

Shariah and Citizenship—How Islamophobia Is Creating a Second-Class Citizenry in America

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In 2010, Oklahoma passed the “Save Our State Amendment,” becoming the first state to officially ban “Sharia law.” Despite the fact that a federal court issued an injunction blocking the measure—holding that the ban violated the Establishment Clause—nearly two dozen state legislatures have since proposed similar measures. In this Comment, I propose that the Oklahoma law exhibits an increased hysteria towards Islam and Muslims—one that creates a distinct second-class citizenry that is not entitled to the privileges associated with, and considered a necessary condition of, citizenship in a nation-state. This problematic trend represents a continuation of a longer history in which law reinforces racism toward Arabs and Muslims and threatens to isolate and alienate one of the fastest growing segments of the American population.

Unfortunately, our present understanding of law and society in the context of anti-Muslim and anti-Shariah rhetoric is severely limited. While the literature on post-9/11 backlash has focused primarily on encroachments upon civil liberties, the deeper, subversive relationship between Islamophobia and the erosion of the substantive citizenship rights of American Muslims has remained largely unexplored within the legal academy.

After providing a brief history of Islamophobia in America, I propose a tripartite temporal framework for understanding Islamophobia in its contemporary context—the pre-9/11 period, the period immediately following the 9/11 attacks, and the period that began during the 2008 presidential campaign. I use Oklahoma’s Save Our State Amendment as an operative example of how, in the third phase, an institutionalized version of Islamophobia is depriving American Muslims of citizenship, not only as a term of identity, but also as a vehicle for practical rights and political activity.

I then provide an overview of what Shariah law actually dictates and describe how the anti-Shariah movement in Oklahoma and

around the country is not based on a credible threat to American society, but rather is part of a well-orchestrated campaign of fear mongering aimed at vilifying American Muslims. Finally, I provide policy recommendations for pushing back against this discrimination in order to ameliorate its impacts and empower American Muslims to vindicate their rights and enjoy the full and equal citizenship guaranteed to them in the U.S. Constitution.

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INTRODUCTION

“To be a Muslim in America now is to endure slings and arrows against your faith—not just in the schoolyard and the office but also outside your place of worship and in the public square, where some of the country’s most powerful mainstream religious and political leaders unthinkingly (or worse, deliberately) conflate Islam with terrorism and savagery.”¹

* J.D., University of California, Berkeley, 2012. I dedicate this Comment to my family, especially my parents and wife, for their constant love and encouragement to speak out against injustice. I would also like to thank Professors Kathy Abrams, Leti Volpp, and Hatem Bazian for their outstanding mentorship and support. Finally, I am grateful to Nicole Schwartzberg, Rylan Weythman, and the editors and staff at the *California Law Review* for their insightful suggestions and edits.

During the 2010 midterm elections, against a backdrop of nativist rhetoric stressing the creeping “threat of Shariah,”² Oklahoma voters overwhelmingly passed the Save Our State Amendment.³ The act, a “pre-emptive strike”⁴ against Islamic law, would have amended the Oklahoma Constitution to specifically forbid Oklahoma judges from using international or “Shariah Law” in any state court decision.⁵

Employing a discourse of fear rather than sound legal reasoning, the amendment’s coauthors stated that the purpose of the bill was to prevent the pending “onslaught” of “Shariah Law” in Oklahoma.⁶ State Representative Lewis Moore stated, “Are we not at war with this ideology? . . . Are we not at war with them? Then why would we give in to this?”⁷ State Senator Anthony Sykes added, “Sharia law coming to the U.S. is a scary concept Hopefully

1. Bobby Ghosh, *Islamophobia: Does America Have a Muslim Problem?*, TIME (Aug. 30, 2010), <http://www.time.com/time/magazine/article/0,9171,2011936,00.html>.

2. “Shariah” is also spelled “Sharia” and “Shari’a” by various actors. This Comment uses “Shariah” for the sake of consistency throughout the Comment except when providing direct quotations.

3. See *Summary Results: General Election*, OKLA. ST. ELECTION BOARD (Nov. 2, 2010), <http://www.ok.gov/elections/support/10gen.html> (noting that Oklahoma State Question No. 755, Legislative Referendum No. 355 passed with 70.08 percent voting in favor of the proposal); see also Joel Siegel, *Islamic Sharia Law to Be Banned in, Ah, Oklahoma*, <http://abcnews.go.com/US/Media/oklahoma-pass-laws-prohibiting-islamic-sharia-laws-apply/story?id=10908521> (last visited Feb. 25, 2012). Interestingly, the “Save Our State Amendment” was also the name of the Proposition 187 anti-immigration initiative in California in the mid-1990s. See John Wildermuth and Kenneth J. Garcia, *Religious Leaders Attack Prop. 187 Growing Political Opposition to Anti-Immigration Measure*, S.F. CHRON., Oct. 24, 1994, at A1.

4. James C. McKinley, Jr., *Oklahoma Surprise: Islam as an Election Issue*, N.Y. TIMES, Nov. 15, 2010, at A12 (quoting State Representative Rex Duncan).

5. For a detailed discussion of what “Shariah Law” really means, see *infra* Part III.B. In short, Shariah refers to the entire corpus of Islamic law by which a Muslim governs all aspects of her personal and communal life. The four primary sources of Shariah are (1) *Quran*, (2) *Hadith*, (3) *Ijma* (scholarly consensus), and (4) *Qiyas* (analytical deduction). See generally N.J. COULSON, A HISTORY OF ISLAMIC LAW (1964) (describing the genesis and development of Shariah law); Mohammad Hashim Kamali, *Methodological Issues in Islamic Jurisprudence*, 11 ARAB L.Q. 3 (1996) (analyzing the “sources of law, their order of priority, and methods by which legal rules may be deduced from the source materials of *Shari’a*”).

6. Mark Schlachtenhaufen, *Sharia Law, Courts Likely on 2010 Ballot*, EDMOND SUN (June 4, 2010), <http://www.edmondsun.com/local/x1996914371/Sharia-law-courts-likely-on-2010-ballot> (quoting State Representative Lewis Moore). Again, note the parallels between this rhetoric and that used in anti-immigration bills. The “onslaught” metaphor here resonates with the “invasion” metaphor being used to conjure up fear against Mexican American immigrants today and was pervasively used in the passage of S.B. 1070, the highly controversial anti-immigration statute in Arizona. See Marc Lacey, *Arizona Lawmakers Push New Round of Immigration Restrictions*, N.Y. TIMES, Feb. 24, 2011, at A16.

7. Tanya Somanader, *GOP Lawmakers Say Oklahoma Ban on Sharia Law Is Not Xenophobic Because ‘We’ Are ‘at War’ with ‘Them,’* THINKPROGRESS (Sept. 27, 2010, 1:43 PM), <http://thinkprogress.org/politics/2010/09/27/120999/oklahoma-sharia> (internal quotation marks omitted).

the passage of this constitutional amendment will prevent it in Oklahoma.”⁸ He continued, “It’s not a problem and we want to keep it that way.”⁹ The strategy worked. Despite the fact that less than 1 percent of Oklahomans are Muslim¹⁰ and that Shariah has never been employed in a judicial decision within the state, over 70 percent of voters approved the ballot measure.¹¹

A Muslim citizen immediately filed suit, arguing that the amendment was a “gross transgression of the Establishment Clause”¹² and that it constrained his ability to “execute valid wills, assert religious liberty claims under the Oklahoma Religious Freedom Act, and enjoy equal access to the state judicial system.”¹³ A federal district judge in Oklahoma agreed and issued a permanent injunction halting certification of the election results. She noted that the issue spoke “to the very foundation of our country, our Constitution, and particularly, the Bill of Rights.”¹⁴ The Tenth Circuit Court of Appeals unanimously affirmed, holding that “the Oklahoma amendment specifically names the target of its discrimination. The only religious law mentioned in the amendment is Sharia law”¹⁵ and that, moreover, “[a]ppellants do not identify any *actual problem* the challenged amendment seeks to solve.”¹⁶

Given the grave constitutional flaws of the amendment, its passage raises a significant question: Namely, how could the nonexistent threat of “Shariah law takeover” be codified into law in the form of a state constitutional amendment? More importantly, the unprecedented amendment was not merely an isolated example of discrimination or intolerance endemic to Oklahoma. Rather, it helped catalyze a disturbing new phenomenon around the country

8. Schlachtenhaufen, *supra* note 6. Proponents of the Shariah bans repeatedly and inaccurately cite a select number of judicial opinions from around the country where judges refer to Shariah as proof of encroachment on our judicial system. These cases, however, deal with routine matters in which judges often look to the religious laws of the parties for guidance. See ACLU, NOTHING TO FEAR: DEBUNKING THE MYTHICAL “SHARIAH THREAT” TO OUR JUDICIAL SYSTEM: A REPORT OF THE ACLU PROGRAM ON FREEDOM OF RELIGION AND BELIEF 5 (2011) [hereinafter ACLU, NOTHING TO FEAR] (“Far from confirming some fabricated conspiracy, these cases illustrate that our judicial system is alive and well, and in no danger of being co-opted or taken over by Islam.”).

9. Ben Armbruster, *Sharia Hysteria Comes to Oklahoma: Voters Approve Sharia Law Ban*, THINKPROGRESS (Nov. 3, 2010, 5:00 PM), <http://thinkprogress.org/2010/11/03/oklahoma-sharia-law>.

10. See Siegel, *supra* note 2.

11. See Editorial, *Intolerance and the Law in Oklahoma*, N.Y. TIMES, Nov. 29, 2010, at A24.

12. Plaintiff’s Memorandum in Support of Motion for Temporary Restraining Order & Preliminary Injunction at 3, *Awad v. Zirriax (Awad I)*, 754 F. Supp. 2d 1298 (W.D. Okla. 2010) (No. 10-CV-01186-M).

13. Plaintiff-Appellee’s Response Brief at 3, *Awad v. Zirriax (Awad II)*, 670 F.3d 1111 (10th Cir. 2011) (No. 10-6273) [hereinafter *Awad Response Brief*].

14. *Awad I*, 754 F. Supp. 2d at 1301.

15. *Awad II*, 670 F.3d at 1128.

16. *Id.* at 32. At the preliminary hearing stage, defendants admitted that they were unaware of any evidence that Shariah was used, let alone caused problems, in Oklahoma. See *id.* (citing *Awad I*, 754 F. Supp. 2d at 1308; Appellant Appendix, vol. 1 at 67–68).

such that nearly two dozen state legislatures have since proposed similar laws.¹⁷ Indeed, the Save Our State Amendment is emblematic of a new kind of legal assault on the citizenship of American Muslims whereby they are publicly ostracized as “religious and political outsiders.”¹⁸

In this Comment, I argue that growing anxiety and antagonism toward Islam and Muslims—*Islamophobia*—as exhibited by the Oklahoma law is creating a distinct second-class citizenry: a group that is not entitled to the privileges associated with, and considered a necessary condition of, citizenship in a nation-state.¹⁹ This problematic trend perpetuates a long history in which law has served to reinforce racism toward Arabs and Muslims. Such institutionalized racism is of broad import today as it explicitly threatens to isolate and alienate one of the fastest growing segments of the American population.²⁰

Unfortunately, our present understanding of law and society in the context of anti-Muslim rhetoric is severely limited. Although legal scholars have written extensively on the encroachments upon and violations of civil liberties following the attacks on 9/11, the relationship between Islamophobia and the erosion of American Muslims’ collective citizenship rights²¹ has remained strikingly absent from the literature. Writing shortly after 9/11, Professor Leti Volpp’s formative work, *The Citizen and the Terrorist*, remains one of the few scholarly pieces addressing the racialization of persons appearing “Middle Eastern, Arab, or Muslim” and the manner in which they are “disidentified as citizens.”²²

In her article, Volpp utilizes Professor Linda Bosniak’s “discourses of citizenship”²³ framework as a typology to conceptualize how American Muslims have been stripped of their citizenship in the aftermath of the 9/11

17. See Andrea Elliott, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES, July 31, 2011, at A1.

18. Awad Response Brief, *supra* note 13, at 3.

19. See Linda Bosniak, *Constitutional Citizenship Through the Prism of Alienage*, 63 OHIO ST. L.J. 1285, 1293 (2002) (“The second-class citizen is one who is a formal subject of citizenship—a status citizen—but who is nevertheless denied full enjoyment of citizenship’s substance, including rights associated with citizenship.”).

20. THE PEW FORUM ON RELIGION & PUB. LIFE, THE FUTURE OF THE GLOBAL MUSLIM POPULATION: PROJECTIONS FOR 2010–2030, at 140 (2011), available at http://www.pewforum.org/uploadedFiles/Topics/Religious_Affiliation/Muslim/FutureGlobalMuslimPopulation-WebPDF-Feb10.pdf.

21. I distinguish the term “citizenship rights” from “civil rights.” The former term includes the latter and refers to those elements that are requisite to “equal citizenship” in society as guaranteed by the Privileges and Immunities Clause of the Fourteenth Amendment. Professor Akhil Amar perhaps most aptly describes these rights as “the rights of Americans as Americans.” See AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 364 n.42 (1998).

22. See Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 (2002).

23. Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 456–88 (2000).

attacks.²⁴ Bosniak identified four distinct “discourses,” or components of citizenship: (1) citizenship as legal status, (2) citizenship as rights, (3) citizenship as political activity, and (4) citizenship as identity/solidarity.²⁵ Volpp argues that after the 9/11 attacks, American Muslims were no longer considered citizens as a matter of national identity, which in turn “haunt[ed] their ability to enjoy citizenship as a matter of rights.”²⁶ Building upon Volpp’s work, this Comment seeks to contribute to the nascent scholarship examining our understanding of Islamophobia and to describe how Islamophobia is reifying the second-class citizenship status for American Muslims today. It argues that, of Bosniak’s four discourses of citizenship, the only one that now remains for American Muslims is formal legal status.

In Part I, I define Islamophobia and propose a new tripartite temporal framework for understanding its existence in recent American history. The first period comprised of the period before 9/11, when centuries of Orientalist discourse vilified Arabs in both literature and popular media and laid the theoretical underpinnings for the development of Islamophobia. I describe how Islamophobia was formed and effectuated as a societal and ideological construct and why its impacts on the American Muslim community during this period were nonetheless relatively constrained.

The second period began immediately after 9/11. In the aftermath of the terrorist attacks, lawmakers enacted numerous discriminatory laws targeting Arabs and Muslims under the ostensible guise of national security policy.²⁷ American Muslims have faced severe civil rights violations and encroachments upon their civil liberties that are well documented in the academic literature.²⁸ The “Muslim” was construed as a presumptive threat to the nation’s security, and thus government bodies presented the targeted security measures as necessary for public safety. Moreover, as Volpp describes, it was also during this period that American Muslims began to be “thrust outside of the protective ambit of citizenship as identity,” which effectively served as the moral justification for the deprivation of their rights.²⁹

24. Although I use the term “American Muslim” throughout this Comment, in actuality the term represents a racially constituted category of people who appear to be Muslim. This frequently includes South Asians and others who bear physical attributes that make them cognizably “Muslim.” See Volpp, *supra* note 22, at 1576 n.2. For a further discussion of this phenomenon, see MOUSTAFA BAYOUMI, HOW DOES IT FEEL TO BE A PROBLEM? BEING YOUNG AND ARAB IN AMERICA 69, 72–73 (2008); Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1278–82 (2004); Nagwa Ibrahim, Comment, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. ISLAMIC & NEAR E.L. 121, 136–51 (2008).

