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## Racial Equality, Religious Liberty, and the Complications of Pluralism

Rachel F. Moran

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# Racial Equality, Religious Liberty, and the Complications of Pluralism

BY RACHEL F. MORAN\*

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Constitutional law scholar Laurence Tribe once described due process and equal protection as “a legal double helix.”<sup>1</sup> By this, he meant that protections for substantive liberties coupled with principles of equal treatment created “a single, unfolding tale of equal liberty and increasingly universal dignity.”<sup>2</sup> In his view, equality and liberty were mutually constitutive and “center[ed] on a quest for genuine self-government of groups small and large.”<sup>3</sup> Although this optimistic account of the nation’s constitutional DNA is reassuring, Professor Sahar Aziz’s new book on “The Racial Muslim: When Racism Quashes Religious Freedom”<sup>4</sup> reminds us that the double helix can unravel, so that freedom and equality become mutually destructive. Far from enjoying self-government, some minority groups have seen that

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1. Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004).

2. *Id.*

3. *Id.* Other scholars have described this mutually constitutive relationship as a comparative conception of discrimination, one that understands rights as equally available to all. See, e.g., Kenneth W. Simons, *Discrimination Is a Comparative Injustice: A Reply to Hellman*, 102 VA. L. REV. ONLINE 85, 86-89 (July 2016).

4. SAHAR AZIZ, *THE RACIAL MUSLIM: WHEN RACISM QUASHES RELIGIOUS FREEDOM* (Univ. Cal. Press, 2022).

“racism intersects with religion to racialize a religion’s followers and consequently exclude them from the panoply of religious freedom.”<sup>5</sup>

Professor Aziz’s book raises important questions about whether a narrative rooted in race and racialization fully captures the complexity of the Muslim experience. It is not clear why race—as opposed to traits like national origin, immigration status, and religion—should be the dominant force that drives government policy, private bias, and Muslims’ self-conceptualization. This is especially true given the tremendous internal heterogeneity of the Muslim population as well as the rise of powerful new ways to surveil and control many of its members through immigration enforcement.<sup>6</sup> Framing the Muslim community in racial terms potentially obscures the complicated dynamics associated with proliferating differences and the anxiety around pluralism they engender. That anxiety in turn can prompt a retreat into individualism. As a result, Americans “hunker down” in the face of growing diversity, even as courts retreat from equality jurisprudence and turn to seemingly universal principles of personal liberty.<sup>7</sup> The challenge is to find a way to restore a sense of shared purpose that remains respectful of distinct histories and identities.

### I. Historical Injustices: The Meaning of Race

Professor Aziz begins her discussion of the Muslim experience by offering historical accounts of other religious groups that have been racialized, denied religious liberties, and deemed unfit for self-government.<sup>8</sup> As she notes, mass migration of Jews and Catholics in the mid-nineteenth and early twentieth century prompted fears that “America’s Protestant, Anglo-Saxon purity was under threat.”<sup>9</sup> Those fears led to racialization of the newcomers, expressed most graphically through predictions of the nation’s impending “race suicide.” Jewish and Catholic immigrants were treated as distinct races, characterized as biologically and culturally inferior, and therefore presumed unassimilable.<sup>10</sup> Jews’ economic success generated theories that they were conspiring to displace Anglo-Saxon Protestants and achieve world domination.<sup>11</sup> Meanwhile, there were doubts that Catholics could be loyal to the United States because of their unwavering attachment to the Pope.<sup>12</sup> The Ku Klux Klan even accused Jews and Catholics of working together to

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5. *Id.* at 4.

6. *See infra* notes 82-87 and accompanying text.

7. *See infra* notes 106-110, 118-123 and accompanying text.

8. AZIZ, *supra* note 4, at 34.

9. *Id.* at 40.

10. *Id.* at 47-48, 57-58.

11. *Id.* at 48-49.

12. *Id.* at 54.

gain control of America.<sup>13</sup> Anxieties like these generated significant legal restrictions on immigration.<sup>14</sup>

As Professor Aziz explains, Jews and Catholics did not gain full acceptance under a “triple melting pot”<sup>15</sup> theory until “after World War II when Whiteness was socially redefined to include all groups of European ethnic origin and American identity expanded to a Judeo-Christian one.”<sup>16</sup> The shift stemmed from the United States’ need to address histories of racism and religious persecution to become a credible leader of the free world.<sup>17</sup> While racism violated principles of equal treatment, religious persecution vitiated promises of freedom of worship. Both failings were seriously at odds with America’s newfound prominence as a paragon of democracy on the world stage.

Professor Aziz briefly discusses other religious minorities: Mormons, Confucians, and Buddhists. She asserts that, like Jews and Catholics, Mormons initially were portrayed as a degraded race, unfit for self-government and with aspirations to take over the country.<sup>18</sup> Suspicions reached such a fever pitch that President James Buchanan sent federal troops to remove Mormon leader Brigham Young from the governorship of Utah.<sup>19</sup> The Mormon practice of polygamy reinforced widespread hostility. Mormons were identified with other cultures that allowed men to take multiple wives. Their households were likened to Turkish harems, as Mormons were cast as new “Mohametans” on American soil.<sup>20</sup>

Professor Aziz contends that Mormons, like Jews and Catholics, ultimately were accorded the privileges of Whiteness.<sup>21</sup> However, it is worth noting that although John F. Kennedy became the first Catholic President of the United States in 1964,<sup>22</sup> Mitt Romney faced ongoing suspicions about his Mormon faith when he unsuccessfully campaigned for that office in 2008 and 2012. Evangelicals were especially concerned that he was not a true Christian, and former Arkansas governor Mike Huckabee even asked

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13. *Id.* at 56.

