addresses laws that discriminate against one particular religion.[82] The court found that the *Larson* test applied in this case because the amendment specifically delineated Islam as the target..[83]

The court then clarified that the burden of proof was on the Government to show that the amendment was not facially unconstitutional, which is a strict scrutiny level of review under the *Larson* test.[84] *Larson* required the Government to show that (1) there is a compelling government interest, and (2) the amendment is closely fitted to that interest.[85] The Oklahoma State Election Board argued that "Oklahoma certainly has a compelling interest in determining what law is applied in Oklahoma courts."[86] The court did not find that interest compelling and noted that the state board of elections did not cite a single instance of an Oklahoma court considering either Sharia law or precepts of other nations or cultures, indicating that the amendment did not serve to solve any existing

76. *Id.* at 1122–23.
77. *Id.* at 1124.
78. *Id.*
79. *Id.* at 1125.
80. *Id.*
81. *Id.*
82. *Id.* at 1126–27.
83. *Id.* at 1128.
84. *Id.* at 1129.
85. *Id.*
86. Supplemental Brief of Appellant at 16, Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012) (No. 10-6273), 2011 WL 5518034, at *16.

problem within the state.[87] The Government failed to satisfy the first part of the *Larson* test because the alleged harm to the state was "speculative at best and cannot support a compelling interest."[88] Although the state failed to establish a compelling interest in support of the amendment, the court went on to say that the amendment is also not closely fitted to the alleged state interest because a complete ban on even the consideration of Sharia law in judicial decision making, rather than just a limitation on applying Sharia law, was not a narrowly tailored solution to the perceived harm.[89]

The court then addressed the remaining factors used in determining whether to grant a preliminary injunction. It held that Awad's claim alleging a condemnation of his religion was sufficient to show irreparable injury if the injunction were denied because suffering a violation of a constitutional right is very difficult to remedy with monetary compensation after the fact.[90] To show that the Government's potential injury from granting the preliminary injunction outweighed Awad's injury from a denial, the Oklahoma State Election Board asserted that Oklahoma voters have a stronger interest in the manifestation of their majority vote.[91] The court disagreed, holding that when the majority votes against the explicit provisions of the U.S. Constitution, its collective will cannot outweigh individual constitutional rights.[92] Finally, the court held that the injunction was in the public interest because upholding individual constitutional rights is always in the long-term public interest, even over the short-term public interest to vote and enact the majority view.[93]

III. ANALYSIS

The Tenth Circuit's holding in *Awad* was well-reasoned and followed Supreme Court precedent. The decision was supported under the *Larson* standard because the Oklahoma amendment was clearly discriminating among religious groups by burdening only Muslims without any compelling government interest for that burden. The more interesting questions arising from this case are the current and future social implications of the amendment and the voters who passed it. First, this Comment will explore why the Oklahoma legislature and voters believed the amendment was necessary despite its blatant unconstitutionality. Second, it will discuss the tensions inherent in a democratic system between the short-term majority vote and the long-term interest in personal freedom and protected individual rights. Finally, it will review wider trends in Establishment Clause jurisprudence.

87. *Awad*, 670 F.3d at 1130.
88. *Id.*
89. *Id.* at 1131.
90. *Id.*
91. *Id.*
92. *Id.* at 1131–32.
93. *Id.* at 1132.

A. Why Pass a Blatantly Unconstitutional and Apparently Unnecessary Amendment?

Oklahoma's State Question 755 explicitly placed restrictions on courts considering two areas of law: international law and Sharia law. This subpart analyzes why the restrictions were unconstitutional and harmful to Oklahoma's residents and examines the motivation for the provision. First, the restrictions were in conflict with longstanding doctrines of international and contract law. Preventing courts from considering international law undermined the Supremacy Clause of the Constitution with regard to the federal government's preeminent power to make and enforce U.S. treaties as law and complicated the interpretation of international agreements and contracts. Contract law is further undermined by the restriction on courts from considering international or Sharia law by limiting Oklahoma residents' freedom to contract. Second, this subpart explores why state legislators believed the restrictions were necessary, and how a large percentage of the population was persuaded to agree.

