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PRIVATE RELIGIOUS DISCRIMINATION, NATIONAL SECURITY, AND THE FIRST AMENDMENT

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Private Religious Discrimination, National Security, and the First Amendment

*Aziz Z. Huq**

Introduction

On November 2, 2010, voters in the Oklahoma general election entered the voting booth to find on their ballot six "state questions" about proposed legal changes. The fourth, State Question 755, proposed an amendment to the state constitution to "forbid[ ] courts from considering or using Sharia law . . . . Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed."[1] The executive director of a group supporting the amendment, a national organization called Act! For America, explained that American Muslims should receive this different treatment from the courts because their legal system is inherently flawed.[2] Elaborating this thought, a correspondent with *The Oklahoman* newspaper explained his view that the amendment was justified because "Islam's stated intent is to bring all of the U.S. under Sharia [law]."[3] State Question 755 passed with seventy percent of the vote.[4] In one way, State Question 755 is unusual. Few American state or federal statutory or constitutional provisions facially distinguish between religious faiths. But it was not an outlier in other ways. It is now a template for legislators in several other states who have proposed or enacted similar choice-of-law rules.[5] And it is not the only

* Assistant Professor of Law, University of Chicago Law School. Data presented in Part II was gathered in work with Tom Tyler and Stephen Schulhofer. Work on this essay was supported by the Frank Cicero, Jr. Faculty Fund at the University of Chicago School of Law and a Carnegie Scholars Fellowship. Thanks to the editors of the *Harvard Law & Policy Review* for superlative editing.

[1] Oklahoma State Election Bd., State Questions for General Election 7 (2010), *available at* http://www.ok.gov/elections/documents/sq_gen10.pdf.

[2] Nicholas Riccardi, *Oklahoma May Ban Islamic Law*, L.A. Times, Oct. 29, 2010, at A6.

[3] Glover Shipp, Letter to the Editor, *The Total Package*, Oklahoman, Nov. 12, 2010, at 9A.

[4] James C. McKinley Jr., *Oklahoma Surprise: Islam as an Election Issue*, N.Y. Times, Nov. 15, 2010, at A12.

[5] Donna Leinwand, *States Enter Debate on Sharia Law: Are Bans Like Oklahoma's Necessary, Constitutional, Anti-Islamic?*, USA Today, Dec. 9, 2010, at 3A. Louisiana and Tennessee have already enacted statutory prohibitions that cover Islamic law. *See* H.R. 785, 2010 Leg., Reg. Sess. (La. 2010), *available at* http://www.legis.state.la.us/billdata/streamdocument.asp?did=722536; H.R. 1353, 106th Gen. Assem., Reg. Sess. (Tenn. 2010), *available at* http://www.capitol.tn.gov/Bills/107/Bill/HB1353.pdf. As of April 11, 2011, there were forty-two proposals in twenty states proposing prohibitions of one sort or another than would extend to Islamic law. Bill Rafferty, *Bans on Court use of Sharia/International Law Advance in Alabama, Alaska, Arizona, Florida, Kansas, Missouri, and Oklahoma*, Gavel to Gavel, April 11, 2011, *available at* http://gaveltogavel.us/site/2011/04/11/bans-on-court-use-of-shariainternational-law-advance-in-alabama-alaska-arizona-florida-kansas-missouri-and-oklahoma/.

example of a public effort to translate private concern about Islam into a public, legal form.

State Question 755 and similar legal efforts are products of a widening public debate about the place of Islam in the United States. On one side are arguments that Islam is linked inherently to violence,[6] antithetical to modernity,[7] and a "totalitarian" political force "that explicitly seeks global hegemony."[8] Recent "homegrown"[9] terrorist attempts supply grist for this perspective.[10] On the other side of the ledger are claims that Islam's core values of "moral accountability and social egalitarianism"[11] fit comfortably in contemporary American society. This side of the debate echoes with concern about the vulnerability of American Muslims to private discrimination and burdensome counterterrorism measures.[12] Enactment of State Question 755 by a wide popular margin suggests the first perspective is currently ascending in the public mind. It also shows how private disquiet can translate into statutory or constitutional text.

This debate is brewing at the same time that Islam has become the fastest growing religion in America.[13] The decennial national census does not elicit data on faith. But estimates of the nation's Muslim population range from 1.1 million to seven million.[14] Large Muslim communities live in New York, Chicago, Detroit, and the Dallas-Fort Worth area. State Question 755 gives tangible form to the belief that these Muslims pose a threat to American culture and security. More mundanely, raw demography implies that millions of Muslims today live, work, and pray alongside Christian, Jewish, Hindu, atheist, and agnostic neighbors. A handful of American Muslims have been implicated in recent alleged homegrown terrorist conspiracies. But millions more seem to participate, without chafing against legal boundaries, in political debate and action. Indeed, as Charles Kurzman explains, with "fewer than 200 Muslim-Americans . . . involved in violent plots since

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[6] *See, e.g.*, SAM HARRIS, THE END OF FAITH: RELIGION, TERROR AND THE FUTURE OF REASON 123 (2004) ("Islam, more than any other religion human beings have devised, has all the makings of a thoroughgoing cult of death.").

[7] *See, e.g.*, BERNARD LEWIS, WHAT WENT WRONG: THE CLASH BETWEEN ISLAM AND MODERNITY IN THE MIDDLE EAST 159 (2001) ("To the Western observer, schooled in the theory and practice of Western freedom, it is precisely the lack of freedom . . . that underlies so many of the troubles of the Muslim world.").

[8] DANIEL PIPES, MILITANT ISLAM REACHES AMERICA 14 (2003).

[9] Karen Greenberg, *Homegrown: The Rise of American Jihad*, NEW REPUBLIC, June 10, 2010, at 6.

[10] *See* STEVEN EMERSON, JIHAD INCORPORATED: A GUIDE TO MILITANT ISLAM IN THE US 486 (2006).

[11] REZA ASLAN, NO GOD BUT GOD: THE ORIGINS, EVOLUTION AND FUTURE OF ISLAM xix (2005).

[12] *See* LORI PEEK, BEHIND THE BACKLASH: MUSLIM AMERICANS AFTER 9/11 78 (2010); Aziz Huq, *The New Counterterrorism: Investigating Terror, Investigating Muslims*, *in* LIBERTY UNDER ATTACK: RECLAIMING OUR FREEDOMS IN AN AGE OF TERROR 167 (Richard C. Leone & Greg Anrig Jr. eds., 2007).

[13] PAUL M. BARRETT, AMERICAN ISLAM: THE STRUGGLE FOR THE SOUL OF A RELIGION 8 (2007).

[14] PEW RESEARCH CTR., MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 11 (2007), *available at* http://pewresearch.org/assets/pdf/muslim-americans.pdf.

9/11, most of them overseas[,] . . . credit for the low level of violence must be due primarily to the millions of Muslims who have refrained from answering the call to terrorism."[15]

Against this complex and contested backdrop, a short essay cannot do justice to the debate about Islam in America. There are issues, for example, of what assimilative demands should be placed on the minority's shoulders. Consider, for example, the proscription of certain head coverings in France,[16] or the distinctively American compulsion that forces minorities to bear the burden of hate speech.[17] The mooted connection between religion and terrorist violence raises other questions. Should criminal penalties be imposed based on the state's judgment of the meaning of religious beliefs and statements?[18] How should the state model the relationship between religious belief and violence in order to predict terrorism?[19] These are all complex questions that have received insufficient attention.

This essay addresses one narrow question raised by these debates: the relationship between private discrimination, national security, and the First Amendment. State Question 755 is one of several recent instances in which Islam has been publicly characterized as singularly dangerous, and where debate has led to calls (successful or not) for government action to exclude Muslims from certain aspects of public life or public institutions via legislation, new legal text, or other official action that places the imprimatur of the state behind anti-Muslim sentiment. A survey of those debates and of recent data on Muslim America suggests that ambient public animus is on the rise, and furthermore increasingly taking the form of legal enactments. For some, this is not problematic because new terrorism risks justify some level of disparate treatment. For many others, any disparate burden imposed by private discrimination is unfair and inimical to shared national values.

This debate of values is hard to resolve. So this essay takes a different tack. It argues that there is no zero-sum trade-off between equality and security. To the contrary, recent research into policing against terrorism suggests the opposite is true: this research identifies a precise mechanism through which private discrimination against American Muslims *increases* the nation's vulnerability to terrorism. The research demonstrates that the willingness to cooperate with police of Muslim American communities is negatively correlated with experiences of private animus. The cost of lost cooperation is not internalized by the discriminator, who therefore has insuf-

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[15] CHARLES KURZMAN, THE MISSING MARTYRS: WHY THERE ARE SO FEW MUSLIM TERRORISTS 11 (forthcoming June 2011).

[16] *See generally* JOAN W. SCOTT, THE POLITICS OF THE VEIL (2007).

[17] *See* Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1612 (2010).

[18] *See* Aziz Z. Huq, *The Signaling Function of Religious Speech in Domestic Counterterrorism*, 89 TEX. L. REV. 833 (2011) (identifying cases in which the government's main evidence of mens rea has been religious speech).

[19] *See* Aziz Z. Huq, *Modeling Terrorist Radicalization*, 2 DUKE F. L. & SOC. CHANGE 39, 43–51 (2010) (describing diverse approaches by federal and state law enforcement authorities to the definition of "radicalization").

ficient motivation to desist from discrimination. Private animus rather has a negative externality in the form of security-related social losses to the nation as a whole. Bias affects not only discrete individuals. It makes us all less safe.

