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# Religious Liberty and the Financial War on Terror

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# RELIGIOUS LIBERTY AND THE FINANCIAL WAR ON TERROR

MALICK W. GHACHEM\*

## ABSTRACT

This Article looks at the intersection between the war on terror and the law of religious liberty as it applies to Muslim Americans. Focusing on the Muslim charity cases of the post-9/11 era, the essay argues that Muslim American religious liberty claims have been marginalized not because federal judges have internalized popular fears of Muslims as dangerous, but because of two doctrinal dynamics internal to First Amendment law. First, the law of material support of terrorism

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\* Associate Professor of History, Massachusetts Institute of Technology. Since 2010, the author has taught at the University of Maine School of Law, where this work was completed in near-final form. A special thanks to Erica James for reading several versions of this article and suggesting how to improve it. I am indebted to the staff of *First Amendment Law Review* for meticulous editing, and especially to editor-in-chief Ethridge “Britt” Ricks for his high standards, patience, and empathy. Bill Marshall’s deep understanding of and passion for the First Amendment inspired me to pursue this subject further; I cannot thank him enough for his generosity as well as the brilliance of his example. Thanks also to Zach Heiden, Rich Schragger, Harvey Silverglate, Ramzi Kassem, Jenny Wriggins, Dave Owen, Mel Zarr, Aziz Rana, Greg Kalscheur, Dmitry Bam, Sarah Schindler, Christopher McCrudden, Peter Pitegoff, Marty Rogoff, Dave Cluchey, Kay Guinane, Deirdre Smith, Aziz Huq, Laura Underkuffler, participants in the University of Michigan Legal Theory Workshop, and the Suffolk Law School faculty for conversations and reactions to sketches or drafts. Zach Caunter was an exceptionally helpful aide to this project. Thanks to Tammie Snow and Ryen Schimerman for additional research assistance, and to Sherry McCall for help with interlibrary loans. It goes without saying that none of these persons is responsible for the views expressed here. Disclosure: from 2005 to April 2007, the author represented Emadeddin Z. Muntasser in *United States v. Muntasser* (Crim. No. 05-40026-FDS) and *Muntasser v. Ridge* (Civ. No. 04-11259-RWZ), both litigated in Federal District Court for the District of Massachusetts. While neither case is discussed herein, the criminal action involved tax fraud charges against the former leaders of a Boston-based Muslim charity.

overrides religious liberty claims with the principle of fungibility, which denotes an organization's inherent ability to offset the cost of illegal activities with innocent funds. That principle, systematically conflating legal and illegal forms of religious exercise, effectively turns a longstanding requirement of strict scrutiny, the least restrictive means test, on its head. Second, non-establishment and church autonomy have shifted the ground beneath free exercise. Because separation of church and state seems to require a "hands off" approach to the regulation of religious institutions, the sweeping measures of counterterrorism strategy fill the void. The Article points to Britain's relative success in pursuing less drastic strategies against an establishmentarian backdrop. That experience suggests that fungibility is not so much wrong as irrelevant and unnecessary where proof of actual support for or knowledge of a specific act of terrorist violence is available. Nonetheless, fungibility is here to stay for the foreseeable future. The Article concludes by taking the measure of fungibility's burden on the law of religious liberty more generally.

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## INTRODUCTION

The church-state field has many general “models” and standards that operate as the functional equivalent of an algorithm. Plug in the government on one side and any religious party (Quaker, Catholic, Buddhist, Jewish, etc.) on the other, and a “neutral” theory of religious liberty should generate a correct result that applies across the board, independent of culture, politics, and history. Thus, we have theories of “equal liberty” and “equal liberty of conscience,” prescriptions of “no money and no coercion,” statements of “substantive neutrality” (itself defined in opposition to “formal neutrality”), “church autonomy,” and now “freedom of the church”—to take a few of the more notable recent examples.<sup>1</sup> The impulse to justify or critique one or another form of

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1. See generally CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 4 (2007); MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY* (2008); NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* (2005); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 *DEPAUL L. REV.* 993 (1990); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 *COLUM. L. REV.* 1373 (1981); Steven D. Smith, *Freedom of Religion or Freedom of the Church?*, San Diego Legal Studies Paper No. 11-061 (Aug. 17, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1911412](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911412). See also ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* (2013); Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 *VA. L. REV.* 917 (recommending reliance on a general theory of conscientious objection in

religious freedom in abstract terms seems a necessary and unceasing part of the law and religion enterprise, notwithstanding legal-historical accounts of religious liberty that make clear no single theory of church-state law can account for the tremendous pluralism and dynamism of American religious conflict and collaboration.<sup>2</sup> The case law, meanwhile, follows a judicial variation on this theme: identify the governing legal standard, be it constitutional or statutory, boil down the messy religious and other particulars of the case to the dispositive legal issue, and then derive a neutral result in terms that can be justified on general grounds.

This tendency is understandable, even commendable. Casuistry in the area of church and state, as in any area of law, can be a bad thing.<sup>3</sup> Most of us believe that like cases should be treated alike, and that, in principle, no area of law is incapable of being analyzed with such evenhandedness. The study of religious liberty in the era of the “war on

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lieu of institution-based religious liberty arguments). Cf. 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 1 (2006) (“[S]ound approaches to the state’s treatment of religion cannot be collapsed into any single formula or set of formulas.”). For a critique of general theories of secularism and neutrality in the law of religious freedom, see William P. Marshall, *Progressives, the Religion Clauses, and the Limits of Secularism, in THE CONSTITUTION IN 2020* 231–42 (Jack M. Balkin & Reva B. Siegel eds., 2009). See also Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 *GEO. L. J.* 1691, 1691, 1714 (1988) (comparing the shortcomings of the “accommodation” principle to those of “neutrality”). MARC O. DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM* 1 (2013), which appeared after this article was submitted for publication, is a thoughtful critique of theory’s “self-assured, single-minded drive to evaluate, justify, and adjudge.” I am uncertain where DeGirolami’s approach, with its reliance on the “social and doctrinal history” of the religion clauses, would leave us as to the issues addressed in this article.

2. See, e.g., SARAH BARRINGER GORDON, *THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA* (2010); EVAN HAEFELI, *NEW NETHERLAND AND THE DUTCH ORIGINS OF AMERICAN RELIGIOUS LIBERTY* 8 (2012) (arguing that relationships of conflict and accommodation between two or more different religious groups, and not any putatively abstract category of “tolerance” or “toleration,” drive the story of early American religious liberty). Note the comment on the jacket cover of Gordon’s book by the legal historian William Nelson, contrasting historical with theoretical accounts of religious liberty.

3. But see ALBERT R. JONSEN & STEVEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* (1988). The basic approach to constitutional interpretation at issue here is perhaps best captured in Herbert Wechsler’s famous essay, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959).

terror,”<sup>4</sup> however, inevitably entails a disproportionate emphasis on the legal condition of one particular American religious community: Muslim Americans. And the generalizing scholarship just described does not like to focus on specific religious communities, for such a focus seems to exude an air of casuistry and identity politics that is incapable of making any genuine “theoretical” contributions to the law of religious liberty. There is some validity to that concern, too. But finally it participates in a catch-22 situation: because the law of religious liberty is itself conceived of in general, theoretical terms, any analysis of that law that fails to match its generality and neutrality inevitably falls short of the desired mark.

One result is that we have very little understanding of what has happened to the law of religious liberty in the context of the war on terror, despite concerns that Muslim Americans have increasingly faced profiling, political and social marginalization, and worse in the years since 9/11.<sup>5</sup> The leading scholarly hypothesis infers that federal judges

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4. Scare quotes around the phrase “war on terror” are omitted hereafter: there is a longstanding debate, not to be resolved here, about the best way to describe the American government’s military and law enforcement responses to 9/11. For a glimpse at the bureaucratic dimensions of this debate, see Scott Wilson & Al Kamen, ‘*Global War on Terror*’ Is Given New Name, WASH. POST (Mar. 25, 2009), [http://articles.washingtonpost.com/2009-03-25/politics/36918330\\_1\\_congressional-testimony-obama-administration-memo](http://articles.washingtonpost.com/2009-03-25/politics/36918330_1_congressional-testimony-obama-administration-memo). See also JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 103–06 (2007).

5. More than half of Muslim Americans (54%) believe the federal government’s counter-terrorism policies “single out Muslims for increased surveillance and monitoring.” *Muslim Americans: Middle Class and Mostly Mainstream*, PEW RESEARCH CENTER 4, 36–37 (May 22, 2007). That conviction is especially strong (73%) among native-born Muslim Americans—less so among foreign-born (47%)—and corresponds to Muslim Americans having the lowest level of confidence in the FBI of any major American faith group. *Id.*; *Muslim Americans: Faith, Freedom, and the Future: Examining U.S. Muslims’ Political, Social, and Spiritual Engagement 10 Years After September 11*, ABU DHABI GALLUP CENTER 24 (Aug. 2011) (regarding the FBI statistic). Cf. CHRISTIAN JOPPKE & TOHN TORPEY, LEGAL INTEGRATION OF ISLAM: A TRANSATLANTIC COMPARISON 126–136 (2013) (discussing evidence that Muslim Americans feel themselves to be, and are in fact, substantially integrated into the American economic and political order). These indicators of incorporation and marginalization point in similarly mixed directions with respect to Arab Americans, though the Detroit Arab American Study reports that Arab-American confidence in the federal government is actually higher than

have internalized popular fears of Muslim America as a source of danger to national security.<sup>6</sup> While we cannot exclude this possibility, as an account of legal doctrine it is, at best, incomplete. The problem with this answer is not simply that it assumes facts not in evidence. The hypothesis also reflects an overbroad framing of the question it purports to answer. A litigant can assert many different kinds of religious liberty claims in an American court, and Muslim Americans have appealed to every available category in recent years.<sup>7</sup> Indeed, in the period from 1996 to 2005, Muslim Americans, who by most accounts make up somewhere between one and two percent of the population, had a hand in about fifteen percent of the religious liberty claims brought in federal courts.<sup>8</sup> Therefore, the question cannot be why Muslim Americans, against a backdrop of real and feared marginalization and persecution, have not embraced the protections of the American free exercise tradition more vigorously, as one prominent scholar of law and religion has framed the issue in passing.<sup>9</sup> Nor would it be possible to measure the strength of a

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among non-Arabs. ARAB DETROIT 9/11: LIFE IN THE TERROR DECADE 5–6, 13 (Nadeel Abraham et al. eds., 2011). “[T]here are processes of integration and identification at work in Detroit, and nationally, that representational politics cannot fully register.” *Id.* at 13.

6. See Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231 (2012) (finding that Muslim Americans are slightly more than half as successful as other religious liberty claimants in the federal courts, and concluding that this discrepancy is most likely due to judicial internalization of popular associations of Muslims with terrorism). The evidence that Sisk and Heise adduce is significant, but the methods they bring to bear on that evidence are unsatisfactory. Statistical analysis and inferences based on social and cognitive psychology, by themselves, cannot substitute for an analysis of what judges actually say.

7. See *infra* Part I.C.

8. See Sisk & Heise, *supra* note 6, at 235. The U.S. Census Bureau is barred from asking questions about religious affiliation on a mandatory basis. Pub. L. No. 94-521, § 214(c), 90 Stat. 2459, 2465 (1976). Estimates of the total size of the Muslim American population therefore vary widely. A 2010 Pew Research Center study puts the total at 2,595,000 (0.8% of the total U.S. population). *The Future of the Global Muslim Population: Projections for 2010–2030*, PEW RESEARCH CENTER 163 (Jan. 2011). Other recent estimates range as high as six to seven million. See, e.g., AKBAR AHMED, *JOURNEY INTO AMERICA: THE CHALLENGE OF ISLAM* 7 (2010).

9. See 1 DOUGLAS LAYCOCK, *RELIGIOUS LIBERTY: OVERVIEWS AND HISTORY* 454 (2010) (“With Muslims worried about active persecution arising from the war on terrorism, they have not been especially active in free exercise litigation.”).

specifically Muslim-American legal activism, whether in religious liberty or other terms. During the Second World War, when persons of Japanese descent were detained in internment camps on the American and Canadian west coasts, “[t]he actions of both white and Japanese advocates fused in litigation that was appealed to the highest courts.”<sup>10</sup> A similar merger of civil libertarian and community-level institutional activism has characterized the post-9/11 period.<sup>11</sup>

A more manageable inquiry, by contrast, would take the measure of the actual constitutional doctrine that a “fused” Muslim American-civil libertarian activism has generated in the post-9/11 era. From this perspective, some notable gaps and omissions stand out, making it possible to bring the nature of the Muslim-American religious liberty landscape into greater focus. Most obviously, the Supreme Court has issued no major pronouncements (positive or negative) on religious liberty in connection with the war on terror. Nor has it handed down any significant decisions grounded in substantive due process or free speech principles with far-reaching religious liberty implications.<sup>12</sup> Of course,

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10. STEPHANIE BANGARTH, VOICES RAISED IN PROTEST: DEFENDING NORTH AMERICAN CITIZENS OF JAPANESE ANCESTRY, 1942–49 154 (2008).

11. A skeptic could read the ACLU’s 2009 report challenging the crackdown on Muslim charities—which features Muslim American testimonials to the “chilling” effect of the government’s policies on the free exercise of religion—as the civil libertarian equivalent of a leading question: is it the lawyer or the client who is speaking here? See AMERICAN CIVIL LIBERTIES UNION, BLOCKING FAITH, FREEZING CHARITY: CHILLING MUSLIM CHARITABLE GIVING IN THE “WAR ON TERRORISM FINANCING” 89–115 (June 2009), available at <https://www.aclu.org/sites/default/files/pdfs/humanrights/blockingfaith.pdf>.

12. The single most important religious liberty holding of the post-2001 era, *Hosanna-Tabor Evangelical Lutheran Church v. Equal Emp’t Opportunity Comm’n*, 565 U.S. \_\_\_, 132 S. Ct. 694 (2012), speaks primarily to the church autonomy line of cases, and has at best only indirect relevance to the free exercise issues raised by the war on terror. Dismissing a claim under the Americans with Disabilities Act brought by a religious school teacher who was fired from her job, *Hosanna-Tabor* holds that the religion clauses require that houses of worship be exempted from employment anti-discrimination liability whenever the employee qualifies as a church “minister.” *Id.* at \_\_\_, 132 S. Ct. at 707. The Court’s most important national security opinions have involved the Guantanamo issues: the availability of habeas corpus, the scope of Congress’s power to suspend it, and due process. Many other critical issues arising out of post-9/11 counter-terrorism policies, however— indefinite detention, torture, rendition, and warrantless electronic surveillance—were prevented from reaching the high court, through a combination of prudential



even these silences can be misleading. Perhaps there have simply been no incursions on religious liberty significant enough to justify the intervention of the federal courts, so successfully has the American melting pot managed to integrate Muslim Americans.<sup>13</sup> This objection cannot be dismissed altogether.<sup>14</sup> President Bush's strong statements in defense of toleration and Muslim American religious liberty in the immediate aftermath of 9/11 will be remembered as constituting one of the more generous and hopeful fronts in the war on terror.<sup>15</sup> Although tremendous pressures have been brought to bear on the scope of some of our most cherished civil liberties since 9/11, the resistance to those pressures at the level of constitutional activism has been unrelenting.

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doctrines such as standing and ripeness and the discretionary certiorari power. In 2007, for example, the Sixth Circuit dismissed for lack of standing a challenge to the National Security Agency's warrantless electronic surveillance program. *ACLU v. Nat'l Sec. Agency*, 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 552 U.S. 1179 (2008). This year, the Supreme Court decided a similar case emanating from the Second Circuit on the merits, and held that the plaintiffs lacked standing to bring the case for failure to prove that surveillance of their communications was "certainly impending." *Clapper v. Amnesty Int'l*, 568 U.S. \_\_\_, 133 S. Ct. 1138 (2013). See also *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (affirming district court's dismissal of plaintiff's lawsuit in case alleging constitutional and statutory violations based on extraordinary rendition, indefinite detention, and torture on grounds that national security and foreign policy concerns prevented judicial redress), *cert. denied*, 130 S. Ct. 3409 (2010). This is in sharp contrast to the high court in Britain, which did reach these hot-button controversies. For a brief survey of the British high court's post-9/11 national security decisions, see Richard J. Maiman, *The "War on Terror" in Court: A Comparative Analysis of Judicial Empowerment*, in *THE LEGACY OF THE CRASH: HOW THE FINANCIAL CRISIS CHANGED AMERICA AND BRITAIN* 242 (Terrence Casey ed., 2011), available at <http://www.britishpoliticsgroup.org/Maiman.pdf>.

13. For an argument that the American melting pot has succeeded in diverting American Muslims from committing acts of domestic terrorism similar to those undertaken by co-religionists in Britain and Europe, see Spencer Ackerman, *Religious Protection*, *THE NEW REPUBLIC* (Dec. 12, 2005), available at <http://www.newrepublic.com/article/politics/religious-protection>.

14. The claim that Muslim American free exercise claims may simply be less meritorious than those of other religious groups is addressed and discredited in Sisk & Heise, *supra* note 6, at 269–77.

15. See JOSEPH MARGULIES, *WHAT CHANGED WHEN EVERYTHING CHANGED: 9/11 AND THE MAKING OF NATIONAL IDENTITY* 125–26 (2013).

Until recently, however, there has been relatively little debate about the religious liberty implications of our national security debates.<sup>16</sup> This Article takes on that task. The integration and stigmatization these operate on too many different registers (religious, economic, political, etc.) and across too many different areas of law to be described in a single article. By contrast, this study advances a pair of doctrinal explanations for the fate of religious liberty law after 9/11. It does so by focusing squarely on a set of highly controversial cases within the larger universe of Muslim American religious liberty jurisprudence: the Muslim charity prosecutions from 9/11 to the present (the “Terror Decade,” as it has been called).<sup>17</sup>

For several reasons, these cases permit us to bring the question of what has happened to religious liberty claims in the war on terror into the sharper focus that it requires. First, the Muslim charity cases cohere around a common problem that seems to leave no room for compromise: the head-on conflict between religious conduct that is central to the self-understanding of a major world faith, on the one hand, and material support of terrorism laws that rank among the most powerful tools in the federal government’s counterterrorism arsenal, on the other.<sup>18</sup> The crackdown on Muslim charities has been a key front, if not the single most important front, of the financial war on terror. And the practice of *zakat* (mandatory charitable giving) is one of the five pillars of Islam, the Muslim variation on the Abrahamic theme of tithing shared by Christians, Jews, and other religious groups.<sup>19</sup>

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16. Cf. Malick W. Ghachem, *Of “Scalpels” and “Sledgehammers”*: *Religious Liberty and the Policing of Muslim Charities in Britain and America Since 9/11*, 9 UCLA J. ISLAMIC & NEAR E. L. 25 (2009–2010); Aziz Z. Huq, *The Signaling Function of Religious Speech in Domestic Counterterrorism*, 89 TEX. L. REV. 833 (2011); Samuel J. Rascoff, *Establishing Official Islam?*, *The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125 (2012). MARGULIES, *supra* note 15, at 10, documents the growth of an anti-Islamic narrative in the United States that, in his view, was mostly silent immediately after 9/11 and gained traction only years later. But he does not attempt to analyze this narrative at the level of church-state law.

17. Cf. ARAB DETROIT 9/11, *supra* note 5, at 3 (“[T]he Terror Decade was a time in which national security was persistently defined as something Arabs and Muslims threaten, and this definition placed serious constraints on how Arab and Muslim Americans could identify as U.S. citizens.”).

18. See *infra* Part I.A–B.

19. For a discussion of the centrality of charity and poor relief to the history of the Abrahamic faiths, see generally PETER BROWN, *THROUGH THE EYE OF A NEEDLE*:

Second, charity and poor relief have been integral to the one of the master narratives of American history: the expansion of religious liberty and the integration of previously despised minorities into the national fabric. A controversy over charitable solicitation marks the beginning of our contemporary era of (incorporated) religious liberty, with the Supreme Court's decision in *Cantwell v. Connecticut*,<sup>20</sup> holding that the concept of liberty embodied in the Fourteenth Amendment Due Process Clause required application of the free exercise clause to the states.<sup>21</sup> And the movement for "Tri-Faith America" in the postwar era, which replaced the older notion that America was a distinctly "Protestant" nation with a new embrace of Protestantism, Catholicism and Judaism as separate but equally American faiths—began with Protestant relief agencies collaborating with their Catholic and Jewish counterparts in the 1920s to consolidate resources and promote an ethos of interfaith goodwill.<sup>22</sup> Charity has been both a key driving force in the modern American law of religious liberty and a conduit for religious pluralism and coexistence.<sup>23</sup> These two developments now intersect in far more conflicted ways, but their interrelationship remains as revealing as ever before. What served at one time in American history as a fulcrum

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WEALTH, THE FALL OF ROME, AND THE MAKING OF CHRISTIANITY IN THE WEST, 350–550 AD (2012).

20. 310 U.S. 296 (1940).

21. *Id.* (reversing criminal conviction for violating Connecticut statute prohibiting solicitation for religious, charitable, or philanthropic causes without approval of Secretary of Public Welfare). Sarah Barringer Gordon usefully demarcates the history of the American law of church and state into three separate periods: an initial and extended era of disestablishment at the state level that runs from the 1770s to the 1840s, an intermediate period running from the 1840s to the mid-twentieth century during which the states (not the federal government) determined the relationship between religion and law, and a new and distinctively modern constitutional world that comes into view in the 1940s, when the free exercise and establishment clauses were finally applied to the states. GORDON, *supra* note 2, at 3–14.

22. KEVIN M. SCHULTZ, TRI-FAITH AMERICA: HOW CATHOLICS AND JEWS HELD POSTWAR AMERICA TO ITS PROTESTANT PROMISE 26–29 (2011).

23. In addition to *Cantwell*, see, e.g., *Larson v. Valente*, 456 U.S. 228 (1982) (holding that a state charitable solicitation law that exempted organizations from taxation only if they receive more than half of their total contributions from members or affiliated organizations violated the establishment clause's prohibition on denominational preferences).

for the expansion of civil liberties and the incorporation of unpopular minorities (Catholics in particular) has become a battleground on which religious freedom and other individual rights have typically been on the defensive.

Third, the Muslim charity cases have enacted a “good Muslim/bad Muslim” dynamic that has extended their implications far beyond the immediate parties at issue. The Bush administration’s otherwise laudable effort, in the days and weeks after 9/11, to distinguish a peaceful and “innocent” form of Islam from the extremist fringe associated with Al Qaida “could not hide the central message of such discourse: unless proved to be ‘good,’ every Muslim was presumed to be ‘bad.’ All Muslims were now under obligation to prove their credentials by joining in a war against ‘bad Muslims.’”<sup>24</sup> The Muslim charity cases pose the difficult question of the relationship between the (suspect) Muslim individuals and organizations under investigation or indictment, and the (presumably innocent) Muslims who participate as charitable donors, volunteers, or clients of these organizations.<sup>25</sup> On one hand, in a technical sense, the named defendants and investigative targets are indeed the only persons and charities whose conduct has been implicated by post-9/11 crackdown. On the other hand, the prosecution of these cases has sometimes evoked a sense of guilt by association based on tenuous links and innovative theories of liability—raising questions about whether our usual standards of culpability and fair notice in the criminal law have been satisfied. One example is the government’s identification of nearly every major Muslim American organization as unindicted coconspirators, in a case involving what was once the largest Muslim American charity.<sup>26</sup> Where to draw the boundary between these

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24. MAHMOOD MAMDANI, *GOOD MUSLIM, BAD MUSLIM: AMERICA, THE COLD WAR, AND THE ROOTS OF TERROR* 15 (2004); *see also* KAMBIZ GHANEABASSIRI, *A HISTORY OF ISLAM IN AMERICA: FROM THE NEW WORLD TO THE NEW WORLD ORDER* 373–77 (2010).

25. *See infra* Part II.A–C.

26. *See* *United States v. Holy Land Found. for Relief & Dev.*, No. 3:04-CR-240-G, 2007 WL 2004458 (N.D. Tex. 2007), *available at* [http://www.investigativeproject.org/documents/case\\_docs/423.pdf](http://www.investigativeproject.org/documents/case_docs/423.pdf). (listing unindicted co-conspirators); *see also* AMERICAN CIVIL LIBERTIES UNION, *supra* note 11, at 53–55; DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 58–64 (2005); IBRAHIM WARDE, *THE PRICE OF FEAR: THE TRUTH BEHIND THE FINANCIAL WAR ON TERROR* 139 (2007) (noting the susceptibility of

cases and the legal and moral standing of the Muslim American community has been left somewhat unclear in their aftermath.<sup>27</sup>

By far the most important reason to study these cases, however, is that they dramatize two crucial doctrinal dynamics in the contemporary law of religious liberty. The first of these dynamics involves the interaction between free exercise and the doctrine of “fungibility.” The real driving force in the Muslim charity cases becomes the merger of First Amendment doctrine with the principle of fungibility, an economic term that, in this context, describes the ability of a designated terrorist organization to convert (innocent charitable) money into other, illegal uses. As Judge Alex Kozinski of the Ninth Circuit put it in 2002, “money is fungible; giving support intended to aid an organization’s peaceful activities frees up resources that can be used for terrorist acts.”<sup>28</sup> By this standard, there can be no distinction between a charity’s legitimate and illegitimate activities, no matter how isolated the latter may be.<sup>29</sup> In *Holder v. Humanitarian Law Project*, the Court, ruling on free speech and association rather than religious liberty grounds in a case brought by a secular organization, upheld the application of the material support of terrorism laws to individuals seeking to support only the peaceful activities of designated organizations (as, for example, by

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Muslim charities to “six degrees of separation” logic in the financial war on terror, given the very large numbers of donors and recipients).

27. The lack of clarity has itself left at least some Muslim Americans confused about the actual state of material support law. Would it criminalize a donor who innocently gives to an organization not listed on the Specially Designated Nationals list at the time of the donation but that is subsequently designated as such? See AMERICAN CIVIL LIBERTIES UNION, *supra* note 11, at 78–80. There have been some cases of individual Muslim American donors arrested or investigated for their donations to legally operating Muslim charities in the United States, though not all of these arrests and indictments have officially relied on charitable contributions. *Id.* at 73–75.

28. *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000).

29. Compare WARDE, *supra* note 26, at 130 (discussing the blurring of the line between “[i]ntent and consequence, the legitimate and the illegitimate, the deliberate and the unwitting” in the crackdown on Muslim charities), with MARIEKE DE GOEDE, SPECULATIVE SECURITY: THE POLITICS OF PURSUING TERRORIST MONIES 127–28 (2012) (arguing that the doctrine of fungibility makes “the boundaries between legitimate aid and illegitimate material support for terrorism . . . nearly impossible to draw here”).

helping them to petition the United Nations for political change).<sup>30</sup> It did so largely by raising the expansive doctrine of fungibility to the status of a quasi-constitutional principle: because money is fungible, there can be no free speech or free association protection for an individual's desire to contribute peaceful, legal forms of support to a banned entity.<sup>31</sup> Well before the Supreme Court intervened, however, that principle had been developed in the lower courts during the Terror Decade so as to apply to the context of religious charitable giving.

