Legal pluralism emerges as a topic of serious scholarly discussion as far back as the 1930s.¹ The ensuing discourse among sociologists, anthropologists and professional lawyers generated a multiplicity of attitudes towards and definitions of legal pluralism, all of which bore the ideological imprint of the respective disciplines. In 1986, however, the anthropologist John Griffiths introduced a binary distinction between what he termed “strong” and “weak” legal pluralism, the substance of which came to be widely recognized as a basic point of reference. Variations on this nomenclature would include “classic” versus “new” legal pluralism,² or even the more transparent “juristic” versus “sociological”³ legal pluralism.

According to Griffiths, “strong” (i.e., new, sociological) legal pluralism referred to and resulted from the fact that not all law is state law administered by a single set of state-sponsored institutions. “Weak” (i.e.,

classic, juristic) legal pluralism, on the other hand, referred to situations in which a state or sovereign power recognized, validated and backed different bodies of law for different groups in society. To be sure, this choice of “strong” and “weak” was neither idle nor value-neutral. It reflected, rather, the inner workings of an ideological campaign to break the hegemonic influence of professional lawyers and legal scholars who proceeded on the notion that law in the proper sense is state law and that it is only in the sense (and to the extent) that the state recognizes alternative systems or repositories of law that any legal pluralism exists. The prototypical example of this “juridical” or “classic” legal pluralism was the hybrid orders that resulted from the recognition granted by the European colonial powers to “tribal,” “customary,” or “indigenous” laws in the territories over which they came to dominate. Griffiths – along with a growing contingent of anthropologists, sociologists and even some legal scholars – wanted to break out of this mindset and insist that the juristic definition of law was under-inclusive and that below, outside, and all around the state were other “forms,” “systems” and reglementary regimes over which the state neither exercised complete control nor had the ability to eradicate.

Equally if not more important, however, the existence of sub-state reglementary regimes was not an idiosyncratic feature of pre-modern, underdeveloped or “primitive” societies. On the contrary, sub-state regimes were inextricably woven into the very warp and woof of modern Western states, from “the rules set by nightclubs and applied by their bouncers”\(^5\) to those written and unwritten regulations governing “guilds, churches, factories and [even] gangs”.\(^6\) This was the reality that classic/juristic legal pluralism had overlooked, ignored or minimized as law. And it was part of the effort to correct this myopia and highlight – indeed privilege -- the hidden reality of sub-state reglementary regimes that informed the nomenclature of the defenders of legal pluralism. The aim, in other words, was to suppress the value and significance of juristic or classic legal pluralism and relegate it to a position of lesser importance, whence its depiction as “weak.” The existence, meanwhile, within modern, Western states, of alternative, sub-state regimes was to be recognized and elevated to a new level of prominence via the designation “strong” legal pluralism.

All of this points up a perduring conflict between the sociologists and anthropologists of law, on the one hand,


\(^6\) Griffiths, “Legal Pluralism?,“ 17.
and the professional lawyers and legal scholars, on the other. The latter, it is argued, are imprisoned by an ideology of “legal centralism,” according to which all law is and should be state-sponsored law, uniform for all persons, applied equally across all social groups, and emphatically superior to, if not exclusive of, any and all other systems or repositories of law. It must be administered by a single, integrated set of state institutions. And

[t]o the extent that other, lesser normative orderings, such as the church, the family, the voluntary association and the economic organization exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the state.  

On this understanding, the only law that really exists is law that is recognized and administered by the state, and the only legal pluralism that can exist is one where the state recognizes multiple sources, systems or regimes of law. Sociological and anthropological approaches, on the other hand, want to deny the state this proud preeminence by both expanding the definition of law and insisting that all sorts of quasi-independent sub-state reglementary regimes function in modern society, a situation resulting in what should be recognized as de facto legal pluralism.