14. AZIZ, *supra* at 41-44.

15. See WILL HERBERG, PROTESTANT, CATHOLIC, JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY 33 (2012) (citing Ruby Jo Reeves Kennedy, *Single or Triple Melting Pot? Intermarriage Trends in New Haven, 1870-1940*, 49 AM. J. SOC. (1944)).

16. AZIZ, *supra* note 4, at 71.

17. *Id.* at 77-80.

18. *Id.* at 59.

19. *Id.* at 59-60.

20. *Id.* at 60.

21. *Id.* at 61.

22. AZIZ, *supra* at 57.

whether “Mormons believe that Jesus and the devil are brothers.”<sup>23</sup> According to polling at the time, 36% of voters who leaned Republican said that they would be less likely to vote for a Mormon candidate in 2006, though that figure had dropped to 21% in 2011.<sup>24</sup> The United States also has yet to elect a Jewish President.<sup>25</sup>

As for Confucians and Buddhists, Professor Aziz makes no claim that they have been assimilated to the privileges of Whiteness. She notes that their religious practices were equated with paganism and amorality, again prompting doubts about fitness for citizenship. Those doubts resulted in exclusionary policies aimed at the Chinese in the late 1800s and early 1900s.<sup>26</sup> Meanwhile, the practice of Shintoism among Japanese immigrants raised concerns about their loyalty because they believed the emperor of Japan to be divine.<sup>27</sup> According to Professor Aziz, although Asian Americans have often been held up as model minorities due to their “high levels of education, move to White suburbs, and cultural assimilation,” they have not enjoyed full acceptance and “are still lower in the racial-religious hierarchy than White Christians.”<sup>28</sup> In her view, “the further away a group’s phenotype and religion is from Anglo-Saxon Protestantism, the lower they are in the racial-religious hierarchy.”<sup>29</sup>

In Professor Aziz’s account, both racial difference and religious pluralism do considerable work in explaining the divergent outcomes for Jews, Catholics, and Mormons on the one hand, and Confucians and Buddhists on the other. Yet, race and religion are fundamentally different constructs. Race scholars Michael Omi and Howard Winant have argued that phenotypical traits, what they term the “ocular” dimension of belonging, have played a vital role in making race a source of cleavage in the United States.<sup>30</sup> According to this view,

phenomic traits, initially associated with African bodies or with indigenous bodies in the Americas, were soon elevated to the status of a ‘fundamental’ (and later biological) difference. The attachment of this

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23. Philip Rucker, *Romney, His Mormonism a Campaign Issue Again, Condemns Religious Bigotry*, WASH. POST (Oct. 8, 2011), [https://www.wapo.st/politics/romney-his-mormonism-a-campaign-issue-again-condemns-religious-bigotry/2011/10/08/gIQAnQxKWL\\_story.html](https://www.wapo.st/politics/romney-his-mormonism-a-campaign-issue-again-condemns-religious-bigotry/2011/10/08/gIQAnQxKWL_story.html).

24. *Id.*

25. Talia Levin, *To Dream of a Jewish President*, THE NEW REPUBLIC (Feb. 13, 2020), <https://newrepublic.com/article/156552/dream-jewish-president>.

26. AZIZ, *supra* note 4, at 61-62.

27. *Id.* at 62-63.

28. *Id.* at 63.

29. *Id.*

30. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 40 (3d ed. 2015).

process of ‘othering’ to immediately visible corporeal characteristics facilitated the recognition, surveillance, and coercion of these people, these ‘others.’ This phenomic differentiation helped render certain human bodies exploitable and submissible.<sup>31</sup>

By contrast, religious differences have been defined not by phenotypical differences but by faith-based choices that shape beliefs and conduct. In fact, physical appearance is such an unreliable indicator of sectarian loyalties that individuals sometimes use visual cues, or “badges of faith,” to signal their solidarity with similarly committed co-religionists.<sup>32</sup>

The stigma attached to badges of faith operates differently than the mark of race. Phenotypical traits are not easily altered, so using race to create hierarchy entrenches disadvantage and difference.<sup>33</sup> However, social pressure can force the devout to become more private about their beliefs, abandon traditional expressions of faith, convert to another denomination, or renounce religion altogether. These dynamics clearly have been directed at individuals whose dress is rightly or wrongly equated with the Islamic faith. As anthropologist Richard Sosis explains,

we can confidently categorize the distinct turbans and beard styles of Sikhs as badges that signal group commitments. However, these badges also prevent them from participating in activities where Sikhs are unwelcome, which in the United States following 9/11 was apparently quite a few, as Sikhs found themselves the misplaced targets of anti-Muslim bigotry. These badges essentially put a tax on events that, whether implicitly or explicitly, sought to restrict Sikh participation.<sup>34</sup>

As the Sikh experience suggests, the more costly the signaling, the higher the sense of collective solidarity must be to sustain overt religious practices.<sup>35</sup> In some cases, coercion can prompt new forms of affiliation. For instance, Sikhs have formed interfaith coalitions with Muslims in the

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31. *Id.* at 247.

32. Richard Sosis, *Religious Behaviors, Badges, and Bans: Signaling Theory and the Evolution of Religion*, in *WHERE GOD AND SCIENCE MEET: HOW BRAIN AND EVOLUTIONARY STUDIES ALTER OUR UNDERSTANDING OF RELIGION* 61, 66-67 (PATRICK MCNAMARA Ph.D. ed., 2006).

