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IN BAD FAITH: ANTI-SHARIA LAWS, THE CONSTITUTION, AND THE LIMITS OF RELIGIOUS FREEDOM

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INTRODUCTION

In March 2011, during his failed presidential campaign, Newt Gingrich said, referencing the world his granddaughters would inherit:

I am convinced that if we do not decisively win the struggle over the nature of America, by the time they're my age they will be in a secular atheist country, potentially one dominated by radical Islamists and with no understanding of what it once meant to be an American.¹

For Gingrich, the fear of an increasingly secular society encompasses Muslim domination. His quote combines themes that continue to reverberate in politics and law: religion, secularism, Islam, and 'real' America. This Article analyzes the genesis, text, and implementation of anti-sharia laws to tackle how these forces struggle within themselves, and against each other.

Prejudicial language, exemplified by Gingrich's words, has real-world consequences. In 2012, a year after Gingrich's remarks, a woman in New York City pushed a man she believed to be Muslim into the path of an oncoming subway train.² In 2016, assaults against Muslims

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¹ Kendra Marr, *Newt Talks Faith at Texas Church*, POLITICO (March 27, 2011), <https://www.politico.com/story/2011/03/newt-talks-faith-at-texas-church-052023#ixzz1I1Exj7oT>.

² Marc Santora, *Woman is Charged with Murder as a Hate Crime in a Fatal Subway Push*, N.Y. TIMES (Dec. 29, 2012), <https://www.nytimes.com/2012/12/30/nyregion/woman-is-held-in-death-of-man-pushed-onto-subway-tracks-in-queens.html>. When asked why she committed this act, the woman said, "I pushed a Muslim off the train tracks because I hate Hindus and Muslims ever since 2001 when they put down the twin towers I've been beating them up." *Id.*

surpassed the previous spike in 2001 after the September 11th attacks.³ This trend builds on the 2015 Chapel Hill shooting of Razan and Yusor Mohammad Abu-Salha, murdered by a neighbor who disapproved of their faith.⁴ Beyond physical violence, the mainstreaming of dangerous stereotypes about Muslims undergirded President Trump's Executive Order 13769, more commonly known as the Muslim Ban.⁵ The text of the Executive Order states, "[t]he United States must ensure that those admitted to this country do not bear hostile attitudes towards it and its founding principles. The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law."⁶

Any long-term attempt to address the increase of Islamophobia, and particularly its manifestation in anti-sharia laws, must begin with an examination of the foundational biases that give rise to hateful and prejudicial acts. With this larger goal in mind, this Article investigates the nexus of religious liberty, Islam, and Americanism to further explore how stereotypes about Muslim Americans and Islam are conceived and maintained by flawed conceptions of religion and perverted tactics of constitutional interpretation.

Although religious liberty is enshrined in the First Amendment of the Constitution, the precise definition of what counts as religion remains unsettled.⁷ In the absence of clear definitions, interpretive methods do the work of delineating the borders between religion and

³ Katayoun Kishi, *Assaults Against Muslims in U.S. Surpass 2001 Level*, PEW RSCH. CTR. (Nov. 15, 2017), <https://www.pewresearch.org/fact-tank/2017/11/15/assaults-against-muslims-in-u-s-surpass-2001-level/>.

⁴ Jonathan M. Katz, *In Chapel Hill, Suspect's Rage Went Beyond a Parking Dispute*, N.Y. TIMES (March 3, 2015), <https://www.nytimes.com/2015/03/04/us/chapel-hill-muslim-student-shootings-north-carolina.html>.

⁵ Vahid Niayesh, *Trump's Travel Ban Really Was a Muslim Ban, Data Suggests*, WASH. POST (Sept. 26, 2019), <https://www.washingtonpost.com/politics/2019/09/26/trumps-muslim-ban-really-was-muslim-ban-thats-what-data-suggest/>. See also *Trump v. Hawaii*, 138 S.Ct. 2392, 2423 (2018) (affirming the ban and stating that "under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review. We express no view on the soundness of the policy. We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim.").

⁶ Exec. Order No. 13769, 82 Fed. Reg 8977 (Jan. 27, 2017).

⁷ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."). Indeed, courts have never defined religion since "[m]en may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others." *United States v. Ballard*, 322 U.S. 78, 86 (1944). Instead, when faced with Religious Clause claims, courts focus on the sincerity, rather than the substance, of the religious belief. For example, in conscientious objector cases, the court has held that its task "is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious." *United States v. Seeger*, 380 U.S. 163, 185 (1965).

secularism. Popular constitutionalism, which understands the Constitution as a living document ripe for interpretation by new and diverse communities, is one such interpretive method.⁸ Although assumed to be progressive, dynamic, and inclusive, popular constitutionalism has so far failed to define secularism and religion in ways that protect all religious communities. In fact, popular constitutionalism has been most successfully wielded as a tool by social movements advocating for anti-sharia laws that purposely strip Islam of its religious components.

Part I examines popular constitutionalism, the role of social movements, and the undefined terrain of religion and secularism. After an analysis of traditional popular constitutionalism, this Part includes anecdotes of the Tea Party and the Second Amendment movement as examples of conservative social movements that have used popular constitutionalism towards non-progressive ends. Then, it introduces secularism and religion as contested spaces into which popular constitutionalist actors have an opportunity to offer clarity. Part I will end with a brief discussion of the history of anti-Muslim sentiment in America.⁹ This history impacts both the public receptiveness to anti-sharia laws and grounds contemporary anti-Muslim biases.

Similar to the Christian Ten Commandments or Jewish Talmudic Law, sharia is a religious code with which Muslims try to live in congruence.¹⁰ Yet, anti-Muslim promoters use popular constitutionalism to pass anti-sharia laws and thus institutionalize their belief that Islam is not protected religion. Part II analyzes the different types of proposed anti-sharia laws, and then examines how anti-Muslim social movements entrench their belief that Islam is an anti-American political doctrine lacking religious components.¹¹

⁸ Ari Shapiro, *Conservatives Have 'Originalism'; Liberals Have...?*, NAT'L PUB. RADIO (June 23, 2009, 10:00 AM ET), <https://www.npr.org/templates/story/story.php?storyId=105439966>.

⁹ See *infra* Part I.

¹⁰ Sharia is a branch of Islamic law. It is not practiced uniformly throughout the Muslim world as there are many different schools of interpretation, including Hanafi, Malifi, Shafi'i, Hanbali, and Ithna Ashari. Carlo A. Pedrioli, *Constructing the Other: U.S. Muslims, Anti-Sharia Law, and the Constitutional Consequences of Volatile Intercultural Rhetoric*, 22 S. CAL. INTERDISC. L.J. 65, 66 (2012). Sharia is primarily concerned with the observance of the five pillars of Islam (belief in God, prayer, fasting, hajj, and charity), derived from the Quran and the hadiths. Ross Johnson, *A Monolithic Threat: The Anti-Sharia Movement and America's Counter-Subversive Tradition*, 19 WASH. & LEE J. CIV. RTS. & SOC. JUST. 183, 187 (2012). Sharia may be best be understood as guidance on how to live in correspondence with God and literally means "the clear, well-trodden path to water." Bridge Initiative Team, *Factsheet: Sharia*, GEORGETOWN BRIDGE INITIATIVE (Dec. 5, 2018), <https://bridge.georgetown.edu/research/factsheet-sharia/>.

¹¹ See *infra* Part II.

To challenge both anti-sharia laws and the prejudices on which they rely, Part III recommends that Muslim rights and anti-discrimination activists use the Fourteenth Amendment Equal Protection Clause.¹² In particular, this Part examines how civil rights activists could mirror the work of gender and sex equality activists, who successfully argued that laws discriminating on the basis of gender unconstitutionally entrenched harmful and outdated stereotypes.

I. THEORETICAL BACKGROUND

Sections I.A and I.B briefly discuss traditional conceptions of popular constitutionalism and the role social movements play in the meaning-making process.¹³ Section I.C then explores how the assumed progressive tactic of popular constitutionalism can actually be used towards regressive ends, illuminated by the examples of the Tea Party and the Second Amendment movement.¹⁴ Section I.D demonstrates how, absent coherent definitions, secularism and religion are ripe for interpretation by both judicial and non-judicial actors.¹⁵ This Section includes a discussion of historic perspectives on Islam in America to illuminate how the boundaries of what qualifies as protected religion have long been policed. All throughout, this Section emphasizes that an understanding of popular constitutionalism, particularly its historical usage and theoretical background, is necessary to appreciate how the interpretive mechanism is being used as a strategic framing tool by anti-Muslim actors to fill the void left by undefined religion.¹⁶

A. *Traditional Conceptions of Popular Constitutionalism*

“The Supreme Court is not the highest authority in the land on constitutional law. We are.”¹⁷

¹² See *infra* Part III.

¹³ See *infra* Sections I.A & I.B.

¹⁴ See *infra* Section I.C.

¹⁵ See *infra* Section I.D.

¹⁶ It is important to remember that tactics like popular constitutionalism are ideologically neutral. Popular constitutionalism used by counterbalancing social movements could be a solution to the proliferation of anti-sharia laws, but just the presence of popular constitutionalism alone does nothing to move the needle in either a progressive or regressive direction. Social movements, as discussed in this section, are the mediating actors that, in applying the popular constitutionalist frame to their agenda, imbue it with ideology and power.

¹⁷ LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 248 (2004).

Modern popular constitutionalism demands that the American people play a crucial role in interpreting the Constitution, including constitutional rights like religious liberty.¹⁸ For many scholars, the United States Constitution was itself an act of popular constitutionalism in its prioritization of the will of the people over colonial government officials.¹⁹ Invoking this original revolutionary action, and resonant with a desire for a powerful and engaged body politic, popular constitutionalism gives the people the final interpretive authority on constitutional issues.²⁰

As the political community expands, historically marginalized communities are welcomed to offer their interpretations of constitutional provisions which can change public understanding and influence judges.²¹ Popular constitutionalists believe that it is “normatively desirable” for the people, an expanding and diversifying group, to engage in constitutional interpretation.²² The courts should consider, and sometimes defer to, the legitimate claims of the people and their elected representatives on constitutional issues.²³

Historically, progressive movements have prized popular constitutionalism. Prior to the First World War, progressives endeavored to rethink the Constitution and the law.²⁴ Along with ambitions to up-end their contemporary administrative and regulatory state, these progressives dreamt of solidifying norms of democratic

¹⁸ *Id.* at 524.

¹⁹ Larry D. Kramer, *Popular Constitutionalism Circa 2004*, 92 CAL. L. REV. 959, 962 (2004).

²⁰ Tom Donnelly, *Make Popular Constitutionalism Work*, 2012 WIS. L. REV. 159, 168 (2012). Popular constitutionalism brings citizens into the political and constitutional discussion to promote civic competence, citizen activism, and electoral responsiveness. *Id.* at 185.

²¹ The expansion of voting rights during the nineteenth and twentieth century changed the complexion of the American body politic. The Fifteenth Amendment, ratified in 1870, enfranchised African American men. However, they were not able to fully fulfill these rights until the 1964 Twenty-Fourth Amendment eliminated poll taxes. Additionally, the Nineteenth Amendment, ratified in 1920, enfranchised American women, and the Twenty-Sixth Amendment, ratified in 1971, lowered the voting age for all elections to eighteen. See U.S. CONST. amends. XV, XIX, XXIV, & XXVI.

²² Rebecca E. Zietlow, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 64 FLA. L. REV. 483, 498 (2012).

²³ Christopher W. Schmidt, *Popular Constitutionalism on the Right: Lessons from the Tea Party*, 88 DENV. U. L. REV. 523, 523 (2011). Accordingly, advocates for popular constitutionalism have attacked the Supreme Court’s efforts to anoint itself as the preeminent and exclusive constitutional interpreter.

²⁴ William E. Forbath, *Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule*, 81 CHI.-KENT L. REV. 967, 975-76 (2006). See Kramer, *Popular Constitutionalism Circa 2004*, *supra* note 19.

accountability and constitutional interpretation.²⁵ Against a conservative *Lochner*-era Supreme Court, progressives used popular constitutionalism to advocate for an expanded and improved vision of government power that protected the civil rights of the working class and the poor.²⁶ Invoking the Constitution's preamble to justify their arguments for dynamic and inclusive judicial interpretation, they argued that the establishment of a more perfect union was an iterative process.²⁷ Progressives used popular constitutionalism to reimagine the document as an oppositional force to the nine unelected Supreme Court justices.²⁸ Finally, scholars who advocate for popular constitutionalism tend to be liberal, thereby strengthening the assumption that the interpretive method is inherently progressive.²⁹

Yet, assuming that popular constitutionalism has a progressive ideological affiliation ignores the significant history of conservative popular constitutionalism.³⁰ Scholars, like Rebecca Zietlow, Christopher Schmidt, and William Forbath argue that popular constitutionalism is a process, absent ideological commitments.³¹ In fact, invocations of popular constitutionalism require only a constitutional claim and the belief that the people, however delineated, deserve a seat at the table.³² Social movements are often the vehicles through which these seats are claimed.

B. *The Role of Social Movements*

“To borrow a phrase from T.S. Eliot, social movements are important because they dare to disturb the universe.”³³

²⁵ Forbath, *supra* note 24, at 976. As Forbath puts it, these progressives desired “to create a modern democracy that was more, not less, rooted in popular participation and decision-making, more, not less, open to initiative and change from below, one that was deliberative in a more popular and plebian fashion than liberal constitutionalists today generally think possible.” *Id.*

²⁶ See Jack M. Balkin, “*Wrong the Day it was Decided*”: *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 720 (2005).

²⁷ Schmidt, *supra* note 23, at 552; U.S. CONST. pmbl. (“We the People of the United States, in Order to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution.”).

²⁸ Schmidt, *supra* note 23, at 546.

²⁹ Zietlow, *supra* note 22, at 496.

³⁰ See *id.*; Schmidt, *supra* note 23, at 552; Forbath, *supra* note 24, at 972.

³¹ See *infra* Section I.C.

³² Schmidt, *supra* note 23, at 523.

³³ Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 946 (2006). See T.S. Eliot, *The Love Song of J. Alfred Prufrock* (1917), reprinted in *THE COMPLETE POEMS AND PLAYS 1909-1950*, at 4-5 (Harcourt Brace Jovanovich, 1980) (“Do I dare / Disturb the universe?”).