In the post-9/11 era, fungibility has come to override both free speech and free exercise interests. In any case where a terrorist designation is at issue, fungibility neutralizes all but the most uncontroversial constitutional claims, subject only to the limits that one appellate court (the Ninth Circuit) has identified in favor of a non-Muslim charity party.<sup>32</sup> The squeezing out of religiously-inflected political dissent is a major by-product of the material support cases, and has implications for both secular and religious individuals and entities. Justice Breyer's dissenting opinion in *Humanitarian Law Project* envisioned that the fungibility doctrine would have a remarkable capacity to suppress core forms of protected political speech.<sup>33</sup> The Muslim charity cases show that religious conduct and expression are

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30. *Holder v. Humanitarian Law Project*, 561 U.S. \_\_\_, 130 S. Ct. 2705 (2010).

31. *Id.* at 2725–26.

32. In this sense, fungibility in the material support context can be compared to the Supreme Court's rejection of "divertibility" as a rationale for finding an establishment clause violation in the parochial school aid context. *See Mitchell v. Helms*, 530 U.S. 793, 820, 822, 824 (2000). In *Mitchell*, a plurality held that a concern over the divertibility of secular aid for religious purposes is misplaced "because it is boundless – enveloping all aid, no matter how trivial – and thus has only the most attenuated (if any) link to any realistic concern for preventing an 'establishment of religion.'" *Id.* Relying on Justice O'Connor's concurring opinion in *Mitchell*, subsequent lower court decisions have extended the life of the divertibility rationale by restricting its application to situations in which secular government aid is in fact diverted to religious indoctrination, or where the government provides money aid directly to a religious institution. *See, e.g., Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1058–59 (9th Cir. 2006) (holding that *Mitchell* is restricted to situations of actual diversion); *Freedom from Religion Found., Inc. v. Bugher*, 249 F.3d 606, 613 (7th Cir. 2001) (holding that *Mitchell* did not involve direct money payments from the government to a religious institution).

33. *Holder*, 561 U.S. at \_\_\_, 130 S. Ct. at 2731–43 (Breyer, J., dissenting).

equally, if not more, vulnerable to that doctrine. In both contexts the basic reason is the same: fungibility upends a basic requirement of traditional strict scrutiny—that the government must show its burden on protected speech or conduct is the least restrictive means available—and imposes on defendants the burden of demonstrating that their speech or conduct has no possibility whatsoever of facilitating the work of terrorism. That is an especially noteworthy reversal of First Amendment doctrine, whatever one thinks about the results in these cases.

The second of these doctrinal dynamics is that religious liberty in the free exercise sense has been absorbed by the paradoxical implications of non-establishment and the law of church (or religious institutional) autonomy. This point can be most clearly made in comparative fashion, vis-à-vis the British experience. The British establishmentarian tradition, in general, permits a greater degree of government intervention into the lives of religious institutions than the American tradition of separation. Although religion and politics intersect to a much greater degree in the United States than in Europe, when it comes to the institutional separation of church and state, American law is, in fact, remarkably strict.<sup>34</sup> The consequence of this separation is that American law enforcement is endowed with relatively few tools for policing the conduct of religious institutions (such as charities) other than those the criminal law makes available for violations of public order generally. The British system has at its disposal an array of “scalpel”-like tools, including the removal of individual officers and trustees from a charity’s leadership, or the temporary transfer of a charity’s management. In a few critical cases, those tools have permitted the British authorities to avoid a head-on collision with Muslim charitable institutions and mosques in the United Kingdom.<sup>35</sup> By contrast, the American tradition of church autonomy is expressly predicated on a rejection of English rules that permitted civil authorities to inquire into matters of religious doctrine and practice or to exercise control over internal institutional leadership.<sup>36</sup>

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34. See James Q. Whitman, *Separating Church and State: The Atlantic Divide*, in *LAW, SOCIETY, AND HISTORY: THEMES IN THE LEGAL SOCIOLOGY AND LEGAL HISTORY OF LAWRENCE M. FRIEDMAN* 233–50 (Robert W. Gordon & Morton J. Horwitz eds., 2011).

35. See *infra* Part II.A–B.

36. See *Watson v. Jones*, 80 U.S. 679, 727–28 (1872) (rejecting the English “departure from doctrine” approach in deciding whether to create an implied trust in

This has left Muslim American charities with essentially two options: make their own preemptive use of the scalpel so as to avoid attracting the attention of law enforcement in the first place, or accept the risks associated with the expansive complicity logic of the material support of terrorism laws.<sup>37</sup> Whether Muslim charities ought themselves to have made greater use of the scalpel in the years before 9/11 is an important question, though not one that I attempt to answer in any detailed way in this paper. In some cases, as in the matter of North London's Finsbury Park Mosque discussed below, mosque leaders did make efforts to expel an especially problematic imam, but his following within the mosque community created a stalemate that was resolved only by the intervention of charitable regulators.<sup>38</sup> In other cases, the record of Muslim institutional tolerance for violent extremism is more ambiguous, and the argument for the use of the sledgehammer correspondingly more persuasive. In particular, what I have seen of the evidence in the *Holy Land Foundation* criminal case (discussed in Part II.C below) has led me to conclude that there are circumstances where a line must be drawn in the sand. But the line in question should and need not be the one that fungibility draws: where there is proof of concrete support for or knowledge of specific acts of terrorist violence, fungibility *per se* should be irrelevant.<sup>39</sup> Yet that principle has become the key tool in the

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favor of the local faction in a property dispute between rival factions of a Presbyterian church); *Hosanna-Tabor*, 565 U.S. at \_\_\_, 132 S. Ct. at 702–04. This contrast between English and American law requires some qualification, as there is case law in Britain that, in certain contexts, prohibits courts from assessing questions of religious doctrine in civil litigation involving rival factions of a religious institution. For further discussion, see *infra* Part III.D.

37. *Hosanna-Tabor* is neither a criminal case nor one that, strictly speaking, falls into the church autonomy category. However, it relies heavily on the church autonomy line of cases. See *Hosanna-Tabor*, 565 U.S. at \_\_\_, 132 S. Ct. at 704–05. Along with *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (holding that the exemption of religious organizations from religious employment discrimination liability when applied to an organization's secular activities does not violate the Establishment Clause), *Hosanna-Tabor* strongly reinforces the predicament outlined here.

38. See *infra* Part II.B.2.

39. A related question is: what standard of proof should apply in cases involving the material support of terrorism statutes? The civil cases involve a typical preponderance of the evidence standard, but as I explain in Part I.A below, no hearing or prior notice is required before the government can seize the assets of a



prosecution of nearly every one of the Muslim charity cases, with the resulting harm to First Amendment doctrine that this Article outlines.

In addition to placing great pressure on religious liberty interests, many of these cases also happened to raise sensitive questions of American foreign policy (*Holy Land Foundation* very much included, since the Israeli-Palestinian conflict and America's role therein sat quite transparently at its core). The argument for prosecutorial and judicial restraint seems accordingly strong. But the federal government did not follow a course of restraint. In nearly all cases following the attacks of 9/11, the Department of Justice opted to enforce the material support of terrorism laws, resulting in across-the-board freezing of assets, designation of entire entities as terrorist organizations, and aggressive criminal prosecutions.<sup>40</sup> In the meantime, we have adopted a much more indulgent policy towards wealthy and powerful financial institutions that have been found to engage in many of the same kinds of violations with which Muslim charities have been charged. In the case of the international banks, the Department of Justice has only very recently begun to bring enforcement actions, and for the most part has allowed the offending parties to settle their cases with digestible fines while avoiding the death sentence of criminal indictment and prosecution.<sup>41</sup>

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targeted organization or designate it as a terrorist group. The standard in criminal cases is, of course, beyond a reasonable doubt, but it is an interesting question whether that amorphous standard can have any real meaning in a context where the rule of fungibility applies.

40. See *infra* Part I.A.

41. The key players in this story are HSBC and Standard Chartered, both London-based banks with operations in the United States and various locations in the Middle East. HSBC was found to have transferred money through American subsidiaries on behalf of governments on the State Department's list of terrorism sponsors, notably Iran. It is also alleged to have moved tainted money from Saudi banks with ties to terrorist groups. The phenomenon extends well beyond these two banks, however. To date, the Department of Justice has reached deferred prosecution agreements to settle money laundering and/or terrorism financing charges in the following cases: *United States v. Royal Bank of Scotland* (former ABM Amro Bank), No. 1:10-CR-00124-CKK (D. D.C., May 10, 2010); *United States v. ING Bank, N.V.* (D. D.C., No. 1:12-CR-00136-PLF, June 12, 2012); *United States v. Credit Suisse AG*, No. 1:09-CR-00352-RCL (D. D.C., Dec. 16, 2009); *United States v. Barclays Bank PLC*, No. 1:10-CR-00218-EGS (D. D.C., Aug. 16, 2010); and *United States v. Lloyds TSB Bank PLC*, No. 1:09-CR-00007-ESH (D. D.C., Jan. 9, 2009);. Standard Chartered settled on Dec. 12, 2012. Noting criticism that the federal

How to explain that particular disparity is a task for another article. Here I argue only that the federal government's policy towards Muslim American charities is, in significant measure, a function of the American law of church and state, which makes available the more sweeping measures just described and seems to make other, more targeted and nuanced measures off limits.<sup>42</sup> A corollary of this argument is that American policy cannot be explained by the suggestion that Muslim American charities are inherently more threatening or corrupt than their British counterparts (or establishment banks, for that matter), nor can it be explained by official anti-Muslim bias.

While the perception that "scalpel"-like measures conflict with non-establishment contains more than a grain of truth, it also serves to caricature the separation of church and state. But I have no illusion that we can better protect religious liberty in the second "Terror Decade" simply by turning to the British experience for a way out of the impasse.

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government should have sought to hold HSBC criminally liable, a federal judge approved HSBC's deferred prosecution agreement on July 3, 2013. Chad Bray, *Judge Approves HSBC Deferred Prosecution Agreement in Money Laundering Probe*, WALL ST. J. (July 2, 2013), <http://online.wsj.com/article/SB10001424127887323936404578582451462472318.html>. All of these banks remain eminently viable financial institutions as of this writing. See Neil Barofsky, *Too Big to Jail: Our Banking System's Latest Disgrace*, THE NEW REPUBLIC (Dec. 12, 2012), <http://www.newrepublic.com/blog/plank/111041/too-big-jail-our-banking-systems-latest-disgrace>; Editorial, *Too Big to Indict*, N.Y. TIMES, Dec. 11, 2012, at A38, available at [http://www.nytimes.com/2012/12/12/opinion/hsbc-too-big-to-indict.html?\\_r=0](http://www.nytimes.com/2012/12/12/opinion/hsbc-too-big-to-indict.html?_r=0); Ben Protess & Jessica Silver-Greenberg, *DEALBOOK; Bank Is Said to Avoid Charges Over Laundering*, N.Y. TIMES (Dec. 11, 2012), <http://query.nytimes.com/gst/fullpage.html?res=940DEFDE1F3DF932A25751C1A9649D8B63>; Jessica Silver-Greenberg, *Prosecutors Link Money from China to Iran*, N.Y. TIMES, Aug. 30, 2012, at B1, available at <http://www.nytimes.com/2012/08/30/business/inquiry-looks-at-chinese-banks-iran-role.html>; Mark Scott, *Inquiry into Iran Deals is an Abrupt Reversal at Standard Chartered*, N.Y. TIMES, Aug. 8, 2012, at B4; Jessica Silver-Greenberg, *Regulator Says Bank Helped Iran Hide Deals*, N.Y. TIMES, Aug. 7, 2012, at A1, available at <http://www.nytimes.com/2012/08/07/business/standard-chartered-bank-accused-of-hiding-transactions-with-iranians.html>; Mark Scott & Jessica Silver-Greenberg, *HSBC May Face Charges in a Laundering Inquiry*, N.Y. TIMES, Nov. 6, 2012, at B1; Jimmy Gurulé, *Are Some Banks Too Big to Prosecute?*, CNN.COM (Aug. 16, 2012), <http://www.cnn.com/2012/08/16/opinion/banks-too-big-to-prosecute>.

42. See *infra* Part II.A.

The wartime Muslim charity cases are not likely to be repeated in anything like their past configuration, and protection of “civilian” religious liberty in contemporary America remains essentially robust—for Muslims as for followers of other faiths.<sup>43</sup> I will be content to have mapped the constitutional landscape of the charity cases as part of an exercise in contemporary legal history that helps to flesh out our understanding of the complexities of the American law of religious liberty in other contexts.

The remainder of this Article proceeds as follows. Part One situates the crackdown on Muslim American charity in its legal and religious framework, including the *Humanitarian Law Project* decision, the Islamic theology of *zakat*, and free exercise law. Part Two turns to the heart of the doctrinal analysis: the emerging relationship between First Amendment and material support law as reflected above all in the doctrine of fungibility. Part Three shows that the dilemmas created by this relationship are partly a function of crude notions of non-establishment and church autonomy, and stand in sharp contrast to the British experience of relative success in regulating but not dismantling Muslim charity through less restrictive measures. In the Article’s final part, I outline the implications of this analysis for the second Terror Decade now unfolding and suggest what that analysis has to say about some other leading religious liberty issues of the day, particularly those involving the Catholic Church.

## I. THE LEGAL AND RELIGIOUS FRAMEWORK

### *A. The Basic Structure of Material Support Law*

The body of law known as material support of terrorism is a mix of (civil) administrative and criminal enforcement strategies that together produce a more powerful set of counterterrorism tools than criminal law

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43. See JOPPKE & TORPEY, *supra* note 5, at 114–138. By the same token, Joppke’s and Torpey’s straightforward conclusion that “Islam in America seems to have been the dog that didn’t bark – a nonproblem, at least from a constitutional-legal perspective,” strikes me as overly simplistic; not surprisingly, their work contains little in the way of actual legal analysis in the American context. *Id.* at 116.

alone could provide.<sup>44</sup> In fact, material support law can be seen as an adjunct of an administrative process created by the 1977 International Economic Emergency Powers Act (IEEPA) and the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA).

The former statute, IEEPA, authorizes the President to prohibit international financial flows into and out of the United States in response to “any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.”<sup>45</sup> Pursuant to this law, the president may “block during the pendency of an investigation” any holdings or transactions involving “any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.”<sup>46</sup> Another provision permits the President, whenever the United States is at war or under attack, to “confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in . . . hostilities or attacks against the United States.”<sup>47</sup>

The contemporary reliance on material support of terrorism law dates back to developments that occurred about two decades after the passage of IEEPA. In January 1995, citing his IEEPA powers, President Clinton issued an executive order, E.O. 12,947, that designated as “Specially Designated Terrorists” (SDTs) certain groups and individuals believed to pose a serious threat to the (then still viable) Middle East peace process, thereby defining that threat as one “to the national security, foreign policy, or economy of the United States.”<sup>48</sup> The near total domination of what is now called the SDN list by Islamic and

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44. See Laura K. Donohue, *Anti-Terrorist Finance in the United Kingdom and United States*, 27 MICH. J. INT’L L. 303, 432–33 (2006). The technical language is material support for (rather than of) terrorism. I use the more colloquial form here.

45. 50 U.S.C. § 1701(a) (1977). IEEPA was in fact an amendment to the 1917 Trading with the Enemy Act. The emergency powers in question originated in the First rather than the Second World War.

46. 50 U.S.C. § 1702(a)(B) (2012).

47. *Id.* at § 1702(a)(C) (2012).

48. See Wadie Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543, 557 (2011).

Arabic-sounding names begins here; Hamas (the Islamic Resistance Movement) and Hizballah (the Party of God) were two of the central targets of the order.<sup>49</sup> President Clinton's order also gave the Treasury Secretary the power to add domestic persons to the list, and delegated to the Secretary of State the authority to add other "foreign persons."<sup>50</sup> The latter authority is now codified in a section of the Immigration and Nationality Act titled "designation of foreign terrorist organizations" (FTOs).<sup>51</sup>

A few months after E.O. 12,947 was issued, Congress passed the AEDPA statute, and it was signed into law by President Clinton one year later, in 1996.<sup>52</sup> A hastily arranged marriage of habeas corpus and counterterrorism reforms, AEDPA's central counterterrorism provision

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49. *See id.*

50. Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995).

51. 8 U.S.C. § 1189 (2004). The SDN list is short for "Specially Designated Nationals and Blocked Persons" list and is compiled by the Treasury Department's Office of Foreign Assets Control. It includes all SDTs, FTOs, and Specially Designated Global Terrorists (SDGTs), among other categories. Any one organization can have more than one of these statuses. Thus Hamas was added to the FTO category in October 1997. An online search engine for the SDN database was created by the Treasury Department at the behest of the advocacy organization Muslim Advocates, as a compromise in lieu of providing a so-called "white list" of acceptable Muslim charities. *See Specifically Designated Nationals and Blocked Persons List Search*, OFFICE OF FOREIGN ASSETS CONTROL (May 28, 2013), <http://sdnsearch.ofac.treas.gov/>. On Muslim American petitions to the Treasury Department to release lists of acceptable charities, see WARDE, *supra* note 26, at 148.

52. The story behind AEDPA's passage is complex. In April 1995, Timothy McVeigh carried out the bombing of the federal building in Oklahoma City. Shortly thereafter, Congress approved the hastily arranged marriage of counter-terrorism and habeas corpus reforms that is AEDPA. The consensus is that AEDPA's passage was greatly facilitated—even if it was not initially prompted—by the Oklahoma City tragedy. Clinton's signing occurred on the heels of a spate of suicide bombing attacks on Israeli civilians by Hamas and the Palestinian Islamic Jihad organization. Michael J. Whidden, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 *FORDHAM L. REV.* 2825 (2001); Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 *TUL. L. REV.* 443, 447 (2008); John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 *CORNELL L. REV.* 259, 269 (2006); Said, *supra* note 48, at 557–58; LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY* 149 (2008) (noting that "[a]lthough US nationals planned and carried out the [Oklahoma City] attack, many of the [AEDPA] provisions . . . dealt with foreign threats").

created a fifteen-year mandatory minimum penalty for the attempted or actual provision of “material support or resources to a foreign terrorist organization.”<sup>53</sup> “Material support and resources” were defined to include “any property, tangible or intangible, or service,” excepting only medicine and religious materials.<sup>54</sup> Despite congressional support for these more aggressive counterterrorism measures, the Department of Justice prosecuted only three material support cases between AEDPA’s adoption and 9/11, none involving Al Qaeda (which did not appear on the FTO list until October 1999).<sup>55</sup>

The next decisive moment for material support law came with President Bush’s Executive Order 13,244, dated September 23, 2001. Again citing the IEEPA, Bush’s order designated Al Qaeda, Osama Bin Laden, and his associates as “Specially Designated Global Terrorists” (SDGTs) and delegated to the State and Treasury Departments the authority to name more of the same (in the respective categories of foreign and domestic persons).<sup>56</sup> This order laid the groundwork for the crackdown on Muslim American charities. By December 2001, the Treasury Department’s Office of Foreign Assets Control (OFAC) had designated and frozen the assets of the three largest Muslim charities in the United States: the Holy Land Foundation for Relief and Development (HLF, based in Dallas, TX), Global Relief Foundation (GRF, based in a Chicago suburb), and Benevolence International Foundation (BIF, located in Ohio). All told, OFAC has closed six U.S.-based, Muslim American charities through the SDGT designation process, closed a seventh by freezing its assets pending an investigation, and raided

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53. 18 U.S.C. § 2339B(a) (2012).

54. *Id.* at § 2339A(b)(1) (2012). The full list of statutory examples is as follows: “currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious materials.” *Id.* As amended, the term “training” is defined as “instruction or teaching designed to impart a specific skill, as opposed to general knowledge,” and “expert advice or assistance” is defined to mean “advice or assistance derived from scientific, technical or other specialized knowledge.” *Id.* at § 2339A(b)(2–3) (2012).

55. Said, *supra* note 48, at 558 n.93.

56. Exec. Order No. 13,244, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

another seven charities, two of which have since closed down as a result of negative publicity.<sup>57</sup>

In the years since 9/11, the material support infrastructure has been amended several times and repeatedly challenged in court. The 2001 PATRIOT Act expanded the list of exemplary support and resources to include “expert advice or assistance.”<sup>58</sup> In 2004, responding to Ninth Circuit litigation in the *Humanitarian Law Project* case, Congress further amended the material support law to require that the defendant have knowledge that the organization is a designated terrorist organization or engages in terrorist activity as defined elsewhere in the federal criminal code.<sup>59</sup> That was the state of the material support statute when, after years of back and forth between Congress and the lower federal courts, it finally reached the Supreme Court.

*Humanitarian Law Project*, handed down in 2010, is an enormously complicated decision that I can only briefly summarize here. Represented by Georgetown University law professor David Cole, the plaintiffs’ chief contention was that the First Amendment rights of free speech and free association protected their ability to provide material support to the nonviolent humanitarian and political activities of two designated organizations: the Kurdistan Workers’ Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE).<sup>60</sup> Put differently, the plaintiffs argued that they could not be prosecuted for material support for terrorism absent evidence that they specifically intended their donations to support the illegal activities of the organizations, and they urged the Court to impose such a requirement of specific intent on the statute, notwithstanding the 2004 amendment to AEDPA.

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57. AMERICAN CIVIL LIBERTIES UNION, *supra* note 11, at 7.

58. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 377 (2001).

59. 18 U.S.C. § 2339B (2009). *See also* AMERICAN CIVIL LIBERTIES UNION, *supra* note 11, at 28. Although the U.S.-based charitable organizations targeted by federal investigators since 9/11 have been designated as SDGTs rather than FTOs, these classifications have effectively overlapped as a result of real and alleged ties between American-based Muslim charities and Muslim charities headquartered overseas.

60. *Holder v. Humanitarian Law Project*, 561 U.S. at \_\_\_, 130 S. Ct. at 2712–13 (2010).

Writing for a conservative majority that notably included Justice Stevens, Chief Justice Roberts declined to read the material support statute so as to require proof that a defendant specifically intended to aid the illegal activities of an FTO.<sup>61</sup> The knowledge specified in the (amended) statute was at once broader and narrower than this, requiring only that the defendant know he was providing material support to a designated organization or a group engaged in terrorist activity. That reading then forced a decision on whether the statute as written could withstand First Amendment free speech and free association scrutiny.<sup>62</sup> Roberts rejected the government's argument that, since the material support statute reached only conduct and not speech, it was subject to intermediate rather than strict scrutiny. Though the statute did not reach the uncoordinated advocacy of a designated organization, it did prohibit a person's attempt to communicate directly with the FTO even for the purpose of trying to persuade that organization to adopt peaceful, lawful methods of conduct (the kind of speech in which the Humanitarian Law Project said it wanted to engage).<sup>63</sup> Indeed, as then-Solicitor General Kagan had asserted in the oral argument before the Supreme Court, the material support statute did not even permit a lawyer simply to file an amicus brief on behalf of an FTO in federal court—which is as good a clue as any that something is amiss in this area of the law.<sup>64</sup>

The Court noted that despite imposing a content-based restriction on speech, the statute satisfied the narrowly tailored prong of strict scrutiny analysis on three related grounds: the fungibility of money, legitimacy concerns, and foreign policy concerns. The fungibility of money permits a designated organization to use money given for peaceful ends towards a terrorist objective, or simply to free up other funds that can be used to support terrorism. Coordinated political advocacy on behalf of an FTO, for its part, could facilitate the work of terrorism by raising the profile of the organization internationally and drawing additional support in the form of new recruits and funds. And

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61. *Id.* at 2717–18.

62. *Id.* at 2718.

63. *Id.* at 2723–24.

64. Only an entirely uncoordinated brief would, per the Solicitor General's argument, escape the reach of the statute. Transcript of Oral Argument at 47–49, 53, *Holder v. Humanitarian Law Project*, 561 U.S. \_\_\_, 130 S. Ct. 2705, 2706 (2010) (No. 08-1498), 2010 WL 621318.



the provision of material support to an FTO risked interfering with the United States' relationship to allied nations who are cooperating in the fight against terrorism. As to each of these three rationales, the Court concluded that it was not in a position to second-guess the factual findings and judgment of Congress.<sup>65</sup>

Justice Breyer, writing for himself as well as Justices Ginsburg and Sotomayor, dissented. Breyer agreed with Roberts that the government had identified a compelling interest in the need to deny terrorist organizations access to financial and other fungible resources, but he disagreed that even the problem of international terrorism "can require *automatic* forfeiture of First Amendment rights."<sup>66</sup> It was not obvious, said Breyer, that helping the PKK and LTTE to petition the United Nations for peaceful political change could be exchanged into resources used for more sinister ends. As used in the majority's opinion, the fungibility and legitimacy concepts extended beyond even what Congress and the Solicitor General had advanced, creating a risk that too much clearly protected political speech would be subject to criminal penalties. Additionally, the mere coordination of protected speech with a designated organization was itself insufficient to deprive the plaintiffs of First Amendment protection.<sup>67</sup>

From a case involving a secular humanitarian organization seeking to engage in purely political and peaceful interactions with designated secular entities, the fungibility doctrine has become applied to the context of religious charitable giving, where a wider range of First Amendment claims is, at least theoretically, in play. The *Humanitarian Law Project* decision, in its various incarnations, has weaved its way over the course of the Terror Decade through both civil and criminal cases involving designated, U.S.-based Muslim charities. Only three such criminal cases have been brought: the Islamic American Relief Agency

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65. *Holder*, 561 U.S. at \_\_\_, 130 S. Ct. at 2724–25, 2728–29, 2731.

66. *Id.* at 2733 (Breyer, J., dissenting).

67. *Id.* at 2731–38. (Breyer, J., dissenting). Breyer agreed with the majority that the terms "expert advice or assistance," "training," and "service" as used in the material support statute were not unconstitutionally vague. For contrasting perspectives on the Roberts-Breyer debate, compare Robert Chesney, *The Supreme Court, Material Support, and the Lasting Impact of Holder v. Humanitarian Law Project*, 1 WAKE FOREST L. REV. ONLINE 13 (2011) (defending the majority opinion), with Wadie Said, *Humanitarian Law Project and the Supreme Court's Construction of Terrorism*, 5 BYU L. REV. 1455 (2011) (agreeing with the dissent).

(IARA, based in Missouri), HLF, and BIF. Only HLF has faced an actual material support of terrorism charge.<sup>68</sup> IARA was prosecuted for violating the IEEPA and U.S. sanctions regulations by transferring funds into Iraq during the reign of Saddam Hussein,<sup>69</sup> and BIF for making and using false declarations.<sup>70</sup> To date, only one Muslim American charity has been convicted of material support of terrorism (HLF);<sup>71</sup> IARA closed down before it could be brought to trial,<sup>72</sup> and the charges against BIF were dismissed by a federal district judge.<sup>73</sup> There have, however, been several individual convictions in these cases, including of Mark Siljander, a Michigan Republican who served in Congress from 1981 to 1987, and who pleaded guilty to falsely telling investigators that money he had received from IARA was in support of a book he was writing about Christian-Islamic relations.<sup>74</sup> The former head of BIF, former officials of the Al Haramain Foundation in Ashland, Oregon, and former officials of the Boston-based charity Care International have been convicted on fraud and false statement charges rather than material support of terrorism.<sup>75</sup>

Exactly what this record tells us about the involvement of Muslim American charities in the funding of terrorist organizations overseas is a complicated matter. Views on every range of the spectrum can be found, from the assumption that virtually the entire sector is

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68. AMERICAN CIVIL LIBERTIES UNION, *supra* note 11, at 33.

