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A Monolithic Threat: The Anti-Sharia Movement and America's Counter-Subversive Tradition

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A Monolithic Threat: The Anti-Sharia Movement and America’s Counter-Subversive Tradition

By Ross Johnson*

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I. Introduction

On September 11, 2001, nineteen Muslims from Egypt, Saudi Arabia, Lebanon and the United Arab Emirates hijacked several commercial

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airliners and crashed them into the World Trade Center and Pentagon. 2,996 people were killed.¹ Less than a week later, President George W. Bush visited the Islamic Center of Washington, D.C. Bush came to the Islamic Center to meet with Muslim-American leaders and provide an important message to the American people. “Acts of violence against innocents violate the fundamental tenets of the Islamic faith,” Bush explained. “[I]t’s important for my fellow Americans to understand that . . . The face of terror is not the true faith of Islam. That’s not what Islam is all about. Islam is peace. These terrorists don’t represent peace. They represent evil and war.”²

Despite President Bush’s message that day, as the facts of 9/11 materialized and the “War on Terror” began, the American public’s perception of Islam took an unfortunate shape. Over the next decade, the terms “jihad,” “al-Qaeda,” and “radical Islam” entered the American vernacular. In addition, horrific stories of radical Islamic religious practices such as “honor-killings” and the “stoning” of Muslim women were broadcast over American television. Unsurprisingly, the American public began to question who this new enemy was. Were we simply at war with al-Qaeda? Or was there a fundamental conflict between Islam and the American way of life?

Over the past year, a movement that classifies Islam, or more specifically, “Shari’a,”³ as a threat to the United States has offered hyperbolic answers to these questions.⁴ More and more, various anti-Muslim groups

1. See THE 9/11 COMM’N REPORT, NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S. chap. 7, 215–53 (2004) available at <http://www.9-11commission.gov/report/911Report.pdf>. An additional plane, United Airlines Flight 93, was also hijacked by four al-Qaeda terrorists (detailing the assembly and training of the terrorists involved in the attack). During the hijacking, some of the passengers attempted to regain control of the plane. The plane ultimately crashed into a field near Shanksville, Pennsylvania killing all 40 people aboard plus the hijackers. *Id.* at 10–14.

2. See President George W. Bush, Address at the Islamic Center of Washington (Sept. 17, 2001), available at http://www.pbs.org/newshour/updates/terrorism/july-dec01/bush_speech_9-17.html. (responding to the American animosity towards Islamic-American citizens following the September 11 attacks).

3. See Asifa Quraishi, *Who Says Shari’a Demands the Stoning of Women? A Description of Islamic Law and Constitutionalism*, 1 BERK. J. OF MIDDLE EASTERN & ISLAMIC L.J. 163 (2008) (explaining the concept of shari’a and its interaction with American constitutionalism). Shari’a literally means “way” or “street,” in essence, it refers to the divine way that God expects Muslims to live. In other words, Sharia is simply a way of life that Muslims believe has been mandated by God through the Quran and the Prophet Muhammad’s example. *Id.* at 164.

4. See generally Wajahat Ali et al., FEAR, INC.: THE ROOTS OF THE ISLAMOPHOBIA NETWORK IN AMERICA, Center for American Progress (August 2011) available at

have begun to identify Sharia as a “legal-political-military” doctrine that seeks to infiltrate the American judicial system and impose a radical brand of Sharia law in the United States.⁵ Sadly, while this view has a minute relation to reality, the rhetoric and fear are gaining attention among national politicians and in state legislatures across the country. To date, twenty-five state legislatures have debated or are currently considering bills that would forbid state judges from considering Sharia law in their decisions.⁶ While the legislators in each state are unique, the legislation and the arguments all share a common theme: a belief that Muslim-Americans are a “monolithic” and subversive threat to the United States and its way of life. Muslims, the argument goes, have a singular loyalty to their religion—a religion that preaches intolerance and violence and advances the notion that the aim of all Muslims is to build a global “caliphate” that subjects all persons to Islam and Islamic law.

As this note hopes to illustrate, though such arguments could be viewed as mere political embellishments, at times of national crisis similar claims have been successfully advanced towards minority groups in the United States. In World War II, with the support of the American public, the Roosevelt administration pointed to military necessity and a subversive Japanese threat as cause for interning over one hundred thousand Japanese-Americans in camps along the West Coast.⁷ Similarly, just over a decade later, the Truman Administration and the U.S. Congress swept the nation into a fury over the threat of a Communist Party takeover.⁸ At that time,

<http://www.americanprogress.org/issues/2011/08/pdf/islamophobia.pdf>.

5. See THE CENTER FOR SECURITY POLICY, SHARIA: THE THREAT TO AMERICA 11, 6 (2010), available at [http://www.worldsecuritynetwork.com/documents/Shariah_The_Threat_to_America_\(Team_B_II_Report\)_9-14-10.pdf](http://www.worldsecuritynetwork.com/documents/Shariah_The_Threat_to_America_(Team_B_II_Report)_9-14-10.pdf). [hereinafter CENTER FOR SECURITY POLICY] (stating that the United States faces an “insidious ideological threat: the totalitarian socio-political doctrine that Islam calls shariah”).

6. See Ashby Jones & Joe Palazzolo, *States Target Foreign Law*, THE WALL STREET JOURNAL, Feb. 7, 2012, <http://online.wsj.com/article/SB10001424052970204662204577199372686077412.html> (“Twenty-one states are considering measures that would prohibit judges from applying the laws or legal codes of other nations in a wide variety of cases. Three states—Tennessee, Louisiana and Arizona—recently added versions of such laws to the books, while a fourth—Oklahoma—worked a similar change into its constitution in 2010.”).

7. See *Korematsu v. U.S.*, 323 U.S. 214, 218 (1944) (“We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.”) (quoting *Hirabayashi v. U.S.*, 320 U.S. 81, 99 (1943)).

8. See ELLEN SCHRECKER, *THE AGE OF MCCARTHYISM: A BRIEF HISTORY WITH*

government leaders and the American public were convinced that American “Communist party members were . . . part of a secret conspiracy, fanatics who would automatically do whatever Stalin told them to do.”⁹ In each of these episodes, the American government took unprecedented steps to challenge a perceived threat to the American way of life, and in each case the Supreme Court upheld the government’s actions.¹⁰

Today, the same arguments that led to the Japanese-American internments and the Red Scare are being directed towards the Muslim-American community. Citing disloyalty, a disparate set of values, and a monolithic community of saboteurs, anti-Muslim activists and organizations are advocating for radical, yet not unprecedented, measures to isolate Muslims and halt “stealth jihad.”¹¹ This Note will seek to compare the arguments being advanced by anti-Muslim activists today with the anti-Japanese and anti-Communist arguments of the past. Part II will briefly explore what Sharia is and is not and, in so doing, seek to explain the “threat” that anti-Muslim groups and politicians have identified. Parts III and IV will then illustrate the rise of the anti-Sharia movement in the United States and the legislation that has appeared in states like Virginia, Pennsylvania, Oklahoma and Tennessee. Next, Parts V and VI will respectively introduce how similar arguments and legislative initiatives were directed towards Japanese-Americans during World War II and American Communists and liberals during the Cold War. Part VII will then look at how the Supreme Court addressed and upheld the decisions that were made during World War II and the Cold War and, additionally, offer a brief discussion of where current jurisprudence lies. Finally, this Note will seek to dispel the belief that Sharia poses a threat to the American judicial system and argue that as a policy going forward, Muslim-American integration should be decoupled

DOCUMENTS 21 (Lynn Hunt et al. eds., 2nd ed. 2002) (“The sense of urgency that surrounded the issue of communism came from the U.S. government’s attempt to mobilize public opinion for the cold war Above all, it legitimated the McCarthy era repression by dehumanizing American Communists and transforming them into ideological outlaws . . .”).

9. *Id.*

10. See Jones & Palazzolo, *supra* note 6 (outlining the recent trend to demand keeping foreign laws out of consideration in American courts); *Dennis v. U.S.*, 341 U.S. 494 (1951) (convicting petitioners of violating the Smith Act, which outlaws conspiracy to overthrow the government).

11. See CENTER FOR SECURITY POLICY, *supra* note 5 at 8 (“Those who today support shariah and the establishment of a global Islamic state (caliphate) are perforce supporting objectives that are incompatible with the U.S. Constitution, the civil rights the Constitution guarantees and the representative, accountable government it authorizes.”).

from the “security” umbrella and, instead, become rooted in a social and civil rights endeavor that recognizes Muslim-Americans essential “American-ness” and desire for acceptance.

II. Sharia Law: Myths and Realities

Over the past decade, there has rightfully been an unremitting devotion by scholars to explain Sharia law and the Islamic faith.¹² Most of these works provide excellent descriptions and insights into how Sharia is practiced in the U.S. and abroad. Still, the sheer number of books and articles on Sharia and Islam is perhaps indicative of the subject’s complexity. While the following description will come short of providing a full representation of Islam, for our purposes it should provide an adequate illustration of Islam’s core teachings and values.

At the foundation of Islam are five pillars: belief in God,¹³ ritual prayers,¹⁴ fasting,¹⁵ the hajj (i.e. pilgrimage),¹⁶ and charity.¹⁷ Sharia is essentially concerned with the observance and practice of these pillars.¹⁸ From the most literal of standpoints, Sharia is defined as “the path or the way.”¹⁹ Similarly, in the religious context, it is said to be “the way God is asking people to behave and to live.”²⁰

Though it is often described to the contrary, Sharia is not a clear and articulate body of law. More precisely, “[it] is a path to religion . . . primarily concerned with a set of values that are essential to Islam and the best manner of their protection.”²¹ There are generally thought to be two tangible sources for Sharia: the Qu’ran, which Islam teaches to be the word of God, and the sunna, a biography of the Prophet

12. For example, a WestLaw search of law review or journal articles with “Sharia” or “Shariah” in the title yields a result of over 2,100 articles written within the past ten years.

13. MOHAMMED HASHIM KAMALI, *SHARI’AH LAW: AN INTRODUCTION* 2 (2008).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Surat Al-Mā’idah 5:48: (“To each among you have We prescribed a law and an open way.”) (translating from Arabic).

20. See Quraishi, *supra* note 3, at 164 (explaining how Sharia law and the Islamic religion developed).

21. See KAMALI, *supra* note 13, at 2. (giving general information about Sharia law).

Mohammed.²² Out of the sunna comes the “hadith”—teachings that provide more “concrete details . . . [of] what the Prophet has done or said, or even tacitly approved”²³ Naturally, while the Qur’an and sunna cover many subjects, these sources do not provide answers to all of life’s questions. In turn, when faced with questions that the Qur’an or sunna do not clearly answer, Muslims turn to religious scholars and leaders to interpret the texts and provide a conclusion. This interpretive work—“ijtihad”—is, in fact, quite similar to the work that lawyers and judges do. In essence, these religious “jurists” are being asked to answer specific legal questions—as they relate to one person’s situation—based upon the interpretation of existing rules.

It is through the differing and occasional inexplicable interpretations of the Qu’ran and sunna that controversy often arises. In certain Islamic societies and nations across the world, Muslim leaders have used the guise of the Qu’ran to promote abhorrent laws and policies. As many scholars have noted, however, many of these shocking interpretations have little, if any, basis in the Qu’ran.²⁴ As the Islamic scholar Wael Hallaq has explained, in its original form Sharia was not meant to apply equally to all people. On the contrary, Sharia recognized that “individuals were not . . . indistinguishable members of a generic species, standing in perfect parity before a blind lady of justice. Each individual and circumstance was deemed unique, requiring *ijtihad* that was context-specific.”²⁵ Following the end of colonialism, however, Islamic political leaders in the Middle East and Africa soon began to use the language of the Qu’ran and sunna to promote political objectives.²⁶ Sadly, this politicization has transformed Sharia “from a worldly institution and culture to a textuality, namely, a body of texts that is entirely stripped of its social and sociological context”²⁷ Though scholars note that the “study of Sharia should not be approached in the expectation of finding a comprehensive or systematic

22. *See id.* (detailing where Sharia law is drawn from).

