AMERICAN MUSLIMS: THE UNTOUCHABLES OF AMERICAN CONSTITUTIONAL DEMOCRACY?

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ABSTRACT

This article is about the future of Muslims in the American constitutional democracy. How this future will look like depends highly on how the dominant majority as well as those sitting in the political, executive and judicial branches of power will deal with the emergence of Islamophobia. This article explores the roots of American fear of Muslims and their faith and reflects on what Islamophobia and its reinforcement bring for the future of American democracy. This article contends that the American anxiety about Islam will create huge disparities and advance a political agenda tainted with animus toward Muslims. This insidious dis-invitation to Muslims to participate in the American democracy needs to be halted to cleanse the American political scene from anxiety, bigotry and exclusion.

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I. INTRODUCTION

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The surprising 2016 election of Donald J. Trump as President of the United States of America marked the beginning of a series of unprecedented steps, including both expressions as well as legal orders, which constituted a paradigmatic shift in the attitude of a major part of the political establishment toward institutions, non-governmental organizations, citizens, and non-citizens. As such, members of the judiciary, political opponents, critical journalists, women, members of minority groups in general, and American Muslims in particular, have been among those groups of people who have experienced serious confrontations with the President over the recent years. What these people have in common is that they either, to one or another extent, disagree with the politics of the current administration, or they have been considered, for whatever reason, a threat to the “Make America Great Again” project and pledge of President Trump. This brief, though alarming analysis helps us in two ways to put American constitutional democracy under critical scrutiny in an era of anxiety, enemy construction, religious animus, and racial stereotyping.

First, it helps us to identify and categorize variations of troublemakers according to the current administration. Second, this finetuning helps us to explore why there are differences in the

1. Neil S. Siegel, Political Norms, Constitutional Conventions, and President Donald Trump, 93 IND. L.J. 177, 190 (2018) (theorizing what political norms in a constitutional democracy entail and illustrating how the President elect has violated these norms).
2. See generally Elizabeth Thornburg, Twitter and the #So-CalledJudge, 71 SMU L. REV. 249, 298 (2018) (discussing how President Trump has scrutinized the legitimacy of judgments and developing an extensive argument for the judiciary to utilize social media against political attacks).
3. See generally Tiffany R. Murphy, Prosecuting the Executive, 56 SAN DIEGO L. REV. 105, 144, 160 (2019) (on the need to cleanse the executive branch of power from [allegations of] corruption, in order to preserve the “tenets of democracy.”).
5. Lawrence J. Trautman, Grab 'Em by the Emoluments: The Crumbling Ethical Foundation of Donald Trump's Presidency, 17 CONN. PUB. INT. L.J. 169, 198 (2018) (discussing the way in which women have been insulted by Donald Trump over the past few years).
way in which the “winner,” i.e. the executive branch of power, deals with the “losers.” This is a very helpful exercise to reflect more broadly on the near future of American democracy, focusing thereby on the question whether “losers,” all those who disagree or have been considered unfit, can equally take part in the process of decision-making. This article contributes to this broad and challenging question by choosing one specific category of people, namely American Muslims, who need our serious attention.

Admittedly, American Muslims do not form a homogenous group. But over the recent years, they have been considered a serious threat to the interests of the United States. And therefore, they have been singled out for restrictive measures in areas related to the protection of national security. This urges us to be seriously worried about unfair treatment of American Muslims. But this single argument is somehow not enough to diagnose the present context. We need something more to make a robust prognosis about the future of Muslims in the American constitutional democracy.

We need, on the one hand, some concrete information that helps us to identify categories of arguments that could justify our special attention for American Muslims. On the other hand, we need to contextualize the present findings in order to be able to say something meaningful about

13. See Peter Baker, Trump Hails Acquittal and Lashes Out at His ‘Evil’ and ‘Corrupt’ Opponents, N.Y. TIMES (Feb. 18, 2020), https://www.nytimes.com/2020/02/06/us/politics/trump-impeachment.html (after the 2020 impeachment acquittal, President Trump called House Speaker Nancy Pelosi a “horrible person,” the cops involved in the process were “dirty,” and Senator Mitt Romney (Utah) who voted against the President in the impeachment trial was a “failed presidential candidate.”).


