ESTABLISHING OFFICIAL ISLAM? THE LAW AND STRATEGY OF COUNTER-RADICALIZATION

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In the name of national security, federal and local governments have begun to intervene domestically in the religious lives of Muslims and into Islam itself. Taken together, these interventions form part of the emerging strategy of counter-radicalization, by which officials aim to diminish the pull of radical Islamic ideology in part by promoting more "mainstream" theological alternatives. Both the official opposition to radical Islam (as opposed to the violence that it is thought to generate) and the support for more palatable (to the state, that is) religious alternatives generate friction with the Establishment Clause and the values that it enshrines. But the prospect of establishing "Official Islam" is not the only worry surrounding counter-radicalization. Counter-radicalization also suffers from a number of strategic flaws that have become apparent in the context of British counter-radicalization efforts undertaken over the last five years. Most fundamentally, Western governments, including our own, are unlikely to succeed in tackling the risk of future terrorism by attempting to shape religious ideology. In fact, this strategy is likely to backfire by stoking animosities and fear. This Article describes the emergence of American counter-radicalization and its roots in the British example, highlights the tension between this area of official endeavor and

the Establishment Clause, and reveals the tight connection between the legal and strategic challenges with which American counter-radicalization must contend.

INTRODUCTION

In the name of national security, the U.S. government as well as state and local governments are increasingly intervening in the religious lives of Muslims and into Islam itself. These interventions—which implicate initiatives from intelligence gathering and analysis to prison management to community outreach—form an essential part of what is now commonly called "counter-radicalization." While the concept remains open-ended and undertheorized, the

core intuition behind counter-radicalization is that the prevention of future violence requires official involvement in shaping the ideational currents that are thought to underpin that violence. The arrival of counter-radicalization on the domestic scene—it has been part of American foreign policy for a decade[1]—represents a significant, if unheralded, development in American counterterrorism. Indeed, some have even suggested that domestic counter-radicalization represents the signature counterterrorism policy of the Obama Administration.[2]

The reasons for the recent rise of domestic counter-radicalization are numerous and overlapping. First, and most basically, counter-radicalization conforms to the preemptive logic of counterterrorism, which focuses on strategies that minimize the risk and intensity of future terrorist attacks.[3] By devoting official resources to changing the ideological orientations of individuals and entire communities before that ideology carries over into violent acts,[4] counter-

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1. The involvement of the U.S. government in counter-radicalization overseas is ongoing. *See, e.g.*, PROJECT AIR FORCE, RAND, STRATEGY IN THE MUSLIM WORLD AFTER 9/11, at 2 (2004), *available at* http://www.rand.org/pubs/research_briefs/RB151.html (embracing the goal of promoting "madrassa and mosque reform").

2. On March 6, 2011, Deputy National Security Advisor Denis McDonough presented a comprehensive strategy for tackling domestic radicalization. *See* Denis McDonough, Deputy Nat'l Sec. Advisor, Remarks on Partnering with Communities to Prevent Violent Extremism in America (Mar. 6, 2011) (transcript available at http://www.cfr.org/terrorism/remarks-denis-mcdonough-deputy-national-security-advisor-partnering-communities-prevent-violent-extremism-america-march-2011/p24313). In August 2011, the Obama Administration formally debuted its domestic counter-radicalization strategy. *See* THE WHITE HOUSE, EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES (2011) [hereinafter WHITE HOUSE, EMPOWERING LOCAL PARTNERS], *available at* http://www.whitehouse.gov/sites/default/files/empowering_local_partners.pdf; Dina Temple-Raston, *White House Unveils Counter-Extremism Plan*, NPR (Aug. 3, 2011), http://www.npr.org/2011/08/04/138955790/white-house-unveils-counter-extremism-plan ("The [strategy] has been more than a year in the making and marks the first time the U.S. has laid out a comprehensive strategy to counter violent extremism."). Counter-radicalization played a significant role in counterterrorism efforts even before the Obama Administration introduced its comprehensive program. *See* Michael Leiter, Dir., Nat'l Counterterrorism Ctr., Remarks at the Aspen Security Forum: The Terror Threat Picture and Counterterrorism Strategy (June 30, 2010) (transcript available at http://www.aspeninstitute.org/video/terror-threat-picture-counterterrorism-strategy-honorable-michael-e-leiter-director-national-c); *see also* THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 19 (2010) [hereinafter WHITE HOUSE, NATIONAL SECURITY STRATEGY], *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (emphasizing the centrality of counter-radicalization to contemporary counterterrorism).

3. *See* Jules Lobel, *The Preventive Paradigm and the Perils of Ad Hoc Balancing*, 91 MINN. L. REV. 1407, 1407-10 (2007) (observing and criticizing the shift toward preventive counterterrorism measures); Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. CAL. L. REV. 575, 604-09 (2010) (describing domestic intelligence as a form of proactive risk assessment aimed at preventing terrorist attacks).

4. *See* Press Release, INTERPOL, Preventing Internet Radicalization of Youth Requires Global Police Network, INTERPOL Chief Tells Police Summit (Sept. 21, 2010), *available at* https://www.interpol.int/Public/ICPO/PressReleases/PR2010/PR072.asp ("[M]any of the behaviors associated with [radicalization] are not in and of themselves criminal.").

radicalization aspires to prevent people from "supporting terrorism or violent extremism in the first place."[5] Second, the United States has a morally, legally, and strategically[6] mixed record in its use of "hard power" counterterrorism techniques—such as interrogation,[7] detention,[8] and the targeting of lethal force against American citizens in league with al Qaeda.[9] Accordingly, counter-radicalization has appealed to some critics of the national security state as supplying an attractive "soft power,"[10] "therapeutic" alternative approach to counterterrorism that may be both more effective and less harmful to the government's reputation at home and abroad.[11] Third, the turn to counter-radicalization reflects an appreciation that the contemporary terrorist threat includes a "homegrown" dimension, which in turn necessitates a domestic pre-

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5. Gordon Brown, *Foreword* to PRIME MINISTER & SEC'Y OF STATE FOR THE HOME DEP'T, THE UNITED KINGDOM'S STRATEGY FOR COUNTERING INTERNATIONAL TERRORISM 6, 6 (2009) [hereinafter CONTEST]. The British counter-radicalization program is one prong of its counterterrorism strategy, CONTEST, and is titled "Prevent." *See* CONTEST, *supra*, at 82.

6. As President Obama's counterterrorism adviser John Brennan has emphasized, "[W]e cannot shoot ourselves out of this challenge." John Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at the Center for Strategic and International Studies: A New Approach to Safeguarding Americans (Aug. 6, 2009) (transcript available at http://www.whitehouse.gov/the_press_office/Remarks-by-John-Brennan-at-the-Center-for-Strategic-and-International-Studies).

7. *See, e.g.*, JEREMY WALDRON, TORTURE, TERROR, AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE 186-87 (2010) (criticizing Bush Administration policies that encouraged the interrogation and treatment of military detainees on moral and legal grounds).

8. The Supreme Court's post-9/11 national security jurisprudence has focused almost exclusively on issues pertaining to detention. *See* Boumediene v. Bush, 553 U.S. 723 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004). The sole exception to this trend was *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), which reviewed the constitutionality of the material support statute under the First Amendment's Free Speech Clause.

9. *See generally* Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SECURITY J. 145 (2010) (discussing the "legal, moral, and strategic implications" of targeted killings).

10. This concept appears to have originated with Joseph Nye, Jr., who distinguishes between hard and soft power. *See* JOSEPH S. NYE, JR., BOUND TO LEAD: THE CHANGING NATURE OF AMERICAN POWER 31-32 (1990); *see also* Peter W. Edge, *Hard Law and Soft Power: Counter-Terrorism, the Power of Sacred Places, and the Establishment of an Anglican Islam*, 12 RUTGERS J.L. & RELIGION 358, 374-75 (2010) (describing the use of soft power in the United Kingdom as "a broader attempt to effect theological change in Islamic communities" beyond direct legal regulation). Secretary of State Hillary Clinton invoked the term "smart power" in her confirmation hearing to describe the utilization of a combination of hard and soft power tools as circumstances require. *Nomination of Hillary R. Clinton to be Secretary of State: Hearing Before the S. Comm. on Foreign Relations*, 111th Cong. 17 (2009) (statement of Sen. Hillary Rodham Clinton), *available at* http://www.nytimes.com/2009/01/13/us/politics/13text-clinton.html?pagewanted=all.

11. *See* J. SCOTT CARPENTER ET AL., WASH. INST. FOR NEAR E. POLICY, FIGHTING THE IDEOLOGICAL BATTLE: THE MISSING LINK IN U.S. STRATEGY TO COUNTER VIOLENT EXTREMISM 8 (2010) ("It is axiomatic that the United States cannot simply kill its way out of the problem; it must find ways to take on the extremist ideology directly.").

ventive approach.[12] A spate of recent terrorist plots and attacks implicating individuals born or raised in the United States has increased pressure on the government to invest in counterterrorism initiatives at home,[13] including in counter-radicalization.[14] For example, a report issued by the Bipartisan Policy Center recently observed that "[t]he American 'melting pot' has not provided a firewall against the radicalization and recruitment of American citizens and residents."[15] Accordingly, elected representatives have begun to draw attention to the issue of domestic radicalization.[16]

Even as domestic counter-radicalization is on the rise, it is fraught with the potential for significant legal tension and strategic confusion. On the legal side, counter-radicalization risks conflict with core American commitments to religious freedom embodied in the First Amendment's Religion Clauses.[17] Of par-

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12. *See* Samuel J. Rascoff, *The Law of Homegrown (Counter)Terrorism*, 88 TEX. L. REV 1715, 1716-18 & nn.9-11 (2010) (discussing the concept and prominent examples of domestic terrorism); Arun Kundnani, *The Wrong Way to Prevent Homegrown Terrorism*, CNN (Dec. 16, 2010, 8:25 AM), http://www.cnn.com/2010/OPINION/12/16/kundnani .prevent.muslim ("Many in Washington tout a Prevent-like program as an essential weapon in what they see as the 'war within,' the next phase of America's War on Terror.").

13. *See generally* J. M. BERGER, JIHAD JOE: AMERICANS WHO GO TO WAR IN THE NAME OF ISLAM (2011) (profiling American jihadists); JEROME P. BJELOPERA & MARK A. RANDOL, CONG. RESEARCH SERV., R41416, AMERICAN JIHADIST TERRORISM: COMBATING A COMPLEX THREAT (2010) (describing domestic violent extremism and government efforts to combat terrorism).

14. *See, e.g.*, DAVID SCHANZER ET AL., ANTI-TERROR LESSONS OF MUSLIM-AMERICANS 2 (2010) ("Research findings suggest that radicalization in the United States can be minimized by taking . . . steps to reinforce successful anti-radicalization activities of Muslim-American communities and create a more positive environment for Muslim-Americans."); Donald Borelli, *Government Needs Better Long-Term Strategy Towards Homegrown Terrorists*, N.Y. DAILY NEWS (Dec. 28, 2010, 4:00 AM), http://www.nydailynews.com/ opinions/2010/12/28/2010-12-28_lean_forward_vs_homegrown_terror.html?print=1&page =all ("[R]eactively arresting homegrown terrorists, one after the other, is no substitute for proactively countering the forces of radicalism that turn 'ordinary' Americans into violent jihadists.").

15. PETER BERGEN & BRUCE HOFFMAN, BIPARTISAN POLICY CTR., ASSESSING THE TERRORIST THREAT 16 (2010). *But see* Memorandum from the ACLU, Muslim Advocates & Muslim Pub. Affairs Council to Interested Persons (Oct. 18, 2010), *available at* http://www.aclu.org/files/assets/ACLU_Interested_Persons_Memo_Regarding_BPC_Threat _Assessment_Report.pdf (arguing that the report misrepresents the threat of homegrown terrorism).

16. *See* Peter King, *What Lies Beneath; Hearings Will Help Us Understand the Forces Radicalizing and Alienating Some Muslim Americans*, NEWSDAY, Dec. 19, 2010, at A34 ("As chairman of the Homeland Security Committee, I will do all I can to break down the wall of political correctness and drive the public debate on Islamic radicalization."); *see also* Stephanie Condon, *Rep. Peter King Planning Hearings on Muslim "Radicalization,"* CBS NEWS (Dec. 17, 2010, 5:44 PM), http://www.cbsnews.com/8301-503544_162-20026083 -503544.html ("The hearings come at a time of increased concerns about 'homegrown' Muslim terrorists—along with persistent fears that innocent Muslims have been unfairly targeted since the Sept. 11, 2001 terrorist attacks.").

17. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."). The First Amendment's Free

ticular concern is the manner in which counter-radicalization may contribute to the "establishment" of what I call "Official Islam"[18]: a government-sponsored account of "mainstream Islam" offered by the state in place of radical doctrinal alternatives.[19] For the government to formulate (or to pick out from among rival options[20]) and endorse a preferred conception of Islam—in effect to play the role of theologian and missionary—raises potentially serious concerns rooted in the Establishment Clause and the values it enshrines. That the government has proved capable of shaping religious beliefs and practices in the past,[21] sometimes with a distinctly heavy hand,[22] hardly supplies a compelling legal foundation for the present preoccupation with Official Islam.[23]

Speech and Association Clauses are, of course, also significant in determining the constitutional status of counter-radicalization. Moreover, counter-radicalization efforts may also conflict with federal statutory and state constitutional law. *See, e.g.*, Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb (2006); First Covenant Church v. City of Seattle, 840 P.2d 174, 186 (Wash. 1992) ("The language of our state constitution [pertaining to religious liberty] is significantly different and stronger than the federal constitution."). In this Article I focus mainly on the role of the Establishment and Free Exercise Clauses of the Federal Constitution, especially the former.

18. In the sense that I use the term, "Official Islam" denotes the Islam in the imagination of national security professionals who seek to interpose a state-sponsored account of Islam as an alternative to radical variants. There are, however, multiple competing narratives of Official Islam. For example, certain officials or contractors have taught law enforcement officers that Islam is fundamentally to blame for contemporary terrorism and is bent on domination of American society. *See* Dana Priest & William M. Arkin, *Monitoring America*, WASH. POST, Dec. 20, 2010, at A1, *available at* http://projects.washingtonpost.com/top -secret-america/articles/monitoring-america (describing training of law enforcement officers by "self-described experts whose extremist views on Islam and terrorism are considered inaccurate and counterproductive by the FBI and U.S. intelligence agencies"). This, too, can be thought of as a (pejorative) form of Official Islam. Indeed, the existence of these strains of Official Islam contributes to the felt need for Official Islam in the sense that I mean it in this Article.

19. *See* LORENZO VIDINO, U.S. INST. OF PEACE, COUNTERING RADICALIZATION IN AMERICA: LESSONS FROM EUROPE 11 (2010), *available at* http://www.usip.org/files/ resources/SR262%20-%20Countering_Radicalization_in_America.pdf (arguing that the United States "must be prepared to intervene in ideological and theological matters"); Michael Hirsh, *America's Blind Side*, NAT'L J. (Oct. 30, 2010), http://www.nationaljournal .com/member/nationalsecurity/america-s-blind-side-20101030 ("[A]s long as America fails to develop a counter-narrative to radical Islamism, it will continue to play a game of global whack-a-mole as the culprits get closer to home.").

20. This conflict between theological conceptions is often described as a "civil war" or "war of ideas" within Islam. *See* Zeyno Baran, *Fighting the War of Ideas*, FOREIGN AFF., Nov./Dec. 2005, at 68; Michael Scott Doran, *Somebody Else's Civil War*, FOREIGN AFF., Jan./Feb. 2002, at 22; Laurie Goodstein, *American Muslims Make Video to Rebut Militants*, N.Y. TIMES, Aug. 1, 2010, at A23 ("The video is one indication that American Muslim leaders are increasingly engaging the war of ideas being waged within Islam.").

21. For example, in the 1940s and 1950s, the government helped to forge a new conception of society that made room for Catholics and Jews within the American mainstream. *See generally* KEVIN M. SCHULTZ, TRI-FAITH AMERICA: HOW CATHOLICS AND JEWS HELD POSTWAR AMERICA TO ITS PROTESTANT PROMISE 43-96 (2011) (describing public and private efforts to craft an image of the United States as "Judeo-Christian" during World War II and the early Cold War). Tellingly, these dynamics were frequently shaped in the context of a

The idea that a portion of the Bill of Rights puts pressure on a claimed governmental authority rooted in national security is not, in the abstract, new conceptual terrain;[24] indeed, the "constant tension between security and liberty" may even supply "[t]he defining character of American constitutional government."[25] And it is hardly a secret that wartime generates its own distinctive challenges to the protection of basic rights.[26] But the narrower question of the relationship between religious liberty and national security has only rarely been explored.[27] So it is perhaps unsurprising that the tension between the emergent

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(perceived) national security imperative. *See id.* at 3-7 (relating how a World War II-vintage story of bravery on the part of Catholic, Jewish, and Protestant chaplains gave impetus to the emergence of "Tri-Faith America"); *see also* STEVE ROSSWURM, THE FBI AND THE CATHOLIC CHURCH, 1935-1962 (2009) (arguing that the FBI and the Catholic Church joined forces during this period both to collaborate on anticommunist initiatives and to enforce conservative social norms in the name of national stability).

22. Perhaps the most overt example of the official intervention into religious life and dogma in American history is supplied by the successful efforts to ban polygamy, a defining religious practice among early Mormons. *See* SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA 232 (2001). As Kathleen Flake has carefully documented, the Mormon "problem" was ultimately resolved politically in the early twentieth century. Specifically, the Mormon Church renounced plural marriage, disavowed a distinctively Mormon politics, and embraced a Protestant conception of religious life, in exchange for which the state extended the benefits of constitutional protections. *See* KATHLEEN FLAKE, THE POLITICS OF AMERICAN RELIGIOUS IDENTITY: THE SEATING OF SENATOR REED SMOOT, MORMON APOSTLE 8 (2004).

23. The historian's "is" is not the same as the lawyer's or the policymaker's "ought." The discrimination against Mormons in the late nineteenth and early twentieth century should not supply a paradigm for contemporary counter-radicalization any more than *Korematsu v. United States*, 323 U.S. 214 (1944), ought to supply a blueprint for how to organize our detention policy.

24. *Compare* ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 28 (2007) ("A well-functioning government will contract civil liberties as threats increase."), *with* PHILIP BOBBITT, TERROR AND CONSENT (2008) (arguing that international institutions, democracy, and the protection of human rights are all necessary to defeat terrorist threats), *and* Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CALIF. L. REV. 301, 323 (2009) (arguing for limits on executive discretion and against "blank-check constitutionalism" in times of emergency).

25. Hamdi v. Rumsfeld, 542 U.S. 507, 545 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

26. For historical and legal background regarding restrictions on civil liberties during times of national crisis, see generally WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998), and THE CONSTITUTION IN WARTIME (Mark Tushnet ed., 2005).

27. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding an Air Force rule prohibiting an Orthodox Jewish officer who served as a mental health professional from wearing a yarmulke in the course of his duties); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (striking down, at the height of World War II, a law making it illegal for schoolchildren to opt out of saluting the flag on religious grounds). Academic commentary has likewise been limited. *Compare* AMOS N. GUIORA, FREEDOM FROM RELIGION 6 (2009) (arguing for the curtailment of the constitutional protection of religious freedoms in view of "the threat of religious extremism"), *with* John H. Mansfield, *Promotion of Liberal Islam by*

domestic counter-radicalization regime and the law and values that derive from the Establishment Clause has thus far largely evaded official comment[28] and academic engagement.[29] (The commentary on the related but distinct question of whether the Establishment Clause applies to foreign aid programs, and if so, with what kind of intensity, merely assumes that domestic national security initiatives are subject to whatever constraints might be imposed by the Establishment Clause.[30])

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the United States, *in* ENEMY COMBATANTS, TERRORISM, AND ARMED CONFLICT LAW 85, 86 (David K. Linnan ed., 2008) ("To import into the Establishment Clause a 'compelling state interest' exception arguably would run counter to the history that led to that Clause's adoption." (footnote omitted)).

28. For example, although they address the implications of the Free Exercise Clause and the First Amendment's other basic protections, the FBI Guidelines for domestic intelligence pronounce apodictically that "[t]he First Amendment's 'establishment clause' . . . has little application to the FBI." FBI, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE 26 (2008). An unnamed official quoted in a recent policy paper on counter-radicalization expressed concern about the government's role in "adjudicat[ing] . . . intra-religious affairs." PETER NEUMANN, NAT'L SEC. PREPAREDNESS GRP., BIPARTISAN POLICY CTR., PREVENTING VIOLENT RADICALIZATION IN AMERICA 27 (2011). But the paper's conclusion, based in part on that comment—that "thanks to the establishment clause, American officials will never find themselves in a position where they have to" intervene in religion—seems to conflate a normative aspiration with an increasingly troubling reality. *Id.* Moreover, the paper's authors do not seem to appreciate the tension between their recommendation that the U.S. government step up its education of Muslim leaders about how to contest radical ideology and its caution that the government "should be careful not to meddle in religious debates." *Id.* at 40.

29. There has been relatively more discussion of the extent to which the Establishment Clause places restrictions on overseas efforts by the U.S. government. *See, e.g.*, CARPENTER ET AL., *supra* note 11, at 10 (suggesting the possibility that "First Amendment and Establishment Clause considerations" may carry implications for overseas counter-radicalization but not developing this claim); CHI. COUNCIL ON GLOBAL AFFAIRS, ENGAGING RELIGIOUS COMMUNITIES ABROAD 62-65 (2010) ("The Task Force calls upon the president of the United States . . . to clarify that the Establishment Clause does not bar the United States from engaging religious communities abroad in the conduct of foreign policy, though it does impose constraints on the means that the United States may choose to pursue this engagement."); Scott Thompson, *House of Wisdom or a House of Cards? Why Teaching Islam in U.S. Foreign Detention Facilities Violates the Establishment Clause*, 88 NEB. L. REV. 341 (2009).

There is obviously a connection between American policy overseas and domestic counterterrorism generally, as well as domestic counter-radicalization specifically. *See* Doug Stone, Retired Major Gen., Address at the New America Foundation: From Liability to Asset: Fixing U.S. Detention Policy in the Field (Oct. 21, 2009), *available at* http://www.ustream.tv/recorded/2395579. Indeed, U.S. counter-radicalization overseas increasingly supplies the template for similar domestic efforts. *See* MARC LYNCH, CTR. FOR A NEW AM. SEC., RHETORIC AND REALITY: COUNTERING TERRORISM IN THE AGE OF OBAMA 4 (2010) (advocating for the domestic implementation of the same "multi-layered strategy" against radicalization as pursued by the U.S. government overseas). The degree to which there is increasing continuity between our overseas and domestic counterterrorism policies speaks to a perennial question in contemporary counterterrorism law—namely, how to integrate foreign and domestic legal authorities in an age of global threats.