The essay further identifies one remedy to the problem. A longstanding mechanism for managing religious differences and frictions is the First Amendment to the U.S. Constitution. Its religion-related clauses preclude establishments of religion and prohibitions upon the "free exercise" of religion.[20] Although disarray currently characterizes Free Exercise and Establishment Clause doctrine—and while neither Clause speaks to private action—the Religion Clauses still have a role to play in minimizing the security-related social costs of private religious discrimination when it is translated into legislated form. Those constitutional provisions put a ceiling on the pay-off from mobilizing to translate animus into official form. In cases where groups mobilize to legislate animus, the federal courts and the Department of Justice can use the Religion Clauses to mitigate bias and to improve security. Constitutional law thus promises results that should be welcomed by both those who favor deontological rights and those who prefer security.

Part I begins by canvassing evidence of a second wave of anti-Muslim sentiment since September 2001. Part II considers the empirical evidence of discrimination's link to security. Focusing on cases where private bias takes the form of laws and other public enactments, Part III explains how the Religion Clauses matter to this problem. Parts I and II are descriptive; Part III is partially evaluative and normative. It therefore reflects my views about religious tolerance along with the empirical status of claims about American Muslims as vulnerabilities for counterterrorism. Others may disagree with these views. But I hope I am candid enough that readers will quickly spot where I have stepped off the narrow track of common ground.

I.

National polling data from the past five years suggests that a majority of Americans have categorically negative views of Islam and their Muslim cocitizens.[21] A 2006 ABC national poll found that almost sixty percent of respondents believed that "Islam is prone to violent extremism, almost half regard[ed] the religion unfavorably, and about one-quarter of respondents openly admitted to harboring prejudicial feelings against Muslims and Arabs alike."[22] Negative views of American Muslims appear to have become more

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[20] U.S. Const. amend. I.

[21] *See* Amaney Jamal, *Muslim Americans: Enriching or Depleting American Democracy?*, *in* Religion and Democracy in the United States: Danger or Opportunity? 89, 95 (A. Wolfe & I. Katznelson eds., 2010) (stating that a 2005 survey showed that: "36 percent of the American population believes Islam encourages violence; another 36 percent reported that they have unfavorable opinion about Islam").

[22] Peek, *supra* note 12, at 14; *see also* Peter Gottschalk & Gabriel Greenberg, Islamophobia: Making Muslims the Enemy 3–4 (2008); Sherman A. Lee et al., *The Is-*

pervasive since then. An August 2010 Pew Research Center poll estimated that 30% of Americans had a favorable view of Islam, down from an estimated 41% in 2005, and that 38% had an unfavorable view of Islam in 2010, up from 36% in 2005.[23] A 2009 national Gallup poll also found a majority of Americans reported unfavorable views of Islam.[24] Smaller-scale experimental studies yield some explanation of the dynamics underneath these numbers. A recent study of a small (225 person) sample of undergraduate students' views on Islam suggests that Christian and Republican identification correlate with negative views of Muslims, while friendship with at least one Muslim led to a "significantly" lower likelihood of holding such views.[25] Negative judgments do not solely reflect views on terrorism. One perceptive anecdotal account of Upstate New York Yemeni communities after 9/11 observed that the attacks gave people a more general "license to cluck about 'how those people lived' and [to comment on] 'those poor women.'"[26] That is, more general disapproval of social arrangements feeds into expressed negative attitudes toward Islam.

Ambient negative attitudes may translate into adverse actions in the workplace.[27] Between 2001 and 2003, complaints filed with the Equal Employment Opportunity Commission (EEOC) alleging discrimination on religious grounds against Muslims doubled.[28] The labor market effects of 9/11, however, were not temporally confined to the immediate aftermath of the attacks. Consider for example a 2004 study testing the impact of perceived attitudes about religion and ethnicity by sending six thousand CVs with similar qualifications and different names to California employers. The study found that the name "Heidi McKenzie" garnered the most positive responses and the name "Adbul-Aziz Mansour" the least.[29] Between 2001 and 2005, another study found, the weekly wages of Arab and Muslim men fell between nine and eleven percent.[30] Government statistics support the inference that workplace discrimination against Muslims continues to be on

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lamophobia Scale: Instrument Development and Initial Validation, 19 INT'L J. PSYCH. RELIG. 92, 93 (2009); Solana Pyne, *Making Enemies*, VILLAGE VOICE, July 15, 2003, at 48.

[23] PEW RESEARCH CTR., PUBLIC REMAINS CONFLICTED OVER ISLAM (2010), http://pewresearch.org/pubs/1706/poll-americans-views-of-muslims-object-to-new-york-islamic-center-islam-violence (on file with the Harvard Law School Library).

[24] PEEK, *supra* note 12, at 14.

[25] Lee, *supra* note 22, at 100–01.

[26] DINA TEMPLE-RASTON, THE JIHAD NEXT DOOR: THE LACKAWANNA SIX AND ROUGH JUSTICE IN AN AGE OF TERROR 34 (2007).

[27] *See* MOUSTAFA BAYOUMI, HOW DOES IT FEEL TO BE A PROBLEM? BEING YOUNG AND ARAB IN AMERICA 194 (2008).

[28] *See* Pyne, *supra* note 22.

[29] BAYOUMI, *supra* note 27, at 194. The difference may be in part due to perceptions of race, not religiosity.

[30] Neeraj Kaushal, Robert Kaestner, & Cordelia Reimers, *Labor Market Effects of September 11th on Arab and Muslim Residents of the United States*, 42 J. HUM. RES. 275, 276 (2007); *see also* Alberto Davila & Marie T. Mora, *Changes in the Earnings of Arab Men in the US Between 2000 and 2002*, 18 J. POP. ECON. 587, 588 (2005).

the rise. In 2002, the EEOC received 1463 bias claims from Muslims.[31] By 2004, the number was 697.[32] In 2009, bias claims had climbed again to 1490, slightly up from the 2002 figure.[33] Of course, such data is an imperfect proxy for a tally of discrimination. Not all claims to the EEOC are valid. Background proclivities to report may change across time. Absent other data, however, it is still plausible to think the data at least shows the *direction* of change. This is especially plausible when the trend in employment discrimination data correlates with changing patterns of reported verbal and physical violence against Muslims.[34] One civil rights organization received 1516 complaints of bias or violence for calendar year 2001, and 2652 for calendar year 2007.[35] All the available evidence points to the increasing prevalence of animus in recent years.

The increasing strength of ambient animus is captured in recent public debates about Islam. Such debates demonstrate how private bias can take the form of public action. That is, organized public pressure can lead to legislative hearings,[36] executive decisions, or new statutory and constitutional provisions. For example, State Question 755 in Oklahoma was itself the object of a concerted public campaign funded by private dollars.[37] The availability of the referendum mechanism provided merely a particularly speedy and cheap vehicle for translating anti-Muslim preferences into legal code. The study of the resulting debates, however, presents a hard methodological question: Do they merely refract implicit public anxieties? Or do they serve as catalysts for new anxieties? In which direction does the causal arrow run? The likely answer is a bit in both directions. Absent some underlying current of suspicion, a story will not take off. Having gained altitude, the story then propagates ideas and feelings. Two moments of high-profile anxiety about the place of Islam in American society from 2009–10 deserve attention: debates about an Arabic-language school in Brooklyn, New York, and a controversy about an Islamic center in lower Manhattan. In both cases, as with State Question 755, there was an effort to give public

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[31] Eve Tahmincioglu, *Muslims Face Growing Bias in the Workplace*, MSNBC, Sept. 13, 2010, http://www.msnbc.msn.com/id/39081887/ns/business-careers/ (on file with the Harvard Law School Library).

[32] *Id.*

[33] *Id.*

[34] *See* Erik Love, *Confronting Islamophobia in the United States: Framing Civil Rights Activism Among Middle Eastern Americans*, 43 PATTERNS OF PREJUDICE 401, 416 (2009) (noting a spike in hate crimes against perceived Muslims following 9/11 and a subsequent decrease in frequency after a few months); PEW RESEARCH CTR., *supra* note 14, at 37 (finding in 2007 "a third of Muslim Americans interviewed report that they experienced at least one hostile act in the past 12 months").

[35] Amany R. Hacking, *A New Dawn for Muslims: Asserting Their Civil Rights in Post-9/11 America*, 54 ST. LOUIS U. L.J. 917, 922–23 (2010).

[36] In early 2011, Rep. Peter King (R-NY) initiated a controversial series of hearings into American Muslims, triggering protests and unease in American Muslim communities. Sheryl Gay Stolberg, *White House Seeks to Allay Muslims' Fears on Terror Hearings*, N.Y. TIMES, Mar. 6, 2011, at A1.

[37] *See* Laurie Goodstein, *Drawing U.S. Crowds With Anti-Islam Message*, N.Y. TIMES, Mar. 8, 2011, at A1 (describing a national organization's role in the Oklahoma campaign).

animus the force of law. The timing of both cases—almost a decade after the 9/11 attacks—also raises questions about how negative attitudes toward a faith community either dissipate over time, or ebb and then flow again.