33. OMI & WINANT, *supra* note 30, at 247-48.

34. Sosis, *supra* note 32, at 70.

35. *Id.* at 78-80.

wake of September 11th.<sup>36</sup> In other cases, this heightened pressure can lead group members to distance themselves from a disfavored identity.<sup>37</sup>

Despite the distinctive dynamics of race and religion, Professor Aziz leans heavily on racial identity to explain the Muslim experience. Yet, it seems entirely possible that proliferating differences are destabilizing notions of race. As sociologist Richard Alba has found, intermarriage is complicating the meaning of racial identities,<sup>38</sup> and individuals are already inconsistent when they self-identify by race.<sup>39</sup> In addition, others' perceptions of racial identity may be changing, especially for groups in the racial "middle," such as Middle Eastern/North African (MENA) and Latinx.<sup>40</sup> For Blacks and Whites, race has been associated with characteristics like ancestry and phenotype, but for a MENA identity, other traits— such as being Muslim or Jewish, having a Middle Eastern name, or speaking Arabic—can play an important role.<sup>41</sup> For those seeking to identify someone as Latinx, biological cues have weak effects, and sociocultural traits, like having a Spanish name or speaking Spanish, are weightier considerations.<sup>42</sup>

The challenges posed by the racial middle suggest "the growing complexity of the U.S. racial system and the inadequacy of referring to it as solely based on institutionalized ancestry logics."<sup>43</sup> All of this creates a quandary about the precise meaning of race. Returning to Professor Aziz's analysis, should we treat being Muslim as a proxy for race? Or does that unfairly conflate race and religion in ways that conceal the distinct injuries of Islamophobia?<sup>44</sup> If religion is a separate trait, how should religious hierarchy be defined and how does it intersect with race, particularly if voluntary religious

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36. Yen Le Espiritu, *Race and U.S. Panethnic Formation*, in RONALD H. BAYOR, *THE OXFORD HANDBOOK OF AMERICAN IMMIGRATION AND ETHNICITY* (Aug. 2016), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199766031.001.0001/oxfordhb-9780199766031-e-013>.

37. See Mehdi Bozorgmehr, et al., *Panethnicity Revisited: Contested Group Boundaries in the Post-9/11 Era*, 39 *ETHN. & RAC. STUD.* 727, 739–41 (2015) (noting that South Asians rejected a pan-ethnic identification with Middle Easterners).

38. RICHARD ALBA, *THE GREAT DEMOGRAPHIC ILLUSION: MAJORITY, MINORITY, AND THE EXPANDING AMERICAN MAINSTREAM* 123-33 (2020).

39. See, e.g., Carolyn Liebler, et al., *America's Churning Races: Race and Ethnicity Response Changes Between Census 2000 and the 2010 Census*, 54 *DEMOGRAPHY* 259 (2017) (describing how approximately 6% of respondents shifted their racial and ethnic identities in various ways).

40. Ariela Schacter, et al., *Ancestry, Color, or Culture?: How Whites Racially Classify Others in the U.S.*, 126 *AM. J. SOC.* 1220, 1221 (2021).

41. *Id.* at 1240.

42. *Id.*

43. *Id.* at 1241.

44. See Swethaa S. Ballakrishnen, *Making It Halal: Blasé Discrimination and the Construction of the "Good" Muslim Lawyer* 18-20 (unpublished manuscript) (on file with author) (describing how Muslim attorneys at law firms often find that micro-aggressions against them are invisible, in part because their identity is not seen as an important element of diversity).

practices are more malleable than ancestry and phenotype? These are significant questions with far-reaching consequences as the size of the nation's racial middle grows through immigration and intermarriage.

## II. Contemporary Wrongs and the Role of Racialization

Professor Aziz argues that the contemporary discrimination that Muslims face is rooted in a tradition of European orientalism, which was transplanted to the United States and treats Islam as “an imposter religion” that “served carnal interests, was led by wicked men, used craft and fraud, and was spread by force.”<sup>45</sup> Even so, before World War II, the United States had little contact with the Islamic world, which in turn allowed the rare Arab or Muslim immigrant to integrate into adopted communities.<sup>46</sup> Syrians, for instance, were able to naturalize and become U.S. citizens as free, White persons, though many of them emphasized that they were practicing Christians to do so.<sup>47</sup>

In 1965, Muslim immigrants began to arrive in the United States in substantial numbers.<sup>48</sup> Amid ongoing conflicts in the Middle East, the newcomers' reception was inextricably linked to global politics.<sup>49</sup> According to Professor Aziz, immediately following World War II, the United States became concerned with preserving access to Middle Eastern oil reserves and containing Soviet influence.<sup>50</sup> In fact, she asserts that the United States sought “to use Islam as a vehicle to mobilize Muslims against godless Soviet influence and secular Arab nationalist leaders.”<sup>51</sup> Conflicts between Arab nations and Israel over territory in the Middle East prompted concerns about Islamic terrorism.<sup>52</sup> Those worries in turn shaped domestic policy directed at Arab communities in the United States. For instance, after a Palestinian resistance organization killed Israeli athletes at the 1972 Munich Olympics, President Richard Nixon's administration ordered covert surveillance of Arab communities and deported hundreds of Arab immigrant activists.<sup>53</sup> These fears reached new heights in 1979 when Iran underwent a revolution and took Americans hostage at the U.S. embassy in Tehran.<sup>54</sup> This time, President

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45. AZIZ, *supra* note 4, at 91 (footnote omitted).

46. *Id.* at 92, 95-96.

47. *Id.* at 96-103.

48. *Id.* at 113.

49. *Id.* at 113-14.

50. *Id.* at 114-15.

51. AZIZ, *supra* at 119 (footnote omitted).

52. *Id.* at 120-21.

53. *Id.* at 121-22.

54. *Id.* at 125.