25. Bosniak, *supra* note 23, at 456–88.

26. See Volpp, *supra* note 22, at 1595.

27. See, e.g., DAVID COLE & JAMES X. DEMPSEY, TERRORISM & THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 107–46 (2002) (discussing the 1996 Antiterrorism Act).

28. *Id.*; see also Ibrahim, *supra* note 24, at 141–51.

29. See Volpp, *supra* note 22, at 1598.

During my third and final period, which began with the 2008 Obama presidential campaign, a seemingly inexorable level of Islamophobic discourse has become the norm. In fact, during the campaign, President Obama's opponents converted the term "Muslim" itself into a slur, as they repeatedly accused then-Senator Obama of being a "closet Muslim."³⁰ More broadly, this third phase of Islamophobia extends beyond the established framework of national security and focuses on the "creeping threat of Shariah" as something antithetical and threatening to American values.³¹ As the Save Our State Amendment demonstrates, this institutionalized version of Islamophobia has permeated a host of legal and policy regimes that were previously unaffected, calling into question whether the foundational principles of citizenship are applicable to American Muslims today.

In Part II, I elaborate on Bosniak's discourses of citizenship and present a number of prominent examples demonstrating how, during this third period of Islamophobia, American Muslims are being substantially deprived of their citizenship. American Muslims today not only lack true citizenship as a form of group identity and as rights—as was the case during the second period—but they also lack citizenship as it relates to political activity.³² In fact, as a steady-state matter, the only citizenship discourse remaining for the group today is formal legal status—although it is unclear what value lies therein if one is not afforded the rights associated with that status.

In Part III, I return to the Save Our State Amendment and describe how it serves as an operative case study for understanding how the third phase of Islamophobia functions. The Oklahoma case is particularly salient, as it serves as a judicial, legislative, and theoretical framework for demonstrating how Islamophobia is actively stripping away the various layers of citizenship from American Muslims. I provide an overview of what Shariah Law actually dictates and describe how the anti-Shariah movement is not based on a credible threat to American society, but rather is part of a well-orchestrated campaign of fear mongering.

Finally, in the Conclusion, I provide policy recommendations and interventions for resisting the rising tide of Islamophobia in order to ameliorate its impacts in both the private and public spheres and empower American

30. See Andrea Elliott, *Muslim Voters Detect a Snub from Obama*, N.Y. TIMES, June 24, 2008, at A1.

31. See COUNCIL ON AM.-ISLAMIC RELATIONS & UNIV. OF CAL., BERKELEY, CTR. FOR RACE AND GEND., SAME HATE, NEW TARGET: ISLAMOPHOBIA AND ITS IMPACT IN THE UNITED STATES, JAN. 2009–DEC. 2010 (2011) [hereinafter CAIR REPORT], available at <http://crg.berkeley.edu/sites/default/files/islamophobiareport2009-2010.pdf>; ACLU, NOTHING TO FEAR, *supra* note 8.

32. I acknowledge that, in some cases, citizenship as political activity still exists, but the net effect of Muslim participation in American politics is nominal at best. The example of Congressman Keith Ellison, described in Part II.C, will further expound on this point. Moreover, the use of the term "Muslim" as a slur directed at President Obama during the campaign typifies the challenges that Muslims face in participating as relevant political actors.

Muslims to enjoy the full and equal citizenship guaranteed them in the U.S. Constitution.

I.

ISLAMOPHOBIA: ORIGINS, EXPRESSION, AND IMPLICATIONS

The term Islamophobia, defined as an “unfounded hostility towards Islam . . . [and therefore] fear or dislike of all or most Muslims,” gained notoriety in a 1997 publication by the influential British think tank, Runnymede Trust.³³ In coining the term in its report, *Islamophobia: A Challenge for Us All*, the Trust listed eight characteristics of Islamophobia that remain useful and applicable today:

- (1) Islam seen as a single monolithic bloc, static and unresponsive to new realities.
- (2) Islam seen as separate and other—(a) not having any aims or values in common with other cultures (b) not affected by them (c) not influencing them.
- (3) Islam seen as inferior to the West—barbaric, irrational, primitive, sexist.
- (4) Islam seen as violent, aggressive, threatening, supportive of terrorism, engaged in ‘a clash of civilizations.’
- (5) Islam seen as a political ideology, used for political or military advantage.
- (6) Criticisms made by Islam of ‘the West’ rejected out of hand.
- (7) Hostility towards Islam used to justify discriminatory practices towards Muslims and exclusion of Muslims from mainstream society.
- (8) Anti-Muslim hostility accepted as natural and ‘normal.’³⁴

Although European scholars have written extensively on Islamophobia,³⁵ legal scholars in particular have been slow in tracing its development as a legal construct in the United States. Nevertheless, as an ideological and political framework, it remains deeply ingrained in the psyche of most Americans. Islamophobia manifests both consciously, as a result of the effects of ongoing political campaigns against Islam as a religion,³⁶ and subconsciously, through the permeation of stereotypical images of those who appear cognitively

33. RUNNYMEDE TRUST, *ISLAMOPHOBIA: A CHALLENGE FOR US ALL* (1997), available at <http://www.runnymedetrust.org/uploads/publications/pdfs/islamophobia.pdf>.

34. *Id.* (numbering added). Note that many of the components listed in the Trust’s definition of Islamophobia are borrowed from, or rely on, previous Orientalist tropes commonly used to stereotype Arabs.

35. See Jocelyn Cesari, “Islamophobia” in the West: A Comparison Between Europe and America, in *ISLAMOPHOBIA AND THE CHALLENGES OF PLURALISM IN THE 21ST CENTURY* 18, 18–20 (2011) (describing the pervasive usage of the term “Islamophobia” among European scholars and media).

36. See McKinley, *supra* note 4.

“Muslim.”³⁷ In this Part, I propose a tripartite framework of the history of Islamophobia and describe the legal and social ramifications of each historical period for the American Muslim community.

A. Pre–September 11, 2001

The September 11, 2001, terrorist attacks provoked a rapid rise in anti-Muslim sentiment in America.³⁸ The mistrust of Muslims, however, was arguably well ensconced in the American psyche even prior to the attacks. My own experience was illustrative in this regard. Only a sophomore in high school at the time, I sat alongside my classmates on the morning of 9/11, watching in horror as the tragedy unfolded before our eyes. The newscaster quickly began speculating on international terrorism when suddenly the boy to my right turned toward me and shouted, “*You knew this was going to happen, didn’t you?*” Shocked, I did not even know how to respond, and I waited for one of my peers—or my teacher—to come to my defense. But nobody did.

I have often wondered how this latent distrust existed within my classmate and potentially, by virtue of their acquiescence, within the rest of my class. The boy’s instantaneous response to the shocking and horrific images was to assume that I, because I was a Muslim, must have had something to do with the attacks. We had been friends for years, but the emotional outrage he expressed at that moment was not reflective of his previous interactions with me. Rather, it was most likely the product of years of stereotypical media depictions of Muslims—and before that, Arabs—as violent, uncivilized, and inherently opposed to Western ideals (the West).³⁹ The literature on Orientalism examines and describes this process of Arab racialization.

1. Orientalism

Orientalism, or the process of Arab racialization, served as the precursor to and one of the foundations of Islamophobia.⁴⁰ During the 1980s and 1990s, the focus on “Arabs” as the archetypal Other began to transform to “Muslims.”⁴¹ Arguably the most influential work to describe this process of

37. See COLE & DEMPSEY, *supra* note 27. See also Ghosh, *supra* note 1 (finding that almost half of Americans think that Islam is more likely than other religions to promote violence).

38. See, e.g., AM.-ARAB ANTI-DISCRIMINATION COMM., REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB AMERICANS: THE POST-SEPTEMBER 11 BACKLASH (Hussein Ibish ed., 2003).

39. See REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE (Media Educ. Found. 2001) (analyzing depictions of Arabs and Muslims in popular film).

40. See STEPHEN SHEEHI, ISLAMOPHOBIA: THE IDEOLOGICAL CAMPAIGN AGAINST MUSLIMS 38 (2011).

41. *Id.* at 38–39. Professor Sheehi explains that “[w]ith the fall of the Soviet Union and the rise of the United States as the unchallenged global hegemon, the preexisting forms of Orientalism and Arabophobia were blended into new forms of political Islamophobia.” He continues, “Where previously brown Arabs were the pariah, the view of Muslims in general as such, has been integrated into America’s racial unconscious.” *Id.*

Arab and Muslim racialization was Edward Said's *Orientalism*.⁴² Said argued that the reason Westerners had preconceived notions about Arabs was a result of a mental process backed by considerable material investment.⁴³

Orientalism, he argued, was a style of thought based on the distinction between "the Orient" and "the Occident," not simply based on "geographical distinction," but also on a "series of 'interests.'"⁴⁴ Said used the term "imaginative geographies" to refer to the Orient as a place distinct from the civilized world, one that is not subject to the normative process governing those within history.⁴⁵ The "Orient," he suggested, was constructed by the West, in relation to the West, and existed solely for the West.⁴⁶ In a Freudian sense, the West was established as the standard of measurement,⁴⁷ and Orientalism was, "a Western style for dominating, restructuring, and having authority over the Orient."⁴⁸ It represented the collective dichotomy of "us" (i.e., Europeans), juxtaposed against "them" (i.e., non-Europeans).⁴⁹

Moreover, the Orient represented all that was inferior and alien to the West.⁵⁰ Referring to their depictions in literature, Said described "Oriental" persons as "inveterate liars . . . 'lethargic and suspicious' and in everything [they] oppose the clarity, directness, and nobility of the Anglo-Saxon race."⁵¹ Orientalism portrayed them as a lesser breed,⁵² that was "patently inferior" to the West.⁵³ Said detailed how literature and media replicated these concepts and ideals to such a degree that they were used to legitimize structural violence—including colonial imperialism—against groups that appeared to threaten Western security.⁵⁴

42. See generally EDWARD W. SAID, *ORIENTALISM* (1978). Note that Said also published a second book, *Covering Islam*, in 1981 that focused on the media's portrayal of Islam and the Muslim World, particularly in light of the Iranian Hostage Crisis.

43. *Id.* at 6. Orientalism's roots can be traced back to Napoleon's invasion of Egypt in 1798, which arguably was "as much an epistemological [study] as a military conquest." Gyan Prakash, *Orientalism Now*, 34 *HIST. & THEORY* 199, 200 (1995) (quoting 'ABD AL-RAHMAN JABARTI, *NAPOLÉON IN EGYPT: AL-JABARTI'S CHRONICLE OF THE FRENCH OCCUPATION, 1798*, at 109–10 (Shmuel Moreh ed. & trans., 1993)). During the invasion Napoleon commissioned French scholars to chronicle Egyptian history for the benefit of Western knowledge of the colonized "other" and to facilitate a more "efficient" colonial administration. See SAID, *supra* note 42, at 81–88.

44. *Id.* at 12.

45. *Id.* at 57.

46. *Id.* at 12.

47. As an example, the construction of the geographical terms "Middle East" and "Far East" are artificial terms invented by Orientalism, created in opposition to the West. SHEEHI, *supra* note 40, at 37–38.

48. SAID, *supra* note 42, at 3.

49. *Id.* at 7.

50. DVD: Edward Said: On Orientalism (Media Educ. Found. 1998), *transcript available at* http://www.mediaed.org/assets/products/403/transcript_403.pdf [hereinafter On Orientalism].

51. SAID, *supra* note 42, at 39.

52. *Id.*

53. *Id.* at 41.

54. See On Orientalism, *supra* note 50.

Nowhere were these stereotypes memorialized more vividly than in Hollywood, as cultural productions tend to replicate and render more explicit the dominant paradigms in society.⁵⁵ Jack Shaheen, author of *Reel Bad Arabs: How Hollywood Vilifies a People*, conducted a comprehensive review of Arab dehumanization in over 900 films; he described the popular stereotype of Arabs:

From 1896 until today, filmmakers have collectively indicted all Arabs as public enemy #1—brutal, heartless, uncivilized religious fanatics and money-mad cultural “others” bent on terrorizing civilized Westerners, especially Christians and Jews Arabs are brute murderers, sleazy rapists, religious fanatics, oil-rich dimwits, and abusers of women.⁵⁶

Shaheen argued that viewers internalized these stereotypes through constant repetition.⁵⁷ He explained this process by use of a powerful Arabic proverb, “*Al tikrar biallem il hmar*. By repetition even the donkey learns.”⁵⁸ Not surprisingly, out of over 900 feature films he reviewed, only a handful depicted Arabs as the protagonist.⁵⁹ Each of the remaining films brandished stereotypical depictions of Arab men as notorious villains and womanizing sheikhs, while Arab women were either hypersexualized, scantily clad belly dancers or weak and oppressed objects draped in black robes and desperately seeking liberation by Western heroes.⁶⁰

It is important to note, however, that Orientalist tropes generally did not focus specifically on Muslims. The fact that a particular villain in a film was Muslim was incidental to his “Arabness.” The Arab stereotype was specifically a racial or ethnic description, whereas a focus on the “Muslim,” the modus operandi of Islamophobia, is a religious categorization.⁶¹ As one author

55. See Angela Onwuachi-Willig, *There’s Just One Hitch, Will Smith: Examining Title VII, Race, and Casting Discrimination on the Fortieth Anniversary of Loving v. Virginia*, 2007 WIS. L. REV. 319, 320 (discussing how, in the past, Hollywood filmmakers did not cast certain interracial actors together because “such a coupling would offend audiences in the United States”).

56. SHAHEEN, *supra* note 39, at 2.

57. *Id.*

58. *Id.* at 7.

59. *Id.* at 10.

60. *Id.* at 15. See generally SHERENE H. RAZACK, *CASTING OUT THE EVICTION OF MUSLIMS FROM WESTERN LAW & POLITICS* (2010). Razack divides her book into two main sections, stereotypes relating to “the dangerous Muslim man” and “the imperiled Muslim woman.”