69. *U.S. Muslim Charities and the War on Terror: A Decade in Review*, CHARITY & SECURITY NETWORK (Dec. 2011), available at <http://www.charityandsecurity.org/system/files/USMuslimCharitiesAndTheWarOnTerror.pdf>.

70. *U.S. v. Benevolence Int'l Found.*, No. 02-CR-414, 2002 WL 31050156, at \*1 (N.D. Ill. Sept. 13, 2002).

71. *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685 (7th Cir. 2008).

72. *U.S. Charity Shut Down By Treasury: Islamic American Relief Agency (IARA-USA)*, CHARITY & SECURITY NETWORK (Jan. 26, 2012), [http://www.charityandsecurity.org/background/shutdown\\_IARA\\_USA](http://www.charityandsecurity.org/background/shutdown_IARA_USA).

73. *Benevolence Int'l Found.*, 2002 WL 31050156, at \*8.

74. See R. Jeffery Smith, *Siljander Pleads Guilty in Islamic American Relief Agency Lobbying Case*, WASH. POST (July 8, 2010), <http://www.washingtonpost.com/wpdyn/content/article/2010/07/07/AR2010070705205.html>.

75. The most up-to-date tracking of these cases is done by the Charity and Security Network. See *Litigation Overview*, CHARITY AND SECURITY NETWORK (Apr. 12, 2012), <http://www.charityandsecurity.org/resources?type=litigation&tid=All>.

implicated in criminal activity to the nearly opposite assertion that most are innocent of any criminal conduct. Exemplars of the former view include Rachel Ehrenfeld, author of a proposal to ban Muslim charity in the United States;<sup>76</sup> Steven Emerson, author of the books *Jihad Incorporated: A Guide to Militant Islam in the U.S.* and *American Jihad: The Terrorist Living Among Us*, (their ominous titles evoking a fifth column of Muslim Americans hiding away in sleeper cells funded by co-religionist charities)<sup>77</sup> and J. Millard Burr and Robert O. Collins, authors of a scholarly volume entitled *Alms for Jihad*, which argues that “Muslims alone are susceptible to the lure of Islamist extremism” and that unspecified “steps must be taken to diminish their unique susceptibility to this totalitarian ideology.”<sup>78</sup> These themes are echoed in the work of Jay Sekulow and David Yerushalmi, attorneys who have been actively involved in litigation seeking to contain what they regard as reactionary Islamic influences in the United States across a range of fronts.<sup>79</sup> Not all of these individuals are as extreme as some of their

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76. RACHEL EHRENFELD, *FUNDING EVIL: HOW TERRORISM IS FINANCED – AND HOW TO STOP IT* 21–22 (2005). For this writer’s proposal to ban Muslim charity, see Rachel Ehrenfeld & Alyssa A. Lappen, Op-Ed., *Jihadists and Jews*, WASH. TIMES, Oct. 15, 2006, at A21. Ehrenfeld has taken up the First Amendment banner in defending herself against libel tourist suits in British courts by a Saudi Arabian citizen and former banker, seeking damages in connection with Ehrenfeld’s accusations that he had financed terrorism. See EHRENFELD, *FUNDING EVIL*, at xi.

77. STEVEN EMERSON, *JIHAD INCORPORATED: A GUIDE TO MILITANT ISLAM* (2006); STEVEN EMERSON, *AMERICAN JIHAD: THE TERRORISTS LIVING AMONG US* (2002).

78. J. MILLARD BURR & ROBERT O. COLLINS, *ALMS FOR JIHAD: CHARITY AND TERRORISM IN THE ISLAMIC WORLD* 286 (2006). The language in question here is drawn verbatim (with attribution but without quotation marks) from Daniel Pipes, *Protecting Muslims while Rooting out Islamists*, DAILY TELEGRAPH (London) (Sept. 14, 2001.), available at <http://www.danielpipes.org/66/protecting-muslims-while-rooting-out-islamists>. The Burr/Collins volume was withdrawn from publication after the publisher, threatened with a libel lawsuit by the same Saudi businessman who sued Ehrenfeld, determined that it contained false accusations about that individual’s alleged financing of terrorism.

79. JAY ALAN SEKULOW ET AL., *SHARIAH IN AMERICA* 5–15 (2011). Sekulow’s path to becoming one of the country’s most well-known religious liberty litigators is traced in JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 88–98, 125–26 (2007). On Yerushalmi, see Andrea Elliott, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES, July 30, 2011, at A1, available at <http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all>. See also

rhetoric may suggest. Sekulow, for example, who is a noted religious liberty advocate, clarifies that his purpose “is not to say that Muslims are not welcome in the United States; they are.”<sup>80</sup> And Ehrenfeld acknowledges that the various Muslim charities she describes do pursue worthy causes, such as the building of hospitals and supplying of food, in addition to their alleged illicit activities.<sup>81</sup>

By contrast, scholars such as Ibrahim Warde, Akbar Ahmed, and Jonathan Benthall, as well as advocacy groups like the ACLU, paint a more benign and sympathetic view of the Muslim American charitable sector.<sup>82</sup> These sources do not deny that there have been problems of management and misuse of funds in a sector that has traditionally operated according to very informal and even lackadaisical governance standards.<sup>83</sup> But they insist that the blanket attribution of criminality to the sector, in part or in whole, is based on tenuous evidence purporting a link between Muslim charities and terrorism, and it creates the mistaken impression that the war on terror is a war against Islam.<sup>84</sup> Moreover, they generally suggest (albeit somewhat inconsistently) that the government’s crackdown is also counter-productive in national security terms, since it has served to drive monies that could otherwise be regulated into the underground terrorist economy.<sup>85</sup> Finally, they argue that the financial war on terror has served to “chill” legitimate charitable giving “[a]t a time when poverty, hopelessness, and despair are widely acknowledged as factors in breeding terror and sustaining terror networks.”<sup>86</sup>

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*The Muslim Brotherhood in America*, CENTER FOR SECURITY POLICY (Aug. 24, 2013), <http://www.centerforsecuritypolicy.org/the-muslim-brotherhood-in-america/> (website of Yerushalmi’s collaborator Frank Gaffney, head of the Center for Security Policy in Washington, D.C.).

80. SEKULOW ET AL., *supra* note 79, at 7.

81. EHRENFELD, *supra* note 76, at 22.

82. WARDE, *supra* note 26, at 127–50; AHMED, *supra* note 8, at 149–52; Jonathan Benthall, *Islamic Humanitarianism in Adversarial Context*, in FORCES OF COMPASSION: HUMANITARIANISM BETWEEN ETHICS AND POLITICS 99–121 (Erica Bornstein & Peter Redfield eds., 2010); AMERICAN CIVIL LIBERTIES UNION, *supra* note 11.

83. WARDE, *supra* note 26, at 128, 147; Benthall, *supra* note 82, at 115–17.

84. WARDE, *supra* note 26, at 139, 147; Benthall, *supra* note 82, at 111.

85. WARDE, *supra* note 26, at 147, 150; AMERICAN CIVIL LIBERTIES UNION, *supra* note 11, at 122–24.

86. WARDE, *supra* note 26, at 149; *see also* AMERICAN CIVIL LIBERTIES UNION, *supra* note 11, at 89–109.

It is no simple matter to understand just how the interests of donors and recipients of Muslim charitable activity have been affected by the prosecutions of the Terror Decade. By nearly all accounts, the crackdown on Muslim American charities did cause a significant drop in charitable giving and expenditures in the years after 9/11.<sup>87</sup> More recently, during the period from 2005 or 2006 to the present, there have been indications of a significant rebound that suggest the earlier drop has, over time, been counterbalanced by correspondingly greater amounts of giving to the handful of Muslim American charities that have survived the post-9/11 era unscathed, such as Islamic Relief USA.<sup>88</sup> But the fate of the operational side of Muslim charitable activity remains uncertain. This appears to be due to ongoing restrictions on the ability of religious and secular organizations to deliver humanitarian aid to conflict zones, and the reluctance of banks and other financial institutions to work with Muslim charities for fear of sanctions in the event that money laundering or terrorism financing charges are brought.<sup>89</sup>

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87. See Teresa Watanabe, *U.S. Muslims Temper Ramadan Giving with Caution*, L.A. TIMES (Nov. 6, 2004), <http://articles.latimes.com/2004/nov/06/local/me-beliefs6/2>; Zahra N. Jamal, *Charitable Giving Among Muslim Americans: Ten Years After 9/11*, INSTITUTE FOR SOCIAL POLICY AND UNDERSTANDING, at 9 (Sept. 2011), available at [http://www.ispu.org/pdfs/ISPU\\_Policy%20Brief\\_Jamal\\_WEB.pdf](http://www.ispu.org/pdfs/ISPU_Policy%20Brief_Jamal_WEB.pdf); DONOHUE, *supra* note 52, at 168; Erich Ferrari, *Deep Freeze: Islamic Charities and the Financial War on Terror*, 7 SCHOLAR 205, 206 (2005); Neil MacFarquhar, *Fears of Inquiry Dampen Giving by U.S. Muslims*, N.Y. TIMES (Oct. 30, 2006), [http://www.nytimes.com/2006/10/30/us/30CHARITY.html?pagewanted=1&\\_r=2&fta=y](http://www.nytimes.com/2006/10/30/us/30CHARITY.html?pagewanted=1&_r=2&fta=y).

88. See Sally Howell, *(Re)Bounding Islamic Charitable Giving in the Terror Decade*, 10 UCLA J. ISLAMIC & NEAR E. L. 35 (2010–2011); ADIL NAJAM, *PORTRAIT OF A GIVING COMMUNITY: PHILANTHROPY BY THE PAKISTANI-AMERICAN DIASPORA* 6, 134 (2006); Stephanie Strom, *A.C.L.U. Report Says Antiterror Fight Undercuts Liberty of Muslim Donors*, N.Y. TIMES, June 16, 2009, at A14, available at [http://www.nytimes.com/2009/06/16/us/16charity.html?\\_r=0](http://www.nytimes.com/2009/06/16/us/16charity.html?_r=0). Especially cautious donors seem to select those charities that have been approved by the Better Business Bureau and the Charity Navigator. Muslim Advocates, a 501(c)(3) based in San Francisco, has a widely respected accreditation program used by many Muslim American donors, mosques, and charitable organizations.

89. See Naz K. Modirzadeh, Dustin A. Lewis & Claude Bruderlein, *Humanitarian Engagement Under Counter-Terrorism: A Conflict of Norms and the Emerging Policy Landscape*, 93 INT'L REV. OF THE RED CROSS 883 (2011); Overseas Development Institute, *Humanitarian Action and the 'Global War on Terror': A Review of Trends and Issue*, in HUMANITARIAN POLICY GROUP REPORT 14 (Joanna

Falling somewhere in between these denunciatory and sympathetic poles are the 9/11 Commission Report and its accompanying staff report on terrorist financing. The Commission was not able to trace the provenance of the funds that supported the 9/11 perpetrators. But it found, based on interviews with intelligence sources, that Al Qaeda regularly collected money from the employees of corrupt Islamic charities located in Saudi Arabia, particularly the Saudi-based Al Haramain Islamic Foundation.<sup>90</sup> The Commission Staff's "Monograph on Terrorist Financing" recapped the intelligence community's findings against Al Haramain, but declined to arrive at any final conclusions on its status, noting that U.S.-Saudi collaboration had resulted in the freezing of the charity's assets and its eventual dissolution by the Saudi government.<sup>91</sup> The Staff Monograph provided a complex account of the government's investigations of the U.S.-based charities BIF and GRF. On the one hand, it said, the "aggressive" nature of those investigations "raises substantial civil liberty concerns" and highlights "the difference between seeing links to terrorists and proving funding of terrorists, and the problem of defining the threshold of information necessary to take disruptive action."<sup>92</sup> And it noted that these investigations "revealed little compelling evidence that either of these charities actually provided financial support to Al Qaeda."<sup>93</sup> On the other hand, the Commission Staff found that "BIF, at least, was plainly funding armed jihadist

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Macrae & Adele Harmer eds., July 2003); Elizabeth A. Bloodgood & Joannie Tremblay-Boire, *Counterterrorism and Civil Society*, 12 INT'L J. OF NOT-FOR-PROFIT L. 4 (2010), available at [http://www.icnl.org/research/journal/vol12iss4/special\\_1.htm](http://www.icnl.org/research/journal/vol12iss4/special_1.htm).

90. 9/11 COMMISSION REPORT, NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 169–71 (2004). See also the careful analysis of Jon B. Alterman, *Saudi Charities and Support for Terror*, in UNDERSTANDING ISLAMIC CHARITIES 64–80 (Jon B. Alterman & Karin von Hippel eds., 2007).

91. JOHN ROTH ET AL., "MONOGRAPH ON TERRORIST FINANCING": STAFF REPORT TO THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 12 (Aug. 21, 2004), available at [http://govinfo.library.unt.edu/911/staff\\_statements/911\\_TerrFin\\_Monograph.pdf](http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf).

92. *Id.* at 111–12.

93. *Id.* at 111.

fighters” and that, with respect to both charities, “the evidence of their links to terrorists and jihadists is significant.”<sup>94</sup>

For what it is worth, my own views on this issue most closely resemble those reflected in the Staff Monograph. But at least some of the documents that could help to better evaluate these contrasting perspectives are unavailable due to the rules governing challenges to the designation of terrorist organizations and seizures of their assets. The most important such rule is that the federal government can act first and justify later: no prior hearing or notice is required for a designation or asset freeze. Thus, the institution is effectively closed down before the opportunity to investigate or challenge the designation can arise.<sup>95</sup> For charities that have the financial resources to persist, challenges are handled in one of two ways depending on the type of designation. Neither the IEEPA nor E.O. 13,224 provides for judicial review of the designation of SDGTs by OFAC.<sup>96</sup> Muslim American charities and other parties have nonetheless sought relief by recourse to the general provisions for review of agency action under the Administrative Procedure Act (APA).<sup>97</sup> Thus, an OFAC designation can be set aside as unlawful only if the reviewing court determines that it was made in an “arbitrary and capricious” manner; the standard of review that is applied to that standard is itself highly deferential. Moreover, since the courts permit the government to come forth with classified evidence *ex parte* and *in camera*, there has been little way for the challenging party to prove arbitrariness or caprice.<sup>98</sup>

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94. *Id.* at 111–12. The ACLU report BLOCKING FAITH, FREEZING CHARITY, *supra* note 11, at 10–11, quotes somewhat selectively from these portions of the Staff Monograph.

95. *See, e.g.*, Ferrari, *supra* note 87, at 213–14.

96. *Id.* at 211–13 (“[IEEPA] discretion is left solely up to the Executive branch”) (explaining that E.O. 13,244 gave the Secretary of State all power granted to the President by IEEPA, but did not add judicial review).

97. Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237.

98. Both Treasury and State have the authority to revoke a designated organization’s terrorist status, though this has happened in an exceedingly rare number of cases. The only instance of which I am aware is OFAC’s recent revocation of its designation of KindHearts for Charitable Humanitarian Development, a Muslim American charity based in Toledo, Ohio. *See* Erica Blake, *Charity Taken Off Suspected Terrorist List: Feds Settle Suit, Agree to Pay Ex-Toledo Group’s Legal Fees*, TOLEDO BLADE (May 2, 2012), <http://www.toledoblade.com/local/2012/05/02/Charity-taken-off-suspected-terrorist-list-1.html>.

For FTOs designated by the Secretary of State, by contrast, a specific statutory scheme applies. Designated organizations must bring their challenge directly to the Court of Appeals for the D.C. Circuit, which may consider, again *ex parte* and *in camera*, classified information used by the State Department in making the designation. The scope of review tracks general APA standards.<sup>99</sup> In material support criminal cases, claims about the underlying FTO designation are barred altogether.<sup>100</sup>

Despite, or perhaps because of, these rather one-sided rules, some courts have found due process and Fourth, Fifth, and even Sixth Amendment violations in Muslim charity cases.<sup>101</sup> But the difficulty of identifying a workable remedy has limited the significance of these holdings.<sup>102</sup> By contrast, a 2012 European Court of Justice decision finding due process violations in the European Union's asset freezing and designation procedures resulted in a United Nations-led effort to

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99. 8 U.S.C. § 1189(c)(3) (2004). The D.C. Circuit thus can set aside a designation if it finds that designation to be "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right; (D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court . . . ; (E) not in accord with the procedures required by law."

100. 8 U.S.C. § 1189(a)(8) (2004).

101. See *Al Haramain Islamic Found. v. U.S. Dep't of the Treasury*, 686 F.3d 965, 995 (9th Cir. 2012) (finding an unreasonable seizure when the Treasury Department froze the entity's assets without ever obtaining a warrant, and remanding to trial court for a remedy); *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637 (N.D. Ohio 2010) (finding that Treasury acted "arbitrarily and capriciously" by preventing charity from accessing its own funds to pay counsel for its defense, finding Fourth and Fifth amendment violations where Treasury failed to obtain a warrant based on probable cause before blocking assets, and finding that Treasury failed to provide entity with adequate notice and meaningful opportunity to respond, but permitting government to show *post hoc* probable cause for its actions).

102. This is in part because the damage is already done by the time an organization is actually designated as terrorist or its assets frozen. In the *Al Haramain* case, the Ninth Circuit held that Treasury's violation of the plaintiffs' due process rights by failing to provide constitutionally adequate notice and a meaningful opportunity to respond prior to designation would not have changed the outcome of the designation process, given that substantial evidence supported the organization's redesignation. *Al Haramain*, 686 F.3d at 1001.



reform international counterterrorism financing policy.<sup>103</sup> And the relative success of procedural claims has effectively occupied the space that a more vigorous contest over First Amendment arguments might have taken. A somewhat symbolic example can be found in the case of the Ohio-based KindHearts for Charitable Humanitarian Development. In 2008, Kindhearts brought a civil challenge to an OFAC order blocking its assets pending investigation issued two and a half years before. A federal district court held that a protective order limiting the charity's and counsel's access to discovery imposed an unjustified burden on the charity's due process and Sixth Amendment rights to fair and adequate representation by counsel.<sup>104</sup> In the course of its decision, the court noted that while "adverse First Amendment consequences result from [Kindhearts'] inability to have access to copies of their materials . . . those consequences are of lesser importance."<sup>105</sup> This state of affairs speaks to a broader and distinctively American phenomenon, namely, the twentieth-century proceduralization of criminal justice, which substitutes for judgments about the substantive limits of the government's powers, including its power to investigate and punish religiously motivated conduct by means of neutral and generally applicable laws.<sup>106</sup>

### *B. The Theology and Jurisprudence of Zakat*

The religious tradition with which material support law has collided begins with a Qur'anic verse defining the Muslim institution of

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103. See Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and the United Kingdom, Joined Cases C-402/05 P and C-415/05 P (European Court of Justice, September 3, 2008); *Tackling the Financing of Terrorism*, CTITF WORKING GROUP REPORT (United Nations Counter-Terrorism Implementation Task Force), Oct. 2009, available at [http://www.un.org/en/terrorism/ctitf/pdfs/ctitf\\_financing\\_eng\\_final.pdf](http://www.un.org/en/terrorism/ctitf/pdfs/ctitf_financing_eng_final.pdf). Implementation of sanctions against Al-Qaida is managed at the U.N. level by a committee known as the 1267 Committee. Thanks to Steve Ratner for alerting me to this information.

104. *In re Search of Kind Hearts for Charitable Humanitarian Dev.*, 594 F. Supp. 2d 855 (N.D. Ohio 2009).

105. *Id.* at 860–61.

106. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 74–85 (2011) (contrasting the proceduralism emphasis of the American Bill of Rights with the substantive limits on governmental power in the 1789 French Declaration of the Rights of Man and the Citizen).

charitable giving. That verse, known as “ayat al sadaka,” or the *sadaka* verse, reads as follows:

Alms are for the poor And the needy, and those  
Employed to administer the (funds); For those  
whose hearts Have been (recently) reconciled (To  
Truth); for those in bondage And in debt; in the  
cause Of Allah; and for the wayfarer. (Thus is it)  
ordained by Allah, And Allah is full of knowledge  
And wisdom.<sup>107</sup>

*Zakat* is “the obligatory payment by Muslims of a determinate portion of specified categories of their lawful property for the benefit of the poor and other enumerated classes” in accordance with this Qur’anic verse.<sup>108</sup> The word *zakat* means purification and is derived from the verb *zaka*, which means “to thrive,” “to be wholesome,” “to be pure.”<sup>109</sup> As one of the five pillars constituting the minimum conduct required of all Muslims, *zakat* is to be distinguished from *sadaka*, which refers to alms voluntarily given (although the term *sadaka* is often used for *zakat*, as in the verse just cited).<sup>110</sup>

At issue in some (but not all) of the post-9/11 controversies over Muslim charitable giving is the category of recipients who are “in (or for) the cause of God,” also translated as “in God’s way,” or “in the path of God.”<sup>111</sup> According to the Islamic legal historian Aron Zysow:

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107. THE HOLY QUR’AN 9:60 (Abdullah Yusuf Ali trans. 1st ed. 1989).

108. Aron Zysow, *Zakat*, in 11 THE ENCYCLOPEDIA OF ISLAM 406 (new ed., 2005).

109. *Id.*

110. *Id.*; see also ÖMER FARUK SENTÜRK, A COMPREHENSIVE GUIDE TO ZAKAT: CHARITY IN ISLAM 3–5, 109–28 (2007); JONATHAN BENTHALL & JÉRÔME BELLION-JOURDAN, THE CHARITABLE CRESCENT: POLITICS OF AID IN THE MUSLIM WORLD 9–12 (2003).

111. For the “in God’s way” translation, see THE KORAN INTERPRETED 186 (Arthur J. Arberry trans., 1982). I use the Ali translation because it seems to be favored by English-speaking Muslims throughout the world and is the dominant text adopted by Muslim Americans. But it is also worth noting that the term Ali translates as “alms” is translated by others as “the freewill offerings” or “voluntary alms” (in other words, the technical meaning of the term *sadaka* rather than *zakat*). In addition to the Arberry translation, see THE QUR’AN 151 (Tarif Khalidi trans., 2008).

The most common interpretation is that these are the volunteers engaged in *djihad*. They are to be given *zakat* to meet their living expenses and the expenses of their military service (animals, weapons). The Twelvers [that is, Shiite Muslims who acknowledge the authority of a line of twelve infallible leaders (imams) beginning with the Prophet Muhammad's cousin Ali] came to adopt a broader interpretation that encompasses a range of public services, including the repair of mosques and bridges . . . . The Hanafis [one of the four schools of Sunni Islamic law], among others, rejected the use of *zakat* for such purposes on the ground that the valid payment of *zakat* requires a transfer of ownership from one person to another.<sup>112</sup>

The literature on the definition of *jihad* in Islamic history is vast, contentious, and far beyond the scope of this essay to resolve.<sup>113</sup> I cite these two extended quotations—the *sadaka* verse and Zysow's commentary on the meaning of the phrase "in the cause of God"—in order to make two simple points.

First, *zakat* involves the transfer of money from one person to another. On both the giving and receiving ends, the persons can be corporate persons, institutions—as in a mosque or a charitable trust (*waqf*) or organization. But ultimately the purpose of *zakat* is to ensure that money gets from the hands of people who have it to those who need it, where need is defined according to the categories of the *sadaqa* verse and other Qur'anic verses on charity, the sayings of the Prophet Muhammad, and the rules of Islamic law (*sharia*) based upon those verses and sayings. This is, in other words, a fundamentally relational form of religious exercise, and any understanding of constitutional right that can be said to attach to that should recognize this difference from the classic liberal-individualist conception of rights.

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112. Zysow, *supra* note 108, at 416.

113. See, e.g., MICHAEL BONNER, *JIHAD IN ISLAMIC HISTORY: DOCTRINES AND PRACTICE* (2006); DAVID COOK, *UNDERSTANDING JIHAD* (2005).

It is also a relational practice that continues to change over time and place. As Ibrahim Warde has explained, in recent years Muslim understandings of the proper recipients of charitable giving have evolved to include refugees, prisoners and their dependents, and the so-called *dawa* effort, which entails proselytization among non-Muslims and deepening the faith of Muslims.<sup>114</sup> In light of these overlapping groups, it is not surprising that Muslim charities, whether U.S. or foreign-based, have tended to focus on places such as Afghanistan, Somalia, Bosnia, Chechnya, and Israel/Palestine.<sup>115</sup> Even with this adaptation of Muslim charity to the situation of the modern world, the religious command of *zakat* retains a strongly moralistic bent. As the Turkish theologian Ömer Faruk Sentürk has written, “*zakat* can be defined as the right possessed by the poor in the wealth of the rich, a right sternly ordained by God, the true owner of riches and property.”<sup>116</sup>

Second, the institution of *zakat* is intimately bound up with questions of scriptural and exegetical meaning in Islamic law. As Zysow’s commentary suggests, those questions have been contested, generating what were relatively minor differences of opinion between the traditional schools of Islamic jurisprudence, but what are now rather fundamental conflicts between progressive and conservative Muslims, particularly in the aftermath of 9/11. Treatises on the law of *zakat* can run into the hundreds of pages. And the matters in question implicate a range of conduct far greater than is generally associated with the institution of charity in other religions. For example, *zakat* historically played an important role in the freeing of slaves and the relief of debtors under Islamic jurisdictions.<sup>117</sup> But the practice of *zakat* nonetheless remains emphatically religious in nature, “a cornerstone of the acceptance of the Islamic faith,”<sup>118</sup> the essence of what binds one Muslim to another and both to God.

Thus, any American legal doctrine that purports to regulate the transfer of money either at home or abroad is, in theory, capable of reaching the institution of *zakat*. Since at least 1977, and now with far

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114. WARDE, *supra* note 26, at 146. This is in addition to rather than in lieu of the traditional Qur’anic categories of needy and deprived individuals.

115. *Id.*

116. SENTÜRK, *supra* note 110, at x.

117. *Id.*

118. *Id.*

greater force since 9/11 under the fungibility logic of *Humanitarian Law Project*, American national security law has permitted far-reaching executive action to regulate money transfers that cross over national boundaries. And the nature of Muslim American charity is such that it is typically extended to other Muslims abroad, usually needy co-religionists residing in conflict zones.

### *C. The Varieties of Religious Liberty Claims*

Muslim Americans have in recent years appealed to the full array of claims recognized by the law of religious liberty. In contexts outside of the Muslim charity controversy, they have sometimes invoked the law of church autonomy, which generally prohibits courts from deciding questions of internal institutional leadership and religious doctrine.<sup>119</sup> The pervasiveness of theological and doctrinal considerations in the practice of *zakat* suggests that government regulation of charitable giving can brush up against the American law of church autonomy as well as free exercise. Since these are questions of religious doctrine, and since Muslim charities are properly considered religious institutions by and large, it stands to reason that, in principle at least, religious institutional autonomy is relevant to thinking about the consequences of the financial war on terror. I consider the relationship between church autonomy and the crackdown on Muslim charity in Part III of this Article.

