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### Banning Sharia Is a “Red Herring”: The Way Forward for All Americans

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**BANNING SHARIA IS A “RED HERRING”: THE WAY FORWARD  
FOR ALL AMERICANS**

ABDULLAHI AHMED AN-NA’IM\*

PLENARY ADDRESS

I am delighted to be here this morning. As you heard, I am a Muslim from Sudan and have been a Muslim activist for human rights for at least forty years. As an activist, I have worked to promote human rights from an Islamic perspective since I was a law student in the 1960s. Furthermore, I see no contradiction whatsoever between being a Muslim and being a human rights advocate. It is from that perspective, when I read the bill<sup>1</sup> on its own terms, in terms of fundamentally protecting people against violations of their rights, that I do not think any Muslim would have a problem with the bill. But, the problem might come from the fact that we feel that we need such a bill. The bill is redundant, and that is why the “anti-Sharia” or “banning Sharia” tags seem to hold, though it is no longer in this draft bill. If the bill is not trying to ban Sharia then there is no reason to present this bill.

American judges already have a fundamental constitutional obligation.<sup>2</sup> Their oath of office, their training, and the entire tradition of the American judiciary require judges to protect the rights of individuals.<sup>3</sup> It is remarkable that we would feel in any of the states of the union of the United States that we would need to remind our judges of their fundamental obligations as American judges under the American Constitution. Since this notion is so redundant and so odd, people will start looking for some other reason for presentation of this bill. Simply, it does not seem to be addressing any problem, especially as far as this state is concerned.<sup>4</sup> For those who followed what happened in Oklahoma and what the Tenth Circuit said about a similar bill, which mentioned the term “Sharia.” In that case, the United States Court of Appeals, Tenth Circuit, said

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\* Charles Howard Candler Professor of Law, Emory University School of Law. This Plenary Address consists of an edited transcript of remarks given by Professor An-Na’im at the Invisible Constitutions symposium held at Saint Louis University School of Law.

1. H.R. 1512, 96th Gen. Assemb. (Mo. 2012).

2. MO. CONST. art. VI, § 11.

3. *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

4. Unlike other states, where “Sharia” was applied to settle disputes, Missouri has had no similar occurrences. *See generally* CTR. FOR SEC. POLICY, SHARIA LAW AND AMERICAN COURTS: AN ASSESSMENT OF STATE APPELLATE COURT CASES (2011).

that the main problem with the bill was it was not addressing a problem.<sup>5</sup> There was no problem that the bill was supposed to fix.

But, in any case, I am not attempting to debate or contest the basis of [what] the bill is and its language as much as I am trying to link what we seem to be talking about here in relation to the theme of this conference and the implications of what Representative Curtman said about the American Declaration of Independence, the American Constitution, and the process of promoting, building, and sustaining a culture of constitutionalism.<sup>6</sup> We cannot just simply assume that because previous generations of Americans have upheld these values that our generation or subsequent generations will do so.<sup>7</sup> I would therefore urge that the value of republican government and constitutionalism must be reaffirmed by every generation. So, the challenge as I see it is how our current American generations are reaffirming these values in light of today's realities of the United States. The demographics of the United States today are not the same as 1779. What do we have here and now? Who are the Americans who are entitled to these protections? Are our protections of these rights inclusive of all Americans today as we speak? I think that is where we need to apply our effort.

Trying to link the topic to the conference theme, I would suggest that "invisible constitutions" are actually the real constitutions, not the written text. The written text can only be a reflection of the underlying values of culture and religion that people live by. And if constitutionalism is not in the hearts and minds of American men and women, having them in a written document is not going to make any difference. What we have seen as the history of American constitutionalism is the history of the development of the values of constitutionalism through the last two centuries and not our clever or our technical construction of the document that was written some 200 years ago. Consider what Professor Walker said about the history of this state (Missouri) and the history of the United States at large in terms of persecution of religious groups and communities.<sup>8</sup> You will find that, for instance, Catholics were persecuted horrendously for many decades during the nineteenth-century, and

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5. *Awad v. Ziriax*, 670 F.3d 1111, 1130 (10th Cir. 2012).