61. One of the unfortunate realities in this categorization scheme is that frequently people who may not even be Muslim, but physically appear to demonstrate “Muslim traits,” become victims of anti-Muslim hate speech, government policies, or even criminal assaults. See, e.g., Neil Gotanda, *New Directions in Asian American Jurisprudence*, 17 ASIAN AM. L.J. 5, 43–46 (2010) (“The category uses the religious identification, ‘Muslim,’ as a racial signifier. Persons have been attacked since they ‘appear Muslim’ which, of course, makes no sense, since Muslims can be of any race.”); see also BAYOUMI, *supra* note 24 (describing the firsthand accounts of seven young Arab Americans who were racialized together as a suspect class in American society).

described, “Orientalism . . . is not the same as Islamophobia. It has paved the way for it and, indeed, perhaps Islamophobia is the heir to Orientalism”⁶²

2. *The Ideological Construction of Islamophobia*

Throughout American history, politicians have demonized certain groups as the “other” in order to legitimize government policies toward those groups.⁶³ In times of conflict, this presumption is only exacerbated.⁶⁴ Professor Mark Tushnet describes that the “focus on the Other” is “the central issue in thinking about civil liberties in wartime.”⁶⁵ Indeed, looking back at such instances of racism is useful in understanding the present situation for American Muslims. Writing as early as 1926, acclaimed American journalist H.L. Mencken described this expressed hatred:

The whole history of the country has been a history of melodramatic pursuits of horrendous monsters, some of them imaginary: the red-coats, the Hessians, the monarchs, again the red-coats, the Bank, the Catholics, Simon Legree, the Slave Power, Jeff Davis, Mormonism, Wall Street, the rum demon, John Bull, the hell bounds of plutocracy, the trusts, General Weyler, Pancho Villa, German spies, hyphenates, the Kaiser, Bolshevism. The list might be lengthened indefinitely; a complete chronicle of the Republic could be written in terms of it, and without omitting a single important episode.⁶⁶

In the 1990s, Islamophobia began replacing Orientalism as the primary target of this manufactured “otherness.”⁶⁷ Professor Samuel Huntington reified this notion in his 1993 essay, “The Clash of Civilizations?,” arguably the most famous article formulating this paradigm shift. Its famous first sentence began, “World politics is entering a new phase,”⁶⁸ setting the stage for the inevitable

62. SHEEHI, *supra* note 40, at 38; see also Lynne Duke, *Islam Is Growing in U.S., Despite an Uneasy Image; Particularly for Immigrants, Anxiety Lingers About American Attitudes*, WASH. POST, Oct. 24, 1993, at A1 (noting that at the time only 12 percent of American Muslims were Arabs).

63. See Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 2 (2003) (describing the historical tradition of treating “non-White immigrants and their descendants (including U.S. citizens) as permanently foreign and un-assimilable”).

64. See, e.g., Eric L. Muller, *Constitutional Conscience*, 83 B.U. L. REV. 1017, 1022 (2003) (detailing how despite the fact that “[m]ost of them [Japanese Americans] had never been to Japan, spoke little Japanese, and identified themselves as Americans, much like the children of other immigrants,” they were all treated as suspect and subject to internment after the Pearl Harbor attacks).

65. Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 298.

66. H.L. MENCKEN, *NOTES ON DEMOCRACY: A NEW EDITION* 40–41 (Dissident Books 2009) (1926).

67. See On Orientalism, *supra* note 50. Said describes how the state of affairs for Muslims in the mid-1990s had deteriorated since the publication of his book, *Covering Islam*, which detailed how Islam was portrayed as “frightening, mysterious, [and] above all threatening.” *Id.* (citing EDWARD W. SAID, *COVERING ISLAM: HOW THE MEDIA AND THE EXPERTS DETERMINE HOW WE SEE THE REST OF THE WORLD* (1981)).

68. Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF. 22 (1993).

clash of cultures upon which Huntington's thesis focused. At the article's core, Huntington predicted a "clash of civilizations" would occur between the West and the Islamic and Confucian civilizations.⁶⁹ Huntington subsequently engaged in a discussion of what he called "civilization identity,"⁷⁰ an oversimplified critique of cultures, laden with patronizing assumptions. Huntington's paranoid worldview seemed derived from an attempt to maintain a post-Cold War conflict status in the minds of the American public.⁷¹ Said argued that these views were likely shaped by a prominent 1990 essay by Professor Bernard Lewis titled *The Roots of Muslim Rage*.⁷² The provocative cover of *The Atlantic*—which published the essay—featured a sinister, bearded man, dressed in a white turban with his eyes piercing through the American flag.⁷³ The essay described Lewis's thesis with respect to the Muslim world: "This is no less than a *clash of civilizations*—the perhaps irrational but surely historic reaction of an ancient rival against our Judeo-Christian heritage, our secular present, and the worldwide expansion of both."⁷⁴

Together, Lewis and Huntington became the theoreticians and spokespersons for the process of Islamophobia unfolding at the time.⁷⁵ Note that both employed the same general framework and considerations of power that dominated Orientalist writings for centuries prior. Lewis, in one of his earliest writings, analogized Muslims to the Communist party, stating, "Both groups profess a totalitarian doctrine, with complete and final answers to all questions on heaven and earth."⁷⁶ Huntington further made the remarkable claim that "a concept of nonviolence is absent from Muslim doctrine and

69. *Id.* Although Huntington equated Islamic and Confucian civilizations as comparable dangers to the West, he proceeded to focus the balance of his analysis primarily on the conflict with Islam.

70. *Id.* at 25.

71. See Edward W. Said, *The Clash of Ignorance*, NATION, Oct. 22, 2001, at 12. Huntington was part of the intellectual elite establishment in Washington and stood to gain personally from maintaining the wartime status quo. Huntington himself explained that one of the central challenges to Western liberalism is its "decay . . . in the absence of a cohesive ideological challenge by a competing ideology, such as Marxism-Leninism." Samuel P. Huntington, *The Islamic-Confucian Connection*, NEW PERSP. Q., Summer 1993, at 19, 20. He stated further that "[f]ragmentation and multiculturalism are now eating away at the whole set of ideas and philosophies which have been the binding cement of American society." *Id.*

72. Said, *supra* note 71, at 12 (noting Huntington's reliance on Bernard Lewis, *The Roots of Muslim Rage*, ATLANTIC, Sept. 1990, at 47).

73. ATLANTIC, Sept. 1990, at cover. A 2001 *Newsweek* cover and its title article, *Why They Hate Us*, by one of Huntington's prominent students, Fareed Zakaria, are strikingly similar in content. The cover features a photograph of a young boy wearing a white turban with an angry look on his face and a large rifle in his hand. NEWSWEEK, Oct. 15, 2001, at cover; see Fareed Zakaria, *The Politics of Rage: Why Do They Hate Us?*, NEWSWEEK, Oct. 15, 2001, at 22.

74. Lewis, *supra* note 72, at 60 (emphasis added).

75. See Gema Martín-Muñoz, *Unconscious Islamophobia*, HUM. ARCHITECTURE: J. SOC. SELF-KNOWLEDGE, Fall 2012, at 21, 26 (2010).

76. Bernard Lewis, *Communism and Islam*, 30 INT'L AFF. 1, 9 (1954).

practice.”⁷⁷ Indeed, both authors relied on a reductionist approach to classify over a billion Muslims as monolithic, full of rage and irrational, and, most importantly, threatening to Western security,⁷⁸ all of which are hallmarks of Orientalist writings.⁷⁹ Most importantly, in addressing the status-quo power relations between the West and the Muslim World, their writings served as the conceptual underpinnings for an Islamophobia that would be reified repeatedly over the next twenty years.

3. *The Implications of Early Islamophobia for American Muslims*

Despite the fact that Islamophobia was formally constructed during the 1990s, American Muslims prior to 9/11 were largely able to practice their religion freely and were unrestricted in their day-to-day activities.⁸⁰ The level of intolerance and bigotry, while present, was comparatively less severe. This period is best described by a term coined by Said, “latent Orientalism,” an “unconscious positivity” in the minds of most Americans over Arabs and Muslims.⁸¹

Nonetheless, there were government policies in place, even during this period, that generally curtailed individual civil liberties, such as the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).⁸² AEDPA was a response to a series of domestic bombings, including the first World Trade Center attack in 1993 and the Oklahoma City bombing in 1995.⁸³ Its controversial provisions included the limiting of habeas corpus rights and the reintroduction of “guilt by association” tactics, which potentially criminalized

77. SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 263 (1996). Huntington’s statement can be easily refuted through numerous Quranic verses. *See, e.g.*, THE HOLY QUR’AN: TEXT, TRANSLATION & COMMENTARY 5:32 (‘Abdullah Yūsuf ‘Alī ed., new rev. ed. 1989) (“[I]f anyone slew/A person—unless it be/For murder or for spreading/Mischief in the land—It would be as if/He slew the whole people;/And if any one saved a life,/ It would be as if he saved/The life of the whole people.”); *id.* at 2:205 (“But Allah loveth not mischief.”) (defining mischief as the destruction of life and property).

78. I would concede that some of the stereotypes that Huntington, Lewis, et al. employ are rooted in some factual basis or draw upon historical occurrences in the Muslim world, but the willingness to apply those tropes to all Muslims as a monolithic unit is where Orientalism, and later Islamophobia, become so problematic.

79. Recall how in his book, *Orientalism*, Professor Said described how the perceived differences between the Orient and the Occident were constructed as insurmountable. *See SAID, supra* note 42, at 2–8.

80. *See* Kathleen M. Moore, *Muslims in the United States: Pluralism Under Exceptional Circumstances*, 612 ANNALS AM. ACAD. POL. & SOC. SCI. 116, 123 (2007) (describing how, prior to 9/11, Muslims “enjoyed a degree of anonymity that allowed them to concentrate on economic advancement and pursuit of the American dream”).

81. Said, *supra* note 42, at 206.

82. COLE & DEMPSEY, *supra* note 27, at 108.

83. *See* discussion, *infra* note 87, on how the Oklahoma City bombing was immediately characterized as a Middle Eastern attack, though there was no relationship with Muslims or Middle Easterners.

support of groups that were wholly lawful but disfavored⁸⁴ and gave designation authority to the Secretary of State to name any foreign organization a terrorist group if she determined that group to “engage in terrorist activity.”⁸⁵ This broad discretion most notably affected Muslim charities that were often controversially accused of giving material support to “terrorist” groups.⁸⁶

A paradigmatic example of the latent Orientalism present in this period can be seen in the media’s coverage of the 1995 Oklahoma City bombing. Just minutes after the blast, media reports surfaced describing the ties to Middle Eastern terrorism. Journalist Steven Emerson stated in a national television interview immediately after the attack that it showed “‘a Middle Eastern trait’ because it ‘was done with the intent to inflict as many casualties as possible.’”⁸⁷ In fact, the Arab terrorist stereotype was so entrenched that even after Timothy McVeigh, a white Christian male, had been arrested and authorities announced that they had apprehended the suspect, CNN’s Wolf Blitzer reported “there is still a possibility that there could have been some sort of connection to Middle East terrorism. One law enforcement source tells me that there’s a possibility that they (the Caucasian suspects) may have been contracted out as freelancers to go out and rent this truck that was used in the bombing.”⁸⁸ Needless to say, Blitzer’s hypothesis was never substantiated.⁸⁹

In sum, although Islamophobia was present prior to 9/11 and Orientalism dominated media portrayals of Arabs and Muslims, its practical effects were still limited when compared to the two subsequent stages. The key was that in the pre-9/11 moment, as a steady-state matter, Muslims were not deprived of any of Bosniak’s four discourses of citizenship.⁹⁰ The latent Orientalism and

84. COLE & DEMPSEY, *supra* note 27, at 109.

85. *Id.* at 119.

86. See Nina J. Crimm, *High Alert: The Government’s War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341, 1404–19 (2004).

87. John F. Sugg, *Steven Emerson’s Crusade: Why a Journalist Is Pushing Questionable Stories from Behind the Scenes*, FAIRNESS & ACCURACY IN REPORTING, <http://www.fair.org/index.php?page=1443> (last visited Feb. 28, 2012).

88. Jim Naureckas, *The Oklahoma City Bombing: The Jihad That Wasn’t*, FAIRNESS & ACCURACY IN REPORTING, <http://www.fair.org/index.php?page=3606> (last visited June 20, 2012).

89. Note that this entire media episode repeated itself almost verbatim in July 2011 in Norway where Anders Behring Breivik, a 32-year-old Norwegian right-wing extremist who had been heavily influenced by Islamophobic writings, killed over eighty people. See Johan Ahlander & Victoria Klesty, *Norway Killer Attacked Multiculturalism, Islam Online*, REUTERS (July 23, 2011, 10:05 PM), <http://uk.reuters.com/article/2011/07/23/uk-norway-killer-idUKTRE76M1OJ20110723>; Eugene Robinson, *Anders Behring Breivik and the Influence Industry of Rage*, WASH. POST (July 25, 2011), http://www.washingtonpost.com/opinions/anders-behring-breivik-and-the-influence-industry-of-rage/2011/07/25/gIQASd2WZI_story.html. Breivik referred to his actions as a declaration of war against the “Islamization of Western Europe,” a tragic but real reminder of the consequences that Islamophobia can have, not just on Muslims, but on the public as a whole.

90. See Bosniak, *supra* note 23. Note that Bosniak does not articulate a difference between continuous and intermittent citizenship. This is perhaps due to the fact that she did not intend for her

Islamophobia only manifested through powerful trigger events, such as the Oklahoma City attacks, at which point temporary and intermittent deprivations of citizenship occurred. In comparison, in phase two, the 9/11 attacks served as a permanent trigger used to justify almost any new national security policy proposal; further, in phase three, the need for a single demarcated trigger event disappears altogether. Now the government no longer requires “triggers” in order to infringe upon Muslim citizenship.

B. A New Incarnation of Islamophobia Following 9/11

*“Men feared witches and burnt women.”*⁹¹

September 11, 2001, a “watershed moment”⁹² for American politics, marked the beginning of a dramatic change in American domestic and foreign policy. Concurrently, it represented the start of the second reification of Islamophobia in America. In the aftermath of 9/11, a consolidation of national identity occurred against those who appeared Muslim, and, as a result, they were subjected to numerous civil rights violations.⁹³ Shortly after 9/11, the federal government hurriedly enacted a corpus of legislation targeting Muslims and Arabs in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“the PATRIOT Act”).⁹⁴ The new legislation passed overwhelmingly in both houses of Congress and granted wide-sweeping authority to the federal government to limit personal freedoms in order to carry out its War on Terror. This authority included, inter alia, authorization for unilateral executive detention, various privacy invasions in the public and private sphere, and warrantless wiretaps.⁹⁵

In addition, the government launched two costly wars in Afghanistan and Iraq. Relying on the legitimate uncertainty at the time, lawmakers and media pundits directed the nation’s fear of another attack toward Muslims—and those

framework to necessarily be used as a typology for assessing citizenship. The latter was developed by Professor Volpp and is expanded in this article.

91. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (analogizing the irrational fears of witchcraft that motivated individuals to wantonly kill women suspected of being witches to the fear of communism that motivated legislation to suppress the free speech of suspected communists).

92. MARY L. DUDZIAK, *SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT?* (2003) (analyzing whether the attacks on 9/11 truly did change the course of history, or if they simply reinforced then-current trends in American domestic and foreign policy).

93. *See* Volpp, *supra* note 22, at 1576.

94. *See, e.g.,* Susan N. Herman, *The USA PATRIOT Act and the Submajoritarian Fourth Amendment*, 41 HARV. C.R.-C.L. L. REV. 67 (2006). *See also* Ahmad, *supra* note 24, at 1329; Adrien Katherine Wing, *Civil Rights in the Post 9/11 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717, 728-29 (2003).