Muslim American prisoner litigation challenging burdens on the free exercise of religion—a tradition commenced in the 1950s by African-American inmates adhering to the Nation of Islam, who forced the federal courts to bring the prisons under the protection of the Constitution for the first time<sup>120</sup>—has been a steady presence on the federal court dockets, now under the aegis of the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000.<sup>121</sup> And there have been

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119. See, e.g., *In re Marriage of Obaidi*, 226 P.3d 787 (Wash. Ct. App. 2010); *Odatalla v. Odatalla*, 810 A.2d 93 (N.J. Sup. Ct. Ch. Div. 2002); *Mansour v. Islamic Educ. Ctr. of Tampa, Inc.*, No. 08-CA-3497 (Fla. 13th Cir. Ct., Mar. 22, 2011).

120. See GORDON, *supra* note 2, at 96–132.

121. Prisoner cases make up the vast majority of the religious liberty cases statistically analyzed in the 2011 Sisk and Heise study. See Sisk and Heise, *supra* note 6, at 53. These cases are regularly collected and briefed on Professor Howard Friedman's Religion Clause blog: [www.religionclause.blogspot.com](http://www.religionclause.blogspot.com). A recent

numerous challenges (several of them successful) under the RLUIPA statute to local zoning decisions that allegedly discriminate against mosques and Islamic community centers.<sup>122</sup> Muslims have also brought anti-discrimination and free exercise challenges to restrictions on their ability to wear religious headwear and adhere to other rules of personal comportment.<sup>123</sup>

Richard Schragger has recently argued that free exercise has been and will continue to be in for a hard time in the post-9/11 era.<sup>124</sup> He emphasizes the relationship between *Employment Division v. Smith*<sup>125</sup> and public anxieties about another major terrorist attack. In *Smith*, the Court held that a member of a Native American church who wished to ingest peyote as part of a religious ceremony could not assert a free exercise challenge against a neutral and generally applicable law that

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example is *Wesley v. City of New York*, No. 05-Civ-5833, 2012 WL 3262749, at \*1, 4 (S.D.N.Y. Aug. 10, 2012) (rejecting a Muslim inmate's claim that the washing of halal food trays together with non-halal trays violated his right to the provision of halal food). See also *Ahmad v. Dep't of Corr.*, 845 N.E.2d 289 (Mass. 2006) (rejecting Muslim prisoner's claims of right to prayer rug and halal diet).

122. See Eric Treene, *RLUIPA and Mosques: Enforcing a Fundamental Right in Challenging Times*, 10 FIRST AMEND. L. REV. 330 (2012). Conversely, it is surely a sign of something like progress and integration that a Muslim charter school and a Muslim American charity have, since 9/11, found themselves on the other side of an ACLU lawsuit alleging that the defendants were using tax funds to establish a school promoting Islam in violation of the establishment clause. See *ACLU of Minn. v. Tarek Ibn Zayed Acad.*, 788 F. Supp. 2d 950 (D. Minn. 2011) (denying defendants' motion for summary judgment because reasonable juror could find the principal primary effect of the school's creation was to advance the religion of Islam). For an example of a pre-9/11 establishment clause challenge brought by a Muslim American party, see *Mehdi v. U.S. Postal Serv.*, 988 F. Supp. 721 (S.D.N.Y. 1997) (holding that post office display of Christmas and Hanukah but not Muslim symbols did not violate the establishment clause).

123. See *Webb v. City of Philadelphia*, 562 F.3d 256 (3d Cir. 2009) (holding that a Muslim police officer's request to wear a headscarf with her uniform could be reasonably accommodated without imposing an undue burden upon police department). See also *United States v. Amina Farah Ali*, No. 11-3512 (8th Cir. June 4, 2012) (holding that a defendant convicted of material support of terrorism could bring a claim under the Religious Freedom Restoration Act to a judge's finding of contempt when she failed to stand when the court convened and recessed).

124. Richard Schragger, *The Politics of Free Exercise after Employment Division v. Smith: Same-Sex Marriage, the "War on Terror," and Religious Freedom*, 32 CARDOZO L. REV. 2009 (2011).

125. 494 U.S. 872 (1990).

burdened that practice.<sup>126</sup> To be successful on free exercise grounds, the plaintiff in such cases would have to show that the law in question specifically targeted religious exercise.<sup>127</sup> Schragger's claim, in essence, is that 9/11 has reinforced the authority of *Smith*: the religious tensions of the Terror Decade and widespread concerns that Islam does not share certain core American values are likely to curb any effort to loosen *Smith*'s tight grip on the constitutional law of free exercise.<sup>128</sup> But he also identifies a countervailing force at work, in the form of the gay and lesbian civil rights struggle, which is putting pressure on *Smith* in the name of relieving religious groups from the obligations of (neutral and generally applicable) anti-discrimination laws.<sup>129</sup>

So far as 9/11 and Muslim America are concerned, the relevant pressures do seem to be working in favor of maintaining the free exercise status quo.<sup>130</sup> *Smith* has been a factor in the story of what has happened to Muslim American religious liberty during the Terror Decade. While this Article has noted the absence of any major federal court pronouncements on religious liberty in the context of the war on terror, the larger truth may simply be that, in the years since *Smith*, there have been few such pronouncements in *any* context, pre- or post-9/11. The biggest exceptions are *Church of the Lukumi Babalu Aye v. City of Hialeah*<sup>131</sup> and *Hosanna-Tabor v. Lutheran Evangelical Church & School v. EEOC*,<sup>132</sup> but both are, at least according to the Court, easily distinguished from *Smith*—the former because it involved a set of local ordinances that unmistakably and specifically targeted the animal sacrifice practices of the Afro-Caribbean religion of Santeria,<sup>133</sup> the latter because it involves an “internal” church decision about who is qualified to minister to the faithful.<sup>134</sup>

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126. *Id.* at 878–86.

127. *Id.* at 878. *Smith* was a civil rather than a criminal case, even though the drug use for which *Smith* was fired could have subjected him to criminal charges. *Id.* at 882–83.

128. Schragger, *supra* note 124, at 2028–30.

129. *Id.*

130. *Id.* at 2010–13, 2029.

131. 508 U.S. 520 (1993).

132. 565 U.S. \_\_\_, 132 S. Ct. 694 (2012).

133. *Church of the Lukumi Babalu Aye*, 508 U.S. at 562–63.

134. *Hosanna-Tabor*, 565 U.S. at \_\_\_, 132 S. Ct. at 697.

Another, somewhat more abstract way of putting this point would be to say, as Douglas Laycock has, that the Supreme Court no longer recognizes a “bare” right to the free exercise of religion, in contrast to the church autonomy and conscientious objection lines of cases, which have both survived *Smith*. According to Laycock, “the Court has taken the bare right to engage in religious activities and made it a conscientious objection claim, even as it greatly reduced the scope of constitutional protection for conscientious objection claims,” through the rule that neutral and generally applicable laws cannot be challenged in free exercise terms.<sup>135</sup> This rather stark description of the anatomy of our current free exercise law seems not entirely right. *Lukumi Babalu*, for one, seems to involve a “bare” right to engage in religious activities just as much as (if not more than) a claim of conscientious objection, for in that latter context the government typically seeks to force the objecting party to engage in conduct that it claims it cannot undertake for reasons of conscience.<sup>136</sup> But the more limited thesis—that free exercise as a right to engage in religious activities has a greatly reduced scope after *Smith*—seems right.

The combination of *Smith* and 9/11 has certainly had some impact on judicial understandings of free exercise. But trying to figure out exactly what this impact is turns out, here too, to be difficult to accomplish in practice. Schragger concedes that “[w]e have not yet seen the reaction to 9/11 show up directly in the law of free exercise.”<sup>137</sup> But, he insists, “it is just a matter of time before the politics of 9/11 comes to the doctrinal fore in the Religion Clauses.”<sup>138</sup> The Muslim charity cases—to the extent they rely on religious liberty holdings consisting of the summary statement that “there is no free exercise right to fund

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135. 2 DOUGLAS LAYCOCK, RELIGIOUS LIBERTY: THE FREE EXERCISE CLAUSE 309 (2010).

136. In *Lukumi Babalu*, South Floridian followers of the Afro-Cuban religion known as Santeria sought First Amendment protection for the practice of animal sacrifice in birth, marriage, and death rites, for the cure of the sick, and other purposes. 508 U.S. at 525. A leading example of the conscientious objection line of cases is *United States v. Seeger*, 380 U.S. 163 (1965) (involving a claim of conscientious objection to combatant training and service).

137. Schragger, *supra* note 124, at 2014.

138. *Id.*



terrorists”<sup>139</sup>—seem at first glance entirely consistent with this emphasis on the relationship between *Smith* and 9/11.

A sustained reading of the material support of terrorism jurisprudence, however, indicates that there may be less to that relationship than meets the eye. Arguably, *Smith* and the constitutional law of free exercise have had very little to do with the actual outcomes of these cases. This is so for two reasons, one obvious, another less so. The obvious reason is that, since the Muslim charity cases involve federal law enforcement, the applicable standard is not *Smith* but the 1993 Religious Freedom Restoration Act (RFRA), which restores the pre-*Smith*, compelling state interest standard in any case, civil or criminal, where “free exercise of religion is substantially burdened.”<sup>140</sup> But this distinction does not amount to much of a difference because even RFRA claims have been uniformly rejected in the federal courts that have presided over these cases. It is, indeed, on the basis of RFRA law that the courts have stated “there is no free exercise right to fund terrorists.”<sup>141</sup>

There is reason to question whether RFRA has had much of an impact on the disposition of religious liberty cases at all: one study of reported decisions from the period between the enactment of RFRA and its invalidation as to the states in *City of Boerne* finds that RFRA claimants prevailed in only fifteen percent of the cases.<sup>142</sup> Since a successful RFRA claim requires a court to find that the government’s chosen means towards the accomplishment of a compelling interest are not narrowly tailored,<sup>143</sup> *Smith* (with its direction to judges that they avoid such analyses) may well be operating in the background of these

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139. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003).

140. 42 U.S.C. § 2000bb(b)(1) (1993). In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court struck down RFRA’s application to the states as exceeding Congress’s enforcement powers under Section 5 of the Fourteenth Amendment. RFRA remains applicable to the federal government. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). In only one of the Muslim charity cases is *Smith* even cited in passing, see *Holy Land Found.*, 333 F.3d at 166, and there merely for the purpose of explaining the background to RFRA.

141. *Holy Land Found.*, 333 F.3d at 167.

142. Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 591 (1998).

143. 42 U.S.C. §§ 2000bb(b)(2), 2000bb(c) (1993).

decisions. In other words, RFRA may simply be permitting courts in Muslim charity and other cases to go through the motions of the pre-*Smith* free exercise standard, all while reconfirming the irrelevance of disparate impact arguments to First Amendment law (and religious liberty law specifically) after *Smith* and RFRA as before.<sup>144</sup>

Hostility to disparate impact theories in both First and Fourteenth Amendment law means that there has been no real judicial forum for addressing the interests of donors and recipients of Muslim American charity, as opposed to the charitable institutions and their officers who have nearly always been the parties in these cases.<sup>145</sup> A related obstacle has been that free exercise law, unlike free speech law, does not recognize claims based on a chilling effect; the litigant must show not simply that state action has the incidental effect of over-detering protected religious exercise, but imposes a direct burden on his or her own free exercise.<sup>146</sup>

In any event, as we will see, the Muslim charity controversy requires another account of what has happened to religious freedom claims in the Terror Decade, one that does not rely on either the constitutional or the statutory law of free exercise *per se*.

## II. FREE EXERCISE, FREE SPEECH, AND FUNGIBILITY

Fungibility, an offshoot of the constitutional law of counterterrorism, does the work that *Smith* might otherwise have done in the war on terror, and it is key to explaining the fate of religious liberty claims in the Muslim charity litigation. Religious liberty arguments in these cases are treated, not without reason, as variations on free speech (or, to a lesser extent, free association) theories. In nearly all contexts involving a designated organization, fungibility makes both the religious and the secular First Amendment claim essentially futile. The story

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144. The pre-*Smith* standard was based on *Sherbert v. Verner*, 374 U.S. 398 (1963).

145. On the First Amendment's lack of receptivity to disparate impact theory, see William P. Marshall, *Smith, Christian Legal Society, and Speech-Based Claims for Religious Exemptions from Neutral Laws of General Applicability*, 32 CARDOZO L. REV. 1937, 1946 (2011) ("[T]he First Amendment does not protect against disparate impacts.").

146. *Id.*

begins with the earliest lower court articulations of the fungibility standard in the post-9/11 era.

A. “*There is No Free Exercise Right to Fund Terrorists*”

Narrow or pyrrhic victories are typical of the lower court cases that have reached the merits of a charity’s First Amendment claim. In 2002, the D.C. Circuit, reviewing a district court’s dismissal of HLF’s lawsuit challenging its designation as an SDT and SDGT, found that the district court had failed to apply the 12(b)(6) standard that requires treating the complainant’s allegations as true for purposes of a motion to dismiss. HLF’s complaint, unsurprisingly, alleged that it did not support terrorism and asserted that OFAC’s designation violated the First and Fifth Amendments as well as RFRA. The district court had rejected these claims on the grounds that “there is no constitutional right to facilitate terrorism.”<sup>147</sup> In order to arrive at such a finding, Judge Sentelle said for the D.C. Circuit, the district court would have had to find, as a factual predicate, that HLF actually facilitated terrorism in some way, which it was not permitted to do under the 12(b)(6) standard.<sup>148</sup>

Having gone through these motions, the appellate panel then held that HLF had suffered no prejudice as a result of the district court’s abuse of discretion because the result would have been identical at the summary judgment stage. In other words, HLF would have suffered prejudice only if it could have produced evidence upon which a reasonable trier of fact could have found that the designation violated the First or Fifth Amendments or RFRA. And this it could not do because (indeed) “there is no constitutional right to fund terrorism. The ample record evidence (particularly taking into account the classified information presented to the court *in camera*) establishing HLF’s role in the funding of Hamas and of its terrorist activities is incontrovertible.”<sup>149</sup> Several years later, as we will see, HLF would have the opportunity to confront this evidence head-on in the context of two successive material support criminal trials (the first having ended on a hung jury).<sup>150</sup> At the

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147. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 81 (D.D.C. 2002) (internal citation omitted).

148. *Holy Land Found.*, 333 F.3d at 164–65.

149. *Id.* at 165.

150. *See infra* Part II.C.

designation stage of the conflict between HLF and the government, the ability to resort to classified, ex parte, and even hearsay evidence essentially mooted the constitutional and statutory claims pending further (criminal) proceedings, by which time HLF would not be permitted to contest that the organization to which it had allegedly contributed was a terrorist organization.<sup>151</sup>

Judge Sentelle's 2002 opinion then proceeded to treat the merits of the RFRA claim, which the district court had dismissed on the grounds that HLF had failed to allege in its complaint that it was a religious organization or that it was engaged in an "actual exercise of religion" as an organization.<sup>152</sup> Sentelle declined to reach this issue of whether a corporation can be a "person whose religious exercise has been burdened in violation" of RFRA, preferring to hold instead that, whatever HLF's standing to bring a RFRA claim, it could not claim that its religious exercise had been burdened. This portion of the court's opinion is worth quoting at some length:

No one on behalf of Holy Land Foundation has forwarded the proposition that the fomenting and spread of terrorism is mandated by the religion of Islam. At most they argue a right to charitable giving as a pillar of that religion. Acting against the funding of terrorism does not violate the free exercise rights protected by RFRA and the First Amendment. There is no free exercise right to fund terrorists. The record clearly supports a conclusion that HLF did.<sup>153</sup>

This analysis is at once self-evident and somewhat confusing. The self-evident part is the statement that religious liberty does not shield the provision of money to terrorists. The confusing aspect derives from Sentelle's conflicting statements that (a) HLF does not embrace the

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151. See 8 U.S.C. § 1189(a)(8) (2004) ("[I]f a designation under this subsection has become effective . . . a defendant in a criminal action . . . shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or an objection at any trial or hearing").

152. *Holy Land Found.*, 219 F. Supp. 2d at 83; *Holy Land Found.*, 333 F.3d at 161.

153. *Holy Land Found.*, 333 F.3d at 167 (citation omitted). The court granted summary judgment to OFAC on this claim.

stigmatizing proposition that Islam mandates the support of terrorism and (b) HLF is advancing the very broad claim that there is a free exercise right to fund terrorism. Exactly how these two statements relate is unclear. If HLF is only insisting that there is a “right to charitable giving as a pillar of” Islam, the conclusion that “there is no free exercise right to fund terrorists” only makes sense if the right to charitable giving that HLF is claiming does in fact entail the support of terrorism. Yet Judge Sentelle properly excluded from the field of argument any intent to associate Islam in general with mandatory charitable subsidies for terrorism.

There is more than one way to reconcile these statements, but the best explanation for them may involve two aspects of the proceedings, one peculiar to the HLF designation, and a second that characterizes the Muslim American charity cases more generally. The specific rationale for HLF’s designation as an SDGT is that it supported the Hamas organization, which (as we have seen) was named a terrorist organization by President Clinton in early 1995.<sup>154</sup> But the evidence behind that designation did not involve direct payments from HLF to Hamas. Rather, OFAC acted on the basis of HLF’s payments to the so-called *zakat* committees of the West Bank and the Gaza strip. Formally independent entities whose mission was to distribute charitable aid to needy Palestinians, these committees were, according to the prosecution in the HLF criminal case, under the effective control of Hamas, and HLF was aware of that relationship at all times.<sup>155</sup> In the D.C. Circuit oral argument in the civil designation proceedings, HLF’s lawyers nonetheless asserted, to the contrary, that for RFRA purposes there was a distinction to be made between cases in which an organization had

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154. Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995).

155. The prosecution’s position is reflected in MATTHEW LEVITT, *HAMAS: POLITICS, CHARITY, AND TERRORISM IN THE SERVICE OF JIHAD* (2006). Levitt served as an expert witness in the Holy Land criminal case and in several other cases involving Muslim charities. For a contrasting perspective, arguing that Levitt’s work relies on webs of association involving sometimes distant and tenuous links, see Benthall, *supra* note 82; and Jonathan Benthall, *The Palestinian Zakat Committees 1993–2007 and Their Contested Interpretations*, GRADUATE INSTITUTE OF INTERNATIONAL AND DEVELOPMENT STUDIES, PROGRAM FOR THE STUDY OF INTERNATIONAL ORGANIZATION(S) OCCASIONAL PAPER (2008), available at <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?id=94618&lng=en>.

concededly given to a designated terrorist organization, and cases, such as HLF's, in which no such direct relationship was alleged:

HLF: [The government's lawyer] said that what we are arguing for, under RFRA, the First Amendment, and so on, is the right to as a religious matter to support a terrorist organization, or the right to associate with a terrorist organization. That's not what we are arguing for. That's what distinguishes this case from cases like the *Humanitarian Law Project*, the *Farrakhan* case from the district court here in D.C.<sup>156</sup> – those were cases where there was no dispute that the would-be charitable giver wanted to contribute to organizations that have been designated.

The Court: What is it that you want to do that you have been prevented to do by the action under review in this case?

HLF: We want to prove that we are not . . .

The Court: No, no, no. Not what you want to prove in this case. What is the ultimate result you want? What is it you want to do that the Secretary or Attorney General is preventing you from doing?

HLF: We want to make charitable and humanitarian contributions, not to Hamas, and that's what we want to do.

The Court: Are you prevented from making charitable contributions to anybody at the present time?

HLF: Absolutely.

The Court: You can't make them to anybody?

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156. *Farrakhan v. Reagan*, 669 F.Supp. 506 (D.D.C., June 3, 1987) (holding free exercise does not require the government to accommodate a Muslim organization's wish to send monies to Libya in violation of U.S. sanctions against that country). See text at note 151, *infra*.

HLF: Every dime is blocked. All of HLF's furniture has been taken, the office equipment has been removed, the employees are out of work.

The Court: All that's left is the lawyer.<sup>157</sup>

This exchange apparently had little impact on the three-judge panel that decided the case. But it does suggest a layer of complexity not reflected in the idea that "there is no free exercise right to fund terrorists."<sup>158</sup> And in so doing, it links up to a second and more generally applicable characteristic of the Muslim charity cases that underlies Judge Sentelle's discussion.

This more generally applicable feature of the proceedings is that a designated entity cannot prevail by making a chilling effect or overbreadth type of argument.<sup>159</sup> That is, the charity cannot hope to prevail on the argument that the designation must be found unlawful where the organization is engaged in at least some legitimate and indisputably religious charitable activity, even if it is also found to have supported some terrorist activity. The standard of review provides for setting aside arbitrary and capricious designations, but has nothing to say about how OFAC ought to use its discretion in deciding whether to designate organizations whose conduct includes both legal and illegal activity.<sup>160</sup> That discretion is vested entirely in OFAC, and to the extent that a designated organization wishes to pursue a religious liberty

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157. As transcribed from the court's digital recording of the oral argument in *Holy Land Found. for Relief & Dev. v. Ashcroft*, No. 02-5307 (D.C.Cir. Apr. 22, 2003). This portion of the argument comes at roughly the thirty-third minute of the recording. Oral Argument at 33:00, *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (No. 02-5307). The lawyer for HLF is John D. Cline; Douglas Letter argued for the Department of Justice.

158. *Holy Land Found.*, 333 F.3d at 167.

159. Not coincidentally, these claims are also foreign to the law of free exercise and RFRA.

160. The statute governing designation of FTOs requires that the Secretary of State find that the organization is "foreign" and "engages in terrorist activity" (as defined elsewhere in the U.S. Code) and that such activity threatens the security of American nationals or the national security. 8 U.S.C. § 1189(a)(1) (2004). Because of the foreign policy implications, federal courts are required to give these determinations "even more latitude than in the domestic context." *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137 (9th Cir. 2000).

challenge, it must do so using a broad brush, effectively implying that illegal as well as legal activity is protected by religious freedom.<sup>161</sup>

It should therefore come as no surprise to learn that HLF is not the only Muslim charity whose religious liberty pleadings have met with the assertion that free exercise does not shield the financing of violence. The legal battles of the Islamic American Relief Agency in the Terror Decade suggest the scope and thrust of the emerging constitutional landscape. IARA was established in Columbia, Missouri in 1985 by a group of Sudanese immigrants as the Islamic African Relief Agency, its professed goal to aid victims of that year's Sudanese famine and other humanitarian disasters.<sup>162</sup> At the time of its incorporation as a 501(c)(3), a foreign organization based in the Sudan itself existed under the name Islamic African Relief Agency.<sup>163</sup> The Missouri-based entity changed its name in 2000 to the Islamic American Relief Agency.<sup>164</sup> In 2004, following prolonged FBI wiretaps of the American entity's officers, both the Sudanese-based and the Missouri-based IARA entities were designated as SDGTs, the latter on the theory that it was in fact a branch office of and fundraiser for the former.<sup>165</sup> Four years later, the Missouri IARA was indicted and charged with violating U.S. sanctions against Iraq under the regime of Saddam Hussein and improperly sending funds to Pakistan on behalf of Gulbuddin Hekmatyar (the notorious Afghan warlord who had once received millions from the CIA before going on to serve briefly as Afghanistan's foreign minister and later as a sometime ally of Osama Bin Laden and the Taliban).<sup>166</sup>

IARA challenged its designation in the D.C. district court, pleading *inter alia* that OFAC's enforcement action violated the charity's

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161. Because Judge Sentelle found no substantial burden on HLF's religious exercise to begin with, it was unnecessary in this case to reach the question of whether OFAC had used the "least restrictive means" of furthering a compelling government interest.

162. *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 39–40 (D.D.C. 2005).

163. *Id.* at 40.

164. *Id.*

165. *Id.*

166. *Islamic Am. Relief Agency*, 394 F. Supp. 2d 34; R. Jeffrey Smith, *Siljander Pleads Guilty in Islamic American Relief Agency Lobbying Case*, WASH. POST. (July 8, 2010), <http://www.washingtonpost.com/wpdyn/content/article/2010/07/07/AR2010070705205.html>.



First Amendment right to the free exercise of religion.<sup>167</sup> The cause of action as laid out in the complaint seems both better and less well handled than in HLF's case. On the one hand, IARA failed to plead a RFRA violation in addition to or instead of the constitutional free exercise claim.<sup>168</sup> That the organization did not speak either to bad lawyering in disregard of *Smith* or to the irrelevance of RFRA in the post-9/11 era. On the other hand, unlike HLF, IARA was careful to clearly allege that it was a religious organization engaged in religious conduct involving both donors and employees:

IARA-USA and its Muslim donors and employees support and participate in IARA-USA's work because it fulfills their religious obligation as Muslims to engage in Zakat (humanitarian charitable giving) . . . . By blocking IARA-USA's assets on the eve of Ramadan, defendants have substantially burdened the exercise of religion by IARA-USA and its Muslim donors and employees."<sup>169</sup> This appeal to the interests of IARA's donors did not escape the eye of the attorneys on the other side, who moved to dismiss the count on the basis that IARA, as an organization, lacked standing to object to a burden on the religious exercise of its members, employees, or donors.<sup>170</sup>

The district court adopted the government's standing analysis as well as its citation to a pre-9/11, pre-*Smith* decision rejecting a Muslim organization's theory that the free exercise clause required the

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167. *Islamic Am. Relief Agency*, 394 F. Supp. 2d 34.

168. *Id.*

169. Complaint at 65–66, *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34 (D.D.C., Dec. 30, 2004) (No. 04-2264 (RBW)).

170. On this point, the Government cited *Harris v. McRae*, 448 U.S. 297 (1980) (“[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion.”). The DOJ further argued that, on the merits, “[a]ny Muslims among plaintiff's employees and past donors remain entirely free to fulfill the obligation of zakat through multitudes of charitable organizations and causes aside from IARA-USA.” Defendants' Motion to Dismiss and for Summary Judgment, *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34 (D.D.C. Mar. 18, 2005) (No. 04-2264 (RBW)).

government to accommodate its wish to send monies to Libya in violation of U.S. sanctions against that country.<sup>171</sup> On appeal two years later, the D.C. Circuit essentially echoed its earlier approach in the *HLF* litigation, choosing to disregard the jurisdictional issue (just as it had largely overlooked the question of whether HLF was a religious organization), and instead hold on the merits that “[t]here is no free exercise right to fund terrorists.”<sup>172</sup>

### *B. Fungibility and Humanitarian Law Project*

This “no free exercise right” refrain might suggest that free exercise or RFRA arguments have a peculiar vulnerability in the Muslim charity cases. In fact, the holding sweeps in the entire range of constitutional rights. In particular, it extends to the law of the First Amendment generally. The D.C. Circuit’s IARA free exercise holding was preceded by a lengthier discussion of the plaintiff’s freedom of association claim. There, as in the *HLF* litigation, the court relied on a then-widely cited Ninth Circuit opinion by Judge Kozinski in *Humanitarian Law Project* that has since been superseded by the Supreme Court’s decision in that case. Writing for a unanimous three-judge panel of the Ninth Circuit, Judge Kozinski affirmed the lower court’s holding that the statute’s use of the terms “training” and “personnel,” as examples of “material support,” were unconstitutionally vague. But the court otherwise rejected the Humanitarian Law Project’s First Amendment argument that it could not be prosecuted for supporting the peaceful goals of LTTE and the PKK (two non-Muslim, secular

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171. *Islamic Am. Relief Agency*, 394 F. Supp. 2d at 54–55. The earlier case is *Farrakhan*, 669 F. Supp. 506. Without using the term, *Farrakhan* is in fact an early expression of the doctrine of fungibility, for it rejected the plaintiff’s claim on the additional basis that “we cannot ascertain what will happen to the money once it reaches Libya. Conceivably, the money could be used for purely innocuous purposes, or it could be used, directly or indirectly, to subsidize the types of anti-United States activity that the sanction regulations aim to prevent.” *Farrakhan*, 669 F. Supp. at 511.