6. Rep. Paul Curtman, Remarks at Saint Louis University School of Law Symposium: Invisible Constitutions (Mar. 2, 2012), <http://slu.edu/school-of-law-home/faculty-and-administration/news-and-events/events/culture-religion-and-memory/videos>.

7. As Thomas Jefferson said: "We may consider each generation as a distinct nation, with a right, by the will of its majority, to bind themselves, but none to bind the succeeding generation, more than the inhabitants of another country." Letter from Thomas Jefferson to John Wayles Eppes (Jun. 1813), *in* THE JEFFERSON CYCLOPEDIA: A COMPREHENSIVE COLLECTION OF THE VIEWS OF THOMAS JEFFERSON 228 (John Foley ed., 1900).

8. Anders Walker, Remarks at Saint Louis University School of Law Symposium: Invisible Constitutions (Mar. 2, 2012), <http://slu.edu/school-of-law-home/faculty-and-administration/news-and-events/events/culture-religion-and-memory/videos>.

hostility or suspicion of Catholics may still persist among some American Christian denominations.

I happen to be writing a book about American Muslims, and I’ll talk about it later on, but in the course of doing that I have come to study the degree of persecution of other religious communities—Catholics, Jews, and Mormons—that really belies our claim that we have affirmed from the start all these values and never strayed away from them. It is not true that the American Declaration of Independence was being upheld when the Catholics were being persecuted, and they were persecuted for decades. And it is not true that the American Declaration of Independence was being upheld when Jews were persecuted or when the Mormons were being expelled from this state.<sup>9</sup>

In fact, it is not true that American history was true to the phrase that Representative Curtman quoted from the Declaration of Independence, that “all men [were] created equal.”<sup>10</sup> For one thing, of course, not all men and women were equal. American women did not have equality under the American Constitution for another century. The right to vote took a constitutional amendment to become a fundamental right for women.<sup>11</sup> Slavery was practiced by the same so-called founders who proclaimed these values. So, how can all men be equal when some men were slaves? And how can all men be equal when women were denied the right to vote? It took a civil war and another constitutional amendment to abolish slavery.<sup>12</sup> The point is not to belittle the achievements of American constitutionalism, but simply to acknowledge the fact that it is a long, protracted, contingent, contested process. The process is constantly vulnerable to regression. It’s constantly vulnerable to hijacking and misappropriation. Our claim that we have achieved something is most at risk when we feel that we are secure in that claim. The true spirit of the American Constitution, or any constitution for that matter, is never to be confident that you have made it, that your constitution is beyond reproach and that your practice is beyond regression.

So, that is how I see the connection. Sometimes, I also make the point about national sentiments. The constitution is not the written document, although ritualistically we have a document; we put it in various places and display it every now and then. All these sort of ritualistic practices are trying to create the mythology of constitutionalism, but the reality of constitutionalism is in the blood and struggle, in the hearts and minds of the people of this country: men and women, African-American and Caucasian, Latinos, new immigrants. What is the current population of the United States? What is the current demographic of the United States and how representative are the values

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9. *Id.*

10. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

11. U.S. CONST. amend. XIX.

12. U.S. CONST. amend. XIII, § 1.

of constitutionalism for the totality of the population of the United States? You can never escape that issue.

I want to make one point, and I definitely do not want to be disrespectful, but one of the insights about being a believer is that you know that human existence is transient. Nothing human is permanent. Nothing human is perfect, never ever. It is constantly imperfect at any point in time. The only question is can you see the imperfection of it or not.

There was a time when there was no United States, and there will be a time when there will be no United States. I'm not sure if any of us have the illusion that the United States is a permanent institution in history. There is no exception. No human institution, no human civilization, no human political structure has ever been permanent. All high civilizations have come to pass, and this high civilization will come to pass. And the question is what values did we contribute to the history of humanity? Were our contributions positive or negative on the balance of history over time?

So, the point that I was coming to earlier regarding reading the text of the bill is that banning Sharia is a red herring. Banning Sharia is not only, simply, a futile legislative waste of time, but a dangerous claim, because it promotes bigoted ignorance and interreligious hostility. These types of legislation will be extremely harmful to the interests of the United States at home and abroad. On its text and probably by the intention of its promoters,<sup>13</sup> this bill is not intended to be an anti-Sharia bill, but the fact that it is cited as such and debated as such shows that that is how it registers in the consciousness of the communities.<sup>14</sup> And the way it registers in the consciousness of communities is what is worrying. By affecting communities this way, the bill is undermining fundamental values of American constitutionalism.