95. COLE & DEMPSEY, *supra* note 27, at 966–74. Professor Cole provides a detailed description of various security provisions included in the PATRIOT Act.

who had physical “Muslim” characteristics—to convince the public that such measures were both valid and necessary to prevent another terrorist attack.⁹⁶

1. A Discursive Shift in Islamophobic Rhetoric

There was a clear discursive shift in Islamophobic discourse after 9/11. What was previously considered unacceptable speech now permeated the discourse. During this time, pundits and public officials construed the stereotypical Muslim male—personifying all the Orientalist tropes and characteristics Lewis and Huntington described in the 1990s—as the primary threat to American security.⁹⁷

The discursive shift transcended political affiliation. One prominent conservative columnist, Ann Coulter, wrote on September 12, 2001, “We should invade their countries, kill their leaders, and convert them to Christianity. We weren’t punctilious about locating and punishing only Hitler and his top officers. We carpet-bombed German cities; we killed civilians. That’s war. And this is war.”⁹⁸ Richard Cohen, writing in the *Washington Post* one month after 9/11, added:

One hundred percent of the terrorists involved in the Sept. 11 mass murder were Arabs. Their accomplices, if any, were probably Arabs too, or at least Muslims. Ethnicity and religion are the very basis of their movement. It hardly makes sense, therefore, to ignore that fact and, say, give Swedish au pair girls heading to the United States the same scrutiny as Arab men coming from the Middle East.⁹⁹

Politicians, too, appeared to be competing as to who could look strongest on national defense. Attorney General John Ashcroft, one of the most vociferous critics of Islam in public office at the time, stated, “Islam is a religion in which God requires you to send your son to die for him. Christianity is a faith in which God sends his son to die for you.”¹⁰⁰ In a speech to the U.S. Conference of Mayors, he stated: “Let the terrorists among us be warned: if you overstay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use

96. In one particularly troubling Gallup Poll shortly after 9/11, one-third of respondents supported such drastic measures as the internment of Arab Americans or the special surveillance of Arabs living in the United States. See Jeffrey M. Jones, *The Impact of the Attacks on America: Americans Believe Country Already at War, Accept Increased Security Measures*, GALLUP (Sept. 25, 2001), <http://www.gallup.com/poll/4894/impact-attacks-america.aspx>.

97. See, e.g., Sahar F. Aziz, *Sticks and Stones, the Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y. CITY L. REV. 33, 37–39, 42–43 (2009).

98. AM.-ARAB ANTI-DISCRIMINATION COMM., *supra* note 38, at 124.

99. *Id.* Such perverse statements were not limited to the far right wing, but were increasing in frequency throughout mainstream media. See *id.* (“Those who take the Koran seriously are taught to hate the Christian and the Jew; lands taken from Islam must be recaptured. And to the Islamist, dying in a jihad is the only way one can be assured of Allah’s forgiveness and eternal salvation.” (quoting Chuck Coleson, *Evangelizing for Evil in Our Prisons*, WALL ST. J., June 24, 2002, at A16)).

100. *Id.* at 128.

every available statute. We will seek every prosecutorial advantage.”¹⁰¹ Senator Saxby Chambliss, a Republican Senator from Georgia, went even further, stating that homeland security would be improved by turning the sheriff loose to “arrest every Muslim that comes across the state line.”¹⁰²

Perhaps the most notorious and destructive comment was President Bush’s description of the War on Terror as a “crusade,”¹⁰³ a statement that outraged Muslims around the world and led to intense damage control efforts on the part of the White House.¹⁰⁴ Although it was conceivably just an ill-advised and unintentional statement by the President, the comment nonetheless suggested that the collective enemy was Islam; and further, to some Muslims, it engendered strong notions of the Middle Ages, when Christian armies embarked on numerous battles with an expressed goal of conquering Muslim lands.¹⁰⁵

Professor Victor Romero describes how the underlying rhetoric after 9/11 was reminiscent of that used toward the Japanese Americans after the attack on Pearl Harbor.¹⁰⁶ He cites a quote from General DeWitt, the chief enforcer of the internment camps:

Further evidence of the Commanding General’s attitude toward individuals of Japanese ancestry is revealed in his voluntary testimony on April 13, 1943, in San Francisco before the House Naval Affairs Subcommittee to Investigate Congested Areas: . . . “I don’t want any of them (persons of Japanese ancestry) here. They are a dangerous element. There is no way to determine their loyalty. The west coast contains too many vital installations essential to the defense of the

101. John Ashcroft, U.S. Att’y Gen., Prepared Remarks for the U.S. Mayors Conference, September 11, 2001: Attack on America (Oct. 25, 2001), available at http://avalon.law.yale.edu/sept11/doj_brief020.asp. Of course, although Ashcroft’s address was targeted towards “terrorists,” the bulk of the detentions and deportations instituted after 9/11 disproportionately targeted American Muslims. See *infra* Part I.B.2.

102. AM.-ARAB ANTI-DISCRIMINATION COMM., *supra* note 38, at 128–29. The report also includes similar statements made by several other elected members of Congress as well. “If I see someone come in that’s got a diaper on his head, and a fan belt wrapped around that diaper on his head, that guy needs to be pulled over.” *Id.* at 128 (quoting Representative John Cooksey of Louisiana).

103. Ron Suskind, *Faith, Certainty and the Presidency of George W. Bush*, N.Y. TIMES MAG., Oct. 17, 2004, at 44. In a press conference regarding homeland security policies, Bush responded, “This is a new kind of—a new kind of evil. And we understand. And the American people are beginning to understand. This crusade, this war on terrorism is going to take a while.” *Id.*

104. White House Press Secretary Ari Fleisher stated two days later, “I think what the president was saying was—had no intended consequences for anybody, Muslim or otherwise, other than to say that this is a broad cause that he is calling on America and the nations around the world to join. . . . [As to] any connotations that would upset any of our partners, or anybody else in the world, the president would regret if anything like that was conveyed.” *Id.* (quoting Fleisher).

105. Peter Ford, *Europe Cringes at Bush “Crusade” Against Terrorists*, CHRISTIAN SCI. MONITOR (Sept. 19, 2001), <http://www.csmonitor.com/2001/0919/p12s2-woeu.html>.

106. See Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, 52 DEPAUL L. REV. 871, 877 (2003) (citing *United States v. Korematsu*, 323 U.S. 214, 236 n.2 (1944) (Murphy, J., dissenting)).

country to allow any Japanese on this coast The danger of the Japanese was, and is now—if they are permitted to come back—espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is allowed in this area¹⁰⁷

As described above, the language employed by General DeWitt was indeed strikingly similar to that used against American Muslims after 9/11. As a result of this framing, the average “Muslim” in America was presumptively considered disloyal and a threat, irrespective of his or her formal citizenship status. In fact, according to one poll, less than half of the respondents during the period shortly after 9/11 believed that American Muslims were loyal to the United States.¹⁰⁸ In one particularly troubling Gallup Poll shortly after 9/11, one-third of respondents supported such drastic measures as the internment of Arab Americans or the special surveillance of Arabs living in the United States.¹⁰⁹ This biased public perception was no doubt a necessary precursor to the large-scale encroachment on civil liberties that targeted American Muslims in the following months and years.

2. *Ramifications for the Muslim Community*

The repercussions of such statements were severe in both the private and public spheres. Muslims were cast as disloyal outsiders and noncitizens. Under the broad umbrella of “national security policy,” the government institutionalized numerous civil liberties violations, including intrusive airport inspections, increased FBI surveillance and warrantless wiretapping, the use of agents provocateurs in mosques, and, in some cases, even torture and suspension of habeas corpus rights.¹¹⁰ Within two months of 9/11, law enforcement officials detained more than 1200 individuals in dragnet searches, most of whom were from the Middle East, South Asia, and North Africa.¹¹¹ In 2004 alone, the FBI initiated a campaign to interview 5000 Muslim men to obtain leads on terrorist attacks.¹¹² The government detained countless others as

107. *Id.*

108. JOHN L. ESPOSITO & DALIA MOGAHED, WHO SPEAKS FOR ISLAM? WHAT A BILLION MUSLIMS REALLY THINK 155 (2007).

109. *See* Jones, *supra* note 96.

110. COLE & DEMPSEY, *supra* note 27, at 107.

111. Aziz, *supra* note 97, at 40 (citing Ahmad, *supra* note 24, at 1269).

112. *Id.* at 40–41 (citing Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 636 (2005)).

“material witnesses,” but neither the exact number nor the names of such persons have been revealed—again for national security purposes.¹¹³

Similarly, whereas before 9/11 President Bush and Attorney General Ashcroft publicly denounced racial profiling tactics,¹¹⁴ their positions quickly changed after 9/11.¹¹⁵ Public sentiment on the issue followed suit, with over half of Americans polled approving racial profiling at airports nearly two weeks after the attacks.¹¹⁶

The government—seizing on the public endorsement of discriminatory policies toward Muslims at the time—implemented four distinct practices of targeting people who appeared “Muslim”: profiling airline passengers, secret arrests, the institution of new race-based immigration policies, and selective enforcement of generally applicable immigration laws.¹¹⁷ Airlines frequently removed Muslim passengers from flights without cause—even removing one of President Bush’s Secret Service agents because he looked Muslim.¹¹⁸ Professor Muneer Ahmad cites two particularly egregious examples of profiling. The first involved a United Airlines pilot refusing to fly a U.S. citizen of Egyptian origin out of Tampa, Florida, because his name was “Mohammad,” and the second was a situation in Austin, Texas, where passengers applauded as two Pakistani men were removed from a flight.¹¹⁹

113. Ahmad, *supra* note 24, at 1270–71 (citing David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 960–61 (2002)).

114. George W. Bush, President of the United States, Remarks to the NAACP National Convention (July 9, 2001), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2001/07/20010709-8.html> (stating emphatically, “[Racial profiling is] wrong, and it must be ended in America.”).

115. See DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 47–55 (2003) (arguing that the actions taken by the former President and the former Attorney General after the 9/11 attacks demonstrate their willingness to engage in racial profiling); see also Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45, 46–50 (2003) (arguing that the actions taken by the Justice Department demonstrate their use of racial profiling tactics post-9/11).

116. See Daniel Eisenberg, *Airline Security: How Safe Can We Get?*, TIME, Sept. 24, 2001, at 88 (citing a TIME/CNN poll in which over half of respondents felt it was acceptable to profile on the basis of race, age, or gender); Nicole Davis, *The Slippery Slope of Racial Profiling*, COLORLINES, Dec. 15, 2001, at 2 (commenting on how Arab Americans begrudgingly accepted racial profiling in the immediate aftermath of 9/11). Professor Jonathon Turley of George Washington University Law School summarized the predominant national opinion at the time in an NPR interview, stating, “There are 40 million people that travel by air in this country. We cannot stop each one of them and make an individualized determination of risk. We have to develop some type of profile. The fact is profiling is a legitimate statistical device. And it’s a device that we may have to use if we’re going to have a meaningful security process at these airports.” *Morning Edition: Use of Profiling to Discover Would-Be Terrorists* (NPR radio broadcast Feb. 12, 2002), transcript *available at* LEXIS (transcripts).

117. Ahmad, *supra* note 24, at 1269.

118. Ken Ellingwood & Nicholas Riccardi, *After the Attack; Racial Profiling; Arab Americans Enduring Hard Stares of Other Fliers; Backlash: They Say They Have Become Victims of Profiling*, L.A. TIMES, Sept. 20, 2001, at A1.

119. See Ahmad, *supra* note 24, at 1270 (citing Sasha Polakow-Suransky, *Flying While Brown*, AM. PROSPECT, Nov. 19, 2001, at 14–15 and Jonathan Osborne, *Passenger Ejections Seen as Profiling*, AUSTIN AM.-STATESMAN, Sept. 29, 2011, at A1).

The government also instituted the National Security Entry-Exit Registration System (“NSEERS”), which required immigrants from twenty-six countries—all but one of which were Muslim countries—to register in a special program and be subjected to fingerprinting upon entry into the country; it also instituted annual reregistration requirements.¹²⁰ Muslim immigrants were further targeted through the Alien Absconder Initiative of 2002, by which the government allegedly sought to identify and deport 315,000 undocumented aliens who had ignored judicial paperwork.¹²¹ Despite the general nature of the legislation and the fact that most of the “absconders” were Latin American, the government instead specifically began by targeting 6000 men from Muslim countries.¹²²

Similarly, the passage of the PATRIOT Act granted even more unbridled discretion to federal officials, allowing them to detain noncitizens who were suspected of terrorism for up to a week without formal charges.¹²³ There is no evidence that the individuals detained in any of these initiatives were actually linked to terrorism, but, rather, their detention was based simply on the perceived disloyalty and “otherness” of Muslims.¹²⁴ Finally, the government’s “immigration-plus” profiling protocols such as NSEERS and INS Special Registration “conflate[d] nationality with religion and target[ed] immigrants from nations with sizable Muslim populations for selective enforcement of immigration laws.”¹²⁵

The reliance on Muslim identity, or Muslim racialization, throughout these four practices mirrored the racialization of the Japanese during World War II. While the stereotypes of the violent and threatening Muslim were prevalent even before 9/11—just as in the case of the Japanese—it was during this phase that the government began collectively and systematically treating the group as disloyal. At least as far as the national security realm was concerned, American Muslims were viewed as presumptively disloyal noncitizens who were not entitled to the rights of citizenship.

120. *Id.* at 1274.

121. *Id.* at 1275.

122. *Id.* at 1275 & n.59; see Memorandum from the Deputy Attorney General to All U.S. Attorneys and All Members of the Anti-Terrorism Task Forces (Nov. 9, 2001).

123. Kevin R. Johnson, *The End of “Civil Rights” as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1482 (2002).

124. *Id.*

125. Karen C. Tumlin, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CALIF. L. REV. 1173, 1184 (2004); see also Mustafa Bayoumi, *Racing Religion*, in AMERICAN STUDIES: AN ANTHOLOGY 99–108 (Janice A. Radway et al. eds., 2009) (describing the racialization of Muslims in the context of the NSEERS special registration program and its discriminatory implementation towards individuals from Muslim countries).

3. *Private Sphere Intrusions*

Violence against Muslims in the private sphere also increased precipitously after 9/11. Although most of these crimes invariably went unreported, over 1000 incidents were reported within the two months immediately following 9/11.¹²⁶ As many as nineteen people were murdered in violence related to the attacks, many of which Professor Ahmad classifies as “crimes of passion.”¹²⁷ Ahmad posits that these private crimes stem from the same bias, or perhaps even as a logical result, from the government’s institutionalized racial profiling policies—the stereotyped “otherness” of the Muslim.¹²⁸ The perpetrators in these hate crimes, Ahmad argues, did not act with malice aforethought or a callous heart, but, rather, they had visceral reactions to the perceived “threat” of this foreign and disloyal “Muslim.”¹²⁹ In their eyes, all Muslims were assumed to have some relationship or involvement with terrorism, and all people who appeared to look Muslim—whether they happened to be or not—were considered Muslim.¹³⁰ Thus without formally endorsing such violence, the State nonetheless sanctioned some of its key premises through its own nefarious racial profiling policies that relied on the same flawed logic.