Jimmy Carter's administration intensified surveillance and increased deportations of Iranian nationals, most of whom were Muslim graduate students.<sup>55</sup>

According to Professor Aziz, "[w]hen the Soviet Union fell in 1990, American policy makers warned that Islam would replace Communism as the global threat to US national security."<sup>56</sup> During the Gulf War that year, President George H.W. Bush described the coming conflict as a battle "for good versus evil," and the United States increasingly saw itself as locked into a clash of civilizations with the Muslim world.<sup>57</sup> After the terrorist attack on the World Trade Center on September 11, 2001, this rhetoric took on a new intensity. High-profile government officials and leading evangelicals openly questioned the legitimacy of Islam as a religion, instead characterizing it as a political ideology that threatened fundamental American values.<sup>58</sup> Once again, the federal government responded, this time addressing the threat to national security through surveillance, registration, detention, and deportation of Muslim immigrants.<sup>59</sup> Fears of the Muslim world culminated in President Donald J. Trump's 2017 executive order, known as the "Muslim ban," which halted admissions from seven majority Muslim countries, even if individuals had resided in the United States for long periods.<sup>60</sup> Although the federal courts stayed the initial ban,<sup>61</sup> the U.S. Supreme Court eventually upheld a later version, which included some nations that did not have a majority Muslim population.<sup>62</sup>

Professor Aziz believes that these developments reflect a process of racialization, which diminishes Muslims' claims to religious freedom. Adherents are racially suspect, and their faith is deemed antithetical to an American way of life.<sup>63</sup> As a result, equality and liberty cease to be mutually constitutive safeguards of democratic inclusion. Instead, a racially subordinated status casts doubt on the authenticity of religious beliefs and practices. This account resonates with Omi and Winant's theory of racial formation. In their view, "[i]n periods of social dislocation and economic decline, race has come to mark those groups who signify corruption and dilution of the national spirit and purpose."<sup>64</sup> The racialization of immigrants in general, and Muslims in particular, is part of a transnational project that relies on status

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55. *Id.* at 125–26.

56. *Id.* at 115 (footnote omitted).

57. AZIZ, *supra* at 128–29.

58. *Id.* at 135–40.

59. *Id.* at 174–77.

60. *Id.* at 177.

61. *See, e.g.,* Washington v. Trump, 847 F.3d 1151, 1167–68 (9th Cir. 2017) (per curiam).

62. Trump v. Hawaii, 138 S. Ct. 2392, 2415–23 (2018).

63. AZIZ, *supra* note 4, at 153–54.

64. OMI & WINANT, *supra* note 30, at 4.

hierarchies in home countries and the United States.<sup>65</sup> Restrictive immigration policies reflect those hierarchies, and efforts to create pan-ethnic categories of Muslims and Arabs are part of the racialization process.<sup>66</sup> This transnational project requires the nation-state to police the boundaries between civil society and “an *outside* that is not civil.”<sup>67</sup> The result is the “supervision and control of the racial ‘threat’ in defense of an ever-more confined and restricted zone of prosperity: the ostensibly ‘civil’ society of neoliberalism.”<sup>68</sup> For Omi and Winant, racialization becomes the template for other sociopolitical cleavages and conflicts, including unprecedented border enforcement that is increasingly militarized and defies any claim to colorblindness.<sup>69</sup>

These observations alert us to an important distinction between the historical experiences of Catholics, Jews, and Mormons and today’s Muslim population. In an earlier era, religious differences called into question an individual’s fitness for democratic self-governance, but those anxieties were not linked to global conflict in the same way that the contemporary treatment of Muslims is. The use of military force against countries of origin did not figure as significantly in depictions of earlier religious minorities, nor was there the same official capacity for surveillance and deportation of suspect groups. The global village has changed, and so the trope of foreignness marked by “forever wars” against implacable enemies plays an unprecedented part in the construction of immigrants.<sup>70</sup> Whether these conflicts are described as “border wars” or “wars on terror,” they involve sustained militarization that shapes the immigrant experience in profound ways.<sup>71</sup> For that reason, it seems worthwhile to interrogate the narrative of racialization further. Is this narrative all encompassing, as Professor Aziz suggests? Or is it part of interlocking narratives that rely heavily on national origin and immigration status to limit entitlements and undermine religious freedom?

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65. *Id.* at 125–26.

66. *Id.* at 130–31.

67. *Id.* at 230 (emphasis in original).

68. *Id.*

69. *Id.* at 238, 246, 258.

70. See Barbara Lee, *Ending the Post 9/11 Forever Wars*, BRENNAN CTR. FOR JUST. (Sept. 9, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/ending-post-911-forever-wars>.

71. See Christopher Rivera, *The Brown Threat: Post 9/11 Conflations of Latina/os and Middle Eastern Muslims in the US American Imagination*, 12 *LATINO STUD.* 44, 49–50 (2014); see also Jonathan Powell, *How the War on Terror Led to the Forever Wars*, *THE NEW STATESMAN* (Sept. 10, 2021), <https://www.newstatesman.com/world/2021/09/how-the-war-on-terror-led-to-the-forever-wars> (describing links between the response after 9/11 and forever wars in the United Kingdom, the United States, and the West more generally); see also Vanda Felbab-Brown, *9-11 and the U.S.- Mexico Border: New Challenges 20 Years Later*, *BROOKINGS* (Sept. 10, 2021), <https://www.brookings.edu/opinions/9-11-and-the-us-mexico-border-new-challenges-20-years-later/>.