23. WAEL B. HALLAQ, AN INTRODUCTION TO ISLAMIC LAW 16 (2009).

24. *See* CENTER FOR SECURITY POLICY, *supra* note 5, at 6. (stating that even though the Center for Security Policy, an anti-Sharia group, ignores this idea in making their final argument, the group initially concedes that among most of the world’s Muslim, Sharia is just “a reference point for a Muslim’s personal conduct, not a corpus to be imposed on the life of a pluralistic society”).

25. *See* HALLAQ, *supra* note 23, at 166.

26. *See id.* at 167–68. (discussing changes and transformational forces such as centralization, codification, homogenization, and militarization were all in fact “props of the modern state project” that led to a view of Sharia that was detached from its past).

27. *Id.* at 167.

code or codes that present definitive answers to precise legal issues of the day,”²⁸ many Islamic states and political leaders have attempted to do just that. In the process, “the very meaning of Islamic law [has been] severely curtailed, if not transformed, having been emptied of the content and expertise necessary for genuine evaluation of Shari’a-on-the-ground, and of its operation within an ‘ecological’ system of checks and balances.”²⁹

The Sharia that has arisen in certain Islamic states has paved the way for draconian laws and policies that offend Western notions of equality and pluralism. Moreover, it has led to the conspiracy theorists and anti-Muslim notions that this strict, yet false, form of Sharia will be brought to the United States and forced upon Americans. Undoubtedly, world events and public statements from radical Muslim groups such as the Taliban in Afghanistan, Hamas, and al-Qaeda have fueled the notion that Islam is an incompatible and violent religion. Nevertheless, polling appears to suggest that over the past decade, this fear of Islam has spread and increasingly Americans are looking towards their Muslim-American neighbors as outsiders who share different values and hold seditious goals.

III. The War on Terror and the Rise of the Anti-Sharia Movement

In the wake of 9/11, the pattern of terrorism and the military threat to the United States seemed too obvious for many Americans to ignore. After all, on 9/11 nineteen Muslims attacked the United States and within a short time, the U.S. was in conflicts in Muslim nations against an enemy that pointed to Islamic teachings as their justification for war.³⁰ Yet over time, as the day-to-day scenes from the warfronts in Iraq and Afghanistan faded from the headlines, what was once an outward fear of terrorism began to shift inward towards domestic Muslim-American communities. Increasingly, Americans began to wonder if, in addition to an external security threat, Islamic and Muslim-Americans posed a danger from within.³¹

28. ABDULLAHI AHMED AN-NA’IM, *Shari’a in the Secular State: A Paradox of Separation and Conflation*, in *THE LAW APPLIED: CONTEXTUALIZING THE ISLAMIC SHARI’A* 321, 321 (Peri Bearman et al. eds., 2008).

29. HALLAQ, *supra* note 23, at 168.

30. See *THE 9/11 COMM’N REPORT*, *supra* note 1, at 215–53 (explaining the 9/11 attacks and subsequent actions by the United States).

31. See PUBLIC RELIGION RESEARCH INSTITUTE, *Majority Say Congressional Hearings on Alleged Extremism in American Muslim Community ‘Good Idea’* (2011) available at <http://publicreligion.org/research/2011/02/majority-say-congressional-hearings-on-alleged-extremism-in-american-muslim-community-%E2%80%98good-idea%E2%80%99/> (“A plural

Today, this fear has reached a tipping point. Opinions of Islam within the U.S. are now at their lowest point ever.³² The Pew Research Center reports that the percentage of Americans with favorable views of Islam has dropped from forty-one percent to thirty percent in the past five years.³³ Additionally, there is now a growing sense amongst Americans that Islam has an inherent anti-American message and that Muslims are inherently un-American and disloyal. According to a recent report by Ohio State and Cornell University, only fifty-two percent of Americans believe that Muslims in the United States are supportive of the United States and only thirty-three percent believe that Muslims are “trustworthy.”³⁴ Similarly, a sizeable proportion of Americans now believe that Muslims should be barred from running for President or sitting on the Supreme Court.³⁵

Undoubtedly, the turn in anti-Muslim attitudes can be traced in large part to world events and the threat of terrorism. Nevertheless, in the decade since 9/11, there has been a corresponding rise in anti-Muslim organizations that promote the view that the greatest threat to America comes not from al-Qaeda or foreign terrorists, but from your Muslim-American neighbor. The Center for American Progress recently released an extensive report that explained how organizations such as the American Public Policy Alliance, Jihad Watch, ACT! for America, and Stop Islamization of America have garnered over \$40 million in donations over the past ten years and have helped spread the notion of “an Islamic conspiracy to destroy ‘American values.’”³⁶

ity (46%) of Americans believe that American Muslims have not done enough to oppose extremism in their communities.”).

32. See THE GALLUP ORGANIZATION, RELIGIOUS PERCEPTIONS IN AMERICA (2010), available at <http://www.abudhabigallupcenter.com/143762/Religious-Perceptions-America.aspx> (“Fifty-three percent of Americans say their opinion of Islam is either ‘not too favorable’ (22%) or ‘not favorable at all’ (31%)”).

33. See OMAR SACIRBEY, *Muslims In America Divided On Improving Image 10 Years After 9/11*, HUFFINGTON POST, July 24, 2011, http://www.huffingtonpost.com/2011/08/24/muslim-america_n_935685.html (stating that despite learning more about the Muslim faith, Americans seem to be turning against it more strongly).

34. See CORNELL UNIVERSITY SURVEY RESEARCH INSTITUTE, THE “BIN LADEN” EFFECT: HOW AMERICAN PUBLIC OPINION ABOUT MUSLIM-AMERICANS SHIFTED IN THE WAKE OF OSAMA BIN LADEN’S DEATH 3 (2011), available at http://www.sri.cornell.edu/sri/files/binladen_report.pdf (describing the anti-Muslim sentiment amongst a large number of Americans).

35. See Alex Altman, *Time Poll: Majority Oppose Mosque, Many Distrust Muslims*, TIME MAGAZINE, Aug. 19, 2010, available at <http://www.time.com/time/nation/article/0,8599,2011799,00.html> (quantifying the animosity towards the Muslim-American community).

36. See Ali et al., *supra* note 4, at 2 (describing several organizations that are

At the forefront of this campaign has been the Center for Security Policy. Its report, “Shariah: The Threat to America,” has become the cornerstone publication for the anti-Sharia movement. In it, the authors conclude that “America is engaged in existential conflict with foes that have succeeded brilliantly in concealing their true identity and very dangerous capabilities.”³⁷ These enemies, the report adds, “adhere to an all-encompassing Islamic political-military-legal doctrine known as shariah. It obliges them to engage in jihad to achieve the triumph of Islam worldwide through the establishment of a global Islamic state”³⁸

The report calls on Americans to resist the urge to welcome Muslims into their communities as the United States has done in the past with other minority groups or “Noble Savages.” For the authors,

There is a crucial difference in the contemporary incarnation of this ‘Noble Savage Other,’ however: Where the Other of yesteryear used to live vividly imagined, if dimly understood, in the Western imagination, the contemporary Other now lives, quite literally, in the West itself. Indeed, a massive demographic shift has brought adherents to shariah—a doctrine that, by definition, opposes all others—deep into the non-Islamic world. The Other is still vividly imagined, if dimly understood. But where he once provided intellectuals with a theoretical foil against modernity, the Other—in this century, in the collective form of practitioners of shariah—now manifests itself as a concrete bloc.³⁹

The segment of American society that the Center for Security Policy and anti-Sharia activists identify as being particularly vulnerable to the “Muslim threat” is the American judicial system. According to this argument, “based on shariah’s tenets, its core attributes . . . and its bid for supremacy over all other legal or political system, there can be no confusion on this score: . . . shariah is an enemy of the United States Constitution. The two are incompatible.”⁴⁰ Americans, in turn, must awaken to the reality that “the United States has been infiltrated and deeply influenced by an enemy within that is openly determined to replace the U.S. Constitution with shariah.”⁴¹

dedicated to the undermining of Muslim-Americans).

37. CENTER FOR SECURITY POLICY, *supra* note 5, at 11.

38. *Id.*

39. *Id.* at 127.

40. *Id.* at 123.

41. *Id.* at 13.

An example that has frequently been underlined as an illustration of this growing danger is a New Jersey criminal court case from late 2009.⁴² The case gained national attention after the trial court judge acquitted the defendant, a Muslim man who had admitted to beating and raping his wife.⁴³ The husband claimed that under Islamic law, he was allowed to have sex with his wife whenever he demanded.⁴⁴ Accepting this defense, the trial court judge found that that the husband's religious belief necessarily eliminated his "intent."⁴⁵ While this bizarre and egregious ruling was immediately overturned by an appeals court,⁴⁶ anti-Sharia critics pounced on the trial court's decision as an example of Muslims attempting to usurp the American judicial system and impose Sharia law on American society.⁴⁷

Similar arguments have now taken hold among national political leaders. Newt Gingrich, the former Speaker of the House of Representatives and Republican presidential candidate, recently warned that "Sharia is a mortal threat to the survival of freedom in the United States and in the world as we know it."⁴⁸ According to Gingrich, "Sharia in its natural form has principles and punishments totally abhorrent to the Western world."⁴⁹ Similar arguments have come from conservative leaders such as former

42. *See* S.D. v. M.J.R., 2 A.3d 412, 422 (N.J. Super. Ct. 2010) (holding that "[d]efendant's conduct in engaging in nonconsensual sexual intercourse was unquestionably knowing, regardless of his view that his religion permitted him to act as he did").

43. *See id.* at 421 ("The trial judge found as a fact that defendant committed conduct that constituted a sexual assault and criminal sexual contact, but that defendant did not have the requisite criminal intent in doing so."). *See also* Hosain v. Malik, 671 A.2d 988 (Md. App. 1996) (interpreting American law by affirming the use of Pakistani law).

44. *See id.* at 416 ("Plaintiff testified that defendant always told her: 'this is according to our religion. You are my wife, I c[an] do anything to you. The woman, she should submit and do anything I ask her to do.'").

45. *See id.* at 418 ("After acknowledging that this was a case in which religious custom clashed with the law, and that under the law, plaintiff had a right to refuse defendant's advances, the judge found that defendant did not act with a criminal intent when he repeatedly insisted upon intercourse, despite plaintiff's contrary wishes.").

46. *See id.* at 421 ("The trial judge found as a fact that defendant committed conduct that constituted a sexual assault and criminal sexual contact, but that defendant did not have the requisite criminal intent in doing so. His conclusion in this respect cannot be sustained.").

47. *See* CENTER FOR SECURITY POLICY, *supra* note 5, at 18 (emphasizing that while the case was overturned, "the fact that such a reversal was necessary is frighteningly instructive").

48. Newt Gingrich, Address at the Am. Enter. Inst. for Pub. Pol'y Research Symposium: Am. at Risk: Camus, Nat'l Sec. and Afghanistan (July 29, 2010).

49. *Id.*

Senator Rick Santorum, Rep. Michelle Bachmann (R-MN), Rep. Peter King (R-NY) and Herman Cain.⁵⁰ All have stressed a common message: Islam and Sharia are adverse to American values and Muslims are a subversive threat to the United States.

IV. *The Anti-Sharia Movement within State Legislatures*

With public opinion of Islam now at historic lows, it is perhaps unsurprising that politicians have begun to promote legislation that exploits these views. The breadth and spread of the anti-Sharia movement has been extraordinary. Today, twenty-five state legislatures have proposed and debated legislation that would forbid judges, state officials, or in some cases even citizens from observing Sharia.⁵¹ Predictably, the drive behind the legislation is rooted in the same anti-Sharia organizations and activists noted above. Leading the way is the American Public Policy Alliance (“APPA”) and its model legislation entitled American Law for American Courts (“ALAC”). The APPA warns,

“One of the greatest threats to American values and liberties today comes from abroad, including foreign laws and foreign legal doctrines which have been infiltrating our court system at the municipal, state and federal levels Examples include “conflict-of-law” issues with foreign law, including many countries that have Shariah-centric legal systems APPA focuses on countering this infiltration of anti-Constitutional laws across a broad variety of initiatives.”⁵²

Versions of the ALAC model are now being promulgated and debated in legislatures throughout the country. Though there have been variations in language and strategies, the core principles of the legislation are identical. The ALAC model provides that “it shall be the public policy of this state to protect its citizens from the application of foreign laws when the

50. See Andrea Elliott, *The Man Behind the Anti-Sharia Movement*, N.Y. TIMES, July 30, 2001, at A1 (stating that Michele Bachmann has “signed a pledge to reject Islamic law, likening it to ‘totalitarian control’”).