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Griffiths, "Legal Pluralism?" 3.
To my mind, there is a practical disconnect between these two approaches to and valuations of legal pluralism. As the sociologists and anthropologists of law clearly demonstrate, state law is not the only reglementary force in modern, Western society, not to mention the rest of the world. At the same time, as the legal centralists would insist, within any given polity, the state is under no obligation to recognize any of these alternative regimes; nor does the latter’s existence necessarily provide any insulation from state laws and sanctions. As such, if the aim – again, within a given polity -- is to gain not merely academic but practical recognition for sub-state regimes and or endow these with the ability to refract if not preempt the application of state rules and sanctions, it seems that legal centralism is the only framework within which this might be accomplished. For, at the end of the day, only the state can convert rules into sanctions that are applied with anything approaching immunity. As such, state recognition must be recognized as the sine qua non of any truly meaningful legal pluralism.

In this paper, I shall attempt a provisional reconciliation of sorts between these two approaches to legal pluralism, via specific reference to Islamic law, most notably in its pre-modern guise. On the one hand, I shall attempt to retain enough of the perspective of legal centralism to secure a functional place for sub-state reglementary regimes. At the same time, this legal
centralism will be tempered by a demonstration that, even where the state enjoys an exclusive monopoly on the application of sanctions with impunity, it need not be the actual source of every rule it recognizes or sanctions as law. On the one hand, this preserves enough of the modern state’s presumed monopoly over law to assuage misgivings about assaults on its sovereignty. At the same time, it holds out the possibility for various sub-state regimes to gain the effect of law, despite their provenance in sources other than the state.

**Legal Centralism Between Politics and Law**

At bottom, legal centralism is not a legal doctrine but a political one. It emerged as a corollary to the rise of the modern nation-state and its newly asserted monopoly over law and the distribution of rights. As Georges Gurvitch so aptly observed: “judicial monism corresponds to a contingent political situation, namely the creation of large modern States between the sixteenth and nineteenth centuries.”

Along with law, however, the new nation-state seems also to have co-opted the legal profession, at least in the sense that lawyers and legal professionals come to see law inherently as the exclusive preserve of the state inherently, a perspective that apparently begins with legal education and extends over the life of a professional legal career. Speaking in this regard, E. Melisarris notes,

The research programme of academic

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legal studies seems to have become an extension of the law of the state. At best, it occasionally expands into new areas of legal regulation, such as alternative dispute resolution mechanisms, but only because and to the extent that the latter are endorsed by or co-ordinated with state law.\(^9\)

From this vantage-point, lawyers habitually conflate the political reality of law as the zealously guarded preserve of the modern state with the very nature of law itself. This has the subtle effect of imposing a certain teleological prism through which not “the people” but the state is seen and treated as the primary constituent of law.\(^10\) From here, numerous conclusions about law (and

\(^9\) “The More the Merrier,” 76. Melisarris believes, for this reason, that only academic theory can advance the cause of legal pluralism, which will never be given serious consideration in institutionalized jurisprudential discourse.

\(^10\) One might ask in this regard, for example, whether the principle of “equality before the law” is primarily designed to serve the concrete needs of the people, especially in an ethnically, religiously and culturally diverse society, or whether its primary function is to promote and preserve the legitimacy of the state. As Griffiths points out: “… the concept of ‘difference’ and ‘sameness’ are not empirical but reflect a particular juridical value, namely that differences of person ought in general not to be taken account of. There is nothing in the nature of the world or of social life that would require anyone to agree … that the acts of any ordinary person and of a businessman, of a clerk
politics) are asserted and assumed rather than validated, while others are summarily proscribed without ever being disproved. This is especially the case when it comes to considerations of legal pluralism.

From the perspective of “legal orthodoxy” (read legal centralism) legal pluralism (strong and weak) is incompatible with a number of basic desiderata of a modern legal system. First, it violates such fundamental principles as “equality before the law,” and “universality.” Second, it is incompatible with the “rule of law.”11 Third, it compromises the state’s rightful monopoly on the legitimate use of violence.

It is my contention, however, that apart from purely ideological considerations, there is no necessary connection between legal centralism and such juristic tenets as equality before the law, the rule of law, or the state’s monopoly on the legitimate use of violence (including the deprivation of property and freedom). Indeed, history has known both nomocracies and nomocratic cultures that embrace

and of a layman, of a patrician and a plebian, etc., are really the same.” “Legal Pluralism?,” 13.