Leading scholars of the Muslim experience cite the role of racialization in constructing a subordinated identity. Law professor Leti Volpp argues that in the wake of the attacks on the World Trade Center on September 11, 2001, a category of “Middle Eastern, Arab, or Muslim” was predicated on “racialization wherein members of this group are identified as terrorists and are disidentified as citizens.”<sup>72</sup> As evidence, she cites the rise of racial profiling based on a Middle Eastern, Arab, or Muslim appearance, a technique the government has regularly used for dragnets, enforcement sweeps, and airport security measures.<sup>73</sup> According to Volpp, these official tactics emboldened individuals to commit hate crimes in the wake of September 11th.<sup>74</sup> Similarly, legal scholar Muneer Ahmad draws connections between racial profiling and hate crimes, arguing that immigration officials have relied on race-based policies and practices to marginalize Arabs, Muslims, and South Asians.<sup>75</sup> This racialization process is expressed through a “Muslim-looking” construct that “is neither religion- nor conduct-based” but instead “has considerable, if not predominant, racial content and is preoccupied with phenotype rather than faith or action.”<sup>76</sup>

Not all accounts of the Muslim experience emphasize racialization as the overriding dynamic. Susan Akram and Kevin Johnson describe the compound effects of race, national origin, religion, culture, and political ideology, all of which contributed to the intensity of the nation’s response to the September 11th attack.<sup>77</sup> Shirin Sinnar identifies both race and religion as playing a critical role in the surveillance and detention of Arab Muslims.<sup>78</sup> According to Khaled Beydoun, Islamophobia has a logic of its own, operating as “a fluid and dynamic system whereby lay actors and law enforcement target Muslim Americans based on irrational fear and hatred.”<sup>79</sup> Although recognizing the role of racial stereotyping, Beydoun sees religion as a critical element of the hostile treatment that Muslims have suffered.<sup>80</sup> Finally, Abed

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72. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1575-766 (2002).

73. *Id.* at 1576-80.

74. *Id.* at 1580-83.

75. Muneer Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1323-27 (2004).

76. *Id.* at 1278.

77. Susan Akram & Kevin Johnson, *Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy: Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 299 (2002).

78. Shirin Sinnar, *The Lost Story of Iqbal*, GEO L.J. 379, 384 (2017).

79. Khaled A. Beydoun, *Muslim Bans and the (Re)making of Political Islamophobia*, 2017 U. ILL. L. REV. 1733, 1738 (2017) (citing Paul Galloway, *Muslim-American or American Muslims? Why It Matters*, MUSLIM MATTERS (Apr. 19, 2011), <https://muslimmatters.org/2011/04/19/muslim-american-or-american-muslims-here-is-why-it-matters/>).

80. *Id.* at 1736-39.

A. Ayoub identifies national origin as playing a significant part in oppressing Muslims, precisely because this trait leaves them vulnerable to aggressive immigration enforcement. According to Ayoub, concerns about religious freedom have largely been eclipsed by anxieties about the dangers that foreigners pose.<sup>81</sup>

If immigration and intermarriage are complicating notions of race, it seems entirely possible that demographic shifts are also affecting the dynamics of racialization. Officials may no longer see formal racial categories as essential instruments for managing minority populations. In her book, Professor Aziz does not address unsuccessful campaigns to add MENA as a separate racial or ethnic category on the United States Census.<sup>82</sup> Advocates called for the change to reflect a shared identity in the wake of September 11th, but federal officials repeatedly rejected the effort to treat these individuals as non-White.<sup>83</sup> The refusal to add another formal category to the Census raises interesting questions about contemporary racialization. For one thing, the MENA community is in the racial middle with a heterogeneity that may defy straightforward categorization.<sup>84</sup> Meanwhile, other means of monitoring vulnerable groups may make racial classifications less necessary for surveillance and control. Most notably, the immigration system has grown to be a highly effective means to manage suspect populations. Government agencies keep comprehensive data on those who enter the country legally, and they have considerable leeway to police unlawful entry. This process of oversight and discipline has grown even more exacting during times of perceived threat, as was true in the wake of September 11th.<sup>85</sup> Moreover, for Muslims, religious practices offer opportunities to target members. Co-religionists regularly gather to worship, and sites like mosques become easy

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81. Abed A. Ayoub, *A Muslim Registry: A Look at Past Practices and What May Come Next*, in *ISLAMOPHOBIA AND THE LAW* 154 (Cyra Akila Choudhury & Khaled A. Beydoun eds. 2020).

82. Memorandum from Albert E. Fontenot, Jr., Associate Director for Decennial Census Programs, on Using Two Separate Questions for Race and Ethnicity in 2018 End-to-End Census Test and 2020 Census (Jan. 26, 2018). This controversy has persisted, and in June 2022, the Biden Administration announced that the Office of Management and Budget would begin another formal review on the way race and ethnicity statistics are collected, including the proposed MENA category; See also Hansi Lo Wang, *Biden Officials May Change How the U.S. Defines Racial and Ethnic Groups by 2024*, NPR (June 15, 2022), <https://wamu.org/story/22/06/15/biden-officials-may-change-how-the-u-s-defines-racial-and-ethnic-groups-by-2024/>.

83. Neda Maghbouleh, et al., *Middle Eastern and North African Americans may not be perceived, nor perceive themselves, to be White*, PNAS, Jan. 5, 2022, at 1, 8, <https://www.pnas.org/doi/pdf/10.1073/pnas.2117940119> (noting that the federal government classifies Middle Eastern and North African Americans as White, although this may contribute to ongoing inequalities these individuals experience; however, some group members fear more granular identification would put them at risk of government intrusion into their privacy).

84. Bozorgmehr et al., *supra* note 37, at 732.

85. Ayoub, *supra* note 81, at 161-68.

targets for surveillance.<sup>86</sup> Muslims who organize for charitable or political purposes can be readily infiltrated based on concerns about national security.<sup>87</sup> In short, it is not evident that race is a more important characteristic than national origin or religion when officials deal with concerns about the loyalty of Muslims in the United States.