30. *See, e.g.*, John H. Mansfield, *The Religion Clauses of the First Amendment and Foreign Relations*, 36 DEPAUL L. REV. 1, 34-35 (1986) (hypothesizing that support for the teaching of liberal Islam could raise Establishment Clause concerns that even foreign policy

On the question of the Establishment Clause, this Article considers not solely the protean doctrine that has evolved over the last sixty years, but also the deeper and more pervasive traditions and values that the law in this area embodies. Most importantly, this Article restores a sense of urgency to an area of Establishment Clause theory and doctrine that has been largely absent for a generation, namely the sense in which the First Amendment embodies a commitment to Anti-Erastianism.[31] Based on their familiarity with European (and in particular, English) establishments, the Framers were deeply concerned with attempts by the state to harness the power of religion to achieve "secular" political goals, and they conceived of the Establishment Clause as a bulwark against precisely this sort of aggrandizement of the state.[32] The establishment of Official Islam that this Article analyzes therefore sheds light on a key underlying principle of the Establishment Clause in a way that the contemporary raft of Religion Clause cases—which have frequently engaged in analyses "more commonly associated with interior decorators than with the judiciary"[33]— arguably do not.[34]

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considerations would not allay); Jesse Merriam, *Establishment Clause-trophobia: Building a Framework for Escaping the Confines of Domestic Church-State Jurisprudence*, 41 COLUM. HUM. RTS. L. REV. 699, 711 (2010) ("If the United States funded similar organizations domestically, the funding would certainly be struck down as unconstitutional."). Some attention has been paid to the ways in which domestic counterterrorism policies might collide with rights protected by the Free Exercise Clause. *See generally* Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201 (2004) (discussing conflict between FBI surveillance of religious groups and the exercise of religious freedoms).

   31. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2189 (2003) ("The technical term for governmental control over the church in the English tradition is 'Erastianism,' so called after the sixteenth-century Swiss-German theologian Thomas Erastus, whose polemics against the ecclesiastical power of excommunication contained the seeds of the notion that the civil authority must control the Church.").

   32. Timothy Samuel Shah & Daniel Philpott, *The Fall and Rise of Religion in International Relations: History and Theory*, in RELIGION AND INTERNATIONAL RELATIONS THEORY 24, 33 (Jack Snyder ed., 2011) ("[T]he First Amendment of the U.S. Constitution, guaranteeing the free exercise of religion and proscribing a nationally established religion, stands as a sharp exception to the Erastian trend of the sixteenth through eighteenth centuries.").

   33. Am. Jewish Cong. v. Chicago, 827 F.2d 120, 129 (1987) (Easterbrook, J., dissenting); *cf.* NOAH FELDMAN, DIVIDED BY GOD 7 (2005) (observing that "[n]o one lives or dies" as a function of how today's typical Establishment Clause issues are resolved).

   34. The Supreme Court has decided fourteen Establishment Clause cases in the past decade. Of these, four involved the status of certain religious symbols. *See* Salazar v. Buono, 130 S. Ct. 1803 (2010); Pleasant Grove City v. Summum, 555 U.S. 640 (2009); McCreary Cnty. v. ACLU of Ky., 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005). Four involved educational funding. *See* Hibbs v. Winn, 542 U.S. 88 (2004); Locke v. Davey, 540 U.S. 712 (2004); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Mitchell v. Helms, 530 U.S. 793 (2000). Two involved standing issues. *See* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011); Hein v. Freedom from Religion Found., 551 U.S. 587 (2007). One involved religion in prison. *See* Cutter v. Wilkinson, 544 U.S. 709 (2005). One involved religious use of a government forum. *See* Good News Club v. Milford Cent. Sch., 533 U.S.

More broadly, this Article embraces Larry Sager's theoretical insight that the limits on judicial resolution of constitutional claims are not coextensive with the conceptual boundaries of those claims, and that it necessarily falls to institutions outside the courts to identify and vindicate "underenforced constitutional norms."[35] Thus, the Article assumes that consideration and enforcement of the relevant issues are as likely (or more so) to take place in an opinion generated by the Office of Legal Counsel (OLC)[36] as in a judicial opinion resolving a constitutional challenge.[37] Whatever weight ought to or does ultimately attach to the legal conclusions reached by executive branch opinions of this

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98 (2001). One involved school prayer. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000). One involved the Pledge of Allegiance. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004). The establishment of Official Islam and its implications for national security reaches issues not covered in these types of cases.

35. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1220 (1978) (criticizing the tendency of constitutional practice to treat "the scope of a constitutional norm" as "coterminous with the scope of its judicial enforcement"). In a very different vein, Steven Smith has offered an account of Establishment Clause traditionalism as "centrally intended to prevent government from exercising power over the church." Steven D. Smith, *The Establishment Clause and the "Problem of the Church" Perspective* 24 (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Paper No. 09-024, 2009), *available at* http://ssrn.com/abstract=1444606. Smith argues, therefore, that much of modern Establishment Clause jurisprudence—for example, the endorsement test—is in fact beyond the scope of what the Establishment Clause was intended to prevent. *Id.* at 22-26.

36. It is possible that an attorney in the OLC has already written such a memo. Concerning the related, but analytically distinct, issue of the application of the Establishment Clause overseas, the OLC was asked to produce a memorandum assessing the matter during the George W. Bush Administration, though OLC had not done so more than two years later. *See* Merriam, *supra* note 30, at 699-700 (noting that the Department of Justice had not responded to a request for guidance on whether a proposed foreign project using a religious message would violate the Establishment Clause).

37. Some relatively unique features of Establishment Clause jurisprudence might argue in favor of judicial resolution of these sorts of matters, including the fundamentally "structural" nature of Establishment Clause claims. *See, e.g.*, Jessica Powley Hayden, Note, *Mullahs on a Bus: The Establishment Clause and U.S. Foreign Aid*, 95 GEO. L.J. 171, 188-97 (2006) (arguing in favor of treating the Establishment Clause as a structural restraint, rather than an individual rights issue). This structural element may be critical, as courts have historically been especially unwilling to decide liberty-based challenges to security policies on explicitly civil-libertarian grounds. *See* Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach to Rights During Wartime*, 2 INT'L J. CONST. L. 296, 332-33 (2004) (exploring courts' emphasis on "ensur[ing] that the right institutional process supports the trade-off between liberty and security"). Although *Boumediene v. Bush*, 553 U.S. 723 (2008), would seem to be a counterexample in that it focused on the individual's right to habeas corpus review of the legality of his detention, the Suspension Clause might itself be viewed as embodying a teaching about constitutional structure. *See* Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 687 (2009) ("[T]he suspension power is an extraordinary power—one that constitutes a dramatic deviation from the principle of government accountability that lies in large measure at the heart of our constitutional structure.").

sort,[38] they represent important sites for the application of law to cutting-edge national-security initiatives, including domestic counter-radicalization.[39]

Legal concerns about counter-radicalization rooted in the law and traditions associated with the Establishment Clause and in conceptions of religious liberty more generally overlap with, and are reinforced by, a series of pragmatic and strategic concerns about its efficacy—concerns which have actually surfaced in the context of counter-radicalization efforts undertaken over the last five years by American allies overseas,[40] most prominently the United Kingdom's domestic counter-radicalization program, Prevent.[41] Does the government possess the right sort of institutional capacity and legitimacy to intervene in the religious lives of Muslim citizens in a manner that will ultimately reduce the threat of terrorism?[42] Might not the institutional focus on winning Muslim "hearts and minds" carry unintended risks, and possibly even backfire, producing a net loss to security? What toll might counter-radicalization exact on the fragile and hard-won ecosystem of American religious pluralism given its potential for sowing social disunity among and within religious groups?[43] The

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38. *Cf.* BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 87-116 (2010) (describing an increasing reliance on legal opinions by the White House Counsel and OLC for the legitimacy of presidential actions).

39. In this way, the argument I advance does not depend on the prospect of a resounding judicially enforced injunction against any particular program. *Cf.* Freedom from Religion Found. v. Obama, 641 F.3d 803, 806 (7th Cir. 2011) ("The Judicial Branch does not censor a President's speech."). This does not mean, of course, that the executive branch cannot censor itself. This idea is related to the concept of the "self-application" of law, an important feature of the legal process tradition. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 120-21 (William N. Eskridge & Philip P. Frickey eds., 1994) ("[E]very directive arrangement which is susceptible of correct and dispositive application by a person to whom it is initially addressed is self-applying."). I owe this citation to Jeremy Waldron.

40. *See, e.g.*, Lorenzo Vidino, *Europe's New Security Dilemma*, 32 WASH. Q. 61 (2009) (examining how "nonviolent Islamists [can be] engaged and used as partners against violent radicalization" in Europe); Sidney Jones, Senior Adviser, Int'l Crisis Grp., Remarks at the Center for Strategic and International Studies: Radicalization and Counter-Radicalization in Indonesia: Taking Stock (May 24, 2010) (transcript available at http://csis.org/event/radicalization-and-counter-radicalization-indonesia-taking-stock) (discussing counter-radicalization in Southeast Asia).

41. *See* CONTEST, *supra* note 5, at 80-102 (outlining the Prevent program).

42. Even proponents of American counter-radicalization are aware of its decidedly mixed track record overseas. *See, e.g.*, Borelli, *supra* note 14 ("While one could challenge the methods, or even the effectiveness, of such programs, at least [the United Kingdom and Singapore] have taken steps to adopt a more holistic approach to this problem.").

43. *See generally* ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US 493-515 (2010) (pointing out the "potentially volatile mixture" of high religiosity and high religious diversity in the United States and further noting that "[t]hree groups stand out for their unpopularity [in contemporary American culture]—Mormons, Buddhists, and Muslims").

British experience—the primary model for domestic counter-radicalization in the United States[44]—supplies cautionary answers to each of these questions.

This Article proceeds as follows. In Part I, I offer a conceptual account of contemporary counter-radicalization. In Part II, I move from the conceptual to the programmatic, providing a genealogy of American counter-radicalization, emphasizing its roots in European and British practices, and describing the extent of its reach across federal and subnational agencies. I categorize contemporary counter-radicalization programs into strategies of engagement, bureaucratic entrenchment, and expression.

Part III argues that these initiatives pursued by American officials at every level of government are potentially in tension with Establishment Clause doctrine, theory, and values. Specifically, I emphasize three main doctrinal and theoretical frameworks for evaluating counter-radicalization under the Establishment Clause—Anti-Erastianism, Endorsement, and Coercion. I then compare each legal framework to aspects of the U.S. and U.K. counter-radicalization programs discussed above. My goal in this Part is twofold: first, to call attention to the counter-radicalization initiatives that threaten the greatest tension with the Establishment Clause; second, to reveal the overlap between the legal and strategic rationales militating against certain counter-radicalization policies. Specifically, by adverting to a number of leading criticisms that have been lodged against British counter-radicalization efforts, I hope to show how these policy-based rationales for official caution coalesce with arguments rooted in constitutional doctrine and theory.[45]

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44. *See, e.g.*, *Working with Communities to Disrupt Terror Plots: Hearing Before the Subcomm. on Intelligence, Info. Sharing, and Terrorism Risk Assessment of the H. Comm. on Homeland Sec.*, 111th Cong. 53 (2010) [hereinafter *Working with Communities*] (statement of Deborah A. Ramirez, Executive Director, Partnering for Prevention and Community Safety Initiative, Northeastern University School of Law) (stating that the British "are miles ahead of the U.S. law enforcement" and that "[w]e can learn from the British example" in regard to counter-radicalization); BERGEN & HOFFMAN, *supra* note 15, at 16 ("[T]he U.S. lost five years [before beginning] to learn from the British experience."). Interestingly, it is incongruous that the United States should turn to Europe for inspiration on counter-radicalization, when research has consistently shown that the American Muslim community is importantly different economically and socially from European Muslim communities. *See, e.g.*, MARC SAGEMAN, LEADERLESS JIHAD 89-108 (2008) ("There have been far fewer home-grown global Islamist terrorists in the United States than in Europe because of differences in the rate of radicalization of their respective Muslim communities.").

45. *See* Holmes, *supra* note 24, at 303-04 ("Rules do not function always and exclusively as disabling restraints, binding our hands; they can also serve as steadying guidelines, focusing our aim, and reminding us of long-term objectives and collateral dangers that might otherwise slip from view in the flurry of an unfolding crisis."). Similarly, Philip Bobbitt claims that the rule of law itself supplies something like a strategic objective of counterterrorism, arguing that "the interface of constitutional rights and the powers of the state [should not be viewed] as a zero-sum game." BOBBITT, *supra* note 24, at 287. In this context, the fact that law and strategy line up is not an accident, but the product of an underlying truth about the strategic visions animating the First Amendment.

In Part IV, I anticipate and address three potential challenges to the central claims of this Article. First is the contention that counter-radicalization takes aim not at a religious phenomenon but at a political or ideological one, and so is the contemporary equivalent of the last generation's official anticommunism, which created no significant Establishment Clause concerns. Second, I take up the claim that expressive counter-radicalization is protected by the First Amendment's Free Speech Clause under the emerging government speech doctrine. Third, I address the argument that the participation of nongovernmental actors in counter-radicalization efforts can avoid Establishment Clause concerns. In Part V, I conclude.

I.   The Varieties of Counter-Radicalization

Unlike "counterterrorism"[46] or "counterinsurgency,"[47] which have rich (if not entirely satisfying) conceptual foundations, "counter-radicalization"[48] remains almost completely undertheorized. To its proponents, counter-radicalization begins with the uncontroversial proposition that manifestations of violent extremism are rooted in ideas and social-behavioral processes. Understanding and addressing those ideas and processes will help prevent future attacks and thus should play an important role in American counterterrorism policy. But these basic assumptions give rise to a wide range of theoretical possibilities about what counter-radicalization is, how it should be conducted, and how the government can best devote its resources to address the contemporary security threat.[49] In order to provide some conceptual clarity, I offer a ty-

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46. *See, e.g.*, Bobbitt, *supra* note 24, at 3 (defining the objectives of the "Wars against Terror" as "not the conquest of territory or the silencing of any particular ideology but rather to secure the environment necessary for states of consent and to make it impossible for our enemies to impose or induce states of terror"); Jack Goldsmith, The Terror Presidency 184 (2007) (defining the "Terror Presidency" as demanding a balance of the "twin and sometimes incompatible obligations to keep us safe and maintain our trust").

47. *See, e.g.*, John A. Nagl, *Foreword to the University of Chicago Press Edition* of U.S. Army & Marine Corps, Counterinsurgency Field Manual, at xiii, xvii-xix (Univ. of Chi. Press, 1st ed. 2007) (2006) (setting out the significance of the new approach to counterinsurgency); Counterinsurgency Field Manual, *supra*, at 34-52 (discussing elements of a counterinsurgency strategy).

48. Some have recently preferred the term "disengagement" to describe counter-radicalization efforts to separate radicals from their inclinations to violence. *See* Qatar Int'l Acad. for Sec. Studies, Risk Reduction for Countering Violent Extremism 3 (2010) (discussing counter-radicalization efforts as "[r]educing the risk of engagement (and/or re-engagement) in terrorism"). Meanwhile, the Quilliam Foundation, a prominent counter-radicalization think tank in London, describes itself as focused on "counter-extremism." *About Us*, Quilliam, http://www.quilliamfoundation.org/about-us.html (last visited Jan. 14, 2012).

49. As a recently issued policy paper puts it, "Counter-radicalization is a policy theme, not a single policy. It is delivered through multiple channels. The range of relevant activities is potentially unlimited . . . ." Neumann, *supra* note 28, at 7. Given the breadth of counter-

pology of contemporary efforts, differentiating between secular and religious methodologies, as well as between efforts that take aim directly at radical ideologies and those that focus on individuals and populations vulnerable to being radicalized.

A. *Counter-Radicalization Methodologies*

The government may employ two main strategies to achieve its counter-radicalization goals: secular and explicitly religious methodologies. Whether counter-radicalization efforts may threaten collision with Establishment Clause doctrine and theory depends on the particulars of the program in question.

1. *Secular methods*

In some instances, counter-radicalization employs a secular methodology. That is to say, the government seeks to effect changes in religious ideation by addressing what are seen as its material causes without direct reference to or interference in religion or ideology.[50] Foreign policy officials thus sometimes speak of U.S. financial support for majority-Muslim countries as discharging a counter-radicalization function. Regarding financial aid packages for the Yemeni poor, for example, USAID has maintained that "[a] higher level of satisfaction with the direction of their lives will lower behaviors that create instability, such as extremism and violence."[51] Similarly, the State Department's top counterterrorism official has observed that "[s]ome of our aid programs will help address underlying conditions for at-risk populations. Reducing corruption and building legitimate institutions with our assistance will also reduce the ap-

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radicalization interventions, it should hardly be surprising that the legal status of counter-radicalization inevitably requires context-specific evaluation.

50. Even hard-power initiatives targeting senior terrorist leadership could be expected to have effects on the trajectory of radical Islam. Killing or capturing leaders of radical movements could either cut off key proponents or leaders of radical Islamic thought, or create martyrs and thus prompt more to join in radical movements in retaliation.

51. USAID, 2010-2012 YEMEN COUNTRY STRATEGY 2 (2010); *see also* USAID, DEVELOPMENT ASSISTANCE AND COUNTER-EXTREMISM: A GUIDE TO PROGRAMMING (2009) (providing programming advice "to help development practitioners respond to socioeconomic, political, and cultural drivers of violent extremism"); Karin von Hippel, *A Counterradicalization Strategy for a New U.S. Administration*, 618 ANNALS AM. ACAD. POL. & SOC. SCI. 182 (2008) (arguing for a U.S. foreign counter-radicalization strategy that addresses the "enabling environment" in Muslim countries through a development strategy that emphasizes "good governance, anticorruption, and social service provision"). *But see* CHARLES KURZMAN, THE MISSING MARTYRS 65 (2011) (arguing that Western-backed secularization as opposed to more indigenous religious education has paradoxically contributed in some ways to violent extremism in the Islamic world).

peal of extremism."[52] On the domestic front, one example of secular counter-radicalization is supplied by government-supported sports leagues intended to serve as outlets for youthful energy among teenagers perceived to be at risk for radicalization.[53] Such programs are of a piece with police department programs targeting children and teenagers at risk for gang membership or other criminal activity.[54] Additionally, the Obama Administration has recently touted the use of "good governance programs—including those that promote immigrant integration and civic engagement, protect civil rights, and provide social services" as part of its domestic counter-radicalization strategy.[55]

2. *Proselytization*

In other cases, counter-radicalization pursues its ends through explicitly religious means. For example, under the command of General Doug Stone, American officials charged with overseeing the detention of Iraqi prisoners of war produced a "directory" that juxtaposed "moderate" and "radical" Koranic passages "in order to refute detainees when they use certain passages to support a radical interpretation of Islam."[56] They also created "the world's most moderate Hadith" in order to harmonize classical Islamic learning with American strategic objectives.[57] The U.S. State Department has also sponsored trips to majority-Muslim countries by Muslim-American religious leaders as part of an

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52. Daniel Benjamin, Coordinator, Office of the Coordinator for Counterterrorism, Remarks at the Jamestown Yemen Conference (Apr. 15, 2010) (transcript available at http://www.state.gov/s/ct/rls/rm/2010/140327.htm).

53. *See, e.g.*, Press Release, N.Y. Police Dep't, NYPD Forms Cricket League for New York City Youth (July 22, 2008), *available at* http://www.nyc.gov/html/nypd/html/pr/pr_2008_029.shtml (describing the NYPD-sponsored cricket league primarily populated by youth of Arab and South Asian descent).

54. Tellingly, Secretary of Homeland Security Janet Napolitano and her senior staff frequently invoke the example of these anti-gang initiatives when they discuss counter-radicalization. *See, e.g.*, DEP'T OF HOMELAND SEC., FACT SHEET: THE DEPARTMENT OF HOMELAND SECURITY'S APPROACH TO COUNTERING VIOLENT EXTREMISM (2011), *available at* http://www.dhs.gov/files/fact-sheet-approach-to-countering-violent-extremism.pdf (listing as one of the Department of Homeland Security's main strategies "[d]isrupt[ing] and deter[ring] recruitment or individual mobilization through support for local law enforcement programs, including information-driven, community-oriented policing efforts that for decades have proven effective in preventing violent crime"); Press Release, Dep't of Homeland Sec., Readout of Secretary Napolitano's Remarks at the West Virginia Homeland Security Summit (June 1, 2011) (transcript available at http://www.dhs.gov/ynews/releases/pr_1306977568776.shtm) ("DHS has . . . worked with hundreds of communities and local organizations to implement community-oriented policing strategies that have been successful in other crime-reduction efforts."). Nevertheless, as is clear from this Article, the "secular" approach championed by the Department of Homeland Security (or its senior leadership) is not normative across the federal government or local and state governments.

55. WHITE HOUSE, EMPOWERING LOCAL PARTNERS, *supra* note 2, at 8.

56. Thompson, *supra* note 29, at 344.

57. *Id.*

official effort to "bring[] a moderate perspective to foreign audiences on what it's like to be a practicing Muslim in the United States."[58] At a recent Senate committee hearing devoted in part to aspects of contemporary counter-radicalization, a veteran FBI and CIA official called for formal imam training (though not with respect to theology) as part of a larger strategy.[59] As discussed below, it is precisely when the government uses these explicitly religious modalities to achieve its counter-radicalization objectives that Establishment Clause concerns are most forceful.

B. *Counter-Radicalization Theories*

1. *Behavioral counter-radicalization*

Counter-radicalization takes aim at "radicalization," a social-psychological process through which non-radical Muslims come to a religious worldview that is tolerant, perhaps even supportive, of terrorist violence. How this process unfolds is deeply contested; theories of "radicalization" abound, but they inevitably exhibit the shortcomings of predictive social science applied to limited data sets.[60] As Secretary of Homeland Security Janet Napolitano recently conceded, "I think that we do not yet have a complete understanding of what would cause a person to become radicalized."[61] The study of radicalization is further complicated by the prominence of analysis carried out by members of the national security bureaucracy.[62] As Aziz Huq has argued, studies of radicalization undertaken by government agencies may represent attempts to secure "legitimacy for policies of investigation and prosecution [predicated] on the state's claim of expertise" as much as instances of dispassionate scientific inquiry.[63] In the absence of a social-scientific framework that commands the respect of academics

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58. Matthew Lee, *U.S. State Department Sending Imam of Proposed New York Mosque to Middle East*, WASH. POST, Aug. 12, 2010, at A13 (citing State Department spokesman P.J. Crowley).

59. *See A Ticking Time Bomb: Counterterrorism Lessons from the U.S. Government's Failure to Prevent the Fort Hood Attack: Hearing Before the Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. 11 (2011) [hereinafter *Ticking Time Bomb Hearing*] (statement of J. Philip Mudd, Senior Global Adviser, Oxford Analytica).

60. The Violent Radicalization and Homegrown Terrorism Prevention Act of 2007 would have created "centers of excellence" at various academic institutions to pursue the social science behind radicalization and counter-radicalization. S. 1959, 110th Cong. § 899D (2007); H.R. 1955, 110th Cong. § 899D (2007).

61. *Nine Years After 9/11: Confronting the Terrorist Threat to the Homeland: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 111th Cong. 14 (2010) [hereinafter *Nine Years After 9/11*] (testimony of Janet Napolitano, Secretary, Department of Homeland Security).