51. See, e.g., H.B. 88, 27th Leg. (Ark. 2011) (making inapplicable choice of law provisions applying foreign law unless consistent with U.S. and Arkansas Constitutions); S.B. 97, 88th Gen. Assemb., Reg. Sess. (Ark. 2011) (same); H.B. 2582, 50th Leg., 1st Sess. (Az. 2011) (prohibiting any controlling use of foreign law); H.R.J. Res. 1004, 2011 Leg. Assemb., 86th Sess. (S.D. 2011) (proposing Constitutional amendment prohibiting use of international law).

52. American Public Policy Alliance, *About Us*, http://publicpolicyalliance.org/?page_id=2 (last visited March 2, 2012).

application of a foreign law will result in the violation of a right guaranteed by the constitution of this state or of the United States”⁵³ The act further provides that a “foreign law, legal code, or system means any law, legal code, or system of a jurisdiction outside of any state or territory of the United States.”⁵⁴ Finally, the ALAC model states that “a contract . . . shall be void and unenforceable if the jurisdiction chosen includes any law, legal code or system . . . that would not grant the parties the same fundamental liberties, rights, and privileges granted under the U.S. and [State] Constitutions.”⁵⁵ Similar versions of the ALAC model act are now being debated in over twenty-three states.⁵⁶ Though the language of the ALAC model act appears innocuous and unremarkable, the outspoken state legislators that sponsor the bills have been clear in their motivations.

The most notorious of proposals have surfaced in Oklahoma, Tennessee, Virginia, and Pennsylvania. In Oklahoma, the legislation process involved an unusual player—the citizenry. There, State Representative Rex Duncan was the lead sponsor and chief author of the “Save Our State Amendment.”⁵⁷ The legislation called for an amendment to the state’s constitution to prohibit the state courts from following the legal precepts of other nations and, specifically, provided that “the courts shall not consider international law or Sharia Law.”⁵⁸ Representative Duncan had compared Sharia law to a “cancer” and stated that his proposed bill “will constitute a pre-emptive strike against Sharia law coming to Oklahoma”⁵⁹ “While Oklahoma is still able to defend itself against this sort of hideous invasion,” Duncan warned, “we should do so.”⁶⁰ After passing the State Senate and

53. American Public Policy Alliance, *American Laws for American Court Model Act*, available at http://publicpolicyalliance.org/?page_id=170 (last visited March 2, 2012).

54. *Id.* at § 1.

55. *Id.* at § 4(a).

56. See Ashby Jones & Joe Palazzolo, *States Target Foreign Law*, THE WALL STREET JOURNAL, Feb. 7, 2012, <http://online.wsj.com/article/SB10001424052970204662204577199372686077412.html> (“Twenty-one states are considering measures that would prohibit judges from applying the laws or legal codes of other nations in a wide variety of cases.”).

57. See James C. McKinley, Jr., *Judge Blocks Oklahoma’s Ban on Using Shariah Law in Court*, N.Y. TIMES, Nov. 30, 2010, at A22 (describing preliminary injunction preventing the amendment from taking effect).

58. H.R.J. 1056, 52 Leg., 2nd Sess. (Okla. 2010).

59. Mark Schlachtenhaufen, *Sharia Law, Courts Likely on 2010 Ballot*, THE EDMUND SUN, June 4, 2010, available at <http://www.edmondsun.com/local/x1996914371/Sharia-law-courts-likely-on-2010-ballot>.

60. Ed Barnes, *Oklahoma’s Ban on Sharia Law Blocked: Supporters Blame State Attorney General*, FOXNEWS.COM, Nov. 8, 2010, <http://www.foxnews.com/us/2010/11/08/oklahomas-ban-shariah-law-blocked-critics-say-attorney-general-failed-respond/>.

House with overwhelming support, the Secretary of State and Election Board presented the amendment to the public for a vote of approval.⁶¹ The proposed amendment passed with seventy percent of the public approving.⁶²

Immediately after the vote, Muneer Awad, the Executive Director of the Oklahoma Council for American-Islamic Relations, filed suit.⁶³ Mr. Awad, a Muslim who “adheres to the religious principles from the Koran and the teachings of Mohammed,”⁶⁴ alleged that the “Save Our State Amendment” violated his rights under both the Establishment Clause and Free Exercise Clause of the First Amendment.⁶⁵ More specifically, Awad objected “to the . . . singling out [of] his religion for negative treatment.”⁶⁶ He argued that the amendment would “stigmatiz[e] him and others who practice the Muslim faith” and would inhibit the practice of Islam by “disabling a court from probating his last will and testament (which contains references to Sharia law)”⁶⁷

After a federal district court granted a preliminary injunction, enjoining Oklahoma from certifying the election results,⁶⁸ the case moved to the U.S. Court of Appeals for the Tenth Circuit. The Tenth Circuit reached a similar conclusion yet did not move past Awad’s Establishment Clause claim.⁶⁹ The court determined that Mr. Awad had suffered “a form of ‘personal and unwelcome’ conduct with an amendment to the Oklahoma Constitution that would target his religion for disfavored treatment.”⁷⁰

61. See *Awad v. Zirriax*, 670 F.3d 1111, 1115 (10th Cir. 2012) (“Once certified by the Attorney General, the Secretary of State transmits the proposed measure and ballot title to the Election Board.”).

62. See James C. McKinley, Jr., *supra* note 57, at A22 (discussing popular support for the amendment).

63. See *Awad*, 670 F.3d at 1118 (alleging that Oklahoma’s “Save our State” amendment violates the first amendment’s free exercise and establishment clauses).

64. *Id.* at 1119.

65. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”).

66. *Awad*, 670 F.3d at 1119.

67. *Id.*

68. See *Awad v. Zirriax*, 754 F.Supp.2d 1298, 1307 (W.D. Okla.2010) (finding that “plaintiff has made a strong showing of a substantial likelihood of success on the merits of his claim asserting a violation of the Free Exercise Clause”).

69. See *Awad*, 670 F.3d at 1119 (“Because Mr. Awad’s Establishment Clause claim provides sufficient grounds to uphold the preliminary injunction, we affirm without reaching Mr. Awad’s Free Exercise claim.”).

70. *Id.* at 1122.

Because of the singular targeting of Islam, the court applied the *Larson*⁷¹ test. *Larson* provides that if a law discriminates among religions, it will survive only if the law is “closely fitted to the furtherance of any compelling interest asserted.”⁷²

Oklahoma was unable to provide such a compelling interest. The government had argued that “Oklahoma . . . has a compelling interest in determining what law is applied in Oklahoma courts.”⁷³ But the court rejected this argument and responded that while this concern was “valid,” this “general statement alone [was] not sufficient to establish a *compelling* interest for the purposes of this case.”⁷⁴ The government, the court explained, failed to “identify any *actual problem* the challenged amendment seeks to solve.”⁷⁵ Indeed, at the preliminary injunction hearing, Oklahoma had failed to present a single example of an Oklahoma court applying Sharia law or the legal precepts of other nations.⁷⁶ Finally, after finding no compelling interest, the court went on to conclude that “[e]ven if the state could identify and support a reason to single out and restrict Sharia law in its courts, the amendment’s complete ban of Sharia law is hardly an exercise of narrow tailoring.”⁷⁷

Oklahoma’s failures before the Tenth Circuit have not deterred other states from advancing similar versions of the ALAC model act. In the 2011 session of the Tennessee General Assembly, State Senator Bill Ketron proposed a bill that would seek to limit material support of “homegrown terrorism.”⁷⁸ Homegrown terrorism, the legislation explained, “is primarily the result of a legal-political-military doctrine and system adhered to . . . by

71. See *Larson v. Valente*, 456 U.S. 228, 255 (1982) (holding that a rule exempting only religious institutions that took more than fifty percent of donations from members or affiliated groups from reporting requirements, violated the Establishment Clause).

72. *Id.*

73. *Awad*, 670 F.3d at 1130.

74. *Id.*

75. *Id.* (emphasis added).

76. See *Awad*, 754 F. Supp. 2d at 1308 (“[D]efendants’ counsel stated that he was not aware of any Oklahoma court who had used the precepts of other nations or cultures and was not aware of any situation where Sharia Law has been applied in an Oklahoma court.”); see also Brief of Petitioner-Appellant at 67–68 (stating lack of specific instances of Sharia law applied in Oklahoma courts), *Awad v. Ziriya*, 670 F.3d 1111, 1130 (10th Cir. 2012) (“Appellants . . . admitted at the preliminary injunction hearing that they did not know of even a single instance where an Oklahoma court had applied Sharia law.”).

77. *Awad*, 670 F.3d, at 1131.

78. See S.B. 1028, 107 Gen. Assemb., 2011 Sess. (Tenn. 2011) (“The threat from terrorism has been documented to exist both outside our national borders and within the homeland.”).

tens of millions if not hundreds of millions of its followers around the world. This legal-political-military doctrine and system is known as sharia”⁷⁹ Sharia, according to the bill, “requires all its adherents to actively and passively support the replacement of America’s constitutional republic, including the representative government of this state with a political system based upon sharia.”⁸⁰ The bill, which was aimed at curbing material support for terrorism, went on to state that “[a]ny person who knowingly provides material support or resources to a designated sharia organization, or attempts or conspires to do so, shall commit a [felony] offense.”⁸¹

After introducing the bill, Senator Ketron faced an immediate reproach from civil rights groups.⁸² Accordingly, with the threat of lawsuits on the horizon, Ketron and his co-sponsors rewrote the bill and eliminated all references to Islam and Sharia.⁸³ The revised bill, entitled the “Material Support to Designated Entities Act of 2011,” passed with overwhelming support, and while there contained no reference to a specific religion in the final version, the bill’s supporters exclaimed that the legislation remained aimed at “protecting our citizens from those who would use religious doctrine as a justification to commit criminal activities or terrorist acts.”⁸⁴

The statutory errors in the Oklahoma and Tennessee statutes has undoubtedly been instructive for the Virginia and Pennsylvania legislators who have also sought to pass anti-Sharia legislation. In Virginia, Delegate Bob Marshall has introduced legislation that would prohibit judges from deciding “any issue in a case or action before that court . . . in whole or in part based on the authority of foreign law except to the extent that the United States Constitution or Constitution of Virginia or any federal or state law requires or authorizes the consideration of such foreign law.”⁸⁵ Likewise, Delegate Rick Morris has introduced a similar yet broader bill that proclaims it to be:

79. *Id.*

80. *Id.*

81. *Id.*

82. See Chas Sisk, *Ketron, Matheny Rewrite Shariah Bill*, THE TENNESSEAN, March 22, 2011, <http://blogs.tennessean.com/politics/2011/ketron-matheny-rewrite-shariah-bill/> (describing changes made to the law following criticism).

