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Sohail Wahedi

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MUSLIMS AND THE MYTHS IN THE IMMIGRATION POLITICS OF THE UNITED STATES

SOHAIL WAHEDI*

Today, the explicit use of anti-immigration rhetoric has become common among a significant portion of the American political establishment. The 2016 election of President Trump generated a tougher attitude toward immigration and immigrants. Subsequently, the 2018 midterm elections revealed an increase in “Islamophobic” rhetoric among political campaigners. This article focuses on the challenges faced by one group—the Muslim community. Specifically, this article aims to shed light on the ways in which the contemporary anti-immigration atmosphere has targeted American Muslims. In doing

* Assistant Professor, Erasmus School of Law, Ph.D., 2019 Erasmus University Rotterdam, L.L.B., 2012 and L.L.M., 2015 Utrecht University, the Netherlands. Writing fellow, International Center for Law and Religion Studies’ inaugural Oxford Program, “Religion and the Rule of Law,” University of Oxford (Jul.–Aug. 2018). Visiting fellow Osgoode Hall Law School, York University, Toronto (Apr. 2018). Deputy Court Clerk, Rotterdam District Court (2012–2015). Intern, Embassy of the Kingdom of the Netherlands in Tel Aviv, Israel (July–Dec. 2011). Research for this article is made possible by the Erasmus School of Law Innovation Programme Research, Erasmus Trustfonds and the International Center for Law and Religion Studies at Brigham Young University. The main argument of this article on singling out the Islamic faith for special bans was discussed in San Diego (“Border Myths” Symposium 2019, March 9, 2019); Bologna (“European Academy of Religion” Annual Conference 2019, March 4, 2019); Prague (“State Responses to Security Threats and Religious Diversity” Conference, Nov. 26–28, 2018) and Rio de Janeiro (the Fifth ICLARS Conference, “Living Together in Diversity: Strategies from Law and Religion,” Pontifical Catholic University, Sept. 12–14, 2018). I am grateful to the participants of those events for their feedback. Also, many thanks for the outstanding editorial support I have received from the people at the *California Western Law Review*. I am especially grateful to Katherine Norton, Samantha Sneen, Janna Ferraro and Meagan Stevens. Errors remain mine. Feedback, comments and criticism can be sent directly to wahedi@law.eur.nl.

so, this article analyzes recent public decisions that have both burdened the Muslim community and negatively affected immigrant civil liberties. Drawing on these recent decisions, the article proposes a strategy to overcome this contemporary era of fear, anxiety, and intolerance toward newcomers—specifically those with an Islamic background.

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INTRODUCTION

The American Dream of “a land in which life should be better and richer and fuller for every man, with opportunity for each according to his ability or achievement,”¹ is a fruitful source of inspiration for many

1. JAMES TRUSLOW ADAMS, *THE EPIC OF AMERICA* 404 (1931). See also Geoffrey D. Korff, *Reviving the Forgotten American Dream*, 113 PENN ST. L. REV. 417, 427 (2008) (quoting Adams and arguing that the classic work-hard-play-hard conception of the American Dream with the aim of achieving a higher level of welfare has made room for a thicker conception. Korff notes the modern version of the American Dream includes other themes relevant to human flourishing, including education, employment opportunities, healthcare, a reliable retirement system, and “a general sense of social mobility.”).

American societal groups in the fight for equality.² The American Dream of a better life for everyone, everywhere in the United States, is endorsed by the Declaration of Independence, which states clearly that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”³ This powerful and timeless promise of equality and welfare inspired great advocates of civil rights and civil liberties, such as Dr. Martin Luther King, Jr. In what he revealed as “a dream deeply rooted in the American dream,” Dr. King scrutinized the presence of obvious inequalities in American society and urged the nation to stop racial discrimination.⁴ He dreamed of a land where

2. Although a shift has taken place in the way people have defined the American Dream throughout history, today, the bottom line is an egalitarian approach: equal opportunities for all citizens, regardless of their racial or economic background. *See, e.g.,* Andrea J. Boyack, *A New American Dream for Detroit*, 93 U. DET. MERCY L. REV. 573, 574 (2016) (noting the American Dream “has always been one of equal opportunity,” but arguing “there can be no equality of opportunity where there is such a stark inequality” in Detroit’s neighborhood decline); Katherine M. Vail, *Saving the American Dream: The Legalization of the Tiny House Movement*, 54 U. LOUISVILLE L. REV. 357, 379 (2016) (arguing that the American Dream rests on an idea of creating equal opportunities for all); Paul D. Carrington, *Financing the American Dream: Equality and School Taxes*, 73 COLUM. L. REV. 1227, 1227 (1973) (claiming “the right to equal educational opportunity is the American Dream incarnate as constitutional law.”). For an official endorsement of this egalitarian conception of the American Dream, see George Bush, *Exporting the American Dream*, 17 HUM. RTS. 18, 19 (1990) (defending the export of the “American Dream” to new democracies and arguing that equality is the most important principle in law that should be guaranteed and protected strongly. That is a democracy “that supports a strict equality of rights: one that guarantees all men and women—whatever their race or ancestry—stand equal before the law.”).

3. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see also* JIM CULLEN, *THE AMERICAN DREAM* 38 (2003) (arguing that the second paragraph of the Declaration of Independence is the “key” to this important document as it “underwrites” the American Dream); Darrell A. H. Miller, *Continuity and the Declaration of Independence*, 89 S. CAL. L. REV. 601, 605 (2016) (critically analyzing the language used in the Declaration and explaining why so many judges, politicians, and civil rights activists have drawn on this document to develop their arguments).

4. Martin Luther King, Jr., “I have a Dream . . .” Speech at the “March on Washington” (Aug. 28, 1963) (transcript available at <https://www.archives.gov/files/press/exhibits/dream-speech.pdf>) (referring to the Declaration of Independence’s promise of equality and criticizing the lack of opportunities for non-white people to flourish in life due to the obvious presence of racial discrimination).

people would “not be judged by the color of their skin but by the content of their character.”⁵ He dreamed of true fulfillment of the promise “that all men are created equal.”⁶ With his renowned “I Have a Dream” speech, Dr. King created awareness of parallel societies in the United States where people did not live together, but rather were separated from one another. He warned against the devastating effects of segregation, discrimination, and hatred.⁷ Dr. King described a nightmare in which many people lived at that time, and declared his unambiguous ambition to end this nightmare for those who faced hatred and discrimination instead of opportunities and freedoms.⁸

The resounding message behind Dr. King’s speech was that the American Dream was a far destination for many American citizens to reach.⁹ His concerns about the inaccessibility of the American Dream have urged politicians and legal scholars to consider concrete steps to preserve this ideal.¹⁰

Recent history reminds us that institutional support of inequality reinforces the emergence of parallel societies. Within these divisions,

5. *Id.*

6. *Id.*

7. *Id.*; see also Katharine Klebes, *The Limited Provision of Mental Health Services at Community Colleges: Obstacles, Initiatives, and Opportunities for Change*, 19 QUINNIPIAC HEALTH L.J. 315, 322 (2017) (referring to a recent study demonstrating how racism hinders the true social integration of students with immigrant backgrounds on university campuses).

8. *Cf.* Kevin Brown, *Hopwood: Was this the African-American Nightmare or the African-American Dream?*, 2 TEX. F. ON C.L. & C.R. 97, 102 (1996) (providing an overview of cases that have challenged the legality of segregation and defending a skeptical approach about eliminating racial discrimination in the future); Kevin Brown, *End of the Racial Age: Reflections on the Changing Racial and Ethnic Ancestry of Blacks on Affirmative Action*, 22 TEX. J. ON C.L. & C.R. 139, 139 (2017) (noting “[m]any minority students experience the environment of their law school as hostile.”).

9. *Cf.* Monroe H. Little, Jr., *More than a Dreamer: Remembering Dr. Martin Luther King, Jr.*, 41 IND. L. REV. 523, 529 (2008) (highlighting the achievements of Martin Luther King, Jr. to argue that Dr. King was more than the main voice of civil rights protests).

10. David B. Oppenheimer, *Dr. King’s Dream of Affirmative Action*, 21 HARV. LATINX L. REV. 55, 86 (2018) (arguing Dr. King’s work is still valuable to fight inequalities related to race and class). See generally Trina Jones, *Occupying America: Dr. Martin Luther King, Jr., the American Dream, and the Challenge of Socio-Economic Inequality*, 57 VILL. L. REV. 339, 342 (2012).

only a few people can benefit from opportunities to flourish, while others suffer from stagnation and deprivation of basic liberties.¹¹ Therefore, the idea that all people should have equal opportunities to realize the American Dream is often echoed in initiatives propagated by legal scholars, or enacted by law after extensive political debates.¹² However, despite the many initiatives geared toward creating equal opportunities, the American Dream is still difficult to realize for many groups in American society.¹³ Even the historic victory of Barack Obama in the 2008 and 2012 presidential elections, and the recent elections of two Muslim women with immigrant backgrounds to Congress, do not erase the palpable presence of racial discrimination in the United States.¹⁴

Studies have reaffirmed the presence of ethnic and racial discrimination in aspects of life considered crucial for the realization of

11. E.g., Khaled A. Beydoun, *Why Ferguson Is Our Issue: A Letter to Muslim America*, 31 HARV. J. RACIAL & ETHNIC JUST. 1 (2015).

12. These steps are mainly in the fields of housing, health care, education, employment, and political freedoms and are meant to provide all people—regardless of their race, color, class, religion, origin, or sexual orientation—access to the basic needs that enable them to flourish in American society. However, the changes in these areas should not be overstated. See Damon J. Keith, *What Happens to a Dream Deferred: An Assessment of Civil Rights Law Twenty Years after the 1963 March on Washington*, 19 HARV. C.R.-C.L. L. REV. 469, 469 (1984) (expressing that the struggle for equality is not over, rather “the gains made in the legal arena over the past . . . decades form only a skeletal foundation for the monumental changes that must take place.”).

13. See generally Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151 (2016) (criticizing the lack of equal protection in the case law of the Supreme Court).

14. Alex M. Johnson, Jr., *What the Tea Party Movement Means for Contemporary Race Relations: A Historical and Contextual Analysis*, 7 GEO. J. L. & MOD. CRITICAL RACE PERSP. 201, 202 (2015) (pointing out that racism “remains endemic in American society,” and noting the fact that some members of minority groups have been successful is not indicative of equal opportunities for all); see also Reginald Oh, *Regulating White Desire*, 2007 WIS. L. REV. 463 (2007).

the American Dream.¹⁵ Such discrimination exists in the job market,¹⁶ access to financial instruments,¹⁷ housing,¹⁸ education, and many other areas.¹⁹ In light of these findings, some scholars have suggested the era of civil liberties is waning.²⁰ This sad and alarming conclusion is not a

15. Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 7–8 (2007) (arguing the struggle for greater equality will continue because “the economic and psychological wounds of slavery and segregation persist in the form of well-documented discrimination . . .”).

16. *E.g.*, Kevin Woodson, *Derivative Racial Discrimination*, 12 STAN. J. C.R. & C.L. 335, 386 (2016) (introducing “derivative racial discrimination” as a form of “institutional discrimination that disadvantages black workers derivatively” due to socio-cultural differences).

17. *E.g.*, Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. REV. 1071 (2017) (reporting on the prevalence of racism and discrimination in the financial world).

18. *See generally* Alexander Polikoff, *Racial Inequality and the Black Ghetto*, 1 NW J. L. & SOC. POL’Y 1 (2006); David R. James, *The Racial Ghetto as a Race-making Situation: The Effects of Residential Segregation on Racial Inequalities and Racial Identity*, 19 LAW & SOC. INQUIRY 407 (1994); Karl Taeuber, *The Contemporary Context of Housing Discrimination*, 6 YALE L. & POL’Y REV. 339 (1988).

19. *E.g.*, Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765, 784 (2017) (finding that schools with an overrepresentation of racially-diverse students tend to be stricter on developing safety measures despite a lack of empirical evidence in favor of this approach); Angela Onwuachi-Willig, *Complimentary Discrimination and Complementary Discrimination in Faculty Hiring*, 87 WASH. U. L. REV. 763, 777 (2010) (identifying a “unique” form of racial discrimination in the hiring system of universities).

20. This position has been defended explicitly in the aftermath of the 2013 Supreme Court’s decision in *Shelby v. Holder*, 570 U.S. 529, 557 (2013) (outlawing the “coverage-formula” of the Voting Rights Act of 1965, which was designed to guarantee equal voting rights); *see also* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1391 (2015) (arguing the unambiguous message behind *Shelby* is that the era of civil rights is over); Seth Davis, *Equal Sovereignty as a Right Against a Remedy*, 76 La. L. Rev. 83, 118 (2015) (calling the decision in *Shelby* “not nuanced”); Ilya Shapiro, *Shelby County and the Vindication of Martin Luther King’s Dream*, 8 N.Y.U. J.L. & LIBERTY 182, 191–92 (2013) (criticizing the critics of *Shelby* and arguing the judgment reaffirms that “widespread, official racial discrimination in voting has disappeared.”). *See generally* REBEKAH HERRICK, MINORITIES AND REPRESENTATION IN AMERICAN POLITICS (2017).

new revelation.²¹ Rather, it is a renewed reminder of the complexity involved in shaping the right conditions to provide all people equal opportunities to flourish in life.²²

This lasting reminder illustrates the fragility and vulnerability of the victories achieved in the field of civil liberties.²³ However, it does not herald the end of the civil rights era.²⁴ Rather, this illustration prompts us to be cautious.²⁵ The key questions are: how can we pursue

21. See, e.g., Mario L. Barnes, *The More Things Change: New Moves for Legitimizing Racial Discrimination in a Post-Race World*, 100 MINN. L. REV. 2043, 2096 (2016) (providing an in-depth analysis of decisions reached by the Supreme Court in employment, education, and voting rights cases that touch upon the theme of racial discrimination and claiming that the Court's rejectionist approach toward the "realness of race" has obviously resulted in the current situation, in which "the Court avoids interrogating larger concerns such as structural racism and white supremacy."); see also *Schuetz v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 338–92 (2014) (Sotomayor, J., dissenting) (suggesting race still matters "because of persistent racial inequality in society").

22. Deborah Hellman, *Two Concepts of Discrimination*, 102 VA. L. REV. 895, 906 (2016) (pointing to a serious challenge caused by affirmative actions: "these policies express that blacks are inferior to whites. Why is that problematic? It is problematic because one way to fail to treat people as equals is to express that they are not, in fact, equals."); see also Anita Christina Butera, *Assimilation, Pluralism and Multiculturalism: The Policy of Racial/Ethnic Identity in America*, 7 BUFF. HUM. RTS. L. REV. 1, 3–8 (2001) (highlighting the main constraints of various models of citizenship in addressing racism and discrimination).

23. See, e.g., Paul Finkelman, *The Necessity of the Voting Rights Act of 1965 and the Difficulty of Overcoming Almost a Century of Voting Discrimination*, 76 LA. L. REV. 181, 185 (2015) (arguing that although the Voting Rights Act of 1965 has improved political participation among the black population, "there are still large disparities between the actual population of African Americans in the South and the actual representation in southern legislatures and in Congress. In part, this is a result of residual white hostility to black political participation."); Anthony J. Gaughan, *Has the South Changed? Shelby County and the Expansion of the Voter ID Battlefield*, 19 TEX. J. ON C.L. & C.R. 109, 112 (2013) (expecting that *Shelby* will "retreat" historical achievements).

24. See Kevin R. Johnson, *The End of Civil Rights as We Know It: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1492–1510 (2002) (arguing immigration will introduce all kinds of new civil rights disputes).

25. Michael Selmi, *Understanding Discrimination in a Post-Racial World*, 32 CARDOZO L. REV. 833, 855 (2011) (providing a clear analysis of the steps necessary to reach an era in which racial discrimination is practically vanished from all important aspects of life).

the courageous path set out in *Brown v. Board of Education*,²⁶ and how can we avoid a revitalization of *Plessy v. Ferguson* in the future?²⁷ Put differently, how can we halt the “insidious and pervasive evil” that is racial discrimination?²⁸ These are fundamental questions in an era where, unfortunately, race is a decisive factor in the continuation of obvious disparities between groups of people.²⁹ We must keep our eyes open and remain alert to developments that jeopardize the equality many have fought for over recent decades.³⁰

Admittedly, we have few reasons to be pessimistic about the scholarly efforts that have highlighted “the stark reality that race matters” in relation to opportunities that help people improve their lives.³¹ Yet, we do have reason to be worried, in general, about the rise of intolerance toward newcomers and citizens with immigrant backgrounds or ethnic appearances. In particular, there is cause for

26. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding the Fourteenth Amendment prohibits racial discrimination at public schools); see also Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (suggesting the outcome in *Brown* was probably the home version of the freedom and equality message spread by the United States during the second world war).

27. *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896) (upholding the notion that separate but equal public education for different racial groups was not at odds with the Fourteenth Amendment and effectively allowing the continuation of racial segregation in public schools).

28. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (ruling on the constitutionality of the Voting Rights Act of 1965 and terming racial discrimination in the exercise of voting rights an “evil”).

29. *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting) (noting “the effects of centuries of law-sanctioned inequality remain painfully evident” in American society and referring to the presence of racial discrimination in the job market, education system, and health sector).

30. Richard R. W. Brooks, *The Banality of Racial Inequality*, 124 YALE L. J. 2626, 2662 (2015) (referring to Justice Sotomayor’s dissenting opinion in *Schuette* to note that race is still relevant because many people suffer from racial discrimination in their daily lives. To stop this unfortunate situation—Brooks again quotes Justice Sotomayor—we must apply the Constitution in a way that shows awareness of the long history of racial discrimination).

31. *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 38 (2014) (Sotomayor, J., dissenting); see also Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011) (providing an in-depth analysis of the shift in the equal protection jurisprudence, saying that the “end of traditional equality jurisprudence . . . should not be conflated with the end of protection for subordinated groups.”).

concern regarding the emergence and political advancement of Islamophobia.³² Nearly sixty years after Dr. King delivered his famous speech, we must again be concerned with the inaccessibility of the American Dream and the tragic re-emergence of a “system of racial caste.”³³ Our main concern should be halting the reinforcement of segregation that will inevitably increase fundamental disparities between groups of people. The best solution to this problem lies within the law and politics relating to immigration.³⁴

A brief analysis of modern immigration law reveals that many stereotypes have been used to justify restrictions with far-reaching consequences upon civil rights. The travel bans instituted by President Trump, popularly known as the “Muslim ban,”³⁵ are timely examples of regulations that rest strongly on anti-Muslim stereotypes and anti-immigration rhetoric.³⁶ Similarly, Oklahoma’s Save Our State

32. Cf. David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168, 210 (2018) (critically discussing some of President Trump’s major anti-immigration projects).