62. *See, e.g.*, MITCHELL D. SILBER & ARVIN BHATT, N.Y. POLICE DEP'T INTELLIGENCE DIV., RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT (2007).

63. Aziz Z. Huq, *Modeling Terrorist Radicalization*, 2 DUKE F. FOR L. & SOC. CHANGE 39, 40 (2010).

and practitioners, officials within the American national security bureaucracy are increasingly disavowing reliance on any one model of radicalization, substituting a multifactored checklist that is calculated to be descriptively accurate, though perhaps less predictive.[64]

The most robust account of radicalization draws on social movement theory and emphasizes the interaction between larger ideological, political, and social currents on the one hand, and personal crises that lead to "cognitive openings" on the other.[65] Radical groups, Quintan Wiktorowicz has argued, employ these openings to impart and anchor their ideology, seeking out individuals for whom existing "religious views and/or established religious institutions seem inadequate in addressing concerns."[66] As a recent empirical study found, "homegrown terrorists' understanding of their religion was a relatively significant factor in their radicalization."[67] Finally, these ideological transformations are, in turn, reinforced and amplified by group dynamics, either in face-to-face meetings or their virtual analogues.[68]

Crucially, the radicalization process so described need not—and frequently does not—culminate in mobilization to engage in terrorist violence.[69] The radicalized subject is not a terrorist, but rather someone who may be predisposed to regard terrorist violence as religiously sanctioned. At the same time, radicaliza-

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64. *See Violent Extremism: How Are People Moved from Constitutionally-Protected Thought to Acts of Terrorism?: Hearing Before the Subcomm. on Intelligence, Info. Sharing, & Terrorism Risk Assessment of the H. Comm. on Homeland Sec.*, 111th Cong. 20 (2009) (statement of Dr. Stevan Weine, Professor of Psychiatry, University of Illinois at Chicago) ("[W]e need scientifically rigorous, conceptually based investigations of how radicalization and recruitment occur.").

65. *See* QUINTAN WIKTOROWICZ, RADICAL ISLAM RISING: MUSLIM EXTREMISM IN THE WEST 85-98 (2005).

66. *Id.* at 21.

67. DAVEED GARTENSTEIN-ROSS & LAURA GROSSMAN, HOMEGROWN TERRORISTS IN THE U.S. AND U.K.: AN EMPIRICAL EXAMINATION OF THE RADICALIZATION PROCESS 18 (2009). The radicalization process may also be triggered by a Muslim teenager's desire to pursue "jihadi cool." *See* Dina Temple-Raston, *Jihadi Cool: Terrorist Recruiters' Latest Weapon*, NPR (Mar. 26, 2010), http://www.npr.org/templates/story/story.php?storyId =125186382.

68. *See* Scott Atran, *The Romance of Terror*, GUARDIAN (July 19, 2010, 8:15 EDT), http://www.guardian.co.uk/commentisfree/belief/2010/jul/19/terrorism-radical-religion ?INTCMP=SRCH ("Individuals now mostly radicalise horizontally with their peers, rather than vertically through institutional leaders or organisational hierarchies: in small groups of friends—from the same neighbourhood or social network—or even as loners who find common cause with a virtual internet community."). Nevertheless, radicalization generally appears to require face-to-face interactions. *See* Tim Stevens, *Regulating the "Dark Web": How a Two-Fold Approach Can Tackle Peer-to-Peer Radicalisation*, RUSI J., Apr. 2009, at 28, 29.

69. *See* BRIAN MICHAEL JENKINS, RAND CORP., OCCASIONAL PAPER NO. OP-292, WOULD-BE WARRIORS: INCIDENTS OF JIHADIST TERRORIST RADICALIZATION IN THE UNITED STATES SINCE SEPTEMBER 11, 2001, at 7 (2010) ("The transition from radical to terrorist is often a matter of happenstance. It depends on whom one meets and probably on when that meeting occurs in the arc of one's life.").

tion that does culminate in violence may occur on a compressed and unpredict-able timetable. As Michael Chertoff has recently commented, "[T]he distance between radicalization and putting a bomb on are [sic] sometimes days and weeks."[70]

To the extent that counter-radicalization tries to prevent this behavioral-psychological transformation, its subjects may be individuals or groups who are vulnerable to being radicalized. Thus far, counter-radicalization efforts have split between two levels: at-risk young Muslims[71] and Muslim communities. The United Kingdom's Channel program, itself part of the larger Prevent strat-egy, provides one example of individual-level counter-radicalization targeting young Muslims.[72] Muslim teenagers come to the attention of officials in the security apparatus or through contact with the welfare state—which now parti-cipates in the larger British counter-radicalization agenda. Once officials have identified their target audience, their goal is to interfere with each individual's radicalization process or to unwind it if it has already taken root.[73] The Channel program employs a host of techniques, potentially including an inculcation of "mainstream" religious beliefs.[74]

In instances where counter-radicalization takes the Muslim community as its subject, the scope of the community may be defined geographically or by reference to shared language or country of origin. For example, the U.S. gov-ernment has devoted significant energies to the Somali-American community in cities like Minneapolis on the theory that that community is uniquely vulner-able to certain strains of radical ideation and activities.[75]

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70. Michael Chertoff, Former Sec'y, Dep't of Homeland Sec., Remarks at the Biparti-san Policy Center's State of Domestic Intelligence Reform Conference (Oct. 6, 2010) (tran-script available at http://www.bipartisanpolicy.org/library/national-security-preparedness-group/transcript-dni-clappers-remarks-bpcs-domestic-intellige).

71. *See, e.g.*, Graeme Wilson, *"One in Eight Admires al-Qaeda" "40pc Want Sharia Law in Britain,"* DAILY TELEGRAPH (London), Jan. 29, 2007, at 1 (reporting on increasing rate of radicalization and anti-Western views among British Muslims aged sixteen to twenty-four). Secretary of Homeland Security Janet Napolitano has posed the issue of individualized counter-radicalization as follows: "How do you identify a youth who is susceptible to be-coming radicalized? How do you work with that youth, his family and community to give them alternatives to radicalization?" Cordula Meyer, *"Away from the Politics of Fear,"* SPIEGEL ONLINE (Mar. 16, 2009), http://www.spiegel.de/international/world/0,1518,613330 ,00.html.

72. *See generally* Alan Travis, *Schools' Counter Terrorism Project Reviewed*, GUARDIAN (London), Feb. 17, 2011, at 15.

73. *See* VIDINO, *supra* note 19, at 9 ("Channel seeks the help of civil servants, teach-ers, social workers, community leaders, and other members of the public, who are instructed to report individuals they consider exhibiting signs of radicalization. A panel of experts that includes police officials, community leaders, and other authorities then assesses the case and might recommend some form of intervention . . . .").

74. *See* Vidino, *supra* note 40, at 68 (describing the role of imams in attempting to de-radicalize youth).

75. *See Violent Islamist Extremism: Al-Shabaab Recruitment in America: Hearing Be-fore the S. Comm. on Homeland Sec. & Governmental Affairs*, 111th Cong. 11 (2009)

Alternatively, counter-radicalization may aim explicitly or implicitly at the Muslim community writ large. As Charles Farr, head of Britain's Office of Security and Counter-Terrorism, has argued:

> There is a much larger group of people who feel a degree of negativity, if not hostility, towards the state, the country, the community, and who are, as it were, the pool in which terrorists will swim . . . . [U]nless we reach that group they may themselves move into the very sharp end, but even if they do not they will create an environment in which terrorists can operate with a degree of impunity that we do not want. . . . That is to a degree what Prevent is all about.[76]

Similarly, according to a controversial study undertaken by the New York City Police Department, the radicalization process begins with "pre-radicalization," the situation in which all "unremarkable" young Muslim men presumably find themselves.[77] Changes that these men may undergo over time might culminate in their radicalization and, past that, in their commitment to participating in an act of terrorist violence. These broader approaches to counter-radicalization inevitably raise significant strategic policy questions—in particular, the risk of stigmatization of all members of Muslim communities and concerns about the cost-effectiveness of programs whose goals are to shape viewpoints on a comprehensive scale.[78] As a leading critic of Prevent has put it, "There was overwhelming concern that the policy construed the entire British Muslim population—roughly two million citizens—as uniquely and collectively responsible for preventing terrorist incidents."[79]

2. *Ideological counter-radicalization*

Behavioral counter-radicalization centers on the social-psychological process of radicalization and the populations that are vulnerable to it. Another possibility—which I call "ideological counter-radicalization"—focuses on the presence and proliferation of radical Islamic ideology as such, rather than on a

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(statement of J. Philip Mudd, Associate Executive Assistant Director, National Security Branch, FBI) (discussing community outreach to Minneapolis's Somali-American community due to risk of radicalization among young Somali men).

76. HOME AFFAIRS COMM., PROJECT CONTEST: THE GOVERNMENT'S COUNTER-TERRORISM STRATEGY, 2008-9, H.C. 212, at Ev 29 (U.K.); *cf.* NEUMANN, *supra* note 28, at 17 ("Unlike counterterrorism, which targets terrorists, counter-radicalization is focused on the communities that are targeted by terrorists.").

77. SILBER & BHATT, *supra* note 62, at 6 (describing pre-radicalization as "unremarkable" young Muslims' "life situation before they were exposed to and adopted jihadi-Salafi Islam as their own ideology").

78. *See* Martin Bentham, *Counter-Terrorism Projects "Are Alienating Muslim Communities,"* LONDON EVENING STANDARD, July 19, 2010, at 8 (questioning the cost-effectiveness of Prevent in view of its capacity to alienate Muslim communities).

79. Kundnani, *supra* note 12.

transformative individual- or group-psychological process.[80] Here, the government comes to view an aspect of Islamic ideology as beyond the pale. For example, a recent report issued by the Senate Homeland Security and Government Affairs Committee, in its investigation of government failures in connection with the recent Fort Hood attack, identified certain strains of political Islam as a source of terrorist violence.[81] Furthermore, some have argued that Is-Islamist groups like the Muslim Brotherhood[82] and Hizb ut-Tahrir and more pietistic organizations like Tablighi Jamaat, while devoid of overt violent commitments, may nonetheless serve as "conveyor belts" on the way to religiously sanctioned violence.[83] Others define the problematic ideologies more narrowly, emphasizing the more openly violent Salafi-Jihadi[84] tendencies propounded by, for example, Osama bin Laden and Anwar al-Awlaki.[85] Regardless of the specific ideology that is viewed as being a potential vector for future violent acts, the point is that ideological counter-radicalization (as distinct from behavioral counter-radicalization) is centrally concerned with official activity targeting an ideology as such, rather than a process of behavioral-psychological transformation that may culminate in the adoption of that ideology.

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80. That said, the literature conflates these two phenomena under the general category of "counter-radicalization," and in the course of this Article, I will employ the term flexibly to refer to both.

81. *See* JOSEPH I. LIEBERMAN & SUSAN M. COLLINS, U.S. SENATE COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, A TICKING TIME BOMB: COUNTERTERRORISM LESSONS FROM THE U.S. GOVERNMENT'S FAILURE TO PREVENT THE FORT HOOD ATTACK 17 (2011), *available at* http://hsgac.senate.gov/public/_files/Fort_Hood/FortHoodReport.pdf.

82. *See generally* LORENZO VIDINO, THE NEW MUSLIM BROTHERHOOD IN THE WEST 199-221 (2010) (debating whether the Muslim Brotherhood is more helpful or more harmful to Western counterterrorism efforts).

83. Tablighi Jamaat is a typical example. *See* J. Scott Carpenter et al., *Confronting the Ideology of Radical Extremism*, 3 J. NAT'L SECURITY L. & POL'Y 301, 307-08 (2009) (describing Tablighi Jamaat as a group that does not condone violence but contributes to the radicalization process); Abul Taher, *Mosque Pleads for Calm After Being Linked to Eight Suspects—Airline Bomb Plot*, SUNDAY TIMES (London), Aug. 13, 2006, at 14 ("Western security services have in the past accused the global Tablighi movement of being a 'conveyor belt' for terrorism.").

84. Salafi-Jihadism is an ideology (or cluster of ideologies) at the intersection of Sunni neopuritanism (Salafism) and an approach to Islamic politics that openly embraces violence. *See* GILLES KEPEL, JIHAD: THE TRAIL OF POLITICAL ISLAM 219-23 (Anthony F. Roberts trans., 2002). Al Qaeda is the most well-known organizational expression of Salafi-Jihadism.

85. Anwar al-Awlaki was an American-born, al Qaeda-affiliated cleric living in Yemen. He had been linked to a number of terrorist attacks, including the Fort Hood shooting and the attempted airliner attack on Christmas Day. Al-Awlaki was killed by a U.S. drone attack in Yemen on September 30, 2011. Mark Mazzetti et al., *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1.

C. *De-Radicalization*

As discussed above, counter-radicalization in all of its various forms sets its sights on preventing individuals or groups from moving toward radicalization in the first place. Thus, the idea of counter-radicalization has a largely anticipatory focus, which fits well within the overarching preventive orientation of counterterrorism.[86] Yet efforts to bring about change in ideation may also take the form of attempts to roll back an individual's or group's existing radical commitments. In this case the government's efforts are typically referred to as "de-radicalization."

Contemporary de-radicalization can be seen in official programs in Yemen,[87] Saudi Arabia,[88] and Singapore,[89] which attempt to resocialize young Muslim men who have been taken into custody. But de-radicalization is increasingly becoming part of the conceptual repertoire of American counterterrorism as well. U.S. Army Major General Doug Stone has applied de-radicalization techniques derived from the Saudi model in American detention facilities in Iraq and Afghanistan.[90] General Stone pioneered the "religious enlightenment" program in Iraqi detention facilities, in which "moderate" imams are tasked with indoctrinating detainees who profess "radical" Islam.[91]

II. THE EMERGENCE OF DOMESTIC COUNTER-RADICALIZATION

The participation of the United States in overseas counter-radicalization efforts is nothing new; officials have been explicitly pursuing such policies for

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86. A central goal of Prevent is "addressing the longer term causes—particularly by understanding what leads people to become radicalised, so we can stop them becoming terrorists or supporting terrorism or violent extremism in the first place." Gordon Brown, *Forward* to CONTEST, *supra* note 5, at 6.

87. *See generally* Peter Baker, *Obama's War over Terror*, N.Y. TIMES MAG., Jan. 4, 2010, at 30, 46 ("Brennan has also been trying to set up a rehabilitation program for Yemen to transition former Guantánamo detainees back into society."); Marisa L. Porges, *Deradicalisation, the Yemeni Way*, SURVIVAL, Apr.-May 2010, at 27 (2010).

88. *See generally* Marisa L. Porges, *The Saudi Deradicalization Experiment*, COUNCIL ON FOREIGN REL. (Jan. 22, 2010), http://www.cfr.org/terrorism/saudi-deradicalization -experiment/p21292; *60 Minutes: Taming Terror* (CBS television broadcast May 3, 2009), *available at* http://www.cbsnews.com/video/watch/?id=4988100n&tag=mncol;lst;1 (exploring Saudi de-radicalization efforts).

89. *See* Betsy Hiel, *Terror Fight Turns Toward Deradicalizing*, PITTSBURGH TRIB.-REV. (Sept. 26, 2010), http://www.pittsburghlive.com/x/pittsburghtrib/news/ middleeastreports/s_701387.html (noting that Singapore's program employs "Islamic clerics, including some from Sunni Islam's top religious institute, Al Azhar University in Cairo").

90. *See generally* Stone, *supra* note 29. General Stone referred to American detention facilities in Iraq prior to the implementation of his plan as a "jihadist university." Tom Bowman, *U.S. Offers Training, Pay as It Frees Iraqi Detainees*, NPR (May 16, 2008), http://www.npr.org/templates/story/story.php?storyId=90506939.

91. *See* Thompson, *supra* note 29, at 343-46 (describing General Stone's "religious enlightenment" program).

the last decade.[92] The United States' foreign counter-radicalization efforts have run the gamut from supporting Western-style schools as institutional counter-weights to Pakistani madrassas, a largely secular approach to counter-radicalization, to exposing detainees at American facilities in Iraq to indoctrination by "mainstream" imams, an explicitly religious modality. In the last two years, however, official preoccupation with domestic counter-radicalization has mounted, leading to the debut of a range of new programs within the United States. Largely driven by growing concerns about homegrown terrorism, American officials across the national security apparatus have taken on key roles in the elaboration of domestic counter-radicalization policies,[93] as have some state governments and municipalities.[94]

For all the mounting interest, locating the distinctive strands of an emerging American counter-radicalization strategy can be difficult, so much so that a recent RAND report went so far as to announce that "[t]he United States does not have a domestic counter-radicalization strategy, much less deradicalization programs."[95] It may be true, as a recent report by the Bipartisan Policy Center pointed out, that "there remains no federal government agency or department specifically charged with identifying radicalization and interdicting the recruitment of U.S. citizens or residents for terrorism."[96] Regardless of a lack of centralized strategic planning, however, American domestic counter-radicalization is under way at the federal, state, and local levels.

In this Part, I first provide a brief genealogy of American domestic counter-radicalization, emphasizing its roots in European (and specifically, British) models. Indeed, U.S. efforts largely come out of a sense that the presence of a British-style, homegrown threat requires the importation of a British-style re-

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92. The idea of employing religious modalities—including Islam—as part of American foreign policy has its own mixed historical record. As a former official (himself later a convert to Islam) has put it, "I had advised Nixon on Islam as an ally against the Communists." STEVEN BARBOZA, *Word at the White House: Robert Dickson Crane*, *in* AMERICAN JIHAD: ISLAM AFTER MALCOLM X 286 (1993). *See generally* GEORGE CRILE, CHARLIE WILSON'S WAR (2003) (describing American support for the mujahideen against the Soviet Union in Afghanistan, which later led to the rise of the Taliban and al Qaeda).

93. The Obama Administration's preferred nomenclature both overseas and domestically is "countering violent extremism." *See, e.g.*, *Hearing to Receive Testimony on U.S. Government Efforts to Counter Violent Extremism Before the Subcomm. on Emerging Threats & Capabilities of the S. Comm. on Armed Servs.*, 111th Cong. 5 (2010) [hereinafter *U.S. Government Efforts Hearing*] (statement of Ambassador Daniel Benjamin, Coordinator for Counterterrorism, Department of State) ("The primary goal of countering violent extremism is to stop those most at risk of radicalization from becoming terrorists."); HOMELAND SEC. ADVISORY COUNCIL, COUNTERING VIOLENT EXTREMISM (CVE) WORKING GROUP RECOMMENDATIONS (2010), *available at* http://www.dhs.gov/xlibrary/assets/hsac_cve _working_group_recommendations.pdf.

94. *See, e.g.*, OMAR ALOMARI, OHIO DEP'T OF PUB. SAFETY, A GUIDE TO ARABIC AND ISLAMIC CULTURE (2010).

95. ANGEL RABASA ET AL., RAND CORP., DERADICALIZING ISLAMIST EXTREMISTS 190 (2010).

96. BERGEN & HOFFMAN, *supra* note 15, at 29.

sponse. Ironically, American attempts at imitating British counter-radicalization are beginning just as the British are modifying these programs in part because of intense public criticism and political contestation.[97]

I then turn to a descriptive account of U.S. domestic counter-radicalization, dividing its various manifestations into three primary categories: engagement, bureaucratic entrenchment, and expression.[98] Counter-radicalization as engagement focuses on turning government-sanctioned views into social reality through official outreach to and cooperation with certain Muslim communities. Bureaucratic entrenchment looks at the ways in which counter-radicalization has altered governmental structure and personnel at the national, state, and local levels. This phenomenon can be thought of as counter-radicalization's inward-looking implications, the manner in which it shapes government itself rather than the ways in which government employs counter-radicalization to shape society. Finally, expressive counter-radicalization entails the processes by which the government transmits the tenets of Official Islam to the public, including everything from State Department documents that make sweeping claims about the nature of Islam as practiced in the United States[99] to pronouncements by the president's top counterterrorism adviser about what *jihad* does and does not mean in Islam.[100]

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97. *See* CMTYS. & LOCAL GOV'T COMM., PREVENTING VIOLENT EXTREMISM, 2009-10, H.C. 65, at 3 (U.K.) [hereinafter PREVENTING VIOLENT EXTREMISM] ("Our inquiry has shown that the current overall approach to *Prevent* is contentious and unlikely ever to be fully accepted in its existing form by those it is most important to engage."); ARUN KUNDNANI, INST. OF RACE RELATIONS, SPOOKED! HOW NOT TO PREVENT VIOLENT EXTREMISM (2009) (criticizing Prevent on a variety of policy grounds); Alan Travis, *Ministers Dismantle £60m Programme to Prevent Violent Extremism*, GUARDIAN (London), July 13, 2010, at 4 (describing structural changes to the program after "a widespread loss of confidence in it within Muslim communities").

98. In a recent policy paper, the Obama Administration divided its domestic counter-radicalization program into three "Areas of Priority Action" that closely map onto the strategies outlined in this Article: "Enhancing Federal Engagement with and Support to Local Communities that May be Targeted by Violent Extremists," "Building Government and Law Enforcement Expertise for Preventing Violent Extremism," and "Countering Violent Extremist Propaganda While Promoting Our Ideals." WHITE HOUSE, EMPOWERING LOCAL PARTNERS, *supra* note 2, at 3-7.

99. *See, e.g.*, U.S. DEP'T OF STATE, BEING MUSLIM IN AMERICA 25 (2009) ("Progressive forms of belief, a more prominent role for women, even the recent evolution of 'mega-mosques' resembling in size the large evangelical Christian churches—are among the characteristics of a rapidly evolving, uniquely American Islam.").

100. *See* John Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at the Center for Strategic and International Studies: Securing the Homeland by Renewing America's Strengths, Resilience, and Values (May 26, 2010) (transcript available at http://csis.org/event/statesmens-forum-securing-homeland-renewing-americas-strengths-resilience-and-values) (discussing the meaning of *jihad*); *see also infra* text accompanying note 167; *cf.* Steven D. Smith, *Why Is Government Speech Problematic? The Unnecessary Problem, the Unnoticed Problem, and the Big Problem* 18-33 (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Paper No. 10-014, 2010), *available*

A. *A Genealogy of American Counter-Radicalization*

Counter-radicalization programs have proliferated across a wide variety of countries over the last five years.[101] American domestic counter-radicalization is emerging mainly as a (modified) import from Europe, chiefly from the United Kingdom.[102] Thus, understanding the European pedigree of American counter-radicalization is important for assessing its legality and strategic value. I first make some general observations about the relationship between Official Islam and counter-radicalization in Continental Europe, and then explore the British counter-radicalization strategy, Prevent, in greater detail.

1. *European Official Islam: from identity politics to security*

In large measure, the politics of Islam on the Continent have been the politics of immigration and postcolonial displacement.[103] Continental Europe's engagement with Islam, therefore, has largely focused for over a generation on issues of identity politics and social integration.[104] Whether the topic has been the regulation of Islamic dress in France or Islamic architecture in Switzerland, government's role has largely been to establish the contours of a religious identity reconcilable with thick conceptions of membership in national and European communities.[105]

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at http://ssrn.com/abstract=1576817 (exploring the inappropriateness of hypothetical examples of government speech).