Therefore, I will suggest that the bill's promoters must make it very clear that the bill is not intended to ban Sharia. It is not enough to try to correct or adjust the language in a way that makes it technically constitutional. The only way the promoters of the bill can succeed in making their text constitutional is to avoid making it applicable to Sharia. Since that outcome is mandated by the Constitution of the United States, as most immediately determined by the United States Court of Appeals, Tenth Circuit,<sup>15</sup> the promoters of the bill must explain that to their constituencies that the bill does not ban Sharia.

There is a paradox in trying to ban Sharia in the United States. If the bill appears to be targeting Sharia, it will be found unconstitutional.<sup>16</sup> If a bill does not target Sharia by name, then Sharia, to the extent that you think it is a threat or a danger, will not be affected. If you try to explain all the types of scenarios

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13. See Curtman, *supra* note 6.

14. Andrea Elliot, *Behind an Anti-Shariah Push*, N.Y. TIMES, July 31, 2011, at A1.

15. *Awad v. Ziriax*, 670 F.3d 1111, 1128–29 (10th Cir. 2012).

16. *Id.*

or situations which you think Sharia permits so that you can ban them by statute in the United States, the task will be too complex and controversial. There is no single code or authoritative source of Sharia as a legal text. All you can do is to cite all the statutes and judicial opinions from about forty Muslim-majority countries around the world which you think are Sharia-based.<sup>17</sup> Then you will need to support your claim that the statute or judicial decision in question is in fact truly based on Sharia principles. Assuming for the sake of argument that you are able to do all this, the question becomes how to include all that information in the draft bill being presented for the State of Missouri or any other state of the United States.

I think one of the main problems with this issue is a lack of understanding of what Sharia means. This lack of understanding is what I mean by bigoted ignorance.

Sharia is the totality of the religious obligation of Muslims. Everything to do with being a Muslim falls under the heading of Sharia. As explained by Professor Gordon Newby,

[t]he term [Sharia] refers to God's law in its divine and revealed sense. This is related to FIQH, which is the human process of understanding and implementing the law. Commentators have argued that the aggregate of all sources by which we know God's law is but a small part of *shari'ah*, which, like God, is unknowable and must be accepted. When the word is used as synonymous with fiqh, it refers to the entirety of Islamic law, often in its actual, historical, and potential senses. Following the original meaning of the Arabic word, it is said to be the source from which all properly Islamic behaviors derive.<sup>18</sup>

The term Sharia does not occur in the Qur'an at all in the meaning that we use it today.<sup>19</sup> In fact, the term Sharia does not exist in Muslim sources for the first 300 years of Islam.<sup>20</sup> In other words, Sharia is not a term or concept that is

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17. For a comprehensive listing of all countries of the world and the percentage of adherents of various religions, including Islam, see *Religions*, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/fields/2122.html> (last visited Sep. 2, 2012).

18. GORDON D. NEWBY, A CONCISE ENCYCLOPEDIA OF ISLAM 193–94 (2002).

19. The term "Sharia" appears once in the Quran (quoted as chapter followed by verse numbers) 45:18. The meaning of this verse can be translated as follows: "We (God) have decreed for you a clear path, so follow it and do not follow the whims of those who do not know." In the context of that chapter, the point is clearly about religious guidance, not legal regulation. The other four mention of derivations of the term as a verb and pronoun (42:13 and 21; 5:48), all speak of religious guidance, not legal norms. In fact, only about eighty verses out of a total of 6219 verses of the Quran have legal subject matter in the modern sense of the term. ABDULLAHI AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW 20 (1990).

20. Wilfred Candwell Smith, *The Concept of Sharia Among Some Mutakallimun [Theologians]*, in ARAB AND ISLAMIC STUDIES IN HONOR OF HALLILTON A. R. GIBB 581, 581–602 (George Makdisi ed., 1965).

interchangeable with Islam that you find from the beginning. In fact, if you said the term Sharia to any of the Muslims of the first several generations of Muslims, they wouldn't know what you were talking about.