Social movements are the primary organizational tools for popular constitutionalists.³⁴ In both grassroots and institutionalized forms, social movements give structure to constitutionalist ambitions and target them effectively towards political parties, electoral politics, litigation, advocacy, and even judicial appointments.³⁵ In doing so, they wrest power away from the Supreme Court and return it to the people.³⁶

Social movements influence constitutional interpretation through two related but independent verticals: altering public opinion and impacting party systems.³⁷ When it comes to changing public opinion, a social movement's success is constrained by the public's receptiveness to the new baseline.³⁸ Social movements are instrumental in bringing a topic into mainstream dialogue and socializing the public until the movement's perspective seems natural and obvious.³⁹ As Jack

³⁴ See *id.* at 928-29. Social movements differ in their levels of institutionalization and formalization. In the ideal grassroots social movement, group power is vested in the ability to turn out vocal, mass populations driven to direct action by a collectively held grievance. J. Craig Jenkins, *Resource Mobilization Theory and the Study of Social Movements*, 9 ANN. REV. OF SOCIO. 527, 539 (1983). Grassroots groups are distrustful of established politics and function as non-institutional checks on institutional power. PAUL PIERSON & THEDA SKOCPOL, *THE TRANSFORMATION OF AMERICAN POLITICS: ACTIVIST GOVERNMENT AND THE RISE OF CONSERVATISM* 50 (2007). At the other end of the spectrum, institutionalized social organizations function like professionalized lobby groups. Unlike grassroots social movements, in which individual local activists select group strategies like mass demonstrations, professional groups only call upon members to participate in highly structured and choreographed events. 36 PATRICK G. COY, *RESEARCH IN SOCIAL MOVEMENTS, CONFLICTS AND CHANGE* 5 (2013). Especially since movement elites make decisions and allocate resources, these movements usually have weak participatory inclinations. There are various permutations of group organization between these two ideal-types, and the social movement terrain is constantly evolving, with established institutions and actors responding to groups who correspondingly transform. Mario Diani & Paolo Donati, *Organisational Change in Western European Environmental Groups: A Framework for Analysis*, 8 ENV'T POL. 13, 17 (1999); Donatella Della Porta, *Research on Social Movements and Political Violence*, 31 QUALITATIVE SOCIO. 221, 222 (2008).

³⁵ Lee J. Strang, *Originalism as Popular Constitutionalism: Theoretical Possibilities and Practical Differences*, 87 NOTRE DAME L. REV. 253, 258 (2011).

³⁶ Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 193 (2008). In her examination of the *Heller* decision, Reva Siegel looks first at the social movement conflict that preceded the decision, remarking that: "The effort to persuade—and to capture institutions that can authoritatively pronounce law—can prompt mobilization, counter-mobilization, coalition, and compromise, a process that can forge and discipline new understandings that courts engaged in responsive interpretation recognize as the Constitution." *Id.*

³⁷ Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 30 (2005).

³⁸ See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1356 (2006).

³⁹ Balkin, *How Social Movements Change*, *supra* note 37, at 52.

Balkin and Reva Siegel write, to enact change, social movements “take advantage of broad-based social, economic, or technological changes that unsettle conventional understandings about the jurisdiction of constitutional principles in order to make new claims about the proper application of constitutional principles.”⁴⁰ In doing so, they often socialize originally radical opinions.⁴¹

Grassroots groups, which mythicize the superiority of the people over institutional actors, do the work of altering public opinion.⁴² Grassroots groups embody the promise of people-driven democracy that exists beyond and beneath institutions.⁴³ These groups emerge spontaneously and mobilize the masses in large demonstrations to hold politicians accountable.⁴⁴

However, even if a movement successfully changes public opinion through grassroots mobilization, its impact can arguably only be fully actualized if it becomes politically powerful, which requires links to institutional actors within the political system.⁴⁵ Because of the access that institutionalized social movements have to political elites, larger donor bases, and institutional channels, they are better positioned to impact political parties. In doing so, they reshape the constitutional common sense by injecting their claims into the legislative and judicial system.⁴⁶ For example, though the Women’s Movement successfully changed public opinion on women’s equality, it did not achieve its seminal goal of achieving Equal Rights Amendment (ERA) ratification

⁴⁰ Balkin & Siegel, *supra* note 33, at 929.

⁴¹ Balkin, “*Wrong the Day it was Decided*”, *supra* note 26, at 718.

⁴² Donnelly, *supra* note 20, at 166, 189; Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1640 (2005) (book review) (arguing that “constitutional interpretation by mob . . . is the logical stopping point of” popular constitutionalism); Kathleen Blee & Ashley Currier, *How Local Social Movement Groups Handle a Presidential Election*, 29 QUALITATIVE SOCIO. 261, 270 (2006). Because of the emphasis on popular interpretation, critics dismiss popular constitutionalism as a form of tyranny of the majority, emphasizing a fear that even the founders identified. Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1639-40.

⁴³ KATHLEEN BLEE, *DEMOCRACY IN THE MAKING: HOW ACTIVIST GROUPS FORM 3* (2012) (stating that “[d]emocracy is a process moved forward by the deliberate work that people do together”); Siegel, *Constitutional Culture*, *supra* note 38, at 1341 (describing democracy as a form of social organization that “values participant engagement in collective deliberation . . . [which] helps establish what things mean[,] . . . why they matter[, and] . . . who we are”).

⁴⁴ Pierson & Skocpol, *supra* note 34, at 50.

⁴⁵ Balkin, *How Social Movements Change*, *supra* note 37, at 30. It is important to note that there has been an increase in radical political movements with oppositional politics that reject any linkages or alliances with institutional actors. *See, e.g.*, Michael J. Jensen & Henrik P. Bang, *Occupy Wall Street: A New Political Form of Movement and Community?*, 10 J. INFO. TECH & POL. 444, 444 (2013).

⁴⁶ Balkin, “*Wrong the Day It Was Decided*,” *supra* note 26, at 719; Balkin, *How Social Movements Change*, *supra* note 37, at 52.

because of a lack of elite-level buy-in.⁴⁷ In sum, both grassroots and institutionalized social movements are integral to the popular constitutional project because of their ability to socialize the public and motivate political change.

C. *Not-So-Progressive Popular Constitutionalism*

“Originalism is not just jurisprudence; it is discourse and language.”⁴⁸

Conservative social movements can use popular constitutionalism to reframe constitutional tenets in furtherance of their agenda. Movements of this type often combine popular constitutionalism with originalism.⁴⁹ Originalism purports to avoid the problem of interpretive subjectivity by locating decisive power within the judiciary.⁵⁰ Originalists traditionally ignore the evolving constitutional landscape and claims by non-institutional actors.⁵¹ Instead, they draw their legal authority from a narrow focus on the constitutional text.⁵²

Conservative social movements often employ originalism as a useful rhetorical tool to connect contemporary and foundational constitutional claims, convincing people that they must safeguard “the

⁴⁷ See SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* 227-29 (3d ed. 2011).

⁴⁸ Siegel, *Constitutional Culture*, *supra* note 38, at 1347.

⁴⁹ Strang, *supra* note 35, at 254. Lee Strang presents the five axes that determine where and when popular constitutionalism and originalism converge in a phenomenon he calls “popular originalism:” (1) whether originalism embraces departmentalism in place of judicial interpretive supremacy, (2) whether originalism requires judicial deference to popular interpretive judgments, (3) the extent to which the Constitution’s original meaning permits the popular branches to engage in authoritative constitutional interpretation, (4) the extent to which the popular branches authoritatively construct constitutional meaning when the Constitution is underdetermined, and (5) whether originalism includes a place for non-originalist precedent. *Id.*

⁵⁰ Kramer, *Popular Constitutionalism Circa 2004*, *supra* note 19, at 962.

⁵¹ André LeDuc, *Originalism’s Claims and Their Implications*, 70 ARK. L. REV. 1007, 1099 (2018) (“Originalism does offer a robust constitutional promise to the conservative constitutional theorist because it promises a return from modernity If the originalists can resort to it as the touchstone of constitutional interpretation, they will construct a simpler, more conservative constitutional world.”).

⁵² Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism*, 53 ARIZ. L. REV. 827, 850 (2011); Kellen Funk, *Shall These Bones Live? Property, Pluralism, and the Constitution of Evangelical Reform*, 41(3) L. & SOC. INQUIRY 742, 757, 757 n.22 (2016) (“For instance, McConnell: ‘Taken to its logical conclusion,’ living constitutionalism turns the Constitution into ‘only a makeweight: what gives force to our conclusions is simply our beliefs about what is good, just, and efficient . . . it instructs us to disregard the Constitution whenever we disagree with it.’”).

constitutional convictions of Americans dead and living.”⁵³ Historically, John Calhoun and the southern segregationists invoked conservative popular constitutional rationale during the antebellum era, and contemporarily, the Tea Party and the Second Amendment movement demonstrate that the two theories can converge.⁵⁴ Although these groups employ a popular constitutionalist framing, they simultaneously reject key tenets of classic popular constitutionalism, including the desired inclusion of an expanding American political community.⁵⁵

i. The Tea Party

The Tea Party emerged as a referendum on President Obama and the Democratic Party’s policy of government bailouts and large-scale market intervention during the 2008 Great Recession.⁵⁶ In the face of perceived government over-regulation, the Tea Party argued for small, state-centered politics, advocating for the repeal of the Seventeenth Amendment and encouraging states to pass “sovereignty resolutions.”⁵⁷ The Tea Party used popular constitutionalism to inject its particular, narrow reading of the Constitution into the mainstream through educational outreach, state-level constitutional mobilization, and

⁵³ Siegel, *Dead or Alive*, *supra* note 36, at 246. According to Jack Balkin, the use of the Constitution by these types of actors is “of-a-piece living constitutionalism.” These groups center their claims around the Constitution, but tactically use popular constitutionalist approaches to articulate those claims. Strang, *supra* note 35, at 261 (citing Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 601 (2009)).

⁵⁴ Zietlow, *supra* note 22, at 496-97. Similarly, John Compton, in his book *The Evangelical Origins of the Living Constitution*, discusses how the nineteenth century evangelical movement successfully re-interpreted the Commerce Clause, using popular constitutionalist arguments to expand the clause to encompass what they wanted. Through this example, he argues that living, and popular, constitutionalism was not a product of progressive, academic elites, but of populist evangelicals who took advantage of popular constitutionalism’s invitation for other voices to weigh in on constitutional meaning. JOHN W. COMPTON, *THE EVANGELICAL ORIGINS OF THE LIVING CONSTITUTION* 14, 177-180 (2014). *See also* Funk, *supra* note 52, at 756, 761

⁵⁵ Zietlow, *supra* note 22, at 507-08.

⁵⁶ Christine Trost & Lawrence Rosenthal, *Introduction to STEEP: THE PRECIPITOUS RISE OF THE TEA PARTY* 8, 10, 18 (Lawrence Rosenthal & Christine Trost eds., 2012). On February 19, 2009, Rick Santelli, a CNBC on-air editor, provided the rallying cry that stimulated large-scale Tea Party organizing, ranting, “President Obama, are you listening? . . . It’s time for another tea party.” *Id.*

⁵⁷ Schmidt, *supra* note 23, at 539 (explaining that “sovereignty resolutions” are “statements asserting a commitment to the principle of state sovereignty as recognized in the Tenth Amendment”); Ilya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 NW. U. L. REV. COLLOQUY 300, 306 (2011) (discussing how the abolishment of the Seventeenth Amendment would eliminate “the requirement that senators be popularly elected”). The Tea Party would like state legislators to select senators. *Id.* at 307.

national politics.⁵⁸ According to the Tea Party's worldview, citizens have a responsibility to read the Constitution, determine its meaning, and demand that public officials act compatibly.⁵⁹ Initially, Tea Partiers used local, grassroots activism to pressure GOP officeholders.⁶⁰ These mass mobilization efforts catapulted Tea Party issues to national relevance.⁶¹ In the 2010-midterm elections, the Tea Party successfully helped elect dozens of legislators in a coalition that has since metastasized into the Freedom Caucus, an enduring and powerful radical-right wing of the Republican Party.⁶²

Like progressive popular constitutionalist movements, the Tea Party challenged the constitutional status quo through mobilization and public interpretation.⁶³ It also recognized the usefulness of connecting with institutional actors, like the Republican party.⁶⁴ Yet, the Tea Party's constitutional vision constrained popular democracy by limiting which constitutional claims were deemed "legitimate" and who could articulate said claims.⁶⁵ In the Tea Party's rhetoric, the overwhelmingly older, whiter, and evangelical people had been shut out of politics by corrupt, foreign-influenced politicians.⁶⁶ According to Jared Goldstein, in employing the Constitution to advocate for small government, the Tea Party used originalism simply as the chosen rhetoric to "effectuate their brand of popular constitutionalism."⁶⁷ The popular constitutional component, drawing interpretive power from the people, is paradoxically combined with an exclusionary interpretation of the text.⁶⁸

ii. *Heller and the Second Amendment Movement*

The pro-gun movement, spearheaded by the National Rifle Association, also used popular constitutionalist tactics to restructure the

⁵⁸ Schmidt, *supra* note 23, at 537.

⁵⁹ *Id.* at 533-34, 538.

⁶⁰ Vanessa Williamson, Theda Skocpol & John Coggin, *The Tea Party and the Remaking of Republican Conservatism*, 9 *PERSP. ON POL.* 25, 28 (2011).

⁶¹ *Id.* at 26.

⁶² See Trost & Rosenthal, *supra* note 56, at 13.

⁶³ Chip Berlet, *Reframing Populist Resentments in the Tea Party Movement*, in *STEEP*, *supra* note 56, at 49.

⁶⁴ Williamson et al., *supra* note 60, at 28-30.

⁶⁵ See Berlet, *supra* note 63, at 58.

⁶⁶ Goldstein, *supra* note 52, at 847-48; Williamson et al., *supra* note 60, at 27.

⁶⁷ Goldstein, *supra* note 52, at 856.

⁶⁸ *Id.* at 850.

terms of the gun control argument and empower ordinary citizens.⁶⁹ Through social movement action, gun rights advocates successfully attached their interpretation of the Second Amendment to the plain constitutional text, so much so that many Americans believe the Constitution explicitly provides for the unlimited and unregulated possession of firearms.⁷⁰

Beyond impacting public opinion and political parties, pro-gun social movements also influenced judicial interpretation of the Second Amendment. Reva Siegel argues that in *District of Columbia v. Heller*, the Supreme Court interpreted the Second Amendment through a popular constitutionalist lens.⁷¹ The *Heller* majority, written by the Court's conservative originalists, utilized understandings of the Second Amendment formed by late-twentieth century social movement activity.⁷² Second Amendment social movements used language like "law and order," and framed their mission as a "restoration" of constitutional language.⁷³ Their re-definition of constitutional text was so effective that Siegel wonders whether Justice Scalia, who wrote the opinion, understood that his words actively took sides in the culture war.⁷⁴

D. *The Contested Terms of Secularism and Religion*

"What counts as religious or secular in any given context is a function of different configurations of power."⁷⁵

⁶⁹ Siegel, *Dead or Alive*, *supra* note 36, 226, 243 (explaining that the movement was organized around "how political claims on the Second Amendment would be asserted: as an outgrowth of a republican tradition that understood the militia as defense against government tyranny, or as . . . concerned with the individual's right to defend himself and his family from crime."); A *Brief History of the NRA*, NAT'L RIFLE ASS'N, <https://home.nra.org/about-the-nra/> (last visited Oct. 22, 2021).

⁷⁰ Siegel, *Dead or Alive*, *supra* note 36, at 239.

⁷¹ *Id.* at 192. See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁷² Siegel, *Dead or Alive*, *supra* note 36, at 192.

⁷³ *Id.* at 220, 222-23, 236.

⁷⁴ *Id.* at 238 (explaining how Scalia views the gun rights movement, and his ruling in support of it, as rescuing the Founders' Constitution from the politics of the culture war when, in fact, he was agreeing with a very modern interpretation of the Second Amendment, popularized by twentieth century social movements).

⁷⁵ WILLIAM T. CAVANAUGH, *THE MYTH OF RELIGIOUS VIOLENCE: SECULAR IDEOLOGY AND THE ROOTS OF MODERN CONFLICT* 4 (2009).