15. See Devon W. Carbado, States of Continuity or State of Exception: Race, Law and Politics in the Age of Trump, 34 CONST. COMMENT. 1, 3 (2019) (illustrating how the Supreme Court jurisprudence has reinforced disparities in different areas of law between the dominant majority and vulnerable minority groups, such as colored people); David Stebenne, Is American Democracy Endangered?, 66 DRAKE L. REV. 919, 932 (2018) (proving the link between contemporary middle-class concerns in areas related to finance and politics to the waning influence of constitutional norms).

16. Ali A. Mazrui, Is There a Muslim-American Identity: Shared Consciousness Between Hope and Pain, 8 J. ISLAMIC L. & CULTURE 65, 67 (2003) (distinguishing four different types of identities for American Muslims related to: (i) geographical background; (ii) race; (iii) interests; (iv) citizenship).


the future of Muslims in the American constitutional democracy. This approach of making first, an
inventory of arguments and circumstances that urge us to be cautious, and, second, contextualizing the findings, is very fruitful in answering the question whether Muslims could be considered the untouchables of American democracy. Those who do not belong to the American society, Whose representatives are fake. And for whom special legal instruments have been created and invoked as deterrents.

This article is about the future of Muslims in the American constitutional democracy. How this future will look depends highly on how the dominant majority as well as those sitting in the political, executive and judicial branches of power will deal with the emergence of Islamophobia. Therefore, Part II focuses on the presence of Islamophobia today. This Part defines Islamophobia as fear of Muslims and their faith, which ultimately results in deploying measures that single out Muslims qua Islam for disfavored treatment. Part III explores the roots of American fear of Muslims and their faith. Part IV reflects on what Islamophobia and its reinforcement bring for the future of American democracy. This Part argues that American anxiety about Islam leads to the political advancement of a dangerous “system of racial caste.”

II. ISLAMOPHOBIA IN THE TRUMP ERA

The American anxiety about Islam, which is predominantly present in the margins of the Republican Party, and which has been fueled by President Trump over the past few years, has constituted the foundations of a wild conspiracy theory about Muslim presence in the United States. This theory combines three political and social perspectives in (i) framing Islam as a dangerous political ideology; (ii) presenting Muslims as a serious threat to national security; and (iii) urging authorities to undertake measures against the presence of both Islam as well as Muslims in the United States.

22. This article uses the word “untouchable” in a metaphorical way.
28. This article does not aim to make an empirical argument about the exact scope of Islamophobia.
31. Id. at 6.
This theory is rejectionist in the sense that it denies considering Islam a religion, such as, for example, Christianity.\textsuperscript{32} It is also a constructionist theory geared toward enemy construction. It portrays Muslims as a real threat to national security and the American way of life.\textsuperscript{33} The anti-Muslim conspiracy theory is also interventionist. It requires authorities to stop the Muslim threat by a wide range of means, varying from travel bans to closure of houses of worship.\textsuperscript{34} This Part focuses on two matters. First, on the synergy between recent anti-Muslim political rhetoric and actual or propagated policies that single out Muslims for disfavored treatment.\textsuperscript{35} Second, on how this synergy accelerates the institutionalization of Islamophobia.

A. Discourse of Islamophobia

The increasing number of political attacks against Muslim presence in the United States,\textsuperscript{36} include three types of rhetorical attacks. Each of these attacks has a different subject matter. The targets have been religion, believers, and institutions. As such, Islam has been a delicate target for fierce attacks. The same is true for both groups of Muslims: civilians without any political function as well as Muslims in office. The third category that has been subjected to political aggression consists of Islamic institutions, such as, for example, mosques and other Islamic centers.\textsuperscript{37}

This political distrust of Islam, Muslims, and Islamic organizations has unambiguously been addressed by Donald Trump.\textsuperscript{38} He thinks that “Islam hates us,”\textsuperscript{39} and Koran “teaches some very negative vibe.”\textsuperscript{40} And, most probably, therefore, he has lashed out multiple times at Muslims and


\textsuperscript{33} Cyra Akila Choudhury, Shari’ah Law as National Security Threat?, 46 AKRON L. REV. 49, 81–82 (2013) (stating how Islam has been constructed as a real threat to the interests of the United States).