11 On these two, see L. McNamara, “‘Equality Before the Law’ in Polyethnic Societies: The Construction of Normative Criminal Law Standards,” Murdoch University Electronic Journal of Law, vol. 11 no. 2 (June, 2004): 4-5. This article is not paginated and this reference is based on my own pagination, which begins with the title-page of the article.
all of these with no commitment whatever to any strict
d doctrine of legal centralism. Islam is a case in point.

Islam\textsuperscript{12} and Legal Centralism

It has been long recognized that Islam is a religion in
which not theology but law emerged as the manifestation of
its genius. As the celebrated scholar of Islamic law Joseph
Schacht once put it,

\begin{quote}
Islamic law is the epitome of
Islamic thought, the most typical
manifestation of the Islamic way
of life, the core and kernal of
Islam itself... Theology has never
been able to achieve a comparable
importance in Islam; only mysticism
was strong enough to challenge the
ascendancy of the Law over the minds
of Muslims."\textsuperscript{13}
\end{quote}

Not only, however, did Islam develop into a nomocracy,
i.e., a society governed by a system of laws, it spawned a
nomocratic culture as well. Early in its history, Sunni
Islam adopted a doctrine of prophetic infallibility, ‘ismat
al-anbiyâ’, according to which the Prophet Muhammad (like
all prophets) was credited with divine protection from

\textsuperscript{12}It is important to note that my characterizations in this
paper are based on an analysis of the majority expression of
Sunni Islam. Shiite Islam would require a different
treatment, owing to certain fundamental differences in the
two systems’ management of the problem of religious
authority.

\textsuperscript{13} An Introduction to Islamic Law (Oxford:Clarendon Press,
1964), 1.
sustaining errors in his scriptural interpretations. Far more important than the substance of this doctrine, however, was its corollary, namely that only the Prophet was infallible. On this understanding, no other individual, not even the Caliph, could claim interpretive infallibility. For Sunnism, the divine protection implied by ‘ismat al-anbiyâ’ passed not to any individual but to the interpretive community as a whole. As such, only those interpretations on which the community of jurists unanimously agreed (such Unanimous Consensus going under the technical term, “Ijmâ‘”) were deemed infallible and thus binding on the entire community. Where, however, their collective efforts resulted in disagreement, competing views simply had to be left to the market of debate. To be sure, this was not an exercise in intramural religious relativism. Rather, pre-modern Islam confirmed Stanley Fish’s adumbration of the distinction between relativism and pluralism:

[T]he absolutely true … exists, and I know what it is. The problem is that you know too, and that we know different things, which puts us armed with … judgments that are irreconcilable, all dressed up with nowhere to go for authoritative adjudication.”

In the absence of the infallible Prophet Muhammad coming back and determining this or that view to be correct,  

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there was indeed “nowhere to go for authoritative adjudication,” that is, other than the intellectual market of exchange. Here, however, we come upon another (related) feature of pre-modern Muslim civilization, namely its commitment to a “public reason” via which to negotiate interpretive disputes.

In an insightful essay, “Exotericism and Objectivity in Islamic Jurisprudence,” Professor Bernard Weiss points to the centrality of the doctrine that the will of the Lawgiver (God) in Islam is made manifest almost exclusively through the “uttered word,” the lafz, of God and His Messenger. Similarly, only that which is deducible from the uttered word through exoteric means, i.e., the locutionary (dalîl lafzî) and illocutionary (dalîl ‘aqlî) dictates of words, is recognized as valid interpretive proof. The resulting legal formalism, developed and institutionalized by the discipline of usûl al-fiqh (legal methodology), aimed not simply to exclude all means of apprehending meaning that were closed or limited to the world of subjective experience but to ensure that there was equal access to all legal

sources and legal proofs and that these remained in the public domain.