The first debate involves a school. In the summer of 2007, heated public controversy erupted about the opening of the Khalil Gibran International Academy (KGIA). KGIA was a New York City public school slated to teach an Arabic-language dual curriculum.[38] The school was named after a Christian poet, founded by a specialist in multicultural education, and led by an interfaith advisory board of rabbis, priests, and imams.[39] Opposition to the school initially came from parents and administrators of a public school chosen to share space with what was meant to be the sixty-pupil, two-classroom KGIA.[40] Their criticism was amplified by national voices such as Philadelphia-based Daniel Pipes, who condemned KGIA's "natural tendency to promote Islam," and *New York Sun* columnist Alicia Colon, who wrote that Osama bin Laden would be "delighted" by the school, which showed New York "bowing down in homage to accommodate and perhaps groom future radicals."[41] Implicit in these criticisms was an equation of Arabs and Islam with terrorist violence. Similar criticism ensued on cable news and the web.[42] The school principal, Yemeni-American Debbie Almontaser, eventually resigned under pressure from the state.[43] The proximate cause was a newspaper interview in which she claimed the term "intifada" translated as "shaking off"; the larger cause was the accusation that she was a "jihadist."[44] In March 2010, the EEOC found that in pushing for Almontaser's departure the New York Department of Education had "succumbed to the very bias that creation of the school was intended to dispel, and a small segment of the public succeeded in imposing its prejudices on D.O.E. as an employer."[45] Still a municipal employee, Almontaser declined to press suit.[46]

The second debate involved what some assumed to be a mosque. In May 2010, national public debate erupted about the plan to construct a Mus-

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[38] Naamah Paley, *The Khalil Gibran International Academy: Diasporic Confrontations with an Emerging Islamophobia*, *in* ISLAMOPHOBIA, ISLAMOPHILIA: BEYOND THE POLITICS OF ENEMY AND FRIEND 53, 53 (Andrew Shryock ed., 2010).

[39] *Id.* at 55–57.

[40] Julie Bosman & Jennifer Medina, *How a New Arabic School Roused the City's Old Rivalries*, N.Y. TIMES, Aug. 15, 2007, at B1. New York has other dual-language public schools, such as the Shuang Wen Academy on the Lower East Side. Julie Bosman, *Plan to Open an Arabic School in Brooklyn Arouses Protests*, N.Y. TIMES, May 4, 2007, at B1.

[41] Bosman, *supra* note 40, at B1.

[42] *See* Samuel G. Freedman, *Critics Ignored Record of a Muslim Principal*, N.Y. TIMES, Aug. 29, 2007, at B7. One example: "I hope it burns to the ground just like the towers did with all the students inside including school officials as well." *Id.*

[43] *See* Julie Bosman, *Head of City's Arabic School Steps Down Under Pressure*, N.Y. TIMES, Aug. 11, 2007, at B1.

[44] Andrea Elliott, *Bias is Found in City's Ouster of a Principal*, N.Y. TIMES, Mar. 13, 2010, at A1.

[45] Jennifer Medina, *Ex-Principal of Arabic School Won't Sue City*, N.Y. TIMES, May 26, 2010, at A24.

[46] *Id.*

lim community center at 45 Park Place in lower Manhattan, between Church Street and West Broadway—roughly two blocks from the site of the former World Trade Center.[47] Plans to develop the center began in 2006, and they were reported on the front page of the *New York Times* in December 2009.[48] According to its sponsors, the center—called Park51 after the initial name "Córdoba House" was abandoned for fear it would be connected to intimations of Islamic rule—would contain a daycare, a gym and pool, art exhibitions, a theater, and a restaurant, in addition to a prayer space.[49] It was thus not only, or primarily, a place of worship.

A day before a May 5, 2010, Manhattan community board meeting on the project—and two days after an attempted terrorist attack in Times Square—several newspapers ran stories about the "World Trade Center Mosque." The community board began receiving "'hundreds and hundreds' of calls, and e-mails" urging it to deny permission to build.[50] The catalyst for this cataract appears to have been a blog called *Atlas Shrugged* run by Pamela Geller, a conservative blogger and founder of JihadWatch.[51] The blog labeled the community center a "sort of like a victory lap" by Muslims that was "[i]nsulting and humiliating," an example of "Islamic domination and expansionism."[52] The *New York Post*'s Andrea Peyser called the idea of a "mosque ris[ing] over Ground Zero . . . a swift kick in the teeth" to those whose relatives died in the 9/11 attacks (incidentally turning the community center into a mosque and moving it two blocks south).[53] Geller's group purchased ads on New York City buses and subway trains asserting (falsely) that the "mega mosque" would open on September 11, 2011.[54] As with the debate on KGIA, cable news, blogs, and websites took up Geller's cause, accompanied by state-level and national figures such as Republican gubernatorial hopeful Rick Lazio, presidential hopeful Newt Gingrich, and Sarah

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[47] Ralph Blumenthal & Sharad Mowjood, *Muslim Prayers and Renewal Near Ground Zero*, N.Y. Times, Dec. 9, 2009, at A1.

[48] *Id.*; Anne Barnard, *One Project, One Faith, and Two Men Who Differ*, N.Y. Times, Sept. 17, 2010, at A20.

[49] *See* Barnard, *supra* note 48, at A20 (noting name change); Anne Barnard, *Islam Center Offers Look at Its Design*, N.Y. Times, Oct. 3, 2010, at A23; Anne Barnard, *For Muslim Center Sponsors, Early Missteps Fueled a Storm*, N.Y. Times, Aug. 11, 2010, at A1 [hereinafter *Early Missteps*].

[50] *Early Missteps*, *supra* note 49, at A1.

[51] *See* Anne Barnard & Alan Feuer, *Outraged, and Outrageous*, N.Y. Times, Oct. 10, 2010, at MB1; Justin Elliott, *How the "Ground Zero Mosque" Fear Mongering Began*, Salon, Aug. 16, 2010, http://www.salon.com/news/politics/war_room/2010/08/16/ground_zero_mosque_origins (on file with the Harvard Law School Library).

[52] Barnard & Feuer, *supra* note 51 at MB1; *see also* Michelle Boorstein, *In Flap Over Mosque Near Ground Zero, Conservative Bloggers Gaining Influence*, Wash. Post, Aug. 19, 2010, at C1.

[53] Andrea Peyser, *Mosque Madness at Ground Zero*, N.Y. Post, May 13, 2010, at 17.

[54] J.V.B., *Beck, Geller Push Falsehood That Ground Zero 'Mosque' Would Open on September 11*, MediaMatters, Aug. 10, 2010, http://mediamatters.org/research/201008100011 (on file with the Harvard Law School Library).

Palin.[55] Again, many saw no light between Islam and terrorism and pushed for official action to block the presence of Islam in the public sphere. As an Op-Ed in the *Washington Examiner* explained, Park51 was "outrageous" because "we have never, ever acknowledged that Islam, with its supremacist cult of jihad, is the enemy threat doctrine."[56] In the eyes of these commentators, the American public sphere has no room for a facility providing recreational and support services that most communities would gladly have if that facility is run by Muslims.

In this case, the campaign to give animus a legal form (in the form of a zoning decision) failed. As of this writing, the Park51 project continues, despite death threats against its sponsor[57] and questions about its fiscal viability.[58] The debate's repercussions spread nationally. Between May 2010 and September 2010, the American Civil Liberties Union counted thirty mosques or proposed mosques that had faced vandalism, public protest, or concerted opposition based on objections to Islam.[59] The Park51 debate firmly established the status of Islam in American public spaces as a legitimate subject of contestation through legal action. In Murfreesboro, Tennessee, for example, three residents filed a lawsuit opposing a local mosque's expansion, arguing in court that "Sharia law is jihad . . . [and] Sharia says the U.S. Constitution is suitable for toilet paper."[60] That controversy was unusual. It provoked the U.S. Department of Justice to file an amicus brief in support of the mosque, arguing that Islam was a religion meriting constitutional and statutory protections.[61]

To recapitulate, both empirical data and trends in the national media point to a rise in ambient negative bias against American Muslims in the past five years.[62] Such recrudescence yields tangible setbacks in employment

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[55] Barnard & Feuer, *supra* note 51, at MB1. By contrast Mayor Michael Bloomberg rejected calls to move Park51. *See* Michael Barbaro, *Political Leaders' Rift Grows on Islamic Center*, N.Y. TIMES, Aug. 25, 2010, at A17.

[56] Diana West, Op-Ed., *A Mosque to Mock 9/11's Victims and Families*, WASH. EXAMINER, May 16, 2010, *available at* http://washingtonexaminer.com/node/87416.

[57] *See Imam's Wife Tells of Death Threats*, N.Y. TIMES, Oct. 4, 2010, at A20.

[58] *See* Kareem Fahim, *Islamic Center Seeks 9/11 Recovery Grants for Lower Manhattan*, N.Y. TIMES, Nov. 23, 2010, at A27.

[59] *See Map—Nationwide Anti-Mosque Activity*, ACLU (last updated Oct. 2010), http://www.aclu.org/map-nationwide-anti-mosque-activity (on file with the Harvard Law School Library).

[60] Stephen George, *U.S. Department of Justice Visitors Tell Muslims They Have Their Back in the Murfreesboro Mosque Dispute*, NASHVILLE SCENE, Oct. 7, 2010, http://www.nashvillescene.com/nashville/us-department-of-justice-visitors-tell-muslims-they-have-their-back-in-the-murfreesboro-mosque-dispute/Content?oid=1858119 (on file with the Harvard Law School Library).

[61] *See* Press Release, U.S. Dep't. of Justice, Justice Department Files Brief in Support of Continued Construction of Murfreesboro, Tenn., Mosque (Oct. 18, 2010), *available at* http://www.justice.gov/opa/pr/2010/October/10-crt-1162.html (on file with the Harvard Law School Library).

[62] I therefore disagree with claims that it is "striking and reassuring" that there has been a "lack of First Amendment litigation over the religious rights of Muslims in America" and that this indicates that "we have something to be proud of." MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 346–47 (2008). I see much that we should feel more than embarrassed about.

prospects and for the collective religious practice of thousands. It also generates coordinated campaigns for official action to exclude Muslims from the public sphere. State Question 755 merely represents the most successful of such law-oriented efforts to date.

