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“Frankly Unthinkable”: The Constitutional Failings of President Trump’s Proposed Muslim Registry

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“FRANKLY UNTHINKABLE”: THE CONSTITUTIONAL FAILINGS OF PRESIDENT TRUMP’S PROPOSED MUSLIM REGISTRY

A. Reid Monroe-Sheridan

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*A. Reid Monroe-Sheridan**

ABSTRACT

On several occasions during the 2016 presidential campaign, Donald Trump endorsed the creation of a mandatory government registry for Muslims in the United States—not just visitors from abroad, but American citizens as well. This astonishing proposal has received little attention in legal scholarship to date, even though Trump has refused to renounce the idea following his election to the presidency.

In this Article, I attempt to address President Trump’s proposal in several ways. First, I aim to provide a thorough analysis demonstrating unequivocally that such a “Muslim registry,” with the characteristics President Trump has endorsed, would violate the First and Fifth Amendments to the Constitution. Second, drawing context from Trump’s executive orders limiting immigration from certain Muslim-majority countries, I analyze the constitutionality of a possible program disguised to avoid overt discrimination among religions but still operating in effect as a “Muslim registry.” This too, I aim to demonstrate, would be a clear violation of the Constitution. Finally, I consider certain constitutional defenses that proponents of the “Muslim registry” have already raised or appear likely to raise in support of the program. I conclude that these arguments are unconvincing.

This Article ultimately attempts to demonstrate, through a methodical analysis of case law, legal scholarship, and the public record, that what President Trump has proposed is plainly unconstitutional. If this conclusion is not surprising, it is significant; even after assuming the presidency, Donald Trump has refused to disavow a policy that would clearly violate the constitutional rights of American citizens.

I. INTRODUCTION

“You tell me.”

This was the response of then-presidential candidate Donald Trump when asked how his proposal to require all Muslims in the United States to register in a database would be different from the registration obligations imposed on Jews in Nazi Germany.¹ In fact, during the presidential campaign Trump made numerous

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1. Trip Gabriel, *Donald Trump Says He’d ‘Absolutely’ Require Muslims to Register*, N.Y. TIMES (Nov. 20, 2015, 1:31 AM), <https://www.nytimes.com/politics/first-draft/2015/11/20/donald-trump-says-hed-absolutely-require-muslims-to-register/> [http://perma.cc/MP22-BN5F]. Under Nazi rule, Germany created various registries of persons and property. Among these were the “Gestapo card indices” which were “the register of persons politically undesirable to the National Socialist regime,” including Jews.

references to a registry or database that would target Muslims in the United States.² Trump’s statements on this topic have been inconsistent and, taken collectively, are difficult to reduce into a coherent policy proposal.³ However, Trump has not abandoned the idea; in the wake of the December 2016 terrorist attack in Berlin, Trump (then President-elect) “appeared to stand by his plans to establish a registry for Muslims.”⁴

Various high-profile Trump supporters have publicly endorsed some form of registry or mass incarceration targeting Muslims in general or suspected (but not formally charged) Islamic terrorists. Shortly after Trump’s electoral victory, a spokesman for a Trump-supporting political action committee argued on Fox News that the internment of Japanese-Americans during World War II was “precedent” for a registry of immigrants from Muslim countries.^{5,6} Immediately following the June

Robert Kempner, *The German National Registration System As Means of Police Control of Population*, 36 J. OF CRIM. L. AND CRIMINOLOGY 362, 378 (1946).

2. Aaron Blake, *Trump Says We’ve Known His Muslim Ban and Database Plans ‘All Along.’ But We Still Don’t — Not Really.*, WASH. POST (Dec. 21, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/17/the-evolution-of-donald-trump-and-the-muslim-database/> [http://perma.cc/4L6D-ZVS9]; Vaughn Hillyard, *Donald Trump’s Plan for a Muslim Database Draws Comparison to Nazi Germany*, NBC NEWS (Nov. 20, 2015, 9:27 AM), <http://www.nbcnews.com/politics/2016-election/trump-says-he-would-certainly-implement-muslim-database-n466716> [http://perma.cc/L3BV-ERZ8].

3. Blake, *supra* note 2.

4. Abby Phillip & Abigail Hauslohner, *Trump on the Future of Proposed Muslim Ban, Registry: ‘You Know My Plans’*, WASH. POST (Dec. 22, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/12/21/trump-on-the-future-of-proposed-muslim-ban-registry-you-know-my-plans/> [http://perma.cc/4L6D-ZVS9]. As of this writing, Trump himself has not disavowed the proposal. However, prior to his December 2016 statement, Trump’s campaign had seemingly walked back the proposal, stating that Trump “has never advocated for any registry or system that tracks individuals based on their religion.” Blake, *supra* note 2. The ambiguity increased with a January 18, 2017 statement from Nikki Haley, then Trump’s nominee for ambassador to the United Nations, that she and “[Trump’s] administration” do not “think there should be any registry based on religion.” Ben Kamisar, *Haley: No Muslim Registry Under Trump Administration*, THE HILL (Jan. 18, 2017, 11:27 AM), <http://thehill.com/homenews/senate/314808-haley-no-justification-for-muslim-registry> [http://perma.cc/JG88-LZTQ]. To add to the confusion, Rex Tillerson, the Secretary of State, has refused to rule out such a policy. Ben Kamisar, *Tillerson Won’t Rule Out Muslim Registry*, THE HILL (Jan. 11, 2017, 4:06 PM), <http://thehill.com/homenews/administration/313846-tillerson-wont-rule-out-muslim-registry> [http://perma.cc/3JEN-EUE7].

5. Blake, *supra* note 2. Members of the legal community will recognize that the spokesman, Carl Higbie, was presumably referring to *Korematsu v. United States*, which found that a military order for the exclusion of all persons of Japanese ancestry for certain areas in the San Francisco Bay Area did not violate the Constitution. 324 U.S. 214 (1944). Higbie is correct to the extent that *Korematsu* has never been overturned, but the occasion for the Supreme Court to reconsider the case has not arisen since it was decided in 1944. In 2015, Justice Stephen Breyer stated, “I think everyone I’ve ever run into thinks that case was wrongly decided.” NCC Staff, *Breyer Doesn’t See Another Korematsu Situation in Near Future*, CONST. DAILY (Dec. 28, 2015), <http://blog.constitutioncenter.org/2015/12/breyer-doesnt-see-another-korematsu-situation-in-near-future/> [http://perma.cc/6XEW-HJG2]. *Korematsu* is discussed in detail in Part III.C.

6. Following Trump’s comments proposing a temporary ban on all Muslims entering the United States, Al Baldasaro, a New Hampshire state representative and co-chair of Trump’s national veterans coalition, said, “What he’s saying is no different than the situation during World War II, when we put the Japanese in camps.” Lindsey Bever, *Internment Camps? ‘I Certainly Hate the Concept,’ Donald Trump Says.*, WASH. POST (Dec. 8, 2015), <https://www.washingtonpost.com/news/post->

2017 London Bridge terrorist attacks, Nigel Farage, an outspoken supporter of Trump and onetime “unofficial advisor” to the president,⁷ called for the mass internment of 3,500 suspected terrorists in the United Kingdom in a segment on Fox News.⁸ On his radio show the next day, Michael Savage enthusiastically endorsed Farage’s proposal, which Savage himself described as “World War II-style internment camps,” and asked why FBI Director James Comey had not already interned “Islamists who are on the watchlist in America.”⁹ Vice President Mike Pence has said that Trump “respects and admires” Savage, and Savage has stated that he “had a big hand in helping Donald Trump . . . get his message across and, therefore, getting him elected . . .”¹⁰ (In a related context, Trump defended his 2015 proposal to ban all Muslims from entering the United States, purportedly for national security purposes, by citing President Roosevelt’s wartime policies with respect to “Germans, Italians and Japanese.”¹¹ When asked, Trump clarified that he was referring to Roosevelt’s proclamations affecting foreign nationals and not the internment of Japanese-Americans.)¹²

The closest analog to Trump’s database proposal in recent U.S. counterterrorism policy is the “NSEERS” (National Security Entry-Exit Registration System) program. Indeed, shortly after Trump’s victory in the 2016 election, Kris Kobach, the secretary of state of Kansas, was photographed together with Trump while carrying a document labeled “Kobach Strategic Plan for First 365 Days” for the Department of Homeland Security (“DHS”), which included as its first item the reintroduction of the “NSEERS screening and tracking system.”¹³

The NSEERS program was implemented by the Bush Administration following the September 11, 2001 terrorist attacks and effectively terminated under President

politics/wp/2015/12/08/trump-on-internment-camps-i-certainly-hate-the-concept/
[<http://perma.cc/K4VA-ZKQT>].

7. Phil Bryant, a Trump supporter and the Governor of Mississippi, described Nigel Farage as a “close but unofficial adviser” in January 2017. Christopher Hope, *Nigel Farage Will Be Made ‘Unofficial Adviser’ to Donald Trump, Close Ally Says at Glittering Party Overlooking White House*, TELEGRAPH (Jan. 21, 2017, 8:31 AM), <http://www.telegraph.co.uk/news/2017/01/20/nigel-farage-trumps-win-part-world-revolution/> [<http://perma.cc/C2FV-TP9X>].

8. Marisa Schultz, *British Politician Says Suspected Terrorists Should Be Put in Camps*, N.Y. POST (June 4, 2017, 6:32 PM), <http://nypost.com/2017/06/04/british-politician-says-suspected-terrorists-should-be-put-in-camps/> [<https://perma.cc/P4WU-4TPF>].

9. *Trump Ally Michael Savage Calls for “World War II-Style Internment Camps” Following London Attack*, MEDIA MATTERS FOR AM. (June 5, 2017, 7:07 PM), <https://www.mediamatters.org/blog/2017/06/05/Trump-ally-Michael-Savage-calls-for-World-War-II-style-internment-camps-following-London-a/216792> [<http://perma.cc/M53Q-8UVH>].

10. *Id.*

11. Meghan Keneally, *Donald Trump Cites These FDR Policies to Defend Muslim Ban*, ABC NEWS (Dec. 8, 2015, 1:01 PM), <http://abcnews.go.com/Politics/donald-trump-cites-fdr-policies-defend-muslim-ban/story?id=35648128> [<http://perma.cc/S6MC-8QNE>]. When asked on a separate occasion, Trump initially declined to denounce the Japanese-American internment but in subsequent interviews said that he was not in favor of it. See Bever *supra* note 6.

12. Keneally, *supra* note 11.

13. Michael D. Shear et al., *A List of Priorities from Trump, and Kris Kobach Tips His Hand*, N.Y. TIMES (Nov. 21, 2016), <http://www.nytimes.com/2016/11/21/us/politics/donald-trump-transition.html> [<https://perma.cc/TW6A-UTKJ>].

Obama in 2011.¹⁴ NSEERS required, on pain of significant criminal penalties, that non-citizen immigrants traveling to the United States from certain countries undergo a secondary inspection upon arrival in the U.S. and register at a designated port of departure upon leaving the country, among other obligations.¹⁵ DHS determined in 2011 that newly implemented automated systems obsoleted the NSEERS registration process but decided to leave the underlying regulation in place until the regulation was fully terminated in late 2016.¹⁶

Although the implementation of NSEERS from 2002 to 2011 did not result in a single known terrorism conviction,¹⁷ the registry has withstood equal protection challenges on the grounds that Congress has broad power to determine, and delegate the determination of, immigration criteria.¹⁸ In light of the existing case law, if DHS were to re-implement NSEERS it seems likely that the program would withstand constitutional challenge.¹⁹

Trump's campaign statements, however, clearly contemplate something far more sweeping than a registry for non-citizen immigrants from certain designated countries. In November 2015, for example, Trump declined in an interview with ABC News to rule out a database of *all* Muslims in the United States.²⁰ This proposal, which apparently contemplates a national tracking program applicable to certain American citizens on the basis of their religion, is unprecedented in modern American politics and has potentially enormous implications for civil liberties in the United States. As an initial matter, Trump's statements on this topic merit examination to allow an estimate of what, precisely, the president has proposed.

A simple data set capturing nearly all Muslim Americans (as well as Americans

14. DEP'T OF HOMELAND SEC., *DHS Removes Designated Countries from NSEERS Registration*, DEPARTMENT OF HOMELAND SECURITY (May 2011), <https://www.dhs.gov/dhs-removes-designated-countries-nseers-registration-may-2011> [<https://perma.cc/X446-FL92>].

15. *Id.*

16. *Id.*; see Kevin Liptak & Shachar Peled, *Obama Administration Ending Program Once Used to Track Mostly Arab and Muslim Men*, CNN (5:34 PM GMT, December 22, 2016), <http://edition.cnn.com/2016/12/22/politics/obama-nseers-arab-muslim-registry/> [<https://perma.cc/PX5D-DQX2>].

17. Chris Rickerd, *Homeland Security Suspends Ineffective, Discriminatory Immigration Program*, AMERICAN CIVIL LIBERTIES UNION (May 6, 2011, 11:30 AM), <https://www.aclu.org/blog/speakeasy/homeland-security-suspends-ineffective-discriminatory-immigration-program> [<https://perma.cc/H7PG-PXP8>].