So, the term was coined three centuries after the beginning of Islam. Moreover, when it was first coined, it was used by theologians to mean something quite different from what it came to mean in the post-colonial context of today.<sup>21</sup> Part of my work is to show that this whole discourse regarding Islamic states that can enforce Sharia is a post-colonial discourse.<sup>22</sup> My claim here can easily be verified by using some of the CD-ROMs which contain hundreds of volumes of original manuscripts of Islamic sources. You can use this resource in Arabic, Farsi, or Urdu to perform a search for "Islamic state." My claim is that you will not be able to find the term "Islamic state" in any scholarship or sources of Muslim history until the mid-twentieth century.<sup>23</sup> One of the obvious reasons for this is that this term assumes a European model of the nation state and its positive law legal systems which were introduced into Muslim-majority countries for the first time in their history by European colonialism. The first codification of Sharia ever attempted was the Ottoman Majella in the mid-nineteenth century.<sup>24</sup> However, that was a codification of a single school regarding a single subject which was the Hanafai School of Islamic jurisprudence on the law of obligations and contracts, not the totality of Sharia even according to this particular school. So, the idea that Sharia is ready to be enacted into statutory law for the state to enforce is an extremely recent post-colonial idea. It is post-colonial for the simple reason that it uses the colonial idea of the state and the colonial idea of law, because it's talking about positive state law of a territorial state, a so-called nation state. Muslims did not live in territorial states and did not have state enforcement of Sharia before colonialism.

I would add that even the idea of enacting a principle of Sharia into a state negates the quality of its being Sharia. By that I mean, if you take a principle, say for example prohibition of drinking alcohol, and enact that into a statute, the language of the statute becomes the law, not the principle, and the authority of the law is the political will of the state, not the religious law of Islam. This change in authority is why Sharia cannot be enacted as a state law. The principle ceases to be Sharia by its enactment into statutory law. It becomes something else.

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21. On pre-colonial application of Sharia see, e.g., KNUT VIKOR, *BETWEEN GOD AND SULTAN: A HISTORY OF ISLAMIC LAW* 174–80 (2005).

22. ABDULLAHI AHMED AN-NA'IM, *ISLAM AND THE SECULAR STATE* (2010).

23. For example, RUHOLLAH KHOMEINI, *ISLAMIC GOVERNMENT* (1979), the basic text for the Islamic Republic of Iran, represents a clear departure from the orthodox historical position of Shia Islam.

24. AN-NA'IM, *supra* note 22, at 17, 194, 287.

Additionally, there are also other reasons why Sharia cannot be enacted by the state. Simply, there are too many conflicting and divergent views on every single imaginable subject. Sharia is comprehensive; it covers everything from articles of faith to ritual practices to etiquette, even social ethics.<sup>25</sup> The Ten Commandments are Sharia.<sup>26</sup> The question the representative specifically mentioned about contracts and charging interest on loans, and so on, are all subjects of Sharia norms.<sup>27</sup> The point to emphasize, however, is that Sharia must be accepted and practiced by believers voluntarily if it is to have any religious value. As soon as a state statute coerces believers into doing so, then the act is no longer a religious act. So, you may have conformity with the norm but it does not have any religious significance if it is coercively enforced. You cannot discharge a religious obligation by obeying a state law.

Whatever the state law is, it will have to exclude some view on the issue and prefer other views. State law cannot say that a contract can be this or the other depending on the school of Islamic jurisprudence you wish to subscribe to or accept. The law must adopt a specific definition and requirements of a valid contract and enforce that view by coercive power, if necessary. For example, if you take the subject of contract law, the scholars disagree as to what is the lawful subject of a contract. There is some overlap but there are also significant differences. Therefore, when you come to enact a statute to define what constitutes a valid contract and what could be a lawful subject of a contract, a legislature must choose one view among the competing views of the scholars. By choosing one view, the state is denying believers their freedom to choose other views, as has always been the way Sharia was practiced by Muslims through community-based practice, not through state enforcement.<sup>28</sup> There was no centralized administration of justice, and no state function of public prosecution. The state does not have the power to make law or the power to enforce law. Litigants choose judges they prefer to go to by their choice. This is why the state may enforce particular subjects which are of political significance for the state, but not the majority of Sharia principles that Muslims live by every day.