83. See H.B. 1353, 107 Gen. Assemb., 2011 Sess. (Tenn. 2011) (removing specific references to Islam and sharia law).

84. Sisk, *supra* note 82.

85. H.B. 825, Gen. Assemb., 2012 Sess. (Va. 2012).

A violation of the public policy of the Commonwealth for a contract, arbitration agreement, or other agreement to provide for the choice of a foreign law to govern the interpretation, enforcement, or resolution of any claim under the contract, arbitration agreement, or other agreement if the foreign law chosen, as applied to the contract, arbitration agreement, or other agreement, would violate a person's rights guaranteed by the United States Constitution or the Constitution of Virginia.⁸⁶

In Pennsylvania, State Representative RoseMarie Swanger has introduced legislation that orders courts to disregard “a foreign legal code or system which does not grant the parties . . . the same fundamental liberties, rights and privileges granted under the United States Constitution and the Constitution of Pennsylvania.”⁸⁷ Any contract between parties which invokes a foreign legal system, the bill states, “violates the public policy of the Commonwealth and shall be void and unenforceable if the foreign legal code . . . would not grant the parties the same fundamental liberties, rights and privileges granted under the United States Constitution and the Pennsylvania Constitution.”⁸⁸ Like the legislation in Virginia as well as the ALAC model act, the bill does not actually mention Sharia or Islam in the text. Nevertheless, Rep. Swanger has not shied from revealing the motivation behind the legislation. In a letter to her colleagues, Rep. Swanger warned that “foreign laws and legal doctrines—including and especially Shariah law—are finding their way into US court cases.”⁸⁹ Moreover, she added, “[t]he embrace of foreign legal systems such as Shariah law, which is inherently hostile to our constitutional liberties is a violation of the principles on which our nation was founded.”⁹⁰

Virginia and Pennsylvania are now just two of twenty-one states that are *currently* debating legislation that would forbid judges from considering foreign or Sharia law.⁹¹ As of this writing, Oklahoma, Tennessee, Arizona and Louisiana already have substantially similar laws in effect.⁹² Though

86. H.B. 631, Gen. Assemb., 2012 Sess. (Va. 2012).

87. H.B. 2029, Gen. Assemb., 2011 Sess. (Pa. 2011).

88. *Id.*

89. Letter from PA Rep. RoseMarie Swanger to House colleagues of Pennsylvania General Assembly (June 14, 2011) (on file with WASH. & LEE J. SOC. RTS. & CIVIL JUST.).

90. *Id.*

91. See Ashby Jones & Joe Palazzolo, *supra* note 56 (“Twenty-one states are considering measures that would prohibit judges from applying the laws or legal codes of other nations in a wide variety of cases.”).

92. *Id.* (“Three states—Tennessee, Louisiana and Arizona—recently added versions of such laws to the books, while a fourth—Oklahoma—worked a similar change into its constitution in 2010.”).

the ALAC model act and the most recent state legislative examples focus, at least facially, on “foreign law,” the drive and rhetoric that surrounds these initiatives is clear. At its core, these bills and the anti-Sharia movement is based upon a belief that America is at risk and that Muslims are the danger. Islam, the argument goes, demands a foreign and fraudulent set of beliefs that are irreconcilable with American legal and societal principles. As Tennessee State Senator Rick Womick recently opined while attending the Preserving Freedom Conference⁹³ in Madison, Tennessee, “I don’t trust one Muslim in our military because they’re commanded to lie to us And if they truly are a devout Muslim, and follow the Quran and the Sunnah, then I feel threatened because they’re commanded to kill me.”⁹⁴ While such rhetoric may appear hyperbolic or simply the bellowing of a politician, the scale and breadth of the legislative initiatives indicate that the anti-Sharia movement is no longer a fringe effort. Moreover, while claims of Muslim-Americans being fundamentally ill-suited for citizenship is indeed extreme, such arguments towards minority groups are by no means unique to our history. Indeed, during World War II and the Cold War, the American public and the government identified the Japanese, liberals and members (or suspected members) of the American Communist Party as disloyal and dangerous threats to the American way of life.

V. Executive Order 9066 and the Anti-Japanese Backlash of World War II

On February 19, 1942, ten weeks after the Japanese attack on Pearl Harbor, President Franklin D. Roosevelt issued Executive Order 9066.⁹⁵ The brief order authorized the Secretary of War to:

[D]esignate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may

93. The Preserving Freedom Conference was held in Tennessee in November of 2011. The Conference was sponsored by the Sharia Action Awareness Network. According to the conference website, “the Sharia Action Awareness Network is a coalition of individuals and organizations who are engaged in educating the American citizenry about how Sharia Law stands in opposition to Constitutional Law, and why that poses a threat to our American way of life.” *available at* <http://preserving-freedom-conference.ettend.com/>.

94. Chas Sisk, *Rick Womick Says Devout Muslims Should be Removed From Military*, THE TENNESSEAN, Nov. 11, 2011, <http://blogs.tennessean.com/politics/2011/rick-womick-tells-liberal-blog-muslims-should-be-removed-from-military/>.

95. See Exec. Order No. 9066, 7 C.F.R. 1407 (1942) (discussing military procedures in the aftermath of Pearl Harbor).

determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion.⁹⁶

Though the order said nothing of Japan or Japanese-Americans, to those behind the order's formulation, its intent was clear. In a broad sense, the order gave the military "the power to exclude any persons from designated areas in order to secure national defense objectives against sabotage and espionage."⁹⁷ Specifically, however, "the order was used, as the President, his responsible Cabinet officers and the West Coast Congressional delegation knew it would be, to exclude persons of Japanese ancestry, both American citizens and resident aliens, from the West Coast."⁹⁸ In the months that followed, over 100,000 people were forced to leave their homes and businesses and enter military-run internment camps.⁹⁹ Two-thirds of the men, women and children were American citizens.¹⁰⁰ In all, the group represented ninety-percent of all Japanese-Americans.¹⁰¹ No criminal charges were ever brought against the evacuees, nor were they given an opportunity to protest their displacement.¹⁰² They were told to bring only what they could carry with them and were soon shipped to one of ten permanent internment camps along the West Coast.¹⁰³ Surrounded by barbed wire and watchtowers, they remained in the camps for three years.¹⁰⁴

A. Military Necessity: Government Justification for the Camps

As the Executive Order made clear, the impetus for the decision was "military necessity."¹⁰⁵ In the years and months prior to Pearl Harbor, Nazi

96. *Id.*

97. REPORT OF THE COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED, chap 2 (1982) [hereinafter *Personal Justice Denied*], available at http://www.nps.gov/history/history/online_books/personal_justice_denied/index.htm.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. See *Hirabayashi v. United States*, 320 U.S. 81, 114 (1943) (interpreting the

Germany had successfully invaded much of Europe and, at the time, American intelligence services presumed that the invasions had been aided by foreign agents and Nazi sympathizers.¹⁰⁶ Predictably, military officials feared that a similar Japanese invasion of the American West Coast would be abetted through similar subversive means.¹⁰⁷ Some high-ranking military officials presumed such espionage was already underway. Just days after the attack on Pearl Harbor and without any direct evidence, Secretary of the Navy Frank Knox noted that “the most effective Fifth Column work of the entire war was done in Hawaii.”¹⁰⁸ Knox was, in effect, placing “blame for the Pearl Harbor defeat at the door of the ethnic Japanese in the United States.”¹⁰⁹ As history later proved, not only was Knox’s claim inaccurate, it ignored the fact that many of the Japanese living in Hawaii had come to the defense and aid of the United States during the Pearl Harbor attack.¹¹⁰

Knox was by no means alone in his belief that the Japanese posed a threat. Perhaps the single most important “security” justification for the decision to remove the ethnic Japanese came from John L. DeWitt, the Commanding General of the Western Defense Command of the United States.¹¹¹ DeWitt was tasked with preparing the American West Coast for a Japanese invasion, and he was instrumental in formulating and executing the Japanese internment plans.¹¹² In 1942, DeWitt released his *Final*

intentions of Exec. Order No. 9066).

106. Brief for the United States at 16–17, *Hirabayashi v. United States*, 320 U.S. 81 (1943) No. 870.

107. *Hearing Before H. Naval Affairs Subcomm.*, 78th Cong. (1943) (testimony of John L. DeWitt).

108. See *Personal Justice Denied*, *supra* note 97. The “fifth-column” is commonly defined as a clandestine group or faction of subversive agents who attempt to undermine a nation’s solidarity by any means at their disposal.

109. *Personal Justice Denied*, *supra* note 97.

110. See BILL HOSOKAWA, *NISEI: THE QUIET AMERICANS 463–64* (1969) (discussing the contributions of Japanese-Americans to the war effort after Pearl Harbor).

111. See *Personal Justice Denied*, *supra* note 97, at “Summary” (“The exclusion of the ethnic Japanese from the West Coast was recommended to the Secretary of War, Henry L. Stimson, by Lieutenant General John L. DeWitt President Roosevelt relied on Secretary Stimson’s recommendations in issuing Executive Order 9066.”).

112. See David A. Harris, *On the Contemporary Meaning of Korematsu: “Liberty Lies in the Hearts of Men and Women,”* 76 MO. L. REV. 1, 5 (2011) (emphasizing that “General DeWitt’s description and justification of the military aspects of the removal of the Japanese from the West Coast in 1942, became the linchpin of the government’s argument, repeating its assertions in the government’s Supreme Court brief”).

*Report: Japanese Evacuation from the West Coast, 1942.*¹¹³ The report was a collection of military and intelligence reports *and theories* that had developed over the past year. In it, DeWitt focused on a confluence of factors:

[S]ignaling from shore to enemy submarines; arms and contraband found by the FBI during raids on [Japanese] homes and businesses; danger to evacuees from vigilantes; concentration of the ethnic Japanese population around or near militarily sensitive areas; the number of Japanese ethnic organizations on the coast which might shelter pro-Japanese attitudes or activities such as Emperor-worshipping Shinto¹¹⁴

From this description, two important factors stood out to DeWitt and the military leaders: the signaling to Japanese submarines from the coastline and the presence of arms and contraband. An investigation by the FCC later discovered that DeWitt's claim of signaling was "so utterly unsubstantiated that, in its brief to the Supreme Court, the Justice Department was careful not to rely on DeWitt's Final Report as a factual basis for the military decision it had to defend. There simply had not been any identifiable shore-to-ship signaling."¹¹⁵ Likewise, the claim of finding arms and contraband amongst the Japanese population was misleading, if not outright false. By May 1942, the FBI had, in fact, seized 2,592 guns, 199,000 rounds of ammunition, 1,652 sticks of dynamite, 1,458 radio receivers, 2,014 cameras, and numerous other items from Japanese immigrants.¹¹⁶ However, these statistics and DeWitt's report failed to acknowledge that most of these weapons had been confiscated through raids on a sporting goods store and a general store owner's warehouse.¹¹⁷ The Justice Department later concluded that DeWitt's claims regarding arms and contraband were insignificant:

We have not, however, uncovered through these searches any dangerous persons that we could not otherwise know about. We have not found among all the sticks of dynamite and gunpowder any evidence that any of it was to be used in bombs We have not found a single machine

113. U.S. GOV'T. PRINTING OFFICE, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 1942, at vii (1943).

114. Personal Justice Denied, *supra* note 97.

115. *Id.*

116. *Id.*

117. *Id.*

gun nor have we found any gun in any circumstances indicating that it was to be used in a manner helpful to our enemies.¹¹⁸

In sum, even in 1941–42, intelligence and military officials acknowledged that there was no direct evidence of a subversive Japanese threat and that “no sabotage has taken place to date.”¹¹⁹ Still, the fear of a Japanese invasion was overwhelming and the military was convinced that every precaution—even those once thought unimaginable—had to be taken.

B. Disloyal and Subversive: The Public’s Justification for the Camps

Generally, the American public agreed with the military’s sentiment.¹²⁰ Pearl Harbor and the shocking stories of Japanese brutality toward American prisoners-of-war sparked intense fear and hatred within the United States. Many believed the threat of Japanese saboteurs was clear and tangible. One prominent businessman wrote at the time:

There will be no armed uprising of Japanese. There will undoubtedly be some sabotage financed by Japan and executed largely by imported agents or agents already imported The Japanese, if undisturbed and disloyal, should be well equipped for obvious physical espionage. A great part of this work was probably completed and forwarded to Tokio [sic] years ago, such as soundings and photography of every inch of the Coast¹²¹

Such attitudes were common throughout the public. According to polling conducted by the Office of Facts and Figures in the Office for Emergency Management, there was a strong consensus that the government had correctly decided to sequester Japanese immigrants.¹²² Equally, much of the population agreed that even Japanese-American citizens posed a threat to the nation and should be removed from the general population.¹²³ Interestingly, however, there were important variances in the opinions.

118. *Id.* See also MORTON GRODZINS, AMERICANS BETRAYED: POLITICS AND THE JAPANESE EVACUATION 134–36 (1949).