18. See *Kandamar v. Gonzales*, 464 F.3d 65, 73 (1st Cir. 2006) ("Every court to address the issue has rejected a challenge to NSEERS registration on equal protection grounds.") (citing *Ahmed v. Gonzales*, 447 F.3d 433, 439-40 (5th Cir. 2006); *Ali v. Gonzales*, 440 F.3d 678, 681 n.4 (5th Cir. 2006); *Zafar v. U.S. Attorney Gen.*, 461 F.3d 1357, 1366-67 (11th Cir. 2006); *Roudnahal v. Ridge*, 310 F. Supp. 2d 884, 892 (N.D. Ohio 2003)); see also Louis Nelson, *Trump's Muslim Registry Wouldn't Be Illegal, Constitutional Law Experts Say*, POLITICO (Nov. 17, 2016, 11:25 AM), <http://www.politico.com/story/2016/11/donald-trump-muslim-registry-constitution-231527> [<https://perma.cc/W6V5-M2YV>].

19. Nelson, *supra* note 18. Alternatively, some argue that hostility toward Muslims evidenced by Trump during the 2016 presidential campaign would provide compelling evidence that anti-Muslim sentiment is behind the reconstitution of the NSEERS program, thus making the program an unconstitutional exercise of religious discrimination for its own sake. See Michael Price & Faiza Patel, *Muslim Registry or NSEERS Reboot Would Be Unconstitutional*, LAWFARE (Nov. 22, 2016, 12:45 PM), <https://www.lawfareblog.com/muslim-registry-or-nseers-reboot-would-be-unconstitutional> [<https://perma.cc/TLW2-FZBB>].

20. Blake, *supra* note 2.

of other religious affiliations) almost certainly exists already as a result of large scale commercial data information-gathering, to say nothing of any non-public data-collection projects that government agencies may already have underway.²¹ To be of any significance, whatever Trump has proposed as a “Muslim registry” must amount to more than an internal government effort to identify who, among American residents, is Muslim. In fact, Trump himself agreed that Muslims would be “legally obligated to sign into the database,”²² stating separately that it would be necessary “to do certain things that were frankly unthinkable a year ago.”²³ Trump’s vague references to “surveillance” and “watch lists” and the precedent of NSEERS are conceptually consistent with a proposal that would require Muslim Americans to initially register and at the very least provide some form of current contact information to the federal government.²⁴ Beyond this, the proposal may not have any clear details in even in Trump’s own mind. As noted above, when asked how his proposal differed from the registration obligations imposed on Jews in Nazi Germany, Trump responded, “You tell me.”²⁵ Asked repeatedly, he provided this same response four times and then stopped answering the question.²⁶

In light of these facts, in discussing and analyzing the proposed “registry” or “database,” this Article assumes that such a policy would require Muslims in the United States to register with the program and that there would a penalty for noncompliance.²⁷ To emphasize that the proposal is not yet clearly defined, this Article will refer to it as the “Muslim registry” in quotation marks.²⁸ This is a description used principally by journalists but not by the president himself.

The American Civil Liberties Union has published a relatively brief legal analysis of a “Muslim registry” that conforms to these contours, arguing that it would violate the First and Fifth Amendments to the Constitution as well as the Privacy Act of 1974 and possibly other federal laws.²⁹ However, considering that the President of the United States continues to leave open the possibility of creating a registry of all Muslims in the country, including American citizens, and considering that the Trump Administration has apparently worked to fulfill one of the president’s other campaign promises by implementing a travel ban applicable to citizens of several

21. Philip Bump, *Just So You Know: The Government Already Has a List of Muslims in the U.S.*, WASH. POST (Nov. 20, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/11/20/just-so-you-know-the-government-almost-certainly-already-has-a-list-of-muslims/> [https://perma.cc/7A59-F22D].

22. Hillyard, *supra* note 2.

23. Tessa Berenson, *Trump: U.S. May Have to Do ‘Unthinkable’ in Light of Paris Attacks*, TIME (Nov. 19, 2015), <http://time.com/4120711/donald-trump-paris-attack-muslims/> [http://perma.cc/TE9F-T2P7].

24. Blake, *supra* note 2.

25. Hillyard, *supra* note 2.

26. *Id.*

27. Alternatively, the policy might avoid explicit references to any specific religion in order to increase its chances of surviving constitutional review. This “facially neutral” permutation of the policy is discussed in detail in Part II.B.

28. At times throughout this Article the registry is referred to as a proposal, policy, or program, or a hypothetical future law or regulation. Because the ultimate legal form of any future “Muslim registry” is unknown, the terms are sometimes used interchangeably in reference to it.

29. AM. CIVIL LIBERTIES UNION, *The Trump Memos*, <https://action.aclu.org/sites/default/files/pages/trumpmemos.pdf> [http://perma.cc/6P5F-BNKT].

Muslim-majority nations (the “Immigration Ban”),³⁰ there is surprisingly little published, in-depth constitutional analysis of Trump’s proposal.

This Article attempts to provide such an analysis, reviewing in detail the applicable constitutional inquiries and scrutinizing the most salient arguments for and against constitutionality. Part II.A of this Article analyzes the constitutionality of a “Muslim registry” that explicitly discriminates among religions and reaches the conclusion (likely unsurprising to most readers) that such a policy would unequivocally violate the First and Fifth Amendments. Part II.B and Part III.A confront the somewhat more complicated questions, respectively, of whether a “Muslim registry” disguised to be neutral among religions could survive constitutional review, and whether the emergency powers of the president could authorize such a policy. Part III.B analyzes whether the Japanese-American internment, in light of its citation by certain Trump backers as precedent for Trump’s proposed ban on Muslim immigration, provides any legal authority to support the constitutionality of a “Muslim registry.” Part III.C briefly analyzes some additional, specious arguments that might be marshalled in support of the registry. This Article ultimately concludes in Part IV that, even recognizing that the policy might be structured to appear facially neutral and justified as a purportedly necessary use of emergency executive power, the “Muslim registry” would be unconstitutional. In short, President Trump has advocated for, and now refuses to disavow, a policy that would overtly violate the constitutional rights of American citizens.

II. CONSTITUTIONAL ANALYSIS

A. The Constitutionality of a Religious Registry that Explicitly Targets Muslims in the United States

An attempt by the federal government to create a registration system explicitly targeting Muslims in the United States would clash squarely with decades of Supreme Court jurisprudence applying the First and Fifth Amendments.³¹ Indeed, the basic constitutional challenges to such a policy would be so straightforward that it is hard to imagine proponents of the “Muslim registry” implementing a program that openly discriminates among citizens on religious grounds if for no other reason than strategic considerations. Nonetheless, because President Trump has so far declined to reject this possibility outright, there is value in explicating the constitutional deficiencies of such a policy.

1. Constitutionality Under the First Amendment

The creation of the “Muslim registry” would contravene both the Establishment Clause and the Free Exercise Clause of the First Amendment. The Establishment Clause provides that “Congress shall make no law respecting an establishment of

30. Exec. Order No. 13769, 82 Fed. Reg. 20, 8977 (Feb. 1, 2017). The order suspended immigration from seven Muslim-majority countries.

31. Regardless of whether the “registry” is created by legislation, administrative action, or executive order, the same constitutional issues arise. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179 (1972) (“State action, for purposes of the Equal Protection Clause, may emanate from rulings of administrative and regulatory agencies as well as from legislative or judicial action.”).

religion” while the Free Exercise Clause is the second portion of this sentence: “or prohibiting the free exercise thereof.”³² The Establishment Clause means “at least” that the federal government cannot “pass laws which aid one religion, aid all religions, or prefer one religion over another” or “force [or] influence a person to . . . profess a belief or disbelief in any religion” and “[n]o person can be punished for entertaining or professing religious beliefs or disbeliefs.”³³ Furthermore, any law that creates “a denominational preference” is subject to strict scrutiny under the Establishment Clause.³⁴

Any government policy that singles out Muslim Americans for certain unique obligations (such as current reporting of one’s residential address and other information as was required by NSEERS) would represent an obvious “denominational preference” against Islam. This would trigger an analysis under strict scrutiny, meaning that to be consistent with the Establishment Clause any “Muslim registry” would need to be “closely fitted” to “a compelling governmental interest.”³⁵ As explained below, it is virtually inconceivable that the registry could survive a strict scrutiny analysis.

The Establishment Clause creates an additional problem for this policy. From a practical standpoint, it would be impossible to enforce any mandatory registration requirement in an overt “Muslim registry” without effectively compelling certain Americans to declare themselves to be Muslim. Although this additional problem may be somewhat counterintuitive, there is a strong argument that government action in this case would amount to “forc[ing] . . . a person to . . . profess a belief . . . in” Islam.³⁶ This too would violate the Establishment Clause.³⁷

The Free Exercise Clause presents yet another problem for Trump’s proposal. Regulating or burdening religious expression is permitted under the Free Exercise Clause when “[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order.”³⁸ However, to avoid strict scrutiny, such regulations must be “neutral and of general applicability.”³⁹ To create a “Muslim registry” remotely consistent with what Trump has proposed, at the very least Americans who publicly identify as Muslims would have to be required to register with an administrative or law enforcement agency. Presumably Americans who choose to worship at a mosque would also be targeted, regardless of whether

32. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

33. *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 15-16 (1947).

34. *Larson v. Valente*, 456 U.S. 228, 246 (1982).

35. *Id.* at 247.

36. For example, if the government believes that an individual is a Muslim and is required to register for the program, on what basis can it challenge that individual’s refusal to register? What if the individual argues that his religious beliefs, although drawing inspiration from Islam, cannot be reduced to a label as simple as “Muslim”? Any attempt at punishment for noncompliance in this context would both create a discriminatory burden on the basis of religion and also constitute a demand that certain persons self-identify as adherents of a particular religious faith. *See Everson*, 330 U.S. at 15-16.

37. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000).

38. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

39. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 521 (1993).

they identify as Muslim.⁴⁰ But the act of publicly identifying oneself as a member of a particular religion, let alone attending a house of worship, is unquestionably an act of religious expression, perhaps commonplace and simple but also profoundly meaningful to many people.⁴¹ Any such registry (which by its nature would not be “neutral and of general applicability” across religions) should face strict scrutiny not only under the Establishment Clause but also as a burden imposed on those who exercise the religious expression of publicly identifying as Muslim. If so, the program would be lawful under the Free Exercise Clause only if it were “narrowly tailored to advance” a “compelling governmental interest.”⁴² Regarding the requisite governmental interest, “(o)nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation” on religious freedom guaranteed by the Free Exercise Clause.⁴³

Accordingly, as for its legality under the First Amendment, the question becomes whether the “Muslim registry” could withstand strict scrutiny under both the Establishment Clause and the Free Exercise Clause. Again, to survive this review in each case, the registry would need to satisfy two requirements. First, it would need to be supported by a “compelling governmental interest.”⁴⁴ Second, in the case of the Establishment Clause, the “denominational preference” granted to religions other than Islam must be “narrowly tailored” to the applicable governmental interest, and, in the case of the Free Exercise Clause, the discriminatory restriction on the free religious expression of American Muslims would need to be narrowly tailored to that interest.⁴⁵

Would the registry be supported by a “compelling governmental interest”? Given that the discussion of Trump’s proposal has not yet progressed beyond ambiguous and sometimes contradictory public statements, the best inference one can make as to its purported justification is based on the vague contours of the proposal itself: “basically that radical Islam poses such a threat that Muslims—irrespective of their potential ties to extremism—should be on some kind of registry so they can be tracked.”⁴⁶ This sort of explanation would also be consistent with

40. The hypotheticals are potentially limitless and thus of limited utility, but it is hard to see how a “Muslim registry” could be anything of the sort without at least these requirements.

41. See, e.g., Note, *Burdens on the Free Exercise of Religion: A Subjective Alternative*, 102 HARV. L. REV. 1258, 1268 (1989) (“The *Seeger* Court’s deference to subjective definitions of religion reflects the constitutional status of an individual’s right to form religious conceptions without government interference. This protected autonomy is in turn informed by the special relationship between religious affiliation and personal identity. Religious beliefs help individuals in ordering their lives and determine how they participate in the community. Like racial and ethnic affiliations, religious beliefs may intimately shape outlooks on life. Religion is so central that religious frictions may be at the core of many intergroup hostilities. Indeed, the Court has acknowledged the role of religious liberties in reducing social strife and has arguably elevated religious affiliation to a protected status even higher than free speech.” (citations omitted)).

42. *Lukumi Babalu Aye*, 508 U.S. at 521.

43. *Sherbert*, 374 U.S. at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

44. *Lukumi Babalu Aye*, 508 U.S. at 521.

45. *Id.*; see also *Larson v. Valente*, 456 U.S. 228, 247 (1982).