\textsuperscript{34} Muslim Advocates, supra note 30, at 6 (mentioning prohibitions, tracking, surveilling and “even” eliminating Muslims as possible means in the fight against the Muslim threat). See also Marvin L. Astrada, Fear & Loathing in the Present Political Context: The Incubus of Securitizing Immigration, 32 GEO. IMMIGR. L. J. 169, 200 (2018) (contextualizing such obvious anti-immigration means as “securitization” of immigration policies).

\textsuperscript{35} Beydoun, supra note 12, at 1755 (qualifying the relationship between the language and politics of Islamophobia as “synergistic” and “symbiotic,” whereby the political discourse of Islamophobia has been reinforced by state actions that consider Muslims a never-ending threat).

\textsuperscript{36} Muslim Advocates, supra note 30, at 6.

\textsuperscript{37} See generally Jessica A. Clarke, Explicit Bias, 113 NW. U. L. REV. 505 (2018) (quoting some anti-Muslim screens and criticizing the (absence of a sophisticated) legal approach to biases).

\textsuperscript{38} This Part does not provide a full overview of anti-Muslim statements. See also Jill E. Family, The Executive Power of Political Emergency: The Travel Ban, 87 UMKC L. REV. 611, 624 (2019); Stuart Chinn, Threats to Democratic Stability: Comparing the Elections of 2016 and 1860, 77 Mo. L. REV. 291, 293 (2017) (on how Donald Trump placed Islam and immigration at the center of campaigns).


pledged, among others, for a “total and complete shutdown of Muslims entering the United States.”\(^{41}\) Trump has justified this by arguing that “large segments” of Muslims hate Americans.\(^{42}\)

This alleged feeling of antipathy might clarify another contentious claim made by Trump: the celebration of 9/11 terrorist attacks by “thousands and thousands” of New Jersey Muslims.\(^{43}\) These people resemble, according to Donald Trump, “a great Trojan Horse” that puts the nation at a high risk of serious attacks.\(^{44}\) Therefore, authorities need to be very “vigilant with respect to the Muslim population,”\(^{45}\) and implement, among others, a registry system that can monitor American Muslims.\(^{46}\) Because these people do not “assimilate [and] don’t want the laws that we have. They want sharia law.”\(^{47}\) To stop this and to reduce Islamic terrorism, Trump has said that he would “strongly consider” closing mosques, because “some of the ideas and some of the hatred—the absolute hatred—is coming from these areas.”\(^{48}\)

Trump’s alleged animus toward Islam,\(^{49}\) or, perhaps better said, his unconcern about unfair treatment of Muslims was reaffirmed during his 2020 visit to India. Dozens of Indian Muslims were attacked and killed by Hindu extremists,\(^{50}\) yet Trump not only remained silent about the rise of anti-Muslim violence,\(^{51}\) he appreciated India’s approach to religious liberty.\(^{52}\) What message does this obvious ignorance, if not carelessness, about anti-Muslim bigotry, religious animus, and discrimination, send to American Muslims?\(^{53}\)

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43. Klaas, supra note 39.
45. MUSLIM ADVOCATES, supra note 40, at 10 n. 10.
46. Id. at 2.
48. Id.
Something about Trump’s attitude suggests that he considers Muslims less protection-worthy than other groups. This message echoes strongly in the way Trump’s (ex-)political allies talk about Muslim presence in the United States.

For example, General Michael Flynn, a former national security advisor to President Trump, compared Islam to a “malignant cancer” that should not be considered a religion, but rather a dangerous and deadly political ideology. After all, as former Congressman, and current Secretary of State, Mike Pompeo, once said: the political ambitions of Islam, and more specifically

[the] efforts to expand the caliphate are not limited to the physical geography of the Middle East or other places where there are large Muslim majorities, and we should be concerned that every member of Congress understands that in the same way, such that we can do the things we need to do to keep us all safe.

This security argument that suggests Islam is a serious threat to the interests of the United States has been used to frame Muslim participation in the American constitutional democracy as dangerous, questionable and even sick. As such, Rashida Tlaib, one of the first ever elected Muslim Congresswomen, was considered “a ‘danger’ who might ‘blow up’ the U.S. Capitol.” And Shahid Shafi, vice chairman of the Tarrant County Republican Party in Texas, was told that “not [all] Republicans . . . think Islam is safe or acceptable in the U.S., in Tarrant County, and in the Republican Party.” But more generally, Muslims who want to be part of, and participate in the democratic process are called “schizophrenic,” because they believe in “two different philosophies” that compete with each other. Hence, plans to single out Muslim neighborhoods for extra security controls, “before they become radicalized,” have never been far away.