The result was a nomocratic culture of what William W. Bartley III would term “justificationism.” 17 In this culture, all assertions of legal doctrine (read rights and obligations) had to be justified on the basis of objective legal sources and proofs. In the sense that Muslim society was a society governed by a set of legal rules, whose derivation was itself governed by a strict set of formal rules of interpretation, Islam might be characterized as having represented an instance of “the rule of law squared.”

And yet, Islamic law was emphatically neither the product nor preserve of the early Muslim state. In fact, it developed in conscious opposition to the latter. Private Muslims during the first two centuries or so after the death of the Prophet Muhammad (632 CE) succeeded in gaining recognition for their interpretive efforts as representing the most reliable renderings of divine intent. By the early decades of the 3rd/9th century, a fledgling interpretive methodology (usûl al-fiqh) had emerged, with the Qurʾān, Sunna (normative practice and supplemental commentary of the Prophet Muhammad) and the Unanimous Consensus (ijmâʿ) of the jurists as primary sources and analogy (qiyaṣ) as the main method of extending the law to unprecedented cases. During

17 On his so-called justificationism, see The Retreat to Commitment (LaSalle, IL: Open Court Publishing Company, 1984), 73, 88, 91-92, 97, 98, 102 and passim.
this same period, the jurists - still private and doggedly independent of the state -- began to organize themselves into formal interpretive communities or schools of law, known as madhhab(s). By the 4th/10th century, the madhhab had emerged as the exclusive repository of legal authority. From this point on, all juristic interpretation, if it was to be sanctioned as “orthodox” would have to take place within the boundaries of a recognized school. By the end of the 5th/11th century, based on the principle of survival of the fittest, the number of Sunni schools would settle at four: the Hanafî, Mâlikî, Shâfi‘î and Hanbalî schools, all equally orthodox, all equally authoritative and all emphatically independent of the state. These would be the Sunni schools passed down into modern times.

It is important to note in this context that the role of the jurists was not purely or even primarily academic, as I understand the role of private legal scholars to be in the Civil Law tradition.18 As I have noted elsewhere, the legal opinion or fatwa of the jurist carried the potential to confer concrete, actionable legal rights, independent of the state.19 Legal authority, in other words (and I distinguish

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19 This past summer at the mosque of Sultan Hasan in Cairo, I attended a question and answer session held by the Grand Mufti of Egypt, Shaykh ‘Alî Jum‘ah, following the Friday prayer. At one point he is asked whether it is permissible for a Muslim to sell alcohol “even if this activity should
between authority and power, which the state did have) derived not from the state but from the community of jurists. As such, where a man came to a jurist and asked if his statement to his wife constituted a declaration of divorce, the jurist’s (mufti’s) answer could have the effect of preserving or terminating this marriage, again, independent of any state supervision.  

Clearly, Islamic law is not grounded in any commitment to the dictates of legal centralism. And yet, it emphatically and unequivocally endorsed the principle of the rule of law, indeed, on my reading, “the rule of law take place in a state-owned institution.” To this the Mufti responded, “What has the state to do with this? This is my jurisdiction (dawlat ayy? Da batâ’i ana)!”

I say “could have the force” here for two reasons: 1) the legal opinion qua legal opinion is not binding on any individual, unless it reflects the view of a Unanimous Consensus. As such, the man in question could petition an opinion from another jurist that would authorize him to act in opposition to the first opinion; 2) there are instances where a legal opinion may be acted upon only under state supervision, as, e.g., where it deals with criminal sanctions, or requires investigation as a prerequisite to the determination of facts, or where there is a strong, outstanding disagreement within the legal community accompanied by a conflict between the priority to be given to a “right of man” (i.e., a private right) versus a “right of God” (a public interest). For more on this provision, see my Islamic Law and the State: The Constitutional Jurisprudence of Shihâb al-Dîn al-Qarafî (Leiden: E.J. Brill, 1996), 220-21. See also below, ---.
squared.” Similarly, Islamic law endorsed the state’s monopoly on the legitimate use of punitive violence (i.e., the deprivation of life, limb, liberty or property). A standard vindication of this monopoly is supplied by the 7th/13th century Egyptian jurist, Shihâb al-Dîn al-Qarâfî (d.684/1285). Explaining those instances where a legal opinion, even one backed by Unanimous Consensus (ijmâ‘), may only be acted upon by the state or under state supervision, al-Qarâfî notes that leaving the implementation of certain rules to the public will only bring harm the latter.21 He mentions specifically, inter alia, prescribed criminal sanctions (hudûd) and notes that