46. Blake, *supra* note 2.

Trump's public statements with respect to his Immigration Ban.⁴⁷ In the event that a registry is actually created, the legislative history and other aspects of its creation would need to be analyzed together with the other relevant facts and circumstances to make a judgment as to the governmental interest at stake.⁴⁸

It is virtually guaranteed that the architects of any future "Muslim registry" would endeavor to provide the relevant legislation and executive actions with at least a patina of non-discriminatory intent for both political expediency and as a defense against future legal challenges. Because the actual policymaking process has not yet occurred with respect to any religious registry, this Article will assume that if such a policy were enacted the policymakers would justify it on the basis of national security, similar to President Trump's Immigration Ban.⁴⁹ If courts were to accept this justification as accurate, it would almost certainly qualify as "compelling."⁵⁰ Notably, it is far from clear that courts would uncritically accept a national security justification asserted by the executive. First, the inquiry as to whether a policy was truly motivated by the claimed governmental interest may at times overlap with the analysis of whether the policy is in fact narrowly tailored.⁵¹ Second, courts have been atypically skeptical of the purported national security rationale for the Immigration Ban, apparently reflecting in part an unstated hesitancy of the judiciary to apply a strong presumption of non-discriminatory intent to the president's actions vis-à-vis Muslims.⁵²

In any event, assuming that the governmental interest at stake were indeed the protection of national security, would a "Muslim registry" be narrowly tailored to achieve this governmental interest, both in terms of the "denominational preference" against Islam and the restriction on each individual's freedom to choose a religious identity and place of worship?

47. Adam Liptak, *Court Refuses to Reinstate Travel Ban, Dealing Trump Another Legal Loss*, N.Y. TIMES (Feb. 9, 2017), <https://www.nytimes.com/2017/02/09/us/politics/appeals-court-trump-travel-ban.html> [<http://perma.cc/6DLS-6PJ7>].

48. *Lukumi Babalu Aye*, 508 U.S. at 540 ("Here, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence. Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." (citations omitted)).

49. Liptak, *supra* note 47.

50. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1330 (2007) ("If the question is whether there is a compelling interest in avoiding a catastrophic terrorist attack, the answer is obviously yes.").

51. *See id.* at 1327; *see also infra* Part II.B (discussing the analysis of the intent behind a facially neutral law).

52. The third iteration of the Immigration Ban became subject to a temporary restraining order in October 2017. *Hawaii v. Trump*, No. C17-1700050 DKW-KSC at 25-33 (D. Haw. Oct. 17, 2017); *see also* *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *1 (W.D. Wash. Feb. 3, 2017); *Washington v. Trump*, 847 F.3d 1151 (9th Cir.), *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017), and *reconsideration en banc denied*, 858 F.3d 1168 (9th Cir. 2017); Benjamin Wittes & Quinta Jurecic, *What Happens When We Don't Believe the President's Oath?*, LAWFARE (Mar. 3, 2017, 12:30 PM), <https://www.lawfareblog.com/what-happens-when-we-dont-believe-presidents-oath> [<http://perma.cc/P4JX-VJWQ>]; Benjamin Wittes, *Malevolence Tempered by Incompetence: Trump's Horrifying Executive Order on Refugees and Visas*, LAWFARE (Jan. 28, 2017, 10:58 PM), <https://lawfareblog.com/malevolence-tempered-incompetence-trumps-horrifying-executive-order-refugees-and-visas> [<http://perma.cc/2J4N-ZQW8>].

Relevant statistical evidence provides a clear and simple basis for the narrow tailoring inquiry. A 2017 analysis from the New America Foundation put the total number of “individuals who are charged with or died engaging in jihadist terrorism or related activities inside the United States, and Americans accused of such activity abroad” from 2015 through 2016 at 123, or just above sixty per year.⁵³ This is consistent with similar research; during roughly the same period, former FBI analyst Nora Ellingsen found that “the FBI has arrested and charged ninety-seven counterterrorism subjects during the past two years,”⁵⁴ while a 2015 report on Muslim American terrorism suspects and perpetrators published by the Triangle Center on Terrorism and Homeland Security found that a total of eighty-one Muslim Americans were associated with violent extremist plots in 2015.⁵⁵ The Pew Research Center estimates the total number of Muslims living in the United States at approximately 3.3 million.⁵⁶ Based on these numbers, a rough estimate suggests that about one out of every 45,000 Muslim Americans or Muslim U.S. residents is associated with a violent extremist plot in a given year. That is, in a given year, a “Muslim registry” would impose a burden on tens of thousands of innocent American citizens and residents for each terrorist-affiliated person affected by the policy.

Considering these numbers, even putting aside serious and legitimate doubts about the efficacy of a registry, it is abundantly clear that a blanket registration requirement targeting all Muslim Americans would not be “closely fitted” to the goal of enhancing national security. Furthermore, strict scrutiny case law is consistent with the concept that broad restrictions or obligations applied in a discriminatory fashion do not meet the narrow tailoring requirement.⁵⁷ Although the narrow tailoring analysis is multifaceted, complex, and not without a measure of ambiguity,

53. Peter Bergen et al., *Terrorism Cases: 2001-Today*, NEW AMERICA, <https://www.newamerica.org/in-depth/terrorism-in-america/part-i-overview-terrorism-cases-2001-today/> [http://perma.cc/B8H5-SVRB]. New America’s research demonstrates that some of these persons are not U.S. citizens, so the actual number of Muslim Americans determined to be engaged in jihadist terrorism would be somewhat lower. See Peter Bergen, et al., *Who Are The Terrorists?*, NEW AMERICA, <https://www.newamerica.org/in-depth/terrorism-in-america/who-are-terrorists/> [http://perma.cc/9TXT-NQEA].

54. Nora Ellingsen, *It’s Not Foreigners Who Are Plotting Here: What the Data Really Show*, LAWFARE (Feb. 7, 2017, 8:48 PM), <https://lawfareblog.com/its-not-foreigners-who-are-plotting-here-what-data-really-show> [http://perma.cc/VE5F-HQSD].

55. CHARLES KURZMAN, TRIANGLE CTR. ON TERRORISM AND HOMELAND SEC., *MUSLIM-AMERICAN INVOLVEMENT WITH VIOLENT EXTREMISM*, 2015, at 2 (2016), https://kurzman.unc.edu/files/2016/02/Kurzman_Muslim-American_Involvement_in_Violent_Extremism_2015.pdf [http://perma.cc/WW6Z-ZGKS].

56. Besheer Mohamed, *A New Estimate of the U.S. Muslim Population*, PEW RESEARCH CTR. (Jan. 6, 2016), <http://www.pewresearch.org/fact-tank/2016/01/06/a-new-estimate-of-the-u-s-muslim-population/> [http://perma.cc/AF3B-URTY].

57. Professor Richard Fallon has distilled the narrow tailoring inquiry into three, or sometimes four, component parts, which are essentially: (1) the infringement must be necessary to achieve the relevant governmental interest; (2) the infringement must not be underinclusive to the extent that the underinclusivity extinguishes the credibility of the government’s purported rationale; (3) the infringement must not be excessively overinclusive (and this criterion may be violated *even if the infringement is necessary to achieve the relevant government interest*); and (4) the policy must satisfy a proportional assessment of the under- or over-inclusiveness of the infringement, the governmental interests at stake, the likelihood of success of the challenged law, and the availability of alternative measures. See Fallon, *supra* note 50, at 1326-30.

it mandates intense skepticism of policies that are overinclusive or that offer meager benefits in proportion to the scale of constitutional rights infringed.⁵⁸ In respect of this “proportionality” requirement, the “question becomes whether a particular, incremental reduction in risk justifies a particular infringement of protected rights in light of other reasonably available, more or less costly and more or less effective, alternatives.”⁵⁹ In other words, the narrow tailoring inquiry is quite searching and includes a detailed consideration of possible alternative policies that could advance the governmental interest at stake.⁶⁰

In light of the enormous array of possible measures available to strengthen national security⁶¹ (or even, as proponents of the “Muslim registry” might phrase it, achieve a more narrowly articulated goal of “strengthening national security against the threat of Islamic terrorism”), and given the fact that the registry-style NSEERS program resulted in zero known terrorism-related convictions during its nearly ten years in effect,⁶² the government would be hard-pressed to demonstrate that “no alternative forms of regulation” could achieve its purported goal.⁶³

By its nature, any review of a government policy under strict scrutiny will be highly fact-dependent, but under virtually all conceivable circumstances an overtly discriminatory “Muslim registry” would clearly violate the narrow tailoring requirement due to its extremely overbroad nature and thus fail constitutional review.⁶⁴ Furthermore, to avoid widespread non-compliance, the program would surely be mandatory under threat of civil or criminal penalties—but the harsher the punishments for non-compliance, the more severe the discriminatory, government-sanctioned burden on one particular religion. This presents a problem for registry proponents in light of the proportionality analysis: the very mechanisms by which the government would attempt to ensure that the registry is functional and accurate would strengthen the argument that the policy was unconstitutional due to its application of an onerous, overbroad burden on members of one specific religion.

58. *Id.* at 1328-31.

59. *Id.* at 1331.

60. *See, e.g.*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316-18 (1978) (comparing other university admissions programs to determine if the University of California’s affirmative action program was truly narrowly tailored to promote a diverse student body); *see also* *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (stating that even if the government interest at stake were compelling, to survive constitutional review “it would plainly be incumbent upon the [government] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.”).

61. Take, for example, the “community-policing approach.” *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (Mar. 17, 2014), <http://www.osce.org/atu/111438> [<http://perma.cc/3TU5-SFTA>].

62. In another recent program with some similarities, the New York City Police Department ran “a secretive program that dispatched plainclothes detectives into Muslim neighborhoods to eavesdrop on conversations” for years, but the efforts did not lead to even one instance of terrorism charges. Matt Apuzzo & Joseph Goldstein, *New York Drops Unit that Spied on Muslims*, N.Y. TIMES (Apr. 15, 2014), <https://www.nytimes.com/2014/04/16/nyregion/police-unit-that-spied-on-muslims-is-disbanded.html> [<http://perma.cc/ZL7J-VFED>].

63. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

64. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Larson v. Valente*, 456 U.S. 228, 246-51 (1982).

2. Constitutionality Under the Fifth Amendment

In addition to triggering strict scrutiny under the First Amendment, the “Muslim registry” would also be subject to heightened scrutiny under the equal protection principles of the Fifth Amendment.⁶⁵ Indeed, the key elements of the policy that would trigger strict scrutiny under the Establishment Clause and Free Exercise Clause also create critical problems for the proposal under equal protection: first, a “Muslim registry” would impose a significant, possibly very onerous, burden on members of one religion but not others; second, Muslim Americans—and Muslim Americans alone—would be effectively forced to declare their religious faith to the government and punished for not doing so.⁶⁶

A mandatory registry applicable only to adherents of a single religion is exactly the type of governmental action the equal protection doctrine is designed to guard against, allowing such measures only in a strictly limited set of exceptional circumstances. Indeed, the Supreme Court has identified “race, religion, [and] alienage” as “inherently suspect distinctions” for government regulation.⁶⁷

This is no new development; the inclusion of religion as a suspect legislative classification that may deserve additional scrutiny dates at least as far back as 1938, to *Carolene Products*,⁶⁸ and even casual students of American history know that the political and legal enshrinement of religious freedom can be traced back to the founding of the United States.⁶⁹ A consequence of this long line of political history and jurisprudence is that a law that prefers certain religions over others will be

65. See, e.g., *Hassan v. City of New York*, 804 F.3d 277, 299-301 (3d Cir. 2015) (“[E]ven before *Carolene Products*, the Court considered religious discrimination to be a classic example of ‘a denial of the equal protection of the laws to the less favored classes.’” (quoting *Am. Sugar Ref. Co. v. Louisiana*, 179 U.S. 89, 92 (1900))). Although equal protection claims are rarely used by litigants alleging religious discrimination, there is a compelling argument that they could and should be used more frequently in this context, especially in cases where state action marginalizes religious minorities. See Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 666 (May 2008).

66. See, e.g., *Lukumi Babalu Aye*, 508 U.S. at 540 (1993) (noting that “[i]n determining if the object of a law is a neutral one under the Free Exercise Clause, [the Court] can also find guidance in [its] equal protection cases.”); *Hassan*, 804 F.3d at 294 (stating a policy that “‘by its own terms’ singles out Muslims ‘for different treatment’” would be the basis for an equal protection claim (quoting RONALD D. ROTUNDA & JOHN E. NOWAK, 3 TREATISE ON CONST. L. § 18.4 (10th ed. 2012))).

67. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). A registry for Muslim Americans would qualify as discriminatory on equal protection grounds simply by virtue of its classification of people based on religious faith. See, e.g., *Hayden v. Cty. of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999) (“[A] law or policy is discriminatory on its face if it expressly classifies persons on the basis of race or gender.”); *Hassan*, 804 F.3d at 294. In the equal protection context, Fourteenth Amendment jurisprudence is directly informative and enriches the base of case law for evaluation under the Fifth Amendment. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (“Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, as recognized by *McConnell v. Fed. Election. Comm’n*, 540 U.S. 93 (2003).

68. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (“Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities.” (citation omitted)). The Third Circuit has traced conceptually similar jurisprudence back to 1877. *Hassan*, 804 F.3d at 300 (citing *Hall v. De Cuir*, 95 U.S. 485, 505, 24 L. Ed. 547 (1877)).

69. See, e.g., *Larson*, 456 U.S. at 245 (“[James] Madison once noted: ‘Security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests and in the other in the multiplicity of sects.’” (citing *The Federalist* No. 51, p. 326 (H. Lodge ed. 1908))).

subject to heightened scrutiny, most likely strict scrutiny,⁷⁰ under the doctrine of equal protection.⁷¹ The basic elements of the strict scrutiny review under equal protection are the same as those under the First Amendment: the law will be adjudged constitutional only if “narrowly tailored” to “further compelling governmental interests.”⁷² Would a registry or database of Muslim Americans satisfy this test in the equal protection context?

Case law provides an answer: clearly not. To reach this conclusion first requires consideration of the purpose of the government policy in question. As noted above in Part II.A.1, there is admittedly a good deal of guesswork involved in performing this analysis when the policy has not evolved beyond vague, inchoate proposals. Nonetheless, consistent with the First Amendment analysis in Part II.A.1, for the purposes of the equal protection analysis this Article will assume that the government would claim the registry is designed to strengthen national security. If this assertion were accepted by the reviewing court, the policy would surely satisfy the “compelling governmental interest” prong of the inquiry.⁷³

The next inquiry becomes whether the policy is narrowly tailored in the equal protection context to strengthen national security.⁷⁴ This is not a hard question. Considering that just tens out of millions of Muslim Americans are associated with a violent extremist plot in a given year, a broadly applicable “Muslim registry” would not come close to satisfying the narrow tailoring requirement. Ultimately, the fact that only a tiny number of Muslim Americans are involved in extremist violence is a fundamental problem for any “Muslim registry” under not only the First but also the Fifth Amendment.

For a recent example of strict scrutiny applied in the equal protection context, consider that a university’s policy of providing “one-fifth of the points needed to guarantee admission” to certain applicants on the basis of race was not “narrowly tailored” to the goal of “diversity” and thus violated equal protection principally because it did not provide “individualized consideration” to each applicant.⁷⁵ Admittedly, there are major and important distinctions between a case in the

70. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (stating that strict scrutiny is required for a law that “operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution”); *United States v. Brown*, 352 F.3d 654, 668 (2d Cir. 2003) (analyzing a religious discrimination-based equal protection claim in the Batson context and noting that “religious classifications, concededly, trigger strict scrutiny.”).

71. The Supreme Court has not clarified the precise level of scrutiny applicable to a policy that discriminates among religions when challenged on an equal protection basis, though some measure of heightened scrutiny should apply. See, e.g., *Hassan*, 804 F.3d at 300-01 (“We also are guided by other appellate courts that have subjected religious-based classifications to heightened scrutiny Today we join these courts and hold that intentional discrimination based on religious affiliation must survive heightened equal-protection review.”).

72. *Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

73. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Larson v. Valente*, 456 U.S. 228, 247 (1982).

74. Proponents of the “Muslim registry” might look (and some likely already have looked) to *Korematsu*, 323 U.S. 214 (1944), as support for the contention that equal protection will not provide a defense if the government acts to further national security even when the action discriminates against protected classes. This is a flawed argument that is addressed in Part III.B.

75. *Gratz v. Bollinger*, 539 U.S. 244, 270-71 (2003).

university context and the analysis that would apply to a “Muslim registry.”⁷⁶ Nonetheless, this example is revealing of the intrusive and stringent standard that applies when a policy that discriminates across protected classes is challenged on equal protection grounds. If a hard (rather than soft) admissions boost for college applicants is not “narrowly tailored” to achieve diversity, it is hard to believe that a religious-based registration and reporting obligation applicable to millions of law-abiding Americans could be narrowly tailored to strengthen national security in such a way that justifies the discriminatory infringement of a core constitutional right.

In addition to being overbroad, considerations of efficacy present another problem in both the First Amendment and equal protection contexts. In short, there is little evidence that creating a registration and reporting obligation would promote national security.⁷⁷ Because in practice the narrow tailoring requirement examines whether the benefit of the challenged governmental action is proportional to the harm caused by the infringement of protected rights, in a strict scrutiny analysis “one must deal in probabilities by attempting to assess how great a risk currently exists and how much reduction in that risk particular proposed measures would likely achieve.”⁷⁸ For an extremely broad policy that discriminates on the basis of a protected class and whose closest analogs have failed to yield tangible results, strict scrutiny is an insurmountable hurdle, at least as long as the analysis hews to recent precedent.

3. Conclusion as to Constitutionality of an Explicitly Discriminatory “Muslim Registry”

In accordance with the above analysis, even assuming that the implementation of a future “Muslim registry” were successfully defended as a response to genuine concerns about national security rather than a manifestation of religious animus, the overbroad nature of such a program virtually ensures that it would violate both the First and Fifth Amendments regardless of its precise structure. Indeed, the constitutional deficiencies are so glaring that it is hard to imagine proponents of the policy endorsing such an explicitly discriminatory approach. Nonetheless, this baseline analysis is informative because it demonstrates the constitutional impediments to the policy, in its most basic terms, as proposed by the President of the United States. If some future policymakers attempt to turn this proposal into a reality while making constitutional accommodations—avoiding specific references to any particular religion, for example—the resulting policy would be a disguised

76. First, the current interpretation of equal protection in the race context is generally less supportive of government policies to enforce equal outcomes than the current interpretations of the First Amendment and equal protection in the religion context. See Joy Milligan, *Religion and Race: On Duality and Entrenchment*, 87 N.Y.U. L. REV. 393, 453-59 (2012). Second, the goal of diversifying a university student body and the goal of protecting the United States from domestic terrorism clearly occupy different planes of urgency and necessity, and this would surely influence the proportionality considerations that form part of the strict scrutiny inquiry.

77. NSEERS, the most closely analogous domestic program, did not result in even one terrorism conviction and may have hindered counterterrorism efforts by making it more difficult for law enforcement to work with immigrant communities. See Nadeem Muaddi, *The Bush-Era Muslim Registry Failed. Yet the US Could Be Trying It Again*, CNN (Dec. 22, 2016, 4:30 PM), <http://edition.cnn.com/2016/11/18/politics/nseers-muslim-database-qa-trnd/> [https://perma.cc/MBH9-7Q6W].

78. Fallon, *supra* note 51, at 1330-31.

effort to achieve the goals of openly discriminatory and unconstitutional proposal through other means.

How might proponents of the “Muslim registry” attempt to increase its chances of surviving judicial review? Without diving too deep into a potentially endless list of hypotheticals, there are two obvious tactics that proponents of the “Muslim registry” might attempt to utilize: first, an ostensibly non-discriminatory structure for the registry that would attempt to avoid the application of strict scrutiny, and second, an extraordinary justification, such as a purported national security crisis, to distinguish this policy from other acts of religious discrimination that have been found unconstitutional. The following Part II.B examines the former, while Part III.A examines the latter.

B. The Constitutionality of a “National Security Registry” that Purports to Be Neutral Among Religions

I. Overview

One alternative approach available to proponents of the “Muslim registry” is to create a registration or reporting obligation for certain individuals that does not directly reference any religion but nonetheless falls disproportionately on Muslim Americans. Notably, this sort of registry would be less overtly discriminatory than what President Trump has endorsed, as his public statements have explicitly identified Muslims as the targets of the policy.⁷⁹ In any event, compelling evidence suggests that Trump used a similar approach to effect his proposed “Muslim ban” without making specific reference to religion.⁸⁰ It is possible that policymakers could use this tactic again in an attempt to create a program that is a “Muslim registry” in deed but not in word.⁸¹ In fact, the ACLU anticipated this possibility in its 2016 analysis of Trump’s policy proposals and argued briefly that such a policy would likely fail constitutional review.⁸² This Article provides a more detailed analysis.

As a general principle, a government policy “that is neutral and of general applicability” among religions will not be subject to strict scrutiny under the First Amendment and equal protection principles.⁸³ However, this requirement may be

79. See Hillyard, *supra* note 2.

80. Amy B. Wang, *Trump Asked for a ‘Muslim Ban,’ Giuliani Says — and Ordered a Commission to Do It ‘Legally’*, WASH. POST (Jan. 29, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/> [<https://perma.cc/8P69-4H7B>].

81. Discriminating on the basis of national origin instead of religion would not help the “Muslim registry” avoid strict scrutiny. See *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (“Strict scrutiny, we have said, is reserved for state ‘classifications based on race or national origin and classifications affecting fundamental rights,’” (quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988))).

82. AM. CIVIL LIBERTIES UNION, THE TRUMP MEMOS 3, 12 n.63 (2016), <https://action.aclu.org/sites/default/files/pages/trumpmemos.pdf> [<https://perma.cc/YJ6C-ZHAJ>].

83. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Recent trends in First Amendment and equal protection jurisprudence also reveal some measure of increased emphasis on the fulfillment of this formalistic requirement over substantive neutrality. See Milligan, *supra* note 76, at 431-40.

harder to satisfy than it appears. Even without explicit references to religion, there are several ways in which legislation or directives creating a "Muslim registry" could run afoul of the Constitution or trigger a strict scrutiny inquiry that would very likely result in the policy being ruled unconstitutional. First, even when the drafters of a law believe it is facially neutral and the law does not reference any specific religions, the law may still not be facially neutral for First Amendment purposes.⁸⁴ Second, a law that is facially neutral may not actually be "neutral" for strict scrutiny purposes if the policymakers intended that the law effectively discriminate among religions.⁸⁵ Third, even a law that is neutral will be subject to heightened scrutiny if its "enforcement target[s] the practices of a particular religion for discriminatory treatment."⁸⁶ Finally, a law that has a discriminatory effect and is motivated by "discriminatory animus" on the basis of religion would also be extremely vulnerable to constitutional challenge.⁸⁷

Although the analysis in Section II.A above reviews the proposal for an overtly discriminatory "Muslim registry" from discrete First Amendment and equal protection perspectives, this section will focus more generally on whether a facially neutral law would be likely to trigger strict scrutiny under either the First or Fifth Amendments or suffer some other constitutional failure.⁸⁸ Notably, although cases addressing actual or alleged racial discrimination occupy a dominant role in strict scrutiny jurisprudence under the equal protection doctrine,⁸⁹ an examination of recent case law suggests that the Court tends to take a more substantive and less formalistic approach to questions of religious discrimination as compared to racial discrimination.⁹⁰ In other words, those who believe that a "Muslim registry" could withstand review under equal protection principles, if sufficiently disguised as a neutral policy, may be taking false comfort from inapposite precedents.

84. The Court has found in at least one prior case that even a law which did not distinguish between religions was not facially neutral for First Amendment purposes because it nonetheless distinguished between the "characteristics" of religions. *See* *Larson v. Valente*, 456 U.S. 228, 255 (1982). This is discussed in more detail below.

85. *See Lukumi Babalu Aye*, 508 U.S. at 557. Notably, in this case the ordinances in question "implicate[d] . . . legitimate concerns" other than "religious animosity" but were nonetheless found to have the object of discriminating among religions, meaning that the ordinances were not "neutral" and were therefore subject to strict scrutiny. *Id.* at 535, 546.

86. *Lukumi Babalu Aye*, 508 U.S. at 557 (Scalia, J., concurring). *See also* *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 696 (1970) ("The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.").

87. *Jana-Rock Const., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 204 (2d Cir. 2006) (noting, in the context of another suspect class (race), that "[g]overnment action also violates principles of equal protection 'if it was motivated by discriminatory animus and its application results in a discriminatory effect.'" (citation omitted)).

88. From a practical standpoint, triggering strict scrutiny under any circumstances would almost certainly doom the "Muslim registry." *See supra* Part II.A.

89. This may be in part because litigants alleging religious discrimination overwhelmingly choose to rely on the First Amendment. Gellman & Looper-Friedman, *supra* note 65, at 666.

90. *See* Milligan, *supra* note 76, at 453-59. For a clear summary of the difficulty of proving ambiguity surrounding discriminatory intent in the race context, *see* Julia Kobick, *Discriminatory Intent Reconsidered: Folk Concepts of Intentionality and Equal Protection Jurisprudence*, 45 HARV. C.R.-C.L. L. REV. 517, 517-40 (2010).

2. *Demonstrating Facial Neutrality Can Be Difficult*

Depending on the structure of the “Muslim registry,” challengers may question whether the law is in fact facially neutral at all, as even laws that appear neutral with respect to specific religious faiths can run afoul of the Establishment Clause by distinguishing among different *characteristics* of religions in their effect.⁹¹ It is not hard to imagine that a purportedly neutral law designed to apply to Muslim Americans could stumble over this tripwire. Indeed, by its very nature, a law that tries to backdoor distinctions among faiths is likely to become one of the “religious gerrymanders” that the Court has sought to discover and invalidate in past First Amendment cases.⁹² If the policy lacks facial neutrality, it will be subject to strict scrutiny and almost certainly fail constitutional review.

