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Response to “The Future of Muslim Family Law in Western Democracies,” by John Witte, Jr.

In “The Future of Muslim Family Law in Western Democracies,” John Witte identifies the challenges and possibilities for traditionalist Muslims who want to implement their understandings of marriage within the framework of liberal legal regimes. After an elegant and succinct description of the legal issues and historical context, Witte offers traditionalist Muslim communities four pieces of advice for gaining more robust accommodation: hone their religious claims to focus on those that are most important to the faith; take seriously and, to the extent possible, internalize fundamental norms of universal human rights; develop adjudicative bodies that are trained in and follow basic standards of procedural fairness; and finally, be patient, because religious accommodations are achieved only after years of struggle.

In the context of US law, to which we limit our reflections, Witte’s advice is undoubtedly sound as matter of prudence. As he acknowledges, however, the injunction to patience implies, and perhaps even implicitly endorses, a limit to the principle of equal treatment under law. Take, for example, the treatment of self-employed members of Amish and Mennonite groups in the law of Social Security. Because of their long history of providing for disabled or retired fellow members, those groups enjoy an exemption not extended to faiths that lack such a track record. Why shouldn’t the Social Security exemption be extended to members of all religious communities that sincerely object to participation in a system of compulsory social insurance?

Understood more broadly, this question reflects a deep conflict in the law and practice of religious accommodation. On one side is what Witte characterizes as a process of “individualized ... equitable adjustments” between the needs of a particular faith and the interests of civil authority. This equitable model has the virtue of allowing the government’s decision-makers to assess the importance to a religious claimant of a specific practice, and balance that religious need against the relevant governmental interest. As with insurance underwriting, optimal judgments frequently depend on fine-grained details of the risks and benefits of the practice at issue.

In the context of family law, courts may defer to some religious communities’ dispute resolution processes, because those processes fulfill core aspects of the faith while simultaneously providing procedural and substantive protections, adequate by secular standards, to participants. Judged by those same standards, the decisions of other religions’ tribunals may receive much less deference from civil authorities. Witte relies on his understanding of New York law’s interaction with Jewish courts to make this point. He asserts that “courts will not issue a civil divorce to a Jewish couple unless and until the *beth din* issues a religious divorce, even though Jewish law systematically discriminates against the wife’s right to divorce.” This deference, he argues, has been earned over time through the experience of civil authorities with the Jewish tribunals, and thus should not automatically lead to the same degree of respect for Islamic tribunals.

We recognize the many attractions of that model of equitable, highly-particularized accommodations. But those attractions come at the cost of two serious problems. First, as with

all multi-factor appraisals, the equitable model's flexibility is both a virtue and vice. At best, such a model creates significant uncertainty for both religious adherents and government officials; neither group may be able to predict the response of courts to particular accommodations or refusals of accommodation. At worst, a practice of equitable and particularized accommodations generates persistent opportunities for discrimination against unfamiliar or unpopular faith groups or practices.

Second, the equitable model presents a special defect in the context of religious accommodations. In its dependence on fine-grained scrutiny of a faith community's reasons for acting, the equitable model invites government officials to make normative religious judgments. Under the most common legal expression of the equitable model, one who asks for an accommodation must show that the challenged regulation "substantially burdens" a "sincerely held" belief or practice. The question of sincerity raises its own problems of legal proof and potential intrusion on religious conviction. The focus on the substantiality of any claimed burden on religious faith, however, is still more troublesome because it requires the judge to evaluate the importance of a particular practice or belief within that faith tradition. Such an evaluation might well include the extent to which the faith offers to adherents alternative means of meeting religious obligations that do not conflict with the challenged regulation. Each of those assessments is, at least potentially, thick with religious meaning.

Civil officials are uniquely incompetent to make such religious judgments. By "incompetent" we do not imply that religious arguments are inherently irrational or otherwise outside the range of ordinary methods of proof. On disputed questions, the parties could certainly hire experts to debate the significance of particular practices or beliefs, and a judge could assess the relative weight of those arguments just as readily as arguments about the intentions of parties to a commercial contract. Instead, officials' incompetence is jurisdictional. The structure of church-state relations reflected in the Establishment Clause reserves normative religious judgments to religious individuals and groups. This reservation serves a number of purposes, but most importantly it keeps the government from exercising direct control over the development and inculcation of religious ideas – control that civil governments regularly seek in order to enhance their prestige and power.

In place of the equitable model of accommodation, the US legal tradition has typically protected religious liberty through rules that encompass a broad range of relevantly similar conduct, religiously motivated or otherwise. For example, the right to engage in door-to-door proselytizing falls under the more expansive category of free speech, with attendant limits on the power of government officials to impose procedural or content-based restrictions on the conduct. These limits apply with equal force to secular and religious causes, and without discrimination among the faiths or movements that inspire the proselytizing.

Indeed, Witte's chief example of equitable accommodation actually reflects the broader strategy. New York law indeed provides a mechanism for coordinating civil and religious divorce proceedings, but it does not work in quite the way that Witte describes. The New York scheme neither expressly privileges *beth din* proceedings, nor makes grant of the civil right to dissolve a marriage contingent on the outcome of a religious proceeding. Instead, the law provides that one who seeks a civil divorce must certify that he or she has taken or will take "all steps solely within

his or her power to remove any barrier to the [other party's] remarriage following the annulment or divorce.” Although the New York legislature certainly drafted the statute with Jewish law and tribunals in mind, nothing in the terms of the law restricts its application to that context, or even to religious barriers to remarriage.

A close reading of this New York statute reveals several features common to the broader, more categorical strategy of religious accommodation. First, as just noted, the protection extends to all religious and relevantly similar non-religious reasons for acting. It does not single out a particular faith, or even religion in general, for special treatment. Second, the accommodation does not – in any way – conjoin civil and religious authority. One who seeks a civil divorce must certify that he has acted in accordance with the statutory requirements, but the law does not require any religious body to do anything in response to that action, nor does it invite secular courts to evaluate the substantive decisions of religious bodies.

More broadly, the courts of New York and many other states have long been willing to enforce couples' premarital agreements to subject marital disputes to arbitration by religious tribunals. But this practice, too, reflects the broader categorical approach to religious accommodation. Civil courts in most jurisdictions routinely enforce arbitration agreements, in the context of domestic as well as commercial disputes. By enforcing religious arbitration agreements, courts demonstrate equal treatment among faith groups, and treat faith communities on the same terms as other, secular institutions, such as merchants in a particular trade. Premarital agreements by Muslim couples to arbitrate disputes in Muslim tribunals should receive precisely the same respect as analogous agreements by Jewish couples – or those of any faith or no faith. Judges will review such agreements, and the subsequent arbitration process and outcome, according to religion-neutral standards of voluntariness and substantive fairness.

Of course, a judge's familiarity with the religious tradition at issue may affect how she assesses the voluntariness or fairness of an arbitration agreement. In that respect, Witte's prudential advice is quite sound. Islamic tribunal proceedings will meet easier acceptance in the U.S. if they adopt procedures that seem fair and impartial, and reach substantive judgments that approximate wider public norms of fairness. But the path to that acceptance is not likely to be through faith-specific, context-dependent accommodations. The long struggle of religious groups for liberty has most often resulted not in protections for that faith alone, but in a more expansive regime of rights that extends to all relevantly similar conduct, both religious and non-religious.