33. *Adarand Constructors v. Peña*, 515 U.S. 200, 273 (1995) (Ginsburg, J., dissenting); see also Frank S. Ravitch, *Creating Chaos in the Name of Consistency: Affirmative Action and the Odd Legacy of Adarand Constructors, Inc. v. Peña*, 101 DICK. L. REV. 281 (1997).

34. Cf. Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 CARDOZO L. REV. 619, 662 (2011) (acknowledging that “any challenge to the restrictions [of legal assistance to immigrants] must contend with the conflicting jurisprudence of immigrant rights”); Saby Ghoshray, *Is There a Human-Rights Dimension to Immigration? Seeking Clarity Through the Prism of Morality and Human Survival*, 84 DENV. U. L. REV. 1151, 1168 (2007) (analyzing the law, politics, and jurisprudence of immigration).

35. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter Exec. Order 13,769]; Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017) [hereinafter Exec. Order 13,780] (both orders are titled *Protecting the Nation from Foreign Terrorist Entry into the United States*); Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017), [hereinafter Proclamation 9645] (titled *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*).

36. Khaled A. Beydoun, *Muslim Bans and the (Re)Making of Political Islamophobia*, 2017 U. ILL. L. REV. 1733, 1735 (2017) (arguing the Muslim ban fits a long tradition of Islamophobia that has always been present in the American law and politics of immigration); Ved P. Nanda, *Migrants and Refugees Are Routinely Denied the Protection of International Human Rights: What Does the Future Hold?*, 45 DENV. J. INT’L L. & POL’Y 303, 315 (2017) (arguing the travel ban embodies the anti-immigration rhetoric of President Trump). Cf. Adrienne Rodriguez, *A Cry for*

Amendment prohibited courts from using Islamic Sharia law or international law, and therefore targeted immigrants with Islamic backgrounds in particular.³⁷ This initiative rested on the same anti-Muslim narratives and stereotypes as the recent travel bans.

What can we say about the contemporary tenor of politics surrounding immigration, immigrants, and non-white citizens generally? How shall we appraise, for example, an incident that took place not so long ago in Washington D.C.? A group of teenagers, equipped with “Make America Great Again” apparel, were caught in an altercation with Nathan Phillips, a Native American activist and Omaha tribe elder. Although Phillips was by no means an immigrant, the teenagers allegedly chanted “build the wall!”³⁸—a reference to President Trump’s plan to build a wall physically separating the United States from Mexico.³⁹

Change: The Fallacy of the American Dream for K-4 Children, 16 SEATTLE J. SOC. JUST. 399, 422 (2017) (suggesting the tougher attitude toward immigration may be due to the election of President Trump).

37. Yaser Ali, *Shariah and Citizenship—How Islamophobia is Creating a Second-Class Citizenry in America*, 100 CALIF. L. REV. 1027, 1065 (2012) (exploring the roots of Oklahoma’s Save Our State Amendment and arguing that this legal initiative fits the tendency of Islamophobia, which reinforces racism toward Arab Americans). For a discussion on the uselessness of anti-Sharia legislation, see generally Lee Ann Bambach, *Save us from Save Our State: Anti-Sharia Legislative Efforts Across the United States and Their Impact*, 13 J. ISLAMIC L. & CULTURE 72 (2011) (warning against the negative effects of anti-Sharia legislation upon businesses and arguing that State and Federal law provide sufficient remedies to deter human rights violations under Sharia law).

38. This is a contentious example due to the lack of video-recorded evidence showing the teenagers shouting “build the wall!” See David Williams & Emanuella Grinberg, *Teen in Confrontation with Native American Elder Says He Was Trying to Defuse the Situation*, CNN (Jan. 23, 2019), <https://edition.cnn.com/2019/01/19/us/teens-mock-native-elder-trnd/index.html>.

39. While referring to the Washington D.C. incident may be contentious, it is valuable for the argument this article will develop about the rise of using hostile rhetoric in politics to talk about immigration and people with immigrant backgrounds. In this respect, “Make America Great Again” is a clear sign of support for President Trump, who was elected after running a campaign full of anti-Islam and anti-immigration rhetoric. See Lindsay Pérez Huber, *Make America Great Again: Donald Trump, Racist Nativism and the Virulent Adherence to White Supremacy Amid U.S. Demographic Change*, 10 CHARLESTON L. REV. 215, 224 (2016).

How can we rationalize accusations of disloyalty against politicians with immigrant backgrounds?⁴⁰ Take, for example, Rashida Tlaib, who is among the first ever Muslims in Congress and one of only two Muslim women ever elected to the House of Representatives. She has been considered, by some, to be a potential danger because of her Islamic and Palestinian background. One Florida city commissioner went so far as to accuse Representative Tlaib “of being a ‘danger’ who might ‘blow up’ the U.S. Capitol.”⁴¹ Similar accusations have been raised against Republican Shahid Shafi, elected Southlake City Council member and vice chairman of the Tarrant County Republican Party in Texas. His Muslim background has been used to portray him as an unreliable person. In a special rally, the Tarrant Republicans asked the party, in vain, to remove Sahid Shafi from his political post. As a practicing Muslim, the Tarrant Republicans reasoned Shafi would not be able to represent the Party, since “not [all] Republicans . . . think Islam is safe or acceptable in the U.S., in Tarrant County, and in the [Republican Party].”⁴²

Does the language used today to talk about immigration and those with immigrant backgrounds or non-white appearances indicate that we have entered an entirely new era? No. Immigration has always been a

40. Most notably against former President Barack Obama, accused of secretly being a Muslim ruling the United States. See, e.g., Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism*, 53 ARIZ. L. REV. 827, 848 (2011) (discussing how President Obama was accused of being born outside the United States and harboring a hidden faith: Islam).

41. See Holly Rosenkrantz, *Florida Official Says U.S. Rep. Rashida Tlaib May “Blow Up” Capitol*, CBS NEWS (Jan. 24, 2019), <https://www.cbsnews.com/news/florida-official-says-rep-rashida-tlaib-may-blow-up-the-capitol/> (quoting Anabelle Lima-Taub, a Florida city commissioner, who referred to Rashida Tlaib as a “ Hamas-loving anti-Semite”). Similar accusations have been raised against Muslim representative Ilhan Omar. See Katie Mettler, *‘Just Deal,’ Muslim Lawmaker Ilhan Omar Says to Pastor Who Complained About Hijabs on House Floor*, WASH. POST (Dec. 7, 2018), https://www.washingtonpost.com/religion/2018/12/07/just-deal-muslim-lawmaker-ilhan-omar-says-pastor-who-complained-about-hijabs-house-floor/?utm_term=.cf94512b35c8 (quoting critics of allowing representatives to wear headscarves in the House of Representatives).

42. Adeel Hassan, *Texas Republicans Rally Behind Muslim Official as Some Try to Oust Him Over Religion*, N.Y. TIMES (Jan. 10, 2019), <https://www.nytimes.com/2019/01/10/us/muslim-republican-shahid-shafi-texas.html> (quoting Dorrie O’Brien).

subject of political debate in the United States.⁴³ Are the measures that target some religious groups for special bans and restrictions unique in their sort? Not really. In the past, some immigrants were expelled from the colonies by powerful settlers because of their “heretic” views. More generally, some colonies were “not open” to Baptists, Jews, and Quakers. And, until very recently, Catholics in the United States suffered from widespread feelings of animosity and prejudice dating back from the Irish migration wave during the nineteenth century.⁴⁴

Can we say that actual or propagated bans that single out the Islamic faith for special prohibitions and restrictions—such as those targeting Muslims *qua* Muslims—add an entirely new perspective to the debate about the law and politics of immigration in the United States? Even this is not the case. For decades, immigrants from predominantly Muslim nations, including non-Muslim immigrants such as Christians, were deprived the right to become full citizens of the United States.⁴⁵ In the years following the 2001 terrorist attacks, racial profiling, discrimination, and hatred have been major issues for those

43. Cf. Pooja R. Dadhania, *Deporting Undesirable Women*, 9 UC IRVINE L. REV. 53 (2018). See also Kevin R. Johnson, *Immigration and Civil Rights in the Trump Administration: Law and Policy Making by Executive Order*, 57 SANTA CLARA L. REV. 611, 613–14 (2017) (arguing that history contains many examples of anti-immigration policies); Amanda Frost, *Independence and Immigration*, 89 S. CAL. L. REV. 485 (2016) (analyzing immigration law from a historical perspective); David B. Oppenheimer, Swati Prakash & Rachel Burns, *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 BERKELEY LA RAZA L.J. 1, 6 (2016) (providing a historical overview of immigration policies); Jill E. Family, *The Future Relief of Immigration Law*, 9 DREXEL L. REV. 393, 395 (2017) (discussing the future of deportation law and noting that immigration has always been part of the political debate).

44. MARTHA C. NUSSBAUM, *THE NEW RELIGIOUS INTOLERANCE: OVERCOMING THE POLITICS OF FEAR IN AN ANXIOUS AGE* 7 (2012).

45. *Id.*; see also Beydoun, *supra* note 36, at 1735. Cf. Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U. ANN. SURV. AM. L. 29 (2013) (exploring the roots and meaning of “whiteness,” which was for a long period a requirement for a successful citizenship application, and pointing to the lack of scholarly attention on cases challenging this racial discrimination); Jonathan Weinberg, *Proving Identity*, 44 PEPP. L. REV. 731, 742 (2017) (arguing the Naturalization Act of 1790 made it practically impossible for a group of Chinese immigrants to become citizens of the United States); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1744–45 (1993) (arguing that “whiteness” is important because of the associated privileges that come with it).

with immigrant backgrounds in the United States.⁴⁶ This group includes not only Muslims, but others whose appearances are similar to adherents of the Islamic faith,⁴⁷ including those with headscarves or turbans, beards, non-Hispanic brown complexions, and Middle-Eastern postures.⁴⁸

Our brief analysis of the law and politics surrounding immigration reveals that neither the strong language used in connection with immigrants, nor the policies related to immigration, indicate that we have entered a new anti-immigration era. In both cases, stereotypes appear to be persistently present, governing the tone of the debate as well as the seriousness of the interventions designed to regulate immigration.⁴⁹ These persistent stereotypes have generated serious

46. Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 LAW & CONTEMP. PROBS. 215, 243 (2005) (“a 2002 report released by the FBI reveals 481 hate crimes against Arabs and Muslims in the year 2001, representing an increase of 1600 percent over the previous year”); see also Makau Mutua, *Terrorism and Human Rights: Power, Culture, and Subordination*, 8 BUFF. HUM. RTS. L. REV. 1, 1 (2002) (exploring the roots of the “War on Terrorism” and the notion of the “‘us-and-them’ dichotomy”); Shoba Sivaprasad Wadhia, *Is Immigration Law National Security Law*, 66 EMORY L.J. 669 (2017) (discussing how the national security agenda has shaped contemporary immigration policies); Sara Mahdavi, *Held Hostage: Identity Citizenship of Iranian Americans*, 11 TEX. J. ON C.L. & C.R. 211 (2006) (“In the aftermath of September 11, the federal government has revived the practice of profiling people who appear to be Muslim, Arab, or Middle Eastern . . .”); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 295–96 (2002) (critical of the post-9/11 security measures that were “‘pushing the envelope’ in restricting civil liberties in the name of national security”).

47. Romtin Parvaresh, *Prayer for Relief: Anti-Muslim Discrimination as Racial Discrimination*, 87 S. CAL. L. REV. 1287, 1313 (2014); Sahar F. Aziz, *Sticks and Stones, the Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y. CITY L. REV. 33, 42–43 (2009). See generally Vijay Sekhon, *The Civil Rights of “Others”: Antiterrorism, the Patriot Act, and Arab and South Asian American Rights in Post-9/11 American Society*, 8 TEX. F. ON C.L. & C.R. 117 (2003) (discussing how non-Muslims have suffered from racial profiling and hatred following the 9/11 terrorist attacks).

48. Khaled A. Beydoun, *Acting Muslim*, 53 HARV. C.R.-C.L. L. REV. 1, 4 (2018) (exploring the consequences of purposefully manifesting or hiding the Islamic faith in public).

49. Today, the explicit use of anti-immigration rhetoric has become common within the American political establishment. It has provoked the immigration debate and has shaped the contours of contemporary political discourse. The 2018 midterm elections showed a clear increase in Islamophobic rhetoric within political campaigns.

concern regarding undocumented immigrants, illegal border crossings, and national security threats. The latter concern is often used to justify the special need for radical measures in the fight against immigration—measures that range from building a separation wall between the United States and Mexico,⁵⁰ to issuing travel bans that deny citizens of some countries access to the United States.⁵¹

People with immigrant backgrounds often suffer harassment, hatred, and racial profiling as a consequence of this harsh political reality.⁵² Remaining silent in the face of this discrimination only advances the process of creating parallel societies with second-class citizens.⁵³ This interim conclusion exhorts us to be cautious. While the inaccessibility of the American Dream remains a larger issue, the re-emergence of Islamophobia is especially concerning. This article thus focuses on the challenges faced by the Muslim community today.

More generally, the 2016 election of President Trump resulted in a tougher attitude toward immigration and immigrants. This attitude has manifested itself in two ways. First, the language used to discuss immigration is generally aggressive in tone. Second, there is a proliferation of actual or propagated restrictions that aim to reduce immigration numbers. What is striking about both political developments is the abundant use of stereotypes. *See generally* Nanda, *supra* note 36.

50. *See* Nick Miroff & Josh Dawsey, *Trump Wants His Border Barrier to be Painted Black with Spikes. He Has Other Ideas, Too*, WASH. POST (May 16, 2019), https://www.washingtonpost.com/national/trump-wants-his-border-barrier-to-be-painted-black-with-spikes-he-has-other-ideas-too/2019/05/16/b088c07e-7676-11e9-b3f5-5673edf2d127_story.html. *See generally* Moria Paz, *Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls*, 34 BERKELEY J. INT'L L. 1 (2016) (providing a thought-provoking explanation for the rise of physical walls separating states).

51. Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 257 (2017) (describing how the Trump administration framed the travel ban for different purposes. To supporters of a stricter immigration policy, it was presented as the promised Muslim ban. In courts, however, it was defended as a necessary security measure). *Cf.* Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 256–77 (2018) (arguing that many of the immigration policies today continue the line that was set out by preceding administrations).

52. *Cf.* Lawrence J. Trautman, *Presidential Impeachment: A Contemporary Analysis*, 44 U. DAYTON L. REV. 529, 564 (2019) (listing examples of racism and discrimination involving the Trump administration).

53. Ali, *supra* note 37, at 1031, 1067 (arguing that “growing anxiety and antagonism toward Islam and Muslims—Islamophobia—as exhibited by the Oklahoma law is creating a distinct second-class citizenry.”).

Specifically, this article explores how the contemporary anti-immigration climate—particularly the increased focus on border protection—has impacted the Muslim community.

Part I of this article focuses on recent public decisions burdening Muslims, such as the travel bans implemented by President Trump, and analyzes the legality of those policies. Part II looks critically at how particular steps taken in the public and private fields have contributed to the racialization of Muslims.⁵⁴ This Part explores the stereotypes and conspiracy theories developed to gain political support for far reaching anti-immigration policies. Not only do these policies aim to limit opportunities for legal immigration to the United States, they specifically target people with immigrant backgrounds, such as the Muslim community.⁵⁵ In Part III, the article draws upon this theoretical framework to introduce a strategy to overcome this era of fear, anxiety, and intolerance toward newcomers and those with immigrant backgrounds. This article concludes that the racialization of people with immigrant backgrounds contributes to the creation of parallel societies. This development, in turn, negatively affects equal access to fundamental liberties. Consequently, not everyone has an equal ability to flourish in life and to achieve the promises of the Declaration of Independence that made the American Dream possible. A final reflection about the tendency of singling out certain groups for special prohibitions follows in the epilogue of this article.

I. PROTECT OUR NATION FROM MUSLIMS

In what has been considered Donald Trump’s “most infamous anti-Muslim screed,” he called for “a total and complete shutdown of Muslims entering the United States.”⁵⁶ This dramatic call came just days after the 2015 terrorist attack in San Bernardino. At the time,

54. Nagwa Ibrahim, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. ISLAMIC & NEAR E. L. 121, 142 (2008) (positing that “racialization of Muslims” has resulted in “a new zone of lawlessness where [Muslims] are neither citizen nor alien, but rather [adherents of the] inherently evil world called ‘Islam.’”).

55. Cf. MUSLIM ADVOCATES, *RUNNING ON HATE* (2019) (surveying the prevalence of anti-Muslim rhetoric in the context of the 2018 midterm elections).

56. Gregory Krieg, *Trump’s History of Anti-Muslim Rhetoric Hits Dangerous New Low*, CNN (Nov. 30, 2017), <https://edition.cnn.com/2017/11/29/politics/donald-trump-muslim-attacks/index.html> (quoting President Trump advocating for a Muslim ban until the authorities “figure out what the hell is going on.”).

Donald Trump was a frontrunner in the Republican Party's primaries for the 2016 presidential elections. In a sense, his call for singling out Muslims for a special entry ban did not come as a surprise.⁵⁷ This was not Donald Trump's first anti-Muslim plan. Prior to these statements, Donald Trump had shown a strong aversion to granting asylum to refugees coming from Syria, comparing them to the "Trojan horse."⁵⁸ He also suggested closing mosques, colorfully describing them as places where "some of the hatred—the absolute hatred—is coming from."⁵⁹ Thus, the calls to introduce an entry ban singling out Muslims fit a longer tradition of proposals targeting both Muslims and their religion for special restrictions and prohibitions.⁶⁰ However, this call to stop Muslims coming to the United States was something more than putting out an anti-immigration feeler—it set the tone for a new, anti-Muslim rhetoric.⁶¹

The call to stop Muslims from entering the United States soon proved to be more than political rhetoric. In 2016, newly-elected President Trump delivered on his campaign rhetoric. Upon taking office, he issued two Executive Orders and one Proclamation, predominantly targeting travelers from Muslim-majority countries.⁶²

57. Cf. Vienna Flores, *Competing Paradigms of Immigrant Human Rights in America*, 21 LAW & BUS. REV. AM. 459, 466 (2015).