3. *Neutrality of Intention May Be Required to Avoid Strict Scrutiny*

Although “facial neutrality” is the commonly used term of art in this context, it may be somewhat misleading. Case law suggests that a law can only avoid strict scrutiny on the basis of neutrality if its “object,” as well as its text, is neutral among religions.⁹³ Admittedly, this inquiry into whether the object of a law is neutral may bleed together somewhat with the inquiry described in Section II.B.2 above as to whether a law is *truly* facially neutral. However, the former focuses on the intent of the law, while the latter is based on the law’s text.

The upshot of this precedent is that a policy that has as its aim the creation of a registry of all members of a particular religion, even if textually neutral, may not be sufficiently “neutral” to avoid the application of strict scrutiny. Importantly, this inquiry into the “object” of the law is distinct from an inquiry into whether the enforcement of the law is discriminatory, and an intention to discriminate on the basis of religion is sufficient to trigger strict scrutiny.⁹⁴

91. This principle has not been elucidated in a clear statement of doctrine by the Supreme Court, but a few examples exist. *See, e.g.*, *Larson v. Valente*, 456 U.S. 228, 248 n.23 (1982) (finding that a Minnesota law imposing certain obligations on religious organizations that solicit more than 50% of their funding from nonmembers was “not simply a facially neutral statute” but rather that it “ma[de] explicit and deliberate distinctions between different religious organizations.”). In *Larson*, the Court determined that the law “grants denominational preferences” and applied strict scrutiny, finding that the law violated the establishment clause. *Id.* at 246-55. *See also* *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (finding that a tax on door-to-door solicitations of certain goods violated the First Amendment’s guarantees of freedom of press, freedom of speech, and freedom of religion when used to fine Jehovah’s Witnesses for refusing to pay a tax for soliciting donations in exchange for books and pamphlets and noting that if the Court were to find the tax constitutional, “a new device for the suppression of religious minorities will have been found,” despite the law being facially neutral).

92. *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 696 (1970) (“The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.”).

93. *Lukumi Babalu Aye*, 508 U.S. 520, 540-42 (1993) (stating that a review of circumstantial evidence “reveal[ed]” that the textually neutral law in question was motivated by discriminatory animus). *See also id.* at 521 (“The ordinances’ texts and operation demonstrate that they are not neutral, but have as their object the suppression of Santeria’s central element, animal sacrifice.”).

94. *Id.* at 533 (“[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct.” (citations omitted)).

Any future "Muslim registry" designed to avoid explicit discrimination among religions would almost certainly be ruled unconstitutional unless it can satisfy the searching and stringent requirements of neutrality that the Court has explicated in prior cases. However, it is difficult to envision how a policy could both satisfy the neutrality requirements and effectively operate as a "Muslim registry." Case law demonstrates that a significant measure of substantive neutrality is required to avoid strict scrutiny, but the more thoroughly the policy satisfies this requirement, the less it will operate as a "Muslim registry."

4. *Discriminatory Enforcement May Also Trigger Strict Scrutiny*

Another way that proponents of a "Muslim registry" might attempt to create such a program without explicitly discriminating among religions would be to create a policy that is fully neutral in text but enforced selectively against Muslim Americans. The ACLU anticipated this approach, writing that "even a facially neutral law or policy that applied to American Muslims with a greater degree of severity than it did to other religious groups, or that intentionally had an adverse effect on Muslims, would also violate the Constitution's guarantee of equal protection."⁹⁵ There are many possible permutations of discriminatory enforcement, but regardless of means, the government's ends would be effectively requiring that Muslim Americans (and generally not others) become subject to the requirements of the registry. If those ends are not achieved, the policy would not be a "Muslim registry" consistent with what President Trump has proposed.

Selective prosecution against Muslim Americans who decline to comply with the requirements of the law would clearly violate the Constitution on equal protection grounds.⁹⁶ Similarly, discriminatory enforcement against Muslims by an administrative agency on the basis of authority granted by a facially neutral law would create the same equal protection problems.⁹⁷ Case law demonstrates that this sort of discriminatory regulatory regime should subject the administrative action to strict scrutiny under the First Amendment.⁹⁸

95. ACLU, *supra* note 82, at 12 n.63 (citing *Vill. of Arlington Heights v. Met. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886); *Jana-Rock Constr. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 204 (2d Cir. 2006)). *See also* *Hayden v. Cty. of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999) ("[A] facially neutral statute violates equal protection if it was motivated by discriminatory animus and its application results in a discriminatory effect.").

96. *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (finding that a Jehovah's Witness minister's arrest for a public address under a city ordinance in Rhode Island, when Catholic worshippers were allowed to conduct the same activity without issue, violated the Constitution. The Court's analysis cites both the First and Fourteenth Amendments, with a slightly greater focus on the First Amendment.); *see also* *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[T]he decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification'" (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962))).

97. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179 (1972) ("State action, for purposes of the Equal Protection Clause, may emanate from rulings of administrative and regulatory agencies as well as from legislative or judicial action."). A policy of discriminatory enforcement, assuming it can be demonstrated, would therefore trigger heightened scrutiny just as would explicit discrimination.

98. If the "object" of the administrative actions were demonstrably not "neutral" as to religion, then the de facto discriminatory policy should be subject to strict scrutiny. *Lukumi Babalu Aye*, 508 U.S. at 533 (1993); *see also id.* at 524, 531 (stating that a policy will not be "neutral and of general applicability" if "the secular ends asserted in defense of the laws [are] pursued only with respect to conduct motivated by religious beliefs."); *Kunz v. New York*, 340 U.S. 290, 314 (1951) (finding a New York ordinance

5. Significant Discriminatory Animus Among Policymakers Could Create Fatal Constitutional Problems

Any “Muslim registry” is also likely to be challenged with claims that its creation was motivated by discriminatory animus against Muslims. For example, litigants challenging President Trump’s initial Immigration Ban have already argued with some success that anti-Muslim animus motivated the order and it thus violates the First and Fifth Amendments.⁹⁹ In this vein, the ACLU published a blog post citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* as support for the idea that any registry, even an NSEERS-style database, would be unconstitutional because Trump’s actions and public statements have made it clear that such policies would be motivated by discriminatory intent.¹⁰⁰

The analysis of this issue is not quite so straightforward. *Lukumi Babalu Aye*, while indeed an example of discriminatory government action failing strict scrutiny, does not include an unambiguous statement that discriminatory animus, as one of multiple motivations, is by itself enough to demonstrate a violation of the Constitution.¹⁰¹ Recognizing this illuminates one key distinction: at least in the First Amendment context, circumstantial evidence for discriminatory animus as motivation for a “Muslim registry” may be primarily useful insofar as it demonstrates either (1) that the object of a purportedly neutral policy was actually to discriminate among religions, thus requiring that the policy be subject to strict scrutiny, or (2) that the policy, once subject to strict scrutiny, is not appropriately tailored to achieve a compelling governmental interest.¹⁰² Short of key advisors and Trump himself declaring that the goal of the “registry” is simply to persecute Muslim Americans, it is unlikely that even significant evidence of discriminatory animus would immediately invalidate the policy and obviate the need for a traditional constitutional review.¹⁰³ In other words, under existing case law, even substantial evidence of bias against Muslim Americans would probably not be enough to foreclose a typical strict scrutiny analysis in favor of an immediate conclusion that the “Muslim registry” is

“clearly invalid” on First Amendment freedom of speech grounds when it allowed the police commissioner “to exercise discretion in denying . . . [public worship] permit applications on the basis of his interpretation, at the time, of what is deemed to be conduct condemned by the ordinance.”). Lack of statutory standards to guide the administrator’s exercise of authority were a key factor in the decision, but the case is an unambiguous example of a plaintiff succeeding on a First Amendment claim based on administrative action effecting religious discrimination.

99. See, e.g., Complaint for Declaratory and Injunctive Relief at 9, *Washington v. Trump*, No. 2:17-cv-00141 (W. D. Wash. Jan. 30, 2017), <https://assets.documentcloud.org/documents/3438932/WA-AG-Complaint-as-Filed.pdf> [<https://perma.cc/5SNP-RX7J>].

100. See, e.g., David Cole, *Why Trump’s Proposed Targeting of Muslims Would Be Unconstitutional*, AM. CIV. LIBERTIES UNION (Nov. 22, 2016, 10:30 AM), <https://www.aclu.org/blog/speak-freely/why-trumps-proposed-targeting-muslims-would-be-unconstitutional> [<https://perma.cc/5CLZ-A95B>].

101. *Lukumi Babalu Aye*, 508 U.S. at 547. Rulings that discriminatory purpose coupled with disparate impact are sufficient to prevail on an equal protection claim have generally arisen in the race context. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 617 (1982); *Milligan*, *supra* note 76, at 412 n.85.

102. Assuming that the ultimate policy is subject to strict scrutiny, convincing circumstantial evidence of discriminatory animus would be a potent argument that the policy is not narrowly tailored to achieve a compelling governmental interest. *Lukumi Babalu Aye*, 508 U.S. at 545-46.

103. See, e.g., *City of Mobile v. Bolden*, 446 U.S. 55, 113 (1980) (Marshall, J., dissenting) (“[A] showing of discriminatory purpose is necessary to impose strict scrutiny on facially neutral classifications having a racially discriminatory impact.” (citing *Washington v. Davis*, 426 U.S. 229 (1976))).

unconstitutional. Nevertheless, a compelling and voluminous track record demonstrating discriminatory intent would make it harder for the executive to argue that the law is a genuine response to a pressing security problem rather than an expression of discriminatory animus.¹⁰⁴

Clearly, any argument that the registry was motivated by discriminatory animus would need to analyze the actual structure of any future policy—currently unknown—on its own terms. However, these allegations, which are often defeated in litigation, could prove unusually effective in this case.¹⁰⁵ There are two key factors that would buttress an argument of improper discriminatory motive against a “Muslim registry,” regardless of its structure. First, in a number of statements, Trump and various current and former high-level advisors have been remarkably forthright in stating their intent to discriminate against Muslims on the basis of religion, or even expressing outright contempt for Islam.¹⁰⁶ This sort of record of public discriminatory statements from policymakers is rarely available to litigants, which is one of the reasons that claims of discriminatory animus are typically of limited efficacy.¹⁰⁷ Second, there remains an inescapable tension between, on the one hand, any claim that a “Muslim registry” would be motivated not by discriminatory animus but instead by evenhanded analysis of threats to national security and, on the other hand, the fact that this policy would subject all members of just one religion to new, onerous obligations even though just one out of tens of thousands of those persons per year is found to be associated with a violent extremist plot.¹⁰⁸ Even when the government interests at stake are legitimate, overbroad measures can provide evidence of “improper targeting” of a particular religion.¹⁰⁹ Thus, even if a future “Muslim registry” were facially neutral but discriminatory in effect, the overbroad nature of this ostensible remedy to the purported harm, combined with statements in the public record from current and former members of the Trump Administration, would greatly strengthen claims that the policy is

104. Religious discrimination for its own sake is not a legitimate governmental interest that can withstand constitutional review. *See, e.g.*, *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 222 (1963) (“to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.”); *Lukumi Babalu Aye*, 508 U.S. at 547 (“Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices.”). For an analog in the race context, *see Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.”).

105. *See, e.g.*, Kobick, *supra* note 90, at 517-40; Cole, *supra* note 100 (“Of course, it is often difficult to prove improper intent.”); *see also* K.G. Jan Pillai, *Shrinking Domain of Invidious Intent*, 9 WM. & MARY BILL RTS. J. 525, 538 (2001). The analysis may be fairly searching and can include “both direct and circumstantial evidence” of intent. *Lukumi Babalu Aye*, 508 U.S. at 540. *See also* *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (With respect to an inquiry of whether racial animus was a motivating factor in legislation, “[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision making body, minutes of its meetings, or reports.”).

106. *See infra* pp 21-23.

107. *See* Cole, *supra* note 100.

108. *See* Part II.A.1.

109. *Lukumi Babalu Aye*, 508 U.S. at 538 (“We also find significant evidence of the ordinances’ improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends.”).

motivated by the intent to discriminate among religions. This is another reason that the policy, whatever its precise structure, is virtually certain to be subject to strict scrutiny if it is ever implemented.¹¹⁰

Returning to the first factor supporting an argument of discriminatory motive, the following is a sampling of some of the extraordinary statements Trump and his current and former senior advisors have made in respect of Muslims and Islam.