119. U.S. GOV’T. PRINTING OFFICE, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 1942, at 34 (1943).

120. See Personal Justice Denied, *supra* note 97, at chap. 3 (“There was virtual consensus that the government had done the right thing in moving Japanese aliens away from the coast; 59 percent of the interviewees also favored moving American citizens of Japanese ancestry.”).

121. See Personal Justice Denied *supra* note 97.

122. *Id.*

123. *Id.*

Lesser-educated respondents were more likely to consider the Japanese as a dangerous threat and were advocates for much harsher treatment of the Japanese.¹²⁴ In addition, southerners tended to have scathing opinions of the Japanese, while residents of the East Coast tended to view German-Americans as a greater threat.¹²⁵

The natural response of most Americans following Pearl Harbor and upon the beginning of the war is perhaps unsurprising. There was also, however, an organized effort to draw attention to the “Japanese-American threat” that should draw pause, for it bears a striking resemblance to the anti-Muslim efforts of today. Members of Congress and Western politicians, for example, were some of the most vocal and aggressive advocates of the internment camps.¹²⁶ The California Joint Immigration Committee sent a lengthy report to California newspapers that supposedly provided numerous examples of Japanese espionage and treason.¹²⁷ The report repeated the fundamental claim that the ethnic Japanese were “totally unassimilable” and declared that “those born in this country are American citizens by right of birth, but they are also Japanese citizens, liable . . . to be called to bear arms for their Emperor, either in front of, or behind, enemy lines.”¹²⁸ The report even went so far as to attack Japanese language schools, which it characterized as “a blind to cover instruction similar to that received by a young student in Japan—that his is a superior race, the divinity of the Japanese Emperor, the loyalty that every Japanese, wherever born, or residing, owes his Emperor and Japan.”¹²⁹

Nativist and other conservative organizations were also active in promoting the backlash. The Native Sons and Daughters of the Golden West viewed the Pearl Harbor attack and war with Japan as a natural consequence of America’s liberal immigration policy. In its January 1942

124. *Id.* (“Relatively uneducated respondents were more likely to consider the Japanese the most dangerous alien group, and they were also disposed to advocate harsher treatment of the Japanese who were moved away from the coast.”).

125. *Id.* (“People in the south, in particular, were prone to treat Japanese harshly.”).

126. *See* Personal Justice Denied, *supra* note 97, at chap. 3 (“On January 30, [1942,] House members from the Pacific Coast urged the President to give the War Department ‘immediate and complete control over all alien enemies, as well as United States citizens holding dual citizenship in any enemy country, with full power and authority to require and direct . . . evacuation, resettlement or internment.’”).

127. *See id.* (claiming that ethnic Japanese had committed espionage in Hawaii and the Philippines).

128. Personal Justice Denied, *supra* note 97, at chap. 2.

129. *Id.*

issue of *The Grizzly Bear*, the organization's flagship publication, the editor chided the American people for failing to heed their prior warnings:

Had the warnings been heeded—had the federal and state authorities been “on the alert” and rigidly enforced the Exclusion Law and the Alien Land Law; had the Jap propaganda agencies in this country been silenced; had the legislation been enacted . . . denying citizenship to offspring of all aliens ineligible to citizenship; had the Japs been prohibited from colonizing in strategic locations; had not Jap-dollars been so eagerly sought by White landowners and businessmen; had a dull ear been turned to the honeyed words of the Japs and the pro-Japs; had the yellow-Jap and the white-Jap “fifth columnists” been disposed of within the law; had Japan been denied the privilege of using California as a breeding ground for dual-citizens (nisei);—the treacherous Japs probably would not have attacked Pearl Harbor December 7, 1941, and this country would not today be at war with Japan.¹³⁰

Similarly, the Grower-Shipper Vegetable Association, long a critic of Japanese immigrants as a source of cheap-labor along the West Coast, offered a ringing endorsement of the internment camps and relocation efforts in a *Saturday Evening Post* article:

We're charged with wanting to get rid of the Japs for selfish reasons. We might as well be honest. We do. It's a question of whether the white man lives on the Pacific Coast or the brown man. They came into this valley to work, and they stayed to take over If all the Japs were removed tomorrow, we'd never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don't want them back when the war ends, either.¹³¹

Throughout the country, the tension and fear of Japanese saboteurs was palpable. Nevertheless, the theory behind Executive Order 9066 and the fear of Japanese espionage were exaggerated if not completely misguided. Finally, on January 2, 1945, the exclusion order was withdrawn and Japanese-Americans were allowed to return to their homes and rebuild their lives.¹³²

130. THE GRIZZLY BEAR (1942), reprinted in MORTON GRODZINS, AMERICANS BETRAYED: POLITICS AND THE JAPANESE EVACUATION 48 (1949).

131. Frank J. Taylor, *The People Nobody Wants*, SATURDAY EVENING POST, May 9, 1942, at 66.

132. See Scott Harrison, *Executive Order 9066: Japanese American internment in World War II*, L.A. TIMES (Feb. 19, 2012), <http://framework.latimes.com/2012/02/19/executive-order-9066-japanese-american-internment-in-world-war-ii/#/0> (reflecting on the legacy of the Japanese-American internment camps).

On February 19, 1976, as part of the Bicentennial Celebration of the Constitution, President Gerald Ford issued President Proclamation 4417. The Proclamation declared that in addition to celebrating the nation's Constitution and proud history, we must also recognize "our mistakes."¹³³ As Ford observed, "[w]e now know what we should have known then"—Executive Order 9066 and the decision to evacuate loyal Japanese-Americans was "wrong."¹³⁴ In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians.¹³⁵ The Commission was tasked with investigating the motivation and implementation of Executive Order 9066 and, following a two-year investigation, concluded that the factors shaping the internment decision were in fact "race prejudice, war hysteria and a failure of political leadership."¹³⁶ Finally, in 1988, Congress passed the Civil Liberties Restoration Act.¹³⁷ Within the act, Congress recognized that "a grave injustice was done to both citizens and permanent residents of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II."¹³⁸ Moreover, the act offered reparations to each of the Japanese-Americans who had suffered discrimination, personal humiliation and loss of liberty and property as a result of the U.S. government's actions.¹³⁹

VI. Domestic Communism and the Red Scare

By the end of World War II, it was clear to many American policymakers that the nation's next great threat was the Soviet Union and the spread of Communism. While it is perhaps unclear if Joseph Stalin did in fact share Adolf Hitler's goal of global domination,¹⁴⁰ by the start of the Korean War in 1950, American policymakers had all the evidence they required. Immediately following World War II, crisis beget crisis. The U.S. and U.S.S.R would disagree over the make-up of the Polish government in

133. Proclamation No. 4417, An American Promise, 41 Fed. Reg. 7741 (Feb. 19, 1976).

134. *Id.*

135. *See* Personal Justice Denied, *supra* note 97, at 5, 8.

136. *Id.*

137. 50 U.S.C. app. §§ 1989-1989a (2000).

138. *Id.*

139. *Id.*

140. *See* WALTER LAFEVER, AMERICA, RUSSIA, AND THE COLD WAR, 1945–2006 23 (2008) ("In dealing with foreign communist parties, Stalin's priority was not world revolution but . . . Russian security and his own personal power.").

1945.¹⁴¹ The Soviets would intervene in Turkey, Iran and the Greek Civil War in 1947.¹⁴² Berlin would be divided between East and West in 1948, and in 1949 the Soviets would detonate their first atomic bomb.¹⁴³ Amongst the foreign policy establishment in Washington, it was clear: Stalin and Communism, like any totalitarian threat, were on a mission of global conquest, and only the United States stood in their way.¹⁴⁴

Within the U.S., a similar fear and accusation would be lodged at the American Communist Party. As Ellen Schrecker—a historian and expert on McCarthyism—has written, “Communist party members were believed to be part of a secret conspiracy, fanatics who would automatically do whatever Stalin told them to do.”¹⁴⁵ In the spring of 1945, the State Department advised President Truman “to treat the American Communist movement as a potential fifth column.”¹⁴⁶ Like those of Japanese ancestry along the West Coast, members of the American Communist Party were presumed to be agents of the KGB and deeply loyal to the Soviet Union. To be sure, there were several examples of Soviet espionage throughout the Cold War. Nevertheless, “[s]uch fear at home was hardly warranted.”¹⁴⁷ In fact, much of the espionage actually occurred during World War II. By 1946, fifty thousand, or around half of the membership of the U.S. Communist Party’s Political Association had left the group.¹⁴⁸ Once the Cold War had begun, “the demonization of American communism and the federal government’s purge of its left-wing employees made it impossible for the Soviet Union to recruit any spies from the party’s declining ranks.”¹⁴⁹ Indeed, as the renowned historian Walter LaFeber noted, “[i]ronically Americans began their search for communists at the same time the Communist party had to begin its own search for members.”¹⁵⁰

As Schrecker has discovered, “what transformed the Communist threat into a national obsession was not its plausibility, but the involvement of the federal government.”¹⁵¹ By the late 1940’s nearly every branch and agency

141. *Id.*

142. *Id.* at chap. 3.

143. See SCHRECKER, *supra* note 8, at 20.

144. See *id.* at 20–21.

145. *Id.*

146. LAFEBER, *supra* note 140, at 24.

147. *Id.*

148. *Id.*

149. *Id.* at 23.

150. *Id.* at 24.

151. See SCHRECKER, *supra* note 8, at 25.

of government—from the Post Office to the State Department—was engulfed in the anti-Communist crusade.¹⁵² Each day brought news of a new executive order, congressional investigation, or criminal prosecution. The media became a willing and able promoter of the government message and by the outbreak of the Korean War, the government had “helped construct the ideological scaffolding for McCarthyism” and sent “a very strong signal about the alien nature of communism and its dangers.”¹⁵³

It was the Executive Branch—the Truman administration and its successors—that did the most to set the tone and cultivate the anti-Communist threat.¹⁵⁴ Specifically, Truman implemented 1) an anti-Communist loyalty-security program for government employees in March 1947, and 2) initiated criminal prosecutions against members and suspected members of the American Communist Party.

A. Executive Order 9835 and the Loyalty-Security Program

While it was Truman who provided the final clearance of the internal anti-Communist “security” programs, it was J. Edgar Hoover and the F.B.I. that provided the political and ideological force. On March 26, 1947, Hoover, a fervent and conservative anti-Communist, forcefully presented his views of the internal Communist threat in the United States.¹⁵⁵ Testifying before Congress (something Hoover rarely agreed to do) at the House Committee on Un-American Activities, Hoover offered a doctrine that would delineate “the main battlegrounds of the McCarthy era,” namely, institutions such as labor unions, the film industry, and the federal government.¹⁵⁶ Hoover declared that the Communist movement in the United States “stands for the destruction of our American form of government . . . and it stands for the creation of the ‘Soviet of the United States’ and ultimate world revolution.”¹⁵⁷ “The Communist,” Hoover added, “once he is fully trained and indoctrinated realizes that he can create

152. *See id.*

153. *See id.* (“The media was the government’s partner, largely because it amplified messages that come from Washington.”).

154. *See id.* at 27 (“The executive branch did more than provide the psychic setting for McCarthyism. The specific steps it took to combat the alleged threat of internal communism were to intensify the national preoccupation with the issue.”).

155. *Id.* at 126.

156. *Id.* at 126.

157. *Hearing on H.R. 1884 and H.R. 2122 Before the H. Comm. On Un-American Activities*, 80th Cong. 1 (1947) (statement of J. Edgar Hoover).

his order in the United States only by ‘bloody revolution.’”¹⁵⁸ Finally, Hoover warned, “[t]he Communist Party of the United States is a fifth column if there ever was one There is no doubt as to where a real Communist’s loyalty rests. Their allegiance is to Russia, not the United States”¹⁵⁹

With this testimony, Hoover provided not only a warning about the threat of Communism within the United States but also a call to action and a blueprint for purging Communism from American society and its institutions. It would not be long before the entire U.S. government heeded his call. On March 21, 1947, President Truman signed Executive Order 9835.¹⁶⁰ Though the government had long had a requirement for examining the backgrounds of government employees, E.O. 9835 greatly enlarged the program.¹⁶¹ Before, only overtly disloyal activities such as sabotage, treason, or advocacy for the overthrow of the government constituted grounds for termination. With Truman’s order, any “sympathetic association” with an organization or movement that had been “designated by the Attorney General as totalitarian, fascist, communist, or subversive” became a violation.¹⁶² Predictably, because the order did not define what exactly “association” entailed, “the criteria were vague and came to be applied to a wide range of political beliefs and activities.”¹⁶³ Soon, people who were on the “wrong” mailing lists, owned the wrong books or had relatives that belonged to politically suspect groups became targets.¹⁶⁴ One man nearly lost his job after he subleased his apartment to a person who had “associations” with Communist front organizations.¹⁶⁵ Another employee was suspended because he remained in “close and continuing association with [his] parents,” individuals who were under suspicion because they had joined a group on the Attorney General’s blacklist to buy cheap insurance and a burial plot.¹⁶⁶

158. *Id.*

159. *Id.*

160. Exec. Order No. 9835, Prescribing Procedures for the Administration of an Employees’ Loyalty Program in the Exec. Branch of the Gov’t., 12 Fed. Reg. 1935 (Mar. 21, 1947).