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25. AN-NA'IM, *supra* note 19, at 11, 31–33.

26. Here are some particularly normative examples of the Ten Commandments, as listed in Exodus, Chapter 20 of the Bible, with the corresponding Chapter and verse of the Quran laying down the same normative command: 5. *Honour thy father and thy mother*—The Quran, 2:83, 4:36, 6:151; 6. *Thou shalt not kill*—The Quran, 5:32; 6:151; 17:33; 7. *Thou shalt not commit adultery*—The Quran, 17:32; 60:12; 8. *Thou shalt not steal*—The Quran, 60:12; 5:38; 9. *Thou shalt not bear false witness against thy neighbor*—The Quran, 25:72; 65:2; 10. *Thou shalt not covet thy neighbour's house, thou shalt not covet thy neighbour's wife*—The Quran, 4:54.

27. See Curtman, *supra* note 6.

28. NOEL J. COULSON, CONFLICTS AND TENSIONS IN ISLAMIC JURISPRUDENCE 34 (1969).



So, I think there is a lot of misunderstanding about what Sharia has been and what it currently is by its own terms. Therefore, we cannot really talk about it in terms of something that the state can enforce, prohibit, or ban.

The Pew Research Center estimates in 2011 that there are 2.75 million Muslims residing in the United States, which represents an increase from the 2.35 [million] estimate revealed by the 2007 Pew Poll. To put this range in global perspective, the world's Muslim population is expected to rise from 1.6 billion in 2010 to 2.2 billion by 2030.<sup>29</sup>

The 2011 Pew Research Center study reports that about two-thirds of the Muslims in the U.S. today (63%) are first-generation immigrants (foreign-born), while slightly more than a third (37%) were born in the U.S. By 2030, however, more than four-in-ten of the Muslims in the U.S. (44.9%) are expected to be native-born.<sup>30</sup>

According to a 2004 Zogby International Survey, about one-third of Muslim-Americans are of South Asian descent; 26% are Arabs and another 20% are African-Americans. However, the 2011 Pew Poll found that 30% of American Muslims describe themselves as white (including most Arabs who classify themselves as white Caucasian), 23% as black, and 21% as Asian.

So, American Muslims are a very mixed population and community, and therefore it is very difficult to talk about American Muslims in the singular. It is not a single community but multiple, very different communities. In fact, some of these communities would not accept other communities as Muslim. The Ahmadis (Ahmadya), for example, are considered by both Sunni and Shia Muslims to be non-Muslims.<sup>31</sup>

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29. *Muslim Americans: No Signs of Growth in Alienation or Support for Extremism*, PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS (Aug. 30, 2011), <http://www.people-press.org/2011/08/30/muslim-americans-no-signs-of-growth-in-alienation-or-support-for-extremism/> [hereinafter *Muslim Americans*]; *The Future of the Global Muslim Population: Projections from 2010 to 2030*, PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS (Jan. 27, 2011), <http://www.pewforum.org/Global-Muslim-Population.aspx>.

30. *Muslim Americans*, *supra* note 29, 7–8.

31. The persecution of Ahmadya as apostates (heretics) started in the Indian sub-continent, on the charge that they believe the founder of their group, Ahmad Qadiani, to be a prophet after the Prophet Muhammad, while all Sunni and Shia Muslims believe the Prophet Muhammad to be the final and conclusive prophet. In Pakistan, for instance, Article 260(3) was added in 1974 to the Constitution of 1973 to provide:

In the Constitution and all enactments and other legal instruments, unless there is anything repugnant in the subject or context,

(a) "Muslim" means a person who believes in the unity and oneness of Almighty Allah, in the absolute and unqualified finality of the Prophethood of Muhammad (peace be upon him), the last of the prophets, and does not believe in, or recognize as a prophet or religious reformer, any person who claimed or claims to be a prophet, in any sense of the word or of any description whatsoever, after Muhammad (peace be upon him); and

It is therefore problematic to speak of all American Muslims as a single unified group, but they would all self-identify as Muslims, and they are all equal citizens of the United States. Therefore, they are entitled to being able to participate in what I call religious self-determination. They have the right to be Muslim by their choice under the law in the same equal way as any other American citizen may freely adopt any religious or other belief.