1. State Question 755 in Conflict with Fundamental U.S. Doctrines: International and Contract Law

Oklahoma's State Question 755 included a preclusion of any consideration of international law by state courts and defined international law as "the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons."[94] International law comes from three general sources: (1) customary law, (2) international agreements, and (3) derived principles common to all major legal systems.[95] The federal Constitution explicitly states that all treaties made by the United States are the supreme law of the land and bind the judges of the states.[96] It has been well settled throughout U.S. legal history that international law is incorporated into U.S. law.[97] Not only is international law validly a part of U.S. law, but courts are bound to consider international law when the question presented concerns an international issue and there is no treaty or other law on point.[98] Additionally, on issues not settled by conven-

94. *Id.* at 1118 (quoting Okla. State Senate, *supra* note 61) (internal quotation marks omitted).

95. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW: SOURCES OF INT'L LAW § 102(1)(a)–(c) (1987).

96. U.S. CONST. art. VI., cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .").

97. The Paquete Habana, 175 U.S. 677, 700 (1900), *aff'd*, Sosa v. Alvarez-Machain, 542 U.S. 692, 730 (2004).

98. *Id.* ("International law is part of our law, and *must* be ascertained and administered by the courts of justice . . . as often as questions of right depending upon it are duly presented for their determination." (emphasis added)).

tional law, the opinions of foreign and international jurists can be given great consideration in U.S. courts.[99]

Oklahoma's proposed amendment seemed to include the "law of nations" in its ban.[100] This ban included treaties (international agreements) as well as domestic contracts with choice of law clauses because they fall within "relationships with person" as part of SQ 755's definition of international law.[101] This component of the proposed amendment was per se unconstitutional in light of various federal holdings and was impractical and harmful to the state and citizens of Oklahoma.[102] An amendment to ban courts from considering international law in decision making went directly against the Constitution's mandate that treaties are the supreme law of the land and Supreme Court precedent that incorporates international law into U.S. law.[103] SQ 755 explicitly stated that the provision's complete ban on considering international law shall apply even to cases of first impression, which is in direct conflict with the principle acknowledged in *Paquete Habana* that courts should give great weight to international sources on questions of unsettled law in the U.S.[104]

SQ 755 was not only outright unconstitutional but also actually harmful to the residents and judicial system of Oklahoma. The amendment did not allow Oklahoma courts to look to the rulings and decisions made in other states if they were based upon international or Sharia law,[105] thereby inhibiting the Full Faith and Credit Clause.[106] SQ 755 would disempower Oklahoma courts to enforce judgments made in other states if the decision discussed international or Sharia law in any way,[107] causing conflicts for Oklahoma residents seeking to enforce divorce decrees or property rights within their home state if they contain language references to international or Sharia law. The amendment also created problems for business transactions and freedom of contract because Oklahoma courts would be unable to (a) adjudicate any foreign choice of law clause because the statute provided that the courts "shall *not look to*

99. *Id.* at 701.

100. Robert E. Michael, *The Anti-Shari'a Movement and Oklahoma's Save Our State Amendment—Unconstitutional Discrimination or Homeland Security?*, 18 ILSA J. INT'L & COMP. L. 347, 355 (2012).

101. *Id.*

102. *Id.* at 367–68.

103. *Id.* at 355, 357.

104. *Compare* Awad v. Ziriax, 670 F.3d 1111, 1118 (10th Cir. 2012) ("The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression." (quoting H.R.J. Res.1056, 52nd Leg., 2d Reg. Sess. (Okla. 2010))), *with Paquete*, 175 U.S. at 700–01 ("[I]n the absence of higher and more authoritative sanctions, the ordinances of foreign states, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law." (quoting 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 18 (Legal Classics Library ed., 1986) (1826)) (internal quotation mark omitted)).

105. *Awad*, 670 F.3d at 1118.

106. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

107. Michael, *supra* note 100, at 358.

the legal precepts of other nations,"[108] or (b) enforce contracts that refer to any Sharia principles throughout the agreement.[109] These restrictions on Oklahomans enforcing contracts and business transactions in court are the unintended negative consequences of a provision that was seemingly meant to restrict only religious practice. The restriction of such a fundamental right necessarily leads to a ripple effect that ultimately impairs other valued protections in U.S. law.

2. State Question 755 in Conflict with Religious Protections

The Tenth Circuit's First Amendment analysis of SQ 755 found that the proposed Oklahoma amendment presented a clear violation.[110] The law singled out a specific religion by name and subsequently gave no compelling interest to support the action.[111] The more interesting question is why, despite the clear constitutional violation of the First Amendment, did the state legislators, and subsequently an overwhelming majority of voters, continue to pursue this unconstitutional and unnecessary amendment.

Several Oklahoma news sources, explaining the mid-term election questions and making voting recommendations, gave SQ 755 a "no" recommendation and described the ballot question in a variety of terms indicating its obsoleteness: "[a] feel-good measure . . . [that v]oters should reject . . . as unnecessary,"[112] "no need for this law,"[113] and "seeks to solve a nonexistent problem."[114] If the journalistic consensus, presumably providing an objective analysis of the ballot measures, was that the proposed amendment was unnecessary to solve for any impending problem concerning Sharia law infiltrating the Oklahoma government, why did SQ 755 get such wide support in the Oklahoma congress[115] and gain a 70% majority by voters?[116] What caused this deviation? The political messaging surrounding the amendment has something to do with these results.

---

108. *Awad*, 670 F.3d at 1118 (quoting H.R.J. Res. 1056, 52nd Leg., 2d Reg. Sess. (Okla. 2010)) (internal quotation marks omitted).

109. Michael, *supra* note 100, at 361.

110. *See supra* Part II.

111. *See supra* Part II.C.

112. Editorial, *We Support Four of 11 State Questions on Ballot: Our SQ Choices*, OKLAHOMAN (Okla. City, Okla.), Oct. 17, 2010, at 13A.

113. Editorial, *Our Take on the State Questions*, ENIDNEWS.COM (Enid, Okla.) (Oct. 18, 2010), http://enidnews.com/opinion/x154637225/Our-take-on-the-state-questions.

114. Editorial, *State Questions*, TULSAWORLD.COM (Tulsa, Okla.) (Oct. 24, 2010, 5:30 AM), http://www.tulsaworld.com/opinion/article.aspx?subjectid=61&articleid=20101024_61_0_Eleven670211&r=4250.

115. Marc Ambinder, *Oklahoma's Preemptive Strike Against Sharia Law*, ATLANTIC (Oct. 25, 2010, 10:10 AM), http://www.theatlantic.com/politics/archive/2010/10/oklahomas-preemptive-strike-against-sharia-law/65081/ (noting that the amendment passed the state legislature with an 82–10 vote in the house and a 41–2 vote in the senate).

116. Awad v. Ziriax, 670 F.3d 1111, 1118 (10th Cir. 2012).

The inspiration for the Save Our State Amendment came from various judicial decisions emerging from courts outside of Oklahoma. There has been a pattern of recent decisions made by European courts that include considerations of Sharia law in divorce decrees.[117] Also concerning to the proponents of the Amendment was a New Jersey case in which a trial court judge, referencing Sharia principles advocated by a party in the case, denied a protection order petition against a man abusing his wife, finding that he did not have the criminal intent because the husband believed his religion allowed him to treat his wife however he wished.[118] The case was quickly overturned by the New Jersey court of appeals.[119] Following these events, the primary author of SQ 755, Republican State Representative Rex Duncan, envisioned the Amendment as a "preemptive strike against Sharia law coming to Oklahoma."[120] Representative Duncan asserted that "America was founded on Judeo Christian Principles," and fighting against the coming of Sharia law (or "the face of the enemy") to the United States is "a culture war, it's a social war, it's a war for the survival of our country."[121] The organization ACT! for America also supported SQ 755 by spending $60,000 promoting the Amendment through advertising and robo-calling throughout Oklahoma.[122] Even the name "Save Our State" was a signal of the perceived imminent doom Oklahoma faced from the oncoming threat of Sharia law.

