

# AMERICAN MUSLIMS: THE UNTOUCHABLES OF AMERICAN CONSTITUTIONAL DEMOCRACY?

SOHAIL WAHEDI\*

## 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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\* Assistant Professor of Law, Erasmus School of Law. PhD, 2019 Erasmus University Rotterdam. I am grateful to Sarojini Nadar and Lee Scharnick-Udemans for their generous invitation to speak about religious animus in May 2019 at the Desmond Tutu Centre for Religion and Social Justice in Cape Town. I also owe thanks to Jane Wise and the International Center for Law and Religion Studies at Brigham Young University J. Reuben Clark Law School for their generous invitation to speak about Islamophobia in March 2019. Maurits Helmich, Rebecca Bosch and Lieske Bottema: thanks for the feedback. Many thanks also to Audrey Thorne and the rest of the *Idaho Law Review* team for their support. Errors remain mine.

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.<sup>1</sup> As such, members of the judiciary,<sup>2</sup> political opponents,<sup>3</sup> critical journalists,<sup>4</sup> women,<sup>5</sup> members of minority groups *in general*, and American Muslims *in particular*,<sup>6</sup> have been among those groups of people who have experienced serious confrontations with the President over the recent years.<sup>7</sup> What these people have in common is that they either, to one or another extent, disagree with the politics of the current administration,<sup>8</sup> or they have been considered, for whatever reason, a threat to the “Make America Great Again” project and pledge of President Trump.<sup>9</sup> This brief, though alarming analysis helps us in two ways to put American constitutional democracy under critical scrutiny in an era of anxiety,<sup>10</sup> enemy construction,<sup>11</sup> religious animus, and racial stereotyping.<sup>12</sup>

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

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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-Called Judge*, 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.”).

4. Ronnell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L.J. 1301, 1309 (2017) (reconstructing and critical of the way in which the Trump administration has framed the media as enemy).

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).

6. See generally Sohail Wahedi, *Muslims and the Myths in the Immigration Politics of the United States*, 56 CAL. W.L. REV. 135 (2019) (showing how stereotyping of people with an immigrant background has resulted in tough policies singling out this group of people for disfavored treatment).

7. Yasmin Dawood, *The Fragility of Constitutional Democracy*, 77 MD. L. REV. 192, 198 (2017).

8. See Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1655 (2018) (illustrating how the Trump administration blames the “deep state” for its own political failures).

9. 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, 222 (2016).

10. Khaled A. Beydoun, *9/11 and 11/9: The Law, Lives and Lies that Bind*, 20 CUNY L. REV. 455, 460 (2017) (on politics of exclusion based on fear).

11. See Stephen Behnke & Corey Artim, *Stop the Presses: Donald Trump’s Attack on the Media*, 44 U. DAYTON L. REV. 443 (2019); Bruce Brown & Selina MacLaren, *Holding the Presidency Accountable: A Path Forward for Journalists and Lawyers*, 12 HARV. L. & POL’Y REV. 89 (2018) (critical of President Trump’s continuous attack on media); Erwin Chemerinsky, *The First Amendment in the Era of President Trump*, 94 DENV. L. REV. 553 (2017) (on how the Supreme Court free speech jurisprudence could help to resist the attack on free media).

12. See 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); Khaled A. Beydoun, *Muslim Bans and the (Re)Making of Political Islamophobia*, 2017 U. ILL. L. REV. 1733, 1740 (2017).

way in which the “winner,” i.e. the executive branch of power, deals with the “losers,”<sup>13</sup> i.e. those who either disagree or have been considered unfit to “Make America Great Again.”<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> But over the recent years, they have been considered a serious threat to the interests of the United States.<sup>17</sup> And therefore, they have been singled out for restrictive measures in areas related to the protection of national security.<sup>18</sup> This urges us to be seriously worried about unfair treatment of American Muslims.<sup>19</sup> 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.<sup>20</sup>

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

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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.”).

14. Cf. Maureen Johnson, *Trickle-down Bullying and the Truly Great American Response: Can Responsible Rhetoric in Judicial Advocacy and Decision-Making Help Heal the Divisiveness of the Trump Presidency?*, 25 AM. U. J. GENDER SOC. POL’Y & L. 445, 463 (2017) (illustrating how Trump’s rhetoric and style could be used as a justificatory framework for racism and misogyny).

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).