161. See SCHRECKER, *supra* note 8, at 44.

162. *Id.*

163. *Id.*

164. See *id.* at 44.

165. ADAM YARMOLINSKY, ED., CASE STUDIES IN PERSONNEL SECURITY 142–47, 152, 158–59, 169–74 (Washington, D.C.: Bureau of National Affairs, 1955).

166. SCHRECKER, *supra* note 8, at 177.

By 1951, as the “Red Scare” swept through the nation, the criteria for dismissal under the loyalty program had changed from “reasonable grounds” for believing in someone’s disloyalty to the broader language of “reasonable doubt as to loyalty.”¹⁶⁷ In 1953, President Eisenhower revoked 9835 and replaced it with Executive Order 10450.¹⁶⁸ Eisenhower feared that Truman and E.O. 9835 had been too lenient, and through E.O. 10450, he ordered all federal agencies to determine whether any federal employees posed a “security risk.”¹⁶⁹ Additionally, this Order expanded the definitions and conditions that were used in the evaluations; while E.O. 9835 had focused largely on an employee’s political affiliations and activities, E.O. 10450 enlarged the scope of investigation to personal behavior and character.¹⁷⁰ For example, Eisenhower’s Order provided that any “criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion” may constitute a security threat and grounds for dismissal.¹⁷¹ As *The Washington Post* reported at the time, Eisenhower’s order had created more than a loyalty test; it had implemented a “suitability test.”¹⁷² As the language of the new order seemed to insinuate, “a person who drinks too much,” “an incorrigible gossip,” “homosexuals,” or simply “neurotics,” could now be deemed disloyal and a threat to national security.¹⁷³

Between 1946 and 1956, around 2,700 federal employees were dismissed from government service for loyalty-security reasons.¹⁷⁴ Many others simply resigned out of fear of the loyalty review process and the humiliation it often brought on oneself and family.¹⁷⁵ The loyalty review process was a well-known anti-Communist program. Nevertheless, it was the criminal prosecution of American Communist Party members and suspected members that captivated the nation and brought the “Red Scare” and “McCarthyism” into mainstream America.

167. *See id.* at 45.

168. *See id.* at 45 (“Eisenhower issued Executive Order 10450, which revised the program yet again to make it even easier to weed out security risks.”).

169. *See id.*

170. *See id.*

171. *Id.*

172. DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* 123–24 (2004).

173. *Id.*

174. SCHRECKER, *supra* note 8, at 45.

175. *See id.* at 178 (“Many . . . employees faced with a set of interrogatories that would have forced them to justify their past political behavior to an unsympathetic audience, probably resigned instead.”).

B. Dennis and the Prosecution of Suspected Communists

The decision to criminally prosecute members and suspected members of the American Communist Party “seems to have been made in a rather haphazard way, the product of bureaucratic routines rather than a high-level political decision.”¹⁷⁶ With pressure mounting from Congress and J. Edgar Hoover, Attorney General Tom Clark laid the groundwork for the process in 1948.¹⁷⁷ Because the federal government feared that simply outlawing the Communist Property would be inconsistent with American ideals and the Constitution, Clark had Department of Justice attorneys scour statute books.¹⁷⁸ Eventually, the Department settled on the Smith Act of 1940. Passed just prior to the beginning of World War II, the Smith Act provides that anyone who:

[K]nowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States . . . Shall be fined under this title or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.¹⁷⁹

On July 20, 1948, arrest warrants were issued for twelve national committee members of the American Communist Party including Eugene Dennis, the party’s general secretary. As proscribed under the Smith Act, the members were charged with conspiring to “teach and advocate” the “violent overthrow” of the American government.¹⁸⁰ The transcripts from the subsequent trials, however, demonstrate that proving this accusation was extremely difficult and the prosecution was forced to rely on particularly militant passages from the works of Marx, Lenin, and Stalin.¹⁸¹ The government’s star witness, Louis Budenz, was the former managing editor of the Communist Party’s newspaper, *The Daily Worker*.¹⁸² In

176. *Id.* at 49.

177. *See id.* (“Attorney General Tom Clark set the apparatus in motion where delegated several subordinates to look into the matter early in 1948.”).

178. *See id.* (“After scouring the statute books in search of an appropriate prosecution tool, the Justice Department’s attorneys settled on a conspiracy charge under the 1940 Smith Act.”).

179. 18 U.S.C. § 2385 (1940).

180. SCHRECKER, *supra* note 8, at 51.

181. *See id.* at 197 (“[T]he government claimed that by subscribing to the doctrines of Marxism-Leninism [the defendants] were actually calling for the overthrow of the American government.”).

182. *See id.* at 50 (“After defecting from the party in the fall of 1945, Budenz came

testimony, Budenz stated that “socialism can only be attained by the violent shattering of the capitalist state In the United States this would mean that the Communist Party of the United States is basically committed to the overthrow of the Government . . . as set up by the Constitution”¹⁸³ In addition, Budenz further bolstered the government’s case by declaring the party’s strict loyalty to the Soviet Union and its quest to infiltrate labor unions throughout the country.¹⁸⁴

From the very beginning, both sides knew that the trials would be as much of a public awareness campaign as it was a judicial prosecution. Throughout the trials, the Truman administration went to great lengths to use the process as a way to shape to the public’s view of domestic communism.¹⁸⁵ The prosecutors “purposely forced several defendants into contempt of court,” a tactic that “gave prosecutors a pretext for putting some of the party’s leaders in jail during the trials and thus dramatizing how dangerous Communists could be.”¹⁸⁶ Likewise, due to the clearly political nature of the trials, “much of the evidence that the government produced had no relation to the case at hand but was designed to reinforce the negative image of the defendants”¹⁸⁷ While both sides knew that the constitutionality of the Smith Act and the prosecutions under it would have to be settled by the Supreme Court, the government achieved its goal nonetheless: the trials “transformed party members from political dissidents into criminals—with all the implications that such associations inspired in a nation of law-abiding citizens.”¹⁸⁸

It is difficult to measure the extent to which these government measures—the loyalty-security program and the criminal prosecution of the American Communist Party—carried public opinion and built an anti-Communist furor in the U.S. Undoubtedly, however, the American public was swayed.

under the protection of the Catholic Church, from which he received the financial and spiritual support he had once gotten from the party.”).

183. Trial Testimony in Joint Appendix, *U.S. v. Dennis*, 183 F.2d 201 (2d Cir. 1950) reprinted in ELLEN SCHRECKER, *THE AGE OF MCCARTHYISM: A BRIEF HISTORY WITH DOCUMENTS* 204 (Lynn Hunt et al. eds., 2nd ed. 2002).

184. See SCHRECKER *supra* note 8, at 50.

185. *Id.* at 27 (“By putting Communists on trial, the Truman administration . . . transformed political dissidents into criminals—with all the implications that such associations inspired in a nation of law-abiding citizens.”).

186. *Id.* at 51.

187. *Id.* at 28.

188. *Id.* at 27.

VII. The Supreme Court's Opinion: Korematsu, Dennis and the Necessity of National Security

The behemoth of “national security” has frequently been touted to justify the government’s intrusion into the fundamental rights of Americans; and at times of national crisis, the American public has often welcomed these actions. Nevertheless, as this note has described, “national security” has also often been employed to isolate minority groups and stifle differing points of view. Ellen Schrecker has noted that much of the rhetoric and action which characterized the Japanese internment decision and Red Scare can be traced to America’s counter-subversive tradition and

[T]he irrational notion that outsiders (who could be political dissidents, foreigners, or members of racial or religious minorities) threatened the nation from within. Projecting their own fears and insecurities onto a demonized “Other,” many Americans have found convenient scapegoats among the powerless minorities within their midst.¹⁸⁹

During World War II and in the immediate aftermath of Pearl Harbor, “[f]ear of possible Japanese sabotage and espionage was rampant, and an outraged public felt an understandable instinct to lash out at those who had attacked the country.”¹⁹⁰ Still, as Professor Geoffrey Stone recently illustrated, Japanese internment “was also very much an extension of more than a century of racial prejudice against the ‘yellow peril.’”¹⁹¹ Throughout 1941 and 1942, “[r]acist statements and sentiments permeated the debate . . . about how to deal with individuals of Japanese descent.”¹⁹²

Before the Supreme Court in *Korematsu v. United States*,¹⁹³ the government justified the internment of the Japanese as a “military necessity.” The government cited the Final Report of Lt. General John L. DeWitt and, in its brief, concluded that the Japanese were “a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion.”¹⁹⁴ Hidden from the Supreme

189. SCHRECKER, *supra* note 8, at 27.

190. Geoffrey R. Stone, *National Security v. Civil Liberties*, 95 CAL. L. REV. 2203, 2205 (2007).

191. *Id.*

192. *Id.* at 2205–06.

193. *Korematsu v. U.S.*, 323 U.S. 217–19 (1944) (holding that “we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did”).

194. U.S. GOV’T PRINTING OFFICE, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 1942, at vii (1943).

Court, however, was the fact that no evidence existed to support the contention that any persons of Japanese ancestry had been involved in espionage along the West Coast.¹⁹⁵ J. Edgar Hoover himself had concluded at the time that the call for mass evacuations was based largely on “public hysteria” rather than fact.¹⁹⁶ Only later was it revealed that the “government’s Supreme Court briefs in *Korematsu* were deliberately sanitized to keep from the justices any facts contradicting General DeWitt’s fabrications.”¹⁹⁷

The Court accepted the government’s word and the necessity of national security, however, and in a six-to-three decision upheld the internment decision.¹⁹⁸ Writing for the Court, Justice Hugo Black concluded:

[W]e are not unmindful of the hardships imposed . . . upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships To cast this case into outlines of racial prejudice . . . confuses the issue. *Korematsu* was not excluded from the [West Coast] because of hostility to . . . his race. He was excluded because . . . the . . . military authorities . . . decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the [area] We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.¹⁹⁹

Following World War II, it did not take long for many Americans to realize the egregiousness of the internment decision.²⁰⁰ Nevertheless, as World War II drew to a close, the nation quickly turned its eyes and fear towards the Soviet Union and the threat of Communism. Once again, the government pointed to national security to justify unprecedented intervention. In scenes reminiscent of the fury that gripped the nation in 1941,

195. See Personal Justice Denied, *supra* note 97 (questioning whether the policy of Japanese exclusion was militarily justified as a precautionary measure in the absence of actual sabotage among people of Japanese descent on the West Coast).

196. DON WHITEHEAD, *THE FBI STORY: A REPORT TO THE PEOPLE* 189 (1956) (quoting memorandum from J. Edgar Hoover, Dir., FBI, to Francis Biddle, U.S. Attorney General).

197. David A. Harris, *On the Contemporary Meaning of Korematsu: “Liberty Lies in the Hearts of Men and Women”*, 76 MO. L. REV. 1, 7 (2011).

198. See Personal Justice Denied, *supra* note 97.

199. *Korematsu*, 323 U.S. at 219, 223–24.