Religious freedom, including secularism and toleration, is a unique American achievement.⁷⁶ Nonetheless, secularism and religious freedom are not fixed concepts.⁷⁷ In *Warner v. Boca Raton*, Judge Ryskamp unhelpfully articulated a circular definition of religion, saying that the religion that counts legally as religion “reflects some tenet, practice, or custom of a larger system of religious beliefs.”⁷⁸ The process of defining religion is difficult and highly subjective, built on social context, political pressure, and bias.⁷⁹

Courts have the interpretive power to legally define what does and does not count as protected religious activity.⁸⁰ Fluctuations in public opinion influence judicial notions of religious freedom and impact court decisions.⁸¹ Thus, the secular legal regime does not unilaterally prohibit religion from having a public life, but rather offers

⁷⁶ WINNIFRED F. SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM 1* (1st ed. 2005) (stating that “Americans who may be able to agree on little else agree that religious freedom is one of the shining achievements of the United States . . .”).

⁷⁷ S.N. Balagangadhara, *On the Dark Side of the “Secular”: Is the Religious-Secular Distinction a Binary?*, 61 *NUMEN* 33, 34 (2014) (“In different historical and political contexts, the meaning of the terms ‘religious’ and ‘secular’ has changed and the borders of the religious-secular dichotomy have shifted.”).

⁷⁸ *Warner v. City of Boca Raton*, 64 F. Supp. 2d 1272, 1282 (S.D. Fla. 1999), *aff’d*, 420 F.3d 1308 (11th Cir. 2005). Sullivan describes how Judge Ryskamp encompasses the American double consciousness of separatism and Christian evangelism, one example of the overlap between secularism and fervent Christianity. Judge Ryskamp’s dual position also demonstrate the compatibility between secularism and Christianity, further giving credence to the conclusion that secularism as understood today includes some fundamentally Christian framework. SULLIVAN, *supra* note 76, at 6, 147.

⁷⁹ SULLIVAN, *supra* note 76, at 1.

⁸⁰ *Id.* at 27; Bryan K. Fair, *The Excessive Entanglement of Politics, Law and Religion*, 26 *J.L. & RELIGION* 371, 374 (2010) (reviewing SULLIVAN, *supra* note 76). Courts must refrain from stumbling into a “theological thicket” or resolving disputes on the basis of religious doctrine and practice. See *Nouri v. Dadgar*, 226 A.3d 797, 809 (Md. Ct. Spec. App. 2020). However, some scholars, like Jonathan Weiss, argue that “any definition of religion would seem to violate religious freedom in that it would dictate to religions, present and future, what they must be Furthermore, an attempt to define religion . . . would run afoul of the ‘establishment’ clause” Jonathan Weiss, *Privilege, Posture and Protection: ‘Religion’ in the Laws*, 73 *YALE L.J.* 593, 604 (1964). Others argue that any definition or concept of religion must “account for the multiplying forms of recognizably legitimate religious exercise.” LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1180 (2d ed. 1988). Either way, although religion remains legally undefined, courts have increasingly interpreted religious protection in ways that predominately safeguard mainstream Christian plaintiffs. For more work on the evolution of the religious protection doctrine under the Roberts Court, see generally Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, *SUP. CT. REV.* (forthcoming 2021), <https://ssrn.com/abstract=3825759>.

⁸¹ Nelson Tebbe, *The End of Religious Freedom: What is at Stake?*, 41 *PEPP. L. REV.* 963, 981 (2014).

this opportunity only to those religions perceived by the public, and by judges, as acceptable.⁸²

The American story of religious freedom begins with the Puritans seeking refuge from religious persecution.⁸³ During the revolutionary years, the Virginia Declaration of Rights of 1776 codified religious freedom: “all men are equally entitled to the free exercise of religion, according to the dictates of conscience.”⁸⁴ In 1821, Thomas Jefferson, expanded on this proclamation, saying that religious liberty was “meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo [sic] and Infidel of every denomination.”⁸⁵ This mandate echoed John Adams’ 1797 insistence that “the government of the United States of America is not in any sense founded on the Christian Religion.”⁸⁶

The essential non-discriminatory element of religious freedom is embodied in the Free Exercise Clause.⁸⁷ The Supreme Court, in *Larson v. Valente*, reaffirmed the necessity of non-discrimination, ruling that religious freedom that applies to some faiths more than others is not truly religious freedom.⁸⁸ Finally, in *West Virginia State Board of Education v. Barnette*, the Court ruled that religious freedoms are not just reserved for unimportant matters.⁸⁹

American religious freedom hinges on a separation between church and state.⁹⁰ The Establishment Clause prohibits the government

⁸² PETER COVIELLO, *MAKE YOURSELVES GODS: MORMONS AND THE UNFINISHED BUSINESS OF AMERICAN SECULARISM* 29 (2019). As Charles Taylor writes, “secularism as a form of mutated religion — secularism does not cancel religion, but redefines and redistributes it.” CHARLES TAYLOR, *A SECULAR AGE* 15 (2007).

⁸³ Kenneth C. Davis, *America’s True History of Religious Tolerance*, SMITHSONIAN MAG. (Oct. 2010), <https://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/>.

⁸⁴ VIRGINIA DECLARATION OF RIGHTS OF 1776, art. XVI; Thomas C. Berg, *Religious Freedom and Nondiscrimination*, 50(1) LOY. U. CHI. L.J. 181, 181(2018).

⁸⁵ James A. Sonne, *Domestic Applications of Sharia and the Exercise of Ordered Liberty*, 45 SETON HALL L. REV. 717, 752 (2015) (quoting THOMAS JEFFERSON, *AUTOBIOGRAPHY OF THOMAS JEFFERSON* (1821), reprinted in *WRITINGS OF THOMAS JEFFERSON* 66-67 (A. Lipscomb et al. eds., 1903)).

⁸⁶ Treaty of Peace and Friendship, U.S.-Tripoli, Nov. 4, 1796, art. XI, 8 Stat. 154.

⁸⁷ JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* (1785), reprinted in *THE PAPERS OF JAMES MADISON* 8 (Robert A. Rutland et al. eds., 1973).

⁸⁸ *Larson v. Valente*, 456 U.S. 228, 245 (1982); Berg, *supra* note 84, at 182.

⁸⁹ *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch of the existing order.”)

⁹⁰ Steven D. Smith, *The Last Chapter?*, 41 PEPP. L. REV. 903, 906 (2013). The first use of the phrase “separation between church and state” is believed to have been by Thomas Jefferson in his letter to the Danbury Baptists Association. Letter from Thomas Jefferson to Messrs.

from either establishing religion or prohibiting the freedom of religious worship, and the Free Exercise Clause grants every person the freedom to practice any religious principle or teach any religious doctrine.⁹¹ Both of these clauses reflect the belief that faith is a sacred practice between an individual and his or her God.⁹² The achievement of religious freedom is also impossible without toleration.⁹³

Yet, scholars like Winifred Sullivan, S.N. Balagangadhara, and Nelson Tebbe have grappled with the slippery nature of “religious” and “secular” and the myth of religious freedom.⁹⁴ In particular, secularism remains inseparable from Christianity as it is traditionally defined as the rational “enlightened” man’s response to religious monarchy.⁹⁵ For example, early nineteenth century religious revivalists celebrated the Declaration of Independence as an inspirational moment of divine Christian progress.⁹⁶ To evangelical Americans, both past and present, “[t]he self-evident, secular truths of the Declaration of Independence [are] the truths of revealed religion.”⁹⁷

During the Second Great Awakening, revivalist preachers “recast the nation’s origins as avowedly Christian.”⁹⁸ The nation’s

Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a committee of the Danbury Baptist Association in the state of Connecticut (Jan. 1, 1802) (on file with Library of Congress). In this letter, Thomas Jefferson reinstated that religion is a matter between the individual and God, and that everyone must respect the “supreme will of the nation in behalf of the rights of conscience” *Id.* See also *Reynolds v. United States*, 98 U.S. 145, 163 (1878); *Everson v. Board of Ed. of Ewing Tp.*, 330 U.S. 1, 18 (1947).

⁹¹ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”). See also Herbert Wright, *Religious Liberty Under the Constitution of the United States*, 27 VA. L. REV. 75, 79 (1940).

⁹² See Steven J. Heyman, *The Light of Nature: John Locke, Natural Rights, and the Origins of American Religious Liberty*, 101 MARQ. L. REV. 705, 769 (2018). Judge Story, in his work on the Constitution, exemplified this belief by saying “[t]he rights of conscience are, indeed, beyond the reach of any human power. They are given by God and can not be encroached upon by human authority.” 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 700 (5th ed. 1891).

⁹³ J. Judd Owen, *Locke’s Case for Religious Toleration: Its Neglected Foundation in the Essay Concerning Human Understanding*, 69 J. OF POL. 156, 157 (2007) (describing how “[i]t is wrong to impose one’s religion on others because no one truly knows which (if any) . . . religion is the true one. The ultimate truth is unknowable.”).

⁹⁴ SULLIVAN, *supra* note 76, at 1, 139 (arguing that religious liberty is impossible because religion is defined too narrowly); Fair, *supra* note 80, at 372 (“It is difficult to locate any organizing principle within the law of religious liberty.”); Balagangadhara, *supra* note 77, at 34 (“In different historical and political contexts, the meaning of the terms ‘religious’ and ‘secular’ has changed and the borders of the religious-secular dichotomy have shifted.”).

⁹⁵ John R. Bowen, *Secularism: Conceptual Genealogy or Political Dilemma?*, 52 COMP. STUD. SOC’Y & HIST. 680, 681 (2010).

⁹⁶ JILL LEPORE, THESE TRUTHS: A HISTORY OF THE UNITED STATES 199 (2018).

⁹⁷ *Id.*

⁹⁸ *Id.* at 201.

secular founding, therefore, was secular insofar as it reflected Christian principles. Notions of liberty, religious freedom, and toleration were understood as applied to Christian denominations in a nation founded on Christian faith. The reimagining of religion by Second Great Awakening revivalists was a popular constitutionalist exercise before the judicial interpretive moniker even existed, as these preachers and their communities proliferated their own historiography of the United States. Current understanding of what was foundational has been colored by these activities, making it even more difficult to combat stereotypes and biases in today's religious doctrine.⁹⁹

Thus, secularism is not the absence of Christianity from politics, but actually another form of its propagation.¹⁰⁰ Gil Anidjar writes that "secularism is a name Christianity gave itself when it invented religion, when it named its other or others as religions."¹⁰¹ To put it even more bluntly: "[S]ecularism is Christianity."¹⁰²

i. Historical Anti-Muslim Sentiment and Islamophobia

Since religion is a contested category, the law, both judicial and statutory, acts as a gatekeeper, determining what counts as religion and which groups enjoy full protections.¹⁰³ In America, although membership in the national community has expanded, whiteness and Christianity remain stubborn pseudo-requirements.¹⁰⁴ For example, Native Americans, failing both of these criteria, were deemed "foreign," and excluded from the American national community and protection under the law.¹⁰⁵ Since whiteness has remained tethered to

⁹⁹ *Id.*

¹⁰⁰ See Christine M. Jacobsen, Mayanthi Fernando, & Janet Jakobsen, *Gender, Sex, and Religious Freedom in the Context of Secular Law*, 113 FEMINIST REV. 93, 99 (2016). Janet Jakobsen asserts that American religious freedom is "the freedom to act like Protestants." *Id.*

¹⁰¹ Gil Anidjar, *Secularism*, 33 CRITICAL INQUIRY 52, 62 (2006); COVIELLO, *supra* note 82, at 43.

¹⁰² Anidjar, *supra* note 101, at 62; COVIELLO, *supra* note 82, at 249.

¹⁰³ See SULLIVAN, *supra* note 76, at 1.

¹⁰⁴ Nagwa Ibrahim, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. ISLAMIC & NEAR E.L. 121, 127 (2008).

¹⁰⁵ *Id.* at 128; *Johnson v. M'Intosh*, 21 U.S. 543, 59 (1823) ("So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others.").

Christianity,¹⁰⁶ Islam has long been positioned as a foreign menace.¹⁰⁷ Fearing the spread of the “inferior” religion, the Spanish halted the importation of Muslim slaves to the Americas between the sixteenth and eighteenth centuries.¹⁰⁸ After the European powers left, their orientalist legacy remained, reflected in the racial requirements for American citizenship.¹⁰⁹

In the nation’s nascent years, the law also defined the national community as white and Christian. In *People v. Ruggles*, in which a man was convicted for blaspheming Jesus, presiding Justice Kent distinguished between Muslims and Christians.¹¹⁰ He called Islam a religion of imposters foreign to national policy.¹¹¹ From his words, it is clear he viewed the American people as Christians and the national community as Christian.¹¹² Thus, the state had to protect against those who disturbed “the good order” by threatening Christian dominance.¹¹³ The Justice’s words are not surprising when read in context with the Naturalization Act of 1790, which limited naturalization to “whites.”¹¹⁴ Subsequent cases demonstrated that, for the purposes of the Act,

¹⁰⁶ Although whiteness is an “ever-morphing social category” that is “continually constructed,” for many, it remains synonymous with “Western” civilization (broadly and stereotypically defined). Matthew W. Hughey, *Hegemonic Whiteness: From Structure and Agency to Identity Allegiance*, in *THE CONSTRUCTION OF WHITENESS: AN INTERDISCIPLINARY ANALYSIS OF RACE FORMATION AND THE MEANING OF A WHITE IDENTITY* 212-33 (Stephen Middleton et al. eds., 2016). See also David Perry & Matthew Gabriele, *Steve King Says He Was Just Defending ‘Western Civilization.’ That’s Racist, Too*, WASH. POST (Jan. 15, 2019), <https://www.washingtonpost.com/outlook/2019/01/15/steve-king-says-he-was-just-defending-western-civilization-thats-racist-too/>.

¹⁰⁷ Ibrahim, *supra* note 104, at 126.

¹⁰⁸ *Id.* at 130.

¹⁰⁹ *Id.* at 131. Edward Said coined the term “orientalist” to describe how the West, or the “Occident,” perceives itself as superior to the uncivilized “Orient,” the distant land of Muslims and Arabs. See EDWARD W. SAID, *ORIENTALISM* 12 (Routledge & Kegan Paul Ltd. 1978). Said’s theory about orientalism continues to permeate political society and culture today. Adam Shatz, *‘Orientalism.’ Then and Now*, New York Review (May 20, 2019), <https://www.nybooks.com/daily/2019/05/20/orientalism-then-and-now/>. Most notably, Samuel P. Huntington uses the same premises of diametrically opposed civilizational monoliths, where the distant “Orient” is an existential threat, and inherently incompatible, with the superior, advanced Western culture. See Samuel P. Huntington, *The Clash of Civilizations*, 72(3) *Foreign Affairs* 22, 31-33 (1993).

¹¹⁰ 8 Johns. 290, 292-95 (N.Y. Sup. Ct. 1811).

¹¹¹ *Id.* at 295.

¹¹² *Id.* at 294 (“The people of this State, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice . . .”).

¹¹³ *Id.*; Ibrahim, *supra* note 104, at 132.