17. Romtin Parvaresh, *Prayer for Relief: Anti-Muslim Discrimination as Racial Discrimination*, 87 S. CAL. L. REV. 1287, 1313 (2014); Hilal Elver, *Racializing Islam Before and After 9/11: From Melting Pot to Islamophobia*, 21 TRANSNAT’L L. & CONTEMP. PROBS. 119, 138–74 (2012); Sahar F. Aziz, *Sticks and Stones, the Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y.C. L. REV. 33, 42–43 (2009) (all criticizing policies that have effectively singled out Muslims for disfavored treatment because of their religious background).

18. See generally Ty S. Wahab Twibell, *The Road to Internment: Special Registration and Other Human Rights Violations of Arabs and Muslims in the United States*, 29 VT. L. REV. 407, 422–28 (2005) (on post 9/11 security measures that have disfavored Arab and Muslim Americans).

19. See Michael J. Whidden, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 FORDHAM L. REV. 2825, 2850 (2001) (critical of security measures that have effectively singled out American Arabs for disfavored treatment because of their Arab background).

20. The medical terminology used in these two sentences comes from a conference I attended in summer 2019: Religious Persecution in the World Today: Diagnoses, Prognoses, Treatments, Cures (Aug. 2–3, 2019) (available at <https://www.iclrs.org/wp-content/uploads/2019/08/2019.Oxford.Persecution-Conference.Program-Final.pdf>).

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,<sup>21</sup> is very fruitful in answering the question whether Muslims could be considered the untouchables of American democracy.<sup>22</sup> Those who do not belong to the American society.<sup>23</sup> Whose representatives are fake.<sup>24</sup> And for whom special legal instruments have been created and invoked as deterrents.<sup>25</sup>

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.<sup>26</sup> 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.”<sup>27</sup>

## II. ISLAMOPHOBIA IN THE TRUMP ERA

The American anxiety about Islam,<sup>28</sup> which is predominantly present in the margins of the Republican Party, and which has been fueled by President Trump over the past few years,<sup>29</sup> has constituted the foundations of a wild conspiracy theory about Muslim presence in the United States.<sup>30</sup> 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.<sup>31</sup>

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21. Cf. Jeffrey F. Addicott, *The Trump Travel Ban: Rhetoric vs Reality*, 44 U. DAYTON L. REV. 491, 522 (2019) (criticizing the inventory of arguments and circumstances approach).

22. This article uses the word “untouchable” in a metaphorical way.

23. See generally Jared A. Goldstein, *Unfit for the Constitution: Nativism and the Constitution, from the Founding Fathers to Donald Trump*, 20 U. PA. J. CONST. L. 489, 552 (2018) (discussing anti-Muslim statements).

24. Rachel E. VanLandingham, *Words We Fear: Burning Tweets & the Politics of Incitement*, 85 BROOK. L. REV. 37, 70 (2019) (criticizing Trump for urging congresswomen with an immigrant background to go back to their countries of origin to “fix” the problems over there).

25. Cf. Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 135–36 (2018) (arguing that there is “obvious inconsistency” between recent Supreme Court decisions on religious animus: while the majority seems to show sympathy for religious neutrality in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), it seems to be quite insensitive toward that argument in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018)).

26. See Sohail Wahedi, *Freedom of Religion and Living Together*, 49 CAL. W. INT’L. L. J. 213, 220 (2019) (showing the analysis that resulted in this definition of Islamophobia showing how the insidious development of singling out Muslims *qua* Islam for disfavored treatment get institutionalized).

27. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 273 (1995) (Ginsburg, J., dissenting).

28. This article does not aim to make an empirical argument about the exact scope of Islamophobia.

29. Ryan M. Mardini, *The “Muslim Ban” and the Constitutional Crisis*, 96 U. DETROIT MERCY L. REV. 225, 230–31 (2019) (on mainstreaming racism, xenophobia, Islamophobia and Christian nationalism by President Trump and his allies).

30. MUSLIM ADVOCATES, *RUNNING ON HATE: 2018 PRE-ELECTION REPORT 1* (2018) (arguing that on a long-term anti-Muslim bigotry will not help to win elections).

31. *Id.* at 6.

This theory is rejectionist in the sense that it denies considering Islam a religion, such as, for example, Christianity.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> 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,<sup>36</sup> 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.<sup>37</sup>

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

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32. ASMA T. UDDIN, *WHEN ISLAM IS NOT A RELIGION: INSIDE AMERICA’S FIGHT FOR RELIGIOUS FREEDOM* 31–65 (2019); Sohail Wahedi, *Abstraction from the Religious Dimension*, 24 *BUFF. HUM. RTS. L. REV.* 1, 16 (2017–2018).

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).