101. *See* TRANSNATIONAL TERRORISM, SEC. & THE RULE OF LAW, THE EU COUNTERRADICALIZATION STRATEGY: EVALUATING EU POLICIES CONCERNING CAUSES OF RADICALIZATION 9 (2008) ("[T]he EU is committed to 'prevent people from turning to terrorism by tackling the factors or root causes which can lead to radicalization and recruitment, in Europe and internationally.'" (quoting THE COUNCIL OF THE E.U., THE EUROPEAN COUNTER-TERRORISM STRATEGY (2005)).

102. *See supra* note 44.

103. *See, e.g.*, STEVEN BARBOZA, *Allah at Harvard: Ali S. Asani, in* AMERICAN JIHAD: ISLAM AFTER MALCOLM X, *supra* note 92, at 36, 39 (observing that colonial attitudes toward Islam represent "the same problem that you find facing Muslims in Europe today," namely, that Muslim populations "are often regarded as primitives"); Ali Vural Ak Ctr. for Global Islamic Studies, *Riem Spielhaus: The Emergence of a Muslim Community in Germany*, 13:55-19:23 (Nov. 4, 2010, 3:00 PM), http://vimeo.com/17404569 (arguing that immigration, not the post-9/11 security imperative, has driven discussions of the role of Islam in Germany).

104. *See, e.g.*, Carpenter et al., *supra* note 83, at 313 ("The French strategy, for example, differs greatly from the British and Dutch approach in that France sees radicalization as a problem of social integration rather than a religious issue.").

105. *Cf.* EUGEN WEBER, PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE 1870-1914, at 485-96 (1976) (describing French cultural assimilation necessary to create today's national identity).

More specifically, France and Germany have sought to "domesticate"[106] Islam such that it can serve as an antidote to two powerful undercurrents: the pull of the transnational *Ummah* on the one hand[107] and consulate-based "Embassy Islam" on the other.[108] To achieve these goals, the state has "institutionaliz[ed] representative Islamic bodies . . . empower[ed] designated Muslim interlocutors, and . . . facilitat[ed] the construction and maintenance of Islamic spaces."[109] For example, in 2002, France's then-Interior Minister Nicolas Sarkozy established the French Council for the Muslim Religion to create an official institutional voice for French Muslims, and simultaneously to diminish the extent of foreign involvement in the internal politics of French Islam.[110] In Germany, officials appointed a moderate Muslim academic to train instructors of Islam within the public schools, which has raised criticisms from certain German Muslim organizations.[111]

Issues of domestic security have, of course, intersected with the management of Official Islam on the Continent.[112] But—in contrast to British, and increasingly American, counter-radicalization efforts—Continental European

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106. This term belongs to Jonathan Laurence. *See* JONATHAN LAURENCE, THE EMANCIPATION OF EUROPE'S MUSLIMS: THE STATE'S ROLE IN MINORITY INTEGRATION 249-51 (2012) [hereinafter LAURENCE, EMANCIPATION OF EUROPE'S MUSLIMS]. Laurence has categorized European state efforts at "domestication" into three main tools:

> [A] charter or founding document in which participating Muslim organizations confirm their respect for the rule of law; the establishment of technical working groups that include representatives of [both the extremist and moderate forms of] Islam alongside state representatives; and, crucially, the nomination or election of a representative council that can serve as an interlocutor for State-Church affairs.

Jonathan Laurence, *Managing Transnational Islam: Muslims and the State in Western Europe*, *in* IMMIGRATION AND THE TRANSFORMATION OF EUROPE 251, 269 (Craig A. Parsons & Timothy M. Smeeding eds., 2006).

107. *Ummah* generally refers to the concept of the transnational Muslim community. OLIVIER ROY, GLOBALIZED ISLAM: THE SEARCH FOR A NEW UMMAH 1 (2004). *See generally* FAISAL DEVJI, THE TERRORIST IN SEARCH OF HUMANITY (2008) (exploring the global phenomenon of militant Islam).

108. "Embassy Islam" refers to efforts by foreign officials to propagate a certain vision of Islam through the work of the embassy's staff, enhanced by the historically naive view of certain European officials that immigrant Muslims would someday return to their countries of origin. *See* LAURENCE, EMANCIPATION OF EUROPE'S MUSLIMS, *supra* note 106, at 30-69 (discussing the phenomenon of Embassy Islam).

109. Yvonne Yazbeck Haddad & Tyler Golson, *Overhauling Islam: Representation, Construction, and Cooption of "Moderate Islam" in Western Europe*, 49 J. CHURCH & ST. 487, 487-88 (2007).

110. JOHN R. BOWEN, CAN ISLAM BE FRENCH? PLURALISM AND PRAGMATISM IN A SECULARIST STATE 26 (2009).

111. *See* Jennifer S. Bryson, *Will Islam in Germany Lead to Mufti Merkel?*, PUB. DISCOURSE (Dec. 12, 2008), http://www.thepublicdiscourse.com/2008/12/104.

112. *See, e.g.*, TRANSNATIONAL TERRORISM, SEC. & THE RULE OF LAW, *supra* note 101, at 9 ("EU [counter-radicalization] strategies . . . focus on countering radicalization and recruitment to Islamist-inspired terrorist groups.").

governments have typically[113] pursued security-related initiatives separately and secretly, as part of the traditional functions of the national security state. As a commentator has recently noted with respect to French counter-radicalization efforts, "France maintains a strong police and intelligence presence, rather than cooperating with local imams to create a connection between them and the local community."[114] A similar strategy prevails in Germany.[115]

2.   *The evolution of Prevent in the United Kingdom*

Moving from the Continent to the United Kingdom, two important contrasts stand out. First, and most basically, contemporary British efforts at the management of Islam stem from the desire to engage in proactive counterterrorism, rather than as a corollary to the goal of cultural assimilation.[116] Second, British counter-radicalization has employed institutions across all of government—from the security apparatus to the agencies of the welfare state—to counter the rise of extremist Islam.

Prior to the attacks on July 7, 2005, and the emergence of a counterterrorism imperative, the United Kingdom essentially pursued a laissez-faire approach to its Muslim citizens, even those engaged in controversial radicalization activities.[117] Historically, the British government has pursued an official policy of multiculturalism regarding its Muslim citizens, the majority of whom are descendants of or are themselves economic immigrants from Pakistan.[118] In

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113. The Netherlands may be something of an exception, as aspects of its counter-radicalization policies resemble British efforts. *See* Carpenter et al., *supra* note 83, at 313 (noting that the "Dutch and British approach engages the community and uses individuals—imams, teachers, and social workers—who have already established a community network").

114. Carpenter et al., *supra* note 83, at 313.

115. *See Salafist Threat Growing, Interior Ministers Say*, LOCAL (June 21, 2011, 11:27 CET), http://www.thelocal.de/national/20110621-35793.html (noting reports that the German domestic intelligence services "would be intensifying their monitoring of the Salafist scene" and quoting Bavarian Interior Minister Joachim Herrmann as saying that "[a]lmost all terrorism issues in the past have been somehow or other traced back to a tendency to radicalisation from Salafism").

116. As discussed below, the gap between British and Continental approaches along this dimension is potentially being closed as Prevent evolves.

117. Laura Donohue has timed this transition to the aftermath of 9/11, rather than the London subway bombings in 2005. *See* LAURA K. DONOHUE, THE COST OF COUNTERTERRORISM 27 (2008) (noting a substantial rise in targeting of people of South Asian descent in the United Kingdom after 9/11).

118. David Cameron, Prime Minister, Speech at the Munich Security Conference (Feb. 5, 2011), *available at* http://www.number10.gov.uk/news/pms-speech-at-munich-security -conference ("Under the doctrine of state multiculturalism, we have encouraged different cultures to live separate lives, apart from each other and apart from the mainstream."); *see also* Kenan Malik, Op-Ed., *Assimilation's Failure, Terrorism's Rise*, N.Y. TIMES, July 7, 2011, at A23 (observing that European policies of multiculturalism, particularly in the United Kingdom, have led politicians to interact with Muslims chiefly as members of a religious minority, rather than as citizens).

the aftermath of the July 7, 2005, attacks, the British Labour government revised its overall approach to domestic counterterrorism. The result of that process was the creation of the so-called CONTEST strategy, which was the sum total of a multipronged counterterrorism strategy made up of the four Ps: Pursue, Protect, Prepare, and Prevent.[119] "Pursue" embodies the government's desire to locate and arrest terrorists. "Protect" is centrally concerned with strengthening the populace and domestic infrastructure against terrorist attack. "Prepare" focuses on the mitigation of the impact of terrorist attacks once they occur. What has proved to be far and away the most controversial of the four strategies, however, is "Prevent."

As initially conceived, Prevent was designed as a decentralized approach to countering violent extremism. To that end, Prevent started with modest funding and emphasized empowering local authorities and communities to tackle radicalization through government-supported programs.[120] For example, an early Prevent program funded the creation of working groups of prominent Muslims and charged them with proposing ideas to combat radicalization.[121] These groups were united under the banner of "Preventing Extremism Together" and made a number of suggestions, such as the creation of "a mosque and imam national advisory board" as well as "the Radical Middle Way," a "road show" composed of imams with avowedly mainstream views.[122] Over time, Prevent expanded to include dedicated "engagement officers in local police forces, the creation of a toolkit for schools on their role in the prevention of violent extremism, and the national roll-out of Channel, a discrete [sic] referral process to provide support for individuals vulnerable to violent extremism."[123]

Faced with inconclusive results from the first years of Prevent funding and programming, the government revised its strategy and debuted an updated version in 2009 as part of what came to be known as "CONTEST 2."[124] The 2009 version of Prevent was more ambitious than its predecessor, as it took aim not

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119. For a brief overview of the CONTEST strategy, see *The Counter-Terrorism Strategy*, HOME OFFICE, http://www.homeoffice.gov.uk/counter-terrorism/uk-counter-terrorism-strat (last visited Jan. 14, 2012).

120. *See* Rachel Briggs, *Community Engagement for Counterterrorism: Lessons from the United Kingdom*, 86 INT'L AFF. 971, 975 (2010) (describing the initial "decentralized approach" of Prevent, which provided funds to local authorities to develop programs "to tackle violent extremism").

121. *See* RABASA ET AL., *supra* note 95, at 125.

122. *Id.*

123. Briggs, *supra* note 120, at 975. In October 2006, the Prevent fund made available a total of £6 million in grants. That number was expected to rise to £240 million by 2011. *Id.*

124. Sunny Hundal, *Is Contest 2 Talking to the Right People?*, GUARDIAN (Mar. 24, 2009, 5:35 EDT), http://www.guardian.co.uk/commentisfree/belief/2009/mar/23/counterterrorism-contest-2-muslim?INTCMP=ILCNETTXT3487 (discussing announcement of Contest 2 policy).

at countering violent extremism, but rather countering extremism as such.[125] As discussed in greater detail below, the revised Prevent strategy came under withering public and official criticism across a number of dimensions: it was accused of distorting the relationship between the state (and in particular the welfare state) and Muslim citizens; subsidizing groups that did not sign on to the basic commitments of liberal democracy; and failing to deliver any tangible security benefits.

Following the 2010 elections and the emergence of a coalition government, another overhaul of Prevent was undertaken,[126] and the British government debuted the newest version of Prevent on June 7, 2011.[127] The newly released strategy criticizes "the Prevent programme we inherited from the last Government" as flawed in a number of respects, including that "[i]t failed to confront the extremist ideology at the heart of the threat we face; and in trying to reach those at risk of radicalisation, funding sometimes even reached the very extremist organisations that *Prevent* should have been confronting."[128] The new strategy has a threefold ambition: to "respond to the ideological challenge of terrorism and the threat we face from those who promote it"; to "prevent people from being drawn into terrorism and ensure that they are given appropriate advice and support"; and to "work with a wide range of sectors and institutions (including education, faith, health and criminal justice) where there are risks of radicalisation which we need to address."[129] But even the release of a new strategy has not resolved the issue of Prevent's status and appropriate focus; apparently Deputy Prime Minister Nick Clegg still endorses its prior iteration.[130] Despite this uncertainty, the United States has drawn on the British experience in designing its own domestic counter-radicalization program, as discussed in the next Subpart.

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125. *See* Vikram Dodd, *Anti-Terror Code "Would Alienate Most Muslims,"* GUARDIAN (London), Feb. 16, 2009, at 10, *available at* http://www.guardian.co.uk/politics/2009/feb/17/counterterrorism-strategy-muslims ("Contest 2 would widen the definition of extremists to those who hold views that clash with what the government defines as shared British values."); Brian Whitaker, *Keep Anti-Terrorism and Theology Apart*, GUARDIAN (Aug. 5, 2010, 6:59 EDT), http://www.guardian.co.uk/commentisfree/belief/2010/aug/05/keeping-terrorism-theology-apart (quoting a leaked briefing paper sent from the Quilliam Foundation to the British Home Office which suggested that "[a]n anti-terrorism strategy . . . should . . . include tackling Islamism 'even if it is not yet being expressed in a violent way'").

126. *See* Alan Travis, *Theresa May Pledges "Significant" Reform of Counter-Terrorism Laws*, GUARDIAN (London), Nov. 3, 2010, at 20, *available at* http://www.guardian.co.uk/politics/2010/nov/03/theresa-may-counter-terrorism-reform (reporting May's statements regarding reforms to Prevent).

127. *See* Press Release, Home Office, New Prevent Strategy Launched (June 7, 2011), *available at* http://www.homeoffice.gov.uk/media-centre/news/prevent-strategy.

128. Theresa May, *Foreword* to SEC'Y OF STATE FOR THE HOME DEP'T, *PREVENT* STRATEGY 1, 1 (June 2011).

129. SEC'Y OF STATE FOR THE HOME DEP'T, *supra* note 128, at 40.

130. *See* Mark Townsend & Hannah Olivennes, *PM Wins Row with Nick Clegg over Crackdown on Muslim Extremists*, OBSERVER (London), June 4, 2011, at 16.

B. *American Counter-Radicalization and the Elaboration of Official Islam*

1. *Engagement*

Domestic counter-radicalization efforts have increasingly been predicated on the idea that engagement—outreach to certain Muslim communities in order to make Official Islam a social reality—can play a crucial role in promoting domestic security. Deputy National Security Advisor Denis McDonough recently affirmed the Obama Administration's commitment to engagement with local Muslim communities:

> [E]quipped with this information, we've expanded our engagement with local communities that are being targeted by terrorist recruiters. The departments of Homeland Security and Justice have created new advisory groups, instituted regular outreach sessions, and held dozens of roundtables across the country. It's all been with the goal of listening to your communities, sharing information on how al Qaeda attempts to recruit and radicalize, and answering the question so many communities have asked us—what can we do to protect our young people?[131]

The precise nature of outreach programs of this sort varies within agencies and from one agency to the next. The FBI, the Department of Homeland Security, the National Counterterrorism Center, the Department of Justice, and numerous state and local agencies have each engaged with members of the Muslim community inside the United States for the purpose of counter-radicalization. For example, the officials from the Department of Homeland Security and the National Counterterrorism Center recently participated in a community awareness briefing for Muslim leaders in Hartford, Connecticut, devoted to "Understanding Radicalization and De-Radicalization Strategies."[132] Among the panel discussions was a session devoted to "Seeking a Counter-Reformation in Islam."[133] The U.S. Attorney in Oregon created his own "network of Muslim community leaders" motivated by the desire to "educate Muslim partners and give them resources and support so they can counter

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131. McDonough, *supra* note 2; *see also* WHITE HOUSE, EMPOWERING LOCAL PARTNERS, *supra* note 2, at 2 ("Countering radicalization to violence is frequently best achieved by engaging and empowering individuals and groups at the local level to build resilience against violent extremism.").

132. Pakistani Am. Ass'n of Conn. et al., Conference Agenda, Understanding Radicalization and De-Radicalization Strategies (June 19, 2010), *available at* http://pakpac.net/Newsletter/2010/June/Deradicalization_Conference_June_11_2010.doc.

133. *Id.* at 3.

radicalization on their own."[134] And Ohio's counter-radicalization efforts have included the creation of an imam council.[135]

The phenomenon of engagement is also connected to the selection of specific interlocutors within various Muslim communities—a choice which necessarily implicates "theological criteria."[136] These sorts of decisions are inevitable when the government dispatches American imams and other exponents of American Islam on overseas delegations. For example, the U.S. government has sponsored multiple overseas trips by the Washington D.C.-based Islamic hip-hop group Native Deen, whose tracks include "Only Fear Allah" and "Ramadan is Here."[137] Similarly, the State Department has underwritten overseas trips by the charismatic Islamic Chaplain of the New York City Police Department, Khaled Latif, who has lectured in the Maldives about tolerance within Islam.[138]

But engagement efforts—and the implicit theological line-drawing they necessitate—implicate more squarely domestic activities as well. For example, the State Department arranges for overseas Muslim leaders to visit the United States and to meet with American Muslims as part of an effort that the influential blogger Haroon Moghul has described as fostering a network of "acceptable" Muslim leaders.[139] More conventionally, certain Islamic leaders appear to have attained something like "official" status. Imam Mohamed Hagmagid, the Executive Director of the All Dulles Area Muslim Society (ADAMS) in suburban Washington, D.C., has long been known for his willingness to cooperate with the FBI. Indeed, ADAMS boasts on its website that it "maintains an excellent relationship with the FBI, the Department of the Treasury, the Department

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134. NEUMANN, *supra* note 28, at 37.

135. *See Working with Communities*, *supra* note 44, at 23 (statement of Omar Alomari, Community Engagement Officer, Ohio Department of Safety) ("We have formed advisory councils, imams' councils, youth councils, and women councils.").

136. PREVENTING VIOLENT EXTREMISM, *supra* note 97, at 34.

137. *See* Mark Oppenheimer, *A Diplomatic Mission Bearing Islamic Hip-Hop*, N.Y. TIMES, July 23, 2011, at A13. The Arabic word "deen" denotes religion. *Id.* Islamic musicians have also inspired terrorist attacks. *See* Souad Mekhennet, *German Officials Alarmed by Ex-Rapper's New Message: Jihad*, N.Y. TIMES, Sept. 1, 2011, at A1.

138. Patricia Butenis, U.S. Ambassador to Sri Lanka and Maldives, Remarks at the American Center Malé Opening Ceremony (Oct. 28, 2010) (transcript available at http://maldives.usvpp.gov/ambsp-28oct10.html) (noting Latif's visit); Harry Bruinius, *When NYPD Wears a Muslim Topi*, CHRISTIAN SCI. MONITOR, Mar. 20, 2009, at 25 (discussing Latif's role as NYPD chaplain). Among the imams who have traveled overseas on behalf of the State Department is also Imam Faisal Rauf, the spiritual leader of the embattled Park 51 Project based in lower Manhattan. *See* Thanassis Cambanis, *Imam Behind New York Project Starts Mideast Tour*, N.Y. TIMES, Aug. 20, 2010, at A3.

139. Haroon Moghul, Remarks at Conference of the Center on Law and Security at New York University School of Law: The Constitution and National Security: The First Amendment Under Attack (Nov. 5, 2010) (transcript available at http://centerlineblog.org/cls -events).

of State, and various state and local law enforcement agencies."[140] (It was the ADAMS Center where Deputy National Security Advisor Denis McDonough chose to debut the Obama Administration's strategy on domestic counter-radicalization in March 2011.[141]) And the website of Shaykh Muhammad Hisham Kabbani, an American Sufi leader,[142] includes under the heading of "Recent Accomplishments" records of meetings with President Bush, Vice President Cheney, Secretary of State Powell, and Prime Minister Tony Blair's staff, as well as appearances at various Prevent-sponsored events in the United Kingdom.[143]

Another illustration of the delicate nature of choosing interlocutors arose in 2009 when the FBI decided to sever its previously close relationship with the Council on American-Islamic Relations (CAIR), one of the largest civil rights organizations of its kind.[144] Although FBI officials publicly stated that the relationship collapsed over "a number of distinct narrow issues," it has been widely reported that in fact concern about CAIR's ambivalent attitude toward political Islam may explain the breakup.[145]

2. *Bureaucratic entrenchment*

The idea of bureaucratic entrenchment underscores the various ways in which counter-radicalization has changed the structure of government. It involves three interrelated phenomena: the creation of a domestic intelligence network for the purpose of informing counter-radicalization efforts; the creation and repurposing of government posts for a counter-radicalization infra-

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140. *About ADAMS*, ADAMS, http://www.adamscenter.org/about-us (last visited Jan. 14, 2012).

141. McDonough, *supra* note 2.

142. Sufism is attractive to some American political leaders for its relative openness. *See* William Dalrymple, *The Muslims in the Middle*, N.Y. TIMES, Aug. 17, 2010, at A27 ("[S]uch moderate, pluralistic Sufi imams are the front line against the most violent forms of Islam."). It is worth observing that although Sufism evokes for many the sort of Islam that thrives in pockets of hippy culture, Sufism has historically been drenched in violence. *See generally* BERNARD LEWIS, THE ASSASSINS (Basic Books 2003) (1967) (discussing the history of Sufi political assassinations in the Middle Ages).

143. *Shaykh Muhammad Hisham Kabbani*, AS-SUNNAH FOUND. AM., http://www.sunnah.org/about/shaykh_muhammad_hisham_kabbani.htm (last visited Jan. 14, 2012).

144. Alexandra Marks, *FBI and American Muslims at Odds*, CHRISTIAN SCI. MONITOR, Mar. 25, 2009, at 2, *available at* http://www.csmonitor.com/USA/Society/2009/0325/p02s01-ussc.html. It is also worth recalling that Anwar al-Awlaki, who was recently killed in a U.S. drone attack, was, in the immediate aftermath of 9/11, welcomed in the Pentagon as an important representative of American Islam. Catherine Herridge, *Exclusive: Al Qaeda Leader Dined at the Pentagon Just Months After 9/11*, FOX NEWS (Oct. 20, 2010), http://www.foxnews.com/us/2010/10/20/al-qaeda-terror-leader-dined-pentagon-months.

145. Marks, *supra* note 144, at 2, 2.

structure; and the imposition of counter-radicalization goals into the traditional welfare state.

First, the government has invested heavily in intelligence collection and analysis as part of a comprehensive approach to domestic counter-radicalization.[146] Counter-radicalization inevitably entails judgments about which individuals or communities have already or may become radicalized as well as the nature of the radicalization process itself.[147] Thus, the government has employed the nascent domestic intelligence apparatus to locate the boundaries—both conceptually and empirically—between radical and non-radical Islam. This intelligence gathering is authorized at the federal level by the Attorney General's FBI Domestic Operations Guidelines, which now allow the commencement of "threat assessments" even absent an official allegation of possible criminal wrongdoing.[148] The New York City Police Department and other state and local actors have also begun to conduct more active domestic intelligence gathering as part of their counter-radicalization efforts.[149]

Second, the government has created new bureaucratic posts—and repurposed others—to implement its counter-radicalization strategy. Examples include the recently developed position of Special Representative to Muslim Communities within the State Department, which is currently occupied by a Muslim woman named Farah Pandith.[150] Although her position ostensibly focuses on foreign policy, Pandith has also weighed in on matters of domestic

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146. *See* DEP'T OF HOMELAND SEC., *supra* note 54, at 2 (highlighting the need to "strengthen[] intelligence analysis" and research "to better understand the phenomenon of violent extremism"); Rascoff, *supra* note 12, at 1718-19 (noting a rise in domestic intelligence gathering due to the risk of a homegrown threat of radicalization); McDonough, *supra* note 2 (emphasizing resources devoted to intelligence collection); *cf.* EMILE A. NAKHLEH, A NECESSARY ENGAGEMENT: REINVENTING AMERICA'S RELATIONS WITH THE MUSLIM WORLD 37-70 (2009) (discussing CIA efforts to gather intelligence on Islamic activism abroad).