Nor is it clear that racialization is the primary basis for the Muslim community's response to hostility and bias. It is true that activists sought to use the MENA classification to reinforce solidarity and promote political mobilization.<sup>88</sup> However, Professor Aziz's account demonstrates a range of strategies, both individual and collective, that Muslims use to combat prejudice. At the individual level, they have deployed their religious practices and political commitments to identify themselves as "good" or "bad" Muslims.<sup>89</sup> According to Professor Aziz, the most suspect Muslims are devout or dissident or both.<sup>90</sup> Meanwhile, "[t]hose most likely to escape the harms of racialization are Muslims willing to pay . . . the racial bribe. They adopt lifestyles, associations, and anglicized names that signal they are secular and nondissident."<sup>91</sup> Though Professor Aziz describes these efforts to assimilate as a racial bribe, the behaviors are rooted in voluntary choices, ones that arguably capitalize on the racial ambiguities of a middle category. In fact, Aziz's analysis undercuts any straightforward racialization process by directly contradicting Muneer Ahmad's description of a "Muslim-looking" construct indifferent to faith and conduct and dependent entirely on physical appearance.<sup>92</sup>

Professor Aziz also evaluates collective efforts to deploy an Abrahamic religious identity as "a strategy for deracializing and depoliticizing Muslims."<sup>93</sup> Although she labels this effort as a "new racial project,"<sup>94</sup> she also

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86. See, e.g., *FBI v. Fazaga*, 142 S. Ct. 1051, 1058-59, 1062-63 (2022) (describing extensive infiltration and surveillance of Muslim communities in southern California; challenges to the enforcement techniques were precluded by the "state secrets" privilege); see also *AZIZ*, *supra* note 4, at 179.

87. *AZIZ*, *supra* note 4, at 179-82.

88. See G. CRISTINA MORA, *MAKING HISPANICS: HOW ACTIVISTS, BUREAUCRATS, AND MEDIA CONSTRUCTED A NEW AMERICAN* 61-82, 126-31, 155-59 (2014) (discussing similar efforts by other groups, and describing how Latinx activists and Spanish-language media executives successfully lobbied for a pan-ethnic classification on the U.S. Census which elevated the Latinx community's visibility as a political and market constituency); Brown & Jones, *supra* note 89, at 188 (noting mixed-race Americans successfully lobbied for recognition on the Census without having been officially ascribed previously).

89. *AZIZ*, *supra* note 4, at 171-74.

90. *Id.* at 171-72.

91. *Id.* at 173.

92. See Ahmad, *supra* note 75, at 1278.

93. Aziz, *supra* note 4, at 194.

94. *Id.* at 193.

describes it as a political project and a faith-based project.<sup>95</sup> Under this strategy, some Muslim community leaders have emphasized Islam's place as one of the three great world religions alongside Christianity and Judaism.<sup>96</sup> Interfaith outreach efforts highlight how all three creeds have strong connections to Abraham and stand in contrast to ways of life that embrace secularism.<sup>97</sup> According to Professor Aziz, these Muslims believe that "interfaith politics will mitigate anti-Muslim racism" by emphasizing values of religious tolerance and pluralism.<sup>98</sup> Some critics have derided these efforts as "faithwashing,"<sup>99</sup> and Professor Aziz herself worries that interfaith outreach does not tackle "systemic racism or the economic inequities of a neoliberal, individualistic society."<sup>100</sup> Moreover, she fears that government officials will deploy this interfaith narrative disingenuously "as a cover for continued anti-Muslim national security practices rather than a basis for deracializing Muslim identity."<sup>101</sup>

Professor Aziz makes clear that, whether at an individual or a collective level, Muslims have not readily acquiesced to a narrative of racialization. Instead, they have drawn on multiple strategies, rooted in their own complex identities, to differentiate and defend themselves. These efforts are not merely reactive. Rather, they demonstrate agency in constructing an identity that must manage the tensions between a sense of solidarity and the realities of ongoing differences.<sup>102</sup> With growing globalization and increased immigration, the heterogeneity of new arrivals makes it increasingly difficult to treat racialization, particularly when defined in terms of appearance, as the driving force in maintaining social stratification. National origin, immigration status, and religion also play critical roles in understanding our growing diversity and intractable divides. In fact, the proliferation of differences may have consequences not only for marginalized groups but also for the larger community that must adapt to an increasingly pluralistic society.

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95. *Id.* at 194-95.

96. *Id.* at 193-94.

97. *Id.* at 194-95.

98. *Id.* at 197.

99. *AZIZ, supra* at 199.

100. *Id.* at 198.

101. *Id.* at 197.

102. Hana Brown & Jennifer A. Jones, *Rethinking Panethnicity and the Race-Immigration Divide: An Ethnoracialization Model of Group Formation*, 1 *SOC. RACE & ETHN.* 181, 185 (2015); Dina Okamoto & G. Cristina Mora, *Panethnicity*, 40 *ANN. REV. SOC.* 219, 221 (2014) (describing how pan-ethnicity, unlike race, involves an "inherent tension" between "[t]he need to manage diversity while promoting an image of cohesion and solidarity").

### III. Demographic Change, Pluralism Anxiety, and the Challenges for Equality and Liberty

A focus on race and racialization does not fully capture the challenges our nation confronts in the face of growing diversity. For one thing, these accounts typically address the impact on a stigmatized group but do not engage with the implications for the democratic polity. Anthropologist Arjun Appadurai contends that the United States is unique in “having organized itself around a modern political ideology in which pluralism is central to the conduct of democratic life.”<sup>103</sup> For that reason, the nation must navigate “the tension between the centripetal pull of Americanness and the centrifugal pull of *diasporic diversity* in American life.”<sup>104</sup> At the heart of this struggle is “the contradiction between group identities, which Americans will tolerate (up to a point) in cultural life, and individual identities, which are still the nonnegotiable principle behind American ideas of achievement, mobility, and justice.”<sup>105</sup>