¹¹⁴ Ibrahim, *supra* note 104, at 133; Khaled A. Beydoun, “*Muslim Bans*” and the Re(making) of *Political Islamophobia*, 5 U. ILL. L. REV. 1733, 1741 (2017) (quoting The Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795) (“That any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States . . .”).

whether a person was Muslim was a determining factor in the assessment of whiteness.¹¹⁵ Additionally, in 1957, the Supreme Court, quoting from John Quincy Adams' writings, articulated that the Christian view of the state of nature is "a state of peace" versus "Mahometan law of nations . . . considered the state of nature as a state of war."¹¹⁶

September 11, 2001 (9/11) and the Ground Zero Mosque controversy reanimated historic American conceptions of Muslim "foreignness."¹¹⁷ 9/11 made Muslim identity salient and visible in ways it had not been previously.¹¹⁸ In large part because of the quick organizing efforts of entrepreneurial anti-Muslim promoters, prejudiced caricatures of Muslims—regardless and uncaring of their citizenship status—as foreign and violent vaulted into the mainstream.¹¹⁹ The fear of international terrorism further bolstered suspicions of American Muslims.¹²⁰

Faced with this perceived foreign threat, legislators invoked the Constitution.¹²¹ In 2004, both houses of Congress considered versions of the Constitution Restoration Act.¹²² Although the Act failed, it would have acknowledged God as the source of authority in America's legal system, as well as permitted the impeachment of federal judges who cited foreign or international law.¹²³ Anti-Muslim promoters like

¹¹⁵ See, e.g., *George Shishim v. United States* (LA Super. Ct. 1909); *Ex parte Shahid*, 205 F. 812, 812-13 (E.D. Ct. S.C. 1913); *United States v. Cartozian*, 6 F.2d 919, 924-25 (Dist. Ct. Or. 1925). Those applying for citizenship had the burden of proving their "white" characteristics to distinguish themselves as Christians versus "Mohammedan." *In re Ahmed Hassan*, 48 F. Supp. 843, 844-45 (S.D. Ct. Mich. 1942). See also Beydoun, *supra* note 114, at 1742.

¹¹⁶ *Reid v. Covert*, 354 U.S. 1, 58 n.8 (1957).

¹¹⁷ Saeed A. Khan, *Sharia Law, Islamophobia and the U.S. Constitution: New Tectonic Plates of the Culture Wars*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 123, 123 (2012); Haj Yazdiha, *Law as Movement Strategy: How the Islamophobia Movement Institutionalizes Fear Through Legislation*, 13 SOC. MOVEMENT STUD. 267, 268 (2014).

¹¹⁸ CHRISTOPHER BAIL, *TERRIFIED: HOW ANTI-MUSLIM FRINGE ORGANIZATIONS BECAME MAINSTREAM* 44 (2014). See also *The State of Things, Being "Brown" in Post 9/11 America*, BLUE RIDGE PUB. RADIO (Dec. 8, 2016), <https://www.bpr.org/post/being-brown-post-911-america#stream/0>.

¹¹⁹ Beydoun, *supra* note 114, at 1737; NATHAN LEAN, *THE ISLAMOPHOBIA INDUSTRY* 70 (2012). See also *infra* Section II.B.

¹²⁰ Johnson, *supra* note 10, at 189.

¹²¹ Martha F. Davis & Johanna Kalb, *Oklahoma and Beyond: Understanding the Wave of State Anti-Transnational Law Initiatives*, 87 IND. L.J. SUPP. 1, 3 (2011).

¹²² *Id.*; Khan, *supra* note 117, at 138.

¹²³ *Constitutional Restoration Act of 2004*, H.R. 3799, 108th Cong. §101(a) (2004) ("[T]he Supreme Court shall not have jurisdiction to review . . . any matter to the extent that relief is sought against an element of Federal, State, or local government . . . by reason of that element's or officer's acknowledgment of God as the sovereign source of law, liberty, or government."); Khan, *supra* note 117, at 138; Davis & Kalb, *supra* note 121.

Pamela Geller, David Horowitz, Robert Spencer, and Frank Gaffney also began organizing.¹²⁴ They formed tight-knit groups and a dense anti-Muslim network that worked together to reinforce their central claims that Muslims had infiltrated the U.S. government and that every mosque was a sleeper cell for al-Qaeda, the Muslim Brotherhood, or Hamas.¹²⁵ Over the past ten years, these groups have been funded by almost \$40 million from seven major foundations.¹²⁶ Absent a coherent, legal definition of religion, the anti-sharia law movement offers its own interpretation.¹²⁷ Yet this interpretation is built upon historic stereotypes of Muslims as inherently dangerous and un-American, and sharia as a totalitarian, foreign, and military force.

II. ANTI-SHARIA LAWS AND DEFINING ACCEPTABLE RELIGION

Since the meanings of secularism and religion are so blurred, interpretive methods employed by judges and civil society determine where the borders are.¹²⁸ Yet the most influential civil society actors asserting their definitions of religion and secularism related to Islam are anti-Muslim groups promoting anti-sharia laws.¹²⁹ Anti-sharia laws, and the activism essential to their passage, shape American public attitudes

¹²⁴ LEAN, *supra* note 119, at 70. Pamela Geller co-founded the American Freedom Defense Initiative, which organized the infamous “Draw Mohammad” competition in Houston, Texas. David K. Shieler, *Pamela Geller and the Anti-Islam Movement*, *New Yorker* (May 12, 2015), https://www.newyorker.com/news/news-desk/pamela-geller-and-the-anti-islam-movement?source=search_google_dsa_paid&gclid=CjwKCAiAzrWOBhBJEiwAq85QZ3hSIErCx1my2fc1tvxWwZuUDoYJ5p3BveOaFY5O_3UQqoa0v-7HLxoCYZkQAvD_BwE. She originally made her name as a vocal opponent of the Park 51 Islamic Center project in Manhattan. *Pamela Geller*, Southern Policy Law Center, <https://www.splcenter.org/fighting-hate/extremist-files/individual/pamela-geller>. David Horowitz is the founder of the David Horowitz Freedom Center, which works to “combat[] the efforts of the radical left and its Islamist allies to destroy American values and disarm this country as it attempts to defend itself in a time of terror.” *About David Horowitz Freedom Center*, David Horowitz Freedom Center, <https://www.horowitzfreedomcenter.org/about>. Robert Spencer is the director of the blog Jihad Watch, the co-founder of Stop Islamization of America, and the author of numerous anti-Muslim books. *About Robert Spencer and Staff Writers*, Jihad Watch, <https://www.jihadwatch.org/about-robert>. Frank Gaffney is the president of the Center for Security Policy and a well-known conspiracist. For example, Gaffney believes that President Obama was secretly Muslim, and has also postulated that Saddam Hussein masterminded the Oklahoma City bombing. Philip Bump, *Meet Frank Gaffney, the anti-Muslim Gadfly Reportedly Advising Donald Trump’s Transition Team*, *WASH. POST* (Nov. 16, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2015/12/08/meet-frank-gaffney-the-anti-muslim-gadfly-who-produced-donald-trumps-anti-muslim-poll/>.

¹²⁵ LEAN, *supra* note 119, at 14. *See also* BAIL, *supra* note 118, at 57

¹²⁶ Yazdiha, *supra* note 117, at 268.

¹²⁷ SULLIVAN, *supra* note 76, at 15.

¹²⁸ *See infra* Section I.D.

¹²⁹ *See infra* Section I.D.

towards Islam, normalizing the perceived inherent threat of Islam to American values.¹³⁰ This Section argues that allowing social movements to make sense of the inherently unstable phenomena of secularism and religion leads to a regressive reality that perpetuates harmful anti-Muslim stereotypes. Section II.A briefly explores the history of the anti-sharia law agenda, as well as the various types of anti-sharia legislation.¹³¹ Section II.B examines the use of popular constitutionalism by anti-Muslim social movements, specifically ACT for America and the Center for Security Policy, and how it has influenced the text of anti-sharia laws.¹³²

A. *Oklahoma's SQ755*

Anti-sharia laws are the crown jewel of the anti-Muslim agenda. First proposed in 2007, early incarnations intended to make adherence to sharia “a felony punishable by twenty years in prison.”¹³³ In November 2010, seventy percent of Oklahoma voters approved an amendment to the state’s constitution entitled “Save Our State” (hereinafter referred to as SQ755).¹³⁴ The ballot initiative to amend Section 1, Article VII of the Oklahoma Constitution added the following:

State and Municipal courts, when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the

¹³⁰ Social movements and anti-Muslim organizations are critical to the normalization of Islamophobia. Christopher Bail examines how anti-Muslim fringe organizations have been mainstreamed and influenced the U.S. government and civil society at large. Many of these organizations dominate the media landscape, and, along with supporting anti-sharia law initiatives, protest outside of mosques, stack school boards to monitor textbooks for pro-Muslim bias, train federal and local counterterrorism agents to spot threats, and infiltrate Muslim community organizations. See BAIL, *supra* note 118. For example, according to Bail, after 9/11, mainstream media outlets hosted self-anointed “terrorism experts,” like Robert Spencer and Frank Gaffney. *Id.* at 78. Additionally, groups “that displayed anger or fear averaged more than twenty times more media influence than all other civil society organizations.” *Id.* at 57.

¹³¹ See *infra* Section II.A.

¹³² See *infra* Section II.B.

¹³³ WAJAHAT ALI ET AL., CTR. FOR AM. PROGRESS, FEAR, INC.: THE ROOTS OF THE ISLAMOPHOBIA NETWORK IN AMERICA 1, 36 (2011) <https://cdn.americanprogress.org/wp-content/uploads/issues/2011/08/pdf/islamophobia.pdf>. Since this first iteration, the language of the template bill has changed and no longer directly mentions sharia or Islam. However, the history of the legislation is evident of its continued purpose. *Id.* at 40.

¹³⁴ Khan, *supra* note 117, at 130; Lee Ann Bambach, *Save Us from Save Our State: Anti-Sharia Legislation Efforts Across the United States and Their Impact*, 13 J. ISLAMIC L. & CULTURE 72, 78 (2011).

Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.¹³⁵

As soon as the electoral results were publicized, Muneer Awad, a Muslim-American and the executive director of the Oklahoma branch of the Council of American-Islamic Relations (CAIR), challenged the amendment's constitutionality.¹³⁶ He alleged that the amendment violated the First Amendment's Free Exercise and Establishment Clauses.¹³⁷ In granting a preliminary injunction, the district court judge highlighted that the amendment's purpose was unambiguously to single out and restrict sharia law.¹³⁸ The law, lacking neutrality and justification by a compelling government interest, was constitutionally invalid.¹³⁹

¹³⁵ Davis & Kalb, *supra* note 121, at 1. The Attorney General of Oklahoma determined that the original proposed ballot title "did not comply with applicable laws" and "did not adequately explain the effect of the proposition because it [did] not explain what either Sharia Law or International Law is." Awad v. Ziriax, 670 F.3d 1111, 1118 (10th Cir. 2012) (citing OKL. CONST. art. VII, §1) (alteration in original) (citations omitted). Following this, the bill included definitions of international, foreign, and Sharia Law. *Id.* Sharia Law was defined as "Islamic law . . . based on . . . the Koran and the teachings of Mohammad." *Id.* (internal citations omitted).

¹³⁶ Bambach, *supra* note 134, at 78; *Oklahoma International and Sharia Law, State Question 755* (2010), [https://ballotpedia.org/Oklahoma_International_and_Sharia_Law,_State_Question_755_\(2010\)](https://ballotpedia.org/Oklahoma_International_and_Sharia_Law,_State_Question_755_(2010)) (last visited Jan. 23, 2020).

¹³⁷ Pedrioli, *supra* note 10, at 76; Khan, *supra* note 117, at 135; Eun-Jung Katherine Kim, *Islamic Law in American Courts: Good, Bad, and Unsustainable Uses*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 287, 292 (2014).

¹³⁸ Awad v. Ziriax, 754 F. Supp. 2d 1298, 1306 (W.D. Okla. 2010); *aff'd* 670 F.3d 1111 (10th Cir. 2012). Awad v. Ziriax, 754 F. Supp. 2d 1298, 1306 (W.D. Okla. 2010); *aff'd* 670 F.3d 1111 (10th Cir. 2012).

¹³⁹ *See Awad*, 670 F.3d at 1130 (holding that because there was a lack of evidence of any concrete issue, there was no compelling government interest).

The Tenth Circuit upheld the District Court's finding of unconstitutionality.¹⁴⁰ In assessing whether a compelling interest was present, the court dismissed Oklahoma's single sentence justification on the law's objective.¹⁴¹ The court also found that Oklahoma did not cite any instance where an Oklahoma court had applied sharia law, "let alone that such applications had resulted in concrete problems in Oklahoma."¹⁴²

Following this ruling, legislators then attempted to sever the offensive language about sharia from the bill, but an Oklahoma district court ruled against severance.¹⁴³ Reviewing the statements of SQ755's legislative sponsors, as well as public debates and advertisements, the court still determined that it was abundantly clear that the amendment's primary purpose was to protect Oklahoma from a perceived "threat" of sharia law.¹⁴⁴

Despite the Tenth Circuit's holding, SQ755 has inspired dozens of similar bills and amendments.¹⁴⁵ Between 2010 and 2016, 194 anti-Muslim bills were introduced in thirty-nine states, with a total of eighteen enacted into law in twelve states.¹⁴⁶ In 2017, at least three states passed anti-sharia legislation, including Texas and Arkansas.¹⁴⁷ In 2018, fourteen states passed similar legislation.¹⁴⁸

¹⁴⁰ *Id.* at 1133.

¹⁴¹ *Id.* at 1130.

¹⁴² *Id.*

¹⁴³ *Awad v. Zirriax*, 966 F. Supp. 2d 1198, 1206 (W.D. Okla. 2013).

¹⁴⁴ *Id.*

¹⁴⁵ ELSADIG ELSHEIKH ET AL., HAAS INST. FOR A FAIR AND INCLUSIVE SOC'Y, LEGALIZING OTHERING: THE UNITED STATES OF ISLAMOPHOBIA 4, 7 (2017), https://haasinstitute.berkeley.edu/sites/default/files/haas_institute_legalizing_othering_the_united_states_of_islamophobia.pdf (demonstrating that in 2010, 14 bills were introduced. In 2011, 56 bills were introduced. In 2012, 25 bills were introduced. In 2013, 35 bills were introduced. In 2014, 15 bills were introduced. In 2015, 35 bills were introduced. In 2016, 14 bills were introduced.). See also Aaron Fellmeth, *International Law & Foreign Laws in the U.S. State Legislatures*, AM. SOC'Y INT'L L.: INSIGHTS (May 26, 2011), <https://www.asil.org/insights/volume/15/issue/13/international-law-and-foreign-laws-us-state-legislatures>.

¹⁴⁶ Elsheikh, et al., *supra* note 145, at 10.

¹⁴⁷ *Tracking Anti-Muslim Legislation Across the U.S.*, S. POVERTY L. CTR., <https://www.splcenter.org/data-projects/tracking-anti-muslim-legislation-across-us> (last visited on Nov. 11, 2021). See also *Islamophobia*, OTHERING & BELONGING INST. AT U.C. BERKELEY, <https://belonging.berkeley.edu/islamophobia> (last visited on Nov. 11, 2021).