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58. See generally MUSLIM ADVOCATES, supra note 30, at 13.


same is true for plans that have targeted places where Muslims come together, such as mosques. To put it in the words of Republican Senator and 2016 Presidential Candidate Marco Rubio: “[it’s] not about closing down mosques. It’s about closing down anyplace—whether it’s a cafe, a diner, an internet site—anyplace where radicals are being inspired.”

This brief overview of political statements about Muslim presence in the United States unveils how today’s political discourse has been dominated by strong anti-Muslim bigotry. And the bottom line of all this political shouting is that neither Islam, nor Muslims, nor any place related to Islam or run by Muslims, could be able to develop a bona fide relationship with the United States.

B. Politics of Islamophobia

What does the anti-Muslim bigotry in the political discourse mean in terms of actual regulations and state policies? Apparently, it is not a very big deal anymore to advocate for measures that disfavor some people because of their religious beliefs. But can we, for example, say that there is a synergy between the bigoted political discourse and policies that affect civil rights of American Muslims? More importantly, can we identify policies that have effectively singled out Muslims for disfavored treatment because of their religion?

For the answer to these questions, we should not confuse the synergy critique with the large body of criticism of ethnic and racial profiling that over the last two decades have harassed people with an Islamic background or Muslim appearance in the fight against terrorism. We need to make a distinction between policies that have bolstered ethnic and racial profiling, and regulations “unconstitutionally tainted with animus toward Islam.” Hence, something like the infamous Muslim registry plan, the propagated closure of Mosques, or designing separate security

63. See MUSLIM ADVOCATES, supra note 30, at 34.
65. See generally David Fontana, Unbundling Populism, 65 UCLA L. REV. 1482, 1495 (2018) (on how the populist political agenda advances a binary view of citizenship that separates the society into those who belong to the dominant majority, and those who do not).
66. Cf. Beydoun, supra note 12, at 1751 (arguing that the law and politics related to the Muslim presence in the United States reveals that Islamophobia is on the rise).
67. See Wahedi, supra note 6, at 200.
69. Wahedi, supra note 26, at 287.
mechanisms for areas dominated by Muslims,\(^74\) would come closer to the category of regulations we aim to conceptualize as measures that have singled out Muslims \textit{qua} Islam for disfavored treatment.\(^75\) But we need to include one important disclaimer at this point. None of these measures have ever become law.\(^76\) Does this mean that we should renounce the synergy critique?\(^77\) Not really. Many of us still remember what happened, just a few days after Donald Trump took office in 2017. A “total and complete” chaos at major international airports inside and outside the United States.\(^78\)

The winner of the 2016 elections had issued Executive Order 13,769 that made it practically impossible for nationals of seven Muslim-majority countries to enter the United States.\(^79\) The main aim of this Executive Order was to keep troublemakers outside the country. It categorized them as people who “do not support the Constitution, or those who would place violent ideologies over American law.”\(^80\) Concrete examples of such people included honor-killers, women-abusers, and certain types of rigorists: either people responsible for “the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.”\(^81\) Drawing on such platitudes and stereotyping people because of their background left nothing to the imagination about the primary goal of this Executive Order: keeping as many Muslims as possible outside the country.\(^82\)

But the Trump administration faced difficulties in realizing this bigoted goal.\(^83\) Both District as well as Circuit Courts granted (nationwide) injunctions, enjoining authorities from the full implementation of the Executive Order.\(^84\) These judgments, however, did not stop Trump from the remake of travel restrictions. He announced new policies “tailored to [the] very bad decision” of