Some evidence suggests that faced with a proliferation of differences, Americans are retreating into individualism. Political scientist Robert Putnam finds that “immigration and ethnic diversity challenge social solidarity and inhibit social capital,”<sup>106</sup> that is, the sense of connection and attachment essential to the health of the nation-state. He bolsters this claim by pointing out that in areas of greater ethnic diversity, people have less confidence in local government, are less likely to register to vote, and are less inclined to contribute to projects that benefit their communities.<sup>107</sup> As a result, Americans withdraw from collective life, becoming increasingly disengaged and disaffected as trust and confidence decline.<sup>108</sup> To counter these tendencies, Putnam argues that “modern, diversifying societies” like the United States must find a way to create “a new, broader sense of ‘we.’”<sup>109</sup> That is, Americans must reconstruct “diversity [so] that [it] does not bleach out our ethnic specificities, but creates overarching identities that ensure that these specificities do not trigger the allergic, ‘hunker down’ reaction.”<sup>110</sup>

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103. Arjun Appadurai, *Patriotism and Its Future*, 5 PUB. CULTURE 411, 425 (1993).

104. *Id.* (emphasis in original).

105. *Id.*

106. Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century*, 30 SCANDINAVIAN POL. STUD. 137, 138 (2007).

107. *Id.* at 149-51.

108. *Id.*

109. *Id.* at 139.

110. *Id.* at 164.

Political philosopher Will Kymlicka expresses similar concerns about how diversity along a range of dimensions can undermine solidarity.<sup>111</sup> He argues that liberal democracies face a potentially stark choice between solidarity without inclusion and inclusion without solidarity.<sup>112</sup> Under solidarity without inclusion, dynamics like those described by Professor Aziz keep some groups from fully participating in the nation-state.<sup>113</sup> Under inclusion without solidarity, communities “hunker down” and withdraw from communities in the way that Putnam recounts.<sup>114</sup> Kymlicka argues that the ideal should be inclusive solidarity, a situation in which there is a sense of “we” that encompasses and embraces individual differences, but he wonders whether this is a realistic prospect.<sup>115</sup> To achieve that goal, he suggests “a form of multiculturalism that is tied to an ethic of social membership,”<sup>116</sup> but he offers few concrete strategies that would operationalize the concept.<sup>117</sup>

A narrative of racialization, standing alone, is unlikely to produce the transcendent sense of solidarity that Putnam and Kymlicka seek. As Putnam’s research shows, Americans understand diversity along a range of dimensions, not just racial ones. Building on these findings, legal scholar Kenji Yoshino concludes that this kind of generalized “pluralism anxiety” already has influenced our constitutional jurisprudence in significant ways.<sup>118</sup> He defines pluralism anxiety as “an apprehension of and about [our country’s] demographic diversity.”<sup>119</sup> Like Putnam and Kymlicka, Professor Yoshino worries that a wide array of differences will undermine the nation’s cohesion and sense of collective purpose, thus weakening its democratic possibilities.<sup>120</sup> According to Yoshino, the Supreme Court has responded to pluralism anxiety by turning away from equality jurisprudence and embracing a more universal set of liberty interests.<sup>121</sup> The Court has declined to recognize new group-based classifications that trigger heightened scrutiny under the Equal Protection Clause. This approach avoids the balkanization that can come with choosing among constituencies, each demanding special

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111. Will Kymlicka, *Solidarity in Diverse Societies: Beyond Neoliberal Multiculturalism and Welfare Chauvinism*, 3 COMP. MIGRATION STUD. 1 (2016).

112. *Id.* at 8.

113. *Id.* at 7-8 (discussing exclusionary practices affecting immigrants).

114. *See id.* at 6.

115. *Id.* at 8.

116. *Id.* at 12.

117. Kymlicka, *supra* at 12-13.

118. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011).

119. *Id.*

120. *Id.* at 751-52.

121. *Id.* at 748-49.



protection against majoritarian overreaching.<sup>122</sup> For similar reasons, the Justices have weakened equality-based safeguards for traditionally protected groups as a way to minimize the dangers of pitting constituencies against one another in a zero-sum game.<sup>123</sup>

Professor Yoshino contends that the Court's shift away from equality-based dignity claims does not portend the end of civil rights because of the Justices' emerging focus on liberty-based dignity claims, "which draw[] on a broader, more inclusive form of 'we.'"<sup>124</sup> This new approach allows the Court to avoid selecting among groups by emphasizing that the constitutional rights in question belong to all persons.<sup>125</sup> For Professor Yoshino, the great advantage of a liberty-based approach is that it "stresses the interests we have in common as human beings rather than the demographic differences that drive us apart."<sup>126</sup> He maintains that this constitutional strategy can yield a happy dividend: liberty and equality once again become mutually constitutive guardians of democratic self-governance.

Not all scholars believe that universal promises of constitutional liberty can perform this critical function. Constitutional law scholar Rebecca L. Brown notes that "[c]ourts have been reluctant to make the judgments necessary to constrain majority rule for the sake of protecting . . . important individual liberties."<sup>127</sup> She contends that the democratic process works best when there is a "communion of interests" between representatives and their constituents.<sup>128</sup> This process functions most easily under conditions of social homogeneity, but heterogeneity can yield significant benefits when it deepens and refines an understanding of the common good.<sup>129</sup> Brown recognizes that the Framers went out of their way to protect certain divergent viewpoints, including religious beliefs and political viewpoints, from the majoritarian pressures of the representative process.<sup>130</sup> Unfortunately, expressly protected liberty interests are few in number,<sup>131</sup> and breakdowns in the

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122. *Id.* at 755-59.

123. *Id.* at 763-73.

124. Yoshino, *supra* at 776.

125. *Id.* at 778.

126. *Id.* at 793. See also David E. Bernstein, *Roots of the "Underclass": The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 135 (1993) (arguing for a civil liberties approach to fight discrimination).