58. Jenna Johnson & Abigail Hauslohner, 'I Think Islam Hates Us': A Timeline of Trump's Comments About Islam and Muslims, WASH. POST (May 20, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/?noredirect=on&utm_term=.418b059fabaa (providing an overview of anti-Muslim statements made by President Trump).

59. *Id.*

60. Cf. Pérez Huber, *supra* note 39, at 225 (on Trump's attitude toward the Latino community).

61. See, e.g., Johnson & Hauslohner, *supra* note 58 (quoting Trump saying: "I think Islam hates us."). See generally Khaled A. Beydoun, *9/11 and 11/9: The Law, Lives and Lies that Bind*, 20 CUNY L. REV. 455 (2017) (discussing President Trump's anti-Muslim agenda).

62. Matthew J. Lindsay, *The Perpetual Invasion: Past as Prologue in Constitutional Immigration Law*, 23 ROGER WILLIAMS U. L. REV. 369, 389 (2018) (pointing out President Trump's anti-Muslim rhetoric during the presidential campaign was something more than a slip of the tongue).

The “Muslim Ban” became a reality,⁶³ throwing the United States back to a dark era of racial discrimination.⁶⁴ This Part analyzes the history of the travel bans and the various case law addressing the lawfulness of these restrictions.

A. *Executive Order 13,769*

Despite harsh criticism from lawyers, political leaders, and commentators, the newly elected President introduced Executive Order 13,769, popularly known as the “Muslim Ban,” just days after the presidential election.⁶⁵ By signing this order, titled *Protecting the Nation from Foreign Terrorist Entry into the United States*, the President paved the way for the realization of one of his major election pledges: enacting a travel ban for Muslims.⁶⁶ After all, Donald Trump’s election campaign was highly dedicated to border protection and national security issues, focusing specifically on who enters the country and how to stop those “invaders.”⁶⁷

63. *Id.* For an extensive overview of travel restrictions targeting Muslims, see Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475 (2018).

64. Julia G. Young, *Making America 1920 again? Nativism and US Immigration, Past and Present*, 5 J. ON MIGRATION & HUM. SEC. 217 (2017) (comparing the anti-immigration era of 1920 to the present day and concluding there are many similarities between the two eras of nativism).

65. Lindsay, *supra* note 62; see also Jennifer Lee Barrow, *Trump’s Travel Ban: Lawful but Ill-Advised*, 41 HARV. J. L. & PUB. POL’Y 691 (2018) (arguing that border and admission questions fall under the authority of the president, making Executive Order 13,769 lawful); Michael B. Mukasey, *Judicial Independence: The Fortress Threatened from Within*, 47 U. MEM. L. REV. 1223, 1232 (2017) (defending the ban as a matter of national security).

66. Exec. Order 13,769, *supra* note 35, at 8977; see also Harold A. Lloyd, *Speaker Meaning and the Interpretation and Construction of Executive Orders*, 8 WAKE FOREST J. L. & POL’Y 319, 332 (2018) (analyzing Trump’s anti-Muslim rhetoric and its contribution to the enacted travel restrictions).

67. Cf. Stuart Chinn, *Threats to Democratic Stability: Comparing the Elections of 2016 and 1860*, 77 MD. L. REV. 291, 293 (2017) (noting that immigrants, Muslims, and Muslim-Americans were “central parts” of President Trump’s presidential campaign); A. Reid Monroe-Sheridan, *Frankly Unthinkable: The Constitutional Failings of President Trump’s Proposed Muslim Registry*, 70 ME. L. REV. 1 (2017) (discussing the constitutionality of President Trump’s proposed “Muslim registry”).

Executive Order 13,769 aimed to protect the United States against foreign terrorism, drawing on experiences from the 9/11 attacks. The main purposes of this order were to fill an important security gap and eliminate opportunities for foreign nationals to commit acts of terrorism within the United States.⁶⁸ The Order urged authorities to approach foreign nationals' travel requests with stricter scrutiny.⁶⁹ The main argument behind this tougher attitude toward immigration and border protection was that:

[the] United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law. In addition, the United States should not admit those who engage in acts of bigotry or hatred (including "honor" killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.⁷⁰

Upon first read, Executive Order 13,769 singled out troublemakers for special travel restrictions. But more specifically, this order suspended—categorically—the issuance of travel visas and other "immigration benefits" to nationals of "countries of particular concern."⁷¹ Although not all explicitly mentioned in the text, these countries of particular concern included Syria, Iraq, Iran, Libya, Somalia, Sudan, and Yemen. This was evident from the decision to revoke all issued and valid visas—except diplomatic visas—to nationals from these seven countries.⁷²

The issued travel restrictions targeted people from Muslim-majority countries in particular. Put differently, Executive Order 13,769 *predominantly* singled out Muslims for a special prohibition:

68. Exec. Order 13,769, *supra* note 35, at 8977 (in Section 1, the Order explains that "while the visa-issuance process was reviewed and amended after the September 11 attacks to better detect would-be terrorists from receiving visas, these measures did not stop attacks by foreign nationals who were admitted to the United States.").

69. *Id.*

70. *Id.*

71. *Id.* at 8979 (only mentioning Syria by name for purposes of halting the entry of refugees).

72. *Tootkaboni v. Trump*, No. 17-CV-10154, 2017 U.S. Dist. LEXIS 14241, at *5 (D. Mass. Jan. 29, 2017).

travel to the United States.⁷³ The restrictions consisted of a general ban on traveling to the United States for a period of 90 days. Additionally, the order urged the Secretary of State to halt the admission of refugees—regardless of their origin—for a period of 120 days, and to suspend the entry of Syrian refugees indefinitely, claiming the presence of pressing security needs.⁷⁴

However, Executive Order 13,769 did allow the Secretaries of State and Homeland Security “to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the admission of such individuals as refugees is in the national interest. . . .”⁷⁵ In this respect, the ban urged authorities to expedite refugee applications from persecuted members of religious minority groups who would not pose security or welfare risks upon their arrival into the United States.⁷⁶ Despite the presence of this tiny exit door, scholars still criticized the ban for its vagueness, arbitrariness, and willingness to stigmatize, drawing on strong anti-Muslim stereotypes, such as honor killings and other forms of gender-related violence.⁷⁷

73. Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2192 (2018); Josh Blackman, *The Legal Resistance*, 9 FAULKNER L. REV. 45, 56 (2017); Latoya Tyson, *A Wolf in Sheep’s Clothing: Executive Order No. 13,780 as a Disguise for a Muslim Ban: The Implications of International Refugee Assistance Project v. Trump*, 40 N.C. CENT. L. REV. 140, 141, 147 (2017) (all arguing Executive Order 13,769 was designed to stop Muslims from visiting the United States).

74. Exec. Order 13,769, *supra* note 35, at 8979 (arguing that the entry of Syrian refugees could harm national interests).

75. *Id.*

76. *Id.* (stating people in transfer could also be exempted). For a critique of the choice to favor religious minority groups, see Barrow, *supra* note 65, at 694, 715 (noting that “giving preference to individual refugees on the condition that the ‘religion of the individual is a minority religion in the individual’s country of nationality’ is a poor policy choice, reflecting an oversimplification of and common misconception of religious persecution.”).

77. Kate Aschenbrenner Rodriguez, *Eroding Immigration Exceptionalism: Administrative Law in the Supreme Court’s Immigration Jurisprudence*, 86 U. CIN. L. REV. 215, 217 (2018) (criticizing Executive Order 13,769 as “vague”); Kaila C. Randolph, *Executive Order 13,769 and America’s Longstanding Practice of Institutionalized Racial Discrimination Towards Refugees and Asylum Seekers*, 47 STETSON L. REV. 1, 35 (2017); Melissa Brooke Winkler, *Executive Order “Protecting the Nation from Foreign Terrorist Entry into the United States”: Violating First Amendment Rights or Altering Constitutional Provisions Granting Foreign Policy Powers to the President?*, 34 T. M. COOLEY L. REV. 79, 83 (2017) (critics questioned why countries that have supported terrorism, such as Saudi Arabia, were not on the

Executive Order 13,769 caused a wave of public indignation and worldwide condemnation after media reports leaked footage of dozens of stuck and detained travelers.⁷⁸ The enacted travel restriction further provoked heated debate among legal scholars and immigration attorneys. This debate was specifically geared toward claims of First Amendment violations,⁷⁹ given the specific political context in which the travel restrictions were realized,⁸⁰ and the clear presence of favoritism toward religious minority groups.⁸¹

It did not take long before this travel restriction was challenged in court. In fact, the litigation journey started just hours after the announcement of the restrictions. On January 28, 2017, in *Darweesh v. Trump*, District Judge Ann Donnelly ordered a temporary injunction

list of countries affected by Executive Order 13,769); Sahar F. Aziz, *A Muslim Registry: The Precursor to Internment?*, 2017 B.Y.U.L. REV. 779, 825 (2017); Eunice Lee, *Non-Discrimination in Refugee and Asylum Law (Against Travel Ban 1.0 and 2.0)*, 31 GEO. IMMIGR. L.J. 459, 464 (2017) (both positing that the aim to keep honor killers outside the United States is an obvious reference to Muslims).

78. Enid Trucios-Haynes & Marianna Michael, *Mobilizing a Community: The Effect of President Trump's Executive Orders on the Country's Interior*, 22 LEWIS & CLARK L. REV. 577, 590–95 (2018) (noting the role both media and attorneys played in challenging the lawfulness of Executive Order 13,769, specifically drawing attention to the allegedly unlawful detention of travelers coming from the banned countries). For a discussion on the importance of media in another context, see Mimi A. Akel, *The Good, the Bad, and the Evils of the #MeToo Movement's Sexual Harassment Allegations in Today's Society: A Cautionary Tale Regarding the Cost of These Claims to the Victims, the Accused, and Beyond*, 49 CAL. W. INT'L L.J. 103, 106 (2018).

79. Earl M. Maltz, *The Constitution and the Trump Travel Ban*, 22 LEWIS & CLARK L. REV. 391, 396–407 (2018) (critically discussing the First Amendment argument). Cf. Gary Feinerman, *Civility, Dignity, Respect, and Virtue*, 71 STAN. L. REV. ONLINE 140, 144 (2018) (briefly highlighting the Establishment Clause argument).

80. For a discussion of the importance of the broader political context for determining the lawfulness of the imposed travel restrictions, see John G. Roberts, Jr. et al., *In Tribute: Justice Anthony M. Kennedy*, 132 HARV. L. REV. 1, 20 (2018) (referring to the travel ban controversy and rhetorically asking “what if (some) words are part of the problem?”). Cf. Anton Sorkin, *Make Law, Not War: Solving the Faith/Equality Crisis*, 12 LIBERTY U. L. REV. 663, 723 (2018) (briefly discussing the concept of using “extrinsic” evidence to help prove the main objective behind certain actions and suggesting this approach was used in the context of President Trump's travel bans).

81. Keith A. Petty, *Duty and Disobedience: The Conflict of Conscience and Compliance in the Trump Era*, 45 PEPP. L. REV. 55, 79 (2018).

halting the removal of passengers with valid travel documents who were affected by the imposed travel restriction.⁸²

On the same day, in *Aziz v. Trump*, District Judge Leonie Brinkema from Virginia granted a Temporary Restraining Order (“TRO”), ordering authorities to provide lawyers access to affected travelers at Dulles International Airport who were in possession of valid entry documents, such as green cards. Judge Brinkema further enjoined authorities from removing those passengers.⁸³

In another TRO granted one day after *Darweesh* and *Aziz*, District Judge Allison Burroughs of Massachusetts also enjoined authorities from removing affected passengers in possession of lawful travel documents and who, “absent the Executive Order, would be legally authorized to enter the United States.”⁸⁴ This TRO also ordered authorities “to notify airlines that have flights arriving at Logan Airport of this Order and the fact that individuals on these flights [cannot] be detained or returned based solely on the basis of the Executive Order.”⁸⁵

82. *Darweesh v. Trump*, No. 17 Civ. 480 (AMD), 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017) (two Iraqi men, Mr. Darweesh and Mr. Alshawi, were on their way to the United States with valid travel visas. However, both were banned from entering the country and put in detention because of the travel restrictions) (case information, available at <https://www.aclu.org/cases/darweesh-v-trump> (last visited Feb. 15, 2019)); see also Matthew R. Segal, *Civil Rights and State Courts in the Trump Era*, 12 HARV. L. & POL’Y REV. 49, 58 (2018) (“Federal litigation aimed at President Trump’s immigration crackdown has been important and, at times, wildly successful”); Spencer E. Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 49 (2017) (briefly referencing the injunction issued in *Darweesh*); Carson Holloway, *Judicial Review and Subjective Intentions*, 9 FAULKNER L. REV. 1, 1 (2017) (referencing *Darweesh* and noting that “those pressing this claim [against the travel restrictions] found a sympathetic ear in some corners of the federal judiciary”).

83. *Aziz v. Trump*, No. 1:17-cv-116, 2017 WL 386549, at *1 (E.D. Va. Jan. 28, 2017).

84. *Tootkaboni v. Trump*, No. 17-CV-10154, 2017 WL 386550, at *1 (D. Mass. Jan. 29, 2017) (motion for extension of TRO declined in *Louhghalam v. Trump*, 230 F. Supp. 3d 26 (D. Mass. 2017)).

85. *Id.*; see also Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1099 (2018) (pointing to the geographical limitedness of the TRO in *Tootkaboni*, and the confusion it has caused regarding the question of who is allowed to enter the country).

Although none of these temporary orders explicitly required authorities to provide entry to affected travelers,⁸⁶ the Trump administration sharply criticized these legal decisions⁸⁷ and reiterated that it would continue enforcing the travel restrictions “humanely and with professionalism . . . to protect the homeland.”⁸⁸ The criticism, however, did not come only from the Trump administration. Legal scholars also expressed criticism of the way the judges blocked enforcement of the Executive order.⁸⁹ Specifically, the critics were concerned about the issuance of nationwide injunctions enjoining authorities from enforcing the travel restrictions.⁹⁰ Critics questioned the constitutionality of issuing geographically unlimited restraining orders, or nationwide injunctions.⁹¹ This criticism arose specifically in the aftermath of the court’s decision—first granting a nationwide TRO and later denying the stay thereof, pending an emergency appeal—in *Washington v. Trump*, where the state of Washington, later joined by

86. An exception to this: *Mohammed v. Trump*, No. CV 17-00786 AB, 2017 WL 438750, at *1–2 (C.D. Cal. Jan. 31, 2017) (enjoining the authorities from “blocking the entry” of anyone traveling on a valid visa, though affected by the travel restrictions).

87. Rebecca Buckwalter-Poza, *New Sheriff, Old Problems: Advancing Access to Justice Under the Trump Administration*, 127 YALE L.J. F. 254, 267 (2017).

88. U.S. Dep’t of Homeland Sec., *DHS Statement on Compliance with Court Orders and the President’s Executive Order* (Jan. 29, 2017) (transcript available at <https://www.dhs.gov/news/2017/01/29/dhs-statement-compliance-Court-orders-and-presidents-executive-order>).

89. Frost, *supra* note 85, at 1068 (referring to the criticism that federal courts lack authority to impose nation-wide injunctions). For examples of such criticism, see generally Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017).

90. Frost, *supra* note 85, at 1072, 1090 (advocating in favor of nationwide injunctions in three circumstances: (i) if it is the only way for complete relief; (ii) if it avoids irreparable injury; and (iii) if geographically curtailed injunctions would end in chaos).

91. Josh Blackman, *The 9th Circuit’s Contrived Comedy of Errors in Washington v. Trump*, 95 TEX. L. REV. SEE ALSO 18, 21–22 (2017); see also Matthew Erickson, *Who, What, and Where: A Case for a Multifactor Balancing Test as a Solution to Abuse of Nationwide Injunctions*, 113 NW. U. L. REV. 331, 352 (2018) (advocating for a balancing test to assess the necessity of nationwide injunctions).

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Minnesota, challenged the lawfulness of the enacted travel restrictions.⁹²

While both the district court and the court of appeals appeared to sympathize with the states' view that the travel restrictions had negatively affected them, neither court thoroughly engaged with allegations that the travel restrictions were designed to ban Muslims from entering the United States. This was likely due to the highly "sensitive interests" involved in the litigation and the relatively limited task of the court.⁹³ Particularly relevant here is the courts' discussion of separation of powers and the judiciary's role to review immigration policies. District Judge James Robart admitted he lacked authority

to create policy or judge the wisdom of any particular policy promoted by the other two branches. That is the work of the legislative and executive branches and of the citizens of this country who ultimately exercise democratic control over those branches. The role of the Judiciary and this Court, is limited to ensuring that the actions taken by the other two branches comport with our country's laws, and more importantly, our Constitution.⁹⁴

On appeal, the Ninth Circuit continued this discussion on separation of powers. While assessing the emergency motion of the Federal Government to stay the TRO, pending an emergency appeal, the court reasoned that

[although] our jurisprudence has long counseled deference to the political branches on matters of immigration and national security, neither the Supreme Court nor our Court has ever held that Courts lack the authority to review executive action in those arenas for compliance with the Constitution. To the contrary, the Supreme Court has repeatedly and explicitly rejected the notion that the political branches have unreviewable authority over immigration or

92. *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *1 (W.D. Wash. Feb. 3, 2017) (granting a nationwide TRO), *aff'd*, 847 F.3d 1151 (9th Cir. 2017) (denying a stay of the granted TRO).

93. *Cf. id.*

94. *Id.*

are not subject to the Constitution when policymaking in that context.⁹⁵

This precedential backdrop led the Ninth Circuit to the conclusion that it had the authority to review the lawfulness of executive actions.⁹⁶ In ruling on the emergency motion to stay the TRO, the court employed a four-part test:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.⁹⁷

The Ninth Circuit concluded—preliminarily—that the Government failed to meet its burden regarding the first two elements.⁹⁸ The court further noted that the last two elements of the test also did not weigh in

95. *Washington v. Trump*, 847 F.3d 1151, 1162 (9th Cir. 2017) (also refusing—with reference to *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) *aff'd sub nom* *United States v. Texas*, 136 S. Ct. 2271—any geographical limit of the TRO, because “such a fragmented immigration policy would run afoul of the constitutional and statutory requirement for uniform immigration law and policy.”).

96. *Id.* at 1164 (positing that “although Courts owe considerable deference to the President’s policy determinations with respect to immigration and national security, it is beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action.”); *see also* Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 *YALE J. ON REG.* 549, 572 (2018) (arguing that compared to the district court’s discussion of the separation of powers argument, the Ninth Circuit’s discussion of this argument was less political in nature, rather it was based “(facially) on more technical statutory interpretation.”).

