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ABSTRACT ONLY – WORK IN PROGRESS

“Academics, Imams, Believers and the State: Religious Authority in
Modern Islam and the American Judicial System”

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While popular culture holds that there exists a clear wall of separation between church and state in the American system of governance, the Free Exercise clause of the First Amendment to the Constitution, and associated acts such as the Religious Freedom Restoration Act (1993) or the Religious Land Use and Institutionalized Persons Act (2000) create conditions in which the judiciary must regularly intervene in questions of religious worship. Moreover, provisions of choice-of-law in private contracts, religiously-regulated arbitration, application of foreign law, and certain areas of family law, also recognize spaces in which the American legal tradition may often interact with some aspects of Islamic law. For most American courts, Islam remains a highly sophisticated and unfamiliar tradition, constraining their ability to independently render judgment on questions that require a more nuanced understanding of *shari'a*. Cognizant of their limited backgrounds, judges have typically deferred to the testimony rendered by expert witnesses, in the form of scholars of religion, imams, or the believers themselves, embracing an allure of neutrality, and explicitly avoiding “*ijtihad* from the bench.” In dealing with Islam, however, contemporary American courts have been confronted with the general fragmentation of authority that characterizes modern Islam. Expert witnesses do not always offer a homogenous opinion on specific matters pertaining to Islam. Consider, for instance, a prisoner who demanded access to prayer incense, for considering it, contrary to the opinion of the prison’s official imam, a necessary aspect of his religious practices (Malik v. Woodley). Whose position should be given the greatest importance: the believer who claims duress; the imam who offers an opinion from his own religious practices; the academic who renders testimony on the basis of history; or the police officer who demands constraint from the perspective of public safety? While courts may seek to claim positions of neutrality, by issuing decisions on what aspects of Islamic law are consistent with public policy, or by determining which features of religious practice constitute essential tenants of Islam, the state itself, in the form of the judiciary, emerges as an additional actor asserting its own claims to authority. In this paper, recent decisions from the American judiciary, in three specific areas – breach of contract (Saudi Basic Industries Corporation v. Mobil Yanbu Petrochemicals), family law (Aqel v. Aqel; Odatella v. Odatella; Aghili v. Saadatnejadi), and RLUIPA-complaints (Caruso v. Zenon; Orfan v. Gourd; Pugh

v. Goord, Lindh v. Terre Haute, and Hudson v. Maloney) – will be read as revealing a tendency within liberal constitutionalism to refrain from recognizing the absolute autonomy of religious systems of law, and instead subsume confessional forms of law under the disciplinary prerogatives of the State.