127. Rebecca L. Brown, *Liberty, the New Equality*, 77 NYU L. REV. 1491, 1496 (2002).

128. *Id.* at 1497.

129. *Id.* at 1517-18.

130. *Id.* at 1519-20.

131. *Id.* at 1557. Brown's concern about the paucity of enumerated liberty interests in the Constitution was brought home by the Court's recent decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022) (striking down the right to abortion

representative process, that is, a we/they mentality, can imperil “[t]he eccentric, the marginalized, the different.”<sup>132</sup> Brown doubts that a limited set of liberty interests can safeguard against facially neutral legislation that burdens individuals differently.<sup>133</sup> For example, universal promises to protect religious liberty can leave minority faiths at a disadvantage if they lack the wherewithal to compete for public funding granted on a purportedly neutral basis. In fact, government subsidies for better-resourced religious organizations can worsen disparities and leave minority faiths even more vulnerable to ostracism.<sup>134</sup>

The Muslim experience illustrates how liberty-based dignity claims can fail to reach the most marginalized. Muslims in detention facilities have challenged denial of access to the Quran, prayer rugs, and food and clothing appropriate to their faith.<sup>135</sup> Federal courts have concluded that these detainees are not persons with enforceable rights to religious freedom. One decision found that enemy combatants held at Guantanamo Bay are non-resident aliens and are therefore not “persons” entitled to protections under the Religious Freedom Restoration Act (RFRA).<sup>136</sup> A Virginia district court built on this precedent to conclude that immigrants stopped at the border reside outside the United States. Though not enemy combatants, these detainees are also not persons entitled to protections under RFRA.<sup>137</sup> For Omi and Winant, these recent cases are evidence of a transnational racial project that culminates in the depersonalization of those outside the boundaries of civil society. For Appadurai, on the other hand, the decisions reveal how battles over diasporic identities transpire at the border. Whatever the interpretation, the holdings clearly demonstrate that liberty interests, including the freedom to worship, can be deployed in ways that reinforce, rather than transcend, we/they divisions.

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because it does not expressly appear in the text of the Constitution and is not deeply rooted in our nation’s history and traditions).

132. Brown, *supra* note 127, at 1532.

133. *Id.* at 1545-46. See also Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of “Neutrality Theory” and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 243, 246 (1999) (concluding that “neutrality theory really isn’t very neutral. Far from minimizing government incentives relating to religious decisions, the theory tolerates and even encourages government decisions that will influence religious choices and behaviors.”).

134. Brownstein, *supra* note 133, at 282-83.

135. Abby Porter, Note, *RFRA at the Border: Immigration’s Entry Fiction and Religious Free Exercise*, 108 VA. L. REV. 223, 224-25 (2022).

136. *Rasul v. Myers*, 512 F.3d 644, 671-72 (D.C. Cir. 2008), *aff’d in part and rev’d in part*, 563 F.3d 527, 533 (D.C. Cir. 2009).

137. *Bukhari v. Piedmont Reg’l Jail Auth.*, No. 01:09-CV-1270, 2010 WL 3385179 (E.D. Va. Aug. 20, 2010).

Putnam's account of how diversity undermines solidarity is focused on dynamics at the local level. As a result, it makes sense to consider not just judicial or legislative responses but also community-based initiatives. One effort to promote liberty, equality, and solidarity relies on "targeted universalism." This strategy embraces universal goals but uses targeted strategies to address differences in the ability to achieve those goals.<sup>138</sup> The emphasis on universal goals helps to build solidarity and overcome polarization by capitalizing on "a degree of legitimacy [that these goals enjoy] in a diverse and pluralistic society."<sup>139</sup> At the same time, targeted processes avoid exacerbating inequality by countering the assumption that all constituents are similarly able to benefit from universal programs.<sup>140</sup> The shared goal "counters forces that divide in- and out-groups,"<sup>141</sup> and the targeted approach focuses on structural barriers rather than group characteristics.<sup>142</sup> Both elements of the strategy are designed to prevent balkanization. Targeted universalism also treats liberty and equality interests as mutually constitutive. Aspirational goals create the foundation for authentic liberty, while targeted interventions avoid the dangers of leveling down.<sup>143</sup> Though preliminary, some evidence suggests that targeted universalism has succeeded on the grass-roots level in communities undergoing demographic change.<sup>144</sup> Importantly, these experiments do not single out any particular dimension of difference, instead allowing communities themselves to grapple with the complexities of pluralism and the anxiety it entails.

#### IV. Conclusion

Professor Sahar Aziz's book offers an illuminating account of the immigrant Muslim experience in the United States, but it does more than that. It provides readers with an opportunity to reflect on whether a narrative of race and racialization remains the most powerful way to understand proliferating differences in the United States. As globalization and immigration lead to increasing demographic diversity, other characteristics like national origin, immigration status, and religion can be highly relevant to any analysis

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138. John A. Powell, et al., *Targeted Universalism: Policy & Practice*, HAAS INSTITUTE FOR A FAIR AND INCLUSIVE SOCIETY 5 (May 2019), [https://haasinstitute.berkeley.edu/sites/default/files/targeted\\_universalism\\_primer.pdf](https://haasinstitute.berkeley.edu/sites/default/files/targeted_universalism_primer.pdf).

139. *Id.*

140. *Id.* at 5, 10.

141. *Id.* at 16.

142. *Id.* at 33.

143. *Id.* at 18.

144. HEATHER MCGHEE, *THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER TOGETHER* 253-54, 258 (2021) (arguing that pursuing universal but targeted strategies will yield a "solidarity dividend" that is better for everyone).

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of social stratification and subordination. Those complications can influence not only how the marginalized understand their place in our nation, but also how our nation understands its place in the world.

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