What explains the trend? An observer in late 2001 might well have predicted a single-peaked distribution of negative attitudes toward American Muslims, reaching its acme soon after 9/11 and then declining. The inverse correlation of violent trauma, such as mass-casualty terrorism, with political toleration toward perceived outsiders is well documented.[63] Numerous studies of Americans in the past decade have demonstrated the positive correlation between perceptions of terrorism and ethnocentrism.[64] But the effect of exogenous shocks on toleration attitudes is generally thought to fade with time.[65] Hence, it is perhaps unsurprising that the six months immediately after 9/11 did see a spike in animus-motivated physical or verbal assaults.[66] And it was surely expected that the federal government would turn to explicit use of race and ethnicity as proxies for risk only in the immediate wake of 9/11, backing away from their explicit use soon thereafter.[67] Conventional accounts suggest these trends should subside. But the data suggests otherwise. Negative attitudes have resurged, yielding an unexpectedly bimodal distribution.

Explanations for this double-peak distribution are easy to hypothesize and hard to test. One possible explanation would focus on the economic recession's effect on the toleration of those groups seen as outsiders. Another account might look to the particular anxieties provoked by the Obama presidency. Almost one in five Americans (18%) believe President Obama to be a Muslim, seven percent more than in 2008.[68] One hypothesis may thus be that racial animus, which is no longer acceptable to express in public, is channeled into anxieties about Islam that both attach to the President and leak outward to other targets. A third mechanism may involve the diffusion of negative views of Islam from other parts of the West. Political mobilization against Muslim migration grew rapidly after 2001 in several European nations.[69] While European trends do not generally influence

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[63] *See, e.g.*, Linda J. Skitka, Christopher W. Bauman & Elizabeth Mullen, *Political Tolerance and Coming to Psychological Closure Following the September 11, 2001 Terrorist Attacks: An Integrative Approach*, 30 PERS. & SOC. PSYCHOL. BULL. 743, 754 (2004).

[64] *See* DONALD R. KINDER & CINDY D. KAM, US AGAINST THEM: ETHNOCENTRIC FOUNDATIONS OF AMERICAN OPINION 31, 44–52 (2010); Johannes Ullrich & J.Christopher Cohrs, *Terrorism Salience Increases System Justification: Experimental Evidence*, 20 SOC. JUST. RES. 117 (2007); Leonie Huddy et al., *Threat, Anxiety, and Support of Antiterrorism Policies*, 49 AM. J. POL. SCI. 593, 599 (2005).

[65] *See* Skitka, Bauman & Mullen, *supra* note 63, at 754.

[66] *See* Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1575–76 n.1 (2002) (collecting data).

[67] *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 975 (2002).

[68] PEW RESEARCH CTR., GROWING NUMBER OF AMERICANS SAY OBAMA IS A MUSLIM 1 (2010), *available at* http://pewforum.org/uploadedFiles/Topics/Issues/Politics_and_Elections/growingnumber-full-report.pdf [hereinafter PEW RESEARCH CENTER, GROWING NUMBER].

[69] *See* JOCELYNE CESARI, WHEN ISLAM AND DEMOCRACY MEET: MUSLIMS IN EUROPE AND IN THE UNITED STATES 29–35 (2004).

American politics, policy entrepreneurs may leverage European developments to shape inchoate American beliefs.[70] Finally, political toleration is perhaps a function of political actors' interest in reelection.[71] Concerns about Islam are more frequent among older and Republican-leaning voters.[72] State Question 755, the Oklahoma anti-Sharia ballot measure, seemed to generate higher turnout among Republican voters, a result that tracks the earlier-cited empirical studies of the dispositional predicates of animus.[73] It is therefore rational for Republican politicians, even absent a personal view on Islam, to push for analogous ballot measures in 2012 in the hope of changing the composition of the voting population that year.

Whatever the causes of the double-peaked profile of religious animus in the United States, its effects will not be felt solely by American Muslims. Through mechanisms that have received insufficient attention, ambient bias also corrodes the nation's security against terrorism, making it an especially appropriate and pressing matter for federal government consideration beyond Murfreesboro.

II.

All agree that concerns about terrorism after September 2001 have provoked changing attitudes toward Muslim Americans. Few have asked how those changing attitudes toward Islam influence security against terrorism. This is an unfortunate omission. Discrimination in this domain imposes externalities—costs to the general public welfare not borne by those who engage in discrimination—by undermining the ability of domestic law enforcement to address terrorism risks within the United States.

The mechanism here turns on the fact that police depend on public cooperation in combating terrorism. The cooperation of Muslim American communities is plausibly more valuable than that of the general public. New empirical research demonstrates that social discrimination is negatively correlated with the willingness of minority populations to cooperate with police. Perceptions that officials share and act on that animus likely corrode American Muslim populations' cooperation with law enforcement. Moreover, as explained below, that perception also undermines non-Muslims' tendency to cooperate. There is a negative feedback loop between private discrimination

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[70] Consider in this regard the role of Ayaan Hirsi Ali, formerly a Dutch parliamentarian, now a resident scholar at the American Enterprise Institute, and a vocal and eloquent critic of Islam. *Compare* AYAAN HIRSI ALI, NOMAD: FROM ISLAM TO AMERICA: A PERSONAL JOURNEY THROUGH THE CLASH OF CIVILIZATIONS 247 (2010), *with* Nicholas Kristof, *The Gadfly*, N.Y. TIMES, May 30, 2010, at BR22 ("Hirsi Ali denounces Islam with a ferocity that I find strident, potentially feeding religious bigotry . . . .").

[71] *See* ANTHONY GILL, THE POLITICAL ORIGINS OF RELIGIOUS LIBERTY 7 (2008) (arguing that "*interests* play an equally important if not more critical role [than ideas] in securing legislation aimed at unburdening religious groups from onerous state regulations").

[72] PEW RESEARCH CENTER, GROWING NUMBER, *supra* note 68, at 2–3.

[73] McKinley, *supra* note 4, at A12; *see also supra* note 22 and sources cited therein.

and public security: terrorism provokes discrimination, which in turn increases vulnerability to terrorism.

The negative feedback mechanism comprises two separate parts. First is the claim that public cooperation, especially that of Muslim American communities, is relevant to successful counterterrorism. The second part of the mechanism is the asserted connection between discriminatory social attitudes and that cooperation.

Take first the role of public cooperation. Most analyses of security against terrorism focus on the role of government. But contemporary terrorism presents challenges that government is ill-equipped to address. As an initial matter, any tactic that relies on surprise attacks against one of a large number of possible targets is hard to anticipate and preempt.[74] Terrorist organizations such as al Qaeda further draw on cultures and languages unfamiliar to police. Our national security institutions are also imperfect. Failures of intelligence analysis,[75] intelligence sharing,[76] and resource allocation[77] are disturbingly commonplace. It is therefore imprudent to rely solely on the government and to deny the significance of private action against terrorism. Indeed, public cooperation has already prevented attacks. Family members have approached intelligence agencies about impending attacks (although the agencies have sometimes failed to take their concerns seriously).[78] Mosques have shunned and tried to dissuade those turning to terrorism.[79] Members of the general public have flagged imminent risks that police have failed to intercept.[80] Even the FBI has underscored the message that "upholding and enhancing the community's trust [allows] law enforcement [to] counter the spread of this extremist ideology."[81] Public cooperation is vital in practice, not just in theory, to successful counterterrorism.

The willingness of the public to supply law enforcement voluntarily with information and assistance is not a given. In general, compliance with legal rules under the shadow of sanctions is imperfect. This is obviously true for legal rules meant to discourage dangerous activities. Think about

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[74] *See* ROBERTA WOHLSTETTER, PEARL HARBOR: WARNING AND DECISION 3, 55– 56 (1962).

[75] *See, e.g.*, Ben Feller, *Obama Acknowledges More 'Red Flags' in Flight Plot*, BOSTON GLOBE, Jan. 6, 2010, at A2.

[76] *See, e.g.*, Dana Priest & William A. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST, July 19, 2010, at A1.

[77] *See, e.g.*, Walter Pincus, *GAO Urges Changes in Security Budgeting*, WASH. POST, Jan. 18, 2010, at A15.

[78] *See*, *e.g.*, James Gordon Meek, *Failure to Communicate*, N.Y. DAILY NEWS, Dec. 31, 2009, at 5.

[79] *See* Martin Evans et al., *Stockholm Bomber: Family Blame Britain for Radicalisation*, TELEGRAPH (U.K.), Dec. 13, 2010, http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8200044/Stockholm-bomber-family-blame-Britain-for-radicalisation.html (on file with the Harvard Law School Library).

[80] For example, in the May 2010 Times Square attempt, it was private actors, not the police, who raised the crucial red flag. Corey Kilgannon & Michael S. Schmidt, *Vendors Who Alerted Police Called Heroes*, N.Y. TIMES, May 3, 2010, at A23.

[81] Carol Dyer et al., *Countering Violent Islamic Extremism: A Community Responsibility*, 76 FBI/LAW ENFORC. BULL. 3, 8 (2007).

how often people drive while intoxicated or while using a cell phone. Cooperation—which must be elicited *without* sanctions—is also likely to be produced at suboptimal levels. In the terrorism context, cooperation may be especially difficult to elicit. Even a suspicion of involvement in terrorism can be costly for a person's reputation. It may be more likely, for example, that a suspect will be detained without bail and subject to onerous restrictions while in detention. It is plausible to believe that many people would hesitate before subjecting a friend, fellow congregant, neighbor, or even family member to such burdens—especially if they are unsure if their suspicions are justified and know that security-focused police would treat their concerns as certainties.

For these reasons, public cooperation in counterterrorism is more important than generally believed and more difficult to obtain. But what produces it? That is the second part of the feedback loop. A recent series of empirical, survey-based studies of American Muslim communities and similarly situated non-Muslims in New York and London casts some light on the mechanisms that produce public cooperation against terrorism.[82] In particular, one sample of New Yorkers who identified as Muslim provides evidence of the connection between social discrimination and cooperation. The study's findings about private discrimination are worth outlining in detail.