200. See MITCHELL T. MAKI, HARRY H. L. KITANO, AND S. MEGAN BERTHOLD, *ACHIEVING THE IMPOSSIBLE DREAM: HOW JAPANESE AMERICANS OBTAINED REDRESS* 98 (1999). On July 2, 1948, President Harry Truman signed the Evacuation Claims Act. Though the act did not address the legality of the internment camps, it did provide compensation for many of the evacuees who suffered property loss. *Id.* at 52.

“the nation demonized members of the Communist Party and . . . [r]ed-hunters demanded, and got, the blacklisting of thousands of individuals and a fear of ideological contamination swept the nation.”²⁰¹

In *Dennis v. United States*,²⁰² the Supreme Court was asked to determine whether the U.S. government could criminally prosecute members of the American Communist Party under the Smith Act. In a six-to-two decision, the Court again sided with the government and concluded that “the power of the Congress to protect the Government of the United States from armed rebellion is a proposition which requires little discussion.”²⁰³ In the majority and concurring opinions, national security concerns predominated. At the time, the Korean War was raging and, as Justice Vinson noted, “the context of world crisis after crisis” justified the government’s prosecutorial powers.²⁰⁴ “The mere fact,” Vinson concluded, “that from the period 1945 to 1948 the petitioners’ activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt.”²⁰⁵

As *Korematsu* and *Dennis* illustrate, when faced with questions of national security and civil liberties, for much of the last century the dominant approach of the Supreme Court was “to employ the ‘logical’ presumption that military and executive officials making wartime decisions act fairly and reasonably.”²⁰⁶ In short, “the Court embraced a highly deferential stance, presuming that restrictions of civil liberties in wartime were constitutionally justified so long as the government could offer a reasonable explanation for its action.”²⁰⁷

Eventually, the Supreme Court altered its approach. In *Yates v. United States*,²⁰⁸ the Supreme Court put an end to the government’s prosecution of suspected Communists under the Smith Act. Writing for the Court, Justice Harlan explained that

201. Stone, *supra* note 192, at 2207.

202. *Dennis v. U.S.*, 341 U.S. 494, 516 (1951) (holding that “the Smith Act, do[es] not inherently, or as construed or applied in the instant case, violate the First Amendment and other provisions of the Bill of Rights, or the First and Fifth Amendments . . .”).

203. *Id.* at 501.

204. *Id.* at 510.

205. *Id.*

206. Stone, *supra* note 192, at 2208.

207. *Id.*

208. *Yates v. U.S.*, 354 U.S. 298, 312 (1957) (concluding “that since the Communist Party came into being in 1945, and the indictment was not returned until 1951, the three-year statute of limitations had run on the ‘organizing’ charge, and required the withdrawal of that part of the indictment from the jury’s consideration”).

[W]hen it comes to Party advocacy or teaching in the sense of a call to forcible action at some future time we cannot but regard this record as strikingly deficient. At best this voluminous record shows but a half dozen or so scattered incidents We are unable to regard this sporadic showing as sufficient to justify viewing the Communist Party as the nexus between these petitioners and the conspiracy charged.²⁰⁹

With the *Yates* decision and several others decided over the same term, the Court put an end to the “Red Scare” era of Supreme Court jurisprudence.²¹⁰ The argument of national security necessity, however, did not vanish. More recently, the Supreme Court addressed the Bush (and Obama) administration’s claims of executive authority in the war on terrorism. Thus far, the Court has refused to grant the degree of deference that led to the results in *Korematsu* and *Dennis*. In *Rasul v. Bush*,²¹¹ the Court held that federal courts have habeas corpus jurisdiction to review the legality of the confinement of the Guantanamo Bay detainees. In *Hamdi v. Rumsfeld*,²¹² decided on the same day as *Rasul* in 2004, the Court went even further in its refusal to grant undue deference to the military and executive officials in the war on terrorism.

Yaser Hamdi, an American citizen, was seized in Afghanistan by the Northern Alliance and turned over to the U.S. military.²¹³ After secretly shipping Hamdi to a naval base in Virginia, the Bush administration claimed that because Hamdi was an “enemy combatant,” he could be detained indefinitely, without access to counsel and without any formal charge or proceeding.²¹⁴ The Supreme Court disagreed. In an eight-to-one decision, the Court held that the Bush administration had violated Hamdi’s due process rights.²¹⁵ Writing for the plurality, Justice O’Connor declared

209. *Id.* at 329–30.

210. The other three decisions were *Watkins v. U.S.*, 354 U.S. 178 (1957) (limiting HUAC’s investigative activities); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (limiting state investigative activities); *Service v. Dulles*, 354 U.S. 363 (1957) (limiting loyalty-security dismissals).

211. *Rasul v. Bush*, 542 U.S. 466 (2004).

212. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (holding that “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker”).

213. *See id.* at 510 (discussing, generally the facts surrounding plaintiff’s detention).

214. *See id.* at 510–11 (discussing the Government’s justification of plaintiff’s indefinite detention).

215. *Id.* at 533 (holding that “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision-

that “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertion before a neutral decisionmaker.”²¹⁶ O’Conner added, it “is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.”²¹⁷ In rejecting the government’s contention that the Court should play “a heavily circumscribed role” in reviewing the actions of the executive in wartime, O’Connor pointedly observed that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”²¹⁸

While the Supreme Court’s recent decisions have offered hope to those who fear that another period of hysteria may not lead to another *Korematsu* or *Dennis*, there remain strong reasons to doubt that the Court has moved completely past the period of granting “logical presumptions” to the government in the realm of national security.

For one, as a matter of law, *Korematsu* has never been explicitly overruled.²¹⁹ Of course, the fact that Mr. Korematsu’s conviction was never overturned may no longer be relevant. As Lawrence Tribe has famously said, it is Justice Jackson’s dissent from *Korematsu* that has “carried the day in the court of history.”²²⁰ Furthermore, Justice Antonin Scalia has characterized *Korematsu* on a par with *Dred Scott*,²²¹ and in 1988, Congress officially apologized to the Japanese and passed legislation that allowed those affected by the relocations and detentions to seek redress.²²²

maker”).

216. *Id.*

217. *Id.* at 532.

218. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

219. *See Korematsu v. U.S.*, 584 F. Supp. 1406 (N.D. Cal. 1984) (overturning Fred Korematsu’s conviction, only). *See also* David A. Harris, *On the Contemporary Meaning of Korematsu: “Liberty Lies in the Hearts of Men and Women”*, 76 MO. L. REV. 1, 13 (2011) (noting that the “1984 decision that overturned the conviction was based on a writ of coram nobis. The writ allows the reviewing court to correct errors of fact, but nothing more”).

220. *See* LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 237 n.118 (3d ed. 2000) (noting case law citing this same language).

221. *See Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (believing that the majority’s decision “will be assigned its rightful place in the history of this Court’s jurisprudence beside *Korematsu* and *Dred Scott*”).

222. *See* Restitution for World War II Internment of Japanese-Americans and Aleuts, 50 App. U.S.C. §§ 1989–1989d (2006).

Still, as has been described, in December 1941, the social, legal, political and military foundations of the United States were transformed. The American citizenry, along with the military, became engulfed in a full-scale effort to defeat Nazi Germany and the Japanese Empire and virtually every aspect of daily life became dedicated to the cause. For many modern legal scholars, such a context and crisis would still provide sufficient justification for the internment orders. Judge Richard Posner, for example, of the United State Court of Appeals for the Seventh Circuit once noted in a debate that he believed *Korematsu* was “correctly decided.”²²³ According to Posner:

Unquestionably, the order excluding people of Japanese ancestry from the West Coast was tainted by racial prejudice. On the other hand, many Japanese Americans had refused to swear unqualified allegiance to the United States. Good or bad, it was a military order in a frightening war. Although the majority opinion, written by Justice Hugo Black, is very poor, the decision itself is defensible.²²⁴

Judge Posner is not alone in his belief that, given the nation’s struggle in a “frightening war,” *Korematsu* was the correct decision at the time. Justice Clarence Thomas, in *Grutter v. Bollinger*,²²⁵ chose to quote the majority in *Korematsu* in order to note that “[p]ressing public necessity may sometimes justify the existence of [racial discrimination].”²²⁶ Thomas added that “[t]he lesson of *Korematsu* is that national security constitutes a ‘pressing public necessity,’ though the government’s use of race to advance that objective must be narrowly tailored.”²²⁷

VIII. Avoiding Alienation and Fostering Integration

To date, “public necessity” has not called for the mass evacuation and internment of Muslim-Americans. Nor have we seen criminal prosecutions or demands that Muslim-Americans withstand a loyalty-security program to prove their allegiance. Nonetheless, ‘Islamophobia’ pervades American society. Notably, the rhetoric that is employed to justify anti-Sharia laws—a

223. Pamela S. Karlan & Richard A. Posner, *The Triumph of Expedience: How America Lost the Election to the Courts*, HARPERS MAG., May 2001, at 39.

224. *Id.*

225. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

226. *Id.* at 351 (Thomas, J., dissenting) (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

227. *Id.*

subversive threat, disloyalty, and incongruent values—are remarkably similar to the arguments that were utilized during World War II and the Cold War. Today, like then, politicians seek to categorize Muslim-Americans as a mysterious “other” and as a threat to America’s security and way of life.

There is no silver bullet for combating these stereotypes. As our nation’s history has shown, minority integration often takes generations and is often the result of years of both struggle and tragedy. Thus, while understanding there is no single program or law to hasten Muslim-American integration, there are perhaps two general principles which political and community leaders could follow:

A. Decouple Integration and Security

Even if one accepts that Muslim-Americans are not fundamentally incompatible with the American system, America’s “War on Terror” and the nation’s legitimate need for vigilant security policies remain. It is undeniable that America’s enemies abroad continue to point to a radical interpretation of Islam as justification for terrorism. It is therefore unsurprising that at the governmental level, Muslim-American integration and the fear of radicalization tends to be viewed solely as a security issue.

As this Note has attempted to explain, when faced with similar circumstances and fears, the U.S. has, in the name of national security, resorted to extreme initiatives that have isolated minority groups and violated their constitutional rights. Today, the U.S. government and state legislatures are beginning to embark down a similar path. Americans and American policymakers do not, however, need to choose solely between security and separation. In fact, given the threat of terrorism and *radical* Islam, such a dichotomy would be detrimental to America’s security objectives.

As Professor Samuel J. Rascoff has explained, if we accept the fact that Muslim-American integration remains problematic and that subsequent alienation (for fear of radicalization) should be avoided, the United States must broaden its approach.²²⁸ Attempts to integrate Muslim-Americans and prevent Muslim-American radicalization cannot be approached solely as a “security” issue. In fact, doing so may only serve the opposing purpose.

228. See Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125 (2011) (arguing that American governmental efforts to establish its version of an “Official Islam” is problematic and unlikely to succeed).

The United States' limited record in this regard is at best mixed and European case studies—where Muslim immigration is far more prevalent—have provided some important lessons.²²⁹ In Britain, “efforts at the management of Islam stem from the desire to engage in proactive counter-terrorism, rather than as a corollary to the goal of cultural assimilation.”²³⁰ Thus, the British strategy for integrating Muslims into their society is also focused almost purely on the need to combat terrorism. Its threefold approach is to “respond to the ideological challenge of terrorism . . . ; prevent people from being drawn into terrorism . . .”; and “work with a wide range of sectors and institutions . . . where there are risks of radicalization”²³¹ While such a strategy seems reasonable, it has largely backfired and has fueled the notion amongst many Muslims in Britain that they are to be feared, not welcomed.²³²

The United States federal government has pursued similar means and focused almost solely on the “security” side of Muslim-American integration. Specifically, the U.S. has fixated on the threat of “radicalization” and the fear that Muslim-American communities may embrace violent interpretations of Islam. Among other approaches, the government has adopted a strategy of engagement with Muslim communities to help prevent the threat of a radicalized version of Sharia from taking hold.²³³ Simultaneously, the U.S. has sought to “bureaucratize” their Muslim-American outreach efforts: the U.S. has “invested heavily in intelligence collection and analysis as part of a comprehensive approach to domestic counter-radicalization;” the government has created new bureaucratic posts—such as the Special Representative to Muslim Communities within the State Department—to implement a counter-radicalization and inte-

229. *Id.* at 135 (“Legal concerns about counter-radicalization rooted in the law and traditions associated with the Establishment Clause and in conceptions of religious liberty more generally overlap with, and are reinforced by, a series of pragmatic and strategic concerns about its efficacy.”).