\(^75\) \textit{See} Wahedi, supra note 26, at 287.
\(^77\) Beydoun, supra note 12, at 1755.
\(^79\) Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter Exec. Order 13,769]. \textit{See also} Wahedi, supra note 6, at 152 (on the immediate consequences of Exec. Order 13,769, such as revoking issued visas).
\(^80\) Exec. Order 13,769, supra note 79, at 8977.
\(^84\) Injunctions were granted for different reasons. \textit{See} Wahedi, supra note 6, at 154–61 (saying that absent the restrictions travelers would be allowed entry).
the Ninth Circuit that denied stay of the restraining order pending appeal.\textsuperscript{85} Soon after this announcement, the first and failed regime of travel restrictions was replaced by Executive Order 13,780,\textsuperscript{86} which was in many ways a remake of its predecessor.\textsuperscript{87} A remake that pursued the same bigoted goal, though not drawing on explicit anti-Muslim stereotypes.\textsuperscript{88} But relying on a more neutral language did not save the administration from a new series of (nationwide) injunctions that once again blocked the full implementation of the travel restrictions.\textsuperscript{89} In doing so, Courts explicitly referred to the bigoted history of the restrictions and held, among others, that the enacted regulations were “issued with a purpose to disfavor a particular religion.”\textsuperscript{90}

Courts relied on similar grounds, namely serious concerns about anti-Muslim sentiments behind the travel restriction regimes, to block the implementation of Proclamation 9645, the successor of Executive Order 13,780.\textsuperscript{91} This successor was considered “a Muslim ban,”\textsuperscript{92} “unconstitutionally tainted with animus toward Islam.”\textsuperscript{93} This animus was “evidenced by official statements of the President . . . that graphically disparage the Islamic faith and its practitioners.”\textsuperscript{94} But despite such sharp condemnations of the travel bans by both Courts as well as legal scholars,\textsuperscript{95} a bitterly divided Supreme Court upheld Proclamation 9645.\textsuperscript{96} As such, the Court denied that the Proclamation reincarnated the promised and infamous Muslim travel ban.\textsuperscript{97} Furthermore, it reaffirmed what Trump’s advisors told him to do, to realize his bigoted goal of keeping as many Muslims as possible outside the country: replace Muslims with national security concerns. Hence, \textit{Trump v. Hawaii} vindicated this substitution as “[p]erfectly legal, perfectly sensible.”\textsuperscript{98}

Trump’s series of travel bans are among the first ever measures developed that, given their bigoted history, fit within the category of, what we could call, politics of Islamophobia that disfavor Muslims.\textsuperscript{99} The enactment history of these measures provides important insights into how they fit the prevailing anti-Muslim conspiracy theory. As such, the travel bans are rejectionist in the sense

\begin{itemize}
  \item \textsuperscript{87} Jennifer Lee Barrow, \textit{Trump’s Travel Ban: Lawful but Ill-Advised}, 41 \textsc{Harv. J.L. \& Pub. Pol’y} 691, 692–94 (2018) (on the similarities and differences between the two Executive Orders, such as, for example, denying entry to nationals of six Muslim-majority countries and suspending the admission of refugees under the U.S. Refugee Admission Program).
  \item \textsuperscript{88} Wahedi, supra note 6, at 162.
  \item \textsuperscript{89} Id. at 164.
  \item \textsuperscript{90} Hawaii v. Trump, 241 F. Supp. 3d 1119, 1134 (D. Haw. 2017) (granting nationwide TRO).
  \item \textsuperscript{91} Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).
  \item \textsuperscript{92} Int’l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570, 628 (D. Md. 2017).
  \item \textsuperscript{93} Int’l Refugee Assistance Project v. Trump, 883 F.3d 233, 257 (4th Cir. 2018).
  \item \textsuperscript{94} Id. at 353 (Harris, J., with whom Motz, J., and King, J., join, concurring).
  \item \textsuperscript{95} Rose Cuison Villazor \& Kevin R. Johnson, \textit{The Trump Administration and the War on Immigration Diversity}, 54 \textsc{Wake Forest L. Rev.} 575, 600 (2019).
  \item \textsuperscript{96} Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).
  \item \textsuperscript{97} Kaelyne Yumul Wietelman, \textit{Disarming Jackson’s (Re)Loaded Weapon: How Trump v. Hawaii Reinvented Korematsu and How They Can be Overruled}, 23 \textsc{Asian Pac. Am. L.J.} 43, 57 (2019).
  \item \textsuperscript{98} Bennett L. Gershman, \textit{Rudolph Giuliani and the Ethics of Bullshit}, 57 \textsc{Duq. L. Rev.} 293, 303 (2019) (quoting Rudy Giuliani who was asked by Trump for legal advice about the travel ban).
  \item \textsuperscript{99} Harold A. Lloyd, \textit{Speaker Meaning and the Interpretation and Construction of Executive Orders}, 8 \textsc{Wake Forest J.L. \& Pol’y} 319, 332 (2018) (on the synergy between rhetoric and politics).
\end{itemize}
that they substitute Islam with security concerns. The bans are constructionist as they contribute to enemy construction, portraying those who should not be admitted into the country as terrorists, rapists, gay bashers, honor killers, and so on. Finally, the travel restrictions fit the last and interventionist prong of the anti-Muslim conspiracy theory. The bans are necessary to save the nation from terrorism.