The study, conducted between March and June 2009, involved a telephone survey of three hundred randomly selected New Yorkers who self-identified as Muslim.[83] The respondents were contacted by telephone and asked a series of questions concerning their experiences and attitudes toward policing, terrorism, and society more generally. Telephonic studies of public attitudes toward police have been used in other surveys of public attitudes to policing.[84] They are limited in some respects. Responses about future cooperation, for example, may diverge from observed behavior. But in the absence of direct observational data of cooperation rates, they provide the best available source of information. The data from these three hundred surveys can be analyzed with econometric tools to draw conclusions about the attributes and experiences that are most likely to predict cooperation. Such tools

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[82] *See* Tom R. Tyler, Stephen Schulhofer & Aziz Z. Huq, *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 L. & Soc'y Rev. 365, 379 (2010) [hereinafter Tyler et al., *Legitimacy and Deterrence*]; Aziz Z. Huq, Tom R. Tyler & Stephen J. Schulhofer, *How Do the Purpose and Target of Policing Affect Public Cooperation? A Study of Policing Crime and Policing Terrorism in Different Minority Communities*, Psychol., Pub. Pol. & L. (forthcoming 2011) [hereinafter Huq et al., *Purpose and Target*)]; Aziz Z. Huq, Tom R. Tyler & Stephen J. Schulhofer, *Mechanisms for Eliciting Cooperation Against Terrorism: A Study of British Muslims*,—J. Empirical L. Stud.—(conditionally accepted 2011), *available at* http://ssrn.com.ezp-prod1.hul.harvard.edu/abstract=1757266 [hereinafter Huq et al., *Mechanisms for Eliciting Cooperation*]. For a survey of some policy implications of this research, see Stephen J. Schulhofer, Tom R. Tyler & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, J. Crim. L. & Criminology (forthcoming 2011).

[83] For more details of the instrument and methodology, see Tyler et al., *Legitimacy and Deterrence*, *supra* note 82, at 377–78.

[84] *See, e.g.*, Tom R. Tyler, Why People Obey the Law 8–12 (2006).

allow the analyst to compare the attitudes of individual respondents within the sample (itself representative of the Muslim population of New York City) in order to draw inferences about correlations between attitudes and beliefs. For example, by looking in essence for patterns within the sample, the analyst can determine whether the belief that police are effective is correlated with an increasing willingness to cooperate. Or she can show how experiences of discrimination influence the proclivity to cooperate.

Tables 1 and 2 below present descriptive data from the survey. As Table 1 illustrates, the respondents were asked questions about the role of religion in their lives. Table 1 reports the percentages of valid responses[85] to questions concerning the strength of Muslim identity. The data suggests respondents generally self-identified strongly in religious terms.

TABLE 1: RELIGIOUS SELF-IDENTIFICATION

	How strongly do you identify as a Muslim, if at all? (% valid response)		**Do you agree strongly, agree, disagree, or disagree strongly that being a Muslim is important to the way you think of yourself as a person? (% valid response)**
Very strongly	57.7	**Agree strongly**	40.8
Somewhat strongly	25.6	**Agree**	47.9
Not very strongly	10.9	**Disagree**	9.9
Not strongly at all	4.8	**Disagree strongly**	1.4
Do not identify at all	1.0		

Tables 2a and 2b report descriptive data concerning questions on others' attitudes towards Muslim Americans. (The survey also contained extensive separate questions about police treatment that are not reported here.) Specifically, Table 2a presents data on experiences of disrespect. Table 2b presents data on more specific experiences with discrimination in workplaces, schools, the media, and interactions with government.

[85] Omitting those respondents who failed or declined to respond. For these questions, this number was zero or in single digits.

TABLE 2A: MUSLIM AMERICAN PERCEPTIONS OF RELIGIOUS TOLERANCE

	When you think about the majority Americans that you deal with in your own life, do you agree or disagree that they respect what you believe? (% valid response)	Do you agree strongly, agree, disagree or disagree strongly that Muslims in general are free to practice their faith in America today? (% valid response)
Agree strongly	32.6	44.9
Agree	52.0	39.9
Disagree	13.4	12.5
Disagree strongly	2.0	2.7

TABLE 2B: EXPERIENCES OF FAIR AND UNFAIR TREATMENT

	How fairly or unfairly are you treated at work and in school? (% valid responses)	How fairly or unfairly are you treated when dealing with authorities in public institutions such as schools, town halls, or other public institutions? (% valid responses)	How fairly or unfairly are you treated in the media (e.g., television, newspapers)? (% valid responses)
Very unfairly	6.8	1.7	25.0
Somewhat unfairly	15.6	13.0	23.2
Somewhat fairly	35.7	45.1	36.6
Very fairly	41.8	40.3	15.1

This data suggests that bias exists and is experienced by some Muslim Americans in New York, but also that most of those surveyed had generally positive views of their immediate interactions with society and of the general public. These results are consistent with the data presented in Part I, which also shows a minority experiencing discrimination. But the national data evinced a higher rate of experienced discrimination than the New York data. This may be a consequence of selection efforts for a particularly cosmopolitan urban area.

How does changing experience with social discrimination interact with cooperation? Indeed, does it have any effect at all? The variance observed within the sample concerning respect and experiences of discrimination provides a way to test the effect of discrimination and disrespect on cooperation. The survey instrument also contained questions about two kinds of cooperation. The instrument first asked about respondents' willingness to engage in "general" cooperation, for example attending voluntary meetings with the police, in the future. The second asked about "specific" cooperation, in essence asking if the respondents would approach the police if they had specific information about a possible terrorism risk. Respondents an-

swered a series of hypotheticals about arguably risky behavior, from planning an attack to reading extremist literature online.[86] They were then asked how likely they were to report that risky behavior to law enforcement.

The range of questions in the survey enabled the testing of theories to explain cooperation. The principal findings of the research concern the effect of the police's conduct on cooperation rates and are reported elsewhere.[87]

To compare the relative strength of different potential explanations, it is necessary to specify a multiple regression that includes separate indices corresponding to each possible explanation.[88] Table 3 excerpts from that multiple regression specification the results when social discrimination is used as an independent variable. Social discrimination is measured as a composition of the three questions reported in Table 2b. Table 3 reports the regression coefficient (beta) for both specific and general cooperation, which is a rough measure of the effect of social discrimination. In addition, this table reports the p-value, which is a measure of the likelihood that the identified relationship occurred by chance. The lower the p-value is, the more confidence can be placed in the observed correlation not being a result of the chance effect of sampling.

TABLE 3: DOES SOCIAL DISCRIMINATION INFLUENCE COOPERATION WITH POLICE?

	Specific Cooperation	**General Cooperation**
Regression coefficient (beta)	–0.18	–0.22
Significance (p value)	$p < 0.05$	$p < 0.01$

This analysis suggests that experiences and perceptions of discrimination have a statistically significant association with predicted specific and general cooperation. In both cases, the relationship is negative: the greater the perception of discrimination, the less likely a respondent is to cooperate. The effect is larger (larger beta) on general cooperation than on specific cooperation. It is important to note here that the claim made in Table 3 is *not* that social discrimination is the *only* influence on cooperation. To the contrary, the larger study from which this result is drawn identifies a range of independent variables that correlate to cooperation rates. The fact that cooperation in counterterrorism policing is complex and multicausal should not distract from the finding that at least one important effect is found with respect to experiences of social discrimination. The fact that social discrimination has statistically significant effects on cooperation even in a regression

[86] For a full list of the risk behaviors see Tyler et al., *Legitimacy and Deterrence*, *supra* note 82, at 390–91.

[87] *See id.* at 386–87.

[88] *See id.* at 380 (reporting results from that specification).

specification that controls for demographics, discriminatory actions by the police, religiosity, and attitudes toward the state provides support for the conclusion that such effects are indeed robust.

Two additional findings from linked studies are worth noting. First, a parallel study of non-Muslim Americans in New York—a control group for the sample described above—found that when respondents believed that police discriminated against and otherwise treated unfairly Muslim minorities, respondents were less willing to cooperate with law enforcement.[89] This suggests that official discrimination has a spillover effect on the general public that corrodes the willingness of people to work with police. Second, a parallel study of British Muslims conducted in London found many of the same correlations—but it found that social discrimination was *not* correlated with cooperation in either direction.[90] That is, ambient discrimination may matter in the American context, but it is not possible to extrapolate out toward some general, trans-historical and trans-cultural claim about the effects of discrimination. The argument here must be confined for now to the U.S. context.

How should the results presented in Table 3 be interpreted? This data is evidence that a U.S. minority population's interactions with police are in part a function of their experience with the larger society. The more exposure they have to private discrimination, the less they trust law enforcement and the less they volunteer information or aid. Although the correlation is clear, and the inference of causality a plausible one, the survey instrument casts incomplete light on the precise psychological mechanism. One explanation may be that experience of discrimination predisposes people to distrust police. Because the general public discriminates, and because police are drawn from the general public, it is to be expected that police will treat Muslims unfairly. Alternatively, even if a respondent believes that the police generally treat Muslims fairly, it may be that she also believes, in a case of unfair treatment, the probability of correction and restitution will be lower when the rate of social discrimination is elevated. A third possibility is that experience of social discrimination damages respondents' identification with and affective ties to society, making the goal of protection against external terrorism risk less valuable. The contrary result from the United Kingdom sample might provide some support for this last theory. In the United Kingdom, the data suggests that the Muslim minority studied has not come to view British society as a shared project in the way their American counterparts have. Hence, they have no expectation of respect and do not respond either to respect or to discrimination.