The sharp discursive shift in the tone of Islamophobia, as well as the government policies and unsanctioned practices targeting American Muslims during this period, actually began to affect a change in the theoretical conception of the Muslim as a “citizen.” In her influential 2002 work, *The Citizen and the Terrorist*, Professor Leti Volpp described how American Muslims and Arabs may formally have been U.S. citizens, but, in practice, they were being construed as noncitizens or, at best, as a second-class group of citizens.¹³¹ She describes this notion of citizenship as identity through the concept of inclusion, positing that despite their actual legal status, “those who appear ‘Middle Eastern, Arab, or Muslim’ . . . are interpellated as antithetical to the citizen’s sense of identity.”¹³² This interpellation functions as an ideological state apparatus and must be distinguished from, for example, the government or

126. Ahmad, *supra* note 24, at 1266.

127. *Id.* at 1266, 1302 (citing Robert Hanashiro, *Hate Crimes Born out of Tragedy Create Victims*, USA TODAY (Sept. 11, 2002), http://www.usatoday.com/news/sept11/2002-9-11-mesa_x.htm; Robert E. Pierre, *Victims of Hate, Now Feeling Forgotten*, WASH. POST, Sept. 14, 2002, at A1; Jim Walsh, *Roque Guilty in Sikh Murder; Insanity Defense Fails; Jury to Decide on Death Penalty*, ARIZ. REPUBLIC, Oct. 1, 2003, at 1).

128. Ahmad, *supra* note 24, at 1306–07 (framing the violent phenomena as a manifestation of the perpetrators’ desire to protect their and their nation’s honor, with misogynistic undertones). Professor Volpp also refers to this phenomenon as “extralegal racial profiling.” Volpp *supra*, note 22, at 1580.

129. Ahmad, *supra* note 24, at 1307–08.

130. *Id.* at 1311.

131. See Volpp, *supra* note 22. I use Professor Bosniak’s definition of second-class citizen described above. See *supra* note 19.

132. Volpp, *supra* note 22, at 1594.

a state actor directly assailing the rights of Muslim citizens.¹³³ Interpellation constitutes an individual as a subject and shapes our reality of the individual—a reality that is then acknowledged by the community and even the subject herself.¹³⁴ Thus, Volpp argues that after 9/11, as a result of being interpellated as the “other,” Muslims were excluded from the informal feeling of collective membership and group solidarity, as well as the formal exercise of some of the legal rights that are recognized as privileges of inclusion.¹³⁵

In sum, in the aftermath of the 9/11 attacks, Muslims were stripped of their citizenship as identity. This bias led to a rapid increase in private-sphere violence against those who appeared to be Muslim. At the same time, the government used this justification to initiate a number of stark and intrusive encroachments on the civil rights and liberties of American Muslims. It must be reiterated that the ostensible purpose of the legislation authorizing these policies was, in almost all cases, framed around national security. In other words, there was de facto targeting of Muslims under the proffered justification that security needs at the time trumped individual liberties, rather than de jure targeting of Muslims because they were no longer considered to be citizens. Although the “Muslim-looking person” was racialized as an entity that people should fear and guard against, the key distinction between this phase and the following one is that in the third phase there is an organized movement advocating that the State should explicitly deprive American Muslims of their citizenship rights simply because they are Muslim.

C. The Present-Day Incarnation of Islamophobia and the Threat It Poses to the Fundamental Rights of Citizenship

One would assume that anti-Muslim sentiment reached its high water mark after 9/11. To the contrary, however, it has increased dramatically in the third phase of Islamophobia, which began during President Obama’s 2008 campaign. If Volpp’s contentions about Muslims’ being relegated to second-class citizenship were true in 2002, then today that distinction has crystallized even further.¹³⁶ Whereas a vast majority of the incursions in the second phase occurred under the umbrella of national security, Islamophobia has now evolved beyond simply encouraging profiling and other surveillance techniques aimed at Muslims under the professed interests of national security. An institutionalized version of Islamophobia in this third phase now focuses on the

133. *Id.* at 1593–95. Volpp acknowledges, however, that not having citizenship as identity means that people will consequently be deprived of citizenship as rights or political activity, though this is not as clear as it is in the third phase of Islamophobia described later.

134. *Id.*

135. *Id.*

136. See Pew Forum on Religion & Pub. Life, *Public Remains Conflicted over Islam*, PEW RES. CENTER (Aug. 24, 2010), <http://pewresearch.org/pubs/1706/poll-americans-views-of-muslims-object-to-new-york-islamic-center-islam-violence> (showing that the favorability rating of American Muslims among the general public had dropped 11 points since 2005).

“creeping threat of Shariah” and, in the process, more explicitly threatens the foundational conceptions of citizenship described by Professor Bosniak.¹³⁷ Further, while citizens enjoy some fundamental level of respect for their individual beliefs and practices, this is no longer the case with regard to Muslims, both in journalism and politics today.¹³⁸ Whereas it is widely recognized as socially unacceptable to be openly disparaging toward minority groups, the privilege reflected in that norm is increasingly denied to Muslims.¹³⁹ In this third phase of Islamophobia, mainstream discourse now explicitly challenges the notion that American Muslims deserve the same liberal notions of rights that other citizens enjoy.

One might surmise that since the contours of this phase cannot easily be demarcated, the third phase is in fact a difference in degree rather than in kind. It is true that unlike the transition from the first to the second phase, there is no single demonstrable event or tipping point that represents the transition from the second to third period; however, there was a gradual progression that increased in intensity since the presidential campaign of 2008 when the term “Muslim” was actually converted into a slur, as political opponents “accused” then-Senator Obama of secretly being a Muslim.¹⁴⁰

The suggestion that a Muslim citizen would be less suited for office represents the deep-seated fear and mistrust of Muslims in the American consciousness. President Obama’s opponents recognized this fact and knew that it would be a powerful tool for discrediting him.¹⁴¹ Yet what was perhaps

137. See *infra* Part II for a further explication of Bosniak’s four discourses of citizenship and how they apply to American Muslims in this third phase.

138. See M.J. Rosenberg, *The “New” Rhetoric of Islamophobia*, AL JAZEERA (Jan. 13, 2011, 12:42 PM), <http://www.aljazeera.com/indepth/opinion/2011/01/201111074425968803.html> (citing statements made by popular commentators in various media outlets disparaging the spread of Islam in the Western society, as well as the actions of Representative Peter King); see also WAJAHAT ALI ET AL., CTR. FOR AM. PROGRESS, FEAR, INC.: THE ROOTS OF THE ISLAMOPHOBIA NETWORK IN AMERICA (2011), available at <http://www.americanprogress.org/issues/2011/08/pdf/islamophobia.pdf>; Max Blumenthal, *A Nation Against Islam: America’s New Crusade*, OPENDEMOCRACY (Jan. 13, 2011), <http://www.opendemocracy.net/max-blumenthal/nation-against-islam-americas-new-crusade>. Blumenthal and Ali chronicle the Islamophobia infrastructure—including pundits, bloggers, and think tanks—which are perpetuating “exaggerate[d] threats of ‘creeping Sharia,’ Islamic domination of the West, and purported obligatory calls to violence against all non-Muslims by the Koran.” WAJAHAT ALI ET AL., *supra*, at 2.

139. See, e.g., Robert Wright, *Islamophobia and Homophobia*, N.Y. TIMES OPINIONATOR (Oct. 26, 2010, 9:00 PM), <http://opinionator.blogs.nytimes.com/2010/10/26/islamophobia-and-homophobia>. Wright argues that making slurs against homosexuals would carry greater political costs compared to remarks made against Muslims. Wright evaluated journalist Juan Williams’s statements about how he gets scared when he sees people wearing “Muslim garb” on a plane. Williams was fired from his position at NPR for those comments, but he subsequently received a \$2 million contract with Fox News the following day. Wright argued that although Williams probably would have been fired had he made such statements about gays, it is highly unlikely that he would have been rewarded with a lucrative employment contract immediately thereafter.

140. Elliott, *supra* note 30.

141. See Pew Forum on Religion & Pub. Life, *Growing Number of Americans Say Obama Is a Muslim*, PEW RES. CTR. (Aug. 19, 2010), <http://pewresearch.org/pubs/1701/poll-obama-muslim->

most striking about the “allegations” was not the partisan claims themselves, but the responses that President Obama and other government leaders offered. Obama felt compelled to reject the “accusations,” doing his best to distance himself from the Muslim community and choosing not to make any campaign stops in mosques or meet with any Muslim organizations during the campaign (despite making numerous stops at churches and synagogues).¹⁴² President Obama did not state, that although he was not a Muslim, there was nothing wrong with Muslims per se. Instead, he reiterated the bias by referring to the accusations on his website as a “smear.”¹⁴³ Further, during one campaign rally, his aides asked two young Muslim women dressed in headscarves to exit the stage area where he would be speaking.¹⁴⁴ Arguably, the pervasiveness of such insidious discourse from the President helped normalize the notion to the public that American Muslims are not “citizens,” but indeed “others.”¹⁴⁵

II.

DISCOURSES OF CITIZENSHIP

According to Professor Bosniak, “citizenship” can be comprised of four distinct discourses: (1) citizenship as legal status, (2) citizenship as rights, (3) citizenship as political activity, and (4) citizenship as identity/solidarity.¹⁴⁶ Volpp argues that after the events of 9/11 American Muslims lost their citizenship as a matter of identity, i.e., that they did not represent the nation and were interpellated as outsiders. I argue that today not only are American Muslims further deprived of citizenship as identity, but they are also deprived of citizenship with respect to rights and political activity. Arguably, the only remaining citizenship discourse for this group is formal legal status, though it is unclear what value lies therein if one is not afforded the rights associated with that status. I will look at each of these discourses individually to further elucidate this point.

christian-church-out-of-politics-political-leaders-religious (showing that nearly 20 percent of the nation believed Obama was a Muslim leading up to the 2010 midterm elections, up from 12 percent during the 2008 presidential campaign, and that beliefs about Obama’s religion are closely linked to political judgments about him).

142. See Holnig Lau, *Identity Scripts & Democratic Deliberation*, 94 MINN. L. REV. 897, 922–23 (2010).

143. *Id.*; see also Constance L. Rice, Editorial, “Muslim” Shouldn’t Be a Slur, L.A. TIMES, Oct. 15, 2008, at A19.

144. Lau, *supra* note 142, at 923.

145. *But see* Devin W. Carbado, *Racial Naturalization*, 57 AM. Q. 633, 638 (2005). Professor Carbado views citizenship and identity as two distinct concepts. He would likely refer to this group as “citizen aliens,” a people who have formal legal status but are excluded from American identity. However, this narrow definition of citizenship is not the post-/trans-framework of citizenship used in this Comment.

146. See Bosniak, *supra* note 23, at 455.

A. Citizenship as Formal Legal Status

Citizenship as legal status refers to the formal legal recognition that one is a member in an organized political community.¹⁴⁷ It is a status exclusively tied to a nation-state, as “the right to belong to some kind of organized community is the necessary grounding for the ‘right to have rights.’”¹⁴⁸ Aliens, then, remain outside of this community, and to the extent that they participate in social activities and enjoy benefits within the state, they do so only at the host state’s discretion.¹⁴⁹ Most importantly, until they attain formal legal status as citizens, they will presumptively be viewed as outsiders, regardless of how involved or invested they are in the community.¹⁵⁰

With respect to American Muslims who have formal legal citizenship status today, there has not been any substantial discourse or legitimate proposals to formally denationalize them via revocation (or reinterpretation) of the Fourteenth Amendment. Yet some commentators have argued that American Muslims are treated like naturalized citizens—i.e., that there is always a risk that their citizenship will be undone given their perennial perceived disloyalty.¹⁵¹ There have even been some isolated cases, such as the Holy Land Foundation case, where the government did attempt to denaturalize the defendants who were accused of providing material support to terrorist organizations, as well as numerous incidences where the government sought to delay the citizenship proceedings of Muslim immigrants.¹⁵²

In actuality, even the proposition of an inquiry into Muslim denaturalization is laced with Islamophobic tropes and stems from a misunderstanding that Muslims are a monolithic group of immigrants. In reality, the American Muslim community, perhaps more so than any other religious group, is extremely diverse.¹⁵³ A 2007 Pew Research Center poll found that 35 percent of all American Muslims are native born, and within that group, the majority (20 percent of the overall Muslim population in the United States) are African American.¹⁵⁴ This fact further highlights the absurdity of a

147. *Id.* at 456.

148. Leti Volpp, *Citizenship Undone*, 75 *FORDHAM L. REV.* 2579, 2582 (2007) (quoting HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296 (1973)).

149. *See* Bosniak, *supra* note 23, at 462.

150. *Id.*

151. *See* Volpp, *supra* note 148, at 2582–83.

152. *Id.* at 2583–84; *see also* Tumlin, *supra* note 125, at 1184 (positing that immigrants from Muslim countries are subjected to increased scrutiny and selective enforcement of immigration laws).

153. *See generally* KAMBIZ GHANEABASSIRI, *A HISTORY OF ISLAM IN AMERICA: FROM THE NEW WORLD TO THE NEW WORLD ORDER* (2010) (providing a detailed account of Muslim immigration to the United States).

154. PEW RESEARCH CTR., *MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 1* (2007), available at <http://pewresearch.org/assets/pdf/muslim-americans.pdf>.

common refrain at anti-Muslim rallies that calls for Muslims to “go back home.”¹⁵⁵

Nevertheless, at least as a theoretical matter, among the four discourses of citizenship articulated in Bosniak’s analytical framework, the only one that remains conceptually strong for American Muslims today is citizenship as formal legal status. The net effect of the Islamophobic discourse characterizing Muslims as noncitizens has been to infringe upon the rights that should accompany formal legal status.

B. Citizenship as Rights

Rights are the defining emblem of membership or legal status in a community. As Professor Bosniak explains, “citizenship requires the possession of rights, and those who possess the rights are usually presumed thereby to enjoy citizenship.”¹⁵⁶ These rights naturally exist in the nation-state, which defines and enforces the rights.¹⁵⁷ It is therefore understood that a full or robust version of citizenship within a nation-state requires the equal enjoyment of all the rights of citizenship by all its members.¹⁵⁸ Accordingly, any member or subgroup who is not entitled to equal rights is thus relegated to a “second-class citizenship” status, defined by Bosniak as “one who is a formal subject of citizenship—a status citizen—but who is nevertheless denied full enjoyment of citizenship’s substance, including rights associated with citizenship.”¹⁵⁹

In the second period of Islamophobia described above, there were numerous egregious violations of these rights. However, a key distinction between the second and third phases is that in the former, encroachments were generally framed under the umbrella of national security policy, while policies in the latter explicitly targeted Muslims based solely on the perception of them as inherently alien or noncitizen.¹⁶⁰ In this reified version of Islamophobia, numerous politicians and public intellectuals no longer couch their Islamophobic positions around national security, but instead they advocate as a *de facto* principle that Muslims are simply not entitled to citizenship rights.