The wider purpose of language advocating a culture war against Sharia law, and ultimately Muslim-American citizens, was to create urgency for voters to go to the polls.[123] Creating a message of fear that a state or country is in danger of an invasion by an enemy force that is infiltrating the system of American justice as we know it is effective in motivating voters to engage in the "fight" to "Save Our State."[124] Who would vote against saving their state? Motivation through fear of Islam is a component of a bigger movement that has been developing since the September 11 terrorist attacks.[125] The Republican state legislators in Oklahoma sought to build on this tried-and-true strategy through the ra-

117. Nicholas Riccardi, *Oklahoma May Ban Islamic Law*, L.A. TIMES, Oct. 29, 2010, at 6.

118. Matt Smith, *Arguments to Take Place in Oklahoma over Ban on Islamic Law in Courts*, CNN.COM (Nov. 22, 2010, 6:21 AM), http://www.cnn.com/2010/US/11/22/oklahoma.islamic.law/index.html.

119. S.D. v. M.J.R., 2 A.3d 412, 428 (N.J. Super. Ct. App. Div. 2010).

120. Mark Schlachtenhaufen, *Sharia Law, Courts Likely on 2010 Ballot*, EDMONDSUN.COM (June 4, 2010), http://www.edmondsun.com/local/x1996914371/Sharia-law-courts-likely-on-2010-ballot (quoting State Representative Rex Duncan, Republican from Sand Springs).

121. *MSNBC Live* (MSNBC television broadcast June 11, 2010) (interviewing State Representative Rex Duncan, Republican from Sand Springs).

122. Andrea Elliot, *Behind an Anti-Shariah Movement*, N.Y. TIMES, July 31, 2011, at A1.

123. Ambinder, *supra* note 115.

124. *Id.*

125. Yaser Ali, Comment, *Shariah and Citizenship—How Islamophobia Is Creating a Second-Class Citizenry in America*, 100 CALIF. L. REV. 1027, 1043–44 (2012) (noting the history of anti-Islam sentiment including Attorney General Ashcroft's negative comparisons of Islam and Christianity and President Bush's description of the War on Terror as a "crusade").

tionale and message behind SQ 755. Because the proposed amendment was scrutinized by the local press as largely unnecessary to address any true threat of Sharia law to the state,[126] the resulting deviation from this view by the Oklahoma voters has a "feel-good"[127] aspect that likely comes from the sentiment of voting for the "American" religion against any impeding and threatening "un-American" religion. The powerful emotion of fear of the "other" explains why a substantial portion of Oklahomans supported an amendment that is both unnecessary[128] and transparently unconstitutional, as indicated by the Tenth Circuit's application of the *Larson* test.[129]

B. Protecting Against the Power of the Faction: The Tension Between the Will of the People and Individual Rights

The Tenth Circuit balanced the interests of each party against the public interest in determining whether to grant an injunction and found that "when the law that voters wish to enact is likely unconstitutional, their interests do not outweigh Mr. Awad's in having his constitutional rights protected"[130] and that "the public has a more profound and long-term interest in upholding an individual's constitutional rights."[131] This subpart (1) discusses how federal courts have failed to protect religious minorities against majority moral sentiment in the past, (2) provides background on James Madison's theory of protecting against the political faction with a democratic republic and how the theory has failed in the face of a powerful moral majority faction, and (3) presents some possible solutions to guard against majority oppression as the Tenth Circuit did in *Awad*.