147. *See* WHITE HOUSE, EMPOWERING LOCAL PARTNERS, *supra* note 2, at 6 ("Although we have learned a great deal about radicalization that leads to violence, . . . [w]e must be vigilant in identifying, predicting, and preempting new developments. This necessitates ongoing research and analysis . . . .").

148. *See* Rascoff, *supra* note 3, at 606-07 (discussing the Attorney General's Guidelines).

149. *Fresh Air: Christopher Dickey: Intelligence the NYPD Way* (NPR radio broadcast Feb. 11, 2009), *available at* http://www.npr.org/templates/story/story.php?storyId =100559912 (discussing the NYPD's growing intelligence and counterterrorism work after 9/11).

150. Press Release, U.S. Dep't of State, Secretary Clinton Appoints Farah Pandith to Head New Office of the United States Representative to Muslim Communities (June 26, 2009), *available at* http://www.state.gov/r/pa/prs/ps/2009/06a/125443.htm. The State Department's Coordinator for Counterterrorism, Daniel Benjamin, also recently expanded his office to include a desk devoted to countering violent extremism. As Ambassador Benjamin stated in a recent congressional hearing, "[O]ne of the first things I did after being sworn in was to start developing a [Countering Violent Extremism] team . . . ." *U.S. Government Efforts Hearing*, *supra* note 93, at 5 (statement of Ambassador Daniel Benjamin, Coordinator for Counterterrorism, Department of State).

radicalization and addressed Muslim audiences in the United States, including Somali refugee groups, on such issues.[151] At the state level, Ohio until recently employed Omar Alomari as a Community Engagement Officer as part of an effort to address counter-radicalization within the Muslim community.[152] Alomari viewed his position as including the charge to "[e]ngage the youth in discussing and debating ideologies of cultural and religious extremism" and to produce literature touting "mainstream Islam and its universal appeal."[153] In other words, Alomari regarded the mission of his newly created office as being centrally concerned with the elaboration of Official Islam.

In other cases, preexisting offices within the government have been recast to address radicalization. For example, the Department of Homeland Security's Office for Civil Liberties and Civil Rights (OCLCR) was initially created to address complaints from American Arabs, Muslims, and Sikhs about violations of civil liberties.[154] Under pressure from the emerging counter-radicalization imperative, that Office's purpose has gradually shifted to include counter-radicalization, a change which has entailed tension. The head of the Office recently expressed the concern that this shift might undermine the core mission of the OCLCR, stating that "[a]lthough we can and should collaborate with community leaders to address this shared problem, 'countering violent extremism' is neither the principal reason we engage these communities nor the lens through which we view this engagement."[155]

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151. *See* Farah Pandith, Special Representative to Muslim Communities, Remarks at the Fletcher School of Law and Diplomacy at Tufts University: Muslim Engagement in the 21st Century (Jan. 28, 2010) (transcript available at http://www.state.gov/s/srmc/136413 .htm) (mentioning conversation with Somali refugees in Columbus, Ohio).

152. Omar Alomari served as the Community Engagement Officer for the Homeland Security Division of the Ohio Department of Safety, and also as an adviser to the U.S. Homeland Security Advisory Council, assisting the Countering Violent Extremism Working Group on recommendations to combat violent extremism domestically. *See Working with Communities*, *supra* note 44, at 22-23 (statement of Omar Alomari, Community Engagement Officer, Ohio Department of Safety) (explaining the nature and purpose of his position); HOMELAND SEC. ADVISORY COUNCIL, *supra* note 93, at 27. Alomari was recently fired for failing to disclose a past employment incident. Randy Ludlow, *Homeland Security Official Fired*, COLUMBUS DISPATCH, July 2, 2010, at B3.

153. *Working with Communities*, *supra* note 44, at 26 (statement of Omar Alomari, Community Engagement Officer, Ohio Department of Safety).

154. *About the Office for Civil Rights and Civil Liberties*, DEP'T HOMELAND SECURITY, http://www.dhs.gov/xabout/structure/editorial_0371.shtm (last modified Oct. 4, 2011) (listing as part of the office's mandate "[c]ommunicating with individuals and communities whose civil rights and civil liberties may be affected by Department activities, informing them about policies and avenues of redress, and promoting appropriate attention within the Department to their experiences and concerns"). Nowhere in the Office's mission statement is counter-radicalization mentioned.

155. *Working with Communities*, *supra* note 44, at 9 (statement of Margo Schlanger, Officer for Civil Rights and Civil Liberties, Department of Homeland Security). Notably, Schlanger participated in the aforementioned "Understanding Radicalization and De-Radicalization Strategies" community briefing. *See supra* note 132 and accompanying text.

Another example of the transformation of existing government posts in favor of counter-radicalization is the shifting understanding of the role of imams in federal and state prisons.[156] Prison officials have historically screened potential religious leaders of every faith tradition for indications that they would encourage violence within prisons.[157] Even given this practice, a 2004 report by the Office of the Inspector General in the Department of Justice found a number of structural flaws in the selection and monitoring of imams in the federal prison system.[158] Among the conclusions of the report were that the Bureau of Prisons (BOP) "typically does not examine the doctrinal beliefs of applicants for religious service positions to determine whether those beliefs are inconsistent with BOP security policies" and that "the BOP does not effectively use the expertise of its current Muslim chaplains to screen, recruit, and supervise Muslim religious service providers."[159] In the wake of these findings and in light of the impetus toward domestic counter-radicalization, officials are likely to place a greater emphasis on selecting imams with ideological sensibilities that will address (or at least not exacerbate) radicalization—not solely out of the traditional concern for prison security, but also in order to promote national security.[160]

Counter-radicalization may also have reshaped the way in which traditional law enforcement agencies manage their confidential informants.[161] Imagine

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156. The role of U.S. military chaplains has also been transformed by current national security needs. Chaplains have been employed on the ground in Afghanistan and Iraq in the way of religious diplomats who engage local clerical leadership. *See* Brian Mockenhaupt, *Enlisting Allah*, ATLANTIC, Sept. 2011, at 28 (describing the role of a U.S. Navy chaplain in instructing local Afghan populations in the Koran and Islamic theology).

157. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF PRISONS' SELECTION OF MUSLIM RELIGIOUS SERVICES PROVIDERS 12-13 (2004).

158. *See id.* at 42-50. The issue of prison radicalization has also been studied abroad. *See, e.g.*, JAMES BRANDON, QUILLIAM, UNLOCKING AL-QAEDA: ISLAMIST EXTREMISM IN BRITISH PRISONS 111 (2009) (suggesting that the Prison Service needs to "inoculate" prisons against extremist ideologies and de-radicalize current prisoners).

159. OFFICE OF THE INSPECTOR GEN., *supra* note 157, at 2.

160. *See, e.g.*, *The Threat of Muslim American Radicalization in Prisons: Hearing Before the H. Comm. on Homeland Sec.*, 112th Cong. (2011) (statement of Patrick Dunleavy, Retired Deputy Inspector General, Criminal Intelligence Unit) (observing that "[t]he prison population is vulnerable to radicalization by the same agents responsible for radicalizing Americans outside of the prison walls . . . [because] prison walls are porous" and calling for heightened scrutiny of Muslim clergy who serve in jails); JON A. OLSEN, DANISH INST. FOR INT'L STUDIES, RADICALISATION IN DANISH PRISONS 4 (Charlotte Hallin trans., 2008) (arguing that prison imams can "make it harder for a radical charismatic inmate to take on the role of the imam towards young converts").

161. *See* Charlie Savage, *F.B.I. Agents Get Leeway to Push Privacy Bounds*, N.Y. TIMES, June 13, 2011, at A1. An unflattering portrait of FBI intelligence gathering in certain California mosques emerges in a civil rights complaint in *Fazaga v. FBI*, No. SA11-CV0-00301CJC (C.D. Cal. Feb. 22, 2011). The government asserted the state secrets privilege in response. *See* Notice of Motion and Motion to Dismiss and for Summary Judgment at 22-35, *Fazaga*, No. SA11-CV0-00301CJC (C.D. Cal. Aug. 1, 2011).

that the FBI is contemplating employing an individual as a confidential informant in a mosque where authorities are concerned about the proliferation of radical ideology. The individual is attractive to law enforcement precisely because he possesses radical bona fides (having previously been an exponent of radical Islam himself) and will therefore have access to the institution. Further consider that the Bureau might want to take measures to protect against the prospective informant's reverting to a radical sensibility as he operates within a radical environment. It is conceivable that under these circumstances the Bureau would, in effect, furnish tutorials for the informant in "moderate" Islam as a means of shoring up his participation in official work.

Finally, in a move highly reminiscent of the British Prevent program, the bureaucratization of counter-radicalization is increasingly implicating government functions far afield of the national security apparatus of the state. Thus, former National Counterterrorism Center Director Michael Leiter endorsed a "'whole of government' approach" as "vital to addressing domestic radicalization."[162] That approach has taken root. For example, the U.S. Department of Education's Office of Safe and Drug-Free Schools recently commissioned a report entitled "Recruitment and Radicalization of School-Aged Youth by International Terrorist Groups."[163] Among the purposes of the study is to "help the Department of Education identify practical implications" of how recruitment and radicalization occur and determine "whether modifications to current policies and practices being used by U.S. schools are indicated."[164] Additionally, Denis McDonough recently announced that, as a key part of the Obama Administration's counter-radicalization strategy, "other departments, like Health and Human Services and Education, have joined with communities to better understand and address the social, emotional and economic challenges faced by young people so they can realize their full potential in America."[165]

3. *Expression*

The government (from the national to local levels) makes claims about the nature of Islam, frequently in order to further the goal of counter-radicalization, and thereby sets out its preferred tenets of Official Islam.[166] Those claims are

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162. *Nine Years After 9/11*, *supra* note 61, at 8 (statement of Michael Leiter, Director, National Counterterrorism Center).

163. HOMELAND SEC. INST., RECRUITMENT AND RADICALIZATION OF SCHOOL-AGED YOUTH BY INTERNATIONAL TERRORIST GROUPS (2009).

164. *Id.* at 1. The Office of Safe and Drug-Free Schools, in collaboration with the Homeland Security Institute, hosted a one-day seminar devoted to the issue of youth recruitment and radicalization, which was attended by a wide range of officials from within the federal national security apparatus as well as school security officers from across the country. *See id.* app. A (outlining seminar program).

165. McDonough, *supra* note 2.

166. McDonough's recent speech regarding the Obama Administration's approach to domestic counter-radicalization makes clear that these expressive dimensions form part of a

embedded in everything from presidential rhetoric to government-issued handbooks. Members of President Obama's staff have elaborated on the nature of Islam (and specific concepts within it) in addresses focused on domestic counter-radicalization. For example, addressing a gathering on the topic of American counterterrorism and its relationship to American Muslims, senior national security official John Brennan expressed the opinion that *jihad* does not refer to "murdering innocent men, women and children" but rather to "holy struggle, a legitimate tenet of Islam meaning to purify oneself [or] one's community."[167] Shortly after Brennan's public comments, Principal Deputy Coordinator for Counterterrorism Robert Godec reinforced and amplified Brennan's observations about *jihad*, making clear that they were intended as a statement of official policy.[168] Similarly, the Ohio Division of Homeland Security issued a *Guide to Arab and Islamic Culture* that teaches that "Jihad doesn't mean *holy war*, as many people are led to believe . . . [but rather] *a struggle to achieve excellence*," and that "[t]he term *holy war* is a European concept that began with the Crusades and was extended to Islam by the West."[169]

To be certain, the viewpoints espoused by these officials are not especially novel; indeed, they are attested within both traditional and contemporary Islam-

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larger strategy: "[W]e're working to improve how we communicate with the American people about the threat of violent extremism in this country and what we're doing to address it . . . . This includes dispelling the myths that have developed over the years, including misperceptions about our fellow Americans who are Muslim." *Id.*; *see also, e.g.*, WHITE HOUSE, EMPOWERING LOCAL PARTNERS, *supra* note 2, at 6 ("We must actively and aggressively counter the range of ideologies violent extremists employ to radicalize and recruit individuals by challenging justifications for violence . . . ."); James K. Glassman, *Winning the War of Ideas*, N.Y. SUN (July 23, 2008), http://www.nysun.com/opinion/winning-the-war-of-ideas/82438 ("Our mission today in the war of ideas is . . . to use the tools of ideological engagement—words, deeds, and images—to create an environment hostile to violent extremism. . . . [T]here is a complex, multi-sided battle going on in Muslim societies for power. . . . In this battle, our main role is to support constructive alternatives to violent extremism."). Within government circles, expressive counter-radicalization is frequently referred to as "messaging" or "counter-messaging." *See, e.g.*, NEUMANN, *supra* note 28, at 39-40 (recommending messaging as a key prong of counter-radicalization efforts).

167. Brennan, *supra* note 100. Note: This Article has been updated since its original printing. The updated version substitutes "[or]" for "of" in the cited quotation.

168. *See* Robert F. Godec, Principal Deputy Coordinator for Counterterrorism, U.S. Counterterrorism Policy: Remarks at the Global Young Leaders Conference (June 30, 2010) (transcript available at http://www.state.gov/s/ct/rls/rm/2010/143809.htm) ("As the Assistant to the President for Homeland Security and Counterterrorism John Brennan has said, 'we do not describe our enemy as jihadists or Islamists because jihad is holy struggle, a legitimate tenet of Islam meaning to purify oneself. . . . There is nothing holy or legitimate or Islamic about murdering innocent men, women, and children. Indeed, characterizing our adversaries this way would actually be counterproductive. It would play into the false perception that they are religious leaders defending a holy cause when in fact, they are nothing more than murderers, including the murder of thousands upon thousands of Muslims.'").

169. ALOMARI, *supra* note 94, at 19.

ic sources.[170] Yet as the noted scholar Olivier Roy has pointed out, contests about the meaning of *jihad* tend to be fruitless: arguments that the term inevitably implies violence are every bit as implausible as those that state that the term merely connotes internal self-mastery.[171] The central point for present purposes is not about the correct meaning of concepts within Islam—it is that expressive counter-radicalization implicates the government in making those theological determinations from within the religious doctrinal traditions of Islam in a way that is congenial to the American national security apparatus. These developments in expressive counter-radicalization put American policy on a trajectory similar to that of Prevent, concerning which a scholar has recently observed: "It is clear from its policy documents that the government intends not only to strengthen moderate Islam, but to help portray certain moderate variants as the true or correct doctrinal interpretation . . . ."[172]

Finally, certain dimensions of expressive counter-radicalization may be going on without any identifying connection to the American government. In recent years, military officers have sought and received greater authority overseas to operate (or underwrite) websites for the purpose of intervening in the internal "battle of ideas" within Islam.[173] While law and internal regulations require that such efforts be directed at overseas audiences,[174] it is in the nature of Internet communications that Americans will also inevitably have access to these websites.

In sum, American officials across state and local governments have become increasingly involved in the formulation and dissemination of Official Islam as part of the U.S. government's counter-radicalization strategy. Whether it is a state homeland security official who educates law enforcement officers about the meaning of "mainstream Islam" or a member of the national security staff who expresses a view about the true nature of Islamic faith, the official shaping of Islamic identity carries significant legal and strategic implications.

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170. *See, e.g.*, KHALED ABOU EL FADL, THE GREAT THEFT: WRESTLING ISLAM FROM THE EXTREMISTS 220-49 (2005) (discussing the contested meaning of *jihad* and rejecting "holy war" as the correct interpretation).

171. ROY, *supra* note 107, at 41.

172. David Stevens, In Extremis*: A Self-Defeating Element in the "Preventing Violent Extremism" Strategy*, 80 POL. Q. 517, 520 (2009).

173. *See, e.g.*, Daniel Silverberg & Joseph Heimann, *An Ever-Expanding War: Legal Aspects of Online Strategic Communication*, PARAMETERS, Summer 2009, at 77, 77-78 (describing Department of Defense policies authorizing online content by the U.S. military).

174. *See, e.g.*, CLAY WILSON, CONG. RESEARCH SERV., RL31787, INFORMATION OPERATIONS, ELECTRONIC WARFARE, AND CYBERWAR: CAPABILITIES AND RELATED POLICY ISSUES 3 (2007).

III.   THE ESTABLISHMENT CLAUSE AND COUNTER-RADICALIZATION:
FROM DOCTRINE TO STRATEGY

It is common ground that neither the U.S. government nor state and local governments may establish religion.[175] The meaning of that prohibition is deeply contested and is the subject of multiple doctrinal tests, academic theories, and political debates. That said, some core themes and widely held assumptions can be discerned both in the scholarship and in Supreme Court opinions interpreting and giving meaning to the Establishment Clause,[176] and my argument is that recent domestic counter-radicalization efforts generate friction with the Establishment Clause in at least three respects.[177]

First, and of greatest significance, counter-radicalization puts the government in the position, vis-à-vis Islam, of serving as a kind of official theologian, taking positions on the meaning of inevitably contested religious concepts and weighing in on one side of debates that rage within a particular faith tradition. Tension with this foundational norm of Establishment Clause doctrine is magnified by the inevitable participation of the nascent counter-radicalization bureaucracy in defining and enforcing the boundaries of Official Islam. I discuss these issues in connection with the *Lemon* test and concerns about Anti-Erastianism. Second, counter-radicalization is in tension with the endorsement test, which Justice O'Connor first debuted and which, while vigorously criti-

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175. *See* U.S. CONST. amend. I. Some scholars have read the Establishment Clause to be centrally concerned with federalism, prohibiting the national government but not the states from establishing religion. But ever since its modern origins in *Everson v. Board of Education*, 330 U.S. 1 (1947), the Supreme Court's Establishment Clause jurisprudence has assumed its applicability against subnational actors. *See* Smith, *supra* note 35, at 9 ("Ironically, modern decisions like *Everson v. Board of Education* that purported to 'incorporate' and extend the establishment clause in effect repudiated it, at least in its original meaning." (footnote omitted)).

176. *Cf.* Andrew Koppelman, *No Expressly Religious Orthodoxy: A Response to Steven D. Smith*, 78 CHI.-KENT L. REV. 729, 729 (2003) (allowing that the Supreme Court's pronouncements on religious freedom, taken together, "are no thing of beauty" but nonetheless observing that "[m]uch of the law in this area is . . . well-settled and uncontroversial").

177. There are certainly other plausible doctrinal lenses through which aspects of counter-radicalization could be evaluated. For example, one (to be sure, contested) line of cases sets out the boundaries of the Establishment Clause in terms of the "neutrality" of government engagement with religion. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) ("[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause."). More fundamentally, certain Establishment Clause cases have historically keyed constitutional violations to the presence of state funding. *See Everson*, 330 U.S. at 16 (upholding public funding of parochial school busing, but noting that the state "cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church"). While I do not explicitly analyze counter-radicalization under these doctrinal headings, there is overlap between the categories that I employ and these (and other) potential frameworks.

cized in the academic literature, continues to shape contemporary Establishment Clause jurisprudence. According to this test, by endorsing particular conceptions of Islam and rejecting others, the government potentially generates a state of (perceived) inequality between citizens as a function of their particular religious beliefs, and more generally stimulates a political economy predicated on religious insiders and outsiders. Third, and most tentatively, counter-radicalization creates the potential for tension with the Establishment Clause under the so-called coercion test, which highlights the capacity of state-sponsored religion to invade individual freedom of conscience. This test, which courts have invoked especially in cases where young people were thought to be at risk of government indoctrination, carries implications for aspects of counter-radicalization that have tended to be disproportionately concerned with young Muslims. As to each of these, beyond merely entertaining the possibility that certain counter-radicalization programs are plausible candidates for constitutional scrutiny, this Part also considers how the enterprise of Official Islam implicates the theoretical concerns underlying the Establishment Clause.[178]

This Part further considers how the core policy debates that have emerged in the United Kingdom with respect to Prevent are likely to play out in terms of Establishment Clause objections to the emerging American involvement in counter-radicalization. I refer to the merging of these policy-based critiques and legal concerns as the "strategic Establishment Clause." Indeed, the counter-radicalization programs most likely to be in tension with the Establishment Clause are also likely to produce minimal benefits—and at the same time are likely to impose substantial costs—when it comes to our national security.

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178. Not long ago Noah Feldman observed that "the Establishment Clause has generated comparatively little academic writing about why (as opposed to how) church and state should be kept distinct." Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 674 (2002). Less than a decade later, theories of the Establishment Clause rooted in historical and normative accounts have flourished. *See, e.g.*, CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007) (political equality); FELDMAN, *supra* note 33 (conscience); MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (2008) (equality); Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793 (2006) (religious exemptions in historical light); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L REV. 115 (1992) (religious pluralism); Smith, *supra* note 35 (preventing government control of religion). However, the recent proliferation of Establishment Clause theories has hardly produced consensus on a unifying theory. A leading treatise on the Religion Clauses states boldly that "there is, in fact, no" convincing comprehensive theory of the Establishment Clause. 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION 433, 451 (2008).

A. *The* Lemon *Test and Anti-Erastianism*

1. *Legal framework*

Although much-maligned,[179] the *Lemon* test continues to shape the adjudication of certain Establishment Clause cases in the Supreme Court and in the lower courts. Under the test, government action must have a "secular . . . purpose, . . . its principal or primary effect must be one that neither advances nor inhibits religion," and it must not bring about "excessive government entanglement" with religion.[180] Unless the government action in question passes all three parts of the *Lemon* test, it is deemed to be unconstitutional.[181]

The *Lemon* test embodies one of the central motifs in Establishment Clause theory, namely that the Framers "disclaimed the Erastian power to set up an official church"[182] comparable to the establishments in Europe from the late eighteenth century down to the present day.[183] So clearly would the presence of such an established church violate the Constitution that the Supreme Court has never been in a position to consider a policy that threatened this sort of core violation.[184] As historians of the Establishment Clause have observed, the religious pluralism that existed at the time of the First Amendment's birth—and that has proliferated exponentially ever since—has guaranteed that such a true "establishment" of an official American church would never have been politically viable.[185] But the Anti-Erastian strain of the Establishment Clause goes further, forbidding official involvement in making theological determinations.[186] As the Court famously said, "The law knows such no heresy, and is com-

179. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.").

180. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970))).

181. *See* 2 GREENAWALT, *supra* note 178, at 45.