C. Reinforcement of Islamophobia

The question arises of what Trump v. Hawaii means in terms of dealing with peculiar measures that are so obviously tainted with religious animus and bigotry. Does vindicating a travel ban tailored to meet bigoted election pledges advance a xenophobic political agenda? And will this promotion reinforce and eventually institutionalize Islamophobia?

What is obvious is that Trump v. Hawaii did not water down the travel restriction regime of President Trump that has been imposed on nationals of predominantly Muslim-majority countries. On the contrary, and despite the presence of extensive critique on this judgment, the administration has relied on Trump v. Hawaii to add six new countries—two Asian and four African states—to the list of countries with limited or practically no access to the United States. This extension to countries like Eritrea, Kyrgyzstan, Nigeria, Sudan and Tanzania which are home to large groups of Muslims suggests that Trump v. Hawaii has paved the way to a much more comprehensive Muslim travel ban.

The choice to add four African countries is a palpable indication of how Trump v. Hawaii has advanced a clearly xenophobic immigration agenda. The extension connects his outrageous statements about Africans to his broader anti-immigration political agenda. In a way, Trump v. Hawaii has helped the President to keep a larger number of people coming from, what he has

called, “shithole countries,” outside the United States either because he thinks that they “all have AIDS,” or, because he is afraid that they would never, ever “go back to their huts.” The advancement of this xenophobic and racist policy will create huge disparities between Americans, as it singles out very specific categories of people for disfavored treatment.

It may also create disparities because Trump v. Hawaii has set an important precedent for discriminatory state policies that disfavor groups of people under the guise of disloyalty, national security protection, and immigration control. But in addition to this fear of a further institutionalization of Islamophobia, there is something more disturbing about this judgment that leads us to be pessimistic about the future of Muslims in the American constitutional democracy. It is the inconsistency in the legal appraisal of acts motivated by animus, by the Supreme Court.

As such, a few weeks before Trump v. Hawaii, there was Masterpiece Cakeshop v. Colorado Civil Rights Commission, a case about denial of services to same-sex couples, religious animus, and state neutrality toward religion. In Masterpiece Cakeshop, the majority found, among others, that a state official who had said that religion has been used, historically, as “one of the most despicable pieces of rhetoric,” to disturb others, was a sign of “hostility . . . inconsistent with the First Amendment’s guarantee that our laws be applied in a manner that is neutral toward religion.”

But in Trump v. Hawaii, the majority held that the travel restrictions are justified for security reasons. Furthermore, the Court found that the text of the Proclamation “says nothing about religion [and the inclusion of five Muslim-majority countries to the list of affected countries]. . . . does not support an inference of religious hostility.”

This asymmetrical approach in dealing with “pervasive official expressions of hostility,” has most probably been caused by an overprotection of majoritarian sensitivities about the American cultural-religious identity. And these sensitivities have been leading in answering the question “whether a government actor exhibited tolerance and neutrality in reaching a decision that affects individuals’ fundamental religious freedom.” This asymmetry has a latent potential to reinforce

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11. Id.
12. Id.
20. Id. at 2439 (Sotomayor, J., dissenting).
21. Id. at 2447.
Islamophobia in the near future. The overprotection of majoritarian sensitivities at the expense of other interests “eroses 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 protection-worthy against religious bigotry and discrimination.122

III. ISLAMOPHOBIA AS THE NEW RELIGIOUS INTOLERANCE

How can we understand the outrageous statements against Muslims and their faith in the political discourse? And what is behind the rise in actual or propagated measures that single out Muslims qua Islam for disfavored treatment? Can we, for example, say that the inflammatory speeches against Muslims and other people with an immigrant background are indications that we have entered a completely new era? Can we, contemporaneously, contend that the rise in anti-Muslim policies as well as propagated regulations creates “a new zone of lawlessness where [Muslims] are neither citizen nor alien, but rather . . . [adherents of the] inherently evil world called ‘Islam’?”123