In an attempt to present and promote that idea, I'm trying to work on the book that I mentioned earlier. The working title is "Beyond Minority Politics: American Muslims and Citizenship." The central point of the book is that American Muslims should not be identified as a religious minority, because they are not only defined as Muslim. They are Americans who happen to be Muslim, but they are also many other things, too. In fact, the very idea of majority and minority is misleading. Everybody is a member of a minority in some respect, and everybody is a member of a majority in some respect also. Every single person in this room who may feel like being part of a majority, for example, Christian and/or Caucasian, is in fact, in some respect, part of a minority. Similarly, this is true about Muslims, because we are not exclusively defined by being Muslims. I, for example, am an American Muslim. I came to this country seventeen years ago, but I've been an American citizen for the last twelve years. I'm an African-American, yes. I'm a Muslim, yes. But, I'm also a professional, a law teacher. I'm this. I'm that. Politically, I'm in a majority in fact, because I vote for a party that is a majority party. My political identity is probably more significant in terms of my citizenship than my Islamic identity. Yet, I know that this claim would be very difficult for other people to accept—even other Muslims may not think about identity in this way.

My point is that we must go beyond this notion that Muslims are defined by being Muslims and nothing else but Muslims, or for that matter that Mormons are just Mormons and nothing but Mormons, or that Catholics are Catholics and nothing but. These types of definitions were exactly the reason why Catholics were persecuted and Mormons were persecuted. Because in the 1830s, '40s, and '50s, Catholics were not seen as Americans who happen to be Catholics. They were seen as Catholics, who can't really be true Americans, and that has come to pass, I hope. Still, I'm sure that some of it is lingering with the Mormons and with everybody else. So, the idea of the book I am writing about American Muslims is to say that we should be serious about how our citizenship enables our choice of identity and that we should respect that

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(b) "non-Muslim" means a person who is not a Muslim and includes a person belonging to the Christian, Hindu, Sikh, Buddhist or Parsi community, a person of the Qadiani Group or the Lahori Group (who call themselves 'Ahmadis' or by any name), or a Bahai, and a person belonging to any of the Scheduled Castes.

Jeffrey Redding, *Constitutionalizing Islam: Theory and Pakistan*, 44 VA. J. INT'L L. 759, 769–70 (2004).

we all have multiple identities. Every single one of us in this room again—none of us is a mono-identity person. We have multiple identities, and we have overlapping identities.

Furthermore, we are very tactical about the identities we choose to assert or not to assert. It is something that we do almost subconsciously. Every time any of us walks into a room, she or he would need to make some type of calculation as to what one is supposed to be in that context. Am I a lawyer or law professor? Am I to identify in terms of my political affiliations or some social identity? If the latter, which one? Should one identify by race or ethnicity or avoid that? So the choices that we make tactically in order to decide what to assert, do, or say or not, are driven by very human impulses of self-interest in relation to our social identity, political affiliation, and so forth.

So, I think we really must try to take ourselves beyond this notion of religious minorities who are permanent minorities. If Muslims are only Muslims and nothing else, then they cannot fully realize their citizenship and social or professional affiliations. It is also important to note that whatever denomination of Christianity one belongs to, one is a member of a religious minority compared to all other Christian Americans. Even within the same denomination, there are all sorts of social, economic, and political differences that make them members of a minority in some way or another.

In conclusion, therefore, I don't think that we are served well by boxing people and being boxed into exclusive categories of identity. We must emphasize our shared citizenship and challenge ourselves to uphold the value of that citizenship. We must also do so by today's values and standards, and not those of two-hundred years ago. We like to talk about Jefferson and Madison and other founders of American constitutionalism as profound and insightful leaders, and they are indeed that for humanity at large. Yet none of us would want to live in the world those founders constructed and lived in. All of us would want to benefit from the historical achievements of great human beings, but take those benefits as we understand them in our lives here and now, in the twenty-first century. This is, I submit, the way forward for all Americans.

Thank you very much.