97. *Washington v. Trump*, 847 F.3d at 1164 (quoting *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) and noting that the first two questions are in fact leading, while the last two steps matter only after the first two questions have been answered).

98. *Id.* (concluding that authorities had failed to prove the enacted regime of travel restrictions “provides what due process requires, such as notice and a hearing prior to restricting an individual’s ability to travel. . . . Rather, . . . the Government argues that most or all of the individuals affected have no rights under the Due Process Clause” and that the authorities had failed to prove that the absence of a stay would cause irreparable injury).

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favor of the Government.⁹⁹ Ultimately, the Ninth Circuit denied the stay.¹⁰⁰

In response to this decision, President Trump quickly took to Twitter, writing: “SEE YOU IN COURT, THE SECURITY OF OUR NATION IS AT STAKE!”¹⁰¹ The President’s challenge to go to court soon became a reality. Although the nationwide injunction had survived the first round of litigation, opponents of the travel restrictions continued to challenge the Executive order. The growing body of court rulings against the newly-enacted travel restrictions gave rise to a new category of arguments, challenging the legality of the restrictions based on religious discrimination, and specifically anti-Muslim discrimination.¹⁰² But courts showed reservation about accepting such claims.¹⁰³

However, in granting the preliminary injunction in *Aziz v. Trump* and enjoining authorities from enforcing a key section of Executive Order 13,769, the court noted the ambiguity of the Trump administration’s reasoning for the travel restriction.¹⁰⁴ Inside the

99. *Id.* at 1168–69 (“the States [of Washington and Minnesota] have offered ample evidence that if the Executive Order were reinstated even temporarily, it would substantially injure [them]” and concluding that both parties can draw on public interest arguments).

100. *Id.* at 1169; *see also* S. Cagle Juhan & Greg Rustico, *Jurisdiction and Judicial Self-Defense*, 165 U. PA. L. REV. ONLINE 123, 135 (2017) (defending the Ninth Circuit’s anonymously written decision: “anonymity frames the debate in institutional terms.”).

101. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 9, 2017, 3:35 PM), <https://twitter.com/realdonaldtrump/status/829836231802515457>.

102. Admittedly, allegations suggesting the enacted travel restrictions incarnate the promised Muslim ban were raised previously. *See, e.g.*, *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017) (saying the states have provided evidence related to the anti-Muslim character of the enacted travel restrictions).

103. For a denial of the Establishment Clause arguments in relation to the imposed travel restrictions, *see Louhghalam v. Trump*, 230 F. Supp. 3d 26, 35 (D. Mass. 2017) (“[The argument] that [Executive Order 13,769] favors Muslims over Christians, in violation of the Establishment Clause [is flawed] . . . Nothing [in the text of the Executive Order] compels a finding that Christians are preferred to any other group.”).

104. *See Aziz v. Trump*, 234 F. Supp. 3d 724, 739 (E.D. Va. 2017) (enjoining the authorities from enforcing § 3(c) of Executive Order 13,769, and specifying the targeted groups); *see also* Josh Blackman, *The Domestic Establishment Clause*, 23 ROGER WILLIAMS U. L. REV. 345, 346 (2018) (critical of accepting the Establishment

courtroom, the administration defended the restriction on neutral grounds, presenting it as a necessary security measure. But outside the court, the restriction was defended as a necessary means to address the “Muslim problem.”¹⁰⁵ In discussing this ambiguity, the district court stated:

The Establishment Clause concerns . . . do not involve an assessment of the merits of the president’s national security judgment. Instead, the question is whether the [executive order] was animated by national security concerns at all, as opposed to the impermissible motive of, in the context of entry, disfavoring one religious group and, in the area of refugees, favoring another religious group.¹⁰⁶

The court further noted a “conceptual link between [the promised] Muslim ban and the [imposed travel restrictions].”¹⁰⁷ Referencing Rudy Giuliani’s comments about the rationale behind the travel restriction,¹⁰⁸ the court concluded that the imposed restriction was not designed to meet a pressing security need.¹⁰⁹ More importantly, the court enervated the argument that authorities would become powerless if the imposed travel restriction was to be interpreted as a Muslim ban. The court qualified this fear as “exaggerated” and found the “the dearth of evidence indicating a national security purpose” persuasive.¹¹⁰ The serious engagement of the court with this argument against the travel

Clause arguments in immigration law cases, positing that such arguments have “no place in the realm of foreign affairs and national security.”).

105. *See Aziz*, 234 F. Supp. 3d at 730 (discussing President Trump’s relationship with the enacted travel restrictions, before and after assuming office). *See generally* Chacón, *supra* note 51, at 257 (arguing the enacted travel restriction regime was defended differently for various uses: “to supporters, it was the promised Muslim ban, but to Courts, it was not.”).

106. *Aziz*, 234 F. Supp. 3d at 735–36.

107. *Id.* at 737 (noting the “discriminatory purpose” of the action is what matters for purposes of Establishment Clause analysis).

108. *Id.* at 736 (Giuliani had linked the imposed restrictions to the promised Muslim ban).

109. *Id.* (saying that the context in which the travel restrictions were designed “bolsters the . . . argument that the [choice to enact those travel restrictions] was not motivated by rational national security concerns.”).

110. *Id.* at 737.

restriction makes *Aziz* an exceptional case.¹¹¹ Perhaps even more importantly, *Aziz* is the first ruling in which the court explicitly hinted to the unconstitutional nature of the travel restriction, concluding “enjoining unconstitutional action by the Executive Branch is always in the public’s interest.”¹¹²

While litigation continued in the aftermath of *Aziz* and *Washington v. Trump*,¹¹³ the Trump administration announced it would issue a new round of travel restrictions more “tailored to [the] very bad decision” of the Ninth Circuit.¹¹⁴ On March 6, 2017, almost six weeks after the announcement of the first Executive order, the administration revoked Executive Order 13,769 and issued Executive Order 13,780, also titled *Protecting the Nation from Foreign Terrorist Entry into the United*

111. Admittedly, arguments addressing the legality of the enacted travel restriction from the angle of non-Establishment were discussed previously in *Louhghalam v. Trump*, 230 F. Supp. 3d 26, 35 (D. Mass. 2017) (rejecting the argument that the imposed travel restrictions violate the guarantees under the Establishment Clause, reasoning that the language used in Executive Order 13,769 is neutral and does not favor one religious group over another).

112. *Aziz*, 234 F. Supp. 3d at 739. Cf. Beatrice Catherine Franklin, *Irreparability, I Presume: On Assuming Irreparable Harm for Constitutional Violations in Preliminary Injunctions*, 45 COLUM. HUM. RTS. L. REV. 623, 665 (2014) (jurisprudential support in favor of the *Aziz* court’s position).

113. Not all litigation concerned the constitutionality of the imposed travel restrictions or sought to enjoin authorities from the enforcement of the newly enacted restrictions. However, the cases related *in some way* to the broader legal debate surrounding the restrictions. See, e.g., *Decker v. Washington*, No. 3:17-CV-00254, 2017 WL 891318, at *1 (M.D. Pa. Feb. 14, 2017) (asking the court to overturn the Ninth Circuit’s denial of stay decision); *McDonnell v. City & Cty. of Denver*, 238 F. Supp. 3d 1279 (D. Colo. 2017) (on the lawfulness of the authorities’ decision to prevent an anti-travel ban demonstration); *Taiebat v. Scialabba*, No. 17-cv-0805-PJH, 2017 WL 839807 (N.D. Cal. Mar. 3, 2017) (aimed at changing man’s legal status as non-immigrant working and living in the United States, as he was afraid of not being allowed to re-enter the country as an Iranian citizen). For a ruling brought before the court by the challengers of the travel restriction, see *International Refugee Assistance Project v. Trump*, No. TDC-17-0361, 2017 WL 818255 (D. Md. Mar. 1, 2017) (granting a motion to proceed under pseudonyms).

114. Laura Jarrett, Allie Malloy & Dan Merica, *Trump Promises New Immigration Order as DOJ Holds Off Appeals Court*, CNN (Feb. 17, 2017), <https://edition.cnn.com/2017/02/16/politics/donald-trump-travel-ban-executive-order/>.

States. The pending appeal in the Ninth Circuit was voluntarily dismissed.¹¹⁵

B. Executive Order 13,780

In many ways, the new version of *Protecting the Nation from Foreign Terrorist Entry into the United States* was similar to its predecessor, Executive Order 13,769.¹¹⁶ Executive Order 13,780 retained the fixed period entry ban for nationals of six predominantly Muslim countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen, claiming their admission “would be detrimental to the interests of the United States.”¹¹⁷ Additionally, the fixed period suspension of admitting refugees under the U.S. Refugee Admissions Program remained unhurt.¹¹⁸ The same is true for the reference to potential foreign troublemakers, such as honor killers.¹¹⁹

However, this new travel restriction also contained important differences from the previous order.¹²⁰ Iraq was removed from the list of countries affected by the travel restrictions,¹²¹ and the choice to keep the other countries on the list was explicitly justified.¹²² Additionally, the new order provided guidance for dealing with those nationals who

115. Nanda, *supra* note 36, at 318; *see also* Washington v. Trump, 858 F.3d 1168, 1183 (9th Cir. 2017) (Bybee, J., dissenting from the majority’s opinion not to rehear the case en banc and saying “[even] if we have questions about the basis for the President’s ultimate findings—whether it was a ‘Muslim ban’ or something else—we do not get to peek behind the curtain. So long as there is *one* ‘facially legitimate and bona fide’ reason for the President’s actions, our inquiry is at an end”).

116. *See* Barrow, *supra* note 65, at 692–94 (describing the similarities and differences between the two Executive Orders).

117. Exec. Order 13,780, *supra* note 35, at 13213.

118. *Id.* at 13215 (the case-by-case decision to admit some refugees in spite of the enacted travel restrictions also remained intact).

119. *Id.* at 13217 (urging authorities to inform the President about “the number and types of acts of gender-based violence against women, including so-called ‘honor killings,’ in the United States by foreign nationals.”).

120. *See* Barrow, *supra* note 65, at 693.

121. Exec. Order 13,780, *supra* note 35, at 13212 (“[T]he close cooperative relationship between the United States and the democratically elected Iraqi government, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq’s commitment to combat ISIS justify different treatment for Iraq.”).

122. *Id.* at 13210–11.

had been affected by the travel restrictions but possessed valid travel documents.¹²³

More importantly, Executive Order 13,780 was Trump's response to the litigation surrounding revoked Executive Order 13,769 in general,¹²⁴ and in particular to the panel's opinion denying the government's motion to stay the TRO.¹²⁵ Consequently, the new order gave the President room to waive aside allegations of a discriminatory rationale behind the former version. President Trump defended the revoked version, saying:

Executive Order 13769 did not provide a basis for discriminating for or against members of any particular religion. While that order allowed for prioritization of refugee claims from members of persecuted religious minority groups, that priority applied to refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion. That order was not motivated by animus toward any religion, but was instead intended to protect the ability of religious minorities.¹²⁶

The President also showed serious disagreement with the Ninth Circuit's denial of the motion to stay. While the court agreed the executive branch is in a better position to make decisions concerning the admission policy, it—in spite of this important acknowledgement—“declined to stay or narrow [the granted TRO] pending the outcome of further judicial proceedings.”¹²⁷ However, the “better position” argument led the President to design a new travel ban,¹²⁸ which

123. *Id.* at 13213–14 (for example, excepting green card holders; people with valid travel visas; and affected nationals with dual citizenship, so long as the travel documents are not issued by one of the affected countries).

124. *Id.* at 13210 (speaking of a “delay” in the implementation of the travel restrictions due to litigation).

125. *Id.*

126. *Id.*

127. *Id.*; *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017) (admitting the lack of authority “to . . . rewrite the Executive Order” since the executive branch is “far better equipped to make appropriate distinctions”).

128. Robert S. Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183, 1189 (2018) (noting racial discrimination jurisprudence is “the strongest precedential authority for President Trump’s executive actions” to enact travel restrictions against Muslims).

“expressly exclude[d] from the suspensions categories of aliens that have prompted judicial concerns and which clarifie[d] or refine[d] the approach to certain other issues or categories of affected aliens.”¹²⁹

These new justifications, explanations, and exemptions did not guarantee the full enforcement of the new travel restrictions. Rather, a new series of litigation began.¹³⁰ And again, the challengers to President Trump won important victories in the courtroom.¹³¹ The first nationwide TRO blocking implementation of the new travel restrictions was issued on March 15, 2017. In an opinion similar to *Aziz*, the district court of Hawaii enjoined authorities from enforcing Sections 2¹³² and 6 of the new Executive order,¹³³ one day before the new restrictions came into effect.¹³⁴

In issuing the injunction, the court discussed the allegations of Muslim discrimination behind the travel restrictions. Unlike the decision in *Louhghalam*, which found the language in the Executive order neutral to religion,¹³⁵ the district court of Hawaii concluded that:

[because] a reasonable, objective observer—enlightened by the specific historical context, contemporaneous public statements, and specific sequence of events leading to its issuance—would conclude that the Executive Order was issued with a purpose to disfavor a particular religion, in spite of its stated, religiously neutral purpose,

129. Exec. Order 13,780, *supra* note 35, at 13212.

130. *See, e.g.*, *Doe v. Trump*, No. 17-CV-112-WMC, 2017 WL 975996, at *1 (W.D. Wis. Mar. 10, 2017) (granting a TRO in part and enjoining the authorities from enforcing Exec. Order 13,780 in relation to the plaintiff).

131. *See Nanda*, *supra* note 36, at 318 (providing an overview of cases against the new order).

132. With few exceptions, generally banning nationals of six predominately Muslim majority countries from entering the United States. *See Hawaii v. Trump*, 241 F. Supp. 3d 1119, 1140 (D. Haw. 2017).

133. Section 6 of the new Executive Order concerned the temporary suspension of admitting refugees to the United States. *See id.*

134. *See id.*; *see also* Exec. Order 13,780, *supra* note 35, at 13218 (*Hawaii v. Trump* was decided on March 15, 2017, while Executive Order 13,780 had an effective date of March 16, 2017).

135. *Louhghalam v. Trump*, 230 F. Supp. 3d 26, 35 (D. Mass. 2017).

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the Court finds that [challengers] are likely to succeed on the merits of their Establishment Clause claim.¹³⁶

This conclusion informed how the court dealt with the Government's claim that the enacted travel ban was designed to meet neutral security purposes.

The Government argued that the ban did not target the Islamic faith or all Muslims around the globe, emphasizing the fact that the restriction was limited to a specified number of countries. Addressing this argument, the court said:

[this] illogic of the Government's contentions is palpable. The notion that one can demonstrate animus toward any group of people only by targeting all of them at once is fundamentally flawed. The Court declines to relegate its Establishment Clause analysis to a purely mathematical exercise. . . . Equally flawed is the [argument] that the Executive Order cannot be found to have targeted Islam because it applies to all individuals in the six referenced countries. It is undisputed, using the primary source upon which the Government itself relies, that these six countries have overwhelmingly Muslim populations . . . It would therefore be no paradigmatic leap to conclude that targeting these countries likewise targets Islam. Certainly, it would be inappropriate to conclude, as the Government does, that it does not.¹³⁷

The court concluded that, by subjecting travelers from predominately Muslim nations to prohibitions, the new travel ban again singled out one specific religion for disfavored treatment. This conclusion formed the legal underpinning of the court's discussion of the alleged violation of the Establishment Clause.¹³⁸ With reference to

136. *Hawaii v. Trump*, 241 F. Supp. 3d 1119, 1134 (D. Haw. 2017) (granting nationwide TRO).

137. *Id.* at 1135.

138. *Id.* at 1134. The Court used similar reasoning to note the main purpose of the travel restriction was to single out Muslims for a special prohibition. *See id.* at 1137 (noting any "reasonable, objective observer would conclude . . . that the stated secular purpose of the Executive Order is, at the very least, 'secondary to a religious objective' of temporarily suspending the entry of Muslims" (citation omitted)). For criticism of the court's reasoning, see Elbert Lin, *States Suing the Federal Government: Protecting Liberty or Playing Politics?*, 52 U. RICH. L. REV. 633, 644 (2018).

the political context in which the travel bans were issued, the court found that challengers had rightly stated a violation of non-Establishment. According to the court, the political context surrounding the travel restrictions clearly illustrated the true motivation behind the bans: “religious animus.”¹³⁹ The “unrebutted evidence” of this animus explained why the authorities had urged the court to focus on the plain text of the order, rather than the broader political context.¹⁴⁰ In the days after *Hawaii*, courts across the country granted temporary injunctions on similar grounds,¹⁴¹ blocking and freezing enforcement of the enacted travel restrictions.¹⁴² The administration’s response to

139. *Hawaii v. Trump*, 241 F. Supp. 3d 1119, 1136 (D. Haw. 2017).

140. *Id.* (“[T]he historical background [of the travel restrictions] makes plain why the Government wishes to focus on the Executive Order’s text, rather than its context. The record before this Court is unique. It includes significant and unrebutted evidence of religious animus driving the promulgation of the Executive Order and its related predecessor.”).

141. *See, e.g., Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 566 (D. Md. 2017) (granting nationwide preliminary injunction blocking enforcement of § 2(c) Exec. Order 13,780, restricting the entry opportunities of nationals of six predominantly Muslim majority countries), *aff’d in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017), *cert. granted*, 137 S. Ct. 2080, 198 L. Ed. 2d 643 (2017), and *vacated and remanded sub nom. Trump v. Int’l Refugee Assistance*, 138 S. Ct. 353, 199 L. Ed. 2d 203 (2017); *Hawaii v. Trump*, 245 F. Supp. 3d 1227, 1239 (D. Haw. 2017) (granting nationwide preliminary injunction), *hearing in banc denied sub nom. Hawaii v. Trump*, 864 F.3d 994 (9th Cir. 2017), and *aff’d in part, vacated in part, remanded sub nom. Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017), *cert. granted sub nom. Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 198 L. Ed. 2d 643 (2017), and *vacated and remanded*, 138 S. Ct. 377, 199 L. Ed. 2d 275 (2017), and *appeal dismissed as moot sub nom. Hawaii v. Trump*, 874 F.3d 1112 (9th Cir. 2017); *Hamama v. Adducci*, No. 17-CV-11910, 2017 WL 2684477, at *3 (E.D. Mich. June 22, 2017) (granting TRO to stay the execution of removal); *State v. Trump*, 263 F. Supp. 3d 1049, 1062–63 (D. Haw. 2017), *aff’d*, 871 F.3d 646 (9th Cir. 2017) (granting nationwide injunction against enforcement of travel restrictions—§§ 2(c), 6(a), and 6(b) Exec. Order 13,780—affecting close relatives, like grandparents, of people living in the United States).