172. *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 737 (D.C. Cir. 2007).

organizations) because “there is no constitutional right to facilitate terrorism.”<sup>173</sup>

Although, as we have seen, it did not involve a religious organization or a religious liberty claim, this decision by the Ninth Circuit has come to assume a foundational role in the Muslim charity cases, as HLF’s oral argument before the D.C. Circuit in 2003 suggests. Central to Judge Kozinski’s ruling was the principle that “money is fungible; giving support intended to aid an organization’s peaceful activities frees up resources that can be used for terrorist acts.”<sup>174</sup> The first decision to reflect this movement from secular to religious applications of fungibility is the D.C. district court’s 2002 decision in HLF, which cited Judge Kozinski’s rejection of HLF’s argument that the government had failed to adopt the least restrictive means of furthering its compelling interest in protecting national security. “Money is fungible,” Judge Kessler explained, “and the Government has no other, narrower, means of ensuring that even charitable contributions to a terrorist organization are actually used for legitimate purposes.”<sup>175</sup>

There have been many critiques of this doctrine as an animating principle of the financial war on terror, including its reliance on an

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173. *Holder*, 205 F.3d at 1133. Kozinski here distinguishes the Humanitarian Law Project’s free association claim from that in *NAACP v. Clairborne Hardware*, 458 U.S. 886 (1982) (holding that the First Amendment restricts a state’s ability to impose liability on an individual solely because of his association with another in the context of a peaceful boycott). *Claiborne Hardware*, Kozinski said, involved punishment by reason of association alone: mere membership or espousal of views, as opposed to the provision of weapons or explosives to carry out terrorist missions. As noted above, a later round of this same litigation in the Ninth Circuit eventually led Congress, in 2004, to amend AEDPA to require knowledge that the recipient entity was a designated entity or has/is engaged in terrorist activity. In that later round, the government argued that it could convict an individual of material support even if she did not know that her donations were going to a designated organization. See *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1142–48 (C.D. Cal. 2005); *Humanitarian Law Project v. Ashcroft*, 352 F.3d 382, 397 (9th Cir. 2003), *vacated*, 393 F.2d 902 (9th Cir. 2004). See also AMERICAN CIVIL LIBERTIES UNION, *supra* note 11, at 29.

174. *Holder*, 205 F.3d at 1136. The doctrine had been developed in the Government’s trial court and appellate briefs, based on statements by officials invoking the phrase “money is fungible” in the legislative history of AEDPA.

175. *Holy Land Found.*, 219 F. Supp. 2d at 82 (citing *Holder*, 205 F.3d at 1136 and *Farrakhan*, 559 F. Supp. at 512).

outdated or inapplicable money laundering tradition of criminal enforcement<sup>176</sup> and its impact on humanitarian organizations serving in post-9/11-sensitive conflict areas.<sup>177</sup> The implications for religious liberty issues have been relatively underemphasized. Where a designated organization is concerned, fungibility performs two operations that are critical in this context. First, it collapses legal and illegal uses of money.<sup>178</sup> Second, because *Humanitarian Law Project* was brought as a secular case that has since become the dominant precedent in the financial war on terror, the fungibility doctrine funnels religious liberty concerns into a secular First Amendment framework that leaves room for only a very narrow range of free speech and free association interests. The Supreme Court has now clarified that this range encompasses only membership (which is protected by the *Scales* decision of the McCarthyism era)<sup>179</sup> and uncoordinated political advocacy: that is, speech that promotes the goals and views of a designated organization,

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176. See Donohue, *Anti-Terrorist Finance*, *supra* note 44, at 394–95; WARDE, *supra* note 26; DE GOEDE, *supra* note 29.

177. Courtney Martin, *The Supreme Court Stifles Humanitarian Groups*, THE AMERICAN PROSPECT (June 25, 2010), available at <http://prospect.org/article/supreme-court-stifles-humanitarian-groups-0>; COLE, *supra* note 26, at 61–64.

178. The idea, at its most basic, is that any single unit of money can be substituted for another. A dollar given to an organization to defray the cost of health care for its members or to aid the poor is a dollar that it does not have to spend on building a bomb. Fungibility says, in effect, that the first of these dollars is functionally the same as the second. In this form, the idea has a self-evident character to it, and indeed its self-evident truth is generally assumed in economic theory. *But see* Johannes Abeler & Felix Marklein, *Fungibility, Labels, and Consumption*, (IZA Discussion Paper No. 3500 May 2008), <http://ssrn.com/abstract=1139870>.

179. *Scales v. United States*, 367 U.S. 203 (1961) (reversing a conviction for membership in the Community Party under the Smith Act and holding that the government must prove not only membership but also a specific intent to further the Party's illegal ends). In fact, however, it is not clear that even membership in an FTO is protected after *Humanitarian Law Project*. The definition of "support" includes the term "personnel," which is further defined to include the act of providing one's own self to a group and being subject to its direction or control. The Court did not reach this particular issue because the plaintiff's proposed actions did not implicate it. See Chesney, *supra* note 67, at 18 n.30.

but without any nexus to the personnel or operations of that organization.<sup>180</sup>

The criminal cases of IARA and HLF well illustrate how this very expansive, secular concept of fungibility has occupied the field of religiously inflected constitutional disputation in the financial war on terror. Following its designation battles in civil court, as we have seen, the Missouri IARA was indicted in federal court in 2008 on charges of violating the IEEPA and the Iraqi Sanctions Regulations by transferring monies into Iraq during the regime of Saddam Hussein. IARA moved to dismiss on RFRA grounds, inter alia. As if to confirm the impossibility of prevailing on such a claim in the case of a designated organization post-9/11, the district court assumed without deciding that IARA's presumably sincere religious beliefs had been burdened by the government's restrictions on economic intercourse with Iraq.<sup>181</sup> The government satisfied the compelling interest standard by the need to maintain national security and public safety through the IEEPA and the Iraqi Sanctions Regulations. That left only the question of whether it had adopted the least restrictive means to achieve that interest. And on this decisive point, as in the D.C. district court's analysis of the free association claim in HLF's civil case, that question was reducible to fungibility.<sup>182</sup> Because there is no way to determine what use is finally

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180. *Humanitarian Law Project*, 561 U.S. at \_\_\_, 130 S.Ct. at 2722–24; *Scales*, 367 U.S. at 229–30.

181. *United States v. Islamic Am. Relief Agency*, No. 07-00087-CR-W-KL, 2009 WL 4016478, at \*7 (W.D. Mo. Nov. 18, 2009). The government took the position that the defendants' exercise of religion was not substantially burdened because Islam does not require giving money to the poor in Iraq as a means of complying with the obligation of zakat. *Id.* at \*6. One of the cases cited by the district court in its discussion of the law on substantial burdens under RFRA is instructive in this regard. In *Western Presbyterian Church v. Bd. of Zoning Adjustment of D.C.*, the court held that it was a substantial burden for a local government to prohibit a church, via zoning regulation, from feeding homeless persons on its premises. 862 F. Supp. 538 (D.D.C. 1994). The differences between these facts and the diffuse, transnational giving patterns typical of Muslim American charity suggests that the scope of First Amendment protections depends at least in part on the nature of the religious-philanthropic culture at issue. For a portrait of these differences in the case of one Muslim-American philanthropic tradition, see NAJAM, *supra* note 88.

182. As construed by Judge Kozinski in the *Humanitarian Law Project* litigation. *Islamic Am. Relief Agency*, 2009 WL 4016478, at \*11 (citing *Holy Land*

made of the donated funds once they cross over from U.S. into foreign territory, “a total embargo on monetary funds is the least restrictive means to further the national security goals of IEEPA.”<sup>183</sup> Fungibility provides an automatic answer to the narrow tailoring prong of RFRA.

### C. *The Holy Land Criminal Case*

The very name of the *Holy Land* case evokes diametrically opposed and passionately held views that have likely been reinforced rather than mitigated since the Fifth Circuit finally resolved it on December 27, 2011.<sup>184</sup> The defendants were never charged with carrying out any terrorist acts, or even with subsidizing a specific act of violence committed by someone else. The trial was nonetheless pervaded by disturbing images and memories of Israeli civilians killed in suicide bombings by Hamas militants who, according to the prosecution, had been incentivized to commit these acts by promises of charitable support for their soon-to-be orphaned children. On the other side, lawyers evoked sympathetic pictures of suffering Palestinian refugees in the occupied territories of the West Bank and Gaza receiving alms from co-religionists in the United States. HLF acknowledged that the orphans of suicide bombers may have received some of its funds, but only as part of a general charitable policy to aid Palestinian children in need, not as an incentive to terrorism.<sup>185</sup> In between stood the federal government, its authority now directed towards the post-9/11 invigoration of the material support laws rather than facilitating an Israeli-Palestinian peace process in tatters. One indication of how deeply polarizing the case eventually became is that, when the Voice of Witness, a progressive human rights nonprofit that sponsors books and other educational activities, published

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*Found.*, 219 F. Supp. 2d at 82, which itself relies on the Ninth Circuit’s 2000 *Humanitarian Law Project* decision).

183. *Islamic Am. Relief Agency*, 2009 WL 4016478, at \*4.

184. Holy Land filed a petition for certiorari with the Supreme Court in May 2012 that was denied on October 29, 2012. On the Holy Land litigation, see Wadie Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543 (2011); Jonathan Benthall, *An Unholy Tangle: Boim Versus the Holy Land Foundation*, 10 UCLA J. ISLAMIC & NEAR E. L. 1 (2011); and Michael G. Freedman, *Prosecuting Terrorism: The Material Support Statute and Muslim Charities*, 38 HASTINGS CONST. L.Q. 1113 (2011).

185. WARDE, *supra* note 26, at 147.

a collection of “narratives of post-9/11 injustice,” its board of directors was sharply divided about whether even to include an account written by one of the HLF defendants.<sup>186</sup>

Established in the 1980s, the Holy Land Foundation was, at the time of its designation as an SDGT in December 2001, the largest Muslim American charity. I have already described some of the contentions in the civil litigation that followed in the wake of that designation.<sup>187</sup> Those proceedings were but a prelude to the even more bitterly divisive criminal case first brought in 2004. The outcome of the initial trial amply demonstrated how ideologically overloaded and hotly contested the proceedings had become: the jury simply could not agree on the vast majority of the charges against most of the defendants, including the central material support charges, producing a mistrial and a second trial in 2008.<sup>188</sup>

The government’s theory of the case echoed the basis of the OFAC designation: HLF was prosecuted not for providing direct aid to the designated organization in question ( Hamas), but for providing aid to a number of *zakat* committees that were either transparently controlled by Hamas (as the government argued) or substantially independent of that organization (as the defendants maintained). It was for the jury to decide, as a factual matter involving knowledge and intent, that sending payments to the *zakat* committees amounted to the same thing as making contributions directly to Hamas. The jury in the second trial concluded that it was, and convicted the defendants on all counts.

In between the verdict and the resolution of the defendants’ appeal by the Fifth Circuit, the Supreme Court issued its previously

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186. PATRIOT ACTS: NARRATIVES OF POST-9/11 INJUSTICE 190 (Alia Malek ed., 2011). The volume did ultimately include Ghassan Elashi’s account, but prefaced it with the statement that “his story is included in this collection because he was found guilty under a law – material support for terrorism – that has come under fire from civil rights, civil liberties and human rights groups for criminalizing, and branding as terrorism, acts that include those that are nonviolent, or are without violent intention.” *Id.* In other words, the rationale for including Elashi’s account mirrored the theory of the plaintiff’s challenge in the *Humanitarian Law Project* litigation.

187. *See supra* Part II.A.

188. Leslie Eaton, *Judge Declares Mistrial in Muslim Charity Case*, N.Y. TIMES (Oct. 22, 2007), <http://www.nytimes.com/2007/10/22/world/americas/22iht-22holy.8005339.html>.

summarized opinion in *Humanitarian Law Project*.<sup>189</sup> HLF's criminal appeal shows the impact of the twelve-year-long litigation in *Humanitarian Law Project* in more than one respect. As with most federal criminal appeals, many of the defendants' contentions involved intricate objections to the admissibility of certain evidence and the legality of FBI searches and surveillance. One of the central disputes involved whether the district court had correctly admitted evidence of the defendants' relationship to Hamas prior to its designation as a terrorist organization in 1996. Although such pre-designation ties with Hamas were perfectly legal, the Fifth Circuit held, they showed that the defendants had the intent needed to violate the material support statute after the 1996 designation: namely, knowledge that their contributions to the Palestinian *zakat* committees were effectively direct contributions to Hamas.<sup>190</sup> To the extent that such evidence of intent raised a First Amendment issue, it did so as a matter of free speech rather than religious liberty. Thus, after citing the settled doctrine permitting the evidentiary use of protected speech to establish the elements of a crime, the appellate panel invoked the newly endorsed principle of *Humanitarian Law Project* that "Congress could criminalize speech that provides material support to designated terrorists."<sup>191</sup>

The religious liberty claims asserted in the earlier civil cases and in the pretrial stages of the criminal case had effectively dropped out of the picture. And the central facts of the case were now framed by the newly endorsed fungibility and legitimacy concerns of *Humanitarian Law Project*. Thus, in recounting the evidence at trial, the Fifth Circuit described a "social wing" of the Hamas organization that provides for the needy through the operation of schools and hospitals. This social wing, the court said, had helped Hamas to win the "hearts and minds" of Palestinians and thereby accrue legitimacy. And "support[ing] the

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189. See *supra* Part II.A.

190. *United States v. El-Mezain*, 664 F.3d 467, 527–54 (5th Cir. 2011). The court did find that the district court had erred in admitting certain items of evidence, but held that such errors were not prejudicial to the defendants given the total body of evidence supporting the requisite intent elements of the material support offense. For example, Judge King ruled that the district court should not have admitted as lay evidence the testimony of a Treasury Department official about OFAC's practices in designating or not designating sub-groups of terrorist organizations. *Id.* at 512.

191. *Id.* at 537 (citing *Holder*, 561 U.S. at \_\_\_, 130 S. Ct. at 2724).



families of Hamas prisoners and suicide bombers [provided] incentives for bombing . . . while also freeing up resources for Hamas to devote to its military and political activities,” demonstrating fungibility in both of the two senses identified by Chief Justice Roberts in *Humanitarian Law Project*.<sup>192</sup>

*D. Fungibility’s Limits: The Al Haramain Litigation*

There are limits to the fungibility doctrine. One obvious limit already mentioned is that, on its face at least, the doctrine only applies in the material support context, where a designated terrorist organization is involved either directly or indirectly.<sup>193</sup> In the conclusion of this Article, I suggest that the post-9/11 articulation of fungibility risks escaping these boundaries, seeping into other aspects of religious liberty and free speech law, as well as neighboring areas of constitutional law. But for now, let us posit, as Chief Justice Roberts insists in *Humanitarian Law Project*, that material support law has no bearing on the boundaries of political speech outside of the FTO context, or even within that context so long as it consists of uncoordinated advocacy.<sup>194</sup> I have been able to identify exactly one lower-court decision from the Terror Decade—either before or after the Supreme Court decided *Humanitarian Law Project*—that places any limits on the fungibility doctrine. Those limits are not negligible, but they confirm the larger narrative about the diffusion of Muslim American charitable religious liberty claims in the post-9/11 era told in these pages.

The case is the Ninth Circuit’s very recent decision in the *Al Haramain Islamic Foundation v. Department of Treasury*. The Al Haramain Foundation is an international Muslim charity with offices

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192. *Id.* at 485–86.

193. This limitation is apparent from the Supreme Court’s discussion of congressional intent behind the material support for terrorism statutes. *See, e.g., Holder*, 561 U.S. at \_\_\_, 130 S. Ct. at 2709.

194. *Id.* at 2724–25. 18 U.S.C. § 2339(A), unlike 18 U.S.C. § 2339(B), requires proof of an actual intent to support terrorist activity, and therefore cannot be extended so easily to situations that would be covered by fungibility under 18 U.S.C. § 2339(B). *See* 18 U.S.C. § 2339A(a) (2006) (establishing criminal penalties for one who “provides material support or resources . . . knowing or intending that they are to be used in preparation for, or in carrying out, a violation of” statutes prohibiting violent terrorist acts).

throughout the Islamic world, one of the largest of which was located in Saudi Arabia. Al Haramain also had what is believed to be an American office located in Ashland, Oregon, incorporated separately under Oregon state law as Al Haramain-Oregon. In 2004, the Treasury Department designated Al Haramain-Oregon as an SDGT, alleging a direct connection between the U.S. branch and Osama bin Laden.<sup>195</sup> The Treasury Department focused in particular on a transaction that did not involve Bin Laden *per se* but rather Al Haramain-Oregon's possible role in transferring a donation of about \$150,000 from an Egyptian national to Chechen militants associated with acts of terrorism in Russia. Al Haramain asserted that the donation in question was intended to be used for humanitarian purposes in Chechnya.<sup>196</sup>

Al Haramain-Oregon eventually brought a lawsuit against OFAC, alleging violation of its First Amendment and other constitutional and statutory rights in the designation and order blocking its assets pending investigation. It was joined in this lawsuit by the Multicultural Association of Southern Oregon (MCASO), which sought on free speech grounds to enjoin the government from applying the material support laws to MCASO's efforts to "engage in advocacy coordinated with and for the benefit of [Al Haramain]-Oregon" on free speech and free association grounds. The court agreed with Al Haramain-Oregon that its Fifth Amendment right to due process and Fourth Amendment right to be free from unreasonable seizures had been violated by OFAC in the designation process, but found that the former violation was harmless and remanded the latter for a remedial hearing by the district court.<sup>197</sup>

In analyzing MCASO's free speech claim, the Ninth Circuit emphasized that the Al Haramain-Oregon organization was "neither

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195. *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 686 F.3d 965, 973–74 (9th Cir. 2012); 9/11 COMMISSION REPORT, *supra* note 90, at 169–171; Alterman, *supra* note 90, at 64. See also DAVEED GARTENSTEIN-ROSS, *MY YEAR INSIDE RADICAL ISLAM: A MEMOIR* (2007) (recounting the author's experiences working for the Al Haramain Foundation in Oregon as a convert to Islam); and JUAN C. ZARATE, *TREASURY'S WAR: THE UNLEASHING OF A NEW ERA OF FINANCIAL WARFARE* 67–76 (2013) (describing the efforts of American officials to gain Saudi approval of the effort to shut down the Al Haramain Foundation). Zarate's book appeared after this article was submitted for publication and so could not be fully incorporated into its analysis.

196. *Al Haramain Islamic Found.*, 686 F.3d at 973.

197. *Id.* at 995.

wholly domestic nor wholly foreign,” a mixed status that bore on just how far the fungibility, legitimacy, and foreign policy rationales of *Humanitarian Law Project* applied to the facts of this case.<sup>198</sup> The Ninth Circuit carefully parsed the Supreme Court’s language as to each of the three rationales. With respect to fungibility, it concluded that Al Haramain-Oregon’s status as a (largely but not solely) domestic organization meant there was only a “less direct and more speculative” possibility that its advocacy could free up resources for the larger Saudi-based Al Haramain organization.<sup>199</sup> As to the legitimacy concern, the court concluded that there was only a “small difference” between a “vigorous independent advocacy campaign”—which the Supreme Court in *Humanitarian Law Project* observed was not within the scope of the material support statute—and “a coordinated advocacy campaign.” The Ninth Circuit insisted that the Supreme Court had not reached the constitutionality of a ban on the latter (coordinated advocacy).<sup>200</sup> Finally, as to the foreign policy concern, the court found that the risk that foreign nations would take offense at MCASO’s activities was diminished because MCASO sought to assist only Al Haramain-Oregon, a “domestic” branch of the larger Al Haramain organization. Such assistance could not be equated with the “direct training of a wholly foreign organization active at war with an ally, at issue in [*Humanitarian Law Project*].”<sup>201</sup>

The Ninth Circuit’s holding that MCASO has a free speech right to engage in coordinated advocacy of Al Haramain-Oregon is an important ruling, but one that is itself distinctly limited in two respects relevant to the context of Muslim American charity. First, while disavowing a formal distinction between “foreign” and “domestic” organizations, the holding relies heavily on the relative differences between foreign and domestic entities to say, in effect, that free speech protections are far greater in the latter case. In its predominant contemporary forms, as we have seen, Muslim American charitable giving is an essentially diasporic, transnational phenomenon, which

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198. *Id.* at 998. In *Holder*, the Supreme Court declined to reach whether Congress would apply a material support statute like that applicable to FTOs to a domestic organization. 561 U.S. at \_\_\_, \_\_\_ 130 S.Ct. at 2730.

199. *Al Haramain Islamic Found.*, 686 F.3d at 999.

200. *Id.* at 1000.

201. *Id.*

means it can only benefit so much from a First Amendment that, in effect, protects only non-diasporic charity and humanitarianism. Second, the ruling is a secular (free speech) one that applies only to the secular, non-Muslim party in the case, a limitation that, albeit not in any intentional or straightforward sense, is indicative of what has become of Muslim American religious liberty claims in the Terror Decade.

### III. PARADOXES OF NON-ESTABLISHMENT AND “CHURCH AUTONOMY”

This Article has thus far addressed only some of the Muslim American charity cases of the last ten years, ones that seem to present the most difficult and inconvenient facts for religious liberty advocates. Here—where war and religion meet face to face in an apparently uncompromising fashion—may be “the hardest place”<sup>202</sup> in the contemporary American religious liberty landscape. It is a hard place in the sense that it is exceedingly difficult to render “comprehensive and consistent moral judgments” about the proper scope of religious freedom when the politics of the cases are so vexed, and the lines between legislative, executive, and judicial authority so fraught with perceptions of potentially imminent and catastrophic danger.<sup>203</sup>

Some of these cases present more difficult situations than others. Some reflect the complicated legacies of many decades of international strife in places like Afghanistan and Saudi Arabia.<sup>204</sup> Others reflect deep

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202. Cf. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* xxv (4th ed. 2006) (examining the overlap of politics and morality in arguments surrounding the war in and occupation of Iraq).

203. *Id.* See also Nancy L. Rosenblum, *Constitutional Reason of State: The Fear Factor*, in *DISSENT IN DANGEROUS TIMES* 146 (Austin Sarat ed., 2005) (examining constitutional reasoning of state actors during times of unrest).

204. Indeed 9/11 was itself in some ways the legacy of this strife, as Steve Coll has demonstrated in *GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001* (2004). Coll shows that from the beginning of the Afghan jihad against Soviet rule, Saudi intelligence used religious charities to send money to favored Afghan commanders outside the control of either the Pakistani or American intelligence services. *Id.* at 83-88. See also LAWRENCE WRIGHT, *THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11* (2006). The significance of the American role in supporting the Afghan jihad for the post-9/11 crackdown on Muslim American charities is suggested in Benthall, *supra* note 82, at 117.

disagreements within the Muslim American community, and between Muslims here and those abroad, over conflicting elements of the Islamic tradition—including the complex relationship between *zakat* and *jihad*—that were shaped in distant times and places and are now adapting to an American stage. These issues, and others related to them, are not primarily the province of legal scholarship, but belong instead to the study of the history, theology, and politics of Muslim America and the Muslim world.<sup>205</sup>

Moreover, the analysis thus far does not entail that free exercise or RFRA arguments should have prevailed in all of these cases, or even in any one particular case. But I do say that there is much more to this story than judicial language like “there is no free exercise right to fund terrorists” suggests. We can, and should, dig deeper than this as lawyers. To do so, we will have first to understand the role of a very different set of legal principles than those at work at the nexus between material support and the First Amendment. We will have to grasp how, in this particular context (but not only in this context), free exercise values interact with those of non-establishment and religious institutional autonomy. This is, of course, one of the classic themes of the law of religious liberty.<sup>206</sup> And yet, the Muslim charity cases show that we have still to fully understand its implications for the fate of religious liberty in the Terror Decade.

#### *A. Religious Institutional Autonomy as Separation of Church and State*

In a 1998 article, Kent Greenawalt subsumed under the label “hands off” a line of cases holding that courts (and governmental actors more generally) ought not to meddle in controversies implicating the

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205. See BONNER, *supra* note 113, at 173–174 (discussing what the author describes as a “permanent” tension between militancy and generosity in the Islamic tradition); see generally REZA ASLAN, NO GOD BUT GOD: THE ORIGINS, EVOLUTION, AND FUTURE OF ISLAM (updated ed. 2011) (explaining the origins and evolution of Islam, with a focus on the events of the last decade). For a critique of post-9/11 human rights and civil liberties scholarship on the grounds that it fails to treat terrorism itself as a human rights violation, see Karima Bennouna, *Terror/Torture*, 26 BERKELEY J. INT’L L. 1 *passim* (2008).

206. See, e.g., MICHAEL W. MCCONNELL, JOHN H. GARVEY, & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 1 (3d ed. 2011); 1 GREENAWALT, *supra* note 1, at 1.

theological and doctrinal concerns of a religious institution or community.<sup>207</sup> Beginning in 1871, with the Supreme Court's decision in *Watson v. Jones*,<sup>208</sup> a church property dispute involving rival factions of a Presbyterian church in Louisville, Kentucky, American courts have generally declined to exercise jurisdiction over cases that would require them to interpret contested questions of theological orthodoxy. This is true whether the underlying dispute concerns title to church property or other matters relating to the internal leadership of a religious institution.<sup>209</sup>

Thus, in the recently decided case of *Hosanna-Tabor*, the Supreme Court relied on the church autonomy line of cases and the "hands off" principle in holding that a person who qualifies as a "minister" cannot bring a claim for employment-related discrimination against her church employer.<sup>210</sup> Such matters, Justice Roberts held for a unanimous court (the only disagreement revolved around the scope of the term "minister"), were protected from government intrusion by both the establishment and free exercise clauses of the First Amendment.<sup>211</sup>

*Hosanna-Tabor* is the latest in a long line of Supreme Court cases that define the American tradition of separation of church and state in opposition to the Anglo-British establishmentarian tradition.<sup>212</sup> But the "hands off" principle has proven to offer very little protection to religious institutions and practices that are implicated in actual or perceived criminal activity.

This is so for two reasons. *Hosanna-Tabor* itself suggests the first. Institutional autonomy arguments resonate when they involve

207. Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843 (1998).

208. 80 U.S. 679 (1871).

209. The Court has since complicated this body of law (which does have a partial antecedent in the *Watson* case itself) in the form of an alternative doctrine known as the so-called "neutral principles" line of cases, not relevant here. But the basic "hands off" doctrine as regards the adjudication or interpretation of contested questions of religious meaning is still good law. See, e.g. *Watson*, 80 U.S. at 679.

210. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. \_\_\_, 132 S. Ct. 694 (2012).

211. *Id.* at \_\_\_, 132 S. Ct. at 709.