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 Securitized Immigration*, 32 *GEO. IMMIGR. L. J.* 169, 200 (2018) (contextualizing such obvious anti-immigration means as “securitization” of immigration policies).

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).

36. MUSLIM ADVOCATES, *supra* note 30, at 6.

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).

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 *MD. L. REV.* 291, 293 (2017) (on how Donald Trump placed Islam and immigration at the center of campaigns).

39. Brian Klaas, Opinion, *A Short History of President Trump’s Anti-Muslim Bigotry*, *WASH. POST* (Mar. 15, 2019), <https://www.washingtonpost.com/opinions/2019/03/15/short-history-president-trumps-anti-muslim-bigotry/>.

40. MUSLIM ADVOCATES, *A RECORD OF BIGOTRY AND HATE: DONALD TRUMP’S LONG HISTORY OF ANTI-MUSLIM ANIMUS 2* (2018), [https://muslimadvocates.org/files/2018.06.12-Anti-Muslim-White-Paper\\_DRAFT-Endnotes.pdf](https://muslimadvocates.org/files/2018.06.12-Anti-Muslim-White-Paper_DRAFT-Endnotes.pdf).

pledged, among others, for a “total and complete shutdown of Muslims entering the United States.”<sup>41</sup> Trump has justified this by arguing that “large segments” of Muslims hate Americans.<sup>42</sup>

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.<sup>43</sup> These people resemble, according to Donald Trump, “a great Trojan Horse” that puts the nation at a high risk of serious attacks.<sup>44</sup> Therefore, authorities need to be very “vigilant with respect to the Muslim population,”<sup>45</sup> and implement, among others, a registry system that can monitor American Muslims.<sup>46</sup> Because these people do not “assimilate [and] don’t want the laws that we have. They want sharia law.”<sup>47</sup> 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.”<sup>48</sup>

Trump’s alleged animus toward Islam,<sup>49</sup> 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,<sup>50</sup> yet Trump not only remained silent about the rise of anti-Muslim violence,<sup>51</sup> he appreciated India’s approach to religious liberty.<sup>52</sup> What message does this obvious ignorance, if not carelessness, about anti-Muslim bigotry, religious animus, and discrimination, send to American Muslims?<sup>53</sup>

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41. 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>.

42. Christine Wang, *Trump Website Takes Down Muslim Ban Statement After Reporter Grills Spicer in Briefing*, CNBC (May 8, 2017), <https://www.cnbc.com/2017/05/08/trump-website-takes-down-muslim-ban-statement-after-reporter-grills-spicer-in-briefing.html>.

43. Klaas, *supra* note 39.

44. Joseph Tanfani, *Donald Trump Warns that Syrian Refugees Represent ‘A Great Trojan Horse’ to the U.S.*, L.A. TIMES (Oct. 19, 2016), <https://www.latimes.com/politics/la-na-pol-syrian-refugees-debate-20161019-snap-story.html>.

45. MUSLIM ADVOCATES, *supra* note 40, at 10 n.10.

46. *Id.* at 2.

47. 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](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).

48. *Id.*

49. Katie R. Eyer, *Animus Trouble*, 48 STETSON L. REV. 215, 230 (2019) (critically reconstructing Supreme Court’s non-consideration of the animus-argument in its travel ban judgment).

50. Hannah Ellis-Petersen, *Delhi Rocked by Deadly Protests During Donald Trump’s India Visit*, GUARDIAN (Feb. 25, 2020), <https://www.theguardian.com/world/2020/feb/25/delhi-rocked-by-deadly-protests-during-donald-trumps-india-visit>.

51. Kevin Liptak, *Trump Concludes India Visit Without Major Agreements*, CNN (Feb. 25, 2020), <https://edition.cnn.com/2020/02/24/politics/donald-trump-india-narendra-modi-trade/index.html>. The anti-Muslim violence increased in the aftermath of the recently passed Citizenship (Amendment) Act 2019 that excludes Muslim immigrants from the right to become full citizens of India. See Anasuya Syam, *Patchwork of Archaic Regulations and Policies in India: A Breeding Ground for Discrimination Practice Against Refugees*, 51 N.Y.U. J. INT’L L. & POL. 1377, 1385 (2019).

52. Robert Mackey, *Trump Praises Modi’s India, as Muslims Are Beaten on the Streets and a Mosque Is Defiled*, INTERCEPT (Feb. 26, 2020), <https://theintercept.com/2020/02/25/trump-praises-modis-india-muslims-beaten-street-mosque-defiled/>.