Were the implementation of these rules left to the public, and the common people set out to lash adulterers and amputate the limbs of thieves, etc., tempers would fly, egos would be stirred up, the people of character would be incensed, and chaos and strife would abound. Thus, the religious law settled this matter by delegating (the implementation of) these rules to the state (wulât al-umûr). The people surrender to this arrangement and accept it, willingly or unwillingly, as a result of which these great liabilities are avoided.22

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21 Jackson, *Islamic Law and the State*, 221.
As for the issue of equality, here too Islamic law evinces a principled commitment, but to **substantive** rather than **formal** equality. The difference between the two is summarized in an exchange related by Yale law professor Stephen L. Carter. In this exchange, a leading Christian evangelist protests that Muslim inmates (in the American correctional system) have no cause to complain because they have all the rights and privileges that Christian inmates have. To this Carter responds,

> No doubt they do. But they would prefer to have the rights they need as Muslims. The right to do everything that Christians are allowed to do is not the same as the right to follow God in their own way.”

Rather than a formal equality, where a presumably objective standard that is assumed to be religiously, culturally and historically equidistant from all parties is uniformly applied, Islamic law opted, **mutatis mutandis**, for a substantive “equality of respect,” where, the standards to which constituent communities held themselves were given recognition. This was clearly the case with regard to the

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1387/1967), 148. But see the entire discussion from pp.146-55. Among the other rules that require state supervision, al-Qarâfî mentions those that require factual determination (e.g., whether a husband is actually insolvent and thus unable to support his wife), distributing the spoils of war, collecting land and poll taxes, and the like.

various subdivisions within the Muslim community, the four schools of law being equally recognized.\textsuperscript{24} It also extended, however (i.e., beyond the perimeters of criminal law, which policed, \textit{ceteris paribus}, public and not private space\textsuperscript{25}) to non-Muslims. As I have established elsewhere, even reputedly puritanical Hanbalites upheld the two-part rule stipulating that 1) if non-Muslims did not submit their disputes to Muslim courts, they were to be left alone and 2) if they did submit their disputes to Muslim courts, they

\textsuperscript{24} This was in fact the subject of my book, \textit{Islamic Law and the State: The Constitutional Jurisprudence of Shihâb al-Dîn al-Qarâfî}.

\textsuperscript{25} Even murder that was not the result of "publicly directed" violence, as for example what happened at Columbine High, was deemed a civil offense, not a criminal one. On this point, see my "Domestic Terrorism in the Islamic Legal Tradition" \textit{The Muslim World} vol. 91 no. 3 and 4 (Fall, 2001): 293-310. Similarly, while wine-drinking was deemed a criminal offense for Muslims (though the Hanafî school allowed the consumption of certain forms of wine, e.g., \textit{nabîdh}, in non-intoxicating amounts) it was not so for Jews and Christians. As such, some jurists held the wine of non-Muslims to be valuable and Muslims who destroyed it to be financially liable. No such liability attached to the wine of other Muslims (with the possible exception of cases where the latter were Hanafîs). On this point, see Shihâb al-Dîn Ibrâhîm b. ‘Abd Allâh Ibn Abî al-Dam, \textit{Kitâb adab al-qadâ’}, ed. M.A. Ahmad (Beirut: Dâr al-Kutub al-‘Ilmîyah, 1407/1987), 118, 166-20 ?????
were to be judged on the basis of their own law, unless they specifically requested Islamic justice. It is clear, on these depictions, that, good or bad, legal centralism is an ideological commitment born of a particular historical experience. Like all ideologies — powerful dogmas and oversimplifications designed to sustain commitment and spawn action — it runs the risk of taking itself as an inalterable, empirical fact and losing sight of its pragmatic raisons d’être. If, however, legal centralism is really only a means to the end of preserving such institutions as equality before the law, the rule of law and the state’s monopoly over the legitimate use of force, it is not clear — certainly not in purely legal terms — why alternative arrangements that are equally committed and effective in this regard should not be considered, especially those that offer the added advantage of