In each of these cases, importantly, the change in cooperation behaviors is a wholly rational and non-ideological response to exogenous circumstances that alter the costs and benefits of such cooperation. Evidence that cooperation rates among Muslim Americans are influenced by external cir-

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[89] Huq et al., *Purpose and Target*, *supra* note 82.
[90] Huq et al., *Mechanisms for Eliciting Cooperation*, *supra* note 82.

cumstances is not evidence that this population is unpatriotic or anything of that nature. Instead, it is evidence that Muslim Americans, like all other Americans, respond to cues and evidence about the society around them and their fellow citizens.

Whatever their explanation, these results suggest that private discrimination has a public cost. Discrimination impairs an essential component of successful counterterrorism strategy. Its costs are borne not by discriminators alone, but by society as a whole. Discrimination both private and official, in short, has security externalities. This is not the first time local bias has imposed costs on the national welfare. During the Cold War, accurate perceptions of racial segregation undermined American soft power and persuasiveness in the international arena.[91] In that era, the federal government undertook initiatives to mitigate externalities.[92] Today, the federal government remains well positioned to address policy problems arising from collective action problems within the several states. The security-related cost of religious discrimination is plausibly viewed as one such problem. The question thus arises what the federal government can do and is willing to do by way of response.

III.

What legal and policy tools exist to disrupt the negative feedback loop between private discrimination and insecurity? Religious tolerance (however defined) is not a constant in American history. The Constitution's Religion Clauses have coexisted comfortably with durable animus toward Catholics, Mormons, and the Salvation Army at different times. Nor is a whiggish expectation of ever-expanding toleration plausible. The trend line moves in both directions. As all know, the Edict of Nantes was once revoked. Concerted applications of policy and legal resources are necessary to counteract ambient discrimination. What government does in response to private discrimination matters.

For the balance of this essay, I focus on those cases in which discriminatory private action is sufficiently successful that it takes the form of an official action or a public, legal enactment. As Section I suggested, this is more frequent than might be thought. The KGIA debate resulted in what the EEOC found to be an official act of discrimination. The Park51 imbroglio almost resulted in a zoning decision against a religious actor and has catalyzed a wave of efforts to use zoning laws against mosques. So State Question 755 is only the most successful, and most naked, of recent efforts to turn private animus into official or legal form. Such efforts, importantly, are strong and unequivocal signals of private discrimination. Therefore, as Part

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[91] *See* MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 6 (2002) ("During the Cold War years . . . the diplomatic impact of race in America was especially stark.").

[92] *Id.* at 79–114 (documenting federal government's efforts).

II illustrated, they will corrode the cooperation necessary for security's production. When this happens, constitutional norms may also come into play.

In focusing on constitutional law, I do not wish to downplay the importance of social movements against bias. Surely, mobilizations and activism are also necessary to secure toleration. Perhaps they are even more important than constitutional law. The degree to which elected actors recognize and act against religious discrimination is a function of constituency dynamics. Where, as in Oklahoma, opposing legal recognition of religious pluralism secures electoral gains, tolerance for religious difference is likely to decline. One way of addressing discrimination is therefore to raise the opportunity costs of intolerance via concerted political action.[93] The role of American Muslims in national politics hence will matter. Prior to 2001, American Muslims were perceived as swing votes and courted by both parties.[94] In the 2000 presidential campaign, for instance, Republican candidate George W. Bush campaigned "a half dozen times" in the Arab community of Dearborn, Michigan.[95] Whether his post-2001 security policies erased the gains that campaigning produced for the immediate future remains to be seen.[96] Today, the evidence suggests that 9/11 and its aftermath have accelerated the growth of a Muslim civil society, including youth and civil rights organizations,[97] mosques,[98] and direct partisan mobilization.[99] Its home on the political spectrum remains uncertain.[100] And it is far from clear that this constituency will pull its weight in national or state elections. But the exogenous shock of 9/11 might perversely have stimulated efforts to make up for lost time.

Private mobilization in the political process can be supplemented by legal action under the Religion Clauses to invalidate legislated signals of

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[93] *See* GILL, *supra* note 71, at 79.

[94] *See* Alexander Rose, *How did Muslims Vote in 2000?*, MIDDLE EAST Q. Summer 2001, at 13. Before 2001, Muslim Americans had a generally positive view of the political process. *See* IHSAN BAGBY, PAUL M. PERL & BRYAN T. FROEHLE, THE MOSQUE IN AMERICA: A NATIONAL PORTRAIT 31 (2001), *available at* http://sun.cair.com/portals/0/pdf/the_mosque_in_america_a_national_portrait.pdf (reporting that eighty-nine percent of those interviewed in a sample of mosques strongly agreed or somewhat agreed that Muslims should participate in the political process).

[95] BARRETT, *supra* note 13, at 39; Niraj Warikoo, *Bush Chats with Arab Americans on Issues*, DETROIT FREE PRESS, Oct. 6, 2000, at A8.

[96] In 2008, one survey estimated that eighty-nine percent of Muslim voters opted for the Democratic candidate. COUNCIL ON AMERICAN ISLAMIC RELATIONS, AMERICAN MUSLIMS AND THE 2008 ELECTION: A POST ELECTION SURVEY REPORT (2008), *available at* http://www.cair.com/Portals/0/pdf/Post_2008_Election_American_Muslim_Poll.pdf; *see also* Jamal, *supra* note 21, at 92–93 (noting Democratic swing).

[97] *See* Kathleen M. Moore, *Muslims in the United States: Pluralism under Exceptional Circumstances*, 612 ANNALS AM. ACAD. POL. & SOC. SCI. 116, 122, 125–26 (2007).

[98] *See* Amaney Jamal, *The Political Participation and Engagement of Muslim Americans: Mosque Involvement and Group Consciousness*, 33 AM. POL. RES. 521, 532 (2005).

[99] Farida Jalalzai, *The Politics of Muslims in America*, 2 POL. & RELIG. 163, 192 (2009).

[100] "In most cases, Muslims cannot easily find the ideal candidate to represent both their foreign policy interests and the moral and ethical values they uphold." Amaney Jamal & Sunaina Maira, *Muslim Americans, Islam, and the 'War on Terrorism' at Home and Abroad*, 59 MIDDLE E. J. 303, 305 (2005).

private bias that will further corrode necessary cooperation in counterterrorism efforts. The First Amendment caps the returns to private social mobilization on grounds of religious animus because it constrains the universe of laws that might be enacted and implemented to operationalize such animus. It is to this use of constitutional law as a disincentive to legislating private bias that I turn in the balance of the essay. More particularly, I use State Question 755 as an example of what the First Amendment has to say about the new wave of anti-Muslim animus.

Looking to law as a solution to discrimination is a contentious idea. A growing body of scholarship casts doubt on the more ambitious claims that constitutional lawyers have made about the transformative consequences of their craft.[101] Constitutional change is often best understood as the result of conscious and long-term political investments. The Warren Court's rulings on equality and criminal procedure are often celebrated (or reviled) as the products of judicial activism.[102] But those rulings diverged less from national majoritarian sentiments than is generally credited.[103] It nevertheless seems premature to abandon wholesale the courts and legal doctrine as sources of social and policy change.[104] Politicians expend nontrivial resources influencing the composition of federal judiciary; the media pays short-term attention to at least some judicial decisions. It seems implausible to disregard the courts as an important component of the larger political constellation. Even those who see politics as more important than law should recognize that law is one form of politics that can be very effective at entrenching policy change. Federal judges, whose views surely reflect the preferences of appointing coalitions, are nonetheless constrained by professional norms, by legal traditions, and by the buffering effect of life tenure. Their inclinations, and their freedom to pursue those inclinations, will systematically diverge from those of even allied politicians.

The question here is whether constitutional law, which speaks largely to state action,[105] has much to say about the private discrimination described in Part I. Constitutional norms come into play when efforts are made to codify discriminatory private beliefs into law. As we have seen, these efforts at codification are increasingly common. State Question 755 provides a useful example. Possible use of constitutional doctrine as a response to State Question 755 tracks a previously successful model of social change through constitutional law. During the 1950s and 1960s, the Supreme Court under Chief

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[101] *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 5 (1991).

[102] STEFANIE A. LINDQUIST & FRANK B. CROSS, MEASURING JUDICIAL ACTIVISM 3–5 (2009).

[103] *See* Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1365 (2004).

[104] For one excellent recent study demonstrating the effect that judicial action can have in the context of race relations, see Paul Frymer, *Acting When Federal Officials Won't: Federal Courts and Civil Rights Enforcement in the U.S. Labor Unions, 1935–1985*, 97 AM. POL. SCI. REV. 483, 495 (2003).

[105] *See* The Civil Rights Cases, 109 U.S. 3, 11, 17 (1883).

Justice Earl Warren used the Bill of Rights to promulgate rules about police procedures, racial justice, and religious free exercise. One plausible view of these decisions is as an effort to bring regional outliers into line with norms promulgated by national elites.[106] Constitutional law thus can supply a "leveling up" tool against local practices potentially far out of step with a national norm that at least some national faction defends. The question then is whether there is a national norm that impinges on the constitutionality of State Question 755, and whether there is sufficient interest at the federal level to defend the norm.[107]

The Religion Clauses of the First Amendment are in doctrinal flux. On the one hand, the Free Exercise Clause was transformed in the 1990 case of *Employment Division v. Smith* from a right against disparate impacts on religious practice into a nondiscrimination rule.[108] *Smith* held that neutral laws of general applicability are valid under the Free Exercise Clause without regard to any burden on religious exercise.[109] *Smith* thus established a weak neutrality command satisfied in all but the small class of cases where legislators discriminate flagrantly. Absent a foolish or intentional violation, most plaintiffs will face an uphill challenge. In a diverse, argumentative republic, impermissible motives will often be easy to obscure. So it will be possible often to target religious groups *sub silentio*. Compounding this problem, the *Smith* neutrality rule is underinclusive. It does not apply to subsidy decisions,[110] following a long-standing "distinction between governmental compulsion and conditions relating to governmental benefits."[111] Discrimination against religion is also permissible in the legislative distribution of accommodations from generally applicable laws.[112] In practical effect, the post-*Smith* regime of Free Exercise jurisprudence means that only intentional "hostility toward or neglect of particular theological perspectives" is uncon-

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[106] *See* LUCAS A. POWE JR., THE WARREN COURT AND AMERICAN POLITICS 488–94 (2000) (asserting that Warren Court activism was disproportionately directed at conservative outliers in an age of liberal political ascendancy); *accord* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 117–20 (2007).