¹⁴⁸ *David Yerushalmi*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/individual/david-yerushalmi> (last visited on Jan. 23, 2020). The states were Idaho, South Dakota, Arizona, Texas, Oklahoma, Arizona, Louisiana, Mississippi, Alabama, Georgia, Florida, Tennessee, South Carolina, and North Carolina. *Id.*

SQ755 is emblematic of the first wave of anti-sharia bills, those that explicitly name sharia or Islamic law in their text.¹⁴⁹ By naming sharia in their text, these laws target one religion over another and grant a denominational preference.¹⁵⁰ Thus, they must satisfy a strict scrutiny standard.¹⁵¹ However, the bills that followed SQ755 learned from its legal complications.¹⁵² Rather than explicitly name sharia or Islam, these second-wave statutes either prohibit or limit the application of religious laws generally or prohibit or limit the application of foreign law.¹⁵³ Since they are facially neutral, these laws are evaluated under the lower standards of rational basis or disparate impact analysis.¹⁵⁴

¹⁴⁹ Muhammad Elsayed, *Contracting into Religious Law: Anti-Sharia Enactments and the Establishment and Free Exercise Clauses*, 20 GEO. MASON L. REV. 937, 937, 943 (2013) (explaining that Oklahoma's "Save Our State Amendment" is a part of anti-foreign law and anti-religion enactments specifically targeting Sharia law). See Sonne, *supra* note 85, at 743 (explaining that support of the Oklahoma law could not point to a problem caused by sharia law in the state); A.B.A. House of Delegates, Resolution 113A (2011) (opposing blanket prohibitions on consideration of foreign laws or an entire body of religious laws). These provisions have been introduced in Oklahoma, Arizona, South Carolina, and Wyoming. See David Yerushalmi, *supra* note 148.

¹⁵⁰ CYNTHIA BROUGH, CONG. RSCH. SERV., R41824, APPLICATION OF RELIGIOUS LAW IN U.S. COURTS: SELECTED LEGAL ISSUES 6 (2011).

¹⁵¹ *Larson v. Valente*, 456 U.S. 228, 246 (1982) ("[W]hen we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality."). The Minnesota Charitable Solicitation Act imposed registration and reporting requirements on religious organizations who solicit more than fifty percent of their funds from nonmembers. *Id.* at 231-32. The Unification Church opposed the Act as violative of the Establishment and Free Exercise Clauses. *Id.* at 233-34. Laws addressing the constitutionality of the exercise of religion must be justified by a compelling government interest and must be narrowly tailored to pursue that interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). See also *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (upholding a New Jersey statute permitting reimbursement to parents of children attending parochial schools for bus transportation). *But see Epperson v. Arkansas*, 393 U.S. 97, 109 (1968) (invalidating an Arkansas "anti-evolution" statute, which made it illegal to teach about evolution or to use a textbook that teaches evolution).

¹⁵² Johnson, *supra* note 10, at 197.

¹⁵³ Berg, *supra* note 84, at 186; Sonne, *supra* note 85, at 743; Davis & Kalb, *supra* note 121, at 4; Elsayed, *supra* note 149, at 944.

¹⁵⁴ *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that "a law, neutral on its face and serving ends otherwise within the power of government to pursue, is [not] invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."). See also *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) (recognizing "that when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work," but this does not mean that the case enjoys strict scrutiny). Even though the standard of review is lower, the Religion Clauses still require the government to minimize the extent to which it supports or condones either religious belief or disbelief. Elsayed *supra* note 149, at 962 (citing Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1989-1990)). Anti-sharia laws masquerading as foreign law limitations are both the most

While these second-wave statutes are facially neutral, a contextual examination makes clear that they are still intended to constrain Islam.¹⁵⁵ For example, referencing a 2012 Kansas bill, Republican State Senator Chris Steineger said “This [bill] doesn’t say ‘Sharia law,’ . . . but that’s how it was marketed.”¹⁵⁶ Although their facial neutrality saves them from strict scrutiny, these laws still implicate the Free Exercise Clause since, “the law at issue discriminates against some or all religious beliefs or prohibits conduct because it has been undertaken for religious reasons.”¹⁵⁷

B. *The Use of Popular Constitutionalism*

Regardless of the type of bill, the anti-sharia law movement uses popular constitutionalism as a framing tool to support both its perception of Islam and larger redefinition of secularism and religion.¹⁵⁸ Anti-sharia law activists strategically use historic nativism, xenophobia, and racism to legitimize their claims that Islam is a foreign threat.¹⁵⁹ For anti-sharia law proponents, the very existence of sharia, conceptualized as a totalitarian military-political regime, is anathema to the American values of freedom of religion, freedom of speech, due process, and privacy.¹⁶⁰ Inevitably then, they conclude Islam threatens American justice and rule of law.¹⁶¹

Anti-sharia law promoters cite the New Jersey case *S.D. v. M.J.R.* as evidence of the danger of Islam and its’ incompatibility with American values.¹⁶² The case concerned a Moroccan Muslim couple.¹⁶³ After constant abuse, the wife sought a restraining order against her

constitutionally sound and the most dangerous. The majority of these laws prohibit courts from enforcing any foreign law that would result in a violation of the state or federal constitution or offend public policy. Sonne, *supra* note 85, at 748. A minority of these laws prohibit courts from considering the laws of any foreign system that is not appropriately aligned with the state or federal constitution, irrespective of whether the specific law in question itself violates state or federal constitutional law. *Id.*

¹⁵⁵ Sonne, *supra* note 85, at 746.

¹⁵⁶ Abed Awad, *The True Story of Sharia in American Courts*, NATION (June 14, 2012), <https://www.thenation.com/article/true-story-sharia-american-courts/>.

¹⁵⁷ Church of the Lukumi Bablu Aye v. City of Hialeah, 508 U.S. 520, 532 (1993).

¹⁵⁸ Yazdiha, *supra* note 117, at 269, 273; LEAN, *supra* note 119, at 14.

¹⁵⁹ See Yazdiha, *supra* note 117, at 270; Johnson, *supra* note 10, at 193.

¹⁶⁰ Yazdiha, *supra* note 117, at 271; *Why American Laws for American Courts?*, AM. L. FOR AM. CTS., <http://americanlawsforamericancourts.com/> (last visited Nov. 24, 2021); CTR. FOR SEC. POL’Y, SHARIAH: THE THREAT TO AMERICA: AN EXERCISE IN COMPETITIVE ANALYSIS (REPORT OF TEAM B II) (2010) [hereinafter “CSP 2010”].

¹⁶¹ Johnson, *supra* note 10, at 192.

¹⁶² 2 A.3d 412 (N.J. Super. Ct. App. Div. 2010).

¹⁶³ *Id.* at 413.

husband, alleging that he forced her to have sex against her will.¹⁶⁴ Her husband said that he was entitled to sex upon demand per his religious beliefs.¹⁶⁵ An imam testified that, in accordance with Islamic law, a wife must comply with her husband's sexual demands.¹⁶⁶ The trial court judge denied the wife's request, holding that since the husband acted in accordance with his religious beliefs, he did not meet the criminal intent threshold.¹⁶⁷ The New Jersey Appellate Court reversed this ruling, finding that the trial court had improperly permitted religious protection to override fundamental liberties.¹⁶⁸ Yet the anti-sharia law movement continues to point to this case as evidence of the threat sharia poses to American liberties.¹⁶⁹

S.D. v. M.J.R. is also used to demonstrate the failure of the judiciary.¹⁷⁰ According to anti-sharia law activists, judges on their own cannot, or will not, protect against the infiltration of Islam and sharia law; therefore, people must stand up and demand a change.¹⁷¹ Legislation, the emblematic representative of democratic activity, is the perfect solution for a movement that positions itself as a citizen-driven campaign to safeguard the Constitution.¹⁷²

i. Template Legislation - American Laws for American Courts

American Laws for American Courts (ALAC), David Yerushalmi's template bill and the preeminent model for anti-sharia

¹⁶⁴ *Id.* at 415-16.

¹⁶⁵ *Id.* at 416.

¹⁶⁶ *Id.* at 417-18.

¹⁶⁷ *Id.* at 418.

¹⁶⁸ *Id.* at 428. The court used the testimony of the couple's imam when determining whether the sexual behavior was religiously sanctioned. The imam "confirmed that a wife must comply with her husband's sexual demands," but also said "a husband was forbidden from approaching his wife 'like any animal.'" *Id.* at 417-18. The imam also "acknowledged that New Jersey law considered coerced sex between married people to be rape." *Id.* at 418. This testimony was used to set up a conflict between religious and civil law, but the imam's comments make clear that religious law does not fully condone this kind of behavior in the simplistic way it was presented. *Id.* at 417-18.

¹⁶⁹ THE CTR. FOR SEC. POL'Y, SHARIAH IN AMERICAN COURTS: THE EXPANDING INCURSION OF ISLAMIC LAW IN THE U.S.LEGAL SYSTEM 23 (2014) [hereinafter "CSP 2014"].

¹⁷⁰ *S.D.*, 2 A.3d at 422.

¹⁷¹ CSP 2014, *supra* note 169, at 13-14, 16. CSP 2014 presents the top twenty cases that illuminate the "expanding incursion of Islamic law" into American courts, and the inability to judges to protect against it. *Id.* at 1. Along with *S.D. v. M.J.R.*, these cases also include *Chaudry v. Chaudry*, 388 A.2d 1000 (N.J. Super. 1978), *Hosain v. Malik*, 671 A.2d 988 (Md. Ct. Spec. App. 1996), and *In re Marriage of Obaidi*, 227 P. 3d 787 (Wash. Ct. App. 2010), amongst others. See CSP 2014, *supra* note 169, at 1.

¹⁷² Yazdiha, *supra* note 117, at 271.

laws, utilizes popular constitutionalist tactics to define Islam as areligious.¹⁷³ Yerushalmi's devotion to the anti-sharia cause began with his 2006 founding of the Society of Americans for National Existence (SANE), a non-profit organization opposed to sharia.¹⁷⁴ SANE's name invokes a certain type of "American," and implicitly delineates who is and is not part of that community. This "Society of Americans," ostensibly representative of the people, is diametrically opposed to sharia, underscoring the menace of the latter.¹⁷⁵ Yerushalmi's initial focus on state-level legislation was born of necessity after his initiatives failed to gain traction at a federal level.¹⁷⁶ Capitalizing on the Tea Party's explosive grassroots momentum, Yerushalmi refined his state legislature project with ALAC at the center.¹⁷⁷

The website of the American Public Policy Alliance (APPA), SANE's successor organization, situates the group's mission within the constitutional tradition, invoking the Declaration of Independence and the Constitution and describing the American Revolution as a struggle against the imposition of foreign power and foreign laws.¹⁷⁸ In APPA's view, the tyranny of foreign laws was and continues to be a threat to "unique American values of liberty and freedom."¹⁷⁹ Additionally, in response to the assertion that ALAC unfairly targets Muslims, the FAQ page for the template ALAC legislation says that ALAC is facially neutral and only applies to legal doctrines.¹⁸⁰ It underscores that the law is not focused on religion, but rather on "any foreign law that violates constitutionally protected liberties."¹⁸¹ Under ALAC, sharia is a system of un-American foreign laws, intent on invading and destroying constitutionally protected freedoms.¹⁸²

¹⁷³ Andrea Elliott, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES (July 30, 2011), <https://www.nytimes.com/2011/07/31/us/31shariah.html>.

¹⁷⁴ Elsheikh et al., *supra* note 145, at 18; Elliott, *supra* note 173.

¹⁷⁵ Elsheikh et al., *supra* note 145, at 18. At this time, Yerushalmi also proposed a law that likened the observance of Islamic law to sedition. *Id.*

¹⁷⁶ Elliott, *supra* note 173.

¹⁷⁷ *Id.*

¹⁷⁸ *American Laws for American Courts*, AM. PUB. POL'Y ALL., <http://ibh.554.myftpupload.com/legislation/american-laws-for-american-courts/> (last visited Jan. 23, 2020).

¹⁷⁹ *Id.*; CSP 2014, *supra* note 169, at 65 ("Application of foreign law—particularly Shariah—in American courts, can deny Americans their unique values of liberty . . .").

¹⁸⁰ *Frequently Asked Questions, Issues, and Objections*, AM. L. FOR AM. CTS., <http://americanlawsforamericancourts.com/faqs/> (last visited Jan. 23, 2020).

¹⁸¹ *Id.*

¹⁸² *Id.* In response to the concern that ALAC is unnecessary because it is already the reality in state courts, APPA says that there are many cases where foreign laws are invoked by parties in dispute. AM. PUB. POL'Y ALL., *supra* note 178. Even if states bar foreign laws if they violate the

Finally, while the passage of legislation is an important objective, Yerushalmi's ultimate project is much bigger; he aims to re-educate society on Islam by dictating the terms of the conversation.¹⁸³ As he says, "If [ALAC] passed in every state without any friction, it would have not served its purpose The purpose was heuristic — to get people asking the question, 'What is Shariah [sic]?'"¹⁸⁴

ii. *The Role of Social Movements*

SANE, and its later transition into APPA, are just two examples of the larger anti-Muslim constellation of think tanks, grassroots groups, and big donors.¹⁸⁵ The different components of the network repeat similar talking points to perpetuate and entrench prejudiced stereotypes of Islam.¹⁸⁶ By combining grassroots and institutionalized social movements, in the form of ACT for America (ACT) and the Center for Security Policy (CSP) respectively, anti-sharia law activists impact party systems and alter public opinions, maximizing the reach of their interpretation of Islam and religion.¹⁸⁷

Although more focus will be paid to ACT and CSP in this Article, many other anti-sharia law promoters invoke both the Constitution and anti-Muslim stereotypes. Daniel Pipes, the head of the Middle East Forum, justified anti-sharia laws in order to "protect the

state's public policy, it is unclear what the threshold for violations actually are, which is why anti-sharia laws are necessary. *Id.*

¹⁸³ Elliott, *supra* note 173.

¹⁸⁴ *Id.*

¹⁸⁵ BAIL, *supra* note 118, at 78; LEAN, *supra* note 119, at 70. The Center for American Progress explores the tripartite Islamophobia Network. ALI ET AL., *supra* note 133, at 4. The seven major funders are (1) Donors Capital Fund, (2) The Richard Mellon Scaife Foundation, (3) the Lynde and Harry Bradley Foundation, (4) the Russell Berrie Foundation, (5) the Becker Foundations, (6) the Anchorage Foundation/William Rosenwald Family Fund, and (7) the Fairbrook Foundation. The self-appointed experts are Frank Gaffney, Daniel Pipes, David Yerushalmi, Robert Spencer, and Steven Emerson. *Id.* The grassroots organizations are ACT! for America, Stop Islamization of America, the Tea Party, the Tennessee Freedom Coalition, and the American Family Association. *Id.* at 5. According to a 2019 report, "nationwide, groups 'whose primary purpose it to promote prejudice against, or hatred of, Islam and Muslims' took in about \$206 million between 2008 and 2013." Mark Olade & Dustin Gardiner, *The Network Behind State Bills 'Countering' Sharia Law and Terrorism*, CTR. FOR PUB. INTEGRITY (July 18, 2019), <https://publicintegrity.org/politics/state-politics/copy-paste-legislate/many-state-bills-one-source-behind-the-push-to-ban-sharia-law/>.

¹⁸⁶ FAIZA PATEL ET AL., CTR. FOR AM. PROGRESS, LEGAL UNCERTAINTIES AND PRACTICAL PROBLEMS 1-4 (2013), <https://cdn.americanprogress.org/wp-content/uploads/2013/05/ForeignLawBans.pdf>.

¹⁸⁷ See TARROW, *supra* note 47, at 1; see also Balkin, *How Social Movements Change*, *supra* note 37, at 30.