212. See, e.g. *Watson*, 80 U.S. at 727–29, *Hosanna-Tabor*, 565 U.S. at \_\_\_, 132 S. Ct. at 702–04 (describing the English background of civil control of church officials against which the founders revolted).

questions of internal institutional leadership. When they cross over into other areas, such as tort liability or, worse yet, alleged criminal conduct, the autonomy part of “church autonomy” can very quickly fade away. The *Hosanna-Tabor* Court expressly reserved these situations for a later day, and strongly implied that the criminal liability question was simply beyond the scope of the ministerial exception doctrine altogether.<sup>213</sup> To the extent that it provided a principled justification for these limits, the Court relied on the idea that *Smith* involves “government regulation of only outward physical acts,” whereas *Hosanna-Tabor*’s claim would have required “government interference with an internal church decision that affects the faith and mission of the church itself.”<sup>214</sup> However the lower courts end up developing that distinction, it seems clear enough that charitable giving, which typically involves the transfer of money or goods from one person or institution to another, can very easily be placed on the “outward physical acts” side of the line, no matter that it also typically involves some of the most deeply felt aspects of a religious community’s “faith and mission.” Not surprisingly, we have seen absolutely no attempt by Muslim American charities or individuals to invoke the church autonomy line of cases to defend against the post-9/11 material support investigations. It seems likely that that this will remain true after *Hosanna-Tabor* no less than before.<sup>215</sup>

From another perspective, however, church autonomy, and the larger American culture of separation of church and state out of which that autonomy emerges, play a very substantial role in contemporary controversies over faith-based charitable giving and the war on terror. The doctrine and the larger culture have indirectly and paradoxically aggravated the severity of the government’s crackdown on Muslim American charity. This point is best demonstrated comparatively, in relation to the relatively restrained approach to the investigation and supervision of Muslim charities that authorities in Britain have adopted. This comparison has been developed elsewhere and will not be repeated here.<sup>216</sup> Instead, this Article seeks to press the comparison further by

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213. *Hosanna-Tabor*, 565 U.S. at \_\_\_, 132 S. Ct. at 710.

214. *Id.* at \_\_\_, 132 S. Ct. at 707.

215. The institutional defendants in some of the Catholic clergy sex abuse tort cases have invoked the doctrine, albeit in an absolutist manner that seems to have been uniformly rejected by the courts. See 2 LAYCOCK, *supra* note 135, at 325–37.

216. See Ghachem, *supra* note 16.

filling in some of the legal background and showing that the contrast between the American “hands off” tradition and a British history of entanglement with religious controversies is less clear-cut than meets the eye, which suggests that the differences in question are not structurally determined but rather contingent and thus subject to modification.

*B. English Establishment and the Charity Commission Approach*

The comparison posits a relationship between two aspects of English law and counterterrorism policy: its establishmentarian background, and its more nuanced and targeted approach to Muslim charitable institutions. England has, of course, an established Church.<sup>217</sup> Its role in British life is largely ceremonial and vestigial, but even purely formal establishmentarian traditions have substantive consequences, and some of these legacies persist into the present.<sup>218</sup> One of those legacies is a tradition of state control over church doctrine, church officials, and church institutions—including charitable institutions, which historically were the domain of the Church in medieval and early modern times.<sup>219</sup> Another is a European practice of relying on state-sponsored or state-affiliated religious councils to serve as interlocutors between minority faiths and government officials. Such institutions—which would clearly offend the establishment clause in the United States—have, in the view of one scholar studying the French scene, served to make religious traditions “more comprehensible and less threatening.”<sup>220</sup> Britain’s variation on this theme is less statist than its French counterpart—the Bradford Council for Mosques and the London-based Council of Britain are both private, but the British government was instrumental in helping to create both and has provided them substantial funding.<sup>221</sup> Britain has

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217. HOME OFFICE, *LIFE IN THE UNITED KINGDOM: A JOURNEY TO CITIZENSHIP* 50 (2006) (“The Church of England, or Anglican Church as it is also known, came into existence in 1534.”).

218. See 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* 42–44 (2008).

219. See James Q. Whitman, *Separating Church and State: The Atlantic Divide*, 34 *HIST. REFLECTIONS* 86, 91 (2008).

220. Elisa Wiygul, *The Headscarf: The French State as Mediator Between Civil Society and Individuals*, 34 *HIST. REFLECTIONS* 61, 64 (2008).

221. See KENAN MALIK, *FROM FATWA TO JIHAD: THE RUSHDIE AFFAIR AND ITS AFTERMATH* 73–79, 123 (2010); *Home Office Funds Muslim Council of Britain*,



even provided direct state funding to Muslim schools, which would be considered unconstitutional in the United States even in the aftermath of the Supreme Court's recent case law permitting taxpayer funds to go to sectarian schools under certain conditions.<sup>222</sup>

These traditions and practices have translated into what many see as a more interlocutory and collaborative policy of faith-based charitable regulation in the United Kingdom. The Charity Commission for England and Wales is an independent agency that serves as the principal charitable regulator in Britain.<sup>223</sup> Its history dates back to 1818, when Parliament commenced an investigation into charities concerned with the education of the poor.<sup>224</sup> In 2007, the Commission created a Faith and Social Cohesion Unit (FSCU) whose inaugural project was to support the British Muslim charitable community in "enhancing and promoting high standards of governance and accountability . . . ."<sup>225</sup> Towards this end, the Commission has also created a Mosques and Imams National Advisory Board comprised of representations from the various British Muslim associations.<sup>226</sup> These initiatives reflect the

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FOIA CENTRE, <http://www.foiacentre.com/news-MCB-060510.html> (last updated June 5, 2006).

222. See Eric Pfanner, *Britain Debates State Aid for Muslim Schooling*, N.Y. TIMES (Oct. 31, 2005), [http://www.nytimes.com/2005/10/17/world/europe/17iht-redislam.html?\\_r=2@pagewanted](http://www.nytimes.com/2005/10/17/world/europe/17iht-redislam.html?_r=2@pagewanted); see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002) (upholding a school voucher program for low-income families as consistent with the requirement of official neutrality between religion and non-religion, where the families retained a "true private choice" over whether to attend a public or sectarian school).

223. *About the Commission*, CHARITY COMMISSION, <http://www.charitycommission.gov.uk/about-the-commission/> (last visited Sept. 14, 2013).

224. Gregory Clark, *The Charity Commission as a Source in English Economic History*, available at [www.econ.ucdavis.edu/faculty/gclark/papers/reh.pdf](http://www.econ.ucdavis.edu/faculty/gclark/papers/reh.pdf).

225. Dame Suzi Leather, Address to Churches Main Committee, The Advancement of Religion and the Public Benefit Requirement, in CHARITY COMMISSION (Dec. 4, 2007), [http://apps.charitycommission.gov.uk/Charity\\_requirements\\_guidance/Charity\\_essentials/Public\\_benefit/cmcspeech.aspx](http://apps.charitycommission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/cmcspeech.aspx).

226. *Faith Based Charities*, CHARITY COMMISSION, <http://www.charitycommission.gov.uk/detailed-guidance/specialist-guidance/faith-based-charities/#about> (last visited Sept. 12, 2013) (discussing the establishment of the Faith and Social Cohesion Unit and the work undertaken by the Mosques and Imams National Advisory Board) [hereafter "Introduction to FSCU"]; see also James Shaw-Hamilton, *Recognizing the Umma in Humanitarianism: International Regulation of*

legacy of Britain's turn, beginning in the 1960s, towards a multicultural approach for governing minority communities.<sup>227</sup> But the initiatives also serve a more ambiguous policing function that flows from the establishment tradition—the specifically Muslim focus of the Charity Commission's dialogue with faith-based charities followed not long after the 2005 London subway bombings.

Out of this combination of establishmentarian, multiculturalist, and counterterrorism impulses, Britain has developed a strategy for the supervision and investigation of Muslim charities that differs in significant respects from the American approach.<sup>228</sup> The comparatively restrained and surgical nature of this strategy is not unique to the charity context; it seems to characterize British counterterrorism policy more generally.<sup>229</sup> Still, the charity cases, precisely because they involve the powers of government to intervene in and regulate the affairs of religious institutions specifically, have some distinctive characteristics that speak to broader differences in constitutional culture. Two examples will suffice to indicate the nature of these differences.

### 1. The Interpal Investigation

The Charity Commission's handling of the Palestinians Relief and Development Fund (Interpal) captures the “entanglement” between public oversight and private charitable management that can come from the more interlocutory nature of the British approach. Strictly speaking,

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*Islamic Charities*, in UNDERSTANDING ISLAMIC CHARITIES, *supra* note 90, at 20 (discussing the establishment of the Faith and Social Cohesion Unit, which works in conjunction with the Mosques and Imams National Advisory Board); MOSQUES AND IMAMS NATIONAL ADVISORY BOARD, <http://www.minab.org.uk/> (last visited Sept. 12, 2013).

227. See Christopher McCrudden, *Multiculturalism, Freedom of Religion, Equality, and the British Constitution: The JFS Case Considered*, 9 INT'L J. CONST. L. 200, 201–02 (2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1701289](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1701289).

228. On charitable regulatory policy after 9/11 in Europe, see Julianne Smith & Natalia Filipiak, *Islamic Charities in Europe*, in UNDERSTANDING ISLAMIC CHARITIES, *supra* note 90, at 15–31, 81–97.

229. See David Cole, *The Brits Do It Better*, N.Y. REV. OF BOOKS, June 12, 2008, <http://www.nybooks.com/articles/archives/2008/jun/12/the-brits-do-it-better/?pagination=false>.

Interpal does not appear to be a “religious” charity, but its website indicates that its fundraising and emergency aid efforts are keyed to the Ramadan season during which Muslims traditionally pay their *zakat* contributions, and it makes a point of supporting religious activities such as Qur’anic *Tahfiz* (memorization) schools, among other causes.<sup>230</sup> Alleged to have provided funds to Hamas, the charity was designed as a Specially Designated Global Terrorist (SDGT) entity by the U.S. Treasury Department in 2003.<sup>231</sup> Following that designation, Interpal was twice investigated by the Charity Commission, in 1996 and 2003, and twice cleared of charges.<sup>232</sup> A third investigation was opened in 2006, following accusations made in a BBC program that the charity had donated to groups guilty of “promoting terrorist ideology or activities.”<sup>233</sup> That latest investigation concluded in February 2009, with the Charity Commission issuing a report finding the BBC materials of “insufficient evidence” to support the allegations in question.<sup>234</sup> The Commission also found, however, that Interpal “had not taken sufficient measures” to investigate its partner organizations.<sup>235</sup> As a result, the Commission directed the charity’s trustees to discontinue its relationship with a Hamas-affiliated entity known as the Union for Good and to enhance its due diligence and monitoring procedures with respect to partner organizations.<sup>236</sup>

One scholar has used this example to illustrate the “apparent errors” made by U.S. authorities in their investigation of Muslim charities.<sup>237</sup> For purposes of the present analysis, the accuracy issue, while significant, is less critical than the methodological one. The

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230. See *Our Work*, INTERPAL, <http://www.interpal.org/content.aspx?pageID=22> (last visited Sept. 12, 2013).

231. Ian Fisher, *Terrorism Plot Raises Concern about Islamic Charities*, N.Y. TIMES (Aug. 8, 2006), <http://www.nytimes.com/2006/08/24/world/europe/24iht-charity.2576960.html>.

232. *Id.*

233. Claire Shropshall, *Interpal Cleared of Terrorist Links*, CHARITY FINANCIALS (Feb. 27, 2009), <http://www.charityfinancials.com/caritas-magazine/interpal-cleared-of-terrorist-links-385.html>.

234. *Id.*

235. *Id.*

236. *Id.*

237. See DONOHUE, *supra* note 52, at 176–200.

Charity Commission's "scalpel" approach<sup>238</sup> in this case permitted British regulators to avoid the significant costs of criminalization and across-the-board freezing of assets characteristic of American policy. But the cost is the entanglement of the Commission with the ongoing operation of the charity. Thus, the Commission's most recent Interpal inquiry provides that the Commission "will be reviewing with the trustees" the implementation of its findings regarding the Union for Good.<sup>239</sup>

While the Commission's exercise of such supervisory authority over charities is typically provisional and ongoing rather than definitive or finite, it contrasts starkly with the arms-length relationship between (religious or secular) charities and the Internal Revenue Service (IRS) in the United States. The IRS relies on period tax filings (forms 990) and occasional audits to ensure that charities adhere to their stated charitable purposes in their day-to-day activities (although "churches" and their functional equivalents, such as mosques and synagogues, are exempted from the requirement to register as tax-exempt entities or file returns).<sup>240</sup> American tax-exempt law does not currently embrace such practices as temporary public receivership of a religious charity or directions that a religious charity cut off its relationship with specific persons.<sup>241</sup> In the absence of the comparatively invasive (but also comparatively restrained) English remedies, the IRS can resort to one of two solutions in its pursuit of terrorism-related allegations: (1) revocation of a charity's

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238. See *supra* text at notes 35–36.

239. Shropshall, *supra* note 233.

240. Ghachem, *supra* note 16, at 75–76; INTERNAL REVENUE SERVICE, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 2 (Nov. 2009). ("The term *church* is found . . . in the Internal Revenue Code. . . . however, . . . we use it in its generic sense as a place of worship including, for example, mosques and synagogues."); see also Victoria B. Bjorklund et al., *Terrorism and Money Laundering: Illegal Purposes and Activities*, 25 PACE L. REV. 233, 244 (2005) (suggesting that "churches" may make "ideal covers" for terrorist financing because they are not required to file IRS forms 1023 and 990 and often receive cash donations).

241. No authority for either practice can be found in the leading treatise on the law of tax-exempt organizations, BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* (10th ed. 2011). Social service charities that accept public funds are subject to government oversight through grant audits.

tax-exempt status if the charity's conduct offends public policy;<sup>242</sup> or (2) asset forfeiture, designation as a terrorist entity, and criminal prosecution.<sup>243</sup> Not surprisingly, the latter rather than the former has been the overwhelmingly preferred tactic in the Terror Decade.<sup>244</sup>

## 2. The Case of the Finsbury Park Mosque

The second example of the contrast between English and American methods involves an outspoken Muslim cleric named Abu Hamza al-Masri and the Finsbury Park mosque in London, which is owned and operated by a charitable entity called the North London Central Mosque Trust (NLCMT).<sup>245</sup> In early 2003, London police had raided the mosque as part of a criminal investigation into the discovery of the deadly poison ricin at a London apartment.<sup>246</sup> A few weeks later, the Charity Commission ordered the removal of Abu Hamza from his post as preacher at the Finsbury Park mosque.<sup>247</sup> In a July 2003 report, the Charity Commission presented the results of its inquiry into Abu Hamza's activities, noting that he had illegitimately seized control of the mosque from its trustees, and had made "highly inflammatory" and "extreme" public statements in his sermons and at a conference marking the anniversary of 9/11. These statements, the Commission concluded, violated the mosque's charitable status. The Commission acknowledged that the trustees had made efforts to gain access to the mosque, but had been prevented from doing so by Abu Hamza and his supporters.<sup>248</sup>

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242. The availability and limits of this revocation power are defined by the Supreme Court in *Bob Jones Univ. v. United States*, 461 U.S. 574, 585–96 (1983).

243. See *supra* Part I.A.

244. *Id.*

245. See Don Van Natta, Jr., *THREATS AND RESPONSES: RADICAL ISLAM; London Imam is Removed as Leader of Mosque*, N.Y. TIMES, (Feb. 5, 2003), <http://www.nytimes.com/2003/02/05/world/threats-and-responses-radical-islam-london-imam-is-removed-as-leader-of-mosque.html>; see also *About Us*, NORTH LONDON CENTRAL MOSQUE TRUST, <http://nlcentralmosque.com/about-us.html> (last visited Sept. 14, 2013).

246. See Van Natta, Jr., *supra* note 245.

247. *Id.*

248. CHARITY COMMISSION, REPORT OF INQUIRY INTO NORTH LONDON CENTRAL MOSQUE TRUST, REG. CHARITY NO. 299884 ¶¶ 14, 22 (July 1, 2003). Indeed, on the very day before the Commission ordered him removed from the Finsbury Park mosque, Abu Hamza had reportedly declared that the space shuttle

Rather than revoke the NLCMT's status, or refer the case to British criminal law enforcement authorities for action to be taken against the Trust as a whole, the Charity Commission had recourse to the scalpel. (In the United States, as indicated above, the Finsbury Park mosque would not have been required to register or file as a charitable entity with the IRS in the first place: a revealing indication of the American separationist distance between institutions of church and state that all too easily collapses into outright criminalization when religious organizations are suspected of engaging in criminal activity.)

To do so, the Commission invoked a power delegated to it by the U.K. Charities Act of 1993 to remove an employee, officer, or agent of a charity.<sup>249</sup> The heading of the application section of the Act provides a telling indication of the extraordinary nature of this power: "Application Of Property *Cy-Près* and Assistance and Supervision of Charities by Court and Commissioners. Powers of Commissioners to make schemes and act for protection of charities etc." (The "Court" in question is the Charity Tribunal, which hears appeals from determinations of the Commission, which are in turn subject to review by the courts of the Chancery Division.)

Notice two aspects of this classification of the Commissions' removal authority: first, it is an instance of *cy près* authority, that is, the equitable power historically exercised by courts to modify the terms of a testator's charitable gift for purposes of ensuring that the gift is used in conformity with the testator's intentions.<sup>250</sup> Second, this *cy près* authority empowers the Commission "to make schemes and act for protection of charities."<sup>251</sup> The underlying purpose is the protection of charities. The specific provision at issue in the Abu Hamza case states that where "there is or has been any misconduct or mismanagement in the administration of the charity" such that "it is necessary or desirable to act for the purpose of protecting the property of the charity," the Commissioners may, of their own motion, "remove any trustee, charity

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Columbia disaster was an act of divine retribution against the United States and Israel (an Israeli astronaut was a member of the seven-member crew that perished on February 1, 2003). See Van Natta, Jr., *supra* note 245.

249. Charities Act, 1993, c. 10, § 18(2)(i) (U.K.).

250. See, e.g., Alberto B. Lopez, *A Revaluation of Cy Pres Redux*, 78 U. CIN. L. REV. 1307, 1313–14 (2010) (discussing the Crown's use of *cy près* authority).

251. Charities Act, 1993, c. 10, § 18 (U.K.).

trustee, officer, agent or employee of the charity who has been responsible for or privy to” or who has otherwise “contributed to . . . or facilitated” the misconduct or management.<sup>252</sup>

In the context of Britain’s Muslim charities, the relationship between “protection” and intervention is clearly more complicated than this generic statutory language would suggest. The Commission’s “protective” mandate is also a disciplinary one.<sup>253</sup> This disciplinary power flows from England’s establishmentarian history no less than the other prerogatives of the Charity Commission vis-à-vis religious charities. While characterizing its removal of Abu Hamza as an effort to guard the line between charitable and non-charitable conduct, the Commission was in fact exercising a remnant of one of the oldest authorities in the establishment tradition: government control over religious doctrine and personnel. And it is this removal power that, in a comparative light, brushes up directly against the American culture of separation of church and state.

While there is no Supreme Court precedent directly on point, it seems far-fetched to say that the IRS could, consistent with the establishment and free exercise clauses, order an American mosque to reconsider their choice of imams (as opposed to taking more drastic measures against the mosque as a whole, against which the First Amendment *per se* offers no special protection). The very idea conjures up horrid notions of the core historical forms of establishment against which the founders rebelled: direct state subsidies to churches, and state control of church officials. In both cases, it is no accident that American law has, ever since, identified such gross offenses to separationist

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252. *Id.* at §§ 18(2)(a), (2)(b), (2)(i). In 2006, Parliament amended the 1993 Charities Act to further empower the Charity Commission, when exercising its suspension or removal power under section 18, to remove the individual in question from the organization’s membership if that person was a member. *See* Charities Act, 2006, c. 50, §19 (U.K.).

253. Indeed, one of the two key goals of the FSCU has been to raise awareness of the FSCU’s existence among the apparently large number of unregistered or informal Muslim charities in the UK; registering these organizations serves to enlist them in the social contract and make them less prone to evading oversight and surveillance. The other goal, said the Commission, was to “engage” with faith-based charities already registered. Introduction to FSCU, CHARITY COMMISSION, *supra* note 226.

sensibilities with Anglo-British traditions.<sup>254</sup> The rationales of *Amos* and, especially, *Hosanna-Tabor*, while both civil employment discrimination cases, together suggest that something like an Abu Hamza removal order, even in the context of a criminal proceeding, would face a steep uphill battle in the United States.<sup>255</sup>

### *C. Zero-Sum Logics of Non-Establishment and the War on Terror*

A number of scholars have recently argued that American counterterrorism policy risks brushing up against the Establishment Clause where that policy seeks to officially mold Muslim public opinion and “speech” at home and abroad according to a moderate, anti-radicalization paradigm.<sup>256</sup> Tracing the genealogy of this policy to a British model known as the “Prevent” program, a prong of Britain’s counterterrorism policy that focuses on counter-radicalization, these scholars cite the following developments as instances of what Samuel Rascoff calls “official Islam.”<sup>257</sup> Examples of “official Islam” include the following: federal law enforcement officials who participate in conference panels on the need to encourage a peaceful and “moderate” form of Islam at home and abroad as a counterweight to violent Islamic extremism; a recent report by the Senate Homeland Security and Government Affairs committee on the 2009 Fort Hood attack that identifies certain strains of “political Islam” as a source of terrorist violence; and the development by American officials overseeing the detention of Iraqi prisoners of war of a “directory” juxtaposing

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254. See *Hosanna-Tabor*, 565 U.S. at \_\_\_\_, 132 S. Ct. at 703 (observing that the founders sought to foreclose the English-style creation of a national church and governmental control of ecclesiastical offices); *Wallace v. Jaffree*, 472 U.S. 38, 104–14 (1985) (Rehnquist, J., dissenting) (arguing that the framers intended the establishment clause to prevent the establishment of a national church and preferences among religious sects or denominations).

255. See *Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 327–28 (1987) (holding that an exemption from employment anti-discrimination laws for religious institutions does not violate the Establishment Clause even where the employee’s duties are strictly secular in nature).

256. See generally Rascoff, *supra* note 16; Huq, *supra* note 16.

257. See Rascoff, *supra* note 16, at 153–166.



“moderate” and “radical” Koranic passages.<sup>258</sup> In each of these examples, the government is embracing a “preferred” form of Islam, thereby clashing with an early modern tradition of opposition to government control over the church that is embodied in our establishment clause.<sup>259</sup>

This is an important, if somewhat elusive, issue because it flags the many unintended and implicit means by which the War on Terror has contributed to underenforcement of the constitutional norm against establishment. But whether the phenomenon of “official Islam” entails an *Establishment* Clause violation depends, in part, on whether the government lacks a secular purpose for such counter-radicalization efforts. Where the government’s purpose is to protect Americans from violent terrorist acts—and it is difficult to conceive of the federal government having a different purpose in this domain—the fact that such a secular purpose manifests itself in rhetoric with pronounced religious implications does not suffice to make out an Establishment Clause violation.<sup>260</sup>

An analogy can be made to the religious symbol cases. In *Lynch v. Donnelly*<sup>261</sup>, the Supreme Court upheld public displays of religious symbols, such as the crèche, if the displays also annex a secular holiday symbol, such as a reindeer.<sup>262</sup> In that context, the Court said, the secular elements and purpose of the display suffice to vitiate the establishment concern.<sup>263</sup> In the counterterrorism context, the government’s compelling interest in protecting national security fills the role served by the secular

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258. *See id.*; John H. Mansfield, *Promotion of Liberal Islam by the United States*, in *ENEMY COMBATANTS, TERRORISM, AND ARMED CONFLICT LAW* 85, 85 (David K. Linnan ed., 2008) *see generally* Huq, *supra* note 16; Aziz Z. Huq, *Modeling Terrorist Radicalization*, 2 *DUKE F. L. & SOC. CHANGE* 39 (2010).

259. Rascoff, *supra* note 16, at 187. Rascoff calls this early modern tradition “anti-Erastianism,” but that term is somewhat misused in this context if used to describe a general opposition to a state-dominated church. The position of the sixteenth-century Swiss theologian Thomas Erastus was more specific than this; he proclaimed “that the final right to excommunicate sinners lay with the secular magistrates, not the church authorities in a Genevan-type consistory.” *See* DIARMAID MACCULLOCH, *THE REFORMATION: A HISTORY* 355 (2003).

260. *See* Rascoff, *supra* note 16, at 143–47. Aware of this difficulty with his argument, Rascoff suggests that his purpose is to identify a judicially under-enforced constitutional norm.

261. 465 U.S. 668 (1984).

262. *Id.* at 671–72, 687.

263. *See id.* at 680.

holiday trappings in the religious display cases. The counter-radicalization policies described in the “Official Islam” literature, in other words, implicate a judicially underenforced constitutional norm to which only the Executive Branch can attend.<sup>264</sup> By contrast, the removal of an imam from a mosque would constitute a clearly litigable Establishment Clause violation. But that scenario also suggests why free exercise, and not simply anti-establishmentarianism (or anti-Erastianism), is at issue in the contrasting approaches that the British and American governments have taken to the post-9/11 Muslim charity controversy.<sup>265</sup>

For the great irony in all of this is that, while effectively foreclosing more restrained measures made available by the establishment tradition, the American system of separation of church and state permits and perhaps even encourages more drastic measures. A constitutional culture that prides itself on permitting greater leeway to religious institutions than establishment societies thereby forces itself into a corner where seemingly zero-sum conflicts between counterterrorism policy and religious liberty become unavoidable.<sup>266</sup> You may not remove the preacher from the church, no matter how egregious his misdeeds or how far they depart from the spirit of the religious organization and its faith, for that would conflict with the “hands off” principle (among other religious liberty norms). But you can indict the entire church hierarchy and even the church itself (if incorporated) in order to punish and deter the problem caused by the errant or corrupt pastor.

There are, of course, an infinite number of variations we can think of along this spectrum of individual versus institutional misconduct: the leadership or membership of a religious charity or house of worship might be relatively more or relatively less “in cahoots” with the bad apple. As discussed later in the Article, the Muslim American

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264. See Rascoff, *supra* note 16 at 149; Huq, *supra* note 16, at 864–65 (arguing that church autonomy argument against use of religious signals unlikely to command substantial respect from courts under current religion clause law).

265. Therefore, like Douglas Laycock, I am skeptical that the establishment clause can provide an end run around *Smith*. See 2 LAYCOCK, *supra* note 135, at 320.

266. See *infra* Part IV.B. (considering a Catholic charitable variation on this theme: the clash between religious liberty and the right of gays and lesbians to adopt children).

charity cases can be placed at different points along that spectrum, though the indications that we have generally underestimated the degree of internal conflict within these institutions are troubling. But the issue is not simply these particular institutions. By the very nature of the philanthropic enterprise, these institutions are embedded in larger webs of charitable giving and service that, when made the target of criminal investigation and public suspicion, can cast a shadow over the entire Muslim American community (and, not incidentally, over Muslim communities abroad). Meanwhile, the underlying dilemma remains: there seems something dysfunctional about a legal culture that severely restricts the ability to resort to targeted disciplinary measures but throws the door open to all-encompassing punitive measures.