1. Examples of Religious Majority Oppression of the Minority

As discussed above, it is not always clear when the *Lemon* or *Larson* test determines the level of scrutiny to be applied to the challenged government action.[132] It is also not clear why discrimination among religions receives the heightened *Larson* strict scrutiny standard while government actions that promote religion over non-religion receive a lesser *Lemon* standard.[133] In other words, laws that benefit a particular religious group while also burdening non-religious minority groups are not viewed by the court as essential to strike down as are laws that favor and burden

126. *See supra* notes 112–14.

127. *See supra* note 112.

128. *See* Ali, *supra* note 125, at 1029; *supra* notes 112–14.

129. See *supra* Part II.C for a discussion regarding the *Awad* court's holding that the Amendment is void of a legitimate, compelling government interest and not narrowly tailored to address the alleged government interest.

130. Awad v. Ziriax, 670 F.3d 1111, 1131 (10th Cir. 2012).

131. *Id.* at 1132 (quoting Awad v. Ziriax, 754 F. Supp. 2d 1298, 1308 (W.D. Okla. 2010), *aff'd*, 670 F.3d 1111 (10th Cir. 2012)) (internal quotation mark omitted).

132. *See id.* at 1126–27; Patrick-Justice, *supra* note 57; Evans, *supra* note 56, at 361 n.12.

133. Patrick-Justice, *supra* note 57, at 81–82.

different religious denominations.[134] The following examples of polygamous marriage practices and same-sex marriage illustrate when a law benefits or promulgates mainstream Christianity while burdening historically "unaccepted" practices based upon a penchant of mainstream morality. Laws that are fundamentally based upon majority Christian beliefs and designed to burden those outside of that majority should be just as suspect under the *Larson* standard as are laws that burden one religion over another because the Establishment Clause's protection extends to people's freedom from majority religious influence from the government.

First, courts have allowed the government to violate First Amendment religious rights through the power of the majority in the treatment of the Church of Jesus Christ of Latter-day Saints and its historical practice of polygamy. The foundational case against polygamous marriage is *Reynolds v. United States*.[135] The Supreme Court held that the First Amendment did not protect Mormons who believed that they must engage in polygamous marriages to fulfill the tenants of their religious teachings[136] because marriage is a civil contract within the scope of government regulation and states can determine the form of marriage as they wish.[137] The true motivation behind this ruling is hinted at in the Court's statement that "[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."[138] This dictum seems to indicate that it was not contract law nor states' rights on which the Court was opining, but rather on a belief that Western European religion is "America's religion" and that foreign or unfamiliar religious practices are not protected by the First Amendment because they are not in the mainstream. The Supreme Court reaffirmed this view a few years after *Reynolds* in *Davis v. Beason*[139] when it stated, "Bigamy and polygamy are crimes by the laws of all *civilized* and *Christian* countries."[140] Denial of religious protections in these cases was based upon what American society would find morally distasteful rather than upon the First Amendment's protection of religious practice.

Second, the Court has discussed the role of the morals of the majority faction in cases that concern laws pertaining to sexual orientation. This discussion is relevant to how the Court views the protection of unpopular minorities in the context of American mainstream religious values be-

134. *Id.*
135. 98 U.S. 145, 166 (1878).
136. *Id.* at 161 ("[I]t was an accepted doctrine of that church that it was the duty of male members of said church, circumstances permitting, to practise polygamy . . . .").
137. *Id.* at 165–66.
138. *Id.* at 164.
139. 133 U.S. 333, 341 (1890).
140. *Id.* (emphasis added).

cause the legal issues surrounding lesbian, gay, bisexual, and transgender (LGBT) rights and same-sex marriage are often framed in terms of religious values. In *Lawrence v. Texas*,[141] the Court struck down a Texas anti-sodomy law by overturning *Bowers v. Hardwick*[142] and relying heavily on Justice Stevens's dissenting argument from *Bowers* that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[143] Justice Scalia offered a warning in his dissent in *Lawrence* that if morality were no longer a compelling government interest, the Court would be bound to strike down a variety of laws pertaining to polygamy, prostitution, and obscenity, among others.[144] However, this warning against invalidating morality as a compelling government interest is amiss because the Court has been moving in the direction of delegitimizing "morality as interest" for the past two decades.[145] Although *Lawrence* was a positive step in protecting LGBT rights, the Court has yet to decide further on the constitutionality of state restrictions on same-sex marriage.[146] At best, the Court's protection of unpopular minority groups by condemning governmental actions based upon a religious moral majority has been inconsistent, outdated, and incomplete.