First, Michael Flynn, Trump's former National Security Advisor and a Trump campaign stalwart, wrote on Twitter that "[f]ear of Muslims is RATIONAL: please forward this to others: the truth fears no questions"¹¹¹ Second, in a 2016 speech, Flynn said that Islam is a "cancer" that "hides behind this notion of it being a religion."¹¹² When asked if Flynn is "in line with how President-elect Trump views Islam," Reince Priebus, Trump's now-former Chief of Staff, responded, "I think so."¹¹³ Third, in a December 2015 press release, Trump himself called for a "total and complete shutdown of Muslims entering the United States" of indeterminate length.¹¹⁴ Trump justified this by claiming that "there is a great hatred towards Americans by large segments of the Muslim population."¹¹⁵ The Trump campaign then published a press release that includes a statement from Trump regarding his call for the cessation of Muslim immigration:

Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension. Where this hatred comes from and why we will have to determine. Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life. If I win the election for President, we are going to Make America Great Again.¹¹⁶

Fourth, Stephen Bannon, Trump's chief strategist until August 2017, has labeled author Robert Spencer as "one of the two or three experts in the world on this great war we are fighting against fundamental Islam."¹¹⁷ The Anti-Defamation League

110. See, e.g., N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016) ("Although the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist. . . . Faced with this record, we can only conclude that the North Carolina General Assembly enacted the challenged provisions of the law with discriminatory intent.")

111. Michael Flynn (@GenFlynn), TWITTER (Feb. 26, 2016, 5:14 PM), <https://twitter.com/genflynn/status/703387702998278144> [<https://perma.cc/2ZBK-9DSP>].

112. Mattathias Schwartz, *Donald Trump's National Security Adviser Michael Flynn Says Islam Is "Like a Cancer"*, THE INTERCEPT (Nov. 21, 2016, 12:10 PM), <https://theintercept.com/2016/11/21/donald-trumps-national-security-adviser-michael-flynn-says-islam-is-like-a-cancer/> [<https://perma.cc/Z6TB-ZQK7>].

113. *Id.*

114. Jessica Estepa, *'Preventing Muslim Immigration' Statement Disappears from Trump's Campaign Site*, USA TODAY (May 8, 2017, 3:32 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/05/08/preventing-muslim-immigration-statement-disappears-donald-trump-campaign-site/101436780/> [<https://perma.cc/CM7T-2PQQ>].

115. *Id.*

116. *Id.*

117. Josh Harkinson, *Trump Campaign CEO Was a Big Promoter of Anti-Muslim Extremists*, MOTHER JONES (Sept. 15, 2016, 10:00 AM), <http://www.motherjones.com/politics/2016/09/stephen-bannon-donald-trump-muslims-fear-loathing> [<https://perma.cc/FMS5-WRLP>].

describes Spencer as an “anti-Muslim extremist.”¹¹⁸ Spencer runs the “Jihad Watch” website¹¹⁹ and counts among his books “The Truth About Muhammad: Founder of the World’s Most Intolerant Religion.”¹²⁰

Although the actual policymaking process giving rise to any future “Muslim registry” will be key to any argument that the policymaking motive was illegitimate, the above examples are just a portion of the unusually large quantity of circumstantial evidence available to support a claim that the policy was primarily motivated by discriminatory animus against Muslims rather than a legitimate concern for national security. And in the context of a First Amendment challenge, the inquiry as to motive should consider relevant these statements from Trump himself and various key policy advisers given the expansive nature of the review; “[t]he Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.”¹²¹

Although politicians now rarely leave evidence of express discriminatory intent for litigants to use as ammunition in a constitutional challenge, Trump and his advisors have been something of an exception in this regard. In addition to the above statements, Trump’s Immigration Ban provides another example. Within days of the order’s passage¹²² Rudolph Giuliani appeared on television to say that he had helped prepare the executive order after President Trump had enlisted his help to impose a “Muslim ban” but “do it legally.”¹²³ Michael Flynn, Jr., a former member of Trump’s transition team, also referred to the executive order twice on Twitter using the “#MuslimBan” hashtag.¹²⁴ Additionally, reports indicated that the order had not

118. Jessica Reaves, *Anti-Muslim Extremists Target Chobani CEO*, ANTI-DEFAMATION LEAGUE (Nov. 3, 2016), <http://blog.adl.org/extremism/anti-muslim-extremists-target-chobani-ceo> [<https://perma.cc/VT5N-5N8B>].

119. JIHAD WATCH, <https://www.jihadwatch.org> [<https://perma.cc/8CKT-FQFS>]. The website is principally a collection of tendentious blog posts about current events that portray Islam in a negative (or very negative) light.

120. ROBERT SPENCER, *THE TRUTH ABOUT MUHAMMAD: FOUNDER OF THE WORLD’S MOST INTOLERANT RELIGION* (2007). Additionally, while a student at Duke University, White House senior policy advisor Stephen Miller co-founded the “Terrorism Awareness Project” with the David Horowitz Freedom Center, a group aiming to combat attempts by the “radical left and its Islamist allies to destroy American values and disarm [the United States].” Andrew Kaczynski & Chris Massie, *In College, Trump Aide Stephen Miller Led Controversial ‘Terrorism Awareness Project’ Warning of ‘Islamofascism’*, CNN (Feb. 15, 2017, 8:40 PM), <http://edition.cnn.com/2017/02/15/politics/kfile-stephen-miller-terrorism-awareness/> [<https://perma.cc/AQ77-MJ5S>]. Miller’s group attempted to run a nationwide ad campaign using an advertisement designed by Robert Spencer, but newspapers rejected the ad. *Id.*

121. *Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993) (quoting *Walz v. Tax Comm’n of City of N.Y.*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). See also *Larson v. Valente*, 456 U.S. 228, 246 (1982) (“Since *Everson v. Board of Education*, this Court has adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can ‘pass laws which aid one religion’ or that ‘prefer one religion over another.’ This principle of denominational neutrality has been restated on many occasions. In *Zorach v. Clauson* we said that ‘[t]he government must be neutral when it comes to competition between sects.’” (citations omitted)); *Lukumi Babalu Aye*, 508 U.S. at 523 (“The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions.”).

122. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

123. Wang, *supra* note 80.

124. Matthew Nussbaum, *Flynn’s Son Says ‘Muslim Ban’ is ‘Necessary’*, POLITICO (Jan. 29, 2017, 11:29 AM EST), <http://www.politico.com/story/2017/01/michael-flynn-muslim-ban-234328> [<https://perma.cc/UM4L-ZABQ>].

been vetted or even shown to DHS prior to its execution, undercutting the Trump Administration's argument that the order was intended to improve national security.¹²⁵ This sort of open admission of discriminatory intent by former advisers to the president, combined with the president's own earlier call for a "total and complete shutdown of Muslims entering the United States,"¹²⁶ is unique in modern presidential politics and appears to have contributed to courts' willingness to temporarily enjoin enforcement of the Immigration Ban.¹²⁷ Similarly, the unprecedented actions and statements of Trump and his advisors make any future "Muslim registry" unusually vulnerable to arguments of improper discriminatory intent.

III. POSSIBLE COUNTERARGUMENTS

A. Introduction

The above analysis shows that any legislation or executive action creating a "Muslim registry" would be exceptionally weak to constitutional challenge under the First and Fifth Amendments even if facially neutral. Given that the constitutional deficiencies have not convinced President Trump or his advisors to definitively abandon the proposal, it is worth considering what sort of counterarguments policymakers might raise in support of this constitutionally suspect program. And that in turn raises another important question: how compelling are those counterarguments in light of existing case law?

B. *Could the Emergency Powers or War Powers Available to the President or Congress Be Used to Authorize a "Muslim Registry"?*

Facially neutral or not, the "Muslim registry" has such clear constitutional failings that it would seem to be doomed under any ordinary process of legal review. But what if President Trump, possibly even with statutory authorization from Congress, declared that ongoing military conflicts or a national security crisis mandated this extraordinary measure?¹²⁸ There is empirical evidence that civil

125. See Michael D. Shear & Ron Nixon, *How Trump's Rush to Enact an Immigration Ban Unleashed Global Chaos*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/politics/donald-trump-rush-immigration-order-chaos.html> [<https://perma.cc/589S-7SFG>].

126. Estepa, *supra* note 114.

127. Wittes & Jurecic, *supra* note 52.

128. According to the Council on Foreign Relations, as of the writing of this Article there were seven ongoing overseas conflicts that have a "critical" impact on United States interests. *Global Conflict Tracker*, COUNCIL ON FOREIGN REL. (Oct. 22, 2017), <https://www.cfr.org/interactives/global-conflict-tracker/> [<https://perma.cc/WHH8-EAVJ>]. The president might use international conflicts, or unspecified intelligence purportedly identifying a domestic security threat, to attempt to justify a "Muslim registry." For example, Kellyanne Conway, Counselor to the President, has already invoked unspecified intelligence available to President Trump as an explanation for Trump's explosive claim that President Obama ordered wiretaps on Trump's office telephones. Louis Nelson, *Conway Blames Trump's Wiretap Dust-Up on 'Double Standard'*, POLITICO (Mar. 6, 2017, 10:15 AM EST), <http://www.politico.com/story/2017/03/trump-wiretap-obama-kellyanne-conway-235714> [<https://perma.cc/Z77E-XDNE>]. Some legal scholars are already speculating that Trump might seize on a terrorist attack to try to greatly expand the scope of his executive power. See, e.g., Ryan Lizza, *How President Trump Could Seize More Power After a Terrorist Attack*, THE NEW YORKER (Feb. 7, 2017),

liberties are repressed somewhat during times of war and national security crisis in the United States,¹²⁹ and *Korematsu*¹³⁰ casts a menacing shadow.¹³¹ The question then becomes: does judicial precedent suggest that the emergency powers of the president could protect a “Muslim registry” from invalidation on constitutional grounds?

In some respects this is a challenging question to answer because it necessitates an increasing number of hypothetical assumptions. Consider, for example, these unknown factors that could influence the answer: the occurrence of another large-scale terrorist attack on American soil, dramatic changes in ongoing overseas military conflicts, the nature and severity of the purported national security crisis at issue, contemporaneous public statements by Trump and his advisors, statutory authorization from Congress, and public opinion. Still, assuming that these factors are roughly in the range of historical precedents it is possible to provide some analysis grounded in case law and political context.

One seemingly plausible scenario would be the Trump Administration asserting that, based on classified intelligence-gathering, the country is facing an immediate threat of additional terrorist attacks to be perpetrated by radicalized American citizens and the “Muslim registry” is necessary to prevent these acts of violence.¹³² When challenged on a constitutional basis, the administration would presumably claim that the niceties of typical First Amendment and equal protection jurisprudence would put thousands of American lives at risk. This is not a novel tactic; the executive branch used a similar invocation of national security necessity as justification for internment of Japanese-Americans during World War II.¹³³ In fact, Trump himself has used similar rhetoric to defend the Immigration Ban.¹³⁴

What happens next? In a 2014 speech, Justice Scalia said of the Japanese-American internment, “[Y]ou are kidding yourself if you think the same thing will not happen again. . . . It was wrong, but I would not be surprised to see it happen again—in time of war.”¹³⁵ It is certainly possible that war or acts of terrorism occurring during the Trump Administration could lead the Court to hand down new, restrictive decisions on civil rights that, like *Korematsu*, the legal community later comes to view with scorn. However, case law and the political context suggest that President Trump’s “Muslim registry” will not form the basis for those decisions.

A full analysis of the range and nature of the emergency powers of the president

<http://www.newyorker.com/news/ryan-lizza/how-president-trump-could-seize-more-power-after-a-terrorist-attack> [<https://perma.cc/7V27-GT6G>] (quoting Professor John Yoo).

129. Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-war Cases*, 80 N.Y.U. L. REV. 1, 11 (2005). See *id.* at 13-14 for a brief overview of curtailments of civil liberties during periods of war or national security crisis.

130. *Korematsu v. United States*, 323 U.S. 214 (1944).

131. See Part III.C below for an analysis of the potential impact of *Korematsu* on the possibility of a “Muslim registry” surviving judicial review.

132. Kellyanne Conway has already made a similar invocation to explain President Trump’s claim that President Obama ordered wiretaps on Trump’s office telephones. See Nelson, *supra* note 128.

133. See *Korematsu*, 323 U.S. at 223-24; *Hirabayashi v. United States*, 320 U.S. 81, 92-93 (1943). This is discussed in more detail in Part III.C below.

134. See Lizza, *supra* note 128.

135. Ilya Somin, *Justice Scalia on Kelo and Korematsu*, WASH. POST (Feb. 8, 2014), <https://www.washingtonpost.com/news/voikh-conspiracy/wp/2014/02/08/justice-scalia-on-ke-lo-and-korematsu/> [<https://perma.cc/9Q26-WJUH>].

during a national security crisis is beyond the scope of this Article, but also unnecessary for the purposes of this analysis.¹³⁶ The powers, to the extent they exist, are not clearly defined and depend in large part on what Congress is willing to authorize.¹³⁷ However, even when the legislative and executive branches act together in a time of war, judicial precedent has established that their constitutional powers are not so greatly expanded from peacetime. A synthesis of case law and the relevant doctrines suggests that the infringement of fundamental constitutional rights during wartime is permitted “only so far as justified by a clear, identifiable, and compelling public interest.”¹³⁸ Although structural, practical, and political obstacles to obtaining judicial relief have thwarted plaintiffs in previous challenges to executive action in the national security context, proponents of the “Muslim registry” should not find comfort in this fact.¹³⁹ Why? First, the policy would create potential plaintiffs out of millions of American citizens. Second, the public reaction and the reaction of the legal community to Trump’s Immigration Ban demonstrate that there is a great deal of intense political energy and significant legal resources ready to be deployed to fight high-profile Trump Administration policies that appear to target Muslims in a discriminatory manner.¹⁴⁰ Third, any Muslim Americans subject to any attempt to enforce the “Muslim registry” would surely have standing to challenge the policy, thereby solving one of the problems that frequently stymies plaintiffs fighting government action in the national security context.¹⁴¹ Implementation of the proposal would likely lead to an avalanche of headline-grabbing litigation backed by some of the most prominent litigators in the country.¹⁴²

136. For a thorough analysis in the post-September 11 context, see John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 TEMP. L. REV. 599, 651-52 (2011). See generally Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993).