*D. "Hands Off," Multiculturalism, and Anti-Discrimination in Britain*

Nonetheless, that conflict is neither inherent in nor necessary to the American law of religious liberty. Consider one additional characteristic of English law in this regard: it too has a version of the "hands off" principle. The Court of Appeals of the Chancery Division for England and Wales recently had occasion to address this issue in a dispute about the trusteeship and governance of two Sikh temples, known as Gurdwaras and described as "religious charities" in the Court's opinion.<sup>267</sup> The dispute centered on whether one of the plaintiffs was the spiritual leader of the Nirmal Sikhs and the successor to the First Holy Saint.<sup>268</sup> If so, that status would entitle him to exercise a power conferred by the trust deeds of the two Gurdwaras to remove the defendants as trustees and replace them with his fellow plaintiffs.<sup>269</sup> The lawyer for the plaintiffs argued that, under the line of cases associated with Lord Eldon's 1813 opinion in the *Craigdallie* case (the leading English case on the resolution of church property disputes), English courts are permitted to consider departures from the doctrines of the faith in deciding intra-church disputes.<sup>270</sup> The Court of Appeals disagreed that *Craigdallie* was apposite, distinguishing between civil property disputes

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267. *Khaira v. Shergill*, [2012] EWCA (Civ) 983 (appeal taken from Eng.).

268. *Id.* at [4].

269. *Id.*

270. *Id.* at [59].

and controversies over the truth of who is a “holy person and a spiritual leader equipped with fundamental powers affecting the internal governance of a body of believers.”<sup>271</sup> In the latter context, a court is clearly “being asked to pronounce on matters of religious doctrine and practice.”<sup>272</sup>

In fact, as Christopher McCrudden has shown, the “hands off” principle dates back to early nineteenth-century English legal history. It was a judicial response to the emancipation of Catholics and Jews, a process begun in the eighteenth century that involved reducing and removing traditional legal restrictions on these two groups. In that context, “hands off” became, in the early nineteenth century, a way to negotiate the conflicts that arose between Jews and Catholics, on the one hand, and the dominant Protestant Christian denominations, on the other: it served as a political settlement rather than a technical constitutional requirement. Parliament remained free to, and did, intervene in inter- and intra-religious disputes involving questions of faith and doctrine, and has done so until the present day.<sup>273</sup> (Hence the Charity Commission’s authority, delegated to it by parliamentary statute, to take the kinds of actions described above in the religious charitable context). With the rise of a multiculturalist approach to questions of religious diversity in Britain beginning in the 1960s, English courts began to supplement this earlier nineteenth-century tradition of accommodation with legislative accommodations of ethno-cultural practices associated with the major “new” ethnic groups residing in late and post-imperial Britain, including sub-continental Muslim immigrants.<sup>274</sup>

The twenty-first century has seen a post-multicultural turn in Britain, and with it an increasing emphasis on seeing differences through the eyes of religion rather than culture. With that emphasis has come an

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271. *Id.* at [61]–[63].

272. *Id.* at [71].

273. McCrudden, *supra* note 227, at 202. As McCrudden puts it, “[i]n Britain, the (normative) constitutional tradition has been seen as one of pragmatic empiricism: if it works, it’s constitutional.” *Id.* For a discussion of the separation of powers issues raised by Parliament’s delegation of regulatory, enforcement, and adjudicative authority to the Charity Commission, see Rohan Price & John Kong Shan Ho, *The Charity Commission of England and Wales as a Model: Could Hong Kong and Australia be Importing a Constitutional Problem?*, 2012 SING. J. LEGAL STUD. 55, 55–75 (2012).

274. McCrudden, *supra* note 227, at 202.

official encouragement of the contribution of faith communities to public life (once again including Islam), and the growing strength of anti-discrimination and human rights norms in British law, particularly following the adoption of the Human Rights Act in 1998.<sup>275</sup> The emerging emphasis on an anti-discrimination norm has been felt even at the level of the Charity Commission. Through its administrative tribunal, the Commission ruled in 2008 that Catholic Care, a longstanding religious charity, would not be permitted to amend its articles of incorporation so as to bring it under a regulatory exemption to Britain's 2006 Equality Act prohibiting discrimination on the basis of sexual orientation.<sup>276</sup> Without that exemption, Catholic Care would have been required to provide gays and lesbians access to its adoption services.<sup>277</sup> The Court of Appeal reversed this decision in 2010, holding that whether Catholic Care was acting within the scope of the public interest requirement of the Equality Act regulatory exemption should be addressed by weighing the positive advantages conferred by the charity against the disadvantage caused by discrimination.<sup>278</sup> The Court thus directed the Commission to consider whether Catholic Care should, by that standard, be permitted to amend its articles so as to bring itself within the exemption for faith-based institutions.<sup>279</sup>

*E. From "Hands Off" to Cy Près in the United States?*

Just how these developments will affect the relationship between the British state and British Muslim charities remains to be seen. They certainly suggest the possibility of greater direct conflict between religious liberty and equality or anti-discrimination claims.<sup>280</sup> But they also highlight just how malleable, how subject to shifts in the larger political culture, constitutional norms can be—not just in Britain, but on this side of the Atlantic, where similar controversies involving Catholic

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275. *Id.* at 203.

276. *Catholic Care (Diocese of Leeds) v. The Charity Comm'n for England & Wales*, [2010] EWHC (Ch) 520, [1] (appeal taken from Charity Tribunal).

277. *Id.* at [6].

278. *Id.* at [65]–[70].

279. *Id.* at [111]; JULIAN RIVERS, *THE LAW OF ORGANIZED RELIGIONS: BETWEEN ESTABLISHMENT AND SECULARISM* 286–87 (2010).

280. *See* McCrudden, *supra* note 227, at 204–05.

and other faith-based social service agencies and institutional employers have been cropping up.<sup>281</sup> In the collision between freedom of religion and anti-discrimination law, the traditional “hands off” principle seems increasingly antiquated, superseded by statutory exemptions on the one hand, and by the Supreme Court’s ruling in *Smith* (requiring free exercise to bow before neutral rules of general applicability) on the other.<sup>282</sup> The American law of church and state still recognizes the “hands off” principle, but is no longer nearly as beholden to that principle across a wide range of contemporary religious liberty issues as it once was. This is likely due in part to the rise of the religious right and conservative political support for faith-based charities.<sup>283</sup>

This analysis means that there may well be room “between the joints” of free exercise and establishment for American federal courts or agencies to tap into the spirit of the state courts’ traditional *cy prè*s authority to intervene in the management of religious charities.<sup>284</sup> While the Charity Commission’s removal power is simply too foreign to current American ways of doing charitable supervision to be carried over, the state *cy prè*s cases suggest other measures—such as the award of charitable assets to alternative classes of recipients, or an order to hold new elections for the leadership of a charity—that can be taken to ensure a charitable institution operates within the bounds of its declared intentions.<sup>285</sup> The law governing reorganization of religious institutions

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281. These cases are discussed further, *infra*, Part IV.B.

282. For more on *Smith* and antidiscrimination law, see generally Schragger, *supra* note 124.

283. See WARDE, *supra* note 26, at 148–49 (summarizing the increase in political support for faith-based charities in recent years).

284. See, e.g., *Locke v. Davey*, 540 U.S. 712, 718–19 (2004); *Cutter v. Wilkinson*, 544 U.S. 709, 719–20 (2005).

285. See, e.g., *Islamic Ctr. of Harrison, Inc. v. Islamic Sci. Found., Inc.*, 692 N.Y.S.2d 94 (N.Y. App. Div. 1999) (upholding trial court order directing religious corporations to hold reorganizational meeting for purposes of electing a new board of trustees, as a remedy for plaintiffs’ action to remove individual officers); *In re Kensington Hosp. for Women*, 58 A.2d 154, 157 (Pa. 1948) (applying *cy prè*s to award assets of defunct nonsectarian hospital to a sectarian hospital); *In re Hawley’s Estate*, 223 N.Y.S.2d 803, (N.Y. Sur. Ct. 1961) (applying *cy prè*s to reform a will providing for annual scholarship prizes to pupils in a Protestant Episcopal school so as to remove requirements that recipients be communicants in Protestant Episcopal Church in the United States and be sons of native-born American citizens).

in bankruptcy might suggest yet another model.<sup>286</sup> There will be situations in which these models conflict with establishment or free exercise norms.<sup>287</sup> And there are indications that British counterterrorism policies, including in the charitable sector, have accentuated divisions within the Muslim-British community itself, as well as between Muslim and non-Muslim Britons. A sense that the British government is picking and choosing its preferred leaders for domestic Muslim communities is a key factor in that perception.<sup>288</sup> This is a serious concern. But there will

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286. See Ryan J. Donohue, Comment, *Thou Shalt Not Reorganize: Sacraments for Sale*, 22 EMORY BANKR. DEV. J. 293, 321 (2005) (“[T]he heavy judicial supervision required in a reorganization case is easily characterized as the type of government intrusion into religious affairs that the Establishment clause was designed to protect against.”).

287. See, e.g., *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Wisan*, 773 F. Supp. 2d 1217, 1232–34 (2011), *vacated & remanded*, 698 F.3d 1295 (10th Cir. 2012) (holding that a state trial court’s effort to reform a religious trust without regard to religion impermissibly entangled the court with religion; injunction was later overturned); *Young v. Crystal Evangelical Free Church*, 82 F.3d 1407 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997). In *Young*, the Eighth Circuit held that RFRA barred a bankruptcy trustee from recovering the funds some debtors had contributed as tithes to the church during the year preceding the filing of their petition for bankruptcy. *Young*, 82 F.3d at 1420. The Supreme Court vacated and remanded for reconsideration in light of *City of Boerne v. Flores*, 521 U.S. 507 (1997), which struck down RFRA’s application to the states as exceeding Congress’s enforcement powers under section 5 of the Fourteenth Amendment.

288. See MARC MCGOVERN & ANGELA TOBIN, COUNTERING TERROR OR COUNTER-PRODUCTIVE? COMPARING IRISH AND BRITISH MUSLIM EXPERIENCES OF COUNTER-INSURGENCY LAW AND POLICY 29 (2009), *available at* [http://www.ihr.org.uk/attachments/9384\\_counterinterrorcounterproductive.pdf](http://www.ihr.org.uk/attachments/9384_counterinterrorcounterproductive.pdf). McGovern writes that Muslim participants in this symposium reported that they regarded as:

[a] core aim of [British counter-radicalization policies] *Contest 2* and *Prevent* to ‘not only define Islam for us, but to choose and select our leaders’. A number of instances of attempts to replace or oust community leaders on the grounds of a ‘supposed radical background’ were discussed, including that of Doctor Daud Abdullah of the Muslim Council of Britain. The state aim of focusing funding on certain kinds of Islamic groups was regarded by some participants as accentuating divisions not only in the community but within the faith group as such . . . . The identification of mosques and imams as supposed key agents of radicalization was also viewed as an erroneous attempt to frame an understanding of issues in order

inevitably be some form of tension between a more targeted approach to the investigation of religious institutions and countervailing autonomy concerns.<sup>289</sup>

#### IV. IMPLICATIONS FOR THE FUTURE OF RELIGIOUS LIBERTY

It is becoming increasingly clear that, even in the area of religious liberty, the war on terror is spilling over its emergency boundaries, seeping into neighboring areas of law, and becoming normalized.<sup>290</sup> Yet exactly how it does this is not always apparent. The Muslim charity cases can help us to see how, for they dramatize the relationship between religious liberty law and neighboring forms of constitutional protection.

##### *A. Religious Liberty and the War on Terror*

Like the law of equal protection, First Amendment law does not recognize claims based upon disparate impact.<sup>291</sup> And unlike the law of free speech, free exercise law does not recognize a chilling effect doctrine for purposes of establishing standing. This means that

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to legitimize the vetting of community funding (i.e. through the Charities Commission given the charitable status of most mosques).

*Id.* at 29. For more on the “Contest 2” and “Prevent” policies, see also Huq, *Modeling Terrorism Radicalization*, *supra* note 259, at 62; and Rascoff, *supra* note 16.

289. This is to say nothing of the range of devices that are available in white-collar criminal law cases to avert indictment and prosecution of corporations. See Ghachem, *supra* note 16, at 62. Federal and state prosecutors have resorted to civil settlements rather than criminal sanctions even as to several prominent global banks suspected of funneling billions of dollars through their American branches to Iran and other sanctioned nations. See Mark Scott, *Shares of Standard Chartered Slide Amid Money Laundering Inquiry*, N.Y. TIMES, Aug. 8, 2012, at B4; Jessica Silver-Greenberg, *Prosecutors Link Money from China to Iran*, N.Y. TIMES, Aug. 30, 2012, at B1; Jessica Silver-Greenberg, *Regulator Says British Bank Helped Iran Hide Deals*, N.Y. TIMES, Aug. 7, 2012, at A1.

290. See Daniel Gordon & Malick W. Ghachem, *From Emergency Law to Legal Process: Herbert Wechsler and the Second World War*, 40 SUFFOLK U. L. REV. 333, 377–81 (2007); *supra* note 128 and accompanying text.

291. Marshall, *supra* note 145, at 1946.



enforcement actions that penalize both legal and illegal religious conduct and speech—and the Muslim American charity cases clearly do this, if they accomplish nothing else<sup>292</sup>—are effectively immune from challenge in a material support context. Under current law, the concern that counterterrorism policy has dampened Muslim charitable giving on the fundraising or operational levels could only be addressed through individual suits brought by donors or recipients, not through challenges by designated institutions and their officers.<sup>293</sup> And, not surprisingly, few individual donors or recipients have found it worth their while to bring such a case, a step that would itself aggravate the stigmatization problem such a lawsuit would be used to check.

But even a relaxation of the standing rules of religious liberty law, or a recognition that disparate impact theory is sometimes the only way to address systemic racial and religious discrimination, might not have much impact in this area. First, as we have seen, the anecdotal information suggests that there has been a rebound in Muslim American charitable activity over the course of the second half of the Terror Decade. That seems to be true at least on the fundraising and expenditure side, while the operational and receiving sides of international humanitarian activity in conflict zones important to Muslims seem to be facing continued challenges.<sup>294</sup> Second, even in a world of relaxed standing and cognizance of chilling effects, it will remain very easy for courts to say that “there is no free exercise right to fund terrorists”<sup>295</sup> in politically very unpopular cases.

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292. Cf. WARDE, *supra* note 26, at 130.

293. This is the problem identified by the district court in the IARA civil case, and disregarded by the D.C. Circuit (which chose to rule on other grounds). *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 735 (D.C. Cir. 2007); *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 54–55 (D.D.C. 2005); see also Kathryn A. Ruff, *Scared to Donate: An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 447, 482–93 (2006) (outlining and evaluating the constitutional claims of a hypothetical class of Muslim donor plaintiffs in a case involving the designation of a Muslim charity as a terrorist organization, and concluding that the claims are unlikely to prevail).

294. See *supra* notes 91–93 and accompanying text; Benthall, *supra* note 82 (suggesting the impact on the operational and receiving side of Muslim charities).

295. See *supra* note 139.

So long as the nexus between religious liberty and charity remains framed in those terms, it is naïve to suppose that the United States can retreat from the material support road down which it has been going and set things on a fundamentally different track. Muslim American religious liberty in the free exercise sense is in retreat today in a way that bears a passing resemblance to the way that church autonomy is in retreat in the Catholic clergy sex abuse context. Douglas Laycock, whose early law review articles helped to put the doctrine of church autonomy on the scholarly map, has observed that in the tort cases that followed the revelations out of Boston in 2002, church authorities put forward institutional autonomy arguments that were too absolute. The “all or nothing” nature of these defenses implied that a civil court simply could not inquire into what a church was doing to control abusive clergy, no matter how egregious the pattern of behavior. He nonetheless concludes that, even in this highly charged context, there is a role for church autonomy defenses where the plaintiffs’ theories of institutional liability for the conduct of individual priests are highly attenuated.<sup>296</sup>

Currently, no court or scholar has suggested that the law of religious institutional autonomy is relevant to the crackdown on Muslim American charities and other institutions.<sup>297</sup> This silence is itself significant, revealing that the law of “church autonomy” is not quite as universal in its application as it purports to be. But church autonomy would not have much traction in the Muslim charitable context: there is almost certainly no end run around the limitations of free exercise law to be found here, anymore than there is in the law of the Establishment Clause. One reason is the association of the church autonomy doctrine with the clergy sex abuse context.<sup>298</sup> Another is that any arguments from institutional autonomy in the material support context are likely to

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296. 2 LAYCOCK, *supra* note 135, at 331–32.

297. The closest is Huq, *supra* note 16, but his argument did not involve the charity cases, rather the general use of religious speech as indicators of incipient terrorist activity. *Id.* at 833. Moreover, Huq concedes that, as a doctrinal matter, church autonomy claims are at best merely instructive in this context, lacking any real traction owing to the post-*Smith* drift of religious liberty law. *Id.* at 860–64.

298. Marci Hamilton has been the most prominent of church-state scholars seeking to discredit the church autonomy doctrine for its alleged role in facilitating the clergy sex abuse crisis. See generally MARCI HAMILTON, *GOD VS. THE GAVEL* (2005). Her very personal feud with Laycock is reflected in 2 LAYCOCK, *supra* note 135, at 325–28.

produce a mere variant of what the courts have already held: “there is no right based on church autonomy to subsidize terrorists.”<sup>299</sup>

The implications of this are potentially dramatic. The law of religious liberty has only so many branches in the United States: free exercise (and RFRA), conscientious objection, non-establishment, and church autonomy describe the pool of available claims. If none of those doctrines has traction in the Muslim charity context, it means that the law has effectively concluded that religious freedom is not salient to this area at the intersection of faith and counterterrorism policy. In itself, this would not be unprecedented. The Supreme Court has deemed certain areas of government regulation—securities regulation and antitrust, for example—to lie beyond the boundaries of the First Amendment.<sup>300</sup> But it is one thing to conclude that these forms of regulation lack “constitutional salience,” in Frederick Schauer’s phrase.<sup>301</sup> It would be a far more radical and dangerous step to say that the Muslim American charity cases also lack constitutional salience, at least where the law of material support is involved (and it is involved across a very wide range of this philanthropic sector). The Muslim charity cases are not the only area of the war on terror to demonstrate that, in a democracy, “respect for the individual is very quickly submerged to the common good . . . when terrorism threatens national security.”<sup>302</sup> But charity is at the center of many of the world’s religions, and also critical to the development of the contemporary law of religious liberty. The status quo should strike supporters of religious liberty as unsatisfactory at best.

I have already suggested one possibility: make greater use of the scalpel<sup>303</sup> where possible, as the British experience suggests.<sup>304</sup> This tool will conflict with American free exercise values at times, and there will be situations where—the target of an investigation having failed to responsibly make its own use of the scalpel—it is necessary to bring

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299. *See supra* notes 137–39.

300. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1765 (2004).

301. *Id.*

302. NICHOLAS P. MILLER, *THE RELIGIOUS ROOTS OF THE FIRST AMENDMENT: DISSENTING PROTESTANTS AND THE SEPARATION OF CHURCH AND STATE* 161 (2012).

303. *See supra* notes 35–36.

304. *See supra* Part III.E., Ghachem, *supra* note 16, at 65–66.

down the sledgehammer. But that muddled state of affairs is preferable to an exclusive reliance upon the sweeping material support of terrorism machinery.

That machinery harms our values because it implicates lawful as well as illegal forms of Muslim belief and conduct, unduly narrowing our religious and political discourse. The Oklahoma constitutional amendment to ban recognition of Islamic law, and the effort to impede the construction of a mosque in Murfreesboro, Tennessee, are the easy cases, in which the impairment of free exercise is driven by transparently anti-Muslim bias within the terms of the Court's reasoning in the case of *Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah*.<sup>305</sup> These are effectively blips on the constitutional radar screen, destined to fade as people tune into and then out of the conservative talk radio and television shows that sustain them. The Muslim charity cases, by contrast, pose a much harder problem, one that cannot be solved by a simple balancing of liberty against security. Risk-free choices are not available in this area because Muslim American willingness to cooperate with counterterrorism investigations appears tied to that community's perceptions of the neutrality and procedural justice of law enforcement.<sup>306</sup> Given that this is the case, it makes sense to make the hard choices with an informed sense of what it is we are trying to secure, which includes a society in which religious liberty is fully implemented for all groups: the politically unpopular as well as the majority faiths.

More than one vision of religious liberty can describe such a society, but one characteristic that all these visions should share is a mechanism for counteracting the pressure towards internalized surveillance that unpopular religious minorities experience.<sup>307</sup> "They have to watch themselves and hesitate, asking whether they are doing

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305. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 524 (1993) (finding that a new city ordinance aimed at prohibiting animal sacrifice was neither neutral nor generally applicable because the law targeted a specific religious group).

306. See COLE, *supra* note 26, at 189–97; see generally Tom Tyler et al., *Legitimacy and Deterrence Effects in Counter-Terrorism Policing: A Study of Muslim Americans*, 44 *LAW & SOC'Y REV.* 365 (2012) (considering "the circumstances under which members of the Muslim American community voluntarily cooperate with police efforts to combat terrorism").

307. MARTHA C. NUSSBAUM, *THE NEW RELIGIOUS INTOLERANCE: OVERCOMING THE POLITICS OF FEAR IN AN ANXIOUS AGE* 220–21 (2012).

everything in their power so as not to give offense. For majorities, by contrast, the world is made in their image . . . : the general shape of public culture expresses their sense of life . . . . [T]hey define what ‘normal’ is.”<sup>308</sup> That phenomenon has a very large reach given the pluralism of contemporary American society. But the crackdown on Muslim American charity has created an especially troubling variation on this theme, by effectively branding as taboo certain expressions of Muslim religiosity because of both their real and supposed connections to actual terrorist activity. The politics of “jihad” and the support of orphans have become loaded categories in the aftermath of cases like *Holy Land Foundation*.<sup>309</sup> So too have the very image of Muslim Americans paying over *zakat* funds to a mosque or an overseas institution, not to mention the figure of the solitary male Muslim volunteer traveling through Afghanistan or Pakistan, or the common expression “Allahu Akbar” (“God is Great”), or even the phenomenon of Muslims praying collectively in an airport. All of these have acquired a sinister and absolutist character in American public discourse.<sup>310</sup> And many of these terms and images have acquired that suspect character in connection with the crackdown on Muslim American charity.

Unlike British and continental law, American counterterrorism law does not expressly criminalize language that tends to support terrorism, barring an incitement to imminent lawless action. American material support laws are protective of free expression and broadly content-neutral in that comparative sense.<sup>311</sup> But, as even the Supreme Court majority opinion acknowledges in *Humanitarian Law Project*, those laws are not exactly content-neutral: they do limit the ability of a speaker to engage with an organization based on the nature of the speech and the identity of the organization. Moreover, as we have seen, the law

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308. *Id.*

309. Laila Al-Marayati, a board member of Kindhearts, which focuses on delivering aid to needy children, has stated that her charity does not inquire into how the father of an orphan died in order to avoid charges that Kindhearts knowingly supports the families of suicide bombers. *See* Watanabe, *supra* note 87.

310. *See, e.g.,* Ramzi Kassem, *From Altruists to Outlaws: The Criminalization of Travelling Islamic Volunteers*, 10 UCLA J. ISLAMIC & NEAR E. L. 85, 85 (2011) (discussing the conflation of positive Islamic charity work with the Islamic fighter).

311. *See* Daphne Barak-Erez & David Scharia, *Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law*, 2 HARV. NAT’L SEC. J. 1, 1–2 (2011).

of evidence permits prosecutors in criminal cases to introduce all kinds of evidence consisting of protected speech and perfectly innocent acts for the purpose of proving criminal intent, or showing the elements of a conspiracy.<sup>312</sup> These rules—and the kinds of trials they license—may not seem problematic from a purely legal point of view, but they communicate a certain message to the lay public in general and the Muslim American lay public in particular. That message is: “Stay away from this stuff; it is criminal in nature.” The case of a Saudi graduate student in computer science at the University of Idaho—prosecuted for material support on the grounds that he funneled money to Islamic charities with ties to terrorists—relied on the defendant’s work in maintaining web sites and an email discussion list that prominently featured the concept of *jihad*.<sup>313</sup> The prosecution of a Massachusetts man named Tarek Mehanna for material support was based in significant part on his role in translating an Arabic document entitled “39 Ways to Serve and Participate in Jihad” and helping to distribute it online.<sup>314</sup> The cases described in this Article, and others not analyzed here, are replete with similar examples.

In the 1960s and 1970s, one of the major challenges facing Nation of Islam prison inmates bringing religious liberty claims was to persuade the courts that the Nation of Islam was indeed a religion that qualified for the protections of the Free Exercise Clause and not an oppositional political movement or black radical cult. With a few notable exceptions, Muslim Americans no longer face that problem today as a matter of law. But the cases sometimes treat Islamic religious concepts as a form of “religionized politics” rather than “real” religion: they are

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312. Under standard conspiracy law, an overt act need not be an illegal act. *People v. Johnson*, 159 Ca. Rptr. 3d 70, 77 (Cal. 2013)

313. Timothy Egan, *Computer Student on Trial Over Muslim Web Site Work*, N.Y. TIMES (Apr. 27, 2004), <http://www.nytimes.com/2004/04/27/us/computer-student-on-trial-over-muslim-web-site-work.html>; Harvey Silverglate, *Free Speech in an Age of Terror*, BOSTON GLOBE (June 28, 2004), [http://www.boston.com/news/globe/editorial\\_opinion/oped/articles/2004/06/28/free\\_speech\\_in\\_an\\_age\\_of\\_terror/](http://www.boston.com/news/globe/editorial_opinion/oped/articles/2004/06/28/free_speech_in_an_age_of_terror/). The defendant, Sami Al-Husayen, was prosecuted under the “expert guidance or assistance” provision of the material support statute. See Egan, *Computer Student on Trial Over Muslim Web Site Work*.

314. See David Cole, *39 Ways to Limit Free Speech*, N.Y. REVIEW OF BOOKS (Apr. 19, 2012, 3:15 PM), <http://www.nybooks.com/blogs/nyrblog/2012/apr/19/39-ways-limit-free-speech/>.

perceived as ideological exhortations signaling terrorist activity rather than the contested legacies of an Abrahamic faith undergoing rapid and profound transformations.<sup>315</sup>

The suppression of this religious discourse and internal contest is one of the major hidden costs of the financial war on terror, and particularly its charitable front. That cost could well be measured in free speech terms, and indeed it is a classic example of the kind of injury to the “marketplace of ideas” that Holmes and other free speech champions of the early twentieth century decried.<sup>316</sup> But the tendency to see it only under that rubric is, in a sense, part of the problem. The “militant” rhetoric of *jihad* has become a form of religious dissent, and religious dissent has a special place in the genesis and culture of the First Amendment.<sup>317</sup> To counteract the suppression of radical (and not so radical) Islamic religious expression, and the pressures towards internalized surveillance that it produces for some Muslim Americans, will require moving beyond the “good Muslim/bad Muslim” dynamic as a condition of admission to the “normal”<sup>318</sup> American religious landscape.<sup>319</sup> And that, in turn, will mean pushing back against an

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315. For the distinction between “religion” and “religionized politics,” see Samuel Helfont, *Term Warfare*, THE NEW REPUBLIC (July 11, 2012), <http://www.tnr.com/book/review/islamism-islam-bassam-tibi>. For indications that the challenge overcome by Nation of Islam inmates remains a live legal problem at some level, see *Camp Retreats Found., Inc. v. Twp. of Marathan*, No. 304179, 2012 WL 1698379, at \*6 (Mich. Ct. App., May 15, 2012) (unpublished) (reversing tax tribunal’s denial of a charitable exemption from ad valorem taxation for a Muslim organization’s use of a summer camp site, where the tribunal had concluded that the camp did not meet the definition of a (religious) charity); Brief for the United States as *Amicus Curiae*, *Estes v. Rutherford Cnty. Reg’l Planning Comm’n*, No. 10CV-1443 (Ch. Ct. Rutherford Cnty. Oct. 18, 2011), available at [http://www.justice.gov/crt/about/hce/documents/murfreesboro\\_amicus\\_10-18-10.pdf](http://www.justice.gov/crt/about/hce/documents/murfreesboro_amicus_10-18-10.pdf) (arguing, in response to plaintiffs’ suggestions to the contrary, that Islam is a religion and a mosque a place of religious assembly).

316. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 135–233 (W.W. Norton & Co. 2004); Barak-Erez & Scharia, *supra* note 311.

317. See MILLER, *supra* note 302.

318. NUSSBAUM, *supra* note 307, at 220–21.

319. Cf. Alia Malek, *Introduction*, in *PATRIOT ACTS*, *supra* note 186, at 19 (“While the injustices, counted individually, can sometimes seem minor, in the aggregate, they suggest that some religions and ethnicities (the lines of which are often blurred and difficult to define) inherently cannot be American.”).

ongoing tendency to assimilate problems of free exercise and religious observance at their core into a framework of free speech and fungibility.

This task is all the more urgent since it is clear that free speech doctrine itself is subject to highly variegated restrictions or protections, depending (1) on whether it is tied to the concept of fungibility and, more generally, (2) on the politics of the individual Justices. To take one very notable recent example, the Court in *Citizens United* did not actually deny that campaign contributions are easily converted into political influence and corruption.<sup>320</sup> It simply held that, for First Amendment purposes, these concerns about the ultimate purchases of political money are not sufficiently weighty to justify the restriction on political speech (unless a “Super-Pac” directly engages in coordinated advocacy of a political candidate).<sup>321</sup> This is so even though the legislative history for the statute challenged in *Citizens United* reflects a congressional determination that the undue influence of wealthy campaign contributors is a serious and compelling problem in American politics today, just as the legislative history of the AEDPA and PATRIOT acts reflects a congressional finding that the need to prevent legitimate monies from getting into the hands of terrorists is a vital matter of national security.<sup>322</sup> We need not conclude that *Citizens United* was wrongly decided in order to see that free speech doctrine cannot be relied on to deal with the specifically *religious* stakes of the conflict between national security and religious expression in this new era.<sup>323</sup>

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320. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 314 (2010).

321. *See id.* at 356–57, 360.

322. For a provocative comparison of *Citizens United* and *Humanitarian Law Project* cases, see generally Aziz Huq, *Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16 (2012), available at <http://ssrn.com/abstract=1984948>.

323. The notion that a “hybrid rights” theory under *Smith* might fare better than either free speech or free exercise alone is not persuasive. *Smith* itself is not the governing standard in these federal cases. And in any event, as Justice Souter pointed out in his concurring opinion in *Lukumi Babalu*, “if a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567 (1993). Not surprisingly, the Supreme Court and the lower federal courts have provided little support for hybrid rights claims in the years since *Smith*. But for a contrary argument that would rely on a hybrid rights approach, see generally Murad Hussein, *Defending the Faithful*, 117 YALE L.J. 920 (2008), and the critiques of Hussein’s argument by R. Richard Banks,



Moreover, even if free exercise law is best seen today as a reflection of equal protection and anti-discrimination norms rather than the desire to protect religious observance,<sup>324</sup> that still leaves much work for the courts to do on the religious liberty front in the post-9/11 era. In October 2001, American counterterrorism officials met with their counterparts in the United Arab Emirates to discuss strategies for keeping track of the informal banking networks (known as *hawalas*) that are used in some Muslim majority countries to transfer monies. The American officials in attendance reportedly tried to ease local concerns that the United States was singling out Muslim and Arab groups in its post-9/11 crackdown on Muslim charities by noting examples of how Roman Catholic charities had been prosecuted for funneling money to the Irish Republican Army during the period of “the Troubles” (extending from the 1960s to 1998).<sup>325</sup> These purported prosecutions do not appear to have taken place. In 1981, the Attorney General did bring a civil action against the Irish Northern Aid Committee (NORAI, a 501(c)(3)) to enjoin the group from violating the provisions of the Foreign Agents Registration Act of 1938. But no criminal case was brought, and no other Catholic charitable entities seem to have been pursued in connection with the financing of IRA terrorism.<sup>326</sup> This

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*Group Harms in Antiterrorism Efforts: A Pervasive Problem with No Simple Solution*, 117 YALE L.J. POCKET PART 198 (2008), and Bernadette Meyler, *Religious Expression in the Balance: A Response to Murad Hussain’s Defending the Faithful*, 117 YALE L.J. POCKET PART 186 (2007).

324. See Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 673–78 (2002).

325. Jeff Gerth & Judith Miller, *U.S. Makes Inroads in Isolating Funds of Terror Groups*, N.Y. TIMES (Nov. 5, 2001), <http://www.nytimes.com/2001/11/05/world/nation-challenged-money-trail-us-makes-inroads-isolating-funds-terror-groups.html>.

326. Att’y Gen. of U. S. v. Irish N. Aid Comm., 530 F. Supp. 241, 245 (S.D.N.Y. Apr. 30, 1981). See also Benthall, *supra* note 82, at 116; Kevin Cullen, *The IRA & Sinn Fein: America and the Conflict*. PBS FRONTLINE <http://www.pbs.org/wgbh/pages/frontline/shows/ira/reports/america.html> (last

visited Nov. 20, 2013). Cullen describes the ubiquity of informal Irish-American fundraising efforts for the IRA at various moments during the Troubles, but notes that these efforts paled in comparison to the millions raised by mainstream charities like the American Ireland Fund. Although the monies raised by those charities apparently included contributions for weapons (if not weapons in kind), Cullen

comparison is significant not only because it was invoked (albeit in an apparently misleading way) by American counterterrorism officials, but also because the Catholic American experience has been so central to the development of American church-state law and such an important source of understanding how religious minorities can overcome stigmatization and marginalization to achieve integration.<sup>327</sup> It is vital that our law enforcement actions not convey the impression (let alone partake of the reality) of selective enforcement. Yet an important percentage of the Muslim American community appears to believe that this is what is happening with the application of material support, immigration, and anti-fraud laws post 9/11, as well as police and FBI surveillance practices.<sup>328</sup>

### *B. Beyond Islam and the War on Terror*

At the same time, the Muslim American charity cases matter because they will continue to bear on the situation of other religious groups, on nonprofit organizations generally, and on the delivery of professional services.<sup>329</sup> The religious and religious liberty-related organizations that filed an *amici curiae* brief with the Fifth Circuit in the *HLF* criminal appeal included the American Friends Service Committee (a Quaker entity), Christian Peacemaker Teams, the Rutherford Institute, and the Tikva Grassroots Empowerment Fund. Nonprofit *amici* included Atlantic Philanthropies, the Council on Foundations, Grantmakers without Borders, the Rockefeller Brothers Fund, and others. Many of these same entities also filed as *amici* in the *Humanitarian Law Project*, where they were joined by a unit of the University of Notre Dame and

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concludes that the extent of Irish-American support for IRA paramilitary actions has been overestimated.

327. See PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 191–92 (2002); SCHULTZ, *supra* note 22.

328. AMERICAN CIVIL LIBERTIES UNION, *supra* note 11, at 73; Sahar F. Aziz, *Countering Religion or Terrorism: Selective Enforcement of Material Support Laws against Muslim Charities*, 47 INST. FOR SOC. POL’Y & UNDERSTANDING: POL’Y BRIEF 1, 2, 6–7 (2011), available at [http://www.ispu.org/pdfs/ISPU\\_Policy%20Brief47AzizWEB.pdf](http://www.ispu.org/pdfs/ISPU_Policy%20Brief47AzizWEB.pdf).

329. Cf. Erica Caple James, *Governing Gifts: Law, Risk, and the “War on Terror,”* 10 UCLA J. ISLAMIC & NEAR E. L. 65, 84 (2011).

the International Crisis Group.<sup>330</sup> As these briefs suggest, fungibility might well become the vehicle by which the government manages, directly or indirectly, to exert a very broad regulatory authority over the faith-based and secular humanitarian aid sectors alike.

The post-9/11 controversies—concerning private foundations placing conditions on grants to human rights organizations based on the recipients' willingness to disclaim any ties to terrorist groups—are an early indication of the kinds of indirect pressures that fungibility is bringing to bear on the work of civil society. The Ford Foundation, for example, has required grantees to sign a document stating that “you agree that your organization will not promote or engage in violence, terrorism, bigotry or the destruction of any state, nor will it make subgrants to any entity that engages in these activities.” Ford was apparently driven to include this language in its grants after lawmakers in Washington were asked to examine its tax-exempt status in connection with grants to a Palestinian nongovernmental organization.<sup>331</sup> The foundation has been involved in a similar controversy involving the ACLU.<sup>332</sup> Not even the traditionally privileged work of lawyering is immune from the reach of the fungibility doctrine, as then Solicitor General Kagan made clear in the course of her oral argument in the *Humanitarian Law Project* case, pointing out that an attorney who files a brief at the behest of a designated organization can be prosecuted for material support of terrorism on that basis alone.<sup>333</sup> That defense lawyers have been increasingly implicated in representations of clients charged with terrorism-related offenses shows that this prospect is not merely abstract. If these and other developments come to pass, they would have implications for the future of the First Amendment as a whole, and not just religious liberty.

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330. Brief for Am. Friends Serv. Comm. et al. as Amici Curiae supporting Respondents, *United States v. El-Mezain et al.*, 664 F.3d 467 (5th Cir. 2011); see also *Aziz*, *supra* note 328, at 5.

331. See Scott Sherman, *Giving, With Strings Attached: The Ford Foundation Needs to Stop Putting Controversial Conditions on Its Grants*, L.A. TIMES, Oct. 21, 2007, at M4.

332. WENDY KAMINER, *WORST INSTINCTS: COWARDICE, CONFORMITY, AND THE ACLU* 35, 66–78 (2010).

333. See Transcript of Oral Argument, *supra* note 64.

The implications of the crackdown on charities for religious liberty issues beyond the war on terror increasingly come into focus. I will briefly consider three such issues or perspectives, beginning with the relationship between “politics” and “charity” or “religion.” Since well before 9/11, it has been a requirement of federal law that secular and religious tax-exempt institutions (including churches and other houses of worship) not engaged in direct campaigning on behalf of a political candidate.<sup>334</sup> That legislative provision—the so-called charitable gag rule—was introduced by then Senator Lyndon Johnson in 1954, as part of a politically opportunistic effort to ensure his reelection to the Senate.<sup>335</sup> Although it is not altogether clear that Johnson intended the rule to apply to houses of worship, the rule flew in the face of a very long American tradition, dating back to the colonial period, of clerics using the pulpit to opine on any number of pressing public policy issues, including political campaigns.<sup>336</sup>

The Terror Decade’s revival of the government’s powers to police the boundary between “charitable” or “religious” activity and all else has been reflected not only in the Muslim charity cases, but in contemporaneous efforts to sanction churches and nonprofit organizations generally for involvement in political campaigns.<sup>337</sup> It is no accident that this increasingly assertive engagement of 501(c)(3) entities, ranging from evangelical churches to the NAACP, has been prompted on so many levels by the highly polarized character of post-9/11 American national and cultural politics. The courts have thus far resisted pressures to revisit the constitutionality of the gag rule since the D.C. Circuit effectively settled that question in 2000.<sup>338</sup> But new court challenges are

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334. I.R.C. § 501(c)(3) (2006).

335. NINA J. CRIMM & LAURENCE H. WINER, *POLITICS, TAXES, AND THE PULPIT: PROVOCATIVE FIRST AMENDMENT CONFLICTS* 11, 72, 110 (2011).

336. *Id.* at 110.

337. In September 2002, a federal judge in Illinois dismissed a criminal indictment against the Benevolence International Foundation (BIF) and its CEO that charged the defendants with falsely stating as follows: “BIF is required to maintain the donations of *zakat* in a non-interest bearing account and to use those funds only to assist the poor and needy. BIF abides strictly by those requirements.” *United States v. Benevolence Int’l Found., Inc.*, No. 02 CR 414, 2002 U.S. Dist. LEXIS 17223, at \*5 (N.D. Ill., Sept. 13, 2002) (quoting from the indictment).

338. *See generally* *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000) (holding that revocation of a church’s tax exempt status for intervening in a

underway, and there have been calls for Congress to take action on its own, at least by permitting the kinds of political speech most relevant to the religious missions of churches and other institutions of worship.<sup>339</sup> Any such effort to loosen the restriction on “political” activity will necessarily take place against the backdrop of the federal government’s vastly expanded counterterrorism powers to define, on pain of criminal sanction, what tax-exempt organizations can and cannot do under the rubric of “charitable” activity. The very definition of what “charity” and “religion” are or can be—their cultural and political boundaries—is in play.

This contest over the limits of the religious sphere is also at work in a second controversy still working its way through the federal courts: the Catholic Church’s steadfast opposition to a provision of the Affordable Care Act (ACA) that requires all employees, except a limited class of religious institutions, to cover prescription contraceptives for their employees. A state law version of this same requirement was upheld by the California Supreme Court in 2004 in a case brought by Catholic Charities of Sacramento.<sup>340</sup> The current challenges to the ACA, brought by various branches of Catholic Charities, the Catholic diocesan authorities, and other arms of the Catholic Church, plead the full range of religious liberty claims, from church autonomy to RFRA, constitutional free exercise, and conscientious objection. Their common themes are twofold: (1) the ACA forces Catholic institutions to engage in conduct that they regard as incompatible with some of the central values of Catholicism; and (2) the Catholic “Church” includes not merely the diocesan church authorities that are the most visible expression of Catholicism, but also Catholic schools, employers, charities, and so forth.<sup>341</sup>

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political campaign did not violate the church’s right to freely exercise its religion, and that the revocation of the church’s tax exempt status was not selective prosecution in violation of the Equal Protection Clause).

339. CRIMM & WINER, *supra* note 335, at 366.

340. Catholic Charities of Sacramento, Inc. v. Super. Ct., 85 P.3d 67, 73–74 (Cal. 2004).

341. *Cf.* Testimony of John Garvey, President of Catholic University of America, before the U.S. House of Representatives, Committee on Oversight and Government Reform (Feb. 16, 2012), *available at* <http://publicaffairs.cua.edu/releases/2012/garvey-hhs-remarks.cfm>.

In response to the Catholic outcry, the Obama administration in 2013 issued a regulation that broadened the scope of the exemption.<sup>342</sup> Meanwhile, the federal courts have issued conflicting decisions on availability of preliminary injunctive relief under RFRA for private corporations seeking to evade the ACA mandate. In one of the earlier decisions, the District Court for the District of Columbia dismissed for lack of standing and ripeness after the Department of Health and Human Services announced a one-year enforcement safe harbor for non-profit groups whose religious beliefs are violated by the mandate.<sup>343</sup> The Seventh Circuit recently heard oral argument in an appeal from a district court decision that found no likelihood of success on the RFRA merits.<sup>344</sup> By contrast, an *en banc* panel of the Tenth Circuit has preliminarily enjoined enforcement of the mandate, with five of eight judges holding that private corporations have free exercise rights.<sup>345</sup> And a federal district judge in Colorado issued preliminary injunctive relief while finding that among the questions of first impression presented was: “Can a corporation exercise religion?”<sup>346</sup>

The parallels between this controversy and the Muslim charity cases can be analyzed at several different levels. For one, the issue of a corporation’s ability to “exercise religion,” far from being an issue of first impression in the federal courts, was foreshadowed in its rough outlines by the *HLF* civil case, as we have seen.<sup>347</sup> The District Court for the District of Columbia found that *HLF* could not plead a religious freedom cause of action because, having described itself as a nonprofit charitable corporation—it had failed to establish that its conduct could

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342. Robert Pear, *Birth Control Rule Altered to Allay Religious Objections*, N.Y. TIMES, Feb. 2, 2013, at A1, A3.

343. *Wheaton Coll. v. Sebelius*, 887 F. Supp. 2d 102, 104 (D.D.C. 2012).

344. Howard Friedman, *7th Circuit Hears Oral Arguments in 2 Contraceptive Coverage Mandate Cases*, RELIGION CLAUSE BLOG (May 23, 2013), <http://religionclause.blogspot.com/2013/05/7th-circuit-hears-oral-arguments-in-2.html>. The Seventh Circuit has preliminarily enjoined enforcement of the ACA mandate pending appeal. *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at \*5 (7th Cir. Dec. 28, 2012).

345. *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2013 WL 3216103, at \*1–2 (10th Cir. June 27, 2013).

346. *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1296 (D. Colo. 2012).

347. See *supra* Part III.A.

involve the exercise of religion.<sup>348</sup> Moreover, the ACA conscientious objection cases and the Muslim charity cases raise overlapping questions about the scope of governmental power over religious organizations. There is surely some distance between preventing religious entities from engaging in conduct they wish to undertake at the risk of severe criminal penalties, and requiring those organizations to actively participate in schemes inconsistent with their core religious beliefs. But the former undoubtedly makes the latter seem more within the pale, and that should come as little surprise. It was the rise of the administrative state around the middle of the twentieth century that gave rise to so many of the conflicts that have fueled the modern American law of religious liberty, including debates over the legitimacy of religious exemptions from generally applicable laws.<sup>349</sup>

We need not believe that the Catholic Church has the better of this legal or policy argument. However, in order to recognize that the two phenomena—posing barriers to religiously-mandated conduct and requiring conduct violative of religious conscience—may be related at the level of the government’s continually expanding administrative powers, whether in the field of national security or health care. There are two other parallels between the Muslim charity cases and Catholic charitable controversies to which we should attend. One is that there are ways of moderating the apparent head-on clash between religious liberty and progressive social policy. The Obama administration has belatedly figured this out, with its proposal to require insurance companies of religious employers (rather than the employers themselves) to pay for the contraceptive coverage. The Catholic Church has rejected this compromise (or scalpel-like<sup>350</sup> measure), but that does not mean it entails an infringement of religious liberty. It is unfortunate that a similar compromise was unavailable in 2006 to prevent Catholic Charities of Boston from abandoning its child adoption services altogether, rather

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348. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 83 (D.D.C. 2002).

349. Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J. L. & RELIGION 139, 140 (2009).

350. See *supra* text at notes 35–37.

than comply with a Massachusetts state regulation that would have required it to extend its services to gay and lesbian clients.<sup>351</sup>

Second, and on that last note, the charitable controversies of the Terror Decade remind us that charity cannot be conceptualized in isolation from its clients and recipients. The religious liberty interest belongs both to the charitable givers of sustenance—in both Muslim and Catholic contexts, often an organization—and to the needy who receive that sustenance. The shortcomings of post-9/11 First Amendment law in protecting the interests of the latter group should make us sensitive to how the concerns of Catholic charities' benefactors are framed in the current legal disputes. In both the contraceptive coverage and same-sex adoption contexts, the religious liberty interest appears to be aligned with the Church and not with its employees or benefactors. Such a mapping of religious liberty however, represents an artificially narrow understanding of just whose exercise of religion is at stake. Surely it is the actual giving of charity that First Amendment law seeks to protect, and not simply the claim of a religious or charitable organization to the status of giver. The interests of gay and lesbian prospective parents, foster children, and even to some extent the employees of the Catholic Church—all of these are part of what it should mean to protect *religious* liberty in the Terror Decade.

## CONCLUSION

As the administrative-homeland security state of the early twenty-first century continues to grow, so too will the potential for

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351. See Colleen Theresa Rutledge, *Caught in the Crossfire: How Catholic Charities of Boston Was Victim to the Clash Between Gay Rights and Religious Freedom*, 15 *DUKE J. GENDER L. & POL'Y* 297, 297–98 (2008). In the early 1990s, a related controversy broke out over the firing of a Catholic Charities staff member who supplied homeless women with condoms in the 1990s, pursuant to a Massachusetts state mandate that human service providers receiving state funds provide some form of AIDS education. Because state law in that case did not require the actual distribution of condoms, a constitutional showdown could be averted. See Peter Canellos, *Firing Brings up Thorny Issues of Church and State*, *BOSTON GLOBE*, Nov. 19, 1991, at 1. For a study of how these church-state conflicts impact the provision of social services in the Archdiocese of Boston, see ERICA CAPLE JAMES, *THE CHURCH, THE CHARITY, AND THE HAITIAN CENTER: CORPORATE CATHOLICISM IN BOSTON* (forthcoming).



conflicts between one form of right and another, along the lines of those just described. The lessons of the Muslim charity cases cannot resolve these thorny problems, but they can at least suggest ways of thinking constructively about them.

This Article's final point about what has happened to religious liberty in the Terror Decade has to do with how legal and religion scholarship strike a balance between the general and the particular. The leading general theories of religious liberty jurisprudence, such as Equal Liberty or Substantive Neutrality (or, for that matter, any other kind of neutrality)<sup>352</sup> leave something to be desired in this context because they never quite roll up their sleeves and get their hands dirty with the "nitty gritty" encounters between counterterrorism and religious observance. And theory tends to give only lip service to history, which can help us to fully understand what is happening in the cases discussed in this article.

The situation of Muslim America today is both similar to and different from other religious and non-religious groups now and in the past, whether we are describing the experience of Catholics, Jews, Japanese Americans, adherents of the Nation of Islam, or others. The example of the integration of Catholics and Jews in the United States from the 1920s onward—the making of so-called "Tri-Faith America" ("Protestant-Christian-Jew," in the title of Will Herberg's famous 1955 essay) —is instructive. That idea depended crucially on the interfaith conciliation efforts of religious activists representing all three groups. Initially working independently of government action, the National Conference of Christians and Jews helped to promote a unified front of American religious leaders against the specter of fascism emanating from interwar Europe. Those efforts, which focused on highlighting the dangers of religious persecution and the need for tolerance and goodwill, in turn received the support of the military leadership during the Second World War. The legacies of organizations like the National Conference of Christians and Jews were subsequently reflected in law, as the Tri-Faith image was harnessed to the causes of legal pluralism and non-establishment in the 1950s and 1960s.<sup>353</sup>

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352. *See supra*, note 1.

353. *See generally* SCHULTZ, *supra* note 22. Herberg's essay reflects the post-World War II codification of these changes. *See* WILL HERBERG, *PROTESTANT-CATHOLIC-JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY* 258 (reprint ed. 1983); *see also* GHANEA BASSIRI, *supra* note 24, at 235–38 (discussing Herberg).

Although framed as an appeal to the virtues of religious tolerance and social progress, the rise of Tri-Faith America had a distinctly strategic and even opportunistic character to it. The social integration of Catholic Americans, long associated with an absolutist faith, proceeded not by way of an abstract and sudden commitment to religious liberty, but through Catholic opposition to the putatively intertwined specters of moral relativism and totalitarianism.<sup>354</sup> The perception that all three groups—Protestants, Catholics, and Jews—could coalesce around resistance to this shared political threat made possible the rise of Judeo-Christian America and the discrediting of anti-Catholic prejudice.<sup>355</sup> That fundamentally political context for integration and de-stigmatization is missing in post-9/11 America.<sup>356</sup> Today, many Americans identify Islam with religious absolutism and the political enemies of the United States, rather than count it as an ally in a dangerous world.<sup>357</sup> Though reservoirs of interfaith goodwill exist, the necessary political ingredients for the making of “Abrahamic America” on a broad scale are not yet available.<sup>358</sup> At one level, we may be justly relieved that this is the case, given the reactionary politics that have so often accompanied invocations of both “Christian” and “Judeo-Christian” America.<sup>359</sup>

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354. See EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 170 (1973).

355. In addition to SCHULTZ, *supra* note 22, see Andrew Preston, *A Very Young Tradition: Our Country's Religious Identity Is a Surprisingly New – And It Hasn't Always Meant What It Does Now*, BOSTON SUNDAY GLOBE (July 1, 2012), <http://www.bostonglobe.com/ideas/2012/06/30/very-young-judeo-christian-tradition/smZoWrkrSLeMzPLou1ZGNL/story.html>.

356. Cf. DENISE SPELLBERG, *THOMAS JEFFERSON'S QUR'AN: ISLAM AND THE FOUNDERS* 298 (2013) (situating President Eisenhower's 1957 embrace of a newly constructed Muslim “church” in Washington D.C. in the context of Cold War opposition to “godless” Communism and noting that this context has been replaced by an association between Islam and terrorism today).

357. See MARGULIES, *supra* note 15.

358. Hence my skepticism of Joppke's and Torpey's conclusion that there is “little reason that Islam in the United States cannot find its place in the already existing chain ‘Protestant-Catholic-Jew’.” JOPPKE AND TORPEY, *supra* note 5, at 116.

359. Cf. BRUCE LEDEWITZ, *CHURCH, STATE, AND THE CRISIS IN AMERICAN SECULARISM* 62–63 (2011). This is to say nothing of the inadequacies inherent in the motif of an “Abrahamic” theological consensus. See AARON W. HUGHES, *ABRAHAMIC RELIGIONS: ON THE USES AND ABUSES OF HISTORY* (2012); JON D.

This also means, however, that while we cannot account for the crackdown on Muslim charities simply as a matter of selective enforcement or anti-Muslim bias, nor can we simply assume that the circle of religious liberty will inevitably expand to include each new generation's disfavored minorities. There is no built-in impulse towards "an ever expanding circle of inclusion" in the story of American religious liberty.<sup>360</sup> The political contexts shaped by large-scale historical forces—totalitarianism and terrorism, war and peace, democracy and secularization, etc.—do matter in the law. The translation of fungibility from economic to national security terms is the product of such forces, not an abstract invention of legal theory. The diminished space for religious liberty that now prevails at the end of the first Terror Decade is closed in by both long-term structural and recent characteristics of church-state law: separation, church autonomy, the *Smith* decision to some extent, and so on. There is no "general" account of law and religion that can describe and account for these forces and changes at a normative level. There is no theory of *church and state* that can alone capture what is now happening at the nexus of *mosque and state*—itself a misleading label for the challenges at hand. We will have to examine the situation of religious minorities *and* majorities in their respective political, cultural, and legal settings, and then also relate them to the more general contours of the law of religious liberty, in order to keep up with the less visible shifts that are underway as the era of the war on terror continues.

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LEVENSON, INHERITING ABRAHAM: THE LEGACY OF THE PATRIARCH IN JUDAISM, CHRISTIANITY, AND ISLAM (2012).

360. Cf. Laycock, *The Religious Exemption Debate*, *supra* note 349, at 174 ("Fortunately, the history of religious liberty in America is a history of an ever expanding circle of inclusion, both social acceptance and legal protection.").