53. *Cf.* Johnson, *supra* note 14, at 463.

Something about Trump's attitude suggests that he considers Muslims less protection-worthy than other groups.<sup>54</sup> This message echoes strongly in the way Trump's (ex-)political allies talk about Muslim presence in the United States.<sup>55</sup>

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.<sup>56</sup> 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.<sup>57</sup>

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.<sup>58</sup> As such, Rashida Tlaib, one of the first ever elected Muslim Congresswomen, was considered "a 'danger' who might 'blow up' the U.S. Capitol."<sup>59</sup> 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]."<sup>60</sup> 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.<sup>61</sup> Hence, plans to single out Muslim neighborhoods for extra security controls, "before they become radicalized," have never been far away.<sup>62</sup> The

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54. Cf. Andrew L. Whitehead, Samuel L. Perry & Joseph O. Baker, *Make America Christian Again: Christian Nationalism and Voting for Donald Trump in the 2016 Presidential Election*, 79 SOC. RELIGION 147, 166 (2018) (concluding that Trump voters strongly support Christian nationalism that outcast Muslims and others who threaten Christian values of the United States); see also Caroline Mala Corbin, *Christian Legislative Prayers and Christian Nationalism*, 76 WASH. & LEE L. REV. 453, 463 (2019) (on Trump's endorsement of a Christian nationalist political language).

55. Mardini, *supra* note 29, at 230.

56. Matthew Rosenberg & Maggie Haberman, *Michael Flynn, Anti-Islamist Ex-General, Offered Security Post, Trump Aide Says*, N.Y. TIMES (Nov. 17, 2016), <https://www.nytimes.com/2016/11/18/us/politics/michael-flynn-national-security-adviser-donald-trump.html>.

57. Miranda Blue, *GOP Rep Agrees With Frank Gaffney That Obama Has 'Affinity' For Terrorists, Muslim Congressman Could Be National Security Risk*, RIGHT WING WATCH (Feb. 27, 2015, 12:55 PM), <https://www.rightwingwatch.org/post/gop-rep-agrees-with-frank-gaffney-that-obama-has-affinity-for-terrorists-muslim-congressman-could-be-national-security-risk/>.

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

59. Holly Rosenkrantz, *Florida Official Says U.S. Rep. Rashida Tlaib May "Blow Up" Capitol*, CBS NEWS (Jan. 24, 2019, 11:01 AM), <https://www.cbsnews.com/news/florida-official-says-rep-rashida-tlaib-may-blow-up-the-capitol/>.

60. Adeel Hassan, *Texas Republicans Rally Behind Muslim Official as Some Try to Oust Him Over Religion*, N.Y. TIMES (Jan. 10, 2019) (quoting Dorrie O'Brien who started a campaign to keep Shahid Shafi outside the Republican Party), <https://www.nytimes.com/2019/01/10/us/muslim-republican-shahid-shafi-texas.html>.

61. Nick Gass, *Carson: Muslims Who Embrace American Values Have to be 'Schizophrenic'*, POLITICO (Feb. 16, 2016, 11:50 AM), <https://www.politico.com/story/2016/02/ben-carson-muslims-schizophrenic-219319>.

62. George Zornick, *Ted Cruz's Radical New Proposal: Patrol and 'Secure' Muslim Neighborhoods*, NATION (Mar. 22, 2016), <https://www.thenation.com/article/archive/ted-cruzs-radical-new-proposal-patrol-and-secure-muslim-neighborhoods/>.

same is true for plans that have targeted places where Muslims come together, such as mosques.<sup>63</sup> 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.”<sup>64</sup>

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.<sup>65</sup>

## B. Politics of Islamophobia

What does the anti-Muslim bigotry in the political discourse mean in terms of actual regulations and state policies?<sup>66</sup> Apparently, it is not a very big deal anymore to advocate for measures that disfavor some people because of their religious beliefs.<sup>67</sup> 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?<sup>68</sup> More importantly, can we identify policies that have effectively singled out Muslims for disfavored treatment because of their religion?<sup>69</sup>

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.<sup>70</sup> We need to make a distinction between policies that have bolstered ethnic and racial profiling, and regulations “unconstitutionally tainted with animus toward Islam.”<sup>71</sup> Hence, something like the infamous Muslim registry plan,<sup>72</sup> the propagated closure of Mosques,<sup>73</sup> or designing separate security

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63. See MUSLIM ADVOCATES, *supra* note 30, at 34.