155. Jillian Rayfield, *CAIR Video Shows Protesters Yelling “Terrorists Go Home” at Muslim Fundraiser*, TPM (Mar. 8, 2011, 1:27 PM), http://tpmmuckraker.talkingpointsmemo.com/2011/03/cair_video_shows_protesters_yelling_terrorists_go_home_at_muslim_fundraiser.php.

156. Bosniak, *supra* note 23, at 464.

157. *Id.* Note that some scholars have posited that these rights refer to general human rights beyond those limited to a nation-state. See RAINER BAUBÖCK, *TRANSNATIONAL CITIZENSHIP: MEMBERSHIP AND RIGHTS IN INTERNATIONAL MIGRATION* 185, 240, 243 (1994) (“Human rights are the cornerstone as well as the most extended application of a transnational conception of citizenship.”).

158. Bosniak, *supra* note 23, at 464.

159. See Bosniak, *supra* note 19.

160. See generally COLE, *supra* note 115, at 47–55 (describing the numerous civil liberties encroachments that were framed under the umbrella of national security during the second period).

Take the recent example of the Park 51 Islamic Center (“Ground Zero Mosque”¹⁶¹) controversy, which inspired strong emotions in opposition to the center. The project was a proposed thirteen-story Muslim community center in lower Manhattan on the site of an old Burlington Coat Factory.¹⁶² The project became a national referendum on Islamophobia and the rights of Muslims to freely exercise their religion. It was dubbed a “victory Mosque,” with one of the leading opponents of the project referring to it as “Islamic domination and expansionism.”¹⁶³ “The location is no accident — just as al-Aqsa was built on top of the Temple in Jerusalem,” she continued.¹⁶⁴ As popular support galvanized against the project, several prominent politicians publicly campaigned against its construction.¹⁶⁵ Former Speaker of the House Newt Gingrich likened the proposed mosque to Nazis trying to put up a sign near Washington’s Holocaust museum,¹⁶⁶ while presidential candidate Sarah Palin infamously tweeted for Muslims to “refudiate” the project, stating that it “stabs hearts.”¹⁶⁷ Acclaimed Harvard Professor Martin Peretz brazenly wrote in the *New Republic*, a mainstream, reputable magazine:

[F]rankly, Muslim life is cheap, most notably to Muslims. And among those Muslims led by the Imam Rauf there is hardly one who has raised a fuss about the routine and random bloodshed that defines their brotherhood. So, yes, I wonder whether I need honor these people and pretend that they are worthy of the privileges of the First Amendment which I have in my gut the sense that they will abuse.¹⁶⁸

161. The term itself is actually a misnomer, one that was employed as a fear tactic by opponents of the center. The proposed center is not actually a mosque, but an Islamic cultural center; nor was it at Ground Zero, but rather, several blocks away. Nonetheless, I retain the term here due to its ubiquitous usage in popular media.

162. Keith Olbermann, *There Is No Ground Zero Mosque*, MSNBC (Aug. 16, 2010, 9:06 PM), http://www.msnbc.msn.com/id/38730223/ns/msnbc_tv-countdown_with_keith_olbermann/t/olbermann-there-no-ground-zero-mosque (transcribing his comment that aired on his program the same evening). In his special comment, Olbermann lambastes the media and American public for buying into the hysteria surrounding the project, and states that “[f]rom the beginning of this nation we have fought prejudice and religious intolerance and our greatest enemy: stupidity, exploited by rapacious politicians.” *Id.*

163. Ghosh, *supra* note 1 (quoting Pamela Geller, manager of the website *Atlas Shrugs*).

164. *Id.*

165. See generally *Timeline: Nine Months of the Right’s Anti-Muslim Bigotry*, MEDIA MATTERS FOR AM. (Sept. 10, 2010, 11:36 PM), <http://mediamatters.org/research/201009100042> (chronicling media reaction to the Ground Zero Mosque).

166. It is worth noting that the Supreme Court actually protected the First Amendment right of Nazis to march in Skokie, Illinois, a substantially Jewish suburb, in the famous case *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977), so Gingrich’s analogy is based on emotion rather than law.

167. Stephanie Condon, *Palin’s “Refudiate” Tweet on Mosque near Ground Zero Draws Fire (for Substance and Style)*, CBS NEWS (July 19, 2010, 9:54 AM), http://www.cbsnews.com/8301-503544_162-20010892-503544.html.

168. Martin Peretz, *The New York Times Laments “A Sadly Wary Misunderstanding of Muslim-Americans.” But Really Is It “Sadly Wary” or a “Misunderstanding” at All?*, NEW REPUBLIC (Sep. 4, 2010, 9:23 PM), <http://www.npr.com/blog/77475/the-new-york-times-laments-sadly-wary->

Peretz's statement that Muslims did not deserve First Amendment privileges was not isolated Islamophobic banter. In fact, President Obama himself offered a muddled message, first speaking out at a White House Ramadan dinner in support of the Muslims' right to build the center, only to retract his support the next morning, stating, "I was not commenting, and I will not comment, on the wisdom of making the decision to put a mosque there"¹⁶⁹ By doing so, Obama himself implied that Muslims were to blame for 9/11, and his comments highlighted the perception held by many that, despite their legal status as citizens, Muslims are no longer entitled to the same religious right to free expression as other fellow citizens.

Further, there has been a recent outcry against the construction of mosques all around the country.¹⁷⁰ One prominent example of a mosque project embroiled in a national firestorm of such controversy was in Murfreesboro, Tennessee, where residents unsuccessfully attempted to halt construction of a mosque project through varying tactics.¹⁷¹ Initially, residents argued before the county commission that they were not put on proper notice and that the project would cause traffic congestion.¹⁷² Soon after, mosque opponents began holding public rallies attempting to intimidate the Muslims into backing down, even defacing property and burning construction equipment in what the FBI investigated as a hate crime.¹⁷³ When all of these tactics were of no avail, plaintiffs filed suit, claiming in federal court that the First Amendment's protection of freedom of religion did not entitle Muslims to build their mosque because Islam was not actually a religion and that "Shariah law [was] pure sedition."¹⁷⁴ The claim was so egregious that the Department of Justice took the

misunderstanding-muslim-americans-really-it-sadly-w. After Nicholas Kristof publicly lambasted Peretz in a *New York Times* column and after numerous student protests at Harvard, Peretz issued an apology nearly ten days later for his statement that Muslims did not deserve the protections of the First Amendment. He stood by his other bigoted remark, however, that "[f]rankly, Muslim life is cheap, especially for Muslims," by emphatically stating, "This is a statement of fact, not value." See Martin Peretz, *An Apology*, NEW REPUBLIC (Sep 13, 2010, 9:02 AM), <http://www.tnr.com/blog/the-spine/77607/martin-peretz-apology>.

169. Richard Cohen, *Obama Muddles His Mosque Message*, WASH. POST, Aug. 17, 2010, at A15.

170. The ACLU has chronicled a map of nationwide antimosque activity over the last five years, including episodes of vandalism or criminal acts as well as efforts to block construction or expansion of existing facilities. See ACLU, Map—NATIONWIDE ANTI-MOSQUE ACTIVITY, <http://www.aclu.org/maps/map-nationwide-anti-mosque-activity> (last visited Feb. 25, 2012).

171. The entire episode pertaining to the Murfreesboro Mosque controversy was chronicled in a CNN Special, *Unwelcome: The Muslims Next Door*, on March 27, 2011. See *Unwelcome: The Muslims Next Door—Educator and Parent Guide*, CNN (Mar. 24, 2011), http://articles.cnn.com/2011-03-24/us/unwelcome.muslims.next.door.guide_1_muslim-community-islamic-center-religious-freedom.

172. *Id.*

173. *Id.*

174. Bob Smietana, *Legitimacy of Islam at Heart of Tenn. Mosque Suit*, USA TODAY (Oct. 4, 2010, 12:48 PM), http://www.usatoday.com/news/religion/2010-10-05-mosque04_ST_N.htm (quoting plaintiffs' attorney Joe Brandon Jr.). In 2012, presidential candidate Herman Cain also threw his support behind the mosque opposition in a *Fox News Sunday* interview with Chris Wallace, stating,

rare step of submitting an amicus brief, writing that “consistent among all three branches of government, the United States has recognized Islam as a major world religion.”¹⁷⁵ Although the plaintiffs’ request for an injunction was rightfully denied, the case demonstrates how a new form of Islamophobia focuses on the “threat of Shariah” to argue that Muslims should not be entitled to the full and equal enjoyment of citizenship rights.

C. Citizenship as Political Activity

Citizenship as political activity refers to “active engagement in the life of the community,”¹⁷⁶ where the very existence of membership in that community “empowers those included in it to contribute to the shaping of a shared collective destiny.”¹⁷⁷ Civic participation is a cornerstone of our democracy, and its roots can be traced back to ancient Greece. Aristotle described a citizen as “a man who both rules and is ruled” and as “one who participates in the rights of judging and governing.”¹⁷⁸ Citizenship as political activity can descriptively refer to the level of involvement or to its normative ideals.¹⁷⁹ Thus, through political engagement, be it democratic ideals or civic republicanism, the citizen is one who plays an active role in shaping the collective group identity and policy.¹⁸⁰

For a Muslim, or one who might appear to be Muslim, the opportunity for political participation has been severely curtailed. Let us return for a moment to the accusations against President Obama that he was a secret Muslim. What is equally telling of the bias against Muslims in those conversations is the insidiousness of the other presidential candidates’ responses to the issue. When asked if she believed that Obama was a Muslim, then-Senator Clinton responded, “[T]here’s nothing to base that on. As far as I know,”¹⁸¹ implying

“They’re objecting to the fact Islam is both a religion and a set of laws, Sharia law. That’s the difference between any one of our other traditional religions where it’s just about religious purposes. The people in the community know best, and I happen to side with the people in Murfreesboro.” Tanya Somander, *Herman Cain: Americans Have the Right to Ban Mosques*, THINKPROGRESS (July 17, 2011, 11:45 AM), <http://thinkprogress.org/politics/2011/07/17/271216/herman-cain-americans-have-the-right-to-ban-mosques>. When pressed by Wallace to clarify if any community could ban a mosque if they wanted, Cain replied, “Yes. They have a right to do that. That’s not discriminating based upon religion.” *Id.*

175. *Justice Department Files Brief in Support of Continued Construction of Murfreesboro, Tenn., Mosque*, U.S. DEP’T OF JUST. (Oct. 18, 2010), <http://www.justice.gov/opa/pr/2010/October/10-crt-1162.html>.

176. Bosniak, *supra* note 23, at 455.

177. *Id.* at 472 (quoting RONALD BEINER, WHAT’S THE MATTER WITH LIBERALISM? 105 (1992)).

178. *Id.* at 470.

179. *Id.* at 449.

180. *Id.* at 473.

181. Jaketapper, *Clinton Says Obama Muslim Rumor Not True “As Far as I Know,”* ABC NEWS POLITICAL PUNCH (Mar. 2, 2008, 11:03 PM), <http://abcnews.go.com/blogs/politics/2008/03/clinton-says-ob>.

that his being a Muslim was still a possibility.¹⁸² John McCain's comments on the subject were equally perverse. At a campaign rally for the senator, an elderly woman took the microphone and stammered, "I can't trust Obama . . . I have read about him and he's, uh . . . , he's an Arab."¹⁸³ McCain immediately shook his head in disappointment and "corrected" her, stating, "No, ma'am . . . [he's] a decent family man, *citizen*, that I just happen to have disagreements with on fundamental issues."¹⁸⁴

The exchange between Senator McCain and the woman is significant for two reasons. First, it exposes the deep-seated and latent Islamophobia that people have for Muslims. In this case, it seems the woman mistakenly conflated "Arab" with "Muslim," since the discourse at the time revolved around Obama being a Muslim, not an Arab. Nonetheless, Senator McCain's response was instantaneous—almost suggesting that he was offended by the woman's remarks—going so far as to cut her off during her comments.¹⁸⁵ Yet, arguably, McCain's own remarks underscore a presumed dichotomy between being a Muslim and a "decent family man" or "citizen."¹⁸⁶ His response insinuated that an Arab or Muslim could not truly be a citizen, as they could not be identified with the traditional American nuclear family. Second, and more importantly, the entire exchange demonstrates how difficult it is for someone who is perceived to be Muslim to gain political office. The Muslim "otherness" is an almost insurmountable barrier to entry into popular politics. Moreover, given the high barrier to entry and intense scrutiny of Muslim candidates, there has naturally been limited engagement of Muslims in American public office.¹⁸⁷ Yet, despite this fact, there has been recent coverage about how many Muslims are actually now entering the political realm.¹⁸⁸ The reality, however, is that any time Muslim candidates attempt to run for a prominent office, they face incredible obstacles, as seen most notably in the case of Congressman Keith

182. The highest ranking public official to denounce the accusations as Islamophobic was Colin Powell, who stated on *60 Minutes*, "The correct answer is, he is not a Muslim, he's a Christian. He's always been a Christian. But the really right answer is, what if he is? Is there something wrong with being a Muslim in this country? The answer's no, that's not America." *U.S. Muslim Voters Are Election-Year Outcasts*, MSNBC (Oct. 23, 2008, 7:21 PM), http://www.msnbc.msn.com/id/27344069/ns/us_news-faith/t/us-muslim-voters-are-election-year-outcasts.

183. Eric Zorn, *He's Not an Arab! He's a Decent Family Man!* CHI. TRIB. CHANGE OF SUBJECT (Oct. 15, 2008), http://blogs.chicagotribune.com/news_columnists_ezorn/2008/10/hes-not-an-arab.html (ellipses in original).

184. *Id.* (emphasis added).

185. *Id.*

186. *Id.*

187. Even the campaign against Muslims who are currently holding political positions is growing. See *Anderson Cooper 360 Degrees* (CNN television broadcast Jan. 20, 2011), *transcript available at* <http://transcripts.cnn.com/TRANSCRIPTS/1101/20/acd.02.html> (describing how a long-time Capitol Hill staffer and conservative activist was recently accused of having ties to the Muslim Brotherhood simply because he was a Muslim).

188. See Assia Boundaoui, *For Muslim Politicians, Running for Office Is the American Way*, CNN (Mar. 24, 2011, 1:16 PM), <http://www.cnn.com/2011/POLITICS/03/23/muslim.politics/index.html>.

Ellison in 2006 (D-MN). At the time of his election, a fellow Congressman, Virgin Goode, wrote a letter to his constituents warning that the Ellison's election as the first Muslim Congressman posed a serious threat to the nation's traditional values:

I fear that in the next century we will have many more Muslims in the United States if we do not adopt the strict immigration policies that I believe are necessary to preserve the values and beliefs traditional to the United States of America and to prevent our resources from being swamped¹⁸⁹

The ludicrousness of Congressman Goode's statement was especially appalling given that Congressman Ellison is an African American who traces his ancestral roots in the United States back to 1742.¹⁹⁰ Yet by virtue of the fact that he converted to Islam, even he was presumptively classified as an "immigrant."