142. *Contra Sarsour v. Trump*, 245 F. Supp. 3d 719, 737–38 (E.D. Va. 2017) (denying TRO that would enjoin authorities from enforcing the new travel restrictions, holding that Executive Order is unreviewable under the Administrative Procedure Act, and furthermore holding that the challengers were not to succeed under the guarantees of the Establishment Clause: “the substantive revisions reflected in [the new Executive Order] have reduced the probative value of the President’s statements to the point that it is no longer likely that Plaintiffs can succeed on their claim that the predominate purpose of [the new Executive Order] is to discriminate against Muslims

these judicial developments was twofold. Put differently, the administration played—like chess masters—on two boards at the same time. First, the President used public debate to lash out at judges who had voted against his travel restrictions, accusing them of endangering the country and writing political judgments to aggrandize their own power and influence.¹⁴³ Simultaneously, his team of lawyers and legal advisors worked on a strategy to convince judges that the President had the sole legal authority to make decisions regarding the admission of aliens.¹⁴⁴ This double-faceted strategy is characteristic of the Trump administration’s dealings with political disappointments, at least in the area of regulating immigration.¹⁴⁵

However, these strategies did not immediately turn out to be the legal game-changer the President had hoped they would be. Instead, history repeated itself. The nationwide injunctions—blocking enforcement of key parts of the new travel suspension and restriction regime—were largely upheld by the Fourth and Ninth Circuits.¹⁴⁶ Both courts shared an important concern: the waning influence of the rule of

based on their religion and that [the new Executive Order] is a pretext or a sham for that purpose.”).

143. See Elizabeth Thornburg, *Twitter and the #So-CalledJudge*, 71 S.M.U. L. REV. 249, 265–68 (2018) (discussing how Trump has repeatedly attacked the judiciary after a disappointing judgment and arguing that judges should use social media to reach a broader audience); see also Alison Higgins Merrill, Nicholas D. Conway & Joseph Daniel Ura, *Confidence and Constraint: Public Opinion, Judicial Independence, and the Roberts Court*, 54 WASH. U. J.L. & POL’Y 209, 223 (2017) (pointing out that judges have little means to save their institution from political attacks).

144. Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 501 (2018) (providing an overview of statements made by President Trump to show his disagreement with the legal decisions issued against his travel restrictions, also pointing to the Administration’s willingness to respect the legal decisions and follow the appropriate appellate procedures).

145. Cf. Chacón, *supra* note 51, at 257.

146. *International Refugee Assistance Project v. Trump*, 857 F.3d 554, 601 (4th Cir. 2017) (holding, among others, that challengers were “likely to succeed on the merits of their Establishment Clause claim.”); *Hawaii v. Trump*, 859 F.3d 741, 761 (9th Cir. 2017) (holding, *per curiam*, among others, that challengers had “shown a likelihood of success on the merits of [their INA-based statutory claim] and that the district court’s preliminary injunction order can be affirmed in large part based on statutory grounds[,]” but not addressing the challengers’ Establishment Clause claims).

law, which shaped a dangerous precedent for fact-free engagement in politics.¹⁴⁷

Nevertheless, in *Trump v. International Refugee Assistance Project*, President Trump gained an important victory on his way to establishing his desired travel regime.¹⁴⁸ Equipped with this safeguard, the President issued a new travel ban: Proclamation 9645, titled *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*.¹⁴⁹ The President announced this new ban in September 2017, just ninety days after receiving a partial stay of the issued injunctions.

C. Proclamation 9645

Like its predecessors, the new travel ban singled out nationals of certain states for special travel restrictions. However, this ban was also unique in some respects. Remarkably, the Proclamation did not contain the stereotypes explicitly mentioned by its predecessors, namely, honor killers and women abusers. Instead, the general focus was on protecting the country from terrorism.¹⁵⁰

147. Renan, *supra* note 73, at 2259–60. See also Matthew R. Segal, *America's Conscience: The Rise of Civil Society Groups Under President Trump*, 65 UCLA L. REV. 1574, 1579 (2018) (expecting that authorities will lose credibility because of President Trump's animus toward everything he dislikes and positing that if "the federal government is . . . going to behave just like a landlord who won't rent to Black people, then it will command precisely the same level of respect.").

148. *Cf. Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2090, 198 L. Ed. 2d 643 (2017) (Thomas, J., with whom Alito, J., and Gorsuch J., join concurring in part and dissenting in part) ("I agree with the Court's implicit conclusion that the Government has made a strong showing that it is likely to succeed on the merits—that is, that the judgments below will be reversed. The Government has also established that failure to stay the injunctions will cause irreparable harm.").

149. Proclamation 9645, *supra* note 35.

150. *Id.* (defending the need for this Proclamation as follows: "As President, I must act to protect the security and interests of the United States and its people. I am committed to our ongoing efforts to engage those countries willing to cooperate, improve information-sharing and identity-management protocols and procedures, and address both terrorism-related and public-safety risks. . . . I have determined, on the basis of recommendations from the Secretary of Homeland Security and other members of my Cabinet, to impose certain conditional restrictions and limitations . . . on entry into the United States of nationals of the countries identified in section 2 of this proclamation.")

Another important distinction between this Proclamation and its predecessors concerns the durability of the latter. While the previous versions were designed to temporarily suspend the entry of certain nationals, the Proclamation had an indefinite character “to advance the national security, foreign policy, and counterterrorism interests of the United States.”¹⁵¹ The only escape was through a recommendation to the President to change the policies, following the outcomes of a review every 180 days.¹⁵² But more importantly, for the first time in the history of President Trump’s travel restrictions, the Proclamation included “non-Muslim” countries. This new ban added North Korea¹⁵³ and Venezuela to the list of countries affected by the travel restrictions.¹⁵⁴ Other states on this list included Iran,¹⁵⁵ Libya,¹⁵⁶ Somalia,¹⁵⁷ Syria,¹⁵⁸ Yemen,¹⁵⁹ and Chad, which was removed from this list in April 2018.¹⁶⁰ Despite this most recent version of the travel ban including

151. *Id.* § 8 (also urging authorities to enforce the restrictions “to the maximum extent possible”).

152. *Id.* § 4 (urging authorities to report “within 180 days, . . . and every 180 days thereafter” about the need to uphold the restrictions and if necessary to modify them).

153. *Id.* § 2(d)(ii) (suspending all nonimmigrant and immigrant visas).

154. *Id.* § 2(f)(ii) (suspending “entry into the United States of officials of government agencies of Venezuela involved in screening and vetting procedures . . . and their immediate family members, as nonimmigrants on business (B-1), tourist (B-2), and business/tourist (B-1/B-2) visas”). Officials “traveling on a diplomatic or diplomatic-type visa” were excepted from this provision. *See id.* § 3(b)(v).

155. *Id.* § 2(b)(ii) (suspending all immigrant visas and all nonimmigrant visas, except F, M, and J visas, instead subjecting those particular visa holders to enhanced screening procedures).

156. *Id.* § 2(c)(ii) (suspending nonimmigrant B-1, B-2 and B-1/B-2 visas, and suspending all immigrant visas).

157. *Id.* § 2(h)(ii) (suspending all immigrant visas, and putting nonimmigrant visa applicants under “additional scrutiny to determine if [they] are connected to terrorist organizations or otherwise pose a threat to the national security or public safety.”).

158. *Id.* § 2(e)(ii) (suspending all nonimmigrant and immigrant visas).

159. *Id.* § 2(g)(ii) (suspending nonimmigrant B-1, B-2 and B-1/B-2 visas, and suspending all immigrant visas).

160. Proclamation No. 9723, 83 Fed. Reg. 15937 (Apr. 13, 2018) (titled *Maintaining Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*) (“[T]he

some “non-Muslim” states and removing one Muslim majority country, Sudan, the vast majority of the targeted states still consisted of places with predominantly Muslim populations.¹⁶¹ Furthermore, the addition of Venezuela had a primarily symbolic significance, since most of its nationals were not affected by the suspension.¹⁶² Therefore, North Korea was the only “non-Muslim” state that faced the same travel restrictions as other predominantly-Muslim countries on the list.¹⁶³

The issuance of this new and indefinite travel ban has had two important short-term effects. First, because Executive Order 13,780 expired on the date President Trump issued Proclamation 9645, the Supreme Court vacated and remanded the cases it had previously granted certiorari to hear. The Court instructed the Fourth and Ninth Circuits to dismiss as moot those cases challenging the legality of the travel restrictions.¹⁶⁴ Second, a new wave of legal challenges blocked enforcement of the travel restrictions. Again, the likelihood of success in challenging the travel restrictions regime on grounds that it discriminates and violates the Establishment Clause played an important role in courts granting nationwide injunctions.¹⁶⁵

entry into the United States of the nationals of Chad . . . no longer would be detrimental to the interests of the United States . . .”).

161. See Proclamation 9645, *supra* note 35, § 3 (listing exceptions and waivers to be decided on a case-by-case basis).

162. See *id.* § 2(f)(ii).

163. See *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 623 (D. Md. 2017) (“[T]he inclusion of two non-majority Muslim nations, North Korea and Venezuela, does not persuasively show a lack of religious purpose behind the Proclamation. The Venezuela ban is qualitatively different from the others because it extends only to government officials, and the ban on North Korea [affects] fewer than 100 people . . . In short, the inclusion of Venezuela and North Korea in the Proclamation has little practical consequence.”).

164. See *Trump v. Int’l Refugee Assistance*, 138 S. Ct. 353, L. Ed. 2d 203 (2017) (mem.); *Trump v. Hawaii*, 138 S. Ct. 377, 199 L. Ed. 2d 275 (2017) (mem.). See also W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 YALE L.J. F. 825, 831 (2018); Peter Margulies, *Bans, Borders, and Sovereignty: Judicial Review of Immigration Law in the Trump Administration*, 2018 MICH. ST. L. REV. 1, 50–51 (2018) (both providing a brief timeline of the legal developments related to the travel restrictions).

165. See, e.g., *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570 (D. Md. 2017), *aff’d*, 883 F.3d 233 (4th Cir. 2018), *as amended*, (Feb. 28, 2018), *cert. granted, judgment vacated*, 138 S. Ct. 2710 (2018), and *cert. granted, judgment vacated*, 138 S. Ct. 2710 (2018); *State v. Trump*, 265 F. Supp. 3d 1140 (D. Haw.

After thoroughly analyzing the history and political context of the imposed travel restrictions, the method adopted to select the countries to be put under security scrutiny, and the language used to define the restrictions, Judge Theodore Chuang stated:

there are substantial reasons to question whether the asserted national security purpose has now indeed become the primary purpose. First, the underlying architecture of the prior Executive Orders and the Proclamation is fundamentally the same. Each of these executive actions bans the issuance of immigrant and nonimmigrant visas on the basis of nationality to multiple majority-Muslim countries on the basis of concerns about terrorism. The Proclamation does not abandon this fundamental approach, but rather doubles down on it¹⁶⁶. . . . [Hence,] the Court concludes that where the Proclamation itself is not sufficiently independent of [its predecessors] to signal a purposeful, persuasive change in the primary purpose of the travel ban, and there were no other public signs that “as persuasively” as the original violation established a different primary purpose for the travel ban, it cannot find that a “reasonable observer” would understand that the primary purpose of the Proclamation’s travel ban is no longer the desire to impose a Muslim ban.¹⁶⁷

The sharpest judicial condemnation of Trump’s travel ban as a sign of animosity toward Muslims and Islam followed a few months later. In *International Refugee Assistance Project v. Trump*, the Fourth Circuit held that the nationwide injunction was warranted only in relation to “foreign nationals with a bona fide relationship with an individual or entity in the United States.”¹⁶⁸ However, after a thorough examination of “official statements from President Trump and other

2017), *aff’d in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017), *cert. granted* 138 S. Ct. 923 (2018), and *rev’d and remanded*, 138 S. Ct. 2392 (2018).

166. *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 624 (D. Md. 2017). *Cf.* *State v. Trump*, 265 F. Supp. 3d 1140, 1157 (D. Haw. 2017) (critical of the methodological justification behind the selection of the targeted countries, concluding that “[the Proclamation’s] individualized country findings make no effort to explain why some *types* of visitors from a particular country are banned, while others are not”).

167. *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d at 624, 628 (referring to *McCreary C. v. Am. Civil Liberties Union*, 545 U.S. 844, 872 (2005)).

168. *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 271 (4th Cir. 2018).

executive branch officials, along with the Proclamation itself,” the court concluded that the ban was “unconstitutionally tainted with animus toward Islam.”¹⁶⁹

This sharp conclusion about religious animosity—“evidenced by official statements of the President . . . that graphically disparage the Islamic faith and its practitioners”¹⁷⁰—came at a time when President Trump was celebrating his most significant progress in dealing with the legal challenges that had continuously delayed what he had promised to his voters: enacting a travel ban. In December 2017, the Supreme Court ordered to stay the granted preliminary injunctions pending “disposition of the Government’s appeal . . . and disposition of the Government’s petition for a writ of certiorari.”¹⁷¹ Furthermore, the Supreme Court urged the courts of appeal to reach their decisions “with appropriate dispatch.”¹⁷² In light of this order, the circuit courts decided to stay their decisions pending the Supreme Court’s future decisions.¹⁷³

This order did not issue any limitations on the scope of the travel restrictions,¹⁷⁴ and the Trump administration approached it as “a substantial victory for the safety and security of the American people.”¹⁷⁵ This timely victory advanced the President’s immigration

169. *Id.* at 256–57.

170. *Id.* at 353 (Harris, Cir. J., with whom Gribbon Motz, Cir. J., and King, Cir. J., join, concurring).

171. *Trump v. Int’l Refugee Assistance Project*, 138 S. Ct. 542 (2017) (mem.); *Trump v. Hawaii*, 138 S. Ct. 542 (2017) (mem.).

172. *Trump v. Int’l Refugee Assistance Project*, 138 S. Ct. 542 (2017) (mem.); *Trump v. Hawaii*, 138 S. Ct. 542 (2017) (mem.).

173. *See Hawaii v. Trump*, 878 F.3d 662, 702 (9th Cir. 2017); *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 274 (4th Cir. 2018); *see also* Lauri Kai, *Embracing the Chinese Exclusion Case: An International Law Approach to Racial Exclusions*, 59 WM. & MARY L. REV. 2617, 2621–22 (2018) (suggesting that contemporary travel restrictions survive Supreme Court review because the “plenary power doctrine” has made policies related to immigration and admission “nonjusticiable.”).

174. *See Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (granting certioraris limited the scope of the enforcement to those who failed to prove their bona fide relationship); *but see* Jeremy Martin, *Trump v. International Refugee Assistance Program* 137 S. Ct. 2080 (2017), 44 OHIO N.U. L. REV. 131, 142 (2018) (critical of this formula).

175. Adam Liptak, *Supreme Court Allows Trump Travel Ban to Take Effect*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/us/politics/trump-travel-ban-supreme-court.html> (quoting Attorney General Jeff Sessions).

agenda,¹⁷⁶ and the administration began to enforce the travel restrictions soon after the issuance of the stays.¹⁷⁷ Moreover, the authorities continued to uphold the travel restrictions after the Supreme Court granted certiorari in January 2018.¹⁷⁸ Consequently, the stay order remained in effect pending the Supreme Court's final decision.¹⁷⁹ This decision came in June 2018, when the Supreme Court upheld Proclamation 9645 in *Trump v. Hawaii*.¹⁸⁰

The Court's opinion in this case was extraordinary,¹⁸¹ and not merely because of the animus toward one particular religion that surrounded the case,¹⁸² prompting today's travel ban controversy to be mentioned in the same breath as cases of racial exclusion from the dark decades behind us.¹⁸³ No, *Trump v. Hawaii* is special because the Supreme Court missed an opportunity to explain to its critics why the

176. See Josh Blackman, *The Travel Bans*, 2017 CATO SUP. CT. REV. 29, 30 (2017–2018) (arguing the stay order “was a conclusive indication that the lower courts had gone astray”). Cf. Ratna Kapur, *The Ayodhya Case: Hindu Majoritarianism and the Right to Religious Liberty*, 29 MD. J. INT'L L. 305, 311 (2014) (pointing out how landmark decisions can advance political agendas).

177. See *December 4, 2017 – Court Order on Presidential Proclamation*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/presidential-proclamation-archive/2017-12-04-Presidential-Proclamation.html> (last visited Feb. 15, 2019).

178. *Trump v. Hawaii*, 138 S. Ct. 923, 924, 199 L. Ed. 2d 620 (2018); see also *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 542, 542 (2018) (mem.).

179. *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 542 (2017) (mem.); *Trump v. Hawaii*, 138 S. Ct. 542 (2017) (mem.).

180. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

181. Cf. Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1453–54 (2018) (asserting the negative assessment the travel ban has received fits a broader tendency, in which other branches of power show their serious disagreement with President Trump's violation of important (unwritten) norms).

182. See Emily C. Callan, *A Funny Thing Happened on My Way to the Border . . . How the Recent Immigration Executive Orders and Subsequent Lawsuits Demonstrate the Immediate Need for Comprehensive Immigration Reform*, 47 U. BALT. L. REV. 1, 11 (2017) (writing that this case “entered a new realm of jurisprudence” by considering statements made by President Trump on the campaign trail).

183. Cf. Shawn E. Fields, *The Unreviewable Executive: National Security and the Limits of Plenary Power*, 84 TENN. L. REV. 731, 753 (2017); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 594–95 (2017).

travel ban case was so different from other recent controversies concerning religious discrimination and religious neutrality, such as the *Masterpiece Cakeshop* case.¹⁸⁴

Before discussing this point of criticism further, we must first explore the arguments set forth in *Trump v. Hawaii* denying the unconstitutionality of the most recent travel ban. We will then turn to a criticism of double standards, analyzing how the Court has responded differently to those officials' statements showing hostility toward religion. Finally, we will briefly highlight the argument that authorities should always be mindful of the constitutional tradition, the freedoms guaranteed, and the impact their actions might have on society, as powerfully advocated by concurring Justice Kennedy.¹⁸⁵

1. *Trump v. Hawaii*

On June 26, 2018, Chief Justice Roberts delivered the majority opinion ruling on the lawfulness of President Trump's latest travel ban.¹⁸⁶ Although the Court dispatched this case barely two months after hearing oral arguments, the 5-4 vote was a clear indication of the Court's contrasting views. The highly divided Supreme Court upheld Proclamation 9645 on the grounds that: (1) the Immigration and Nationality Act ("INA") allows the President to deny entry to aliens when their admission would harm the interests of the United States;¹⁸⁷ (2) the non-discrimination provision of the INA relating to the issuance of visas does not alter the right of the President to deny aliens entry to

184. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719 (2018). See Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 135–36 (2018) (blaming the Supreme Court for not providing sufficient standards for handling cases concerning religious discrimination and criticizing the Court for delivering contradictory opinions in *Masterpiece* and *Trump v. Hawaii*, both touching upon animosity toward religion and discrimination); Brandon L. Garrett, *Unconstitutionally Illegitimate Discrimination*, 104 VA. L. REV. 1471, 1516 (2018) ("Perhaps Justice Sotomayor is correct that the majority in *Trump v. Hawaii* could not defend the presidential expressions of animus, so instead ignored that aspect of the analysis and ruled based on deference to the executive branch on issues of immigration and national security.").

185. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423–24 (2018) (Kennedy, J., concurring).

186. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

187. *Id.* at 2408–10 (referencing Immigration and Nationality Act § 1182(f)).

the United States;¹⁸⁸ (3) the travel ban might be rationally related to its purported goal, namely national security;¹⁸⁹ and (4) the ban did not violate the Establishment Clause.¹⁹⁰ For purposes of this article, we will limit our analysis to the Court's discussion of the travel ban's constitutionality in light of the First Amendment's Establishment Clause.

The Supreme Court began this discussion by outlining the factors it would consider in assessing the lawfulness of the travel ban. First, the Court clarified that its task was not to denounce what the President had said, but rather to protect the authority of the Presidency and the legitimacy of the Executive power. Thus, what the President has said needs to be assessed in light of what exercising his Executive power entails. That was the main focus of the Court, since the travel restrictions addressed "a matter [that fell] within the core of executive responsibility."¹⁹¹ The Court further stated that this case is fundamentally different than other non-Establishment guarantee litigation because the issued Proclamation touched upon issues of national security, drawing on entirely religion-neutral language.¹⁹² "Conventional" Establishment Clause cases, however, typically discuss the lawfulness of authorities' endorsing religion in public.¹⁹³

With this background in mind, the Court reiterated that matters of admission and removal of aliens fall under the authority of the executive and legislative branches, insulating this specific issue from judicial scrutiny.¹⁹⁴ The Court explained that those branches are better informed to make such decisions because "decisions in these matters may implicate 'relations with foreign powers,' or involve 'classifications defined in the light of changing political and economic circumstances.'"¹⁹⁵ However, when admission questions implicate the constitutional rights of United States citizens, it may provide reason for

188. *Id.* at 2414–15.

189. *Id.* at 2423.

190. *Id.* at 2420.

191. *Id.* at 2418.

192. *Id.*

193. *Id.* (noting "typical" Establishment Clause cases involve religious displays or school prayer).

194. *Id.*

195. *Id.* at 2418–19 (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)).

the Court to put such cases under scrutiny.¹⁹⁶ Yet this does not alter the legal authority given to the executive and legislative branches to make decisions concerning the admission of aliens. In other words, those branches retain the final say. That is also the case “when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the Courts will neither look behind the exercise of that discretion, nor test it by balancing its justification,” in light of the Constitutional rights of United States citizens.¹⁹⁷

Further, the Court approaches cases of national security with the highest possible cautiousness, given the authority and information the President has regarding such cases. The majority noted that applying the conventional inquiry—that is, asking whether the adopted policy was facially legitimate and bona fide—“would put an end to our review.”¹⁹⁸ However, following the suggestion of the Government, the Court delved beyond the ban’s facially neutral appearance.¹⁹⁹ In this respect, the Court drew upon its rational basis doctrine to assess the lawfulness of the travel ban in light of the Establishment Clause. The Court “may consider . . . extrinsic evidence [as submitted by the challengers to the travel restrictions], but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.”²⁰⁰

In other words, the rational basis doctrine does not help opponents of the travel restrictions to halt a policy that pursues a legitimate government interest. To illustrate this point, the majority referred to “a few occasions” where the Court has invalidated policies that were clearly harmful.²⁰¹ In *Romer v. Evans*, for instance, the Supreme Court struck down a state amendment that clearly discriminated against non-heterosexuals, depriving them of the right to access anti-discrimination

196. *Id.* at 2419 (“[A]lthough foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen.”) (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 756–57 (1972)).

197. *Id.* at 2419.

198. *Id.* at 2420.

199. *Id.*

200. *Id.*; see also Sorkin, *supra* note 80 (discussing “extrinsic evidence”).

201. *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) (noting the Court has invalidated policies that appear to have been implemented for no other purpose than a “bare . . . desire to harm a politically unpopular group” (citation omitted)).

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laws.²⁰² The Court's limited precedent in striking down laws and policies that do not pursue a legitimate governmental interest provided little guidance here. However, the Court concluded that the travel ban regime did not share such characteristics with cases like *Romer* to warrant invalidating the Proclamation.²⁰³ Chief Justice Roberts stated:

[the] Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. [Challengers to the Proclamation] nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks.²⁰⁴

The Supreme Court also saw no reason to invalidate the Proclamation on the ground that it lacked effectiveness, as posited by the challengers. The Court could not properly evaluate the content of that argument, since the effectiveness question involved complicated matters that were better suited for the executive branch. Put differently, the Court was not in a position to "substitute [its] own assessment for the Executive's predictive judgments on [security] matters."²⁰⁵ The fact that the Government had removed three predominantly-Muslim countries from the list of affected countries further reaffirmed the view that the Proclamation pursued a legitimate security interest.²⁰⁶ Furthermore, the Court reasoned, the Proclamation included "significant exceptions" and waiver programs for those nationals affected by the restrictions.²⁰⁷

Despite the majority noting the Court would not denounce any political statements made by the President in the context of the travel

202. *Romer v. Evans*, 517 U.S. 620, 632–36 (1996).

203. *Trump v. Hawaii*, 138 S. Ct. 2392, 2420–21 (2018).

204. *Id.* at 2421.

205. *Id.*

206. *Id.* at 2422.

207. *Id.*

bans, it nevertheless bitterly denounced any comparison between the contemporary travel bans and the Supreme Court's decision in *Korematsu v. United States* concerning the lawfulness of forced relocations based on race and national origin. Opponents of the travel bans had suggested that the restrictions rested on the same narrative present in *Korematsu*—namely, anxiety toward a specific group of people that ultimately resulted in singling them out for a cruel relocation policy.²⁰⁸ The majority vigorously denounced this comparison, saying:

Korematsu has nothing to do with this case. The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. . . . The entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.²⁰⁹

The majority went a step further in conveying its disdain toward *Korematsu*, stating the decision “was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—‘has no place in law under the Constitution.’”²¹⁰

The Court concluded that the Government had met its burden to demonstrate the Proclamation pursued a legitimate government interest—security protection—which is itself a rational and justified ground to limit the entry of certain nationals. Finding that the Proclamation survived rational basis review, the Supreme Court reversed the lower court's judgment granting the preliminary injunction.²¹¹

208. *Id.* at 2423. *See generally* *Korematsu v. United States*, 323 U.S. 214 (1944).

209. *Trump v. Hawaii*, 138 S. Ct. at 2423.

210. *Id.* (quoting Justice Jackson's dissenting opinion in *Korematsu*).

211. *Id.*

2. *The Façade of Security Concerns and Double Standards*

While *Trump v. Hawaii* reaffirmed the Government's argument that the Proclamation pursued a legitimate aim, one major criticism of the travel ban is that it is politically motivated and fulfills President Trump's promise to implement a Muslim ban, instead of actually dealing with national security concerns.²¹² Critics maintain the travel ban lacks a bona fide justification, arguing that it instead rests primarily on stereotypes about immigrants.²¹³ However, stereotyping immigrants—varying from job-hunters to terrorists—has proven to be a successful method for justifying exclusionary politics today and in the past.²¹⁴

Another criticism of the travel ban case is that the Supreme Court's majority opinion applied double standards. It was uncritical toward the President's remarks about Muslims both during the election and after he took office, but critical toward officials' statements discrediting majoritarian religious sensitivities. For example, the Court considered the President's statements toward Muslims irrelevant for purposes of assessing the travel ban, but the "hostile" religious statements of a local civil rights commissioner were found decisive for the Court's assessment of a First Amendment claim in *Masterpiece Cakeshop*.²¹⁵

212. See, e.g., Wadhia, *supra* note 63, at 1502–06. The "disconnect" between a neutral defense of the ban (security concerns) and its political presentation (a Muslim ban) puzzled courts in how to approach the travel bans. See Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 124 (2017).

213. Cf. Leti Volpp, *Protecting the Nation from "Honor Killings": The Construction of a Problem*, 34 CONST. COMMENT. 133, 169 (2019) (arguing that "[the] specter of violence against women has played an important role in the Trump administration's executive orders seeking to bar Muslims from entry, and continues to rationalize the notion that the nation must be protected through their exclusion. Yet this submerged story has been largely overlooked.").

214. Critics have placed the contemporary travel bans in the category of exclusionary policies that have historically singled out specific groups of immigrants for special bans. See, e.g., Chang, *supra* note 128; Kai, *supra* note 173; Michael Kagan, *Is the Chinese Exclusion Case Still Good Law? (The President Is Trying to Find Out)*, 1 NEV. L.J. F. 80 (2017).

215. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018); see also Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 515–16 (2018) (criticizing the Court for being overtly protective toward majoritarian beliefs and sensitivities, while indifferent toward similar claims for protection coming from minority groups); Thomas C. Berg, *Masterpiece Cakeshop: A Romer for*

These two major points of criticism—the façade of security concerns behind the travel ban and the presence of double standards—are further discussed in light of Justice Sotomayor’s dissenting opinion in *Trump v. Hawaii*, which dispatches each of these concerns thoroughly. Justice Sotomayor stated that “repackaging” the promise of enacting a “total and complete shutdown of Muslims entering the United States” as a matter of national security “does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President’s words have created.”²¹⁶

Justice Sotomayor further suggested that “behind [the] facade of national security concerns” existed fear of the stranger *in general* and of the Muslim migrant *in particular*.²¹⁷ This is reflected in the obvious presence of animus toward Muslims that drove the President to issue travel bans singling out Muslims in the first place. This hostile language toward Muslims has always surrounded the travel bans and plainly contradicts the guarantee of neutrality toward religion enshrined in the Establishment Clause of the First Amendment. Furthermore, a historical review of the emergence of travel bans in the Trump era complicates the argument that the travel bans were not issued to target Muslims. It was therefore regrettable, according to Justice Sotomayor, that the majority limited its review to the plain text of the Proclamation.²¹⁸

To properly evaluate the challengers’ Establishment Clause claim, it is necessary, according to Justice Sotomayor, to review the statements of the President as a whole. It is this “full record [of statements that] paints a far more harrowing picture [than the one we may discern on the basis of the majority judgment], from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith”²¹⁹ instead of pressing

Religious Objectors, 2017 CATO SUP. CT. REV. 139, 168 (2017–2018) (saying that in general “majoritarian branches are insensitive to particular free-exercise claims” and urging the Court to mind this unfortunate circumstance in its decisions). See generally Frank S. Ravitch, *The Supreme Court’s Rhetorical Hostility: What is Hostile to Religion Under the Establishment Clause?*, 2004 B.Y.U. L. REV. 1031 (2004).

216. *Trump v. Hawaii*, 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting).

217. *Id.*

218. *Id.* at 2435.

219. *Id.*

security needs.²²⁰ This is exacerbated, according to Justice Sotomayor, by the fact that President Trump has never rectified his bold statements, despite his many opportunities to do so.²²¹ Instead of offering a different justification for the relationship between the travel restrictions and the Muslim faith, to make the national security claim more plausible to the objective observer, the President has continued his infamous attacks on the Muslim community.²²²

Referencing the majority decision in *Masterpiece Cakeshop*—decided just weeks before *Trump v. Hawaii*—Justice Sotomayor called it striking that the Court found “less pervasive official expressions of hostility and the failure to disavow them to be Constitutionally significant.”²²³ Why the Court chose not to draw the same line in the travel ban case was “perplexing.”²²⁴ This difference in treatment leaves an unsatisfactory feeling. While local officials were held “accountable” for the impact of their statements about religion in *Masterpiece Cakeshop*, the majority declined to apply the same standard in this case.²²⁵ But, as Justice Sotomayor indicated, both cases questioned “whether a government actor exhibited tolerance and neutrality in reaching a decision that affects individuals’ fundamental religious freedom.”²²⁶

The majority’s choice to exclude the President’s statements from its legal assessment—while operating opposite to *Masterpiece Cakeshop*, a case concerning majoritarian sensitives²²⁷—is a disservice to adherents of minority religions. Justice Sotomayor concluded that

220. *Id.* at 2438.

221. *Id.* at 2439.

222. *Id.*

223. *Id.*

224. *Id.* at 2441 (however, Justice Sotomayor uses the term “perplexing” to criticize the choice of the majority to apply rational basis doctrine in assessing the lawfulness of the Proclamation. This is a “perplexing” choice because the Court has historically applied “a more stringent” test in Establishment Clause cases, especially ones about animosity toward religion. This major difference in deciding similar cases justifies our choice to quote “perplexing.”).

225. *Id.* at 2447.

226. *Id.*

227. Cf. Nora Olabi, “*We Told You So*”: *Conservatives Use Masterpiece Decision to Energize Base*, WESTWORD (Jun. 5, 2018), <https://www.westword.com/news/colorado-republicans-use-masterpiece-cakeshop-court-decision-to-rally-support-for-november-elections-10377635>.

applying double standards in apparently similar cases “erodes the foundational principles of religious tolerance that the Court elsewhere has so emphatically protected, and it tells members of minority religions in our country” that they are not equally entitled to the same rights and privileges as those who belong to the majority.²²⁸

3. *The Freedom to Disregard the Constitutional Tradition*

Justice Sotomayor’s criticism of the Court’s decision in *Trump v. Hawaii* primarily concerned President Trump’s remarks, his decision not to rectify those remarks, and his continued hostility toward members of the Islamic minority in the United States. While the majority excluded President Trump’s remarks from their analysis, concurring Justice Kennedy noted that public statements made by the executive branch may have significant societal consequences.²²⁹ Justice Kennedy cautioned that although such statements are often “not subject to judicial scrutiny or intervention,” this does not allow government officials “to disregard the Constitution and the rights it proclaims and protects.”²³⁰ Officials have broad discretion free from judicial scrutiny, but it is this freedom that “makes it all the more imperative for [government officials] to adhere to the Constitution and to its meaning and its promise.”²³¹

Justice Kennedy applied this concept of public manners to First Amendment controversies. Because the Constitution guarantees the freedoms of religion and expression and simultaneously prohibits the Government from establishing any religion,

[it is] an urgent necessity that officials adhere to these Constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our Government

228. *Trump v. Hawaii*, 138 S. Ct. 2392, 2433, 2447 (2018) (Sotomayor, J., dissenting).

229. *Id.* at 2424 (Kennedy, J., concurring).

230. *Id.*

231. *Id.* at 2423–24 (also positing that the shared point of view in *Trump v. Hawaii* is that officials’ statements can be subjected to judicial scrutiny when such statements spread hostility toward, for example, religion, but that the scope of putting authorities’ statements under judicial scrutiny is quite limited and reserved to extraordinary circumstances).

remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.²³²

In a forceful plea, Justice Kennedy urged authorities to be mindful of the constitutional tradition, the freedoms and constraints guaranteed, and the impact their actions might have, both internally and externally. The public appearance of authorities should attest to the rich constitutional tradition of freedom and neutrality.²³³

While Justice Kennedy did not apply his framework of public manners explicitly to the travel ban case, and specifically to President Trump's remarks about Muslims, his unambiguous message of minding the Constitution while exercising power raises the following questions: how should we appraise President Trump's travel ban project? What does President Trump's rhetorical attack on Muslims tell us? Does the President's disregard for the Constitution, in terms of explicitly questioning the reliability of one group of people, namely Muslims,²³⁴ indicate that the United States has entered into a completely new era of hatred and racial discrimination?²³⁵

The President has almost unlimited discretionary authority, and thus power, to deny aliens entry into the United States.²³⁶ This is what *Trump v. Hawaii* tells us. And although it might be empirically right for the President to possess unlimited power to decide questions of admission, we must ask whether it is justified for the President to exclude *categories* of people. We must ask whether the President should be allowed to continue—unrestrained—to insult adherents of one religion, portraying them, for example, as a dangerous group,²³⁷ who are unreliable, ill-mannered, uncivilized, honor killers, rapists,

232. *Id.* at 2424.

233. *Id.*

234. *Id.* at 2437–42 (Sotomayor, J., dissenting) (discussing at length the record of anti-Muslim statements made by President Trump).

235. *Cf.* Eric K. Yamamoto, Maria Amparo Vanaclocha Berti & Jaime Tokioka, "Loaded Weapon" Revisited: The Trump Era Import of Justice Jackson's Warning in *Korematsu*, 24 ASIAN AM. L.J. 5, 6 (2017) (noting the "[Trump] era is tarnished by accelerating Muslim harassment and discrimination").

236. *See generally* Barrow, *supra* note 65.

237. *Cf.* 138 S. Ct. 2392, 2433–47 (2018) (Sotomayor, J., dissenting) (providing an overview of President Trump's anti-Muslim statements, both during his presidential campaign and after assuming office).

ticking time bombs, and harmful to American society.²³⁸ It is the desire to exclude this group of individuals that has ultimately driven the President to enact a series of travel bans.²³⁹

II. SAVE OUR STATE FROM ISLAM

A historical analysis of President Trump's travel ban project suggests his focus on border protection was mainly concerned with who is *entering* the country—drawing on stereotypes and ultimately ordering a series of facially neutral travel restrictions targeting one specific group of people. However, concerns about who is *living in* the United States have similarly disfavored the American Muslim community. For example, headscarves and beards kept for religious purposes have, for some, caused trouble in the workplace.²⁴⁰ Similar troubles arise in relation to plans to build mosques or Islamic centers. One particularly controversial example of this is the plan to build a multi-faith center close to Ground Zero in New York, popularly known as the “Ground Zero Mosque” by opponents of the project.²⁴¹ Another consequence of the stereotypes surrounding the Muslim immigrant

238. Cf. Khaled A. Beydoun, *Islamophobia: Toward a Legal Definition and Framework*, 116 COLUM. L. REV. ONLINE 108, 111 (2016) (arguing that stereotypes are a driving factor behind policies that specifically target Muslims).