What we can say, without hesitations, is that the “polemical tactics” used to present Muslims as outcasts who should be subjected to special laws are something new.124 But, more generally, religious intolerance, racial discrimination as well as politics of exclusion are something old.125 The history of migration to the United States contains many horrific examples of religious discrimination and racial exclusion. In the early days, some colonies were not open to, among others, Baptists, Jews, and Quakers.126 Others, such as, for example, members of The Church of Jesus Christ of Latter-day Saints and Jehovah’s Witnesses faced hatred and violence.127 And until very recently, Catholics suffered from hostilities and prejudices because of their beliefs.128 But for decades, many people, including those from Asia and the Middle East, both Christians as well as Muslims, had no chance to become citizens of the United States, because they lacked “whiteness.”129

This brief history informs us that the American political scene is not unfamiliar with religious bigotry, racism, and the exclusion of others.130 But this infamous history of prejudices

122. Id.
127. Id.
128. Id.
130. See Wahedi, supra note 6, at 145–47.
and exclusion has repeated itself. The many references to Korematsu (on the lawfulness of forced relocation of American Japanese), in the academic and political critiques on the travel bans of President Trump, confirm, more or less, that politics of exclusion on the basis of race or religion, have never been eradicated, nor completely abandoned.\textsuperscript{131}

The same is true for plans that have singled out Islam \textit{qua} Islam for disfavored treatment. Anti-Sharia legal initiatives across the United States are appropriate examples of such measures.\textsuperscript{132} These initiatives have been framed as something necessary in the “war for the survival of America.”\textsuperscript{133} More specifically, as means to protect certain Judeo-Christian values and to make sure “that our [C]ourts are not used to undermine those founding principles and turn [our country] into something that our founding fathers and our great-grandparents wouldn’t recognize.”\textsuperscript{134}

Apparently, for those who defend such bigoted measures, the tension between Christian values and basic liberal principles, such as “democracy, equality, and tolerance is never in doubt, revealing sharply the degree to which [their] line of [reasoning] rests not on a thorough-going 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.”\textsuperscript{135}

What does this brief history tell us about the bigoted anti-Muslim political discourse and regulations based thereon? The fact that in the course of history many religious groups have suffered, to one or another extent, from religious bigotry suggest that today’s Islamophobia is the new victim of an old and ugly practice: religious intolerance.\textsuperscript{136} This animus feeds politics of exclusion that are deeply rooted in fear of the stranger and fear of losing control over peculiar interests.\textsuperscript{137} Historically, politics of fear and exclusion have affected migrant groups who did not share the majoritarian cultural-religious identity.\textsuperscript{138} In the past, Baptists, Catholics, Jews, Mormons, and Quakers were targeted.\textsuperscript{139} Today, politics of fear and exclusion affect American Muslims.\textsuperscript{140}

\begin{itemize}
  \item[134. ] Lee Tankle, \textit{The Only Thing We have to Fear Is Fear Itself: Islamophobia and the Recently Proposed Unconstitutional and Unnecessary Anti-Religion Laws}, 21 \textit{Wm. & Mary Bill Rts. J.} 273, 284 (2012) (quoting Rex Duncan).
  \item[135. ] This quote is a critique on the religious freedom jurisprudence of European Court of Human Rights that is overtly intolerant toward Muslim applicants. Nevertheless, it covers exactly what is so problematic about disfavoring American Muslims. See Nehal Bhuta, \textit{Two Concepts of Religious Freedom in the European Court of Human Rights}, 113 S. \textit{Atlantic Q.} 9, 26 (2014).
  \item[136. ] \textit{Nussbaum, supra note 126.}
  \item[138. ] \textit{Nussbaum, supra note 126.}
  \item[139. ] \textit{Id.}
  \item[140. ] Wahedi, \textit{supra note 6.}
\end{itemize}
IV. ISLAMOPHOBIA AND AMERICAN CITIZENSHIP

How shall we appraise the comeback of bigotry and politics of exclusion? After all, and for a long time in history, Americans have presented their democracy and their efforts to provide equal access to all citizens in the democratic process as a big success story. Moreover, over the last decade, it was precisely this model that has been exported to other destinations, such as Afghanistan and Iraq. But the American constitutional democracy, like many other Western democracies, faces some serious challenges that are, among others, related to immigration.