27 Timur Kuran notes that under the Ottomans, Jewish and Christian litigants often opted for Islamic law instead of their own legal regimes, even where the Muslim authorities afforded them the right to be judged according to the latter. See his “The Economic Ascent of the Middle East’s Religious Minorities: The Role of Islamic Legal Pluralism,” *The Journal of Legal Studies* vol. 33 no. 2 (June, 2004): 484-88 and passim.
accommodating desiderata with which legal centralism is ill at ease, such as legal pluralism.

**Medieval Romanticism or Pragmatic Modernity**

It was the late Schlomo Goitein who perceptively observed that "with the exception of some local statutes, promulgated and abrogated from time to time, the [medieval Muslim] state as such did not possess any law...." On this reality, law in pre-modern Islam would be almost invariably of sub-state provenance, and to the extent that the sub-state terrain was culturally and (especially) religiously variegated, so too would law be destined to be.

In reality, the sub-state terrain of modern nation-states is no less culturally or even religiously diverse. The fact that law is now state-sponsored might obscure this fact, as does the nation-state’s legal centralist underpinnings. As Griffiths notes, analyses of legal pluralism are "almost all written under the sign of unification: unification is inevitable, necessary, normal, modern and good." This is because, from the perspective of legal centralism, "Uniform law is not only dependent upon but also a condition of progress toward modern nationhood." Increasingly, however, whether we are talking about the Muslim world or America, the homogenizing agenda of legal centralism finds itself in increasingly apparent competition

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29 Griffiths, "Legal Pluralism?,” 34.
with sub- and non-state reglementary regimes of various forms, origins and degrees of authority.

In the Muslim world, the problem begins with the fact that Islamic law historically precedes and transcends the state. This means that there is an entire universe of legal rights and obligations that are authoritative and deeply felt in the hearts and minds of people yet totally independent of the state. The political theory underlying the modern nation-state is ill equipped to deal with this reality. Consequently, modern Muslim states tend either to seek to co-opt the religious law or to suppress it. The result is almost invariably one or another form of Islamic "fundamentalism," which at its core has nothing to do with "literalist interpretations"\(^\text{30}\) but is a playing out of the

\(^{30}\) Classical Islam produced an entire juristic school that was premised on literalist interpretations, whence its name, the Zâhirite school (from the word "zâhir," i.e., apparent, literal). But Zâhirite interpretations were neither extreme nor conservative, certainly no more so than any of the other schools. In fact, on some issues the Zâhirites were actually more "liberal" than their counterparts. For example, since they rejected analogical reasoning, they rejected analogizing from gold and silver to other forms of money. On this interpretation, they would reject the entire edifice of laws regarding interest. In other words, on a strict Zâhirite interpretation, there would be no ban on interest on paper money! Clearly, borrowing the term fundamentalism from the experience of late 19\(^\text{th}\) and early 20\(^\text{th}\) century Christianity in the West has bred much ignorance and confusion.
conflict engendered by the modern state’s presumed monopoly over law in the face of large segments of the population’s recognition of other, prior and, in their view, “superior” sources of law. Given the general pervasiveness of the logical underpinnings of the nation-state, both sides proceed on the basis of the presumed normativeness of “juristic monism,” the view that there can be only one law of the land uniformly applied across the board. On this understanding, modern Muslim societies are transformed into veritable powder-kegs where control over the state is deemed a prerequisite to control over the law and where each party wants to ensure that if there is only going to be a single law of the land, that law is its.\textsuperscript{31}

In America the situation is not as volatile. America enjoys the advantage of having emerged as a modern nation-state where the presumption that the state had a monopoly over law was not borrowed but original. Even European immigrants who brought with them aspects of their legal heritage recognized that the process of Americanization entailed a degree of forfeiture.\textsuperscript{32} This contrasts sharply

\textsuperscript{31} I have not been able to keep up with legal debates and constitutional developments in the new Iraq. To my mind, however, given its history, whether the new constitution is able to embrace and or accommodate some or another form of legal pluralism will be key to Iraq’s success in managing its multi-ethnic, sectarian, Muslim society.