2. Madison's Cure of the Democratic Republic and Its Failings

In *The Federalist No. 10*, James Madison defined a faction as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[147] Madison recognized the common fear of majority power as a threat to private rights to which he offered two solutions: (1) remove the root cause of a faction or (2) control the power of the faction.[148] The first solution, he argued, is more undesirable than is the majority ruling faction itself.[149] Dismantling the faction completely would require eliminating the liberty of the democratic system (so as not to allow the majority to gain power through voting) or forcing all citizens to have the same opinion, which is impracticable.[150]

---

141. 539 U.S. 558, 564 (2003).
142. 478 U.S. 186 (1986).
143. *Id.* at 216 (Stevens, J., dissenting).
144. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).
145. *See* discussion *infra* Part III.B.3.c.
146. *See* Tom Goldstein, *The Proposition 8 Oral Argument*, SCOTUSBLOG (Mar. 26, 2013, 11:57 AM), http://www.scotusblog.com/2013/03/the-proposition-8-oral-argument/ (arguing that the Supreme Court, after hearing oral arguments in *Hollingsworth v. Perry*, will likely not decide the merits of whether California's ban on same-sex marriage is constitutional).
147. THE FEDERALIST NO. 10, at 51 (James Madison) (Bantam Dell Publishing Group ed., 1982).
148. *Id.*
149. *Id.*
150. *Id.* at 51–52.

Madison proposed that the only way to protect against the power of the majority faction is to control its effects on decision making that may be detrimental to the minority or to individuals.[151] He argued that a true democracy will always suffer at the hands of a powerful faction, but a democratic republic will better serve to protect the minority from oppression.[152] According to Madison, elected officials have the experience and wisdom to better determine the long-term public interests of the nation than does the majority of voters, including for the protection of individual rights and minority groups, because it is within the duty of their position to protect the public good.[153] Additionally, a representative government in the form of a union of states is prophylactic against faction oppression because it is more difficult for factions to develop and organize, and the influence of any majority group that is successful in rising up in one state will likely be checked and tempered by the other states of the union, preventing the faction from spreading.[154]

James Madison recognized the potential and power of a majority faction that rises up within a democratic government,[155] even pinpointing religion as a particular source of faction power.[156] His proposed solution to oppression of minorities by a powerful majority faction was to control the effects of factions through a representative governmental system that seeks to (1) represent the people through wise public officials who can better determine and uphold the public interest, and (2) widen the representative scope so that factions are less able to communicate and organize into powerful forms.[157]

Madison's theory of a representative government depends upon the election of representatives "whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations."[158] This basic premise proved untrue in the events leading up to *Awad*, as demonstrated by the vast support that the ballot proposal had in both houses of the Oklahoma state legislature, passing with an 82–10 vote in the house and a 41–2 vote in the senate.[159] Those representatives who supported the ballot proposal failed to recognize and uphold the "long-term interest in upholding an individual's constitutional rights"[160] as the *Awad* court did

151. *Id.* at 54.
152. *Id.* at 54–55.
153. *Id.* at 55.
154. *Id.* at 57–58.
155. *Id.* at 50.
156. *See id.* at 52 ("A zeal for different opinions concerning religion . . . divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than, to co-operate for their common good.").
157. *Id.* at 54–55.
158. *Id.* at 55.
159. *See* Ambinder, *supra* note 115.
160. Awad v. Ziriax, 670 F.3d 1111, 1132 (10th Cir. 2012) (quoting Awad v. Ziriax, 754 F. Supp. 2d 1298, 1308 (W.D. Okla. 2010)) (internal quotation mark omitted).