Moreover, numerous local and national candidates are effectively campaigning on anti-Muslim platforms.¹⁹¹ This fear mongering strategically targets the emotional—rather than rational—decision-making process of voters.¹⁹² Notably, 2012 Republican Party presidential candidate Herman Cain, who has a long history of making Islamophobic comments, declared that, if elected, he would not appoint Muslims to his cabinet or to the federal judiciary.¹⁹³ "There is this creeping attempt, there is this attempt to gradually ease Sharia law and the Muslim faith into our government. It does not belong in our government," he stated.¹⁹⁴ Cain's statements are indicative of how, during this third phase of Islamophobia, citizenship as political activity has become an increasingly illusory ideal for American Muslims. In this noxious political climate, Islamophobia serves as a de facto bar from allowing Muslims to make meaningful political contributions, given their lack of critical mass in such decision-making positions.

D. Citizenship as Identity

Citizenship as identity refers to the ties of identification, solidarity, and belonging that bond a group of people together.¹⁹⁵ Volpp distinguishes two

189. Rachel L. Swarns, *Congressman Criticizes Election of Muslim*, N.Y. TIMES, Dec. 21, 2006, at A31.

190. *Id.*

191. See CAIR REPORT, *supra* note 31, at 56–61 (chronicling statements by each of the congressional and gubernatorial candidates in the 2010 election who employed Islamophobic rhetoric during their campaign).

192. MANUEL CASTELLS, COMMUNICATION POWER 144 (2009).

193. Scott Keyes, *Exclusive: Herman Cain Tells ThinkProgress "I Will Not" Appoint a Muslim in My Administration*, THINKPROGRESS (Mar. 26, 2011, 7:30 PM), <http://thinkprogress.org/politics/2011/03/26/153625/herman-cain-muslims>.

194. *Id.*

195. Bosniak, *supra* note 23, at 479.

separate conceptualizations of this idea: inclusion and interpellation.¹⁹⁶ Inclusion refers to the concept of a citizen including and accepting others into her network or membership. Interpellation, on the other hand, refers to a process by which an individual is “transformed into a subject of ideology”¹⁹⁷ In the case of Muslims shortly after 9/11, and much more so today, the process of interpellation systematically and continuously reduces them to being outside of, and antithetical to, the American identity. Explaining this concept further, Volpp writes, “Citizenship in the form of legal status does not guarantee that they will be constitutive of the American body politic. In fact, quite the opposite: The consolidation of American identity takes place *against* them.”¹⁹⁸

A recent example will help clarify how this process occurs. When the 112th Congress convened in January 2011, Representative Peter King (R-NY) was reappointed as Chairman of the House Committee on Homeland Security.¹⁹⁹ He publicly stated that his first order of business would be to implement hearings on American Muslim radicalization.²⁰⁰ In March he convened a series of controversial hearings on Capitol Hill titled *The Extent of Radicalization in the American Muslim Community and That Community’s Response*.²⁰¹ Largely decried by civil rights advocates and a broad coalition of religious leaders from all faith groups,²⁰² the hearings came at a time when attacks on Islam, and Muslims generally, were becoming more pervasive and accepted across the American landscape. “My first goal is just to have people even acknowledge this as a real issue This politically correct nonsense has kept us from debating and discussing what is one of this country’s most vital issues. We are under siege by Muslim terrorists,” he said.²⁰³ King did not stop there. Contending that the target of his hearings were, in fact, not simply terrorists, but rather all American Muslims, he stated:

196. Volpp, *supra* note 22, at 1592.

197. *Id.* at 1594.

198. *Id.*

199. Representative King also served as the Committee’s first chairman when it first was granted permanent status in 2005. He served as the Committee’s ranking member during the Democratic controlled 110th and 111th Congresses. See *About the Committee*, H. COMM. ON HOMELAND SEC., <http://homeland.house.gov/about/history-jurisdiction> (last visited Feb. 28, 2012).

200. William Wan, *Hearings on Muslims Trigger Panic*, WASH. POST, Jan. 24, 2011, at A1; see also Romesh Ratnesar, *The Myth of Homegrown Islamic Terrorism*, TIME (Jan. 24, 2011), <http://www.time.com/time/world/article/0,8599,2044047,00.html> (showing that numerous other politicians have also sounded the “imminent threat” of homegrown Islamic radicals).

201. See *Compilation of Hearings on Islamist Radicalization—Volume 1: Hearing Before the H. Comm. on Homeland Sec.*, 112th Cong. 1 (2011) [hereinafter *Islamist Radicalization Hearings*].

202. See Letter to John Boehner, Speaker, U.S. House of Reps. and Nancy Pelosi, Minority Leader (Feb. 1, 2011) [hereinafter Letter to Speaker Boehner], available at [http://www.muslimadvocates.org/Coalition Letter to King hearings, 2-1-11.pdf](http://www.muslimadvocates.org/Coalition%20Letter%20to%20King%20hearings,%202-1-11.pdf). The letter is signed by over fifty prominent faith, civil rights, and human rights organizations and asks Congress to object to the hearings on the grounds that “individuals are responsible for their actions, not entire communities.” *Id.* at 3.

203. Wan, *supra* note 200.

It's not just people who are involved with the terrorists and extremists, it is people who are in mainstream Islam, leaders of mosques, leaders of Muslim organizations . . . So, it goes beyond the terrorists and the extremists and also includes those in what others call mainstream Muslim leadership.²⁰⁴

Brushing aside accusations that he was engaging in modern-day “McCarthyism” by singling out and demonizing the entire American Muslim community, King responded that “there [was] nothing radical or un-American in holding these hearings.”²⁰⁵ Yet, like King’s hearings,²⁰⁶ the McCarthy hearings remain a dark cloud in U.S. history—an overzealous effort during the Red Scare by Senator Joseph McCarthy to investigate communist activity in the United States amounting to false accusations of disloyalty and treason against patriotic American citizens.²⁰⁷

Congressman King’s hearings were driven by Islamophobia and the unrelenting notion that all American Muslims, irrespective of their status as legal citizens, are the “other”—presumptively dangerous and disloyal. The title itself—referring to “that” community’s response—suggests that American Muslims are in fact not part of the larger American community.²⁰⁸ Further, although empirical evidence is normally presented at congressional hearings, King did not provide any such support,²⁰⁹ instead reiterating his belief that the hearings were somehow necessary “to protect America from a terrorist attack.”²¹⁰

The silver lining to the hearings, if any, was Congressman Ellison’s emotional plea to stop the demonization of American Muslims.²¹¹

It is true that specific individuals, including some who are Muslims, are violent extremists. However, these are individuals—but not entire communities. . . . Throughout human history, individuals from all communities and faiths have used religion and political ideology to

204. Ben Armbruster, *Peter King Claims American Muslim Communities “Do Not Cooperate” to Combat Terrorism*, THINKPROGRESS (Aug. 28, 2010, 4:50 PM), <http://thinkprogress.org/security/2010/10/28/127117/peter-king-muslim-cooperate>.

205. James Oliphant, *Rep. Peter King Defends Muslim “Radicalization” Hearing*, L.A. TIMES (Mar. 10, 2011), <http://articles.latimes.com/2011/mar/10/nation/la-na-muslim-house-hearing-20110311>.

206. See Letter to Speaker Boehner, *supra* note 201.

207. See David Cole, Essay, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003) (comparing the forms of repression used in the post-9/11 War on Terror with those employed by the government during the Cold War).

208. See Letter to Speaker Boehner, *supra* note 201.

209. See Letter from ACLU and over forty civil rights groups to Representative King (Mar. 8, 2011), *reprinted at* <http://www.aclu.org/free-speech-national-security/aclu-and-broad-coalition-tell-rep-king-concerns-about-muslim-radicaliz> (criticizing the hearings’ false premises that American Muslims do not cooperate with law enforcement).

210. See Oliphant, *supra* note 205.

211. *Islamist Radicalization Hearings*, *supra* note 201, at 14–18 (statement of Representative Keith Ellison).

justify violence. Let's think about the KKK, America's oldest terrorist organization; the Oklahoma City bombing; the shooting at the Holocaust Museum by James von Brunn; and bombings at Planned Parenthood clinics. Did Congress focus on the ethnic group and religion of these agents of violence as a matter of public policy? The answer is no.²¹²

Ellison further described the story of 23-year-old Mohammad Salman Hamdani, an American Muslim and first responder, who was killed in the 9/11 attacks.²¹³ Fighting back tears, as Ellison recounted Hamdani's death and the speculations that he was in league with the terrorists because of his Muslim faith. Ellison closed with the powerful line, "Mohammed Salman Hamdani was a fellow American who gave his life for other Americans . . . His life should not be defined as a member of an ethnic group or a member of a religion, but as an American who gave everything for his fellow citizens."²¹⁴

King's hearings, and the message they sent, further solidified the notion that Muslims, as a group, belong to a separate and inferior second-class citizenry that is precluded from enjoying citizenship as identity. Islamophobia is being used to cast Muslims as individuals outside of and antithetical to the American identity. As this phenomenon continues to increase in scope, it follows that the rights and political activity associated with such inclusiveness are likely to experience further infringements. The Save Our State Amendment in Oklahoma is a prime example of how Islamophobia is stripping these layers of citizenship away from American Muslims.

III.

THE SAVE OUR STATE AMENDMENT AND THE THIRD PHASE OF ISLAMOPHOBIA

A. The Save Our State Amendment

Despite the fact that the Framers designed constitutional protections in our judicial system to safeguard minorities against majoritarian tyranny,²¹⁵ America has a long historical tradition of treating "non-White immigrants and their descendants (including U.S. citizens) as permanently foreign and unassimilable."²¹⁶ Today, American Muslims are becoming the primary targets of this discrimination. As Islamophobic statements become more institutionalized, there is a palpable increase in pernicious policy against American Muslims, the development of their institutions, and the free exercise of their religion. The

212. *Id.* at 15–16.

213. *Muslim Congressman Weeps at Terror Hearing*, MSNBC (Mar. 10, 2011, 2:34 PM), <http://www.msnbc.msn.com/id/42005790/ns/politics/t/muslim-congressman-weeps-terror-hearing>.

214. *Islamist Radicalization Hearings*, *supra* note 201, at 18; *Muslim Congressman Weeps at Terror Hearing*, *supra* note 213.

215. See THE FEDERALIST NO. 51 (James Madison).

216. See Joo, *supra* note 63, at 2.

most obtrusive example of such policy is the Oklahoma Shariah ban.²¹⁷ Having reviewed the literature on citizenship, let us revisit the Amendment to see how it deprives American Muslims of the various dimensions of citizenship.

State Question 755 (“Save Our State Amendment”), a ballot measure to change the Oklahoma Constitution, proposed to outlaw the use of “Sharia Law.” It read:

- This measure amends the State Constitution. It changes a section that deals with the courts of this state. It would amend Article 7, Section 1. It makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. It forbids courts from considering or using Sharia Law.
- International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons.
- The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties.
- Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed.²¹⁸

The amendment’s authors explicitly stated that the target of the ban was “Sharia law.” The proposal’s main author, State Representative Rex Duncan, described Shariah tribunals in England as “a cancer” and said that Muslims want to take away “liberties and freedom from our children.”²¹⁹ He also said, “This is a war for the survival of America. It’s a cultural war.”²²⁰ At the same time, however, he acknowledged that Shariah was “not an imminent threat in Oklahoma yet” but warned that “it’s a storm on the horizon in other states.”²²¹ Despite Duncan’s assertions, there is no evidence of such encroachment. Rather, Duncan’s statements rely on the public’s ignorance of the tenants of

217. McKinley, *supra* note 4.

218. H.J. Res. 1056, 52nd Leg., 2d Reg. Sess. (Okla. 2010).

219. McKinley, *supra* note 4. The tribunals of which Duncan spoke are alternative dispute resolution fora, which are fully in accordance with British law, and have been endorsed by Britain’s Chief Justice, Lord Phillips. See *Sharia Law “Could Have UK Role,”* BBC NEWS (July 4, 2008, 9:26 AM), <http://news.bbc.co.uk/2/hi/uk/7488790.stm> (“There is no reason why [S]haria principles, or any other religious code, should not be the basis for mediation or other forms of alternative dispute resolution.”).

220. McKinley, *supra* note 4.

221. Armbruster, *supra* note 9. Another coauthor, Representative Mike Reynolds, stated, “I believe there is an awakening of people concerned about Christian values in our nation, and they are starting to express themselves.” McKinley, *supra* note 4.

Shariah in order to cast it as an existential threat to America's well-being.²²² Here, a brief description of Shariah is appropriate.

B. Defining Shariah

The success of the anti-Shariah campaign stems partially from the public's lack of understanding about Shariah's true definition and core tenets. As Britain's Chief Justice, Lord Phillips, described, "Part of the misconception about [S]haria is the belief that [S]haria is only about mandating sanctions such as flogging, stoning, the cutting off of hands or death for those fail to comply with the law."²²³ Indeed, Shariah opponents such as Frank Gaffney, whose Center for Security Policy is responsible for articulating and perpetuating much of the Shariah hysteria, promote such a narrative, defining Shariah as a "legal-political-military doctrine" that is the "preeminent totalitarian threat of our time."²²⁴

Literally translated, however, Shariah simply means "road to the watering place" or "path leading to the water," or, in practical terms, "the way to the source of life."²²⁵ Thus, for a Muslim, Shariah itself is not technically "law,"²²⁶ but, rather, it is the moral code by which she regulates all of her daily activities in accordance with her understanding of the Quran and teachings of Mohammad in an effort to gain God's mercy.²²⁷ It is derived from four primary sources: (1) the *Quran*, what Muslims believe to be the divinely revealed word of God; (2) the *Hadith*, the recorded tradition of the Prophet Muhammad; (3) *Ijma*, or scholarly consensus; and (4) *Qiyas*, a process of analytical

222. See generally ACLU, NOTHING TO FEAR, *supra* note 8. See also Donna Leinwand, *More States Enter Debate on Sharia Law*, USA TODAY (Dec. 9, 2010), http://www.usatoday.com/news/nation/2010-12-09-shariaban09_ST_N.htm. As Randall Coyne, a professor of constitutional law at the University of Oklahoma College of Law described, "There is no blossoming of [S]haria law in Oklahoma . . . There's no risk of Oklahoma falling under the sway of [S]haria law or any other law other than American law for that matter. It's fear mongering at its worst."

223. Christopher Hope & James Kirkup, *Muslims in Britain Should Be Able to Live Under Sharia*, *Says Top Judge*, TELEGRAPH (July 3, 2008), <http://www.telegraph.co.uk/news/uknews/2242340/Muslims-in-Britain-should-be-able-to-live-under-Sharia-law-says-top-judge.html>.

224. See WAJAHAT ALI & MATTHEW DUSS, CTR. FOR AM. PROGRESS, UNDERSTANDING SHARIA LAW: CONSERVATIVES' SKEWED INTERPRETATION NEEDS DEBUNKING (2011), available at http://www.americanprogress.org/issues/2011/03/pdf/sharia_law.pdf.

225. Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, J. ISLAMIC L. & CULTURE, Spring/Summer, 2002 at 27, 33.

226. *Awad I*, 754 F. Supp. 2d 1298, 1306 (W.D. Okla. 2010) (finding that "'Sharia Law' lacks a legal character" in issuing a permanent injunction).

227. 'ABDUR RAHMAN I. DOI, SHARI'AH: THE ISLAMIC LAW (Abdassamad Clarke ed., rev. & expanded ed. 2008); see also WAEL B. HALLAQ, AN INTRODUCTION TO ISLAMIC LAW 28 (2009) (stating Muslim jurists view Shariah as "a mandate to regulate all human conduct, from religious rituals and family relations to commerce, crime and much else").

deduction.²²⁸ As the latter two sources indicate, it is not rigid in its nature and is subject to varying interpretations among individuals and communities.²²⁹

Although various countries have based their legal systems, or portions thereof, on the mandates of Shariah, it is predominantly concerned with personal religious obligations, rather than national laws.²³⁰ In fact, nearly 70 percent of Shariah deals with the performance of religious rituals such as fasting and the giving of alms, 25 percent deals with economic, family, and dietary regulations, and only about 5 percent deals with Islamic criminal law, which would be implemented by a Muslim government.²³¹ However, as Islamic law scholar Yasir Qadhi explains, most American Muslims are not arguing for the implementation of this last group.²³² Nonetheless, most would proudly refer to themselves as “Shariah adherent[s],” as Shariah is the ethical framework that governs their personal lives and is in full consonance with the U.S. Constitution.²³³

C. *The Anti-Shariah Campaign*

The Save Our State Amendment is significant not only because of its content and character but more so because it has prompted a flurry of similar proposals throughout the country. So far, over two dozen states have proposed anti-Shariah measures.²³⁴ While the language of the texts varies slightly from state to state, the statements from the various bills’ authors are remarkably similar.²³⁵

228. See generally COULSON, *supra* note 5, at 9–102 (describing the genesis and development of Shariah law); Kamali, *supra* note 5, at 3 (analyzing the “sources of law, their order of priority, and methods by which legal rules may be deduced from the source materials of *Shari‘a*”).

229. See ALI & DUSS, *supra* note 224, at 2–3.

230. *Id.*; see also Sherman A. Jackson, *Legal Pluralism Between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity?*, 30 FORDHAM INT’L L.J. 158, 165 (2006) (“Islamic law was emphatically neither the product nor preserve of the Muslim State. In fact, it developed in conscious opposition to the latter.”). Although a minority view, Professor Abdullahi An-Na‘im actually argues that Shariah is exclusively a personal religious code, and that the moment the state imposes Shariah, it stops being Islamic. See ABDULLAHI AHMED AN-NA‘IM, *ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI‘A* 1–9 (2008).

231. Yasir Qadhi, *A Proud, Patriotic, Shariah Practicing American*, FAITH IN MEMPHIS (Mar. 10, 2011), <http://faithinmemphis.com/2011/03/10/a-proud-patriotic-shariah-practicing-american>.

232. *Id.*

233. ALI & DUSS, *supra* note 224, at 3.

234. See Elliott, *supra* note 17.

235. Professor Anvar Emon classifies these anti-Shariah measures into three groups: (1) bills that refer to Shariah specifically; (2) bills that mirror the model statute, *American Laws for American Courts*, promulgated by lawyer David Yerushalmi; and (3) bills that call for ballot initiatives to amend state constitutions. See Anver Emon, *Banning Shari‘a*, IMMANENT FRAME (FEB. 20, 2012, 8:15 PM), <http://blogs.ssrc.org/tif/2011/09/06/banning-shari%E2%80%98a>.

One legislative proposal in Tennessee would make any adherence to Shariah a felony, punishable by up to fifteen years in prison.²³⁶ While the bill does not define Shariah, it gives the State Attorney General the prerogative to decide who is practicing it and which “practitioners” require investigation.²³⁷ It goes so far as to call Shariah “treasonous” and claims that “Sharia requires all its adherents to actively and passively support the replacement of America’s constitutional republic, including the representative government of this state with a political system based upon [S]haria.”²³⁸ By enacting a blanket prohibition on Shariah, however, the act—in its literal sense—effectively equates to a total ban on the practice of Islam, in obvious contravention of the Free Exercise Clause of the First Amendment.²³⁹

Missouri provides an even more bizarre indication that legislators do not understand Shariah or what it is they intend to ban through these measures. Representative Don Wells, the bill’s sponsor, likened Shariah to the polio virus, apparently insinuating that both can spread quickly and undermine the state’s judicial system.²⁴⁰ A fellow legislator attempted to clarify what he meant, asking, “So Shariah law is like polio; it is a terminal disease?” Wells unequivocally responded, “Absolutely.”²⁴¹

Meanwhile, former Speaker of the House and 2012 Republican presidential candidate Newt Gingrich even suggested a federal ban on Shariah, stating emphatically, “I believe Shariah is a mortal threat to the survival of freedom in the United States and in the world as we know it,”²⁴² and promising that “no judge will remain in office that tried to use [S]haria law.”²⁴³ Gingrich’s statements, along with a plethora of others made by Republican candidates on the election trail, highlight yet again how mainstream this Islamophobic discourse has become.

This alarming trend raises a question about what it means for lawmakers to propose or pass legislation that they know is unconstitutional. The Save Our State Amendment was squarely struck down in Oklahoma, yet public officials continue to propose similar legislation on similar grounds. There are three

236. Bob Smietana, *Tennessee Bill Would Jail Some Shariah Followers*, USA TODAY (Feb. 23, 2011, 11:58 AM), http://www.usatoday.com/news/nation/2011-02-23-tennessee-law-shariah_N.htm.

237. *Id.*

238. Melissa Jeltsen, *Tennessee Jumps on the Anti-Shariah Bandwagon*, TPM (Feb. 24, 2011, 4:48 PM), http://tpmmuckraker.talkingpointsmemo.com/2011/02/tennessee_state_sen_joins_effort_to_criminalize_sh.php.

239. *Awad I*, 754 F. Supp. 2d 1298, 1307 (W.D. Okla. 2010).

240. Rudi Keller, *Shariah Likened to Polio*, COLUMBIA DAILY TRIB., Mar. 17, 2011, at A12.

241. *Id.*

242. Scott Shane, *In Islamic Law, Gingrich Sees a Mortal Threat to U.S.*, N.Y. TIMES, Dec. 21, 2011, at A22.

243. Evan McMorris-Santoro, *Gingrich Calls for Federal Ban on Shariah Law in US*, TPM (Sept. 18, 2010, 12:05 PM), <http://tpmdc.talkingpointsmemo.com/2010/09/gingrich-calls-for-federal-law-banning-shariah-law-in-us.php>.

explanations, all of which are disconcerting. The first is that it is a legal mechanism to further conceptualize Muslims as noncitizens on the record. The proposals thus demonstrate that this group is not entitled to the rights of citizenship, i.e., the right to freely practice their religion, even in instances that do not conflict with secular law. The second possibility is that it is an attempt to scare Muslims into a cognitive helplessness, a la Volpp's interpellation example where the subject recognizes her place in society as a second-class citizen.²⁴⁴ If Islamophobic discourse can intimidate American Muslims into feeling as though they are not members of the American collective and do not have the political strength or willpower to effectuate positive political change, then legal methods will be unnecessary to suppress these rights. Finally, a third reason, which is certainly tied to the previous two, is that it is simply a technique by which lawmakers are pandering to people's fears and bigotry in order to win votes. This too would suggest how deep seated the anti-Muslim and anti-Shariah bias has become among the American public and highlights the pressing need to effectively respond to Islamophobia.

CONCLUSION

*"They came first for the Communists, and I didn't speak up because I wasn't a Communist. Then they came for the trade unionists, and I didn't speak up because I wasn't a trade unionist. Then they came for the Jews, and I didn't speak up because I wasn't a Jew. Then they came for me and by that time no one was left to speak up."*²⁴⁵

Today Islamophobia has colored the "prism through which Muslims are viewed."²⁴⁶ It has created a social environment in which Muslims are cast as second-class citizens whose citizenship is neither protected nor respected in society. The discourse surrounding the "threat of Shariah" in this third phase of Islamophobia pervades all other rational discourses on the subject and challenges American Muslims' notions of citizenship as rights, identity, and political activity; indeed the only dimension of citizenship that remains is formal legal status.

As Pastor Niemöller's famous quote illustrates, history has repeatedly shown us the consequences of remaining silent in the face of such hatred and bigotry. More than a decade has passed since the 9/11 attacks, and we must collectively reflect on how we arrived at this juncture and what changes we

244. See Volpp, *supra* note 22, at 1594.

245. See Harold Marcuse, *Martin Niemöller's Famous Quotation*, U.C. SANTA BARBARA (Feb. 24, 2012), <http://www.history.ucsb.edu/faculty/marcuse/niem.htm>.

246. John L. Esposito, *Islamophobia*, ACMCU, GEORGETOWN UNIV., <http://acmcu.georgetown.edu/135398.html> (last visited Feb. 28, 2012); see John L. Esposito, *Introduction to ISLAMOPHOBIA: THE CHALLENGE OF PLURALISM IN THE 21ST CENTURY*, at xxi (John L. Esposito & Ibrahim Kalin, eds., 2011).

must make. I propose a number of policies for systematically responding to the campaign of Islamophobia.

First, there needs to be an organized effort to explain the dictates of Shariah to the public. These conversations must begin in a number of different fora, including, most prominently, within the legal academy where they remain largely absent—arguably itself a manifestation of the power of Islamophobia. Islamic law scholars need to engage in substantial research in order to articulate an effective response to the Center for Security Policy’s report, *Shariah: The Threat to America*,²⁴⁷ which has become the primary resource for improperly defining Shariah.²⁴⁸ Further, Muslim religious authorities must do a better job of educating the public about what *is* and *is not* Shariah. Imam Suhaib Webb, one of the leading Islamic scholars in the United States, advocates the need for Muslims to be socially relevant in order to explain what Shariah in America actually entails, rather than allowing others—such as the authors of the Oklahoma amendment—to do it for them.²⁴⁹ This is an important first step in debunking the false threat of a “Shariah takeover.”

Second, public officials need to take a stronger stand denouncing Islamophobia. The Tenth Circuit’s unanimous opinion striking down the Oklahoma amendment as unconstitutional was an important step for the courts. Now, elected officials need to speak out against Islamophobia as unacceptable bigotry. One recent example involving Lowe’s is a promising sign that legislators are heading in the right direction. Lowe’s had pulled advertising from the reality TV show “All-American Muslim” after pressure from a fringe Christian group in Florida.²⁵⁰ A number of lawmakers quickly voiced their disapproval, with California State Senator Ted Lieu calling the decision “un-American” and “naked religious bigotry,” even threatening a boycott.²⁵¹ The response to the controversy demonstrated that American Muslims are increasingly able to mobilize quickly and lawmakers are indeed responsive to their needs. Thus, the incident should serve as a model for the community on

247. CTR. FOR SEC. POLICY, SHARIAH: THE THREAT TO AMERICA (2010), available at <http://shariathtreat.org/wp-content/uploads/2011/04/Shariah-The-Threat-to-America-Team-B-Report-Web-09292010.pdf>.

248. See ALI & DUSS, *supra* note 224, *passim* (detailing the report’s “misrepresentation and misunderstanding of Sharia” and noting that its conclusions have been “taken up by others”).

249. See Suhaib Webb, *Keynote Address: Islam in America*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 81, 86 (2011); see generally Symposium, *Confronting Islam: Shari’ah, the Constitution, and American Muslims*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 59 (2011) (publishing the keynote address, *supra*, and related panel discussions).

250. Arsalan Iftikhar, *My Take: Is “All-American Muslim” Begetting All-American Bigotry?* CNN BELIEF BLOG (Dec. 12, 2011, 10:29 PM), <http://religion.blogs.cnn.com/2011/12/12/my-take-is-all-american-muslim-begetting-all-american-bigotry>.

251. *Lawmakers Slam Lowe’s for Pulling Ads from Muslim-American Reality Show*, FOX NEWS (Dec. 11, 2011), <http://www.foxnews.com/politics/2011/12/11/california-senator-threatens-boycott-after-lowes-pulls-ads-from-muslim-american>.

how to engage lawmakers and for elected officials on how to effectively respond to Islamophobia.

Finally, as the “All–American Muslim” controversy highlights, Muslims need a better voice in the media—one that humanizes them and allows them to define their own narrative. Whether this be through a “Muslim Cosby Show,” as advocated by some journalists,²⁵² or simply by playing a larger role in developing existing programming that often contains implicit biases toward Muslims, honest and positive depictions of Muslims are critical in dispelling the “otherness” that has been attached to American Muslims.²⁵³

At this crucial stage, where Islamophobia continues to strip away the citizenship of American Muslims, Justice Stone’s powerful statement regarding the treatment of Japanese Americans in World War II serves as an important reminder: “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”²⁵⁴ While there is a concerted and institutionalized attempt to perpetuate those distinctions towards the Muslim community, there are also increasing opportunities and platforms to push back against this discrimination, just as past groups were able to do. Through such efforts, American Muslims will be able to regain equal citizenship and exercise, alongside their fellow citizens, “the rights of Americans as Americans.”²⁵⁵

252. See Katie Couric Speaks Against Anti-Muslim Bigotry, Suggests Muslim “Cosby Show,” HUFFINGTON POST (June 25, 2011, 7:20 PM), http://www.huffingtonpost.com/2011/01/01/katie-couric-muslim-bigotry-cosby-show_n_803208.html.

253. See Keith Ellison, *Should We Fear Islam?*, WASH. POST ON FAITH (Oct. 7, 2010, 12:26 PM) http://onfaith.washingtonpost.com/onfaith/guestvoices/2010/10/keith_ellison.html; Joshua Miller & Jack Date, *Heated Debate over Place of Islam in the United States*, ABCNEWS THISWEEK (Oct. 3, 2010), <http://abcnews.go.com/ThisWeek/heated-debate-place-islam-united-states/story?id=11786737>. An example will help elaborate the implicit bias that often exists even in pro-Muslim programming. At the height of the Ground Zero mosque controversy, ABC News produced a special *This Week* town hall segment about Islam titled *Should Americans Fear Islam?*. The program was rife with religious stereotypes and featured well-known Islamophobes posing as “terrorism experts.” The program was noteworthy, not only because of its content but because normalizing these invidious stereotypes through a respectable and widely acclaimed news program raises a number of serious ethical considerations and reaffirms the deeply ingrained image of the Muslim as a suspect “other” in the eyes of viewers. Congressman Keith Ellison of Minnesota, the first Muslim elected to Congress, argued that a responsible media outlet would never produce a similar show full of racial stereotypes toward African Americans. He posited, “Irresponsible and sensational depictions of Muslims in the popular media are not the cause of Islamophobia, but they certainly can make it worse.” Ellison, *supra*.

254. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

255. See AMAR, *supra* note 21, at 364 n.42.