137. Dehn, *supra* note 136, at 651-52; Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 426-27 (2011).

138. Dehn, *supra* note 136, at 659-60. Also, “the Court’s precedent fully supports the proposition that laws plainly calculated to cabin executive discretion in armed conflict are not subject to derogation by the Commander-in-Chief on claims of general military authority or necessity.” *Id.* at 662.

139. *Id.* at 652-53 (quoting HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 148 (1990)).

140. See Andy Newman, *Highlights: Reaction to Trump’s Travel Ban*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/nyregion/trump-travel-ban-protests-briefing.html> [<https://perma.cc/8R86-9DEN>].

141. See Dehn, *supra* note 136, at 653 (quoting HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 148 (1990)). Certain states might also bring a legal challenge against the policy. California, for example, has passed a state law that would prohibit the creation of databases based on religion. Melody Gutierrez, *Gov. Brown Signs Bill banning Creation of Any Muslim Registries*, SFGATE (Oct. 15, 2017), <http://www.sfgate.com/politics/article/Gov-Brown-signs-bill-banning-creation-of-any-12280180.php> [<https://perma.cc/2GZ8-VDFM>].

142. In response to Trump’s initial Immigration Ban, “[a]n army of corporate lawyers” joined “an effort to advise travelers detained at US airports,” with active participation from some of the largest U.S. law firms. Lindsay Fortado, *Corporate Lawyers Prepare for Battle Over Trump’s Travel Ban*, FINANCIAL TIMES (Feb. 1, 2017), <https://www.ft.com/content/06468f6e-e72c-11e6-967b-c88452263daf> [<https://perma.cc/BZB5-NAF6>]. Take also for example the offer of Ted Boutrous, the global co-chair of Gibson, Dunn & Crutcher’s litigation group, to provide *pro bono* representation to any person Trump sues for exercising their free speech rights. Boutrous wrote in October 2016 that 100 additional lawyers had already offered to join him. Ted Boutrous, *Why I’ll Defend Anyone Trump Sues for Speaking Freely*, POLITICO (Oct. 31, 2016), <http://www.politico.com/magazine/story/2016/10/trump-lawsuit-free-speech-defense-214404> [<https://perma.cc/5AS8-FA9L>].

Litigation in the aftermath of the September 11 terrorist attacks demonstrates the limited constitutional flexibility available to the executive branch even during a period of national security crisis. Take, for example, the case of Yaser Hamdi, an American citizen captured in Afghanistan and accused of fighting for the Taliban during the United States' post-September 11 war in Afghanistan.¹⁴³ Hamdi was brought to a naval brig in South Carolina, held without legal counsel, and interrogated, with no notice as to if or when he might be arraigned in a U.S. court.¹⁴⁴ Hamdi's father brought a habeas corpus petition in federal court, which the Supreme Court adjudicated on appeal in 2004.¹⁴⁵ Among other issues, the Court considered what process Hamdi was due under the Fourteenth Amendment given that he was captured and initially detained overseas in an armed conflict and a time of war.¹⁴⁶ The government argued that Hamdi's detention was within its power, that courts were not in a position to engage in "military decision-making," and that, out of respect for separation of powers, courts should not review individualized detention cases.¹⁴⁷ Nonetheless, the Court engaged in a due process balancing analysis, noting:

[A]s critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.¹⁴⁸

The Court also noted that the judicial branch must "pay proper heed" not only to national security but also "to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns."¹⁴⁹ Considering the Court's measured approach following the September 11 terrorist attacks, it is hard to imagine how even an immediate threat to national security or an ongoing war could possibly justify a "Muslim registry" on the basis of the war powers or emergency powers available to the president.¹⁵⁰

Empirical research quantifying the impact of war and national security crises on Supreme Court civil rights and civil liberties decisions supports the contention that the emergency powers, whatever they may be, are limited in this context.¹⁵¹ In a 2005 analysis, Professor Lee Epstein and others examined wartime and crisis-time

143. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510-12 (2004). Majority opinion by Justice O'Connor with Justice Souter concurring in part but finding that the detention was a violation of law and agreeing that Hamdi is entitled to notice of the reason for his detention, a fair chance to contest his detention, and legal counsel, *id.* at 553 (Souter, J., concurring).

144. *Id.* at 510-11.

145. *Id.* at 511.

146. *Id.* at 524.

147. *Id.* at 527 (quoting Brief for Respondents at 26).

148. *Id.* at 530.

149. *Id.* at 539.

150. *See Dehn*, *supra* note 136, at 645-47; *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (finding that a Bush Administration Military Commission Order, which had been challenged by Salim Hamdan, a Yemeni national awaiting military commission trial, was invalid for violating various domestic laws).

151. Lee Epstein, *supra* note 129, at 9. This analysis does not consider the magnitude of the rights claims at stake in the cases analyzed, but its findings do provide general support for the contention that the impact of wartime on civil rights outcomes is limited.

Supreme Court cases from 1941 through 2002.¹⁵² They found, first, that the existence of war or a national security conflict had *no* statistical impact on the outcome of civil rights and liberties cases that are directly related to the conflict.¹⁵³ They also found that the negative impact on civil rights and liberties claimants for *unrelated* cases during wartime was about ten percent.¹⁵⁴ That is, the probability of the plaintiff winning a civil rights or civil liberties claim decreases by about ten percent on average during a time of war or crisis.¹⁵⁵ This is a significant distinction between wartime and peacetime, but hardly a paradigm-shattering shift that suggests the Court would jettison decades of First Amendment precedent in a support of a “Muslim registry” due to a purported national security emergency.

There is another factor that is likely to play an important role in any judicial evaluation of a “Muslim registry” to the extent that emergency powers or a national security crisis is invoked to defend the policy. The judiciary justifies a deferential approach to the executive in matters of national security in part because it assumes that members of the executive branch act in good faith.¹⁵⁶ Benjamin Wittes and Quinta Jurecic have argued incisively that an unprecedented weakening of this assumption of good faith with respect to the Trump Administration has increased the willingness of the judiciary and other elements of the government to resist or reject certain executive initiatives.¹⁵⁷ The assumption that the executive is faithfully attempting to fulfill its constitutional duties may be an even more important factor influencing judicial review when the president asserts military necessity in the wartime context.¹⁵⁸ If so, this bodes particularly ill for any attempt by the Trump Administration to defend, on the basis of the executive’s national security judgment, an extraordinary, constitutionally suspect action that cannot be justified with empirical evidence.¹⁵⁹ This unusual potential weakness of executive policy with respect to the “Muslim registry” is at root contextual rather than substantive, but it

152. *Id.* at 8.

153. *See id.* at 72.

154. *Id.* at 71.

155. *Id.*

156. *Martin v. Mott*, 25 U.S. 19, 33 (1827) (“Every public officer is presumed to act in obedience to his duty, until the contrary is shown; and, *a fortiori*, this presumption ought to be favourably applied to the chief magistrate of the Union.”); *see also* Wittes & Jurecic, *supra* note 52.

157. Wittes & Jurecic, *supra* note 52. Some of the fuel for this fire no doubt comes from the administration’s inability to clearly defend its policies on an evidentiary basis. For example, in a March 7, 2017 press briefing, while discussing President Trump’s second executive order halting immigration from certain Muslim-majority countries, the acting spokesman of the State Department cited vetting problems with travelers from Iran but was unable to say whether the U.S. would engage with Iran to improve vetting of Iranian visitors and was unable to explain why Syrian refugees were banned under the first immigration executive order but not the second. Josh Rogin, Opinion, *No News at the State Department*, WASH. POST (Mar. 7, 2017), <https://www.washingtonpost.com/news/josh-rogin/wp/2017/03/07/no-news-at-the-state-department/> [<https://perma.cc/24DY-8DPN>].

158. Consider, for example, the assumption of good faith implicit in the final two sentences of the majority opinion in *Korematsu*: “There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions [excluding people of Japanese ethnicity from certain regions of the United States] were unjustified.” *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944).

159. Recall again the tiny fraction of Muslim Americans involved in terroristic activities compared to the broader population. *See infra* Part II.A.

could prove important nonetheless.

The analysis above foresees a grim fate for any “Muslim registry,” regardless of what extraordinary national security justifications the president may supply. This may seem hard to square with *Korematsu*. If constitutional protections do not significantly recede in times of war, what do we make of the Court’s finding that a race-based policy targeting Japanese-Americans was a proper exercise of executive authority? Indeed, as President Trump himself has compared his proposal for a ban on Muslims entering the United States to President Roosevelt’s wartime policies, references to the Japanese-American internment are likely to emerge again should government policymakers ever attempt to make the “Muslim registry” a reality. So, what about *Korematsu*?

C. Does Korematsu v. United States Provide Support for the Contention that a “Muslim Registry” Would Be Constitutional?

In *Korematsu*, the Court upheld a military order that subjected all persons of Japanese ancestry, including American citizens, to exclusion from certain areas of the West Coast of the United States.¹⁶⁰ This was one of the military orders that formed the foundation for the internment of tens of thousands of Japanese-Americans and Japanese nationals living on the West Coast.¹⁶¹ In upholding the order, the Court wrote that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect” and must be subject to “the most rigid scrutiny.”¹⁶² The Court’s claim that it was “not unmindful of the hardships imposed by [the order] upon a large group of American citizens” was belied by its subsequent dismissive proclamation that “hardships are part of war, and war is an aggregation of hardships.”¹⁶³ Writing for the majority, Justice Black concluded by stating—from today’s vantage point, preposterously—that the exclusion order was not the result of “hostility to [Fred Korematsu] or his race” but instead an acceptable consequence of the U.S. armed forces deciding that “the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily” pursuant to valid authorization from Congress.¹⁶⁴ In reaching its conclusion, the Court did not discuss the remarkably compelling evidence that the general who made the determination of supposed military necessity, John L. DeWitt, was driven by anti-Japanese racism (among other statements and actions, DeWitt described the Japanese as “an enemy race”).¹⁶⁵

Korematsu was controversial even when it was decided. Writing in 1945,

160. *Korematsu*, 323 U.S. at 215-16.

161. *Id.*

162. *Id.* at 216.

163. *Id.* at 219. Trump himself said something similar in initially refusing to condemn the Japanese-American internment during the presidential campaign: “It’s a tough thing. It’s tough. But you know war is tough.” Michael Scherer, *Exclusive: Donald Trump Says He Might Have Supported Japanese Internment*, TIME (Dec. 8, 2015, 9:02 AM), <http://time.com/4140050/donald-trump-muslims-japanese-internment/> [<https://perma.cc/9M24-5Y7P>].

164. *Korematsu*, 323 U.S. at 223.

165. *Id.* at 236 (Murphy, J., dissenting) (quoting JOHN L. DEWITT, FINAL REPORT, JAPANESE EVACUATION FROM THE WEST COAST, 1942, at 34 (1943)); see also Mark V. Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 288 (2003).

Professor Eugene Rostow of Yale Law School described the Japanese-American internment as “a disaster” instigated by a minority of racist agitators on the West Coast and “the worst blow our liberties have sustained in many years.”¹⁶⁶ Even considering its ignominious reception, the case has not aged well. It now forms part of the “anticanon,” joining *Dred Scott*,¹⁶⁷ *Plessy*,¹⁶⁸ and *Lochner*¹⁶⁹ to form the group of “decisions the legal community regards as the worst of the worst.”¹⁷⁰ Importantly, the “legal community” as used here includes Supreme Court justices. In a 2011 analysis of Senate confirmation hearings, Professor Jamal Greene found that only five cases had been openly disavowed by nominees to the Supreme Court who were subsequently confirmed; *Korematsu* is among these cases, garnering disavowals from Justices Sotomayor, Alito, Roberts, and Ginsburg.¹⁷¹ Greene concludes that “Supreme Court nominees believe they will curry favor with senators and the public by declaring [*Dred Scott*, *Plessy*, *Lochner*, and *Korematsu*] to be *reliably bad law*.”¹⁷² Greene also notes that although the Court has cited *Korematsu* positively many times, the “overwhelming majority of these positive citations have been in support of the proposition that governmental racial classifications receive strict scrutiny from reviewing courts.”¹⁷³

Finally, although the Court has not yet overturned *Korematsu*,¹⁷⁴ in addition to the case having become a subject of scorn and source of chagrin for the legal community, the internment itself was formally repudiated by Congress in the 1980s. In 1988, President Reagan signed into law a bill to “acknowledge the fundamental injustice” of the internment of Japanese-Americans, “apologize on behalf of the people of the United States,” and to make restitution to internees.¹⁷⁵

Greene performs the exercise of attempting to defend *Korematsu* on its own merits, arguing that under the circumstances and in light of *Hirabayashi v. United States* there are reasonable counterarguments against singling out *Korematsu* as a case of unique jurisprudential deficiency.¹⁷⁶ Nonetheless, he concludes that *Korematsu* is in fact “the hardest of the four [anticanonical cases] to defend using

166. Eugene V. Rostow, *The Japanese American Cases-A Disaster*, 54 YALE L.J. 489, 489-90, 496 (1945).

167. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

168. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

169. *Lochner v. New York*, 198 U.S. 45 (1905).