and Madison presumed all good public officials would. Madison's second guard against the faction—a representative government that "[e]xtend[s] the sphere"[161] of the people represented, preventing the development of factions by limiting communication and organization—is also problematic in a modern world that Madison was unable to imagine. In an age of Internet communication and mass media, people with similar interests, be they religious, political, or otherwise, are substantially more able to connect and organize into larger factions and spread their message to others quickly and effectively.[162] ACT! for America's radio advertisement[163] is an example of how much wider a message can be broadcast today to catalyze support than in Madison's far-flung, slow-moving republic. The safeguard of distance between factions to inhibit organization and communication is no longer a viable precaution against wide-ranging, powerful majorities.

The failure of Madison's two safeguards will lead to more frequent occurrences of majority factions wielding greater power. Religious factions, in particular, have distinguishing features that make them even less likely to be constrained by Madison's defenses.[164] Religious factions are arguably less subject to be persuaded to change their position and more resistant to compromise because they base many of their positions on pre-established religious teachings and principles rather than on personal opinion.[165] They are also more organized within a community of common believers, while often being more isolated from people who are non-believers.[166] Madison assures us that even if a majority faction gains governmental control in a particular state, the wide scope of a democratic republic will keep the majority faction from spreading and influencing other states in the Union.[167] This theory is only partially accurate. As of September 2012, anti-Sharia law bills have been introduced in twenty states,[168] and House Bill 825 was proposed in the U.S. House of Representatives to ban courts from considering any legal codes outside of codes developed in U.S. courtrooms.[169] It appears that the wide scope of Madison's representative government has not prevented the spread of anti-Sharia movements engineered by a majority faction. However,

161. THE FEDERALIST NO. 10, *supra* note 147, at 57.

162. *See* Peter Dahlgren, *The Internet, Public Spheres, and Political Communication: Dispersion and Deliberation*, 22 POL. COMM. 147, 154–55 (2005).

163. *See* Elliot, *supra* note 122.

164. Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347, 372 (1995).

165. *Id.* at 372–73.

166. *Id.*

167. THE FEDERALIST NO. 10, *supra* note 147, at 57–58.

168. Moni Basu, *Rising Anti-Islamic Sentiment in America Troubles Muslims*, CNN.COM (Sept. 5, 2012, 1:19 PM), http://religion.blogs.cnn.com/2012/09/05/rising-anti-islamic-sentiment-in-america-troubles-muslims/.

169. Robert P. Jones, *The State of Anti-Sharia Bills*, WASH. POST (Feb. 29, 2012, 3:55 PM), http://www.washingtonpost.com/blogs/figuring-faith/post/the-state-of-anti-sharia-bills/2012/02/29/glQAql5miR_blog.html.

House Bill 825 did receive public criticism from various religious groups, causing it to be sent back to committee for now,[170] and suggesting that expanding the reach of this type of legislation to a national level, and therefore a more diverse population, might temper the movement. Although Madison's safeguards have largely failed in the realm of anti-Sharia legislation, there are other solutions to minimize the effects of a majority faction.

3. Alternative Solutions

In his survey of anti-Sharia initiatives from the September 11, 2001 terrorist attacks through the 2010 Oklahoma ballot initiative, Yaser Ali proposes some solutions to stem the public's fear of Islam and the creation of anti-Islam legislation.[171] First, he proposes public education about actual Sharia law to deflate the threat being purported by supporters of the anti-Sharia legislation and eliminate the public's unfounded fear of Islamic takeover and culture wars.[172] Second, Ali encourages public officials to take a stronger stand against religious intolerance and anti-Sharia legislation to dispel the generated fear of Islam.[173] This harkens back to Madison's argument that enlightened public officials have a "love of justice"[174] and will speak up for the minority. As discussed above, this theory largely failed in the face of the large support for the anti-Sharia proposals from the congressional representatives who failed to protect their vulnerable religious minority constituents.[175]