182. Smith, *supra* note 35, at 12. Official Islam presents a variation on the theme of establishment, in that rather than seeking to make Official Islam the religion of the United States, the U.S. government seeks to enforce it only as the religion of American Muslims. In this sense, the imposition of Official Islam can be seen as a form of "ironic establishment."

183. *See* Alan Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 709 (1968) ("It is agreed that the establishment clause prohibits government from intentionally creating an official or preferred religion . . . .").

184. *Cf.* Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (setting as a baseline that the Establishment Clause means at least that "[n]either a state nor the Federal Government can set up a church").

185. *See* FELDMAN, *supra* note 33, at 26 ("[T]he religious diversity *between* states made a national establishment impossible.").

186. Similar concerns are evident in other liberal democracies. During the veil controversy in France, one commentator observed: "[I]t is almost laughable to see members of the government and the president himself pompously arguing that such a veil is not truly Mus-

mitted to the support of no dogma, the establishment of no sect."[187] Or as the Second Circuit reasoned, striking down a New York state statutory scheme as a violation of *Lemon*, "The challenged laws . . . excessively entangle the State with religion because they require New York to adopt an official State position on a point of religious doctrine."[188]

Anti-Erastianism has an institutional dimension. The state lacks the epistemological authority and administrative ability necessary to parse nuanced theology and to intervene in the religious lives of believers. As Madison put it in his celebrated *Memorial and Remonstrance*, the view that "the Civil Magistrate is a competent Judge of Religious truth" is an "arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world."[189] Moreover, to the extent that the government becomes involved in the regulation of religion, its interventions are frequently regarded as illegitimate by those whose minds it is trying to shape. As Locke argued:

> The one only narrow way which leads to heaven is not better known to the magistrate than to private persons, and therefore I cannot safely take him for my guide, who may probably be as ignorant of the way as myself, and who certainly is less concerned for my salvation than I myself am.[190]

The government official is not incentivized to think about the religious goals of citizens, only their secular well-being. This causes a fundamental legitimacy gap when the state endeavors to regulate religious ideation and practice.[191]

Anti-Erastianism is also bound up with concerns about the effects that official regulation—itself likely motivated by the state's secular logic—has on the integrity of religious life. As Andrew Koppelman has argued, "The core Establishment Clause violation, from the perspective of the corruption argument, is

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lim, as if more knowledgeable than the Muslims themselves about the orthodox prescriptions of their own lifestyle. A peculiar facet of so-called French secularism sees government ministers assuming the fashionable role of imams." Raphaël Liogier, Op-Ed., *The Attack on the Veil Is a Huge Blunder: France's Ill-Founded Push to Ban the Face Covering Is Rooted in a Wider Crisis of Identity and Influence*, GUARDIAN (London), Jan. 27, 2010, at 30.

187. Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1872).

188. Commack Self-Serv. Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 427 (2d Cir. 2002).

189. 2 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments* (1785), *in* THE WRITINGS OF JAMES MADISON 183, 187 (Gaillard Hunt ed., 1901); *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, No. 10-553, slip op. at 8-9 (U.S. Jan. 11, 2012) ("By forbidding the 'establishment of religion' and guaranteeing the 'free exercise thereof,' the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices.").

190. JOHN LOCKE, *A Letter Concerning Toleration* (1689), *in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 215, 230 (Ian Shapiro ed., 2003).

191. *See* Whitaker, *supra* note 125 (criticizing the U.K. government's reliance on counter-radicalization strategy provided by the Quilliam Foundation, which, in a leaked briefing paper, suggested "choos[ing] which Muslim organisations to work with 'according to their commitment to shared values which help to foster national cohesion and integration, and according to their willingness to challenge the Islamist ideology that lies behind terrorism'").

action by the state that intentionally manipulates religion to serve official ends."[192] The Framers understood the intellectual stakes of this rationale to be high. They were aware of Hume's argument that political control of religion was necessary precisely in order to sap the latter of its vitality and public appeal—that, in the words of S.P. Foster, religion ought to be "managed and neutralized by the state."[193] Regardless of whether the state sought explicitly to undermine religion or merely to manipulate it to achieve the state's secular objective, the Anti-Erastian Establishment Clause was there to stand in the way.[194]

2. *Strategic worries about legitimacy and competence*

Insofar as counter-radicalization entails the creation of a governmental apparatus designed to intervene into the belief structures of American Islam, it may implicate doctrinal and theoretical concerns rooted in Anti-Erastianism. In a more policy-oriented vein, practical questions about the government's legitimacy and competence at counter-radicalization have played out dramatically in the context of Prevent. Most fundamentally, a wide range of officials and commentators have criticized Prevent for failing to achieve its stated strategic goal of countering violent extremism—and possibly even exacerbating the problem it attempts to solve.[195] Critics typically put forward two reasons. First, governments are simply not adept at performing counter-radicalization, especially in its more religious modalities. Effective counter-radicalization programs of this kind require immense amounts of insight into questions that merge theology with cutting-edge social science. It is questionable whether any institution—let alone a secretive government bureaucracy that lacks a track

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192. Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1927 (2009). As the Supreme Court has said, "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948); *see also* Lemon v. Kurtzman, 403 U.S. 602, 650 (1971) (Brennan, J., concurring in part and dissenting in part) ("The picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental secularization of a creed." (internal quotation marks omitted)).

193. *See* S.P. Foster, *Different Religions and the Difference They Make: Hume on the Political Effects of Religious Ideology*, *in* 5 DAVID HUME: CRITICAL ASSESSMENTS 377, 392 (Stanley Tweyman ed., 1995).

194. Of particular relevance here is the fact that the mere presence of a "secular purpose" is insufficient to immunize official action from Establishment Clause liability under *Lemon*.

195. *See* Stevens, *supra* note 172, at 518 ("[T]his arm of [Preventing Violent Extremism] is, at best, barking up the wrong tree; at worst, fuelling extremism.").

record of social-scientific insight—is well positioned to develop that sort of analytic account.[196]

Second, the government may fail at counter-radicalization because of the messenger, not the message itself.[197] That is, the government lacks credibility within Muslim communities and lacks expertise regarding the relevant religious issues. As anthropologist Scott Atran has recently cautioned, "Appeals to moderate Islam are about as irrelevant as older people appealing to adolescents to moderate their music or clothes."[198] Concerning the credibility gap, evidence suggests that identification with a government-sponsored counter-radicalization program tends to undermine the credibility of the actor or group in question. As a parliamentary report deeply critical of Prevent recently put it, the problem of government efficacy at counter-radicalization "is exacerbated by the possible risk that any organisation endorsed by Government or local authorities— however 'radical'—stands to lose its credibility once 'approved' by the authorities."[199] Some have argued that the legitimacy gap is at its widest when Western governments practice counter-radicalization. As a British commentator recently noted, "It is one thing for Muslim countries like Indonesia or Saudi Arabia to promote scholar-led, Qur'an-based deradicalisation programmes, but quite another for non-Muslim countries like the United Kingdom and the United States. It just isn't credible."[200] But the argument need not depend on the peculiarly non-Islamic identity of the Western state. Contemporary radical Islam is, in a deep sense, a form of rejection of traditional Islamic authority that has historically been deeply tied to the state.[201] As Quintan Wiktorowicz has

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196. *See* Huq, *supra* note 63, at 56-57 ("[T]errorism presents particularly acute epistemic problems: terrorists are not transparent about their intentions, particularly to the state; post hoc accounts from perpetrators about their motives merit skepticism; and many of the normal tools of empirical analysis are unavailable.").

197. *See* Stephen J. Schulhofer et al., *American Policing at a Crossroads* 5 (NYU Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 10-55, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1663819 (arguing that compliance with officials is shaped by "the strength of citizens' belief that law enforcement agencies are legitimate" (emphasis omitted)).

198. Atran, *supra* note 68; *cf.* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, No. 10-553, slip op. at 4 (U.S. Jan. 11, 2012) (Alito, J., concurring) ("When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters.").

199. PREVENTING VIOLENT EXTREMISM, *supra* note 97, at 42.

200. Mehdi Hasan, *The Wrong Kind of Intervention*, GUARDIAN (July 20, 2010, 9:01 EDT),   http://www.guardian.co.uk/commentisfree/belief/2010/jul/20/terrorism-policy -theology -islam. The author further questioned the efficacy of government interventions into religious matters, asking, "So does counterterrorism need to have a religious and, in particular, an Islamic angle? Should our leading spooks and cops be dabbling in theology? In Qur'anic tafsir and the science of hadith? Does it matter if a special branch officer can't tell a Salafi from a Sufi?" *Id.*

201. *See, e.g.*, NOAH FELDMAN, THE FALL AND RISE OF THE ISLAMIC STATE 105-11 (2008) (noting that traditional Islamic scholars have played little role in contemporary Islamic political thought).

argued, "Islamic movements offer themselves as autonomous interpreters capable of assessing the divine sources of Islam without bias."[202] In other words, radical Islam's motivating theology and hermeneutic depend on a rejection of the idea of Official Islam.

The likelihood of conflict with Anti-Erastianism has increased under the banner of U.S. domestic counter-radicalization efforts.[203] As discussed above, counter-radicalization functionally requires government employees to become expert in aspects of Islamic law and doctrine.[204] In so doing, officials are tasked with determining "the significance and the meaning of disputed religious doctrine"[205] and with employing "religious organizations as an arm of the civil [government] to perform the function of interpreting and applying state standards."[206] Furthermore, these bureaucracies tend to employ Muslims in order to discharge their mandates both in official positions and as informal ambassadors of government-approved Islamic thought. This practice may run up against the Religious Test Clause of the Constitution, which denies the government the power to limit public offices to persons who hold a particular religious belief.[207]

The problem of religious expertise has already taken a toll.[208] Reports suggest that government officials are woefully lacking in the sort of fine-grained understanding of the languages and cultural syntax of Islam, without which counter-radicalization efforts are doomed to fail.[209] A particularly dispiriting example is supplied by a recent investigative report by the *Washington Post* that revealed the misinformation regarding Islam provided to American law enforcement officers. The *Post* reported that Ramon Montijo, a former Army

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202. WIKTOROWICZ, *supra* note 65, at 21.

203. Through its counter-radicalization efforts, the United States is relaxing the boundaries between church and state in response to its conflict with an ideology predicated on the absence of such a distinction. Thus, employing Official Islam as a tool of counter-radicalization may supply confirmation of what Daniel Patrick Moynihan called the "iron law of emulation"—that enemies in a conflict come to resemble one another. *See* Steven R. Weisman, *Introduction* to DANIEL PATRICK MOYNIHAN: A PORTRAIT IN LETTERS OF AN AMERICAN VISIONARY 1, 2 (Steven R. Weisman ed., 2010).

204. *See supra* Part II.B.3.

205. Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 452 (1969) (Harlan, J., concurring).

206. *Id.* at 451 (majority opinion).

207. *See* Torcaso v. Watkins, 367 U.S. 488, 494 (1961) (striking down a Maryland requirement that notaries public must believe in God and disavowing any notion that government can "limit[] public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept").

208. *See* NEUMANN, *supra* note 28, at 40 ("At the same time, government pronouncements about the character of Islam or the 'true' meaning of religious concepts (such as jihad), however well intentioned, are not credible, nor do they do justice to complex theological debates.").

209. The FBI is famously lacking in employees who have Arabic language skills. *See* Dan Eggen, *FBI Agents Still Lacking Arabic Skills*, WASH. POST, Oct. 11, 2006, at A1 (reporting that only 33 of 12,000 FBI agents "have even a limited proficiency in Arabic").

Special Forces sergeant and Los Angeles Police Department investigator and now a private security consultant with extensive contacts in the law enforcement community, teaches his official audiences that the majority of Muslims in the United States "want to make this world Islamic" and that without sufficient attention, "[t]he Islamic flag will fly over the White House."[210] In sum, the counter-radicalization imperative has begun to generate tension with the First Amendment's Anti-Erastianism by putting the government in the position of aiming to achieve a secular benefit by discerning and spreading religious truth about Islam.

B. *Endorsement, Nonpreferentialism, and Equality*

1. *Legal framework*

The endorsement test was first proposed by Justice Sandra Day O'Connor in her concurring opinion in the 1984 case of *Lynch v. Donnelly*[211] and was later adopted by a majority of the Court in *County of Allegheny v. ACLU*.[212] The test calls for the invalidation of government action if "a reasonable observer would view such longstanding practices as a disapproval of his or her particular religious choices."[213] Under this test, then, it is the perception of the "reasonable observer" (to whom some sort of familiarity with the government action or with the display at issue is frequently imputed[214]), rather than the state's intent, that matters.[215]

In the concurrence in which she debuted the endorsement test, Justice O'Connor reasoned that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[216] The Court has continued to invoke the endorsement

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210. *See* Priest & Arkin, *supra* note 18.

211. 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

212. 492 U.S. 573, 595-97 (1989).

213. *Id.* at 631 (O'Connor, J., concurring in part and concurring in the judgment).

214. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (noting that the endorsement test asks "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of [religion] in public schools" (quoting Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring in the judgment))); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears.").

215. *See* Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713, 717-26 (2001) (observing the development away from a focus on political alienation among citizens with specific religious perspectives to a more generalized concern for the welfare of a hypothetical "objective observer").

216. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

test, especially where the government has engaged in some kind of expressive activity, such as religious displays on government property and school funding.[217] Given the mixed reputation of the *Lemon* test, it is probably not an exaggeration to say that the endorsement test is the reigning standard by which potential Establishment Clause violations are judged.

The endorsement test looks at violations of the Establishment Clause in terms of political equality and the recognition of religious pluralism. Does this or that public display cause certain viewers to regard themselves as professing a faith that is endorsed (or rejected) by the state? If so, the display may violate the political equality of citizens—and with it, the Establishment Clause.[218] Justices Kennedy and Breyer have noted that a core concern of endorsement is the tendency of official policies of this sort to interfere with the delicate ecosystem of American religious pluralism. As Justice Kennedy has explained, "Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial."[219] And as Justice Breyer has emphasized, the Establishment Clause is motivated in part by the desire to avoid "religiously based social conflict," which the Framers understood implied the possibility of unrestrained violence.[220] Along these

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217. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 655 (2002) (applying endorsement test to a school voucher program); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 100 (2001) (applying test to a school district's policy regarding a religious student club meeting on school property); Mitchell v. Helms, 530 U.S. 793, 798 (2000) (applying test to programs providing governmental aid to parochial schools); Agostini v. Felton, 521 U.S. 203, 235 (1997) (same).

From its very inception, the endorsement test has been the subject of intense academic criticism rooted in a range of practical and historical concerns. *See generally* Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & Pol. 499, 499 (2002) (arguing that the endorsement test "provides neither a workable nor a wise judicial standard"); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266, 267 (1987) (arguing that the "no endorsement" test does not eliminate—and may instead compound—the "inconsistencies and defects that have plagued establishment analysis").

218. Endorsement places at the heart of the constitutional analysis the question of how the "tutelary state" serves as a powerful shaper of social meaning. *See* Sanford Levinson, *The Tutelary State: "Censorship," "Silencing," and the "Practices of Cultural Regulation,"* *in* Censorship and Silencing: Practices of Cultural Regulation 195, 197-99 (Robert C. Post ed., 1998) (emphasizing the role of the government as a shaper of public morality).

219. Bd. of Educ. v. Grumet, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring in the judgment); *see also* Catholic League for Civil & Religious Rights v. City & Cnty. of S.F., 624 F.3d 1043, 1052 (9th Cir. 2010) (en banc) ("Plaintiffs allege that . . . the stigmatizing resolution leaves them feeling like second-class citizens of the San Francisco political community, and expresses to the citizenry of San Francisco that they are."), *cert. denied*, 131 S. Ct. 2875 (2011).

220. *Zelman*, 536 U.S. at 717-18 (Breyer, J., dissenting); *cf.* Van Orden v. Perry, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in the judgment) (worrying that mandating the removal of certain Ten Commandments displays from public buildings might prove contro-

lines, Chris Eisgruber and Larry Sager have provided a theoretical account of
the Establishment Clause that rests its normative foundations on a concern for
the "equal liberty" of members of the political community.[221] Their notion of
equal liberty requires that "no members of our political community ought to be
devalued on account of the spiritual foundations of their important commit-
ments and projects."[222]

Casting violations of the Establishment Clause in terms of equality is
not limited to the endorsement test. Powerful intimations of an equality norm
are also present in the Court's commitment to nonpreferentialism in the treat-
ment of religion:

> Government in our democracy, state and national, must be neutral in mat-
> ters of religious theory, doctrine, and practice. It may not be hostile to any re-
> ligion or to the advocacy of no-religion; and it may not aid, foster, or promote
> one religion or religious theory against another or even against the militant
> opposite.[223]

For the state to prefer one religious teaching over another would implicate
"[t]he clearest command of the Establishment Clause . . . that one religious de-
nomination cannot be officially preferred over another."[224] Inevitably, the
boundaries of this nonpreferentialism are contested, with liberals generally tak-
ing the view that it covers preferences for (monotheistic) religion over nonreli-
gion while conservatives see nonpreferentialism as placing limits on govern-
ment solely insofar as it favors one religious sect over another.[225] But to
concede the fundamentally contested nature of nonpreferentialism's boundary
is simultaneously to allow that there is consensus around the view that "our
constitutional tradition . . . rule[s] out of order government-sponsored endorse-
ment of religion . . . where the endorsement is sectarian, in the sense of specify-
ing details upon which men and women who believe in a benevolent, omnipo-
tent Creator and Ruler of the world are known to differ . . . ."[226]

2.   *Strategic worries about equality and pluralism*

British counter-radicalization has been marked by the sustained criticism
that Prevent embodies the tendency to put the government in the position of
touting one or another Islamic viewpoint as officially sanctioned. For example,

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versial to the point where it would "create the very kind of religiously based divisiveness
that the Establishment Clause seeks to avoid").

221. EISGRUBER & SAGER, *supra* note 178, at 4.

222. *Id.*

223. Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968).

224. Larson v. Valente, 456 U.S. 228, 244 (1982).

225. *Compare* Wallace v. Jaffree, 472 U.S. 38, 53 (1985) ("[T]he individual freedom of
conscience protected by the First Amendment embraces the right to select any religious faith
or none at all."), *with id.* at 113 (Rehnquist, J., dissenting) ("[N]othing in the Establishment
Clause requires government to be strictly neutral between religion and irreligion . . . .").

226. Lee v. Weisman, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).

the "Radical Middle Way" component of Prevent entails active government in-
volvement in a "Road Show" of "mainstream" imams—in other words, clerics
carefully vetted by the state whose preaching is in harmony with the normative
conception of Islam that the state seeks to inculcate.[227] More fundamentally,
Prevent has been criticized for effecting a transformation in the relationship be-
tween Muslim citizens and the state—a phenomenon commonly referred to as
"securitization."[228] Securitization is itself multidimensional. At one level, secu-
ritization speaks to the manner in which Muslims—especially those who fit the
bill of potential radicals—are now perceived by the state (and by non-Muslim
fellow citizens, perhaps) as potential radicals in need of official attention and
"therapy." Complex patterns of stigmatization and sorting along (and within)
confessional lines are the result.[229] As Intissar Kherigi has observed, Prevent
has "created an artificial distinction between 'moderate' and 'extremist' which
was exploited by both government and the various Muslim bodies that had be-
come involved."[230]

More concretely, Prevent has created an awkward political economy in
which Muslim groups have access to special counter-radicalization funding.
For example, a group of British teenagers of Pakistani heritage is likely to re-
ceive funding for an evening soccer league from a Prevent fund on the theory
that athletics can serve as an outlet for youthful energy that might otherwise be
directed in more sinister ways.[231] Furthermore, some have suggested that in the
British prison system, recent moves to recruit more imams "have caused dis-
may and some anger, with Christians complaining about the amount of cash
and other resources being devoted to Muslims."[232] Thus, the political economy
of Prevent has created and reinforced unequal access to public funding along

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227. *See supra* note 122 and accompanying text.

228. *See* PREVENTING VIOLENT EXTREMISM, *supra* note 97, at 53 (mentioning public
discomfort with the increasingly security-based relationship between law enforcement and
public services). This concern has been raised in the United States as well. *See* McDonough,
supra note 2 ("We refuse to 'securitize' the relationship between the government and mil-
lions of law-abiding, patriotic Muslim Americans and other citizens.").

229. *Cf.* Adam Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting
Principles* 17-18 (Univ. of Chi. Law Sch. Pub. Law & Legal Theory Working Paper Grp.,
Paper No. 112, 2005), *available at* http://www.law.uchicago.edu/files/files/112.pdf (discuss-
ing the relationship between the Establishment Clause and worries about sorting along reli-
gious lines).

230. Intissar Kherigi, *No Legitimacy—No Influence*, GUARDIAN (July 21, 2010, 11:00
EDT),   http://www.guardian.co.uk/commentisfree/belief/2010/jul/21/counterterrorism
-theology-prevent.

231. HM GOV'T, THE PREVENT STRATEGY: A GUIDE FOR LOCAL PARTNERS IN ENGLAND
46   (May   2008),   *available   at*   https://www.education.gov.uk/publications/
eOrderingDownload/Prevent_Strategy.pdf ("The cultural and sporting sectors can play an
important role in delivering specific key interventions to those who are at risk of radicalisa-
tion.").

232. Richard Ford, *Jail Imams Vetted by Security Services and Muslim Books Screened
for Code*, SUNDAY TIMES (London), Feb. 26, 2007, at 4.

religious lines.[233] It is unsurprising, perhaps, that there are indications from the United Kingdom that Prevent has motivated a nativist anti-Muslim political constituency.[234]

Similar dynamics are emerging with respect to American counter-radicalization. First, and most basically, certain counter-radicalization decisions—whether the choice of groups or religious leaders with which to engage in dialogue, or the official demarcation of the boundary between "mainstream" and "radical" Islam—have the potential to create and reinforce a sense of political inequality within the Muslim population.[235] That is, due to the selective quality of these programs, certain believers regard themselves as being favored by the state while others see themselves as marginal and disfavored. As Raffaello Pantucci has said of Prevent, "[I]t could seem that the government is choosing to engage with those it sees as 'good Muslims', suggesting by default that those who have not been engaged with are 'bad Muslims'."[236]

Second, counter-radicalization efforts can create a sense of political inequality between Muslims and non-Muslims. The theory underlying counter-radicalization—and especially underlying efforts aimed at transforming entire communities—treats Muslims as simultaneously posing a unique threat to security and possessing the distinctive capacity to address that threat. Especially at a time when anti-Muslim sentiment is on the rise in the United States—as evidenced by the anti-sharia constitutional amendment in Oklahoma[237] and the

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233. *See* Douglas Murray, *Britain's Islamist Split*, WALL ST. J. EUR., June 8, 2011, at 15 ("One strand of Prevent aimed to use taxpayers' money to fund a variety of groups claiming to draw young British Muslims away from violent extremism. If the theory was poor, the reality was worse. Prevent swiftly became a magnet for racketeers, a cash-cow for extremists and a textbook example of government overreach.").

234. *See* Lauren Collins, *England, Their England*, NEW YORKER, July 4, 2011, at 28 (describing the rise of what Collins calls the "Islamophobic Right" in England).