64. Kyle Munzenrieder, *Marco Rubio Wants To Shut Down Muslim Cafés and Diners, Maybe Some Mosques Too*, MIAMI NEW TIMES (Nov. 20, 2015, 3:59 PM), <https://www.miaminewtimes.com/news/marco-rubio-wants-to-shut-down-muslim-caf-s-and-diners-maybe-some-mosques-too-8064185>.

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.

68. Khaled A. Beydoun, *On Islamophobia, Immigration, and the Muslims Bans*, 43 OHIO N.U. L. REV. 443, 451 (2017) (discussing the synergy between anti-Muslim political language and state policies).

69. Wahedi, *supra* note 26, at 287.

70. See, e.g., Khaled A. Beydoun, *Acting Muslim*, 53 HARV. C.R.-C.L. L. REV. 1, 4 (2018); 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); 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).

71. *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 256–57 (4th Cir. 2018).

72. A. Reid Monroe-Sheridan, *“Frankly Unthinkable”: The Constitutional Failings of President Trump’s Proposed Muslim Registry*, 70 ME. L. REV. 1, 2–6 (2017).

73. Jonathan J. Kim & Eugene Temchenko, *Constitutional Intolerance to Religious Gerrymandering*, 18 CONN. PUB. INT. L.J. 1, 28–29 (2018) (on the uselessness of such measures).

mechanisms for areas dominated by Muslims,<sup>74</sup> would come closer to the category of regulations we aim to conceptualize as measures that have singled out Muslims *qua* Islam for disfavored treatment.<sup>75</sup> But we need to include one important disclaimer at this point. None of these measures have ever become law.<sup>76</sup> Does this mean that we should renounce the synergy critique?<sup>77</sup> 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.<sup>78</sup>

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.<sup>79</sup> 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.”<sup>80</sup> 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.”<sup>81</sup> 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.<sup>82</sup>

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

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74. See generally Eliav Lieblich & Adam Shinar, *The Case Against Police Militarization*, 23 MICH. J. RACE & L. 105, 134 (2017) (calling this a “racial profiling” instrument applied on a collective to prevent harm).

75. See Wahedi, *supra* note 26, at 287.

76. Except monitoring Muslims in New York, see Mehdi Hasan, *Bloomberg Apologized for Stop-and-Frisk. Why Won't He Say Sorry to Muslims for Spying on Them?*, INTERCEPT (Feb. 17, 2020), <https://theintercept.com/2020/02/17/mike-bloomberg-new-york-muslim-surveillance/?comments=1>.

77. Beydoun, *supra* note 12, at 1755.

78. The quotation is a reference to Donald Trump’s pledge for a Muslim ban. See Abed Ayoub & Khaled A. Beydoun, *Executive Disorder: The Muslim Ban, Emergency Advocacy, and the Fires Next Time*, 22 MICH. J. RACE & L. 215, 220, 224 (2017) (on the chaos caused by Trump’s first Executive Order, restricting the entrance of travelers from seven Muslim-majority countries).

79. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter Exec. Order 13,769]. 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.

81. *Id.* Drawing on such examples contributes to enemy construction. See Leti Volpp, *Protecting the Nation from “Honor Killings”: The Construction of a Problem*, 34 CONST. COMMENT. 133 (2019).

82. Wahedi, *supra* note 6, at 198; Sahar F. Aziz, *A Muslim Registry: The Precursor to Internment?*, 2017 B.Y.U. L. REV. 779, 825 (2017).

83. Kaila C. Randolph, *Executive Order 13769 and America’s Longstanding Practice of Institutionalized Racial Discrimination Towards Refugees and Asylum Seekers*, 47 STETSON L. REV. 1, 29–31 (2017) (discussing the litigation journey Exec. Order 13,769 took).

84. Injunctions were granted for different reasons. 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.<sup>85</sup> Soon after this announcement, the first and failed regime of travel restrictions was replaced by Executive Order 13,780,<sup>86</sup> which was in many ways a remake of its predecessor.<sup>87</sup> A remake that pursued the same bigoted goal, though not drawing on explicit anti-Muslim stereotypes.<sup>88</sup> 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.<sup>89</sup> 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.”<sup>90</sup>

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.<sup>91</sup> This successor was considered “a Muslim ban,”<sup>92</sup> “unconstitutionally tainted with animus toward Islam.”<sup>93</sup> This animus was “evidenced by official statements of the President . . . that graphically disparage the Islamic faith and its practitioners.”<sup>94</sup> But despite such sharp condemnations of the travel bans by both Courts as well as legal scholars,<sup>95</sup> a bitterly divided Supreme Court upheld Proclamation 9645.<sup>96</sup> As such, the Court denied that the Proclamation reincarnated the promised and infamous Muslim travel ban.<sup>97</sup> 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, *Trump v. Hawaii* vindicated this substitution as “[p]erfectly legal, perfectly sensible.”<sup>98</sup>

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.<sup>99</sup> 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

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85. Maura Dolan & Jaweed Kaleem, *Trump Says He Will Issue a New Order After a ‘Very Bad Decision’ Blocked His Initial Travel Ban*, L.A. TIMES (Feb. 16, 2017), <https://www.latimes.com/nation/la-na-travel-executive-order-20170216-story.html/>; see also *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).

86. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

87. Jennifer Lee Barrow, *Trump’s Travel Ban: Lawful but Ill-Advised*, 41 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).

88. Wahedi, *supra* note 6, at 162.

89. *Id.* at 164.

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

91. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

92. Int’l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570, 628 (D. Md. 2017).

93. Int’l Refugee Assistance Project v. Trump, 883 F.3d 233, 257 (4th Cir. 2018).

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

95. Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV. 575, 600 (2019).

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

97. Kaelyne Yumul Wietelman, *Disarming Jackson’s (Re)Loaded Weapon: How Trump v. Hawaii Reincarnated Korematsu and How They Can be Overruled*, 23 ASIAN PAC. AM. L.J. 43, 57 (2019).

98. Bennett L. Gershman, *Rudolph Giuliani and the Ethics of Bullshit*, 57 DUQ. L. REV. 293, 303 (2019) (quoting Rudy Giuliani who was asked by Trump for legal advice about the travel ban).

99. Harold A. Lloyd, *Speaker Meaning and the Interpretation and Construction of Executive Orders*, 8 WAKE FOREST J.L. & POL’Y 319, 332 (2018) (on the synergy between rhetoric and politics).

that they substitute Islam with security concerns.<sup>100</sup> 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.<sup>101</sup> 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.<sup>102</sup>

### 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?<sup>103</sup> And will this promotion reinforce and eventually institutionalize Islamophobia?<sup>104</sup>

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,<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup>

The choice to add four African countries is a palpable indication of how *Trump v. Hawaii* has advanced a clearly xenophobic immigration agenda.<sup>108</sup> The extension connects his outrageous statements about Africans to his broader anti-immigration political agenda.<sup>109</sup> In a way, *Trump v. Hawaii* has helped the President to keep a larger number of people coming from, what he has

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100. Vanita Saleema Snow, *Reframing Radical Religion*, 11 GEO. J.L. & MOD. CRITICAL RACE PERSP. 1, 11 (2019) (on framing Islam and Muslims as a threat by Trump and his allies).

101. Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1268 (2018).

102. Michael B. Mukasey, *Judicial Independence: The Fortress Threatened from Within*, 47 U. MEM. L. REV. 1223, 1232 (2017) (defending the issued travel bans necessary security measures).

103. Cf. Ratna Kapur, *The Ayodhya Case: Hindu Majoritarianism and the Right to Religious Liberty*, 29 MD. J. INT'L L. 305, 311 (2014) (on how landmark decisions may advance political agendas).

104. L. Darnell Weeden, *Using Rational Basis Review in an Establishment Clause Challenge to an Alleged Muslim Travel Ban Undermines Religious Liberty*, 18 CONN. PUB. INT. L.J. 165, 183 (2018) (on the public concerns about the consequences of *Trump v. Hawaii*).

105. Cf. Tally Kritzman-Amir & Jaya Ramji-Nogales, *Nationality Bans*, 2019 U. ILL. L. REV. 563, 594 (2019); David Simson, *Whiteness as Innocence*, 96 DENV. L. REV. 635, 686–87 (2019).

106. Proclamation No. 9983, 85 Fed. Reg. 6699 (Jan. 31, 2020).

107. Grace Meng, *New Travel Ban Reflects Trump Administration's Discriminatory Intent*, HUM. RTS. WATCH (Feb. 4, 2020, 11:30 AM), <https://www.hrw.org/news/2020/02/04/new-travel-ban-reflects-trump-administrations-discriminatory-intent>.

108. Umar A. Farooq, *Rights Groups Decry Trump's Travel Ban Extension as New Restrictions Take Effect*, MIDDLE E. EYE (Feb. 21, 2020, 10:53 PM), <https://www.middleeasteye.net/news/civil-rights-groups-decry-trumps-travel-ban-extension>.