\textsuperscript{32} See, e.g., Nancy Cott’s Public Vows: A History of Marriage and the Nation (Cambridge, Mass.: Harvard University Press,
with the situation of Egyptians, Syrians or Pakistanis. For Egyptian-ness and Syrian-ness – both of which connote Islam cum Islamic law -- were prior to the Egyptian and Syrian states. As such, neither of these states can assume the authority to define these nationalities in the way that the American state could do with American identity. As for such modern creations as Pakistan, it came into existence as a would-be “Islamic state,” which, by definition, connoted a reglementary regime both prior to and transcendent of the state.

And yet, the American state is not without its issues in confronting a sub-state terrain that is at least (if not more) culturally, historically and religiously diverse as the societies of the Muslim world. A good example of how this is reflected in legal terms would be the present debate over gay marriage. While the state assumes, on the one hand, the right to regulate marriage, it recognizes, on the other hand, at least to some degree, that marriage is perceived by many (if not most) Americans as a “sacred’ cum religious institution. Moreover, there are well-established

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Ironically, the process of establishing American identity is never fully complete and the substance of that identity is always contested. This is clearly reflected in Samuel P. Huntington’s recent book, *Who Are We?*
religious communities in America, most notable within the broader Christian community, that condone homosexual relations and have even ordained religious authorities who are openly gay. The present effort to pass a Constitutional amendment to ban gay marriage for all religious communities would seem thus to run the risk both of unduly entangling the government in religion (at least for those who see marriage as a religious institution) and of discriminating against those established religions that do not proscribe homosexual relations. In the end, the government’s “juristic monism,” reflected in its one-size-fits-all approach, has the effect of privileging some established religions while penalizing others, an effect that can ultimately serve neither the government nor the governed.

This brings me to my penultimate point, namely that formal equality, which is the basis of the one-size-fits-all approach, is only effective with populations that are more or less substantively equal. The same law equally applied to peoples who differ historically, socially, religiously, culturally, etc., will often produce an unequal effect. This is the point of the anthropologist Sally Moore, who notes that, contrary to the assumption of the legal centralists, the social space between legislators and individuals is not a “normative vacuum” but is “full of norms and institutions of varied provenance,” all of which contribute to the law’s ultimate effect. It would seem,

34 See Griffiths, “Legal Pluralism?,” 34.
thus, that to the extent that government wants to sustain its image of being equidistant from the entire population, these sub-state reglementary norms and institutions would have to be factored into its legal order.

To conclude, all of this is another way of suggesting that legal pluralism, far from being a romantic notion from the medieval past, may offer some very practical alternatives for the culturally, religiously and ethnically diverse 21st century nation-state. This is not to suggest a complete scrapping of the legal centralist posture. It is simply to suggest (and recognize) that all law does not have to originate with the state, even as the state maintains its monopoly as legal executive. To some extent, this is already taking place and being recognized. As Klaus Günther points out, all kinds of sub-state NGOs (e.g., Amnesty International or Human Rights Watch) and “extra-state” international organizations (the WTO or the World Bank) have acquired the ability to hold states to legal norms and standards (e.g., of what is humane or what is protectionist) that are transcendent of any individual state. Similarly, under the influence of American law firms, private arbitration has been transformed into a veritable “international lex mercatoria” that is largely detached from national legislation and regarding which “national governments are only needed as bailiffs for the execution of
the court decision."  In such a context, it would seem ironic, indeed, that national governments should grow comfortable with non-state reglementary regimes that originate ‘above’ or outside its jurisdiction but look upon those sub-state reglementary regimes that exist and or develop within its territorial boundaries as constituting a mortal threat to the dictates of legal centralism.

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