As public and political opinions remain in flux, one option to counteract anti-Sharia legislation is for the judiciary to remain vigilant in enforcing the First Amendment's protection of minority religions that may be currently unpopular. Courts that are presented with a question of religious minority oppression should follow the lead of the Tenth Circuit in *Awad*. Judicial enforcement of the Constitution to protect the rights of vulnerable minorities is well-established.[176] In determining whether there should be any religious exception for Jehovah's Witnesses to a state law requiring schoolchildren to salute and pledge allegiance to the U.S. flag, the Supreme Court recognized:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. . . . [F]undamental rights

170. *Id.*
171. Ali, *supra* note 125, at 1067.
172. *Id.*
173. *Id.*
174. THE FEDERALIST NO. 10, *supra* note 147, at 55.
175. *See* Ambinder, *supra* note 115.
176. Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 160 (1998).

> may not be submitted to vote; they depend on the outcome of no elections.[177]

The Tenth Circuit followed this reasoning in its *Awad* decision, citing several precedents establishing that a majority vote cannot outweigh the constitutionally protected rights of individuals.[178]

The *Larson* test should continue to be applied to laws that attempt to single out an unpopular religion and should even be expanded to questions of moral majority oppression, such as laws that discriminate based upon sexual orientation. The First Amendment's freedom of religion should be construed to include freedom *from* religious majority influence in government actions. The Supreme Court hinted at this in *Romer v. Evans*[179] when it decided upon a Colorado state constitutional amendment that repealed all local ordinances creating a protected status for sexual orientation, holding that "desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[180] Historically, the LGBT community has been "politically unpopular" among those espousing the religious and moral majority sentiment.[181] The next logical step in protecting minorities singled out for discrimination based upon a moral agenda is to extend the *Larson* test to require that all government actions based upon majority Christian morality have a "compelling governmental interest."[182] The reasoning in *Romer*, therefore, would not allow for government to invoke morality as a basis to discriminate against unpopular or minority lifestyles, choices, or viewpoints because it would not be considered a compelling governmental interest by the Court.[183]

CONCLUSION

The Establishment Clause's protection extends to groups burdened by government actions that support the religious majority in creating "American" values. Because the government is precluded from establishing a national religion, courts must apply a strict scrutiny standard to laws based upon the practices or beliefs of the majority religion that appear to create a burden on non-adherents. The problematic issue is less the oppression of one religious minority and more the powerful control of one religious majority that can affect the secular freedom of those who

177. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

178. Awad v. Ziriax, 670 F.3d 1111, 1131–32 (10th Cir. 2012); *see also* Williams v. Rhodes, 393 U.S. 23, 29 (1968) ("[G]ranted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution."); Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 699 (9th Cir. 1997) ("[T]he court merely reminds the people that they must govern themselves in accordance with principles of their own choosing.").

179. 517 U.S. 620 (1996).

180. *Id.* at 634 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (internal quotation mark omitted).

181. *See supra* Part III.B.1.

182. Larson v. Valente, 456 U.S. 228, 245–47 (1982).

183. *See Romer*, 517 U.S. at 634.

do not hold the same moral values. A moral majority should not be able to dictate the morals of individuals. So long as religious or secular practices do not harm others[184]—whether by following the tenets of Sharia law, engaging in polygamy, or maintaining same-sex relationships—the government should not be able to establish a moral law against such practices through a majority vote either in Congress or on a ballot. The Tenth Circuit in *Awad* was able to clearly articulate why SQ 755 violated the First Amendment's protection for minority religion, but the judicial system must continue protecting minority interests against a powerful religious moral majority at work.

Renee Sheeder[*]

184. *See* Wisconsin v. Yoder, 406 U.S. 205, 224 (1972) ("A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.").

* J.D. Candidate, 2014. I greatly appreciate the assistance of Professor Nancy Leong and the *Denver University Law Review* Board and editorial staff for their valuable insight and direction. I give thanks to my friends and family for their boundless love and support, especially my father, Vince, and mother, Amy. Finally, I am deeply grateful for the support and encouragement of Tyler Sheyko, without whom this article and law school in general would not be possible.