[107] *Cf.* Mark Graber, *Does it Really Matter? Conservative Courts in a Conservative Era*, 75 FORDHAM L. REV. 675, 688 (2006).

[108] Employment Division v. Smith, 494 U.S. 872, 879 (1990); *accord* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32, 546 (1993) (holding that a "law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny").

[109] *See Smith*, 494 U.S. at 879; *see also Lukumi Babalu*, 508 U.S. at 536 (applying rule).

[110] *See* Locke v. Davey, 540 U.S. 712, 718 (2004) (concluding that "there is room for play in the joints" between the Free Exercise and Establishment Clauses) (citation omitted).

[111] Bowen v. Roy, 476 U.S. 693, 705 (1986) (citing Abington Sch. Dist. v. Schempp, 374 U.S. 203, 252–53 (1963)); *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 603–04 (1983) (denying tax-exempt status to educational institutions that endorse and enforce racial biases).

[112] *Compare* Cutter v. Wilkinson, 544 U.S. 709, 713–14 (2005) (stating that certain accommodations may still "devolve into 'an unlawful fostering of religion' ") (quoting Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 334–35 (1987)), *with Amos*, 483 U.S. at 338–39 (upholding exception in Title VII for religious institutions).

stitutional.[113] And only rarely will evidence of such animus be readily available.

On the other hand, the Establishment Clause imposes related constraints on the government's ability to respond to religiously inflected preferences. The two Religion Clauses are plausibly understood to operate to order the relationship between the state and religious civil society. Precisely what the lodestar of that relationship should be remains a topic of much contention in the scholarship. One influential account, which in my view captures an important strand of the case law, focuses on neutrality as the guiding principle.[114] In the Establishment Clause context, nevertheless, doctrinal constraints on state action have been slackening in a way that parallels expansion in the Free Exercise context. The Court has increasingly distanced itself from a longstanding three-part test requiring that state action be characterized by a secular purpose, secular effect, and no entanglement of state and faith.[115] Some elements of the old regime, such as the anti-entanglement rule, have been overtly abandoned.[116] On other occasions, the Court simply ignores sectarian dimensions of a state action. When the Court in 2005 held that a Texas display of the Decalogue did not violate the Establishment Clause, for example, a plurality of Justices invoked tradition and history as constitutionally sufficient justifications for a nakedly sectarian state action.[117] Exempting an inchoate domain of "tradition" from Establishment Clause scrutiny, the Court more generally licenses the state to take sides in important religious disputes provided one historically powerful majority faction has long prevailed.[118]

Weakening another line of Establishment Clause case law, the Court has permitted governmental educational aid that is "neutral with respect to religion . . . [that] provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice."[119] This allows the state to channel money toward domains where favored religious institutions are already established, thereby selectively boosting those institutions. Yet

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[113] Christopher L. Eisgruber & Lawrence G. Sager, Religious Freedom and the Constitution 69 (2007).

[114] There are several different accounts of neutrality as applied to religion. *See, e.g.*, Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990). For a survey of responses to Laycock's pathmarking tripartite typology, see Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. Va. L. Rev. 51 (2007).

[115] *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

[116] *See* Agostini v. Felton, 521 U.S. 203, 232–33 (1997).

[117] *See* Van Orden v. Perry, 545 U.S. 677, 686–92 (2005) (Rehnquist, C.J., plurality opinion) (relying on "unbroken history" as a warrant for display of the Decalogue on the grounds of the Texas State Capitol). On the same day, the Court invalidated a display in a Kentucky courtroom. McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 866 (2005). In *McCreary County*, the Court "presumed . . . familiar[ity] with the history of the government's actions," and rejected the government defendants' request to elide history's significance. *Id.* at 866. On this score at least *McCreary County* and *Van Orden* are consistent.

[118] *See* Salazar v. Buono, 130 U.S. 1803, 1817 (2010).

[119] Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002); *see also* Mitchell v. Helms, 530 U.S. 793, 809–10 (2000) (Thomas, J., plurality opinion).

even the "endorsement" test, which once commanded support, is fragile.[120] Justice Scalia has already set forth an alternative view whereby government need not remain neutral between religion and non-religion, and also can "acknowledg[e] a single Creator."[121] Wherever the merits of these discrete developments, they add up to major erosion of Establishment Clause doctrine toward some weak form of neutrality. Change under both of the Religion Clauses has a common direction toward an emasculated demand for state neutrality.

State Question 755 provides fertile ground to examine the combined scope and effect of those clauses today. How does that provision square with the enfeebled neutrality command of the First Amendment? The inquiry must be tentative because the immediate effects of State Question 755 are uncertain. A preliminary injunction from a federal district court barring certification of the referendum means the effects of the law cannot be directly observed.[122] Question 755's terms are also not free of ambiguity. It leaves the term "Sharia" undefined. Due to this gap, courts at the very least have to define the ambit of this religious term, a task that raises questions about the epistemic competences of Oklahoma judges. As might be expected, a fourteen-centuries-old tradition of religious rule making and reasoning that has spread to and been adapted by communities across several continents is hardly a simple, unitary strand of writing and thought.[123] However the term is eventually defined, State Question 755 nevertheless commands a court to refrain from "considering or using Sharia." The amendment thus not only prohibits courts from invoking Sharia as a reference point or as persuasive authority, it prohibits its *consideration*. The scope of this rule is unclear not only because of the ambiguity of the definition of Sharia, but also because it is not clear what a prohibition on consideration would cover. For example, would it extend only to explicit references to religious law? Or would it extend to facially neutral language that tracked the elements of a religious rule? Such uncertainty about the scope of the amendment has immediate costs. At a minimum, noted one transactional lawyer, the amendment "increases uncertainty and could thwart the expectations of the parties to affected transactions."[124] As a result of this uncertainty, some parties will not engage in welfare-improving transactions they would otherwise have entered.

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[120] *See, e.g.*, *Van Orden*, 545 U.S. at 695–97 (2005) (Thomas, J., concurring) (criticizing endorsement test).

[121] *McCreary Cnty.*, 545 U.S. at 866, 88–94 (Scalia, J., dissenting).

[122] Awad v. Ziriax, No. CIV-10-1186-M, 2010 WL 4814077, *24 (W.D. Okla. Nov. 29, 2010) (granting preliminary injunction against certification of State Question 755 by state election board until a ruling on the merits).

[123] For an introduction to Sunni jurisprudence, *see generally* WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO THE SUNNI USUL AL-FIQH (1999). For a critique of recent centralizing impulses in the jurisprudence and a call to recognize its historical pluralism, see generally KHALED ABOU EL FADL, AND GOD KNOWS THE SOLDIERS: THE AUTHORITATIVE AND THE AUTHORITARIAN IN ISLAMIC DISCOURSE (2001).

[124] Paula Burkes, *Q&A with Richard Riggs*, OKLAHOMAN, Nov 19, 2010, at 4B.

Beyond uncertainty, State Question 755 likely will have a nontrivial effect. Courts use foreign law as a result of their application of a choice-of-law rule. Usually, the latter is found in the terms of a contract or other private law instrument. Given that, it is plausible to read the amendment to deny legal effect to any choice-of-law analysis that directs a court to use a legal rule falling within the terms of the designated corpus of religious law. The ban on use, if it has any meaning at all, covers private decisions to use Sharia through choice-of-law clauses.

Even on that narrow reading, the amendment would entail selective non-enforcement of a class of private contractual instruments defined on religious grounds. Consider three examples. First, a fraud action would not lie for a false representation that meat was halal (i.e., meat that was prepared in accordance with food preparation rules required by Islamic legal texts).[125] A contract to supply halal meat could not be enforced. By contrast, a contract for kosher meat would be enforced.[126] Second, State Question 755 may impact the burgeoning field of Islamic finance. On some interpretations of Islamic doctrine, interest (*riba*) on a loan of money is prohibited.[127] Fully Islamic banks have existed since 1975 to provide financial services compliant with this rule, and by now at least sixty nations have such institutions.[128] As of September 2008, $700 billion of assets worldwide were being managed in explicitly Sharia-compliant vessels.[129] Most of these assets and instruments explicitly reference their compliance with the *riba* prohibition. State Question 755's prohibition on the use of Islamic law on its face suggests these instruments may not be enforced in Oklahoma, even though a similar financial instrument framed in nonreligious terms could be executed. The effect of these rules on existing contracts may depend on the Contract Clause of the federal Constitution.[130] Its effect on future contracts is uncertain. Perhaps it would chill Muslim Americans from expressing their religious beliefs in contractual form. Perhaps it would propel them into subterfuges to obtain what they see as mandated outcomes. It is also possible that courts would read the use bar to invalidate contractual language that tracked religiously mandated outcomes without mentioning religious principles on the ground that to do otherwise would be to enable circumvention of State Question 755's directive. Finally, it is worth noting that an Oklahoma court would seemingly also have to deny execution of a trust or testamentary

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[125] *Cf.* People v. Atlas, 170 N.Y.S. 834, 835 (N.Y. App. Div. 1918), *aff'd*, 130 N.E. 921 (N.Y. 1921) (affirming conviction based on fraudulent sale of kosher meat).