239. See, e.g., Caroline Mala Corbin, *Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 FORDHAM L. REV. 455, 481 (2017) (describing the enacted travel restrictions as “Trump’s attempt to fulfill his campaign promise to bar Muslims from entering the country”).

240. See, e.g., Kelly A. Harrison, *Hiding Under the Veil of “Dress Policy”:* *Muslim Women, Hijab, and Employment Discrimination in the United States*, 17 GEO. J. GENDER & L. 831 (2016); Cheryl A. Sharp, *Sweet Land of Liberty: Islamophobia and the Treatment of Muslims in the State of Connecticut*, 11 CONN. PUB. INT. L.J. 221 (2012); Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033 (2009) (all referring to controversies at work because of a religious appearance).

241. Cf. Nicholas A. Primrose, *Has Society Become Tolerant of Further Infringement on First Amendment Rights?*, 19 BARRY L. REV. 313, 317–20 (2013); Heather Greenfield, *International Law, Religious Limitations, and Cultural Sensitivity: The Park51 Mosque at Ground Zero*, 25 EMORY INT’L L. REV. 1317, 1319–22 (2011); Aziz Z. Huq, *Private Religious Discrimination, National Security, and the First Amendment*, 5 HARV. L. & POL’Y REV. 347, 353–55 (2011).

population appears in the form of legal initiatives prohibiting the use of Sharia law in the United States.²⁴²

How can we rationalize policies that target a very specific group of people? Particularly, how can we rationalize those policies that target adherents of an unpopular religion, or those who come from regions associated with such religions? How can we understand the Supreme Court's majority decision to uphold a policy obviously condoning hatred and animus toward one group of people? Oklahoma's urgent plea to save their State from Islamic law²⁴³ suggests President Trump's exclusionary politics are not accidental. Rather, these policies share the same historical background of exclusion and are rooted in a narrative of fear—fear of the non-white stranger in general and fear of the Muslim in particular. Fear has proven to be a useful breeding ground for policies of exclusion and reprisal in the United States.²⁴⁴ Part II of this article discusses Oklahoma's Save Our State Amendment and determines that, like the President's travel ban project, Oklahoma's amendment emanates from feelings of fear and animus toward the stranger.²⁴⁵ This analysis will be used in Part III to uncover some of the possible myths driving policymakers to design such exclusionary policies.

242. See generally Asma T. Uddin & Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST AMEND. L. REV. 363 (2012).

243. Cf. Ross Johnson, *A Monolithic Threat: The Anti-Sharia Movement and America's Counter-Subversive Tradition*, 19 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 183, 191 (2012) (describing how the American anti-Sharia movement presents the fight against Sharia law in the United States as an "existential conflict").

244. See Beydoun, *supra* note 238, at 114. See generally NUSSBAUM, *supra* note 44.

245. John M. Bickers, *False Facts and Holy War: How the Supreme Court's Establishment Clause Cases Fuel Religious Conflict*, 51 IND. L. REV. 305, 332 (2018); Hilal Elver, *Racializing Islam Before and After 9/11: From Melting Pot to Islamophobia*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 119, 162 (2012) (both pointing to the role fear plays in pushing anti-Sharia initiatives forward).

A. *State Question 755*

In November 2010, Oklahoma residents participated in a ballot initiative aimed to single out Sharia law for a special ban.²⁴⁶ This proposal, colloquially titled the Save Our State Amendment, asked Oklahomans via State Question 755 whether they agreed with a ban on the use of international law and Sharia law in Oklahoma courts.²⁴⁷ The proposal defined Sharia law as “Islamic law . . . based on two principal sources, the Koran and the teaching of Mohammed.”²⁴⁸ More than 70% of voters agreed with the ban.²⁴⁹

Rex Duncan, a primary proponent of this initiative, defended this amendment as an absolute necessity in the “war for the survival of America.”²⁵⁰ Duncan stated that, contrary to Muslims:

Oklahomans recognize that America was founded on Judeo-Christian principles . . . [a]nd State Question 755, the Save Our State Amendment, is just a simple effort to ensure that our Courts are not used to undermine those founding principles and turn Oklahoma into something that our founding fathers and our great-grandparents wouldn’t recognize.²⁵¹

246. Sarah Topy, *Sharia Law in the Sooner State and Beyond: How the First Amendment Impacts the Future of Anti-Sharia Law Statutes*, 80 U. CIN. L. REV. 617, 641 (2011).

247. H.R.J. Res. 1056, 52nd Leg., Reg. Sess. §§ 1(B) & 1(C) (Okla. 2010) (transcript available at <https://www.sos.ok.gov/documents/questions/755.pdf>) (last visited Feb. 15, 2019).

248. *Id.*

249. Penny M. Venetis, *The Unconstitutionality of Oklahoma’s SQ 755 and Other Provisions like It that Bar State Courts from Considering International Law*, 59 CLEV. ST. L. REV. 189, 190 (2011) (the proposal aimed to amend Oklahoma’s Constitution in a way that prohibited courts from making use of international law, Sharia law, or “the precepts of other nations or cultures”).

250. NUSSBAUM, *supra* note 44, at 11; Uddin & Pantzer, *supra* note 242, at 368. See also Justin R. Long, *State Constitutions as Interactive Expressions of Fundamental Values*, 74 ALB. L. REV. 1739, 1744–45 (2010) (discussing how the ban was defended by proponents in the public discourse).

251. Lee Tankle, *The Only Thing We Have to Fear Is Fear Itself: Islamophobia and the Recently Proposed Unconstitutional and Unnecessary Anti-Religion Laws*, 21 WM. & MARY BILL RTS. J. 273, 284 (2012) (quoting Rex Duncan in defense of the anti-Sharia proposal); see also Amara S. Chaudhry-Kravitz, *The New Facially Neutral*

This fallaciously gallant rhetoric unveiled the true motivation behind State Question 755: fear of the stranger, in this case Muslims. But this animus toward Muslims and their customs had deeper roots, grounded in majoritarian sensitivities about who Oklahomans were and where their sentiments were coming from. Specifically, this animus stemmed from the idea that the Judeo-Christian character of Oklahoma needed protection from a serious threat coming from outside the state and even outside the country—those individuals who did not share the majoritarian narrative about who Oklahomans are. In other words, Oklahoma was clearly being threatened by Muslims and their customs,²⁵² and something had to be done.²⁵³

Apparently, for individuals like Rex Duncan:

[when] it comes to Christian religious values, their potential inconsistency with democracy, equality, and tolerance is never in doubt, revealing sharply the degree to which [their] line of [reasoning] rests not on a thoroughgoing rationalist secularism but on a political theology of Christian democracy in which the identity of democratic values with an imagined Christian civilizational tradition is unquestioned.²⁵⁴

Anti-Shariah Bills: A Constitutional Analysis, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 25, 31 (2013).

252. Carlo A. Pedrioli, *Constructing the Other: U.S. Muslims, Anti-Sharia Law, and the Constitutional Consequences of Volatile Intercultural Rhetoric*, 22 S. CAL. INTERDISC. L.J. 65, 69–72 (2012) (analyzing why those who are outside the immigrant group fear immigrants and their rituals).

253. See Ali, *supra* note 37, at 1065–66.

254. Nehal Bhuta, *Two Concepts of Religious Freedom in the European Court of Human Rights*, 113 S. ATLANTIC Q. 9, 26 (2014) (admittedly, the quote is a critique on the jurisprudence of the European Court of Human Rights related to the assessment of laws targeting Muslims. However, this quote covers precisely what is so problematic about the Oklahoma case and its progeny). For criticism of the United States that fits the critical analysis of Nehal Bhuta, see Mark C. Rahdert, *Exceptionalism Unbound: Appraising American Resistance to Foreign Law*, 65 CATH. U. L. REV. 537, 558 (2016) (arguing that singling out Sharia law for a special ban at least implies that the Judeo-Christian legal tradition is not entitled to the same amount of disfavor); Robert L. McFarland, *Are Religious Arbitration Panels Incompatible with Law? Examining “Overlapping Jurisdictions” in Private Law*, 4 FAULKNER L. REV. 367, 371 (2013) (addressing the hypocrisy of those who defend religious arbitration but keep Muslims from the same privilege). Cf. Najmeh Mahmoudjafari, *Religion and Family Law: The Possibility of Pluralistic Cooperation*,

B. Disfavoring Muslims

The approval of State Question 755 by Oklahoma voters was immediately challenged by Muneer Awad, the executive director of Oklahoma's chapter of the Council on American-Islamic Relations.²⁵⁵ On November 9, 2010, the district court granted Awad a preliminary injunction, enjoining the Oklahoma State Board of Elections from certifying the election outcomes.²⁵⁶ The court found Awad had successfully demonstrated the criteria needed to grant the preliminary injunction. Specifically, Awad had demonstrated a substantial likelihood of success on the merits of his First Amendment claims and that he would suffer from irreparable harm if his request for an injunction was denied.²⁵⁷ Furthermore, the balance of hardship and public interests advocated for the issuance of an injunction in this case.²⁵⁸

The district court was especially concerned about the consequences of the special disfavor to Sharia law. The court found:

[Awad] has sufficiently set forth a personal stake in this action by alleging that he lives in Oklahoma, is a Muslim, that the amendment conveys an official government message of disapproval and hostility toward his religious beliefs, that sends a clear message he is an outsider, not a full member of the political community, thereby chilling his access to the government and forcing him to curtail his political and religious activities.²⁵⁹

82 UMKC L. REV. 1077, 1085 (2014) (wondering whether similar exceptions made for the Jewish community relating to religious arbitration could also be made for Muslims).

255. John T. Parry, *Oklahoma's Save Our State Amendment: Two Issues for the Appeal*, 64 OKLA. L. REV. 161, 161 (2012).

256. Venetis, *supra* note 249, at 198 (providing an overview and timeline of the proceedings).

257. *Awad v. Ziriaux*, 754 F. Supp. 2d 1298, 1307 (W.D. Okla. 2010), *aff'd*, 670 F.3d 1111 (10th Cir. 2012).

258. *Id.* at 1308 (holding that “[while] the public has an interest in the will of the voters being carried out, for the reasons set forth above, the Court finds that the public has a more profound and long-term interest in upholding an individual’s constitutional rights.”).

259. *Id.* at 1303.

Similarly, the district court disavowed the argument that Oklahoma's amendment concerned a permissible choice of law.²⁶⁰ In finding the amendment explicitly singled out Sharia Law for disfavor, the court said:

[the] amendment creates two independent restrictions on use/consideration of Sharia Law: (1) the amendment requires that Oklahoma courts "shall not consider . . . Sharia Law", and (2) the amendment allows Oklahoma courts to use/consider the law of another state of the United States but only if "the other state does not include Sharia Law." No other "legal precepts of other nations or cultures" is similarly restricted with respect to the law of another state.²⁶¹

More fundamentally, the court agreed with Awad's argument that Sharia is not only a legal system, but a way of life "that [provides] guidance to [Awad] and other Muslims regarding the exercise of their faith."²⁶²

The Attorney General of Oklahoma appealed the preliminary injunction,²⁶³ but the Court of Appeals for the Tenth Circuit affirmed the district court's decision in January 2012.²⁶⁴ On appeal, members of the Oklahoma State Board of Elections argued that Awad had not suffered actual harm because the adopted amendment was not yet in effect when he initiated his lawsuit. Neither had the rule limiting the use of Sharia law been implemented in any Oklahoma court. Therefore, appellants contended, Awad's action rested merely on hypothetical risks.²⁶⁵ The appellate court rejected this line of reasoning, finding the

260. Cf. Kimberly Karseboom, *Sharia Law and America: The Constitutionality of Prohibiting the Consideration of Sharia Law in American Courts*, 10 GEO. J.L. & PUB. POL'Y 663, 675 (2012) (defending the line that "[if] Sharia is a legal system, then the Oklahoma voters had every right to ban its consideration in state courts. It is conceivable that the legislators included the portion about Sharia Law in the Save Our State Amendment because, as a legal system, it is not covered under the doctrine of the Establishment Clause and its subsequent cases. In any event, Oklahoma voters had the right to decide which types of law could be considered in their state courts.").

261. *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1306 (W.D. Okla. 2010).

262. *Id.*

263. Venetis, *supra* note 249, at 199.

264. *Awad v. Ziriax*, 670 F.3d 1111, 1133 (10th Cir. 2012).

265. *Id.* at 1120.

fear of exclusion and “disfavored treatment” that had driven Awad to file the suit was not based on speculation.²⁶⁶ The ban would have been enacted a week after the voters’ approval. The court concluded the injunction was warranted, finding the four prongs of the injunction test—a successful claim, the balance of harms, irreparable injury, and public interests—weighed in Awad’s favor.²⁶⁷

In discussing the alleged violation of the Establishment Clause, the appellate court drew on the *Larson* test,²⁶⁸ due to the obviously discriminatory nature of the Save Our State Amendment. In this respect, the court noted:

[the] amendment bans only one form of religious law—Sharia law. Even if we accept Appellants’ argument that we should interpret “cultures” to include “religions,” the text does not ban all religious laws. The word “other” in the amendment modifies both “nations” and “cultures.” Therefore, if we substituted the word “religions” for “cultures,” the amendment would prohibit Oklahoma courts from “look[ing] to the legal precepts of other . . . religions.” The word “other” implies that whatever religions the legislature considered to be part of domestic or Oklahoma culture would not have their legal precepts prohibited from consideration, while all others would. Thus, the second portion of the amendment that mentions Sharia law also discriminates among religions.²⁶⁹

The Tenth Circuit’s discussion of the existence of any concrete justification for the ban on Sharia law is meaningful not only for the greater legal debate concerning the presence or absence of a compelling state interest to pursue the ban, but also for its analysis of the real reasons behind the ban.²⁷⁰ This analysis again revealed strong feelings of animus toward Muslims and their customs. Consequently, the appellate court refrained from a thorough discussion of the existence of

266. *Id.* at 1123.

267. *Id.* at 1126.

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

269. *Awad*, 670 F.3d at 1129.

270. *Id.* at 1130 (finding the authorities have “admitted . . . that they did not know of even a single instance where an Oklahoma court had applied Sharia law or used the legal precepts of other nations or cultures, let alone that such applications or uses had resulted in concrete problems in Oklahoma.”).

“a close fit with a compelling state interest.”²⁷¹ The court’s discussion of irreparable harm in the absence of the injunction was also remarkably brief, merely approving the district court’s holding.²⁷²

In relation to the balance of harms prong, the court first disavowed the argument that Oklahomans should have the right to see authorities take their vote seriously.²⁷³ The court explicitly rejected this idea, reasoning that the balance of harms test prevents authorities from enacting laws that seriously infringe upon the constitutional rights of part of the population.²⁷⁴ Similarly, the court found that avoiding violation of citizens’ fundamental rights is always in the public interest, and therefore affirmed the district court’s application of this prong of the injunction test.²⁷⁵

Finally, in the summer of 2013, the District Court for the Western District of Oklahoma granted summary judgment in favor of the plaintiff, permanently enjoining the authorities from implementing State Question 755.²⁷⁶ Although *Awad v. Ziriya* halted Oklahoma’s Save Our State Amendment, such initiatives, largely defended as necessary to combat a “barbaric” culture,²⁷⁷ continue to appear.²⁷⁸ However, as was the case with President Trump’s travel bans, the presentation of these initiatives has changed: from explicitly anti-Sharia to “facially neutral.”²⁷⁹

271. *Id.* (holding that a further inquiry is useless because the strict scrutiny test requires the presence of both a particular compelling interest and a close fit).

272. *Id.* at 1131.

273. *Id.* at 1132.

274. *Id.*

275. *Id.* (holding 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.”).

276. Chaudhry-Kravitz, *supra* note 251, at 32 (providing a brief timeline of the legal proceedings in *Awad v. Ziriya*).

277. See Jeremy Grunert, *How Do You Solve a Problem Like Sharia? Awad v. Ziriya and the Question of Sharia Law in America*, 40 PEPP. L. REV. 695, 696 (2013).

278. Holly Tao, *Congress, Courts, and Control over Persuasive Sources of Law*, 51 GONZ. L. REV. 235, 238 (2015) (examining the rise of anti-Sharia legal initiatives in the United States).

279. Chaudhry-Kravitz, *supra* note 251, at 26–28 (explaining that after the failure to realize an anti-Sharia bill in Oklahoma, the anti-Sharia movement has decided to rethink its strategy and moved toward facially neutral measures that could have the same effect as the Save our State Amendment).

C. Facially Neutral, But Obviously Sectarian

Recall the history of President Trump’s travel bans: the President-elect asked his advisory team how he could realize his promised Muslim travel ban in a legally-sound way.²⁸⁰ The advisory team concluded the threat of “danger” was an appropriate justification for banning individuals from Muslim majority countries: the same category of people the President had promised to single out for special travel restrictions.²⁸¹ This shift to focusing on national security instead of religion was “perfectly sensible, perfectly legal.”²⁸² But, as Justice Sotomayor noted in *Trump v. Hawaii*, this use of neutral language does little “to cleanse” such initiatives from their discriminatory purpose and obvious animus toward specific groups.²⁸³ Contrary to Justice Sotomayor, the majority appeared to show sensitivity toward this shift, concluding that “because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.”²⁸⁴

Apart from this adoption of more facially neutral language, there is something else of theoretical relevance about the rise of these legal initiatives that may explain the prevalence of animosity toward the other. This may also help us conceptualize policies, like the travel bans, that show obvious disdain toward individuals from Muslim majority countries. Put differently, there exists a much deeper ideological root

280. W. Bradley Wendel, *Sally Yates, Ronald Dworkin, and the Best View of the Law*, 115 MICH. L. REV. ONLINE 78, 82 (2016) (using President Trump’s travel ban as an example to answer the question “what happens when there are competing accounts of what the law permits or requires?”).

281. Bennett L. Gershman, *Rudolph Giuliani and the Ethics of Bullshit*, 57 DUQ. L. REV. 293, 303 (2019) (quoting Rudy Giuliani).

282. Jim Dwyer, *First Came Giuliani’s Input on the Immigration Order. Now There’s the Court Test*, N.Y. TIMES (Feb. 9, 2017), <https://www.nytimes.com/2017/02/09/nyregion/rudolph-giuliani-donald-trump-travel-ban.html>. See also Ana Pottratz Acosta, *Sunlight Is the Best Disinfectant: The Role of the Media in Shaping Immigration Policy*, 44 MITCHELL HAMLINE L. REV. 803, 841–42 (2018) (explaining how this specific statement has played a major role in the litigations against the travel bans, saying that challengers have utilized statements made in the media to find support for their Establishment Clause claim).