235. In the case of Representative Peter King's hearings on radicalization, *see supra* note 16, many advocacy groups expressed a concern that King's hearings—in particular, the selection of witnesses—would stigmatize large groups of Muslims. Even one of the witnesses scheduled to testify in front of Representative King's committee expressed serious concerns about the nature of the hearing. *See* Jill Jackson & Nancy Cordes, *Rep. Keith Ellison: Radicalization an Issue Across Religions, Not Just for Muslims*, CBS NEWS (Mar. 8, 2011), http://www.cbsnews.com/8301-503544_162-20040836-503544.html (referring to hearings as "McCarthyistic").

236. Raffaello Pantucci, *A Contest to Democracy? How the UK Has Responded to the Current Terrorist Threat*, 17 DEMOCRATIZATION 251, 262 (2010).

237. *See* Aziz Huq, *Defend Muslims, Defend America*, N.Y. TIMES, June 20, 2011, at A27 (observing that the anti-sharia movement coincides with a "pattern of growing animus toward American Muslims" based on spikes in incidents of anti-Muslim employment discrimination and hate crimes). State Representative Rex Duncan introduced House Joint Resolution 1056, which allowed Oklahomans to vote in the November 2010 election to amend the state constitution to prevent judicial rulings based on international law or sharia law. The resolution passed 91-2 in the Oklahoma House of Representatives. Press Release, State Representative Rex Duncan, Legislation Advances to Prevent Foreign Court Rulings from Impacting Oklahomans' Rights (Mar. 15, 2010), *available at* http://www.okhouse.gov/OkhouseMedia/ShowStory.aspx?MediaNewsID=3504.

fever-pitched resistance to the construction of an Islamic center near Ground Zero[238]—counter-radicalization may create unwelcome official and societal attention to American Muslims. Somewhat more abstractly, the very fact that the government engages in counter-radicalization with an eye on the Muslim community tends to create a divide between the government and the Muslim community.[239]

Concerns rooted in the logic of endorsement do not end there. True to Justice O'Connor's most basic worry,[240] counter-radicalization may generate feelings of alienation within the Muslim community,[241] which in turn may generate a backlash against official activity. In other words, counter-radicalization, if pursued in such a way as to threaten the perceived political equality of Muslims, may well exacerbate the problem that counter-radicalization sets out to solve in the first place.[242]

C. *Coercion and Liberty of Conscience*

1. *Legal framework*

The coercion test was first adopted by the Supreme Court in the 1992 case of *Lee v. Weisman*,[243] in which the Court found that a prayer led by a rabbi at a public school graduation ceremony ran afoul of the Establishment Clause. Justice Kennedy wrote for the Court:

> [T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. . . . [P]rayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school

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238. *See, e.g.*, *Imam's Wife Tells of Death Threats*, N.Y. TIMES, Oct. 4, 2010, at A20 (discussing security threats to Imam Rauf amidst opposition to the plans to build an Islamic community center near Ground Zero).

239. In a sense, the very fact that the establishment in question is "ironic," *see supra* note 182, raises issues rooted in the endorsement test and its underlying concern for the equal political standing of citizens.

240. *See* Koppelman, *supra* note 192, at 1839-41 (describing Justice O'Connor's endorsement test as predicated on concerns of alienation).

241. *Cf.* Oliver King, *Criticism for New Muslim Organisation*, GUARDIAN (July 19, 2006, 12:24 EDT), http://www.guardian.co.uk/politics/2006/jul/19/immigrationpolicy .religion (reporting criticisms by the Muslim Council of Britain that the Sufi Muslim Council is "unrepresentative and divisive").

242. The Obama Administration appears to be aware of this risk. *See* WHITE HOUSE, EMPOWERING LOCAL PARTNERS, *supra* note 2, at 2 ("Violent extremists prey on the disenchantment and alienation that discrimination creates, and they have a vested interest in anti-Muslim sentiment.").

243. 505 U.S. 577 (1992).

context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.[244]

Justice Kennedy had previously debuted the coercion test in his partial concurrence in *County of Allegheny v. ACLU.* There, he openly disagreed with the endorsement test and argued that coercion ought to be the touchstone for deciding all Establishment Clause cases.[245] As he put it, "[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal."[246] Justice Kennedy also hinted at the more psychologically in- formed coercion standard that he later introduced in *Lee*, noting that coercion may go beyond "*direct* coercion in the classic sense" to include subtle coercion when the government provides "[s]ymbolic recognition or accommodation of religious faith . . . in an extreme case."[247]

The coercion test continues to inform analysis both at the Supreme Court and in the lower courts, especially in the contexts of young people and schools.[248] Still, scholars disagree about the usefulness and effectiveness of the coercion test, with some arguing that it creates unnecessary confusion in Estab- lishment Clause jurisprudence,[249] and others maintaining that the coercion test or a modified version of it should supply the overall foundation of Establish- ment Clause doctrine.[250]

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244. *Id.* at 592 (citations omitted).

245. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 659-60 (1989) (Kennedy, J., concur- ring in the judgment in part and dissenting in part). The coercion test, with its emphasis on the role of the state in compelling participation in religious activity of a certain kind, bears a deep conceptual affinity with the core concerns of Free Exercise jurisprudence. Indeed, crit- ics of the coercion test have claimed that "[t]o require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy." *Id.* at 628 (O'Connor, J., concurring in part).

246. *Id.* at 662 (Kennedy, J., concurring in the judgment in part and dissenting in part).

247. *Id.* at 661; *see also* Steven Goldberg, *Beyond Coercion: Justice Kennedy's Aver- sion to Animus*, 8 U. PA. J. CONST. L. 801, 801 (2006) (suggesting that Justice Kennedy, even though a proponent of a "pure" coercion test, might nevertheless regard certain psychologi- cally coercive displays to be Establishment Clause violations).

248. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301-02 (2000) ("Al- though this case involves student prayer at a different type of school function, our analysis is properly guided by the principles that we endorsed in *Lee*."); Croft v. Perry, 624 F.3d 157, 169 (5th Cir. 2010) ("Although not mentioned by the parties, we use a three-part test in ap- plying *Lee*. '[U]nconstitutional coercion occurs when: (1) the government directs (2) a for- mal religious exercise (3) in such a way as to oblige the participation of objectors.'" (quoting Doe v. Beaumont Indep. Sch. Dist., 173 F.3d 274, 285 (5th Cir. 1999))); *see also* ROGER J.R. LEVESQUE, NOT BY FAITH ALONE 5 (2002) ("In *Lee v. Weisman* . . . and *Santa Fe Indepen- dent School District v. Doe* . . . the Court described adolescents as especially vulnerable to religious ideas and therefore in need of protection from peer pressure they would face if prayers were to be offered at public occasions.").

249. *See, e.g.*, Mark Strasser, *The Coercion Test: On Prayer, Offense, and Doctrinal Inculcation*, 53 ST. LOUIS U. L.J. 417, 418 (2009) (highlighting ways in which the Court's coercion jurisprudence has created unnecessary difficulty and confusion).

250. *See, e.g.*, Stephen M. Durden, *In the Wake of* Lee v. Weisman*: The Future of School Graduation Prayer Is Uncertain at Best*, 2001 BYU EDUC. & L.J. 111, 159 (suggest-

The coercion test resonates with a family of historically informed Establishment Clause theories propounded by First Amendment experts such as Michael McConnell and Noah Feldman. Both emphasize the role that a concern for the "liberty of conscience" of religious dissenters played in the original design of the First Amendment.[251] As McConnell has stated, "The generation that adopted the First Amendment viewed some form of governmental compulsion as the essence of an establishment of religion."[252] From this historical foundation, McConnell derives what he regards as the cardinal teaching of the First Amendment's religion guarantees: government should aspire to a "hypothetical world in which individuals make decisions about religion on the basis of their own religious conscience, without the influence of government."[253]

2. *Strategic worries about liberty*

How the coercive elements of counter-radicalization play out is, in part, a function of the distinctive political economies created by government interventions. The debate over counter-radicalization in the United Kingdom has recently focused on a key issue: Is it appropriate for the government to work with individuals and groups that may espouse radical perspectives without endorsing violence? To the proponents of such an approach—for example, Prevent head Charles Farr and veteran police-officer-turned-scholar Robert Lambert—such interactions are necessary if counter-radicalization is to be effective.[254] In a similar vein, American official Quintan Wiktorowicz has said that for counter-radicalization to succeed, "the tent [needs] to be as broad as possible. As long as they are opposed to extremism and terrorism, I want everyone to be part of that coalition."[255]

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ing that the *Lemon* test is inappropriate in the school prayer context and that the coercion test applied in *Engel v. Vitale*, 370 U.S. 421 (1962), is more appropriate); James A. Campbell, Comment, Newdow *Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard Provides the Necessary Renovation*, 39 AKRON L. REV. 541, 544 (2006) (arguing that Justice Thomas's "actual legal coercion test" will address problems created by the Court's current inconsistent approach).

251. *See, e.g.*, Feldman, *supra* note 178, at 675.

252. McConnell, *supra* note 178, at 154-55.

253. *Id.* at 169.

254. *See, e.g.*, Robert Lambert & Jonthan Githens-Mazer, *The Demonisation of British Islamism*, GUARDIAN (Apr. 1, 2009, 6:30 EDT), http://www.guardian.co.uk/commentisfree/belief/2009/mar/31/religion-islam (arguing for engagement with British Islamist groups); Allegra Stratton, *Are We There Yet? Nick Clegg and David Cameron Agree to Disagree*, GUARDIAN (June 1, 2011, 15:01 EDT), http://www.guardian.co.uk/politics/2011/jun/01/nick-clegg-david-cameron-disagree?INTCMP=SRCH (describing Farr as "believ[ing] that to get to the really nasty guys, you have to engage with the not-so-nasty guys").

255. *Morning Edition: New Terrorism Advisor Takes a "Broad Tent" Approach* (NPR radio broadcast Jan. 24, 2011) (transcript available at http://www.npr.org/2011/01/24/133125267/new-terrorism-adviser-takes-a-broad-tent-approach).

To the critics of a "big tent" strategy—notably members of two influential think tanks[256]—government engagement with nonviolent radicals means purchasing short-term gains at the expense of long-term threats, and more fundamentally, disbursing taxpayer monies to individuals who espouse deeply illiberal views at odds with British societal commitments.[257] As a recent study puts it, "[T]raditional Salafist ambivalence on such crucial subjects as Jihadists' condoning of suicide terrorism has called this avenue of counter-radicalization into question . . . ."[258] The same point could be made in reference to Salafist sexism, homophobia, and anti-Shiism.[259] With the recent upheaval in the Prevent program, the Cameron government has now decisively associated itself with the "shared values" position, rather than the "big tent" approach. As Prime Minister Cameron recently put it in a major policy address, enlisting the support of nonviolent but still radical elements within the Muslim community "is like turning to a right-wing fascist party to fight a violent white supremacist movement."[260]

While the previous government's realpolitik approach may have generated its own political economy of religious coercion, Prime Minister Cameron's new approach is even more likely to result in coercion problems. Under the new system, the state is more likely to underwrite liberal Muslim voices, putting pressure on groups and individuals to reconfigure their belief systems to suit the temper of the times. Especially in view of counter-radicalization's focus on young people—for example, the Channel component of Prevent targets young

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256. *See* Robert Lambert, *Cameron and Blair: The Real Counter-Terrorism Coalition*, NEW STATESMAN STAGGERS (June 6, 2011, 5:11 PM), http://www.newstatesman.com/ blogs/the-staggers/2011/06/cameron-clegg-muslim-blair (characterizing a hardline antiterrorism approach as "a policy first prescribed by . . . Policy Exchange and set now to become Home Office policy"); Lambert & Githens-Mazer, *supra* note 254 (describing "negative caricatures" of Islamists created by the Quilliam Foundation and Policy Exchange).

257. A similar debate has occurred among American intellectuals, with Paul Berman claiming that Islam is fundamentally incompatible with political liberalism and Marc Lynch arguing that the government must be willing to reach out to illiberal (and even antiliberal) voices within the Islamic world in order to realize its security objectives. *See, e.g.*, Marc Lynch, *Veiled Truths: The Rise of Political Islam in the West*, FOREIGN AFF., July-Aug. 2010, at 138 (reviewing Paul Berman's book, *The Flight of the Intellectuals*, and highlighting areas of disagreement on engagement).

258. Doron Zimmermann & William Rosenau, *Introduction* to CTR. FOR SEC. STUDIES, ETH ZURICH, THE RADICALIZATION OF DIASPORAS AND TERRORISM 9, 11-12 (Doron Zimmermann & William Rosenau eds., 2009).

259. As an opinionated observer recently characterized the debate, "The core of the . . . disagreement is this: Are people who are radicals, bigots, racists, homophobes, misogynists and more, but not currently actively violent, the sort of people you should support, or shun?" Murray, *supra* note 233.

260. Cameron, *supra* note 118. There has been a suggestion that the more restrictive Cameron policy is already being implemented. *See* Patrick Wintour & Jenny Percival, *Cameron Begins Extremism Crackdown as Cash Withheld from "Suspect Groups,"* GUARDIAN (London), Feb. 6, 2011, at 4.

people at risk of radicalization for early intervention by the state[261]—it is easy to see how a government program that handsomely rewards conformity with Official Islam (and punishes ideological departures from it) can be powerfully coercive. It is telling that certain radical groups such as Hizb ut-Tahrir reject Prevent funding out of an appreciation that public "grants are so our communities become addicted to government money, so they can then dictate to us what we can and cannot think, believe or say."[262]

A second strategic issue that implicates concerns rooted in freedom of conscience flows from the pervasiveness of counter-radicalization programs across "the whole of government."[263] Proponents recognize that, to be successful, counter-radicalization efforts must extend far beyond the traditional national security apparatus of the state, which implies the subordination of the traditional welfare state to the goal of national security. As Briggs has recently cautioned:

> Community development workers, teachers, social workers and mental health practitioners are not counterterrorism practitioners, although they undoubtedly have a contribution to make. However, in order to play their role they do not need to form part of the "official" response, be recipients of government funding, or operate under the control of the state's security architecture.[264]

The criticism of the securitization of the welfare state goes so far as accusing welfare-state bureaucrats of functioning as adjuncts to the intelligence apparatus, a charge that the leadership of Prevent vigorously disputes.[265] As one scholar has recently stated, "[O]rganizations traditionally geared towards countering terrorism and the culture of secrecy that this engenders find themselves forced to operate with agencies and ministries geared towards social work, which by its very nature is far more open."[266] At the same time, the pervasive-

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261. According to a recent report, "as many as 200 schoolchildren, some as young as 13, had been identified as being 'vulnerable' to extremism in the first 18 months of Channel's existence." Jerome Taylor, Op-Ed., *The Big Question: Are Efforts to Tackle Home-Grown Muslim Extremism Backfiring?*, INDEPENDENT (London), Mar. 31, 2010, at 38.

262. Hizb ut-Tahrir, *Contest 2: UK Government Leaked Plans to Label Every Muslim an "Extremist,"* KHILAFAH.COM (Feb. 20, 2009), http://www.khilafah.com/index.php/analysis/europe/5399-contest-2-uk-government-leaked-plans-to-label-every-muslim-an-qextremistq.

263. *See supra* notes 162-65 and accompanying text.

264. Briggs, *supra* note 120, at 981.

265. *See* KUNDNANI, *supra* note 97, at 28-34 ("A significant part of the Prevent programme is the embedding of counter-terrorism police officers within the delivery of other local services. The implication of teachers and youth, community and cultural workers in information sharing undercuts professional norms of confidentiality."). Charles Farr, who supervises all of Prevent, responded to the allegation by maintaining that intelligence flows downstream from the security apparatus to the frontline practitioners of Prevent, and not vice versa. *See* PREVENTING VIOLENT EXTREMISM, *supra* note 97, at 13.

266. Pantucci, *supra* note 236, at 256-57. Pantucci also expressed concern about the manner in which the expansion of Prevent beyond the traditional national security apparatus of the state had negative side effects, including "drafting of individuals who do not see (or wish to see) themselves as security agents into those sorts of roles." *Id.*

ness of counter-radicalization also magnifies the ways in which the coercive power of the state is being employed to shape the religious outlook of Muslim citizens, especially young ones.

The growing reliance on a "whole of government" approach to counter-radicalization within the United States carries with it the risk of the securitization of the relationship between Muslims and the state, as well as the possibility of pervasive religious coercion. Such is the case, for example, where, as discussed above, the U.S. Department of Education has become engaged in the enterprise of counter-radicalization.[267] But it is also true in other places where young people are potentially exposed to religious indoctrination, such as in prison. A well-recognized, if undertheorized, exception to traditional Establishment Clause doctrine exists for chaplains who minister at jails and prisons.[268] While avoiding the selection of imams whose teachings contradict BOP security policy is commendable, employing the broader counter-radicalization imperative as an opportunity to inculcate officially palatable mainstream Islam among prisoners through the selection of clergy or the regulation of Islamic literature in prison libraries[269] is a more questionable matter.

Although counter-radicalization is typically not coercive in the literal sense that national security officials compel or prohibit individuals from engaging in certain religious ideation or conduct, the counter-radicalization regime at the higher level of generality implicates the coercion test. Indeed, the overarching intended effect of a counter-radicalization program is, almost by definition, to distort the market for religious ideation and to create powerful incentives for individuals to toe a certain doctrinal line.

IV.   CRITIQUES AND COUNTER-CRITIQUES

There are three main counterarguments to my contention that the Establishment Clause may place pressure on domestic counter-radicalization activities: (1) that counter-radicalization aims at radical Islam as a political movement, not a religious faith, so it does not implicate the Establishment Clause at

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267. *See supra* notes 163-64 and accompanying text.

268. *See* Katcoff v. Marsh, 755 F.2d 223, 231-32, 237 (2d Cir. 1985) (rejecting an Establishment Clause challenge to the existence of the military chaplaincy program); *cf.* Cruz v. Beto, 405 U.S. 319, 322-23 (1972) (per curiam) (allowing a Free Exercise challenge by a Texas prisoner based on the state jail's failure to allow the petitioner, a Buddhist, to have access to the prison chapel). Scholars of the Religion Clauses have been hard pressed to locate the specific rationale for the historic tradition of state employment of chaplains in the prison setting. *See* 2 GREENAWALT, *supra* note 178, at 219-20.

269. *See* Press Release, Congressman Frank R. Wolf, Wolf, King Ask Federal Prisons to Remove "Nation of Islam" Materials (July 5, 2011), *available at* http://wolf.house .gov/index.cfm?sectionid=34&sectiontree=6,34&itemid=1764 (announcing a letter written by Representatives Wolf and King to the Acting Director of BOP calling for the agency to "conduct a comprehensive audit of all . . . Islamic texts and sermons made available to inmates, including a review of procedures for vetting such materials").

all; (2) that expressive counter-radicalization, far from generating tension with the First Amendment, is actually protected under the First Amendment under the government speech doctrine; and (3) that to the extent that grassroots non-governmental organizations play a more decisive role in counter-radicalization efforts, the legal and strategic problems that this Article has emphasized are diminished. I argue that the first two of these rejoinders fundamentally miss the mark, in terms of both constitutional and strategic concerns, while the third is arguably more powerful.

A. *Counter-Radicalization Is Fundamentally Political, Not Religious*

One challenge to the thesis of this Article proceeds from the premise that counter-radicalization is fundamentally indistinguishable from the anticommunism that was a staple of American foreign and domestic policy for the better part of the twentieth century and which likely did not run afoul of the Establishment Clause.[270] The argument assumes that radical Islam is properly conceived of as a political ideology wrapped in religious rhetoric, rather than an authentic manifestation of religion.[271] This challenge, while not lacking in force, is not fatal to the argument advanced in this Article for a number of reasons.

First, and perhaps most important, regardless of the legal status of radical Islam itself, counter-radicalization implies the government's interposition of Official Islam as an alternative.[272] It is precisely by utilizing approaches that are themselves incontrovertibly religious in nature—that is, endorsing "mainstream" approaches to Islam—that official policy threatens tension with the Es-

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270. This is not to say, of course, that there were not powerful religious overtones to the Cold War. As William Inboden has pointed out, President Truman warned in the early days of the Cold War that international communism "denies the existence of God, and wherever it can, it stamps out the worship of God." WILLIAM INBODEN, RELIGION AND AMERICAN FOREIGN POLICY, 1945-1960: THE SOUL OF CONTAINMENT 114 (2008). In a similar vein, the key (and for decades, classified) American strategic manifesto of the Cold War observed that the Soviet Union was "animated by a new fanatic faith, antithetical to our own." *Id.* at 2. Furthermore, the words "under God" were inserted in the Pledge of Allegiance only in 1954, in a political climate shaped by the Cold War. *See* H.R.J. Res. 243, 83d Cong., 68 Stat. 249 (1954).

271. Extreme versions of this view regard Islamic radicalism as a form of fascism. *See* PAUL BERMAN, THE FLIGHT OF THE INTELLECTUALS 45-48 (2010). The question of how to define religion for purposes of First Amendment protection is notoriously knotty. *See* Koppelman, *supra* note 192, at 1905. Indeed, religion is often defined differently for purposes of the Free Exercise Clause and the Establishment Clause. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1186-87 (2d ed. 1988). I focus here on the narrower issue of whether the presence of a political dimension disqualifies radical Islam from the protection of the Establishment Clause.

272. As discussed above in Part I.A.1, this is not necessarily so. Some counter-radicalization methodologies are thoroughly secular, such as creating athletic or employment opportunities for at-risk youth. This Article has focused, however, on those strains of counter-radicalization policy and strategy that emphasize religious modalities.

tablishment Clause.[273] If the federal government had demonstrably supported Roman Catholicism as a bulwark against domestic communism during the 1960s,[274] that too would have appropriately triggered Establishment Clause concerns.[275] Counter-radicalization implies the possibility of doing something analogous, especially in light of the social science findings tending to show that "a well-established religious identity actually protects against violent radicalisation."[276]

The question of whether "radical" Islam ought to count as a religion for purposes of Establishment Clause analysis is more complicated.[277] To begin with, although this basic idea has bizarrely been called into question of late, Islam itself is a religion entitled to the full protection of the First Amendment.[278] American policymakers and politicians have been wont to draw sharp distinctions between the religion of Islam and its political teachings, in part to avoid the sorts of legal and policy issues squarely raised by this Article.[279] Indeed,

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273. It is important to distinguish counter-radicalization from instances in which officials pursue various policies out of their own religious motivation. While the latter issue concerns the role of personal morality in the shaping of public policy, the former concerns the role of public policy in shaping private religious life, and more often than not in the case of Official Islam, the private religious lives of other people. *See* Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 643 ("The Establishment Clause . . . was not designed to make religion irrelevant to politics (an impossible task), but to protect the right of the people to make religious decisions . . . without government interference or favoritism.").

274. The controversial writer Ayaan Hirsi Ali has, in fact, called for the adoption of Christianity in place of Islam, the faith into which she was born and has vigorously renounced. AYAAN HIRSI ALI, NOMAD: FROM ISLAM TO AMERICA 243, 250-51 (2010). Although Ali proclaims herself an atheist, she acknowledges that many people seek a "spiritual anchor" in their lives that she believes Christianity can fill. *Id.* at xx.