230. *Id.* at 150.

231. Theresa May, Foreword to Sec’y of State for the Home Dep’t, Prevent Strategy 1, 40 (June 2011) reprinted in Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125, 152 (2011).

232. *See supra* note 228, at 147 (“Ironically, American attempts at imitating British counter-radicalization are beginning just as the British are modifying these programs in part because of intense public criticism and political contestation.”).

233. *Id.* at 153 (“Domestic counter-radicalization efforts have increasingly been predicated on the idea that engagement—outreach to certain Muslim communities in order to make Official Islam a social reality—can play a crucial role in promoting domestic security.”).

gration strategy; and finally, the U.S. has embraced the British model of “implicating government functions far afield of the national security apparatus of the state.”²³⁴ For example, the U.S. Department of Education’s Office of Safe and Drug-Free Schools recently commissioned a report entitled “Recruitment and Radicalization of School-Aged Youth by International Terrorist Groups.”²³⁵ The study helps “the Department of Education identify practical implications” of how recruitment and radicalization occur and determine “whether modifications to current policies and practices being used by U.S. schools are indicated.”²³⁶

Certainly, such outreach efforts and security strategies may be necessary. Nevertheless, these bureaucratized attempts to “counter-radicalize” Muslims and prevent the entrenchment of a radical form of Sharia are only a small piece of a larger puzzle. Integration of Muslim-Americans under the banner of security cannot be the sole strategy. Instead, the U.S. must also view Muslim-American integration as an area of social and civil rights policy. Today, Muslim-Americans are more vulnerable to financial hardships than any other American religious group.²³⁷ Large proportions of Muslims now claim there have been times in the past year when they were unable to afford basic necessities such as food, shelter, and healthcare.²³⁸ Likewise, Muslim-Americans are the only major U.S. religious group where less than half claim they would be able to make a major purchase if they needed to.²³⁹

Much of these financial hardships are likely linked to the anti-Muslim phobia this Note has described. Nonetheless, if the federal government or a state legislator is concerned about Muslim radicalization, these issues—not the text of the Qu’ran—are what beg attention. Identifying Muslims as members of society who are best integrated through counter-terror and counter-radicalization policies only further stigmatizes and alienates them. In essence, it teaches Muslims that their most valuable contribution to society is to refrain from blowing up a building.

Surely, this is not the depth of acceptance that Muslim and non-Muslim Americans desire. Instead, integration initiatives—be it at the

234. *Id.* at 159.

235. HOMELAND SEC. INST., *Recruitment and Radicalization of School-Aged Youth by International Terrorist Groups* (2009), reprinted in Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125, 159 (2011).

236. *Id.*

237. See MUSLIM AMERICANS: FAITH, FREEDOM, AND THE FUTURE *infra* note 246, at 16.

238. *Id.* at 17.

239. *Id.*

national, state, local or non-governmental level—must focus on Muslim-Americans as just that: Muslim-Americans. Their religion need not be their sole identifying trait and, like any American, policies must recognize their desire for the same rights and social benefits that all Americans enjoy. Rejecting and denouncing the anti-Sharia laws is one step. Additionally, governmental and non-governmental institutions must address the issues that Muslim-Americans care about and are affected by: unemployment, education, healthcare, and racism. Focusing on these issues would not only increase the assimilation and acceptance of an important minority group, but it would also do far more than any surveillance or police strategy in addressing the security fears that now dominate our view and treatment of Muslim-Americans.

B. Do No Harm

While government and political institutions can play an important part in encouraging minority assimilation, the most important players in any society are of course not the leaders, but the people. From this idea comes a second, yet fairly unremarkable principle: *do no harm*. Minority acceptance in the United States has often been achieved through an organic process that reflects the societal, cultural and political changes that slowly occur in the background of our lives and experiences. A recent survey by the Pew Research Center demonstrates this idea well. As has been noted, a remarkable number of non-Muslim Americans have unfavorable views of Islam. Nevertheless, Pew found that Americans who simply know a Muslim are much more likely to have positive views of Islam and are less likely to believe that Islam encourages violence.²⁴⁰ Reza Aslan, a renowned Muslim-American political and academic commentator has noted a similar historical trend. Aslan argues that while education and interfaith dialogues will certainly help Christian and Jewish Americans understand Islam, nothing can replace the benefits that result from life's basic interactions.²⁴¹ As Aslan likes to note, Jews were once also regarded as a suspicious and untrustworthy group.²⁴² Yet their acceptance into American society was

240. See THE PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS, MUSLIMS WIDELY SEEN AS FACING DISCRIMINATION 2 (2009), available at <http://www.people-press.org/files/legacy-pdf/542.pdf>.

241. See generally MUSLIMS AND JEWS IN AMERICA: COMMONALITIES, CONTENTIONS, AND COMPLEXITIES (Reza Aslan & Aaron J. Hahn Tapper, eds.) (2011).

242. See *id.*

not the result of Christian Americans reading the Torah and learning about Judaism. On the contrary, it was through the simple exchanges and connections within a community—going to school together, working together, joining the same clubs and organizations, playing sports together, etc.—that fostered the acceptance and integration of Jews.²⁴³

Muslim-Americans can expect to find acceptance through a similar path and, importantly, they will likely find acceptance quickly. Muslim-Americans are extremely “American.” Contrary to the aforementioned stereotypes, Muslim-Americans are, in fact, more likely to identify with their country than their religion,²⁴⁴ and Muslim-Americans are strong believers in American democracy and the American judicial system.²⁴⁵ Muslim-Americans are not an inherently violent people. A recent Gallup report found that Muslim-Americans are actually the least likely of any religious group to believe that individual violence towards civilians is ever justified.²⁴⁶ Finally, Muslim-Americans are not seeking to force Islam or Sharia on all Americans. On the contrary, Muslim-Americans have been shown to be extremely open-minded and exceptionally tolerant of other religious groups.²⁴⁷ Perhaps unexpectedly, such tolerance may indeed be due to the fact that Muslim-Americans are the most racially-diverse religious group in the United States.²⁴⁸ They are themselves composed of a

243. *See id.*

244. ABU DHABI GALLUP CENTER, MUSLIM AMERICANS: FAITH, FREEDOM, AND THE FUTURE 50 (2011) (“In no major U.S. religious group is there a conflict between loyalty to the U.S. and identifying with others around the world who share the same religion. Rather, in every group, including Muslim Americans, people who identify extremely strongly with the U.S. are also more likely to identify strongly with their worldwide religious identity.”).

245. *Id.* at 23 (“Muslim Americans are the most likely of any religious group in the U.S. to say the country’s elections are honest. Fifty-seven percent of Muslim Americans say this, versus 44% of Protestant Americans . . . Moreover, Muslim Americans are just as likely as other religious groups to say they have confidence in the U.S. media and judicial system.”).

246. *Id.* at 31 (“Muslim Americans are the least likely of all major religions in the U.S. to justify individuals or small groups attacking civilians.”).

247. *Id.* at 41 (“Despite believing that they are often the victims of prejudice, Muslim Americans are among the most tolerant of all major faiths in the U.S. Their attitudes toward other religious groups qualify 44% of them as being ‘integrated,’ the highest possible level on a continuum of acceptance of other faiths.”).

248. *See* THE MUSLIM WEST FACT PROJECT, MUSLIM AMERICANS: A NATIONAL PORTRAIT 10 (2009) (“Muslim Americans are the most racially diverse religious group surveyed in the United States. African Americans represent the largest racial group (35%) within the national U.S. Muslim population, more than a quarter of Muslim Americans classify themselves as ‘white,’ and about one in five identify themselves as ‘Asian.’”).

variety of racial and ethnic groups and their lineage can be traced to colonial America, Africa, Europe, the Middle East, South Asia, etc.²⁴⁹

Fears that Islam is incompatible with Western society are also misplaced. There are undoubtedly statements from the Qu'ran and sunna that run counter to American constitutional principles. However, this fact alone does not render Islam a violent and inimical religion. More precisely, because Islam—like the other Abrahamic faiths—is based upon a text that is centuries old, applying that text in any modern society can be difficult and is subject to bizarre and radical interpretations. Christianity and Judaism also have their own principles that if taken literally or out of context would clearly be hostile to Western ideas of democracy, freedom and equality.²⁵⁰

The goal of this Note is not to prescribe a proper role for Sharia or foreign law in the American legal framework. Neither though is that the goal of the anti-Sharia legislators who are proposing the Sharia and foreign law bans across the country. In fact, this movement and these proposals are simply reactions to misconceived fears and these pieces of legislation are unnecessary, misguided, and will do vastly more harm than good. From a legal standpoint, the Supreme Court has already addressed what role, if any, foreign and international law should have in U.S. courts. This debate is actually much less threatening and while there may be times where a judge is forced to acknowledge a couple's or individual's Islamic beliefs when interpreting certain civil matters, our laws, the Constitution, and our nation's jurisprudence provides all the guidance our courts should require.²⁵¹

From a societal standpoint, the anti-Sharia laws are much more problematic. Instead of encouraging Muslim-Americans to become active members of their community, these laws reinforce the notion that Muslim-

249. *Id.*

250. See WAJAHAT ALI AND MATTHEW DUSS, CENTER FOR AMERICAN PROGRESS, UNDERSTANDING SHARIA 1, 3 (2011) (“The equivalent would be saying that Jews stone disobedient sons to death (Deut. 21:18-21) or that Christians slay all non-Christians (Luke 19:27).”).

251. See *The Paquete Habana*, 175 U.S. 677, 700 (1900). See also Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984); Arthur Weisburd, *State Courts, Federal Courts and International Cases*, 20 YALE J. INT'L L. 1 (1995); Curtis Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Harold Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Ryan Goodman & Derek Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997).

Americans are to be isolated. Instead of emphasizing the fact that Muslim-Americans seek the same goals and aspirations as all Americans, these laws emphasize that Muslim-Americans are to be feared. These laws run afoul of today's cultural and social currents and they are completely detached from what is actually occurring on the ground. In every corner of American society, Muslim-Americans have demonstrated just how "American" they are. Within our communities, businesses, academic institutions and political processes, Muslims and non-Muslims are engaging with one another and learning from one another. Going forward, this process must be encouraged, not stifled, and any attempts to isolate and segregate Muslim-Americans must be denounced, not promoted.

IX. Conclusion

Professor Geoffrey Stone recently noted: "[a] time-honored method of gaining or consolidating power is to incite public fear, demonize an internal 'enemy,' and then 'protect' the public by prosecuting, interning, deporting, and spying upon those accused of disloyalty."²⁵² Sadly, we are seeing a similar pattern unfold today. The uproar over Sharia and Muslim-Americans, however, is completely misplaced. We should not simply focus on what is written in the Qu'ran or the sunna and presume that this precisely defines Muslim-Americans. On the contrary, we should focus on the people these texts are meant to guide. It is easy to look at a document that is centuries old and discover ideas or statements that do not translate to today. Likewise, it is easy to look at individuals or leaders in distant countries and determine that because they share a religion in name, they share the same goals and values. One only has to look and interact with Muslim-Americans today to realize that such lazy characterizations are incorrect.

Still, anti-Muslim views have grown more common. Recently, on the floor of the Tennessee State Assembly, State Senator Rick Womick went before his colleagues to warn them of the threat of Islam and Sharia. He declared that he had been studying the Qu'ran and determined that Sharia is a political, legal, and military doctrine that calls for global jihad and world domination. "Folks," Sen. Womick, said, "this is not what I call 'Do unto others what you'd have them do unto you.'"²⁵³

252. Stone, *supra* note 190, at 2208–09.

253. Andrea Elliott, *The Man Behind the Anti-Sharia Movement*, N.Y. TIMES, July 30, 2001, at A1.

Similar warnings are being echoed across the country as elected officials and activists mobilize against what they describe as the menace of Sharia in the United States. History has taught us that in the midst of national crises and threats to our security, such rhetoric can be dangerous. Over the next several years, as additional proposals to ban Sharia and alienate Muslim-Americans are put forward, it will be essential for the government and the public to chart a different course.