Constitutional order from Middle Eastern threats.”¹⁸⁸ Similarly, Robert Spencer of Stop Islamization of Nations writes that the “denial of equality of rights and dignity remains part of the Sharia, and, as such, [is] part of the legal superstructure that global jihadists are laboring to restore everywhere in the Islamic world, and wish ultimately to impose on the entire human race.”¹⁸⁹ David Horowitz, of the eponymous Freedom Center, underscored the necessity of anti-sharia laws to “combat the efforts of the radical left and its Islamist allies to destroy American values.”¹⁹⁰ Finally, Pamela Geller, of the Atlas Shrugs blog and the Draw Mohammad competition, urged the necessity of “mobiliz[ing] citizens to fight Islam, the ‘sinister agenda that could do nothing less than destroy the United States.’”¹⁹¹

a. ACT for America

ACT for America (ACT) believes it is returning power to the people to enact change and safeguard national security and American values, an essential component of both a legitimate grassroots group and popular constitutionalism.¹⁹² It is a self-anointed “citizen action network that promotes public policies and legislation that defend America and democratic values against the terror and tyranny of radical Islam.”¹⁹³ In

¹⁸⁸ *The Middle East Forum*, DANIEL PIPES: MIDDLE E. F., <https://www.danielpipes.org/mef.php> (last visited Nov 16, 2021); Yazdiha, *supra* note 117, at 271.

¹⁸⁹ *Why Jihad Watch?*, JIHAD WATCH, <https://www.jihadwatch.org/why-jihad-watch> (last visited Nov 16, 2021).

¹⁹⁰ *About David Horowitz Freedom Center*, DAVID HOROWITZ FREEDOM CTR., <https://www.horowitzfreedomcenter.org/about> (last visited Nov 16, 2021); Yazdiha, *supra* note 117, at 271.

¹⁹¹ Yazdiha, *supra* note 117, at 271 (citation omitted).

¹⁹² *Our Mission*, ACT FOR AM., <https://www.actforamerica.org/Mission> (last visited Nov 16, 2021) (stating that ACT’s “mission is to engage, train, and mobilize citizens to ensure the safety and security of Americans against all threats foreign and domestic while preserving civil liberties guaranteed by the US Constitution.”). ACT is actually a hybrid group that combines both grassroots and institutionalized tactics because of its unique protest cycle origin story. Isabelle M. Cnaan, *Institutionalization Without Formalization: The Puzzle of Mid-Protest Cycle Entrants and ACT for America* (unpublished MPhil thesis, University of Oxford) (on file with author). ACT promotes itself as a grassroots organization, while continuing to emphasize institutionalized strategies (like lobbying and legislation) rather than large-scale disruption/protests. *Id.* However, for the purpose of this Comment, ACT will be used as an example of the more grassroots dimension, and especially the perceived grassroots power, over the anti-sharia law movement. *Id.*

¹⁹³ Yazdiha, *supra* note 117, at 271. ACT has sanitized its language as of late, and now refers to itself as: “The nation’s premier national security grassroots movement.” See ACT FOR AM., <https://www.actforamerica.org/> (last visited Nov 16, 2021). ACT claims to have over one million members. *Id.* Yet, as evident in its organizational materials, one of the group’s central tenets is “An Organized Minority is Louder Than a Silent Majority.” ACT FOR AM., KEEP

2010, ACT's self-reported organizational mission on its 990 tax form was "to establish a means for all American citizens to provide a collective voice (I) for the democratic values of western civilization and (II) against the threat of radical Islam."¹⁹⁴

As the faithful arbiter of the people's will, ACT both constructs and reflects their wishes.¹⁹⁵ These desires include anti-sharia laws. Even before Yerushalmi released ALAC, ACT spearheaded an initiative entitled "Stop Sharia Now" to increase public awareness of the threat of creeping sharia in America.¹⁹⁶ ACT successfully used classic popular constitutionalist tactics to change public opinion and make reasonable their notion of pervasive, threatening sharia.¹⁹⁷

Since 2010, ACT has also fulfilled the second goal of a social movement—to pressure politicians through organized local action.¹⁹⁸ In 2010, in support of an anti-sharia law campaign targeting state-level initiatives, including SQ755, ACT provided bottom-up pressure to convince legislators that the people were behind the campaign.¹⁹⁹ ACT "direct[ed] its membership to letter-writing campaigns, petitions, and,

AMERICA SAFE: ACT ACTIVIST GUIDE 2 (2020), <https://www.actforamerica.org/sites/default/files/ActivismPacket2020UpdatedLinks07062020.pdf>. Thus, the group is focused on maximizing grassroots power to create the perception that the majority shares its warped opinion. *Id.* For more information on ACT's activist and grassroots strategy, see ACT for America, *Activist Material*, <https://www.actforamerica.org/activact-material> (last visited Nov 16, 2021).

¹⁹⁴ U.S. DEP'T OF TREAS., IRS, FORM 990 FILED BY ACT! FOR AMERICA 2 (2010), https://projects.propublica.org/nonprofits/display_990/260772227/2011_12_EO%2F26-0772227_990O_201012 (tax return of organization exempt from income tax).

¹⁹⁵ These tactics could also be classified as a form of right-wing populism, which attempts to undermine democracy by taking advantage of its own flaws and praised tenets. See Linda Bos et al., *An Experimental Test of the Impact of Style and Rhetoric on the Perception of Right-Wing Populist and Mainstream Party Leaders*, 48(2) ACTA POLITICA 192, 194 (2013) (quoting Cas Mudde, *The Populist Zeitgeist*, 39 GOV'T & OPPOSITION 541, 543 (2014) ("The *populist rhetoric* consists of an anti-establishment appeal or anti-elitism, and the celebration of the heartland, which is . . . a place 'in which, in the populist imagination, a virtuous and unified population resides.' Populism 'considers society to be ultimately separated into homogeneous and antagonistic groups, 'the pure people' versus 'the corrupt elite' . . ."). ACT frames its work, and its audience, in a distinctly populist way, by bifurcating the population between the pure people and the corrupt elite who, in this case, are facilitating the Muslim takeover of the United States. See *About ACT*, ACT FOR AMERICA, <https://www.actforamerica.org/aboutact> (last visited Nov 16, 2021).

¹⁹⁶ ACT! For America, ISLAMOPHOBIA NETWORK, <https://islamophobicnetwork.com/echo-chamber/act-for-america/> (last visited Oct. 25, 2021).

¹⁹⁷ ALI ET AL., *supra* note 133, at 67. Per Balkin's formulation, this is the tactic of moving an "off-the-wall" argument into the realm of the possible. Balkin, *How Social Movements Change*, *supra* note 37, at 38.

¹⁹⁸ U.S. DEP'T OF TREAS., *supra* note 194; ALI ET AL., *supra* note 133, at 68-69.

¹⁹⁹ LEAN, *supra* note 119, at 138.

specific Twitter hashtags.”²⁰⁰ En route to SQ755’s electoral victory, ACT spent \$60,000 on telephone campaigns and radio advertisements.²⁰¹

ACT’s distortion of public discourse around sharia and Islam goes beyond its support for anti-sharia laws. Like Yerushalmi, ACT’s central focus is on citizen education.²⁰² In pursuit of this goal, ACT works to change public opinion and impact political parties by conducting “Citizen in Action” training conferences to teach concerned citizens how to pressure local legislators to support local legislation.²⁰³ ACT also educates its members on the incompatibility between Islam and the United States.²⁰⁴ Brigitte Gabriel, ACT’s founder and head, has said that a practicing Muslim cannot be a loyal American citizen and that Muslims should not be trusted in elected office, as they will always choose Islam over the country.²⁰⁵ Furthermore, on June 10, 2017, ACT held “Marches Against Sharia” in nearly two dozen cities and nineteen states.²⁰⁶ All of these efforts are intended to normalize the belief that Islam threatens real America.

b. The Center for Security Policy (CSP)

While ACT’s grassroots elements motivate and legitimize the anti-sharia law project, CSP provides evidence of the threat. Since 2009, Frank Gaffney, CSP’s leader, has worked closely with Yerushalmi on

²⁰⁰ BAIL, *supra* note 118, at 111; Mobashra Tazamal, *Is ACT for America Really a Grassroots Organization?*, GEO. BRIDGE INITIATIVE (Sept. 10, 2018), <https://bridge.georgetown.edu/research/is-act-for-america-really-a-grassroots-organization/>.

²⁰¹ BAIL, *supra* note 118, at 111; LEAN, *supra* note 119, at 138; Elliott, *supra* note 173.

²⁰² See ALI ET AL., *supra* note 133, at 65.

²⁰³ *Id.* at 67-68. See also *Activist Registration*, ACT FOR AM., <https://www.actforamerica.org/join-the-movement> (last visited Oct. 22, 2021) (providing links for individuals to “Start a Chapter” or “Register a Group” with ACT and join in its mission to “educate, train, and mobilize citizens to strategically organize on the local level”).

²⁰⁴ ALI ET AL., *supra* note 133, at 65.

²⁰⁵ Peter Beinart, *America’s Most Prominent Anti-Muslim Activist Is Welcome at the White House*, ATLANTIC (Mar. 21, 2017), <https://www.theatlantic.com/politics/archive/2017/03/americas-most-anti-muslim-activist-is-welcome-at-the-white-house/520323/>; Chris Rodda, *Maher Season Premiere Includes Islamophobe Who Said Muslim-Americans Shouldn’t Be Allowed to Hold Public Office*, HUFFINGTON POST (Dec. 6, 2017, 5:12 AM), https://www.huffpost.com/entry/maher-season-premiere-inc_b_168972.

²⁰⁶ Kurtis Lee & Jenny Jarvie, *Anti-Sharia Rallies Around the U.S. Denounce Islam While Stoking Concerns Among Muslim Groups*, L.A. TIMES (June 10, 2017, 9:00 PM), <https://www.latimes.com/nation/la-na-anti-muslim-rallies-20170610-story.html>; Hatewatch Staff, *Live-Blog: ACT for America’s “March Against Sharia” Rallies*, S. POVERTY L. CTR. (June 10, 2017), <https://www.splcenter.org/hatewatch/2017/06/10/live-blog-act-americas-march-against-sharia-rallies>.

the anti-sharia law project.²⁰⁷ In 2010, CSP released a report entitled “Shariah: The Threat to America.”²⁰⁸ The report begins by presenting the dichotomy between sharia and traditional American values, like equal treatment and individual liberty.²⁰⁹ It states that those who support sharia stand for objectives that are incompatible with the U.S. Constitution, the civil rights therein guaranteed, and the representative government so authorized.²¹⁰ Sharia is thus depicted as a destructive threat intended to undermine American society and values, including the “bedrock proposition[s] that the governed have a right to make law for themselves” and “the republican democracy governed by the Constitution”²¹¹ Additionally, a 2016 CSP Report states that sharia is a body of law, not faith, and “must be seen as an illegal effort to supplant our Constitution with another legal code, not a religious practice protected by the document.”²¹²

Similar to how SANE’s name implies at a certain understanding of who counts as “the people,” CSP intentionally creates an exclusive community primed to stop the sharia threat.²¹³ Citing the Declaration of Independence, CSP explains how all power in the United States is derived from “We the People.” The Constitution does not exist independently of the people; it is the people who are the “founding entity.”²¹⁴ By voluntarily safeguarding their rights in the Constitution, with the American government acting as steward, the people, according to CSP, acted “in their sovereign capacity.”²¹⁵ Today, because of the

²⁰⁷ Elliott, *supra* note 173.

²⁰⁸ CSP 2010, *supra* note 160.

²⁰⁹ *Id.* at 6-7.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² CTR. FOR SEC. POL’Y, SHARIAH: THE THREAT TO AMERICA: ABRIDGED 25 (2016) [hereinafter CSP 2016].

²¹³ CSP 2010, *supra* note 160, at 5-6. Identity-formation is a complex process. Identity is highly contested, evolving, political, and non-neutral. Identity and group-belonging are powerful in that they are cognitive maps used to make sense of one’s place in the social world. *See* GOPAL BALAKRISHNAN, MAPPING THE NATION (1996). The presumption that identity is constructed is not fully accepted (the primordial school on ethnic and national identity stubbornly continued to exist), yet scholarship is moving towards a study of identity as unstable and created. *See* Henry Hale, *Explaining Ethnicity*, 37 COMP. POL. STUD. 458 (2004); Kanchan Chandra, *What is Ethnic Identity and Does it Matter*, 9 ANN. REV. POL. SCI. 397 (2006). By invoking certain assumed collections of “the people,” SANE and CSP engage in an identity and group construction exercise. *See* CARLES BOIX & SUSAN C. STOKES, OXFORD HANDBOOK OF COMPAR. POLS. (2009). They define themselves in opposition to the “other,” and, in doing so, circumscribe a certain acceptable type of action. *Id.* Identity-formation and politics matter because the “us versus them” paradigm motivates bias, prejudice, and violence. *Id.*

²¹⁴ CSP 2010, *supra* note 160, at 119.

²¹⁵ *Id.*

infiltration of foreign laws and the incompetence of government elites, CSP warns that the Constitution is under threat.²¹⁶ Thus, the people must take back some of their sovereignty to protect against the dangerous invasion of Islam.²¹⁷

In a 2012 report assessing the presence of sharia law in American state courts, CSP alleged to have identified fifty significant state court cases, including fifteen trial court cases and twelve appellate court cases, where the presiding judge found that an analysis of sharia was applicable.²¹⁸ For CSP, these cases are evidence of sharia's co-optation of American institutions, as well as the success of "stealth" or "civilization" jihad.²¹⁹ Based on Muslim Brotherhood documents uncovered in the *United States v. Holy Land Foundation for Relief and Development* trial, civilization jihad occurs prior to violent jihad but is, nevertheless, oriented towards transforming society and overthrowing Western democracy.²²⁰ In a 2016 report, CSP describes civilization jihad as "the enemy among us, working out in the open but disguised by deceit" and says it "poses the greater long-term threat to our legal system and way of life."²²¹

Faced with the threat of Islam manifested in sharia law and civilization jihad, CSP believes that the people must resist "elites" who have capitulated and enabled sharia's spread. This notion resonates with popular constitutionalism's goal of wresting constitutional interpretive powers away from judges.²²² For CSP and ACT, judges are viewed with

²¹⁶ *Id.* ("As a nation, we have lost our understanding of America's founding principles and, as a result, have become increasingly ill-prepared to defend the superiority of those principles.")

²¹⁷ *Id.* at 130-31.

²¹⁸ *Shariah Law and American State Courts: An Assessment of State Appellate Court Cases*, CTR. FOR SEC. POL'Y (Aug. 30, 2012), <https://www.centerforsecuritypolicy.org/2012/08/30/shariah-law-and-american-state-courts/>.

²¹⁹ See CSP 2016, *supra* note 212, at 12-14.