[126] *But see* Barghout v. Bureau of Kosher Meat and Food Control, 66 F.3d 1337, 1346 (4th Cir. 1995) (invalidating fraud ordinance that delegated enforcement decisions to religious scholars).

[127] Timur Kuran, Islam and Mammon: The Economic Predicaments of Islamism 7–8, 15 (2004) (noting doctrinal disagreements).

[128] *Id.* at 9.

[129] *Savings and Souls*, Economist, Sept. 4, 2008, at 81.

[130] *See* U.S. Const. art. I, § 10, cl. 1; *see also* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 262 (1827) (holding that clause banned retroactive impingement on contracts, but not prospective changes). State Question 755, however, might be styled as simply a change to available remedies.

instrument explicitly modeled on Islamic rules. This would have the effect of disrupting estate planning, potentially unraveling testamentary instruments.

In short, for a class of Americans defined by religious belief, the decision to comply with religious mandate when transacting with others would yield a selective denial of the benefits and protections of Oklahoma's courts across a spectrum of commercial and noncommercial transactions. State Question 755 is a rule that on its face identifies one and only one faith tradition for this legal disability. Plainly, no other religious group is required to bear an analogous burden. Plainly, State Question 755 has the practical effect of signaling that Muslims are the objects of state sanctioned private discrimination. And plainly, the amendment will thereby erode the public cooperation on which successful counterterrorism efforts often rely.

Understood in this way, the Oklahoma amendment presents an easy question under the Religion Clauses. Under the Free Exercise Clause, a "law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."[131] No compelling justification supports the naked discrimination of State Question 755. To the extent that the state wishes to deny enforcement of private law instruments that violate gender equality norms, Oklahoma courts already apply a public policy exception in choice-of-law analysis.[132] Moreover, Islamic law encompasses equitable as well as discriminatory versions,[133] much as American law has historically included different views on gender and, at present, respecting sexuality. It would be passing odd, however, to condemn *all* of American law on the basis of *Bradwell v. Illinois*[134] or *Bowers v. Hardwick*,[135] on the theory that some parts of the law have yet to renounce entirely the pernicious taint of those decisions. Hence, State Question 755 is impermissibly overbroad. At the very least, such overbreadth gives lie to claims that the provision has a salutary, equality-related end.

Oklahoma's amendment additionally runs up against Establishment Clause limits. In its most recent invalidation of state action on Establishment Clause grounds, the Court held that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."[136] Oklahoma voters were asked whether to "forbid[ ] courts from considering or using Sharia law" alone; no other religious law was mentioned.[137] That is, it sought to distinguish between different sects and impose a burden on one that applied to no other. The referendum, for

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[131] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

[132] *See, e.g.*, Harvell v. Goodyear Tire & Rubber Co., 164 P.3d 1028, 1034 (Okla. 2006); Bohannan v. Allstate Ins. Co., 820 P.2d 787, 797 (Okla. 1991).

[133] *See generally* ASMA BARLAS, "BELIEVING WOMEN" IN ISLAM: UNREADING PATRIARCHAL INTERPRETATIONS OF THE QUR'AN (2002).

[134] 83 U.S. 130 (1873).

[135] 478 U.S. 186 (1986).

[136] McCreary Cnty. v. ACLU, 545 U.S. 844, 860 (2005) (citation omitted).

[137] OKLAHOMA STATE ELECTION BD., *supra* note 1, at 7.

this reason, falls afoul of even a weak version of the neutrality principle at the core of both the Establishment and Free Exercise Clauses.

Perhaps anticipating problems, the amendatory language to be added to the Oklahoma Constitution diverges from the question posed to the voters and provides that "courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia law."[138] At first blush, the first sentence of this language seems to sweep broadly but evenly on non-sectarian grounds: any legal rule derived from any other "natio[n] or cultur[e]" would be inadmissible. On closer inspection, however, its neutrality is illusory. Rather, this expansion of State Question 755 raises more problems than it resolves. On the one hand, it might be read to impose a bar on any rule derived from a faith that originated outside the United States. Catholics and Jews would thus be disabled from including faith-based rules in their contracts, while Christian Scientists and Mormons would not. Members of the Nation of Islam and the Moorish Science Temple, twentieth-century American offshoots of Islam,[139] by contrast, could fairly object to the notion that their faith was foreign if the law were applied to them.[140] But such a reading of the law is implausible as a claim about of the electorate's intentions.[141] It is also inconsistent with the expressed motives of Act! for America, the national organization that funded the public campaign for State Question 755, an organization that "draws on . . . evangelical Christian conservatives . . . and Tea Party Republicans."[142] Simply put, the extension of the prohibition to "other nations or cultures" cannot mean what it says (and would, independently, be unconstitutional if it did due to its arbitrary discrimination between faiths).

Moreover, it is worth emphasizing that Islam, like Catholicism and Judaism, is not solely the faith of *other* nations and cultures. It is a faith practiced daily by millions of Americans born and raised in the United States. It is also a religious tradition that arrived before Independence, a faith that has been practiced in the several states as long as many Christian sects (and longer than many new sects).[143] It is no more and no less foreign than Catholicism, Judaism, Sikhism, Buddhism, Anglicanism, or the Lutheran

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[138] Defs.' Resp. to Pl.'s Mot. for Prelim. Inj. at 3, Awad v. Ziriax, No. CIV-10-1186-M, 2010 WL 4814077 (W.D. Okla. Nov. 29, 2010), [hereinafter "Defs.' Resp."]. It is not clear this linguistic shift is sufficient to save the amendment given the problems that adhere in the ballot question. The contents of ballot questions are state action, and are therefore constrained by constitutional limitations. Morse v. Republican Party of Virginia, 517 U.S. 186, 273 (1996); Burdick v. Takushi, 504 U.S. 428, 433 (1992). Through State Question 755, Oklahoma chose to single out for potential penalty one discrete and insular religious minority. The ballot was therefore facially discriminatory

[139] Kambiz GhaneaBassiri, A History of Islam in America 218–24 (2010).

[140] In any event, denominational preferences are problematic under the Establishment Clause. Larson v. Valente, 456 U.S. 228, 255 (1982).

[141] *But see* Defs.' Respn, *supra* note 138, at 12–13 (making this argument).

[142] Goodstein, *supra* note 37, at A1. It is surely a strike against State Question 755 that it involves adherents to some faiths working to exclude adherents of another faith from the public sphere.

[143] *See* GhaneaBassiri, *supra* note 140, at 15–32; Edward E. Curtis IV, Muslims in America: A Short History 5–24 (2009).

Church. To be sure, Oklahoma could invoke a historical tradition of repugnance toward Islam in America, best demonstrated by slave owners who justified the existence of slavery by claiming a need to eliminate Islam from amongst their chattel.[144] One hopes that plea from history would fail. Whether it does or not, the contradistinction between "Islam" and "America" is false in historical terms just as it is false as a description of quotidian America.[145] The state of Oklahoma has no warrant in history, tradition, or policy to deny the equal protection of its courts to one religious group without any clear or remotely compelling justification.[146]

In my view, the First Amendment case against State Question 755 is surprisingly simple. That does not mean it would prevail. Constitutional doctrine, even in more stable areas than the Religion Clauses, is treacherous ground. But the federal courts today *could* exercise a salutary centripetal yank back to a desirable constitutional norm of nondiscrimination. Doing so would track the Court's historical practice in invalidating state policies that diverge dramatically from constitutional norms, especially where those policies impose high costs on the nation as a whole. As they did during the Warren Court years, the courts would doubtless benefit from the spine-stiffening support of the executive. The U.S. Department of Justice has interceded once in Murfreesboro, Tennessee. It could, with equal justification, intervene in Oklahoma to make clear that the legal instantiation of animus toward one faith (and one faith alone) violates the Constitution. Doing so would send a clear signal to other politicians considering invocation of the Islam card to rally votes in the 2012 electoral cycle, and perhaps might even dissuade a few from doing so.

Conclusion

It is banal to observe that anti-Muslim discrimination is precipitated by terrorism-related fears. But this is only part of the story. The discrimination provoked by the experience of terrorism-related fear in turn increases security vulnerabilities. This negative feedback loop benefits politicians willing to leverage public unease, distaste, and fear for electoral gain. It also benefits terrorists, who can expect to operate with a lower probability of discovery. The law surely does not provide the only or the most important point of

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[144] Ghanea Bassiri, *supra* note 140, at 46–47.

[145] The advocates of State Question 755 disagree and "have succeeded in popularizing the notion that American Muslims are just biding their time until they gain the power to revoke the Constitution and impose Shariah law in the United States." Goodstein, *supra* note 37, at A1. This seems to me a culpable misdescription of reality.

[146] The Court has previously invalidated, seemingly on Equal Protection grounds, popular lawmaking that selectively imposes barriers on the ability of a single class of citizens to secure the protection of the laws in the absence of any justification for singling out of that class. *See Romer v. Evans*, 517 U.S. 620, 635 (1996) (invalidating Colorado law prohibiting municipalities and the state legislature from enacting sexuality-related antidiscrimination rules). More generally, there are striking parallels between the political logic of anti-gay referenda that proliferated in 2004 and that of State Question 755.

leverage against this dynamic. But when animus takes official form, as is increasingly the case, legal responses can be salvaged from current doctrine under the Religion Clauses. Over the past decades, the protections offered by those provisions of the First Amendment have withered, perhaps as controversies over the role of religion in national politics and society have sharpened. Yet even the emaciated Religion Clauses, which promise only a weak kind of neutrality, provide some tools to vindicate both core rights and security values in the current context. Consequently, the great challenge in coming years will not be in crafting novel responses to staunch animus. Rather, the large question is whether there exists the necessary political will to motivate the Justice Department and, as importantly, the federal bench to act against the dynamic anti-security effects of discrimination.

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