283. *Trump v. Hawaii*, 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting).

284. *Id.* at 2421.

behind the contemporary animosity toward the non-white other: misgivings about multiculturalism make a rejection of the Islamic culture possible, specifically in the area of alternative dispute resolution dealing with disputes that have a religious dimension.²⁸⁵

Although criticism on religious arbitration as a form of alternative dispute resolution might sound fair because of favoritism toward religious people, singling them out for special favor,²⁸⁶ it does not justify singling out Muslims for special *disfavor*, either in the form of travel bans or in the enactment of rules depriving them from living in accordance with their faith.²⁸⁷ This criticism touches upon the presence of double standards that explicitly disfavor some groups. For example, in the case of Oklahoma, the Save Our State Amendment singled out explicitly Sharia law for special disfavor but remained silent as to other

285. The lack of appreciation of multiculturalism frustrates the possibility of having “competing and independent legal orders,” enabling people to find appropriate solutions for their civil law disputes in accordance with their religious convictions. See Sukhmiranjit Singh, *Religious Arbitration and Its Struggles with American Law & Judicial Review*, 16 PEPP. DISP. RESOL. L.J. 360 (2016) (arguing that the debate about multiculturalism is at the heart of the debate concerning the permissibility of religious arbitration within secular systems); Joel A. Nichols, *Religion, Marriage, and Pluralism*, 25 EMORY INT’L L. REV. 967, 976 (2011) (saying that the “disconnect between religious law and civil law, when combined with premises of multiculturalism and the deep commitments of religious believers, has led to calls for greater legal recognition of the decisions of religious tribunals.”). Cf. Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1239 (2011) (purporting that anti-Sharia legal initiatives mainly “seek to undermine the ability of groups to serve as competing and independent legal orders, thereby striking at the very heart of the new multiculturalism.”).

286. Importantly, this concern can be seen as the other side of our critique so far on measures that have singled out groups for a special *disfavor qua* religion. Singling groups out for a special *favor qua* religion is on similar grounds very objectionable. See generally Sohail Wahedi, *Abstraction from the Religious Dimension*, 24 BUFF. HUM. RTS. L. REV. 1 (2017–2018) (discussing the liberal critique on singling out religion for a special favor). For a critique of favoritism in relation to religious arbitration, see Brian Hutler, *Religious Arbitration and the Establishment Clause*, 33 OHIO ST. J. ON DISP. RESOL. 337, 358 (2018). For a discussion on the problem with favoritism, see generally Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws*, 48 B.C. L. REV. 781, 788 (2007) (claiming that favoritism toward certain groups undermines the authority of rules).

287. James A. Sonne, *Domestic Applications of Sharia and the Exercise of Ordered Liberty*, 45 SETON HALL L. REV. 717, 728 (2015) (arguing a disfavored treatment of Sharia law in courts is not justified).

religious legal systems.²⁸⁸ The courts in *Awad* easily parried the concerns and shattered the illusion—created out of myths and persisting conspiracy theories about Muslims—that Oklahoma was facing a huge Sharia problem. The Supreme Court in *Trump v. Hawaii*, however, showed sensitivity to the seemingly neutral re-description of the travel ban, despite its undeniable and notorious history of hostility toward Muslims.

Comparing the travel ban cases to the Save Our State Amendment debacle raises three delicate and challenging questions. First, how do we rationalize the return of exclusionary politics that single out people with immigrant backgrounds for disfavored treatment? Second, how can we understand the return of exclusionary politics *as such*? And third, how can we spread awareness of the devastating effects of such discriminatory policies?

The first question is contextual in nature. Fear has played a significant role in both the enactment of the travel bans and in the rise of anti-Sharia initiatives.²⁸⁹ The fear of uncertainty as to who is entering the country, namely potential terrorists, led to the issuance of the travel ban. And it was the fear of who is already living here, namely people who follow the rules of an evil tradition, that caused the wave of anti-Sharia initiatives. This focus on border protection and preservation of the majoritarian narrative led to the rise of fear-based politics not

288. Cf. Rahdert, *supra* note 254, at 557–58.

289. Fear plays a major role in cases that, in one way or another, threaten majoritarian sensitivities. Cf. Sohail Wahedi, *The Health Law Implications of Ritual Circumcisions*, 22 QUINNIPIAC HEALTH L. J. 209, 211–12 (2019) (discussing the first ever criminal trial in the United States regarding the permissibility of the lightest version of female circumcision, separation of the mucous membrane from the girls' genitalia, which was rhetorically presented as a horrifying case of brutality. While this case concerned *religious* female circumcision that in all respects was less invasive than religious male circumcision, the mass media attention for “genital mutilation” made it impossible to say something meaningful about the lawfulness of this variant of female circumcision); Saul Levmore, *Can Wrinkles be Glamorous?*, in SAUL LEVMORE & MARTHA C. NUSSBAUM, *AGING THOUGHTFULLY: CONVERSATIONS ABOUT RETIREMENT, ROMANCE, WRINKLES, AND REGRET* 104 (2017) (“[T]he fact that so many thoughtful people find female but not male circumcision abhorrent, suggests that a critical difference is that one is practiced on a group that is, at least to Western eyes, seriously constrained and subjugated by a variety of practices.”).

grounded in a thorough and rationalist approach to the problems they claim to solve.²⁹⁰

The second question about how we should understand the return of these exclusionary politics is a conceptual one. How did it come to be that in both cases, the religious dimension was pushed to the margins? The travel bans were presented—ultimately with great success—as solutions to growing national security concerns. The Save Our State Amendment, finding significantly less success, was presented merely as a choice-of-law or choice-of-forum issue. This sharp abstraction from the religious dimension,²⁹¹ particularly to the field of national security, has made it possible to marginalize serious criticism of the travel restrictions. After all, who could be against national security measures?²⁹²

The third question is about recommendations, focusing primarily on how to overcome the era of fear and spread awareness of the devastating effects of policies that single out minority groups for disfavored treatment. But before we can address solutions to the challenges posed by these fear-based politics, we must first identify and define what is at risk.

III. FREE OUR POLITICS FROM ANIMUS

Following our analysis of fear-driven politics, we are left with two fundamental questions. First, how can we conceptualize such politics? More specifically: against which theoretical backdrop can we conceptualize politics that single out specific groups—in our case, American Muslims—for special disfavored treatment? And second, how can we save our politics from fear and animus in an era of terror, anxiety, and social unrest?

What is interesting about the travel ban project and the Save Our State debacle is that we can identify some facially neutral justification in both cases. While both situations could easily be characterized as concerning animus toward Muslims, there is another approach:

290. *Cf.* Bhuta, *supra* note 254.

291. *Cf.* Wahedi, *supra* note 286, at 37.

292. *See, e.g.,* Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 838 (2017) (discussing President Trump’s style of leadership and suggesting that “today’s conditions of partisanship and polarization significantly reduce the possibility of meaningful oversight . . .”).

abstraction from the religious dimension. This is reflected in the Trump administration's decision to translate the President's promise to shut down the borders to Muslims. The administration found a suitable and legally acceptable way to keep that promise, shifting the attention from religion and instead focusing on national security. This strategy corresponded with concerns intelligence services generally have about people coming from conflict areas, such as the Middle East and other Muslim-majority countries. A similar strategy was adopted in the Sharia ban cases: shifting the attention from religion to choice-of-law and choice-of-forum issues.

Both security concerns and choice-of-law issues were facially neutral and, therefore, suitable substitutes for the categories they effectively targeted. But what does abstraction from the religious dimension entail and how does it work in relation to the fear-driven politics discussed in this article? To answer this question, we must first acknowledge that the idea of abstraction, as discussed here, derives from the scholarly debate about the relationship between law and religion within the paradigm of liberal political philosophy.²⁹³ Basically, liberal theories of religious freedom dealing with the specialness of religion for either religious accommodation or justification of public decisions²⁹⁴ have one major commonality: abstraction from the religious dimension.²⁹⁵

Liberal theories of religious freedom are skeptical about the specialness of religion, rejecting the special legal solicitude toward religion.²⁹⁶ In other words, there should be no room for sectarian

293. For a discussion of the debate surrounding the place of religion in liberal political philosophy, see generally CÉCILE LABORDE & AURÉLIA BARDON, *RELIGION IN LIBERAL POLITICAL PHILOSOPHY* (2017).

294. Cf. Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1357 (2012).

295. Wahedi, *supra* note 286, at 37.

296. Cf. Kenneth Einar Himma, *An Unjust Dogma: Why a Special Right to Religion Wrongly Discriminates Against Non-Religious Worldviews*, 54 SAN DIEGO L. REV. 217, 219 (2017). See generally BRIAN LEITER, *WHY TOLERATE RELIGION?* (2014); RONALD DWORKIN, *RELIGION WITHOUT GOD* (2013); MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE* (2008); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007) (all agreeing that sectarian arguments in favor of religious freedom are insufficient to justify singling out religion for special legal solicitude).

justifications of the special legal solicitude toward religion.²⁹⁷ Within this approach, religion can only be considered special and, thus, a protection-worthy category via abstraction. That is to say, via the identification of its liberal and neutral substitutes.²⁹⁸ The question becomes whether politics of fear, as described in this article, are paradigmatic expressions of abstraction. Intuitively, the answer is yes. Because of the strong rejectionist nature of the abstraction thesis that aims to find liberal substitutes for religion, explaining based hereon, why it is for example worthy to protect some religious practices, such as wearing headscarves or consuming Halal and Kosher food. Ultimately, not because these cases concern matters of religion, but because they concern matters of conscience.²⁹⁹

This rejection of the religious dimension that defines the abstraction strategy makes sense when analyzing the Government's decision to present the travel ban as purely a security matter. This also helps explain why authorities in Oklahoma strongly emphasized approaching State Question 755 solely as a choice-of-law matter. In both cases, abstraction was a useful strategy to shift the conversation away from religion and its serious constitutional concerns.

Although it may be true that abstraction from the religious dimension, as presented here, could be used to declare every unpopular religious act out of order,³⁰⁰ abstraction also emphasizes the importance of egalitarianism. In this context, that means authorities should enable all citizens to make use of their basic liberties to the same extent. Conversely, authorities should not favor one group at the expense of another. Thus, because of its emphasis on egalitarianism, abstraction

297. For a sectarian defense of religious freedom, see Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 786–89 (2013); Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1183 (2013).

298. See, e.g., JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE 89 (2011) (considering freedom of conscience an appropriate substitute for freedom of religion).

299. Cf. LEITER, *supra* note 296, at 64; MACLURE & TAYLOR, *supra* note 298, at 77.

300. Sohail Wahedi, *Freedom of Religion and Living Together*, 49 CAL. W. INT'L L.J. 213 (2018–2019) (explaining European cases of singling out Muslims for special restrictions in light of abstraction from the religious dimension).

disapproves a favored treatment of religion. But it also disapproves—for reasons of neutrality—a disfavored treatment of religion.³⁰¹

Neither the travel ban nor the Save Our State Amendment can pass the second prong of abstraction: the ban on singling out groups of people or beliefs for special restrictions. Animosity toward Muslims was obviously present in both cases. The travel ban claims to deal with security measures, keeping potential terrorists, rapists, honor killers, and other troublemakers outside the United States. The Save Our State Amendment similarly hid the religious concerns of its Muslim victims by positing that it aims solely to see that Oklahoma courts utilize only American laws, rather than any foreign laws.

The question now becomes how to overcome this era of anxiety toward the other. Anti-Sharia legal initiatives did not stop after *Awad*. In fact, there has been an increase in the amount of such initiatives proposed throughout the country. Additionally, the Islamic faith has been singled out for special restrictions in the areas of labor and land allocation for religious institutes.

Obviously, politics of fear are contrary to the promise of the American Dream. The only legacies these fear-driven politics will leave will be the creation of disparities between groups of people, downgrading them to secondary citizens;³⁰² the reinforcement of majoritarianism and the political advancement of a clearly xenophobic immigration agenda;³⁰³ and, above all, the institutionalization of Islamophobia.³⁰⁴

But we should not give up quickly. We may still have some hope to overcome this era of anxiety, animus, and disregard of the constitutional traditions of freedom and neutrality. Justice Kennedy's concurring opinion regarding public manners in *Trump v. Hawaii* provides some guidance here. A broad interpretation of Justice Kennedy's forceful plea reminds the authorities to be mindful of what the constitutional tradition tells them; to bear in mind the freedoms

301. Cf. DWORKIN, *supra* note 296, at 130 (defending the line that liberal democracies should not abandon a particular lifestyle because another lifestyle is "intrinsically better." It should be left to citizens to decide which way of life better suits them).

302. Ali, *supra* note 37, at 1031.

303. Kapur, *supra* note 176, at 307.

304. See generally Beydoun, *supra* note 36.

guaranteed in the Constitution; and to be aware of legal constraints, such as the Establishment Clause.³⁰⁵

Indeed, we should not forget this country is “built upon the promise of religious liberty. [The Founding Fathers] honored that core promise by embedding the principle of religious neutrality in the First Amendment.”³⁰⁶ Similarly, we should keep in mind what Dr. King fought to achieve: more equality and less disparity. Pursuing the ideal of equal liberty and equal respect for human beings in a highly divided world is the least we can do to honor Dr. King’s powerful and timeless dream.

Just as important as the plea for equal liberty, public manners, and respect for the constitutional tradition, is the need for having and maintaining “a Judiciary willing to hold the [political] branches [accountable] when they defy our most sacred legal commitments,” such as religious freedom.³⁰⁷

CONCLUSION

Immigration has always been subject to great political debate in the United States. Today, however, the explicit use of anti-immigration rhetoric has become common among a significant portion of the political establishment. This rhetoric has provoked the immigration debate and shaped the contours of the contemporary political discourse concerning immigration. With the 2016 election of President Trump came a tougher attitude toward immigration and immigrants. Subsequently, the 2018 midterm elections revealed an increase in “Islamophobic” rhetoric among political campaigners. This stricter attitude toward immigration has manifested itself in two ways. First, through the aggressive language used to discuss immigration. And second, through the proliferation of restrictions aiming to inhibit immigrants from entering the United States.

What is striking about both political developments is the undue use of stereotypes. These stereotypes have intensified concerns about undocumented immigrants, illegal border crossings, and national security threats. Specifically, this latter concern has been used to justify

305. *Trump v. Hawaii*, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring).

306. *Id.* at 2433 (Sotomayor, J., dissenting).

307. *Id.* at 2448.

the special need for radical measures in the fight against immigration—measures ranging from building a separation wall between the United States and Mexico to denying citizens of some countries access into the United States. As a consequence of this harsh political reality, people with immigrant backgrounds suffer from harassment, hatred, and racial profiling.

This article has focused on the challenges faced by one group in particular: the Muslim community. The contemporary anti-immigration atmosphere draws upon fears of uncertainty about who is crossing the borders and who is living here. To deal with these concerns, authorities have singled out Muslims and their faith for special restrictions. This is obviously discriminatory and contrary to the rich constitutional tradition of freedom and neutrality.

To halt a further racialization of Muslims and to overcome the contemporary era of fear, anxiety, and distrust, we must act in accordance with and uphold the constitutional tradition of freedom and neutrality. We must foster a strong judiciary that can halt the executive and legislative branches if necessary. We must keep in mind: no more racial discrimination, but equal liberty and equal respect toward the other, even if the other does not share our beliefs or our way of life.

EPILOGUE

The travel ban project and the Save Our State debacle fit a broader tendency of disregarding constitutional traditions of religious liberty and state neutrality toward religion, applying double standards and framing the “other” as dangerous, unwelcome, and unfit. Unfortunately, this tendency is present across many liberal democracies: from the Far East, to the Middle East, Europe, and North America. Of these places, the situation in Europe is comparable to, and in some instances even worse, than what we see happening in the United States. The rise in measures targeting people with an Islamic background is perplexing. And the restraint of the judiciary to defend “our most sacred legal commitments” is regrettable.³⁰⁸

As such, the religious freedom jurisprudence of the European Court of Human Rights is notoriously Islamophobic in nature, likely resting

308. *Id.*

on myths about Muslims,³⁰⁹ rather than drawing on an approach attesting to equal respect and equal liberty.³¹⁰ It has proven to be very “lenient toward practices of Christian establishment and overtly intolerant toward the presence of Islam.”³¹¹ But more alarming is the rise of concrete measures across European states singling out the Islamic faith for special bans. For example, in 2015, Austria adopted the “Islam-bill,” singling out Islamic organizations and banning them from receiving foreign funding.³¹² More recently, the European Parliament has proposed to close all Islamic centers, including mosques and other institutes that operate contrary to values of the European Union, while again leaving other religions unmentioned.³¹³

Abstraction may be a helpful strategy to separate practices from their religious dimension, but it is never a justificatory strategy for discrimination, religious intolerance, or the spread of hatred toward unpopular religious groups.

309. Peter G. Danchin, *Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law*, 49 HARV. INT’L L.J. 249, 275 (2008) (saying with reference to critics of the case law of this Court that “there appears to be a bias in the jurisprudence of the [European Court of Human Rights] under article 9 toward protecting traditional and established religions and a corresponding insensitivity toward the rights of minority, nontraditional, or unpopular religious groups.”). *See also* Samuel Moyn, *Religious Freedom and the Fate of Secularism, in RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY* 27 (Jean Louise Cohen & Cécile Laborde Eds., 2016) (asking rhetorically with respect to the systematically different legal treatment of Islamic cases before the ECtHR: “Do the cases . . . reflect a Christian Islamophobia in the principled garb of secularism?”).

310. Christian Joppke, *Pluralism vs. Pluralism: Islam and Christianity in the European Court of Human Rights*, in *RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY* 88 (Jean Louise Cohen & Cécile Laborde Eds., 2016) (analyzing the case law of the European Court of Human Rights in religious freedom cases and claiming the Court interprets pluralism as a value that is threatened by the Islamic faith and therefore needs protection).

311. CÉCILE LABORDE, *LIBERALISM’S RELIGION* 33 (2017).

312. *See* Elahe Izadi, *Austria Is Taking Controversial Steps to Tighten a 100-Year-Old ‘Law on Islam’*, WASH. POST (Feb. 26, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/02/26/austria-is-taking-controversial-steps-to-tighten-a-100-year-old-law-on-islam/>.

313. Wahedi, *supra* note 300, at 228.