²²⁰ CSP 2010, *supra* note 160, at 17; CSP 2016 *supra* note 212, at 14; *What Is Civilization Jihad*, COUNTER JIHAD, <https://counterjihad.com/backgrounder/what-is-civilization-jihad/> (last visited Oct. 23, 2021). See also *United States v. Holy Land Found. for Relief & Dev.*, No. 3:04-cr-0240-P, 2008 WL 11355290 (N.D. Tex. July 3, 2008). The concept of "civilization jihad" comes from a memo entitled "Explanatory Memorandum on the General Strategic Goal for the Group in North America," discovered during an FBI raid of the home of a Muslim Brotherhood member named Mohamed Akram Adlouni. Bridge Initiative Team, "Civilization Jihad: Debunking The Conspiracy Theory," GEO. BRIDGE INITIATIVE (Feb. 2, 2016), <https://bridge.georgetown.edu/research/civilization-jihad-debunking-the-conspiracy-theory/>. The memo states that Akram believes that the Muslim Brotherhood "eliminat[e] and destro[y] Western civilization from within . . ." *Id.* Although, there is no evidence that this letter was approved or even acknowledged by the Muslim Brotherhood as a whole, the memo continues to be used as evidence of the overarching mission of both the Muslim Brotherhood and Islam overall. *Id.*

²²¹ CSP 2016, *supra* note 212, at 15.

²²² *Id.* at 26.

particular suspicion for failing to uphold their constitutional duty to reject foreign law.²²³

iii. *Reflective Laws and Rhetoric*

APPA, ACT, and CSP's popular constitutionalist arguments are reflected in the dozens of laws introduced nationwide. Even before SQ755, popular constitutionalist language regarding the threat of sharia law had already permeated the legislative forum.²²⁴ In 2008, Colorado Republican Representative Thomas Tancredo introduced HR6975 entitled the "Jihad Prevention Act."²²⁵ If passed, the Act would have amended the Immigration and Nationalization Act to require non-citizens to pledge that they would not implement sharia in the United States.²²⁶ The Act invokes both the "foreignness" of sharia and its inherent incompatibility with United States values, since the punishment for violation is the revocation of any visa or citizenship.²²⁷

SQ755 continued to perpetuate the myth that an inherent incompatibility exists between Islam and America. Although sharia law had never been cited in Oklahoma courts, state lawmakers justified the necessity of SQ755 as a "pre-emptive strike" against Islamic law.²²⁸ They also emphasized the invasive nature of sharia, with state representative Lewis Moore saying, "'Are we not at war with this ideology?'" and state senator Anthony Sykes saying, "Sharia law coming to the US is a scary concept . . . [h]opefully the passage of this constitutional amendment will prevent it in Oklahoma."²²⁹ Beyond the

²²³ CSP 2014, *supra* note 169, at 16. This CSP report finds that 1 in 5 American judges have failed to reject foreign law that violates United States and state public policy. *Id.* See also CSP 2010, *supra* note 160, at 11 ("Our national leaders and military and intelligence officers took oaths to 'support and defend' the Constitution that is now being targeted by those foreign and domestic enemies who seek our submission to shariah.").

²²⁴ See Yaser Ali, *Shariah and Citizenship—How Islamophobia Is Creating a Second-Class Citizenry in America*, 100 CALIF. L. REV. 1027, 1042-43 (2012).

²²⁵ Jihad Prevention Act, H.R. 6975, 110th Cong. (2008).

²²⁶ *Id.* at § 2 ("Any alien who fails to attest, in accordance with procedures specified by the Secretary of Homeland Security, that the alien will not advocate installing a Sharia law system in the United States is inadmissible.").

²²⁷ *Id.* at §§ 3-4 (stating that "the visa of any alien advocating the installation of a Sharia law system in the United States shall be revoked," and "[a]dvocating the installation of a Sharia law system in the United States shall constitute a ground for revocation of a person's naturalization under this subsection.").

²²⁸ Davis & Kalb, *supra* note 121, at 7; Ali, *supra* note 224, at 1029; Mark Schlachtenhaufen, *Sharia Law, Courts Likely on 2010 Ballot*, THE EDMOND SUN (Jun. 4, 2010), https://www.normantranscript.com/edmond/sharia-law-courts-likely-on-2010-ballot/article_769e3baf-5fb8-5b9c-9dff-5bea567c5007.html.

²²⁹ Ali, *supra* note 224, at 1029-30; Schlachtenhaufen, *supra* note 228.

clear fearmongering, these laws demonstrate deep distrust of the United States' judicial system.²³⁰

The first major initiative after SQ755, a 2011 Tennessee anti-terrorism law, would have empowered the state attorney general to designate Islamic groups as “sharia organizations.”²³¹ In its original iteration, this law provided that “knowing adherence to sharia and to foreign sharia authorities is prima facie evidence of an act in support of the overthrow of the United States.”²³² The bill defined sharia as an inherently violent “legal-political-military doctrinal system,” which requires anyone who adheres to it to seek the violent overthrow of the U.S. government.²³³ Sharia and violent jihad are conflated, as, according to the bill, “the unchanging and ultimate aim of jihad is the imposition of sharia.”²³⁴ Supporters praised the bill as emblematic of Tennessee’s leading role in preventing civilization jihad in the American legal system.²³⁵

In addition, while facially neutral laws do not include ACT or CSP’s talking points within the four corners of the text, the rhetoric and context around these bills demonstrate that they are oriented towards similar ends.²³⁶ A Kansas bill, for example, did not explicitly mention sharia.²³⁷ However, the sponsoring representative, Peggy Mast, referenced the CSP Report on the use of sharia law in state courts to justify the bill, stating “we need to assert our Constitution is still the law of the land.”²³⁸ Similarly, in Missouri, the anti-sharia law amendment’s sponsor analogized the threat of sharia to the polio virus that could quickly spread and infect the entirety of the state’s judicial system.²³⁹ Thus, it is clear that anti-sharia activism has taken on a popular constitutionalist form, actively working to elevate the constitutional interpretation of a specific sub-section of the people over institutional judicial analysis.

²³⁰ Davis & Kalb, *supra* note 121, at 7.

²³¹ S.B. 1028, 107th Leg. Sess. (Tenn. 2011); Elliott, *supra* note 173.

²³² S.B. 1028, *supra* note 231. *See also* ABA House of Delegates, *supra* note 149.

²³³ Bambach, *supra* note 134, at 84-85; S.B. 1028, *supra* note 231.

²³⁴ Bambach, *supra* note 134, at 80; SB1028, *supra* note 231.

²³⁵ PATEL ET AL., *supra* note 186, at 34.

²³⁶ Bambach, *supra* note 134 at 81-82.

²³⁷ H.B. 2087, 84th Leg., Reg. Sess. (Kan. 2011).

²³⁸ Yazdiha, *supra* note 117, at 267-68.

²³⁹ Ali, *supra* note 224, at 1065.

III. THE FOURTEENTH AMENDMENT OPPORTUNITY

When the “popular” turns out to be regressive groups intent on redefining foundational principles like religion and secular in pursuit of entrenched illiberal goals, a counter-balancing mechanism within the constitutional structure is necessary. Issues of secularism, religious liberty, and even more essentially, of belonging are litigated in the courts.²⁴⁰ Yet how these conflicts shake out largely depends on social forces, which guide the court’s ability to gauge religious convictions and their place in wider socio-political debates.²⁴¹ Section III.A demonstrates the limitations of using the First Amendment to challenge anti-sharia laws.²⁴² Section III.B argues that, to both repeal anti-sharia laws in the short-term and unsettle the illiberal biases on which they are based in the long-term, civil rights activists should consider bringing suit under the Fourteenth Amendment’s Equal Protection Clause.²⁴³ This Section asserts that civil rights activists should follow the lead of gender-discrimination cases and argue that anti-sharia laws are unconstitutional because they reflect and perpetuate harmful stereotypes.

A. *The Limitations of the First Amendment*

Civil rights activists have used the First Amendment to strike down anti-sharia laws. For example, Muneer Awad successfully demonstrated how SQ755 could not satisfy a strict scrutiny analysis and thus impermissibly infringed on his Free Exercise and Establishment Clause rights.²⁴⁴ Courts have more generally shown a willingness to strike down facially neutral laws that discriminate against religion.

In *Burwell v. Hobby Lobby Stores*, despite the fact that the contraceptive mandate in question was facially neutral, the Supreme Court still evaluated whether it substantially burdened religion under the Religious Freedom Restoration Act of 1993 (RFRA).²⁴⁵ The Court did

²⁴⁰ See BARBARA WELKE, LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES (2010).

²⁴¹ Tebbe, *supra* note 81, at 977 (referencing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012), in which “traditional” believers found comfort that they will continue to be protected, even when they engage in illiberal behavior).

²⁴² See *infra* Section III.A.

²⁴³ See *infra* Section III.B.

²⁴⁴ *Awad v. Zirriax*, 966 F. Supp. 2d 1198, (W.D. Okla. 2013).

²⁴⁵ 573 U.S. 682, 726-27 (2014). RFRA prohibits the government from burdening the exercise of religion, even when it results from neutral laws, unless the law: ““(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C.A. § 2000bb-1.” *Id.* at 726.

not defer to the government's justification that the mandate served the public interests of health and gender equality, but rather examined the marginal interests of the parties.²⁴⁶ Even though the government's interest was to protect another constitutional right, namely the right to obtain contraception, the Court found that the mandate was neither narrowly tailored enough nor the least restrictive means.²⁴⁷ Thus, the harm to religion could not stand.²⁴⁸

It is unclear if this type of protection extends to situations when a facially neutral law primarily impacts Islam. For example, in *Trump v. Hawaii*, the petitioners argued that the executive proclamation banning immigration from Muslim-majority countries violated the First Amendment by disproportionately burdening Muslims.²⁴⁹ Although the proclamation was facially neutral, petitioners pointed to language used by President Trump and others as evidence of its biased objective to ban Muslims.²⁵⁰ Yet, when evaluating the law, the Court accepted its facial neutrality and was persuaded by the government's national security justification.²⁵¹

Therefore, while First Amendment arguments can be successful, their potency is limited by the anti-sharia law movement's successful popular constitutionalist reframing of Islam as non-religious. By defining sharia as a totalitarian, foreign, and military force, the anti-sharia law movement effectively demonstrates that only those religions perceived to be in-line with modern Western society count as valid religion, and enjoy all the relevant protections.²⁵² Islam, intent on destroying the liberal order, cannot count.²⁵³ Litigating under the First Amendment alone cannot disturb the root prejudices used by anti-sharia law activists to reinforce the necessity of the bills.

²⁴⁶ *Id.* at 726-27. *See also* *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006).

²⁴⁷ *Hobby Lobby*, 573 U.S. at 726-29.

²⁴⁸ *Id.* at 735-36. *But see* *Griswold v. Connecticut*, 381 U.S. 479, 485-486 (1965) (the ruling in *Hobby Lobby* occurred despite the fact that, in *Griswold*, the Court reaffirmed the privacy interest of married couples to buy and use contraception without being subject to government regulation.).

²⁴⁹ *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018).

²⁵⁰ *Id.* at 2417-18.

²⁵¹ *Id.* at 2418.

²⁵² COVIELLO, *supra* note 82, at 28.

²⁵³ Beydoun, *supra* note 114, at 1751.

B. The Fourteenth Amendment – The Equal Protection Clause and Stereotyping

In Federalist Paper No. 51, James Madison elucidates how the Framers purposely designed constitutional protections to protect minorities against tyranny of the majority.²⁵⁴ As Justice Harlan exclaimed in his dissent in the anti-canonical case *Plessy v. Ferguson*, “Our constitution . . . neither knows nor tolerates classes among citizens . . . The law regards man as man, and takes no account of his surroundings or his color when his civil rights as guaranteed by the supreme law of the land are involved.”²⁵⁵ In other words, the Constitution treats all citizens equally and with neutrality.²⁵⁶

In this vein, the Fourteenth Amendment’s Equal Protection Clause covers all groups, regardless of their societal favorability. Justice Brennan, in *U.S. Department of Agriculture v. Moreno*, underscored that at its most basic, the Equal Protection Clause prevents a “bare congressional desire to harm a politically unpopular group” from constituting “a legitimate government interest.”²⁵⁷ Additionally, under Fourteenth Amendment analysis, religious minorities enjoy a higher level of scrutiny because they are distinct and insular minorities.²⁵⁸

Civil rights activists have an opportunity to frame their claims in Equal Protection Clause language.²⁵⁹ Unlike under the First Amendment, under the Fourteenth Amendment, civil rights activists could challenge laws based on how they perpetuate impermissible stereotypes, under the larger animus framework.²⁶⁰ Litigation of this type not only could successfully strike down anti-sharia laws, but it could also redefine the societal baseline about Islam, forcing a re-examination of normative assumptions about what constitutes permitted religious practice.

²⁵⁴ THE FEDERALIST NO. 51 (James Madison). See also Ali, *supra* note 224, at 1061.

²⁵⁵ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

²⁵⁶ *Romer v. Evans*, 517 U.S. 620, 623 (1996).

²⁵⁷ *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

²⁵⁸ *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938).

²⁵⁹ U.S. CONST. amend. XIV (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

²⁶⁰ William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 182 (2019).

i. Impermissible Stereotypes

The treatment of Islam in the courts is based on stereotypes perpetuated and strengthened by ACT, CSP, and APPA, amongst others. These social movements purposely frame Islam as a political and military doctrine, not as a system of faith or belief.²⁶¹ In doing so, they further entrench the historic otherization and demonization of Islam in America.

a. Sex and Gender Discrimination Cases

In sex and gender discrimination cases, courts have deemed legislation that reflects and perpetuates biased stereotypes unconstitutional.²⁶² To justify a policy that discriminates on the basis of sex, the government must not only show that the policy is substantially related to a governmental interest, but also that it does not reflect stereotypes.²⁶³ These stereotypes do not have to be overt or blatantly biased, nor must they be irrational or uncritical.²⁶⁴ In fact, impermissible stereotypes can actually be based on some level of empirical support and, as such, appear rational.²⁶⁵ For example, in *Weinberger v. Weisenfeld*, the Court examined whether the Social Security Act, in its treatment of husbands, but not wives, as primary earners, was discriminatory.²⁶⁶ Although admitting that empirical evidence existed supporting the contention that men were more likely to be the primary earners, the Court still found that the gender-based generalizations did not justify the negative effects of the policy.²⁶⁷

Furthermore, courts have already demonstrated the ability to discern when a stereotype is being used to justify an illiberal policy, even if that stereotype contains a “shred of truth” or “some statistical

²⁶¹ See *supra* Section II.B.

²⁶² See *United States v. Virginia*, 518 U.S. 515, 515-16 (1996); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975).

²⁶³ *United States v. Virginia*, 518 U.S. at 515-16 (“Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action . . . [C]ategorization by sex may not be used to create or perpetuate the legal, social, and economic inferiority of women.”).

²⁶⁴ *Nguyen v. I.N.S.*, 533 U.S. 53, 89 (2001) (Ginsburg, J., dissenting).

²⁶⁵ *Id.* at 89-90.

²⁶⁶ *Weinberger*, 420 U.S. at 645.