275. An analogy to faith-based initiatives is inapt, because the legality of such programs is predicated on the availability of private choice, which is not present in the case of counter-radicalization. *See* Freedom from Religion Found. v. McCallum, 324 F.3d 880, 882 (7th Cir. 2003) (Posner, J.) ("[T]he state may not require offenders to enroll in Faith Works even if it is the best halfway house in Milwaukee for any or even all offenders. The choice must be private, to provide insulating material between government and religion." (citation omitted)).

276. Alan Travis, *Terror: Secret MI5 Report Challenges Views on Extremists*, GUARDIAN (London), Aug. 21, 2008, at 1.

277. *See* Malnak v. Yogi, 592 F.2d 197, 199 (3d Cir. 1979) (per curiam) (setting out the leading test for determining whether a group counts as a religion for purposes of constitutional protection).

278. The United States has recently found itself in the position of claiming that Islam itself is a religion, rather than a political ideology. The contrary view was adopted by opponents of the construction of a mosque in Murfreesboro, Tennessee. According to the government's brief, "[I]t is uncontroverted [under the Constitution and federal law] that Islam is a religion, and a mosque is a place of religious assembly." Brief for the United States as Amicus Curiae at 1, Estes v. Rutherford Cnty. Reg'l Planning Comm'n, No. 10cv-1443 (Tenn. Ch. Ct. Oct. 18, 2010).

279. Karen Hughes, President Bush's Undersecretary of State for Public Diplomacy, both acknowledged the difficulty of creating this distinction and evidenced the intent to do

government officials and commentators have advanced the claim that the religious and political aspects of Islam can be divided into Islam and Islamism, wherein Islam is the classical faith tradition and Islamism is a twentieth-century development that injected religious content into otherwise secular political systems—whether through political mobilization or through resort to political violence.[280] Even Supreme Court opinions evince this tendency.[281]

Certainly there is some historical truth to the claim that Islamism is a modern political development. As L. Carl Brown has argued, "[A]lthough radical Islamist groups today claim that they are only restoring Islam to an earlier worldly model established during the time of the Prophet Muhammad and his followers they are, in fact, introducing striking innovations."[282] To Brown, the complex interactions between European colonialism and Islam brought about many of these innovations.[283] Similarly, sociologists like Olivier Roy have argued that radical Islam's conceptual vocabulary derives from modern political ideologies, including liberal individualism.[284] The rise of political Islam embodied in movements as diverse as the Muslim Brotherhood, Hizb ut-Tahrir, and Hezbollah attests to the innovative ways in which Islam has recently become politicized.

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so when she observed that "[i]t's difficult to know what to call the ideology that we're up against, because it is a perversion of Islam." Anne Gearan, *Hughes: Fixing U.S. Image May Take Years*, WASH. POST. (Sept. 28, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/09/28/AR2006092801185_pf.html. The familiar trope that "extremists" have "hijacked" Islam is perhaps the most prevalent, if still unfortunate, articulation of this idea.

280. *See, e.g.*, STAFF OF S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, 110TH CONG., VIOLENT ISLAMIST EXTREMISM, THE INTERNET, AND THE HOMEGROWN TERRORIST THREAT 2 (Comm. Print 2008) (defining "violent Islamism" as an ideology that "calls for the pursuit and creation of a global Islamist state—a Caliphate—that unites all Muslims—the *Ummah*—and is governed by Islamic law—*Sharia*"); Maajid Nawaz, *Islamism Is Not Islam*, WALL ST. J., Aug. 28, 2010, at A13 (distinguishing between Islam and Islamism in the controversy over the plans to build an Islamic community center near Ground Zero). A sharp divide between the realms of religion and politics itself represents a kind of establishment—namely the establishment of classical Christian teachings on the bifurcation of the spiritual and the temporal. *See, e.g.*, FLAKE, *supra* note 22, at 20 (noting tension between Mormonism and Protestantism regarding this division).

281. *Compare* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 894 (2005) (Scalia, J., dissenting) ("The three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic."), *with* Boumediene v. Bush, 553 U.S. 723, 827 (2008) (Scalia, J., dissenting) ("America is at war with radical Islamists.").

282. L. CARL BROWN, RELIGION AND STATE: THE MUSLIM APPROACH TO POLITICS 4 (2000).

283. *See id.* at 86-89.

284. *See* ROY, *supra* note 107, at 29-33. As Faisal Devji has similarly argued,

The nation state, after all, was founded to subdue religion, seen as the only entity capable of providing an alternative foundation for political life. So it is only natural if today Islam seems to confront the liberal state with its own founding myth, having become the Frankenstein's monster of its history.

DEVJI, *supra* note 107, at 172.

Nevertheless, the distinction between (religious) Islam and (political) Islamism may be overstated.[285] First, it is hardly the case that all groups labeled Islamist are political; some, such as the quietist Tablighi Jamaat, are "avowedly apolitical."[286] Furthermore, the distinction does not easily square with historical understandings of Islam. Classical Islam regulated political life just as comprehensively as personal ritual life.[287] Indeed, the tradition of Islamic politics persists in different variations across the world; Islamic law is given constitutional pride of place in countries as divergent politically as Egypt, Saudi Arabia, and Iran, and supplies positive legal authority in parts of Nigeria and Indonesia.[288] To deny the continuities between Classical Islam and the current embrace of political ideology by radical groups smacks of Protestant essentialism.[289] In any event, attempting to demarcate sharply between contemporary religion and politics in Islam arguably proves too much. As Olivier Roy has argued, much of contemporary Western religion reflects the convergence of classical theological and legal categories on the one hand and contemporary politi-

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285. By way of analogy, Zionism was a contested political ideology in the late nineteenth and early twentieth centuries, sharply dividing Jewish public opinion in the United States and Europe. *See, e.g.*, NOAM PIANKO, ZIONISM AND THE ROADS NOT TAKEN: RAWIDOWICZ, KAPLAN, KOHN 3-5 (2010) (discussing conflicting views within the Jewish community in the interwar period). In large segments of the American Jewish community today, meanwhile, Zionism commands respect precisely as an expression of ancient religious longing for a homeland. *See* ELLIOTT N. DORFF, CONSERVATIVE JUDAISM: OUR ANCESTORS TO OUR DESCENDANTS 199 (1977) ("To us it seems obvious that a Jew must be a Zionist."); CENT. CONFERENCE OF AM. RABBIS, REFORM JUDAISM & ZIONISM: A CENTENARY PLATFORM (1997), *available at* http://ccarnet.org/Articles/index.cfm?id=42&pge id=1606 (celebrating "[t]he restoration of *Am Yisrael* to its ancestral homeland after nearly two thousand years of statelessness and powerlessness").

286. Nicholas Howenstein, *Islamist Networks: The Case of Tablighi Jamaat*, U.S. INST. PEACE (Oct. 2004), http://www.usip.org/publications/islamist-networks-case-tablighi-jamaat. This is so even though the group's emergence is connected with anticolonial politics in the late Raj. *See* BROWN, *supra* note 282, at 105-07 (offering a schema for how anticolonial politics drove modern Islamic ideology).

287. *See generally* PATRICIA CRONE, GOD'S RULE: GOVERNMENT AND ISLAM 3-16 (2004) (detailing the religious origins of Islamic government).

288. *See generally* NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT 59-60, 180-84 (2002) (explaining the role of Islamic law in the constitutions of Egypt and Saudi Arabia); ROY MOTTAHEDEH, THE MANTLE OF THE PROPHET: RELIGION AND POLITICS IN IRAN 380-83 (2d ed. 2009) (explaining the role of Islamic law in Iran's constitution); JOHN N. PADEN, FAITH AND POLITICS IN NIGERIA 58-62 (2008) (explaining the role of Islamic criminal law in Nigeria's northern states); Arksal Salim, Shari'a *in Indonesia's Current Transition: An Update, in* SHARI'A AND POLITICS IN MODERN INDONESIA 213, 225-28 (Arksal Salim & Azyumardi Azra eds., 2003) (explaining the role of Islamic law in Aceh, Indonesia).

289. *See* LOCKE, *supra* note 190, at 218, 220 (defining the commonwealth as "a society of men constituted only for the procuring, preserving, and advancing their own civil interests" while religion concerns "[t]he care of the salvation of men's souls").

cal and cultural undercurrents on the other.[290] In this way, contemporary radical Islam is not meaningfully different from aspects of contemporary Evangelical Christianity or Orthodox Judaism.

In sum, acknowledging the complexity of the issue along the dimensions discussed above, I generally agree with Mahmood's characterization of counter-radicalization that "[t]his broad-based ideological project bears obvious similarities with the State Department's Cold War strategy of aiding and abetting oppositional currents in the former Soviet Union—with one important exception: the current campaign has an overt *theological* agenda."[291] This theological agenda is what creates the doctrinal and strategic tensions under the Establishment Clause.

B. *Expressive Counter-Radicalization Is Protected as Government Speech*

A second line of attack (aimed mainly at expressive counter-radicalization) takes as its starting point the observation that the "government speech" doctrine, according to which "[a] government entity . . . is entitled to say what it wishes, and to select the views that it wants to express," provides officials the expressive liberty given to private actors.[292] Under this doctrine, the government is not the regulator of private speech, but the speaker itself. The criticism extrapolates from that observation to the broader point that not only is expressive counter-radicalization not prohibited under the Establishment Clause, it is protected under the First Amendment's Free Speech guarantee.

Although the courts have not definitively answered this question,[293] the weight of evidence suggests that this critique misses the mark. As the Supreme Court recently observed, the government speech doctrine "does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause."[294] To be sure, mapping the outer

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290. *See* ROY, *supra* note 107, at 29-35 (claiming that patterns of globalization and secularization have had consequences for "neofundamentalists" that cut across religious divides).

291. Saba Mahmood, *Secularism, Hermeneutics, and Empire: The Politics of Islamic Reformation*, 18 PUB. CULTURE 323, 331 (2006).

292. Pleasant Grove City v. Summum, 555 U.S. 460, 467-68 (2009) (citations omitted).

293. *See id.* at 486-87 (Souter, J., concurring in the judgment) ("[T]he government could well argue, as a development of government speech doctrine, that when it expresses its own views, it is free of the Establishment Clause's stricture against discriminating among religious sects or groups.").

294. *Id.* at 468 (majority opinion); *see also id.* at 482 (Stevens, J., concurring) ("[E]ven if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including . . . the Establishment . . . Clause[].")). The idea that the First Amendment embodies commitments to overlapping goals that may conflict is itself nothing new. For a generation, courts and scholars have been wont to point out some of the internal tensions within the First Amendment's Religion Clauses themselves, let alone the rest of the Amendment. *See, e.g.*, Locke v. Davey, 540 U.S. 712, 718-19 (2004) (stating that the government must be allowed "play in the joints"

limits of the tension between the authority to speak and the prohibition against Establishment is complicated. As Justice Souter put it in one recent concurring opinion, "[t]he interaction between the 'government speech doctrine' and Establishment Clause principles has not . . . begun to be worked out," and "[t]he [present] case . . . shows that it may not be easy to work out."[295]

In a related vein, the Ninth Circuit sitting en banc recently divided sharply over whether a nonbinding resolution adopted by the San Francisco Board of Supervisors that condemned the Catholic Church's official opposition to adoption by same-sex couples gave rise to standing and substantive liability under the Establishment Clause.[296] Judge Kleinfeld, writing for the majority of the court on this point, expressed the view that "[t]he Establishment Clause as it has developed may be violated even by government action that is no more than expression of a sentiment, as by displays of religious symbols on government property."[297] A finding of Establishment Clause liability on the strength of official expressive activity alone substantially undermines the criticism that the First Amendment protects, rather than makes vulnerable, expressive counter-radicalization. At the very least, it is clear that invocation of the government speech doctrine is not a complete answer to the legal and strategic issues posed by expressive counter-radicalization.

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between the demands of the Establishment Clause and the requirements of the Free Exercise Clause). *But see* MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 2-3 (2d ed. 2006) (suggesting that the Religion Clauses can be read as creating a singular, coherent command).

295. *Summum*, 555 U.S. at 486 (Souter, J., concurring); *see also* Bernadette Meyler, *Summum and the Establishment Clause*, 104 NW. U. L. REV. 95, 95 (2009) ("[T]he more you say that the monument is Government speech to get out of . . . the Free Speech Clause, the more it seems to me you're walking into a trap under the Establishment Clause. If it's Government speech, it may not present a free speech problem, but what is the Government doing speaking—supporting the Ten Commandments?" (quoting Chief Justice Roberts at oral argument for *Summum*)). *See generally* RonNell Anderson Jones, *Pick Your Poison: Private Speech, Government Speech, and the Special Problem of Religious Displays*, 2010 BYU L. REV. 2045, 2062-64 (explaining that current Supreme Court jurisprudence causes litigants either to characterize speech as private to avoid Establishment Clause problems, in which case they run into free speech problems, or to characterize it as governmental to avoid free speech problems, in which case they run into the Establishment Clause).

296. *See* Catholic League for Religious & Civil Rights v. City & Cnty. of S.F., 624 F.3d 1043 (9th Cir. 2010) (en banc).

297. *Id.* at 1058; *see also* Koppelman, *supra* note 176, at 734 (noting that the Establishment Clause restricts government speech). A pointed dissent reasoned that "the resolution is *not* a display; it is an act (albeit a non-binding act) of a legislative body" and that "[t]he mere existence of an enactment on the books (or virtual books) is not enough" to warrant a finding of constitutional standing. *Catholic League*, 624 F.3d at 1078-79 (Graber, J., dissenting in part).

C. *Grassroots Counter-Radicalization Avoids Legal and Strategic Problems*

A third critique proceeds from the premise that although active government participation in counter-radicalization is fraught with legal and strategic tension, a complete solution may lie in devolving significant responsibility to non-governmental actors.[298] Recent Obama Administration pronouncements are of a piece with this approach.[299] As a senior counterterrorism official put it,

> Where the federal government can add value, we'll offer it. But often times, the best expertise and solutions for a community will be found in that community—in the local organizations, institutions and businesses that understand the unique challenges of that community. . . . In those instances, the federal government will use our convening power to help communities find the partnerships and resources they need to stay safe.[300]

But it is not clear that the devolution of counter-radicalization authority to nongovernmental actors represents anything more than a marginal improvement from both legal and strategic perspectives. On the legal side, it is incontrovertible that "[b]y its terms th[e] [Establishment] Clause applies only to the words and acts of *government*."[301] Similarly, in the context of applying the endorsement test, the more subdued the government's role, the less likely that an official policy or pronouncement will be perceived as conveying a message of official support or condemnation. At the same time, for the government to use its "convening power" is not to avoid altogether the state's imprimatur[302] or the

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298. *See, e.g.*, ALEJANDRO J. BEUTEL, MUSLIM PUB. AFFAIRS COUNCIL, BUILDING BRIDGES TO STRENGTHEN AMERICA: FORGING AN EFFECTIVE COUNTERTERRORISM ENTERPRISE BETWEEN MUSLIM AMERICANS AND LAW ENFORCEMENT 8 (2009) ("[T]his report argues the most effective way to deal with the challenge of radicalization and violent extremism is for law enforcement and Muslim American community leaders to partner together.").

299. *See, e.g.*, WHITE HOUSE, EMPOWERING LOCAL PARTNERS, *supra* note 2, at 3, 5 (acknowledging that "[g]overnment will often be ill-suited to intervene in the niches of society where radicalization to violence takes place" and adopting a "community-based approach" that will enlist the help of "individuals, groups, civil society organizations, and private sector actors"); WHITE HOUSE, NATIONAL SECURITY STRATEGY, *supra* note 2, at 19 ("Our best defenses against this threat are well informed and equipped families, local communities, and institutions. The Federal Government will invest in intelligence to understand this threat and expand community engagement and development programs to empower local communities.").

300. McDonough, *supra* note 2; *see also Ticking Time Bomb Hearing*, *supra* note 59, at 14 (statement of Samuel J. Rascoff, Assistant Professor of Law, New York University School of Law) (commenting on certain advantages of nongovernmental participation in counter-radicalization).

301. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 767 (1995) (plurality opinion).

302. For example, even as he touted local communities as the "key players in countering radicalization," National Counterterrorism Center Director Leiter acknowledged that "government has an important role" to play. *Nine Years After 9/11*, *supra* note 61, at 8 (statement of Michael Leiter, Director, National Counterterrorism Center).

potential for constitutional tension.[303] Sometimes it is not even clear where the official activity ends and private participation begins, as in cases where the state has effectively conscripted a nongovernmental actor in the service of a government mission.[304] Furthermore, even if officials could elude potential liability under the Establishment Clause by devolving responsibility for counter-radicalization to private actors, opponents might nonetheless mount legal challenges couched in terms of the First Amendment's Free Speech guarantee.[305]

On the strategic side, meanwhile, the absence of heavy-handed government involvement may increase the likelihood that Muslim communities and individuals seriously consider the messages of counter-radicalization. But as discussed above in the context of Prevent, a less pronounced government footprint may serve to heighten skepticism about the counter-radicalization efforts of community organizations by fueling the view that the secretive national security apparatus plays some unknown role in the process.[306] Furthermore, as discussed above, questions about which individuals or groups represent a given community do not admit of easy practical answers.[307] Still, it remains the case that a more grassroots approach to counter-radicalization represents the most effective approach both to addressing potential Establishment Clause issues and

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303. State support of private religious action has created problems for Establishment Clause doctrine in a number of cases. *See, e.g.*, Salazar v. Buono, 130 S. Ct. 1803 (2010) (reviewing a congressional statute transferring public land on which a cross was erected to a private party); Zelman v. Simmons-Harris, 536 U.S. 639, 662-63 (2002) (upholding state provision of school vouchers against Establishment Clause challenge); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982) (striking down a state statute allowing religious institutions to prevent issuance of liquor licenses to neighboring businesses).

304. Indeed, in the counter-radicalization context, it is not always easy to differentiate between nongovernmental organizations and the state. *See* Vikram Dodd, *List Sent to Terror Chief Is a Smear Tactic, Say Peaceful Islamic Groups*, GUARDIAN (London), Aug. 5, 2010, at 4 ("A secret list prepared for a top British security official accuses peaceful Muslim groups, politicians, a television channel and a Scotland Yard unit of sharing the ideology of terrorists. . . . It was sent to [Charles Farr, the British counterterrorism director] in June by the Quilliam Foundation, a counter-extremism think tank which has received about £1m in government funding."). The Quilliam Foundation participates in counter-ideology efforts in the United Kingdom and receives both public and private financing. *See Frequently Asked Questions*, QUILLIAM, http://www.quilliamfoundation.org/faqs.html (last visited Jan. 14, 2012).

305. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 102 (2001) (holding unconstitutional under the Free Speech Clause a public school's exclusion of a Christian club from after-school use of its facilities and rejecting the school district's Establishment Clause defense); Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 845-46 (1995) (holding unconstitutional under similar reasoning a public university's denial of funding to a student newspaper that published Christian viewpoints); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) (holding unconstitutional under similar reasoning a public school district's denial of the use of school facilities to a church group for a religious film series).

306. *See supra* text accompanying note 199.

307. *See supra* notes 136-45 and accompanying text (discussing the problem of selecting interlocutors within the larger Muslim community).

to avoiding the sorts of strategic pitfalls that have beset British counter-radicalization programs.[308]

<div align="center">CONCLUSION</div>

In this Article, I have raised a number of questions about the emerging practice of employing domestic counter-radicalization as a technique for addressing a perceived "homegrown" terrorism threat. Specifically, I have sounded a cautionary note about the manner in which counter-radicalization might generate tension with Establishment Clause doctrine, theory, and values. Moreover, I have argued that these constitutional rationales for official pause are reinforced by strategic concerns about the efficacy and desirability of counter-radicalization—concerns which themselves are internally related to various theories that motivate the Establishment Clause.

To argue that the Establishment Clause puts pressure on aspects of counter-radicalization is not to claim that all official efforts in this area are likely to be struck down by a federal judge as unconstitutional. First, not all aspects of counter-radicalization implicate the establishment of Official Islam.[309] Second, even concerning those that arguably do, Establishment Clause doctrine is sufficiently contested and indeterminate that fine-grained judgments of specific programs would be required before a credible determination of outright unconstitutionality could be sustained.[310] Third, regardless of the potential unconstitutionality of this or that counter-radicalization initiative in the abstract, it is by no means clear that a judge will have occasion to reach a decision on the merits given potential issues of standing,[311] political questions,[312] or the invocation of state secrets.[313]

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308. *See, e.g.*, PREVENTING VIOLENT EXTREMISM, *supra* note 97, at 41 ("The international community—NGOs, governments and regional entities such as the EU—should assist capacity-building in strategic and tactical performance by indigenous actors in nonviolent struggles for rights, democracy, and freedom from domination.").

309. For example, see the discussion of "secular" counter-radicalization above in Part I.A.1.

310. Aziz Huq has generalized from this indeterminacy to the broader claim that the Religion Clauses perform no doctrinal work in domestic counterterrorism. *See* Aziz Z. Huq, *The Signaling Function of Religious Speech in Domestic Counterterrorism*, 89 TEX. L. REV. 833, 851 (2011). This Article has embraced a more comprehensive sense of tension with the Religion Clauses than Huq's narrower focus on unconstitutionality as determined by the courts. *See id.* at 864-65.

311. The Supreme Court has produced a distinctive if dynamic body of standing law in the context of challenges to government action rooted in the Establishment Clause. *Compare* Flast v. Cohen, 392 U.S. 83, 105-06 (1968) (empowering taxpayers to sue for violations of the Establishment Clause), *with* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1447-48 (2011) (undercutting taxpayer standing in this area).

312. The political question doctrine supplies a perennial obstacle to legal challenges of official national security policies. *See, e.g.*, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 44-52

Nevertheless, consideration of the relationship between the Establishment Clause and the counterterrorism apparatus of the state is timely and important. The First Amendment is more than a set of rules enforceable by judges against official actors. It is also an embodiment of public morality[314] and strategic wisdom.[315] The interplay between the state's understandable impulse to oppose the ideological foundations of terrorist violence and its solemn obligation not to arrogate to itself the authority to decipher or shape religious meaning presents a host of complicated problems. This Article has not offered any ready answers to the hard questions it has raised; it has instead sought to lay out a framework for further thought.

(D.D.C. 2010) (rejecting a suit challenging the targeted killing of Anwar al-Awlaki on political question grounds, among others).

313. Although the Obama Administration committed itself to more limited use of the state secrets privilege, it has not shied away from raising state secrets in lawsuits, including those alleging violations of the First Amendment's Religion Clauses. *See, e.g.*, Declaration of Eric H. Holder, Attorney General of the United States at 1-2, Fazaga v. FBI, No. SA11-CV0-00301CJC (C.D. Cal. Feb. 22, 2011) (asserting the state secrets privilege in a suit alleging First Amendment violations through FBI surveillance of a mosque).

314. *See supra* note 218.

315. *See supra* note 24.