109. Jamelle Bouie, Opinion, *The Racism at the Heart of Trump's 'Travel Ban'*, N.Y. TIMES (Feb. 4, 2020), <https://www.nytimes.com/2020/02/04/opinion/trump-travel-ban-nigeria.html>.

called, “shithole countries,”<sup>110</sup> outside the United States either because he thinks that they “all have AIDS,”<sup>111</sup> or, because he is afraid that they would never, ever “go back to their huts.”<sup>112</sup> 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.<sup>113</sup>

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.<sup>114</sup> 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.<sup>115</sup>

As such, a few weeks before *Trump v. Hawaii*, there was *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,<sup>116</sup> a case about denial of services to same-sex couples, religious animus, and state neutrality toward religion.<sup>117</sup> 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.”<sup>118</sup>

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.”<sup>119</sup>

This asymmetrical approach in dealing with “pervasive official expressions of hostility,”<sup>120</sup> 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.”<sup>121</sup> This asymmetry has a latent potential to reinforce

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110. Ibram X. Kendi, *The Day Shithole Entered the Presidential Lexicon*, ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/shithole-countries/580054/>.

111. *Id.*

112. *Id.*

113. Sam Levin, *‘Trump Is Deciding Who Is American’: How the New Travel Ban Is Tearing Families Apart*, GUARDIAN (Feb. 16, 2020, 6:00 AM), <https://www.theguardian.com/us-news/2020/feb/16/trump-is-deciding-who-is-american-how-the-new-travel-ban-is-tearing-families-apart>.

114. Wietelman, *supra* note 97, at 5457. See also Frank Abe, *Resistance, Resettlement, and Redress*, 68 CASE W. RES. L. REV. 1085 (2018); Stephanie Howell, *In the Shadow of Korematsu: Precedent & Policy Considerations for Trump’s Muslim Registry*, 27 S. CAL. INTERDISC. L.J. 593 (2018); Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 YALE L.J.F. 688 (2019).

115. See Thomas C. Berg, *Masterpiece Cakeshop: A Romer for Religious Objectors?*, 2017 CATO SUP. CT. REV. 139, 168 (2017–2018); Jessica A. Clarke, *Explicit Bias*, 113 Nw. U.L. Rev. 505, 515–16 (2018) (both criticizing the asymmetrical religious animus jurisprudence of the Supreme Court).

116. 138 S. Ct. 1719 (2018).

117. Douglas Laycock, *The Broader Implications of Masterpiece Cakeshop*, 2019 B.Y.U. L. REV. 167 (2019).

118. *Masterpiece Cakeshop*, 138 S. Ct. at 1729, 1732.

119. *Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018).

120. *Id.* at 2439 (Sotomayor, J., dissenting).

121. *Id.* at 2447.

Islamophobia in the near future. The overprotection of majoritarian sensitivities at the expense of other interests “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 protection-worthy against religious bigotry and discrimination.<sup>122</sup>

### 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?’”<sup>123</sup>

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.<sup>124</sup> But, more generally, religious intolerance, racial discrimination as well as politics of exclusion are something old.<sup>125</sup> 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.<sup>126</sup> Others, such as, for example, members of The Church of Jesus Christ of Latter-day Saints and Jehovah’s Witnesses faced hatred and violence.<sup>127</sup> And until very recently, Catholics suffered from hostilities and prejudices because of their beliefs.<sup>128</sup> 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.”<sup>129</sup>

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

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122. *Id.*

123. Nagwa Ibrahim, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. ISLAMIC & NEAR E. L. 121, 142 (2008).

124. Jamie R. Abrams, *Experiential Learning and Assessment in the Era of Donald Trump*, 55 DUQ. L. REV. 75, 88 (2017) (arguing that “in terms of rhetoric . . . Donald Trump [is] deploying the most inflammatory, brazen, and polemical tactics of any candidate in modern times.”); Marsha B. Freeman, *Holier than You and Me: ‘Religious Liberty’ Is the New Bully Pulpit and Its New Meaning Is Endangering Our Way of Life*, 69 ARK. L. REV. 881, 892 (2017).

125. 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 (2017); Maureen Johnson, *Separate but (Un)Equal: Why Institutionalized Anti-Racism is the Answer to the Never-Ending Cycle of Plessy v. Ferguson*, 52 U. RICH. L. REV. 327 (2018); Julia G. Young, *Making America 1920 Again? Nativism and US Immigration, Past and Present*, 5 J. ON MIGRATION & HUM. SEC. 217 (2017).