²⁶⁷ *Id.* (stating that these negative effects were “the denigration of the efforts of women who do work and whose earnings contribute significantly to their families’ support”).

support can be conjured up for the generalization.”²⁶⁸ Therefore, when evaluating a claim of discrimination under Equal Protection Clause analysis, courts are able to determine whether or not the policy is likely “to stigmatize as well as to perpetuate historical patterns of discrimination.”²⁶⁹

For example, in *J.E.B. v. Alabama*, the state of Alabama, on behalf of the mother, sought child support from a putative father.²⁷⁰ During jury selection, Alabama used nearly all of its preemptory strikes to remove men from the jury pool, leading to an all-female jury.²⁷¹ The state justified its decision to strike the majority of the male jurors by arguing that, keeping all other qualifications equal, female jurors were more likely to be more sympathetic and receptive to their case.²⁷² The Court disagreed, and found that Alabama’s actions “ratif[ied] and reinforc[ed] prejudicial views of the relative abilities of men and women.”²⁷³ The Court went on to describe these prejudicial views as “invidious, overbroad, and archaic stereotypes.”²⁷⁴

Finally, the Court “has consistently found government enforcement of private prejudice impermissible, even when the justifications are legitimate or even compelling.”²⁷⁵ In *Palmore v. Sidoti*, a state court judge awarded sole custody of a three-year-old daughter to her father after he complained that her mother was in an interracial relationship.²⁷⁶ In its unanimous holding, the Supreme Court reasoned that the state judge’s order was unconstitutional not because it failed a strict scrutiny analysis, but rather because it gave force to private racial biases.²⁷⁷ Reaching this conclusion, the Court did not concern

²⁶⁸ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140, n.11 (1994) (“The Equal Protection Clause, as interpreted by decisions of this Court, acknowledges that a shred of truth may be contained in some stereotypes, but requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination.”). See also, e.g., *Nguyen*, 533 U.S. at 89; *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982); *Craig v. Boren*, 429 U.S. 190, 201 (1976); *Weinberger* 420 U.S. at 645; *Stanton v. Stanton* 421 U.S. 7, 14 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

²⁶⁹ *J.E.B.*, 511 U.S. at 140.

²⁷⁰ *Id.* at 129.

²⁷¹ *Id.*

²⁷² *Id.* at 137-38.

²⁷³ *Id.* at 130-31.

²⁷⁴ *Id.* at 131.

²⁷⁵ Eric Merriam, *Fire, Aim, Ready – Militarizing Animus: Unit Cohesion and the Transgender Ban*, 123 DICK. L. REV. 57, 66 (2018).

²⁷⁶ *Palmore v. Sidoti*, 466 U.S. 429, 431 (1984). The state court’s reasoning rested on the child being susceptible to peer pressures and social stigmatization from living in an interracial household with unmarried adults. *Id.*

²⁷⁷ *Id.* at 432-34; Merriam, *supra* note 275, at 65-66.

itself with an examination of the reasonability of the private racial bias.²⁷⁸ The potential harm of a public enforcement of a private bias, and thus the state-sanctioning of personal animus, was itself constitutionally impermissible.²⁷⁹ Thus, a finding of animus-motivation circumvents the regular Equal Protection Clause tiered analysis, pushing the onus on the government to defend against claims of invidiousness and justify its actions.²⁸⁰

b. Potential Use by Civil Rights Activists

Civil rights activists should borrow from this language about stereotyping and animus with the goal of forcing courts to articulate what biased stereotypes about Islam entail and the damage that they do, just as courts have done for gender-based stereotypes.²⁸¹ Forcing a court to reference the invidious biases and stereotypes promoted by anti-sharia laws would be a powerful way to contend with the reframing of Islam as non-religious.

Anti-sharia law promoters have worked hard to mainstream their belief that Islam, positioned as an invading foreign threat, undermines essential liberties in order to destroy American civilization.²⁸² Public opinion polling demonstrates that, while opinions about Muslims are becoming more positive, the religion still receives the lowest approval rankings.²⁸³ A 2016 Pew Research Poll found that nearly half of American adults think some Muslims are anti-American.²⁸⁴ Building on

²⁷⁸ Merriam, *supra* note 275, at 66.

²⁷⁹ *Id.*

²⁸⁰ Araiza, *supra* note 260, at 186-87.

²⁸¹ *Miller v. Albright*, 523 U.S. 420, 442 (1998) (quoting *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977) (Stevens, J., concurring)) (“Discrimination that ‘is merely the accidental byproduct of a traditional way of thinking about females’ is unacceptable.”).

²⁸² *See supra* Section II.C.

²⁸³ *How the U.S. General Public Views Muslims and Islam*, PEW RSCH. CTR. (July 26, 2017), <https://www.pewforum.org/2017/07/26/how-the-u-s-general-public-views-muslims-and-islam/>. Pew Research Center asked respondents to rate Muslims on a “feeling thermometer” ranging from 0 to 100, where 0 degrees indicates the coldest, most negative feelings, and 100 degrees indicates the warmest, most positive feelings. On average, Americans gave Muslims a thermometer rating of 48 degrees, which was 8 degrees warmer than in 2014, when the Center first posed the question. However, this is lower than all the other categories. Atheists received a 50; Mormons received a 54; Hindus received a 58; Buddhists received a 60; Evangelical Christians received a 61; Mainline Protestants received a 65; Catholics received a 66, and Jews received a 67. *Id.*

²⁸⁴ *Republicans Prefer Blunt Talk About Islamic Extremism, Democrats Favor Caution*, PEW RSCH. CTR. (Feb. 3, 2016), <https://www.pewforum.org/2016/02/03/republicans-prefer-blunt-talk-about-islamic-extremism-democrats-favor-caution/>. One-quarter of U.S. adults (25%) think half or more of Muslims in the U.S. are “anti-American,” while an additional 24% of adults think “some” Muslims are anti-American. *Id.*

this, a 2017 Pew Research Poll found that forty-four percent of American adults believed there was a natural conflict between Islam and democracy.²⁸⁵ The pervasive anti-Muslim bias in the mainstream body politic cannot be attributed to the activity of ACT, CSP, ALAC, and SANE alone. Yet these social movements intend for their campaigns to imbue society with their particular perspective on totalitarian and threatening Islam. Thus, it is highly likely that the work of Yerushalmi, ACT, CSP, and others has impacted how Americans continue to perceive Islam.

Anti-Muslim bias is also a historic part of American politics and identity, bolstering its appearance as rational.²⁸⁶ Yet perceived rationality does not insulate a law that makes classifications from a judicial determination that it promotes impermissible stereotypes. Faced with a Fourteenth Amendment lawsuit, CSP and ACT would likely emphasize how anti-sharia laws are necessary to combat the documented infiltration of the judicial system by sharia. Relying on *S.D. v. M.J.R.*, as well as CSP's 2012 Report on the fifty significant state court cases in which sharia was used, these social movements would argue that anti-sharia laws are justified by empirical realities.²⁸⁷ However, a court could still find that the law is based on a stereotype, despite this evidence.

One of the most dangerous consequences of stereotypes is that they make assumptions about an individual based on their membership to a particular group.²⁸⁸ For example, laws based on gender and sex stereotypes "restrict individual choices by punishing those men and women who do not fit the stereotype mold."²⁸⁹ Stereotypes about Islam similarly exclude individuality. For example, the 2010 CSP report flattens perceptions of Islam, saying that the mainstream practice of

²⁸⁵ *How the U.S. General Public Views Muslims and Islam*, *supra* note 283. When asked to describe, in their own words, the reasons why they think there is a natural conflict between Islam and democracy, many Americans (44% of those who see such a conflict) say there is a basic incompatibility or tension between the tenets of Islam and the principles of democracy. One respondent, for example, said, "There is no democracy in Islam." *Id.*

²⁸⁶ *See supra* Section I.D.

²⁸⁷ *Shariah Law and American State Courts*, *supra* note 218. Additionally, the Court has shown itself willing to investigate statistics presented in support of a discriminatory law. For example, in *Craig v. Boren*, the Court found that "the very social stereotypes that find reflection in age-differential laws . . . are likely substantially to distort the accuracy of these comparative statistics." 429 U.S. 190, 202 n.14 (1976).

²⁸⁸ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Miller v. Albright*, 523 U.S. 420, 469 (1998) (Ginsburg, J., dissenting).

²⁸⁹ *Isaacs v. Felder Servs., LLC*, 143 F.Supp.3d 1190, 1194 (M.D. Ala. 2015).

sharia is the greatest threat to the United States.²⁹⁰ By purposely stripping Islam of its religious components, the anti-sharia movement de-emphasizes and obscures how sharia law interacts with personal and individual preferences, fulfilling the criteria of a stereotype.²⁹¹

In his suit challenging SQ755, Muneer Awad invoked his First Amendment freedoms.²⁹² Although SQ755 included an explicit classification, Awad did not make a Fourteenth Amendment Equal Protection Clause claim.²⁹³ When faced with anti-sharia laws that, like SQ755, explicitly mention sharia or Islam, civil rights activists should bring suit under the Fourteenth Amendment using the proposed stereotype framework. These suits would force courts to contend with, and hopefully dismiss the viability of, arguments based on the underlying biases perpetuated by anti-sharia laws and linked to historic, prejudiced understandings of Americanism and Islam. Forcing states to find an exceedingly persuasive justification for anti-sharia laws without depending on stereotypes would lay bare the biased nature of these laws. This path is most immediately applicable to laws like SQ755 that explicitly mention anti-sharia or Islam. Once courts identify the baseline components of impermissible stereotypes about Islam and Muslims, this criterion could be used to challenge the more nefarious facially neutral bills.

Certainly, even if civil rights advocates utilize this strategy, they will be advocating to a bench with a very pro-Christian religious doctrinal approach.²⁹⁴ In a major departure from its predecessors, the Roberts Court has ruled in favor of religious organizations over 81% of the time, with mainstream Christian organizations as the most common victors.²⁹⁵ Of the three cases involving non-mainstream Christian plaintiffs, the only loss occurred in *Trump v. Hawaii*.²⁹⁶ The Court's movement perhaps reflects the sticky narrative of Christian values as under threat from secularists, atheists, and the LGBTQIA+

²⁹⁰ CSP 2010, *supra* note 160, at 123. These reports do not, for example, discuss the differences between Shi'a and Sunni Islam, or the different types of practice within these two major categories. *Id.*

²⁹¹ See Pedrioli, *supra* note 10, at 66; ABA House of Delegates, *supra* note 149, at 1-3; PATEL ET AL., *supra* note 186, at 1-5.

²⁹² See *supra* Section II.A.

²⁹³ Robert E. Michael, *The Anti-Shari'a Movement – Unconstitutional Dimension or Homeland Security?*, 18 ILSA J. INT'L & COMP. L. 347, 352-53 (2012).

²⁹⁴ See Epstein & Posner, *supra* note 80, at 1, 8, 18-19.

²⁹⁵ *Id.* at 1.

²⁹⁶ *Id.* at 8. Epstein & Posner comment that, when viewed through the lens of the Roberts Court as pro-mainstream Christianity, "*Trump v. Hawaii* is no longer an anomaly but fits the pattern: the outcome is not pro-religion (it harms Muslims) but it advances, or at least is consistent with, a pro-Christian agenda." *Id.*

community,²⁹⁷ which justified the Roberts Court's extension of "protections for minority religions so as to encompass majority religions as well."²⁹⁸

Even so, employing a Fourteenth Amendment animus and stereotyping strategy is the first step in a long road to undo the dangerous public perception of Islam as a violent and foreign political threat. The law, along with civil rights and liberties movements, must play a role in helping society unlearn entrenched and hidden biases. So far, anti-Muslim social movements have most successfully used popular constitutionalism to define religion. However, courts can rebut these narratives by articulating the stereotypes of Islam and acknowledging the inherent limitations of religion and secularism as currently understood.

CONCLUSION

"Christian faith is not the past but the present and the future. Make it stronger."²⁹⁹

Anti-sharia laws carry real life-and-death dangers beyond their text. They reflect and perpetuate the continued marginalization of the American-Muslim community.³⁰⁰ The educational aspect of these initiatives, identified as the primary priority by David Yerushalmi, legitimize bias and prejudice that, in particularly potent doses, motivate acts of violence.³⁰¹ According to the latest FBI Hate Crime Statistics Report, in 2020, of the 1,244 victims of anti-religious hate crimes, 8.8% were victims of anti-Muslim bias.³⁰² Even in supposedly liberal and progressive bastions, anti-Muslim hate crimes continue at unacceptably

²⁹⁷ For examples of this narrative, see Federalist Society, *Address by Justice Samuel Alito*, YOUTUBE (Nov. 12, 2020), <https://www.youtube.com/watch?v=VMnukCVIZWQ>, and William P. Barr, Attorney General, Dep't of Just., Attorney General William P. Barr Delivers Remarks to the Law School and the de Nicola Center for Ethics and Culture at the University of Notre Dame (Oct. 11, 2019) (transcript available at <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-law-school-and-de-nicola-center-ethics>).

²⁹⁸ See Epstein & Posner, *supra* note 80, at 8.

²⁹⁹ *Presidential Candidate Donald Trump Remarks in Detroit*, C-SPAN (Sept. 3, 2016), <https://www.c-span.org/video/?414743-1/donald-trump-speaks-african-american-church-detroit>.

³⁰⁰ See Bambach, *supra* note 134, at 72-73.

³⁰¹ Elliott, *supra* note 173.

³⁰² *2020 Hate Crimes Statistics*, U.S. DEP'T JUST. (Dec. 9, 2021), <https://www.justice.gov/crs/highlights/2020-hate-crimes-statistics>.

high levels.³⁰³ Additionally, these statistics do not capture the quotidian threat under which most American Muslims live.³⁰⁴ Therefore, anti-sharia laws, especially in their support of a certain type of civic nationalist and American identity, have consequences for the real lives and bodies of thousands of Americans.

Anti-sharia law advocates, using popular constitutionalist tactics, purport to speak for the people. They take advantage of the squishiness and fluidity of the borders of religion and secularism. In doing so, they further legitimize the historic prejudice that Islam and America are inherently incompatible, and justify further action, like anti-mosque demonstrations, large-scale surveillance, and physical violence.³⁰⁵ Employing a Fourteenth Amendment perspective within the contours of the secular nation would expose and debunk anti-Muslim prejudices. Therefore, this tactic could dismantle pervasive, historic, stereotypes used to justify anti-sharia laws and other forms of social, political, and physical violence. The law is elastic, and understandings of belonging are iterative. Fourteenth Amendment challenges to anti-sharia laws could promote inclusiveness and, in doing so, bring society closer to the equal and tolerant America the Constitution imagines.

³⁰³ Press Release, *CAIR-NY Reports 74% Increase in Anti-Muslim Hate Crimes Since Trump's Election*, CAIR (March 5, 2018), <https://www.cair-ny.org/news/2018/3/5/cair-ny-reports-74-increase-in-anti-muslim-hate-crimes-since-trumps-election>.

³⁰⁴ Katayoun Kishi, *Anti-Muslim Assaults Reach 9/11-Era Levels, FBI Data Show*, PEW RSCH. CTR. (Nov. 21, 2016), <https://www.pewresearch.org/fact-tank/2016/11/21/anti-muslim-assaults-reach-911-era-levels-fbi-data-show/>.

³⁰⁵ See Craig Considine, *The Racialization of Islam in the United States: Islamophobia, Hate Crimes, and "Flying while Brown"*, RELIGIONS, Sept. 2017, at 1, 10 (finding that the association of Islam with terror and violence contributes to conveying the "message that American Muslims are a threat to national security and require careful monitoring and surveillance"). See also Ahmed Shaheed (Special Rapporteur on Freedom of Religion or Belief), *Countering Islamophobia/Anti-Muslim Hatred to Eliminate Discrimination and Intolerance Based on Religion or Belief*, U.N. Doc. A/HRC/46/30 (Apr. 13, 2021) ("Islamophobic attitudes that draw on negative overgeneralizations about Islam and essentializations of Muslims — which depict them as threatening and centre on constructions of irreconcilable cultural differences between Muslims and the values of majority populations — have fuelled acts of discrimination, hostility and violence against Muslim individuals and communities.").