170. Greene, *supra* note 137, at 387.

171. *Id.* at 391-92. Writing for herself and Justice Breyer in a dissent, Justice Ginsburg also concluded that the *Korematsu* decision “yielded a pass for an odious, gravely injurious racial classification” and noted that “[a] *Korematsu*-type classification, as I read the opinions in this case [*Adarand Constructors, Inc. v. Pena*], will never again survive scrutiny: Such a classification, history and precedent instruct, properly ranks as prohibited.” *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 275 (1995).

172. Greene, *supra* note 137, at 396 (emphasis added).

173. *Id.* at 398.

174. Fred Korematsu’s conviction was later overturned pursuant to a 1983 *coram nobis* action in federal district court, but this did not overrule *Korematsu* as precedent. *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

175. *Restitution for World War II Internment of Japanese-Americans and Aleuts*, 50 U.S.C. §§ 4201, 4124 (2012).

176. Greene, *supra* note 137, at 422-25. In particular, Greene reviews *Korematsu* in light of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and notes that the executive action at issue in *Korematsu* had been preauthorized by Congress. *Id.*

conventional constitutional arguments.”¹⁷⁷ In any event, the evolution of strict scrutiny to its modern form (a form detailed in Section II of this Article), should make clear that the Court’s application of “the most rigid scrutiny” in *Korematsu* is a far cry from what that phrase has come to mean in more recent cases.¹⁷⁸ In short, in addition to being inconsistent with contemporary jurisprudence, *Korematsu* is reviled by the legal community at large and part of a national abuse so extraordinary that the federal government issued a formal apology via statute and provided financial recompense to its victims.

In this respect, *Korematsu* does appear to be a seminal decision after all, and one that may offer insight into how an attempt to implement a “Muslim registry,” justified by purported national security exigencies or military necessity, would be treated by the judicial branch. But *Korematsu*’s likely influence is not what defenders like Carl Higbie or Al Baldasaro are hoping to achieve by tying the Trump Administration’s policies vis-à-vis Muslims to the internment of Japanese-Americans. How might these analogies to a widely-repudiated program of racial discrimination influence judicial review of the “Muslim registry?”

Professor Mark Tushnet has argued that a form of “social learning” guides the American government’s treatment of civil liberties in wartime.¹⁷⁹ He summarizes the concept as follows:

Knowing that government officials in the past have in fact exaggerated threats to national security or have taken actions that were ineffective with respect to the threats that actually were present, we have become increasingly skeptical about contemporary claims regarding those threats, with the effect that the scope of proposed government responses to threats has decreased.¹⁸⁰

In Tushnet’s conceptualization, the challenge to balancing legal protections of civil liberties lies in the fact that—although today Americans look back with incredulity at claims of Japanese-American subversion and arguments for restricting free speech during the first and second Red Scares—each new crisis presents different facts, brings its own fresh uncertainty, and demands a unique governmental response, and so the lessons learned from past cases are inadequate protection against future abuses.¹⁸¹ Tushnet’s principal evidence takes the form of a survey of civil liberties case law beginning with the suspension of habeas corpus during the Civil War, moving through the Red Scares and into more recent cases, including a

177. *Id.* at 422.

178. *Korematsu v. United States*, 323 U.S. 214, 216 (1944). The 1960s and 1970s in particular marked a significant period of expansion in the protective interpretations of the First Amendment. *Milligan*, *supra* note 76, at 405.

179. Tushnet, *supra* note 165, at 283-84.

180. *Id.* For a counterargument, see Lee Epstein, *supra* note 129, at 34 (summarizing the argument that “statist ratchets” and increasing “dosages” of the curtailment of civil liberties are the legacy of successive layers of crisis jurisprudence). However, this counterargument is not so convincing in light of Greene’s analysis of post-September 11 references to *Korematsu* as judicial authority, which is described later in this Part III.B. Although in their statistical analysis of Supreme Court crisis jurisprudence Epstein et al. found no evidence for either the “social learning” or the “ratchet” theory, this is a purely quantitative analysis of civil liberties cases that does not consider the nature of the claims at stake, and thus seems ill-suited to evaluating Tushnet’s argument that the government makes new (perhaps progressively less egregious) “mistakes” with each successive crisis. *Id.* at 80-81.

181. See Tushnet, *supra* note 165, at 300-01.

comparison of *Korematsu* to *Hamdi v. Rumsfeld*.¹⁸² Using this case law as evidence, Tushnet argues that “the legal world’s retrospective evaluation of actions taken the last time around is that those actions were unjustified.”¹⁸³ As a result of this retrospective analysis, “we learn from our mistakes[,]” but that learning is limited in that it only ensures “that we do not repeat precisely the same errors.”¹⁸⁴

Some of Greene’s research provides interesting support for Tushnet’s conclusion. In Tushnet’s model, once a case achieves sufficient toxicity, even if not overturned it should prove an unappealing source of authority for Supreme Court litigants. This is because approving citations of anticanonical cases in support of a litigant’s position might connect the new case at issue to one of the Court’s past “mistakes” in the eyes of the reviewing justices. Indeed, in a review of “every publicly available Office of Legal Counsel (OLC) opinion since September 11 and the merits [briefings] and published opinions in ten detention-related cases to reach the Supreme Court or federal courts of appeals during that period,” Greene found just one citation to *Korematsu*, which was included simply to buttress a claim that the judiciary had authority to review the executive action in question.¹⁸⁵ Concluding his review, Greene notes, “[i]t is fair to say that *Korematsu* is almost uniformly recognized by serious lawyers and judges to be bad precedent, indeed so bad that its use by one’s opponent is likely to prompt a vociferous and public denial.”¹⁸⁶

In this case, however, Trump himself and supporters like Higbie have already taken the initiative in drawing similarities between the Trump Administration’s policies and President Roosevelt’s wartime actions. By doing so, they have already anchored the proposals they seek to defend to “precisely the same errors” that occupy the very core of the anticanon.¹⁸⁷ Although competent lawyers defending future Trump Administration policies will likely work to avoid even the suggestion of any similarities to *Korematsu*, the President of the United States has already compared one of his own proposals to discriminate against Muslims for purported national security benefits (i.e., the Immigration Ban) to President Roosevelt’s wartime policies. The comparison is an indelible part of the public record.

Viewed from this angle, *Korematsu* is an anti-precedent, even if never formally rejected by the Court. It is a repulsive lodestar from which subsequent policymakers have worked to distinguish their own efforts. The fact that *Korematsu* has never been overturned may well be more an effect of America’s “social learning” than a validation of the decision; across seventy years, many wars, and a massive terrorist attack on U.S. soil, the Court has never had occasion to review another explicit government policy of widespread race-based internment because the country has learned something from this dark chapter of its history. So *Korematsu* stands, for now. But its value as precedent for executive action is almost certainly negative. As a substantive matter, the contours of strict scrutiny have emerged over the intervening decades and the credulous acceptance of explicit distinctions among

182. See generally *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002), *rev’d*, 316 F.3d 450 (4th Cir. 2003). Tushnet’s article predated the Supreme Court’s adjudication of the case.

183. Tushnet, *supra* note 165, at 291.

184. *Id.* at 292.

185. Greene, *supra* note 137, at 400.

186. *Id.* at 402 (emphasis added).

187. Tushnet, *supra* note 165, at 292.

protected classes that characterizes *Korematsu* no longer reflects the state of the Constitution as applied by the Court. But substance aside, the internment of Japanese-Americans and the *Korematsu* decision are a moral and political stinkbomb, lambasted by today’s lawyers and judges and formally repudiated by Congress and the executive branch. In every meaningful sense, *Korematsu* is the opposite of “good law.”

D. Could Other Programs, Such as NSEERS and Religious Registries in Prisons, Be Used to Defend the “Muslim Registry” from a Constitutional Challenge?

There are various other arguments that proponents of a “Muslim registry” might raise based on flawed analogies to distinguishable case law. Unlike approving references to *Korematsu* as precedent, these throwaway arguments have not yet been publicly espoused by Trump or his political allies, so this Article will dispense with them quickly. They are not likely to convince any judge, lawyer, or legal academic reasonably familiar with First and Fifth Amendment jurisprudence and accordingly they do not require detailed analysis here.

The first such argument is that religious registries *already* exist and have not yet failed constitutional challenge—in prisons. For example, a prison inmate in New York State brought a legal challenge in federal court when he was subject to a requirement “to register as a Shiite Muslim in order to continue participating in Shiite classes and fasting during” several holidays.¹⁸⁸ In analyzing the plaintiff’s claims, the District Court correctly noted that “free exercise claims of prisoners are evaluated ‘under a “reasonableness” test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights.’”¹⁸⁹ This reasonableness analysis is clearly distinguishable from the standard of review that would apply to a registry burdening the religious liberty of free American citizens on a discriminatory basis.¹⁹⁰

A second such argument is that the NSEERS program withstood constitutional challenge and the “Muslim registry” would simply apply regulations similar to the approved NSEERS rules, but to a broader group of people. This elides what was surely the principal factor in NSEERS’s survival: the fact that it applied only to non-citizen immigrants. Allegations that NSEERS violated equal protection of non-citizens collided with the extremely deferential standard that the courts apply to restrictions on immigration.¹⁹¹ Like rules regulating the treatment of prisoners, laws and executive actions regulating immigration based on protected classes are not relevant authority to support the constitutionality of a “Muslim registry” because they are subject to a different, more lenient standard of review than government policies that target protected classes of free American citizens.

The two arguments above are easily defeated and do not require additional discussion. They are mentioned in brief here because they are just plausible enough and superficially relevant enough that they may be an attractive defense for future

188. *Williams v. King*, 56 F. Supp. 3d 308, 317 (S.D.N.Y. 2014).

189. *Id.* at 322 (quoting *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987)).

190. *Turner v. Safley*, 482 U.S. 78, 89 (1987). When a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. *Id.*

191. *See, e.g., Kandamar v. Gonzales*, 464 F.3d 65, 72 (1st Cir. 2006).

proponents of a “Muslim registry” who are not familiar with First and Fifth Amendment case law. Two years ago, it was virtually inconceivable that a key campaign advisor of the President of the United States would describe one of the president’s executive orders as aiming to effect a “Muslim ban” but seeking “to do it legally.”¹⁹² In this context, it would be little surprise if inapposite comparisons to NSEERS and prison registries of Muslim inmates surface in any future political debates about a “Muslim registry.”

IV. CONCLUSION

The proposals analyzed in this Article will hopefully never advance beyond inchoate hypotheticals. Nonetheless, they deserve serious consideration as a legal matter in light of their promotion by the man who is now the President of the United States and the actions that he has taken during his first months in office. A review of relevant case law demonstrates unequivocally that a “Muslim Registry” would violate the Constitution, and that any wartime emergency powers available to the president would be insufficient to remedy the gross constitutional deficiencies of such a policy. Furthermore, the foreseeable measures that policy architects might undertake to disguise the registry as facially neutral will almost certainly fail constitutional review if the resulting policy effectively targets Muslim Americans by criteria other than religion (and if not, then the resulting policy will not be a “Muslim registry”).

Finally, the defenses that proponents of the registry might raise are not likely to be effective. *Korematsu* presents an analysis that is materially and substantively different from subsequent cases applying strict scrutiny. Furthermore, from a political standpoint *Korematsu* is likely one of the worst possible sources of supporting authority available for any policy, as evidenced by the OLC’s scrupulous avoidance of positive citations to the case following September 11, 2001 and Congress’s formal repudiation of the Japanese-American internment. Other contexts in which religious registries have withstood constitutional challenge are dissimilar and subject to different standards of scrutiny. There is, in short, no legal authority that provides any convincing support for the constitutionality of this proposal. Although the precise contours of its form remain subject to some guesswork, any “Muslim registry” that is substantively true to its name will violate and endanger the constitutional rights of the American people. And if, at some point in the future, the Trump Administration attempts to turn the registry into a reality, the courts must strike it down.

192. Wang, *supra* note 80.