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

127. *Id.*

128. *Id.*

129. Jonathan Weinberg, *Proving Identity*, 44 PEPP. L. REV. 731, 742 (2017); Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U. ANN. SURV. AM. L. 29, 29 (2013); John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283, 325–327 (1997).

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.<sup>131</sup>

The same is true for plans that have singled out Islam *qua* Islam for disfavored treatment. Anti-Sharia legal initiatives across the United States are appropriate examples of such measures.<sup>132</sup> These initiatives have been framed as something necessary in the “war for the survival of America.”<sup>133</sup> 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.”<sup>134</sup> 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.”<sup>135</sup>

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.<sup>136</sup> This animus feeds politics of exclusion that are deeply rooted in fear of the stranger and fear of losing control over peculiar interests.<sup>137</sup> Historically, politics of fear and exclusion have affected migrant groups who did not share the majoritarian cultural-religious identity.<sup>138</sup> In the past, Baptists, Catholics, Jews, Mormons, and Quakers were targeted.<sup>139</sup> Today, politics of fear and exclusion affect American Muslims.<sup>140</sup>

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131. See generally Lorraine K. Bannai, *Korematsu Overruled: Far from it: The Supreme Court Reloads the Loaded Weapon*, 16 SEATTLE J. SOC. JUST. 897 (2018); Richard A. Dean, *Trump v. Hawaii is Korematsu All over Again*, 29 GEO. MASON U. C.R. L.J. 175 (2019); Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 YALE L.J.F. 641 (2019).

132. Cf. Asma T. Uddin & Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST AMEND. L. REV. 363, 371 (2012).

133. Justin R. Long, *State Constitutions as Interactive Expressions of Fundamental Values*, 74 ALB. L. REV. 1739, 1744–45 (2010).

134. 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).

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, *Two Concepts of Religious Freedom in the European Court of Human Rights*, 113 S. ATLANTIC Q. 9, 26 (2014).

136. NUSSBAUM, *supra* note 126.

137. Cf. Jamie R. Abrams, *The Myth of Enforcing Border Security Versus the Reality of Enforcing Dominant Masculinities*, 56 CAL. W. L. REV. 69 (2019).

138. NUSSBAUM, *supra* note 126.

139. *Id.*

140. Wahedi, *supra* note 6.

#### 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.<sup>141</sup> Moreover, over the last decade, it was precisely this model that has been exported to other destinations,<sup>142</sup> such as Afghanistan and Iraq.<sup>143</sup> But the American constitutional democracy, like many other Western democracies, faces some serious challenges that are, among others, related to immigration.<sup>144</sup>

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.<sup>145</sup> Something similar has been expected from the judiciary, making this branch of power very vulnerable to fierce attacks,<sup>146</sup> 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,<sup>147</sup> or by those who claim that this branch of power is way too lenient toward the constitutional claims of migrants, neglecting pressing security needs.<sup>148</sup>

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.<sup>149</sup> Also, they have been regularly framed as unreliable people, aliens, and terrorists.<sup>150</sup>

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

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141. Cf. NUSSBAUM, *supra* note 126, at 1.

142. George Bush, *Exporting the American Dream*, 17 HUM. RTS. 18, 19 (1990) (defending the export of the "American Dream" to young democracies).

143. Jason Lawrence Reimer, *Finding Their Own Voice? The Afghanistan Constitution: Influencing the Creation of a Theocratic Democracy*, 25 PENN ST. INT'L L. REV. 343, 352 (2006); Bartram S. Brown, *Intervention, Self-Determination, Democracy and the Residual Responsibilities of the Occupying Power in Iraq*, 11 U.C. DAVIS J. INT'L L. & POL'Y 23, 51 (2004).

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.

145. 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) (on the rise of building separation walls between countries).

146. 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) (on political attacks on judicial independence).

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,<sup>151</sup> 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,”<sup>152</sup> which downgrades American Muslims as second-class citizens,<sup>153</sup> 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.<sup>154</sup> 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.<sup>155</sup>

## 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.<sup>156</sup> 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.

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151. Cf., e.g., Engy Abdelkader, *Muslim Americans: Do US Democratic Institutions Protect Their Religious Liberty*, 26 ASIAN AM. L.J. 52 (2019).

152. See *Adarand Constructors v. Peña*, 515 U.S. 200, 273 (1995) (Ginsburg, J., dissenting).

153. See Yaser Ali, *Shariah and Citizenship—How Islamophobia is Creating a Second-Class Citizenry in America*, 100 CALIF. L. REV. 1027, 1065 (2012).

154. See Cuison Villazor & Johnson, *supra* note 95.

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

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).