Today, security threats, caused by acts of terror all round the world and feelings of anxiety about a growing presence of cultures that do not belong to the dominant tradition of the society, put a high pressure on the executive and the regulatory branches of power to solve a continuous societal uneasiness about immigration with dispatch. Something similar has been expected from the judiciary, making this branch of power very vulnerable to fierce attacks, either by those who claim that the judiciary is simply advancing the authorities’ restrictive immigration agenda, closing its eyes to obvious discrimination and religious animus, or by those who claim that this branch of power is way too lenient toward the constitutional claims of migrants, neglecting pressing security needs.

Looking at some recent political developments related to immigration and people with an immigrant background or a colored appearance reveals that many racial stereotypes have been used to justify restrictions with far-reaching consequences upon civil rights. This exercise also unveils how minority groups, especially American Muslims, face serious challenges to participate in the American democracy. For example, their elected representatives at the local and federal level have repeatedly been accused of having double agendas that endanger the American society. Also, they have been regularly framed as unreliable people, aliens, and terrorists.

What message does this unfortunate development send to the adherents of the Islamic faith? Are they allowed to take part equally in the American constitutional democracy, regardless of their religious background? Although we may have no clear-cut answers to these important questions

142. George Bush, Exporting the American Dream, 17 Hum. Rts. 18, 19 (1990) (defending the export of the “American Dream” to young democracies).
144. For example, President Trump’s political campaign was to a high extent related to questions about immigration and integration of people with an immigrant background. See Chinn, supra note 38; Monroe-Sheridan, supra note 72.
147. See Chang, supra note 12, at 1189.
148. See Thornburg, supra note 2, at 265.
149. Wahedi, supra note 6, at 145.
150. Id.
that arise in response to the widespread anti-Muslim bigotry,\textsuperscript{151} we nevertheless contend that relying on fact-free rhetoric, either to win elections or to justify certain regulations, is in fact a dis-invitation to American Muslims to participate as full-citizens in the American democracy. This insidious dis-invitation reincarnates a “system of racial caste,”\textsuperscript{152} which downgrades American Muslims as second-class citizens,\textsuperscript{153} who, sooner or later, will become the “untouchables” of the American constitutional democracy. The outcasts of the society, whose claims for protection against bigotry, discrimination, and exclusion will be judged by other standards. Obviously, this development threatens, in an unprecedented way, the American Dream of a better life for everyone and everywhere in the country. This Dream might even become a nightmare because of a systematic deconstruction of what the American civil society has reached in terms of equal access to and protection of civil liberties.\textsuperscript{154} Although we may not have very concrete suggestions to overcome the era of exclusion and religious animus, we nevertheless could call upon those sitting in the political and judicial branches of power to be aware of what the constitutional guarantees of freedom and neutrality toward religion entail and require. Even in anxious times.\textsuperscript{155}

V. CONCLUSION

The American constitutional democracy is threatened by different actors and some un-American developments. As such, it is frankly perplexing to see how Muslims have been disfavored in areas so crucial to the functioning of the constitutional democracy. And what is even more regrettable is the restraint of the judiciary, or perhaps, the extreme extent of judicial deference toward presidential control over issues related to migration and border control that has made a proper protection of our most sacred freedoms practically impossible.\textsuperscript{156} The tragic synergy between inflammatory political rhetoric against American Muslims and the rise in anti-Muslim measures will create huge disparities that are unprecedented in the recent history of the United States. To cleanse the American political scene from anxiety, bigotry, and exclusion, we may expect more action from the judicial branch of power. This may sound like an emergency exit. But it is one that will save the future of the constitutional democracy.

\textsuperscript{151} Cf., e.g., Engy Abdelkader, Muslim Americans: Do US Democratic Institutions Protect Their Religious Liberty, 26 ASIAN AM. L.J. 52 (2019).
\textsuperscript{154} See Cuison Villazor & Johnson, supra note 95.
\textsuperscript{156} See Yamamoto & Oyama, supra note 114. For a critique on such deference, See Philip Lee, A Wall of Hate: Eminent Domain and Interest-Convergence, 84 BROOK. L. REV. 421, 463 (2019).