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Does the Constitution Allow President to Ban Muslims?

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Constitutional Connections

The president-elect has stated that he intends to protect national security by banning Muslim immigration into the United States. He also has signaled an openness to some form of Muslim registration program. Does the Constitution impose barriers to the adoption of such policies?

Since 1868, the Constitution's Equal Protection Clause has formally guaranteed all "persons" – a term that encompasses non-citizens – the "equal protection of the laws." Sometimes, this guarantee is described as protecting against governmental "discrimination." But that description is too general.

All laws that regulate human behavior "discriminate" in some way. Some laws discriminate on the basis of conduct. Homicide laws discriminate against those who have taken a human life. Environmental laws discriminate against polluters. Tax laws discriminate among those who earn different incomes over a specified period of time.

Other laws discriminate on the basis of inherent or unchangeable characteristics. Laws requiring that a person be at least 16 years old to obtain a driver's license discriminate against the young. Laws imposing mandatory retirement ages discriminate against the elderly. Laws requiring airplane pilots to pass visions test discriminate against those with poor eyesight.

Nearly all such laws are perfectly constitutional if they use rational means to achieve reasonable ends. This is true even of laws that discriminate on the basis of inherent or unchangeable characteristics. And it is true even when a court knows that the fit between a law's means and ends is likely to be far from perfect. Setting the driving

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age at 16 is permissible, for example, even if it is shown that many 15-year-olds are capable of driving safely and many 16-year-olds are not.

So what does the Equal Protection Clause actually accomplish? For the first three-quarters of a century of its existence, the answer was "not much." During this era, the Supreme Court almost always characterized as "reasonable" the executive and legislative judgments that were challenged under the clause. Indeed, in 1927, Justice Oliver Wendell Holmes derided equal protection as "the usual last resort of constitutional arguments."

But all of this changed in the following decades. Perhaps prompted by the horrors of genocide, totalitarianism and deeply entrenched domestic racial discrimination, the Supreme Court began to take a different approach to a small subset of laws that discriminate on the basis of inherent or unchangeable characteristics – those that discriminate on the basis of race.

No longer did the court review racially discriminatory laws for mere reasonableness. Instead, it subjected them to a heightened form of scrutiny and held them unconstitutional unless they used narrowly tailored means to achieve a "compelling" governmental interest. This has proven to be a very difficult test to meet.

Soon, the Supreme Court extended heightened scrutiny to laws that discriminate on the basis of religion, ethnicity and national origin. And it eventually applied a modified form to heightened scrutiny to laws that discriminate on the basis of gender. The court also extended heightened scrutiny to laws that infringe upon "fundamental" rights, such as the First Amendment right to freely exercise one's religion.

So what does all of this mean for the president-elect's plans with respect to Muslims? If the administration adopts measures that explicitly subject Muslims to different treatment on account of their religion, it should anticipate immediate court challenges. To survive these challenges, the government will need to establish that its measures advance a compelling government interest through means that are narrowly tailored – i.e., that are neither overinclusive nor underinclusive.

This will be a very difficult showing to make. Obviously, national security is a "compelling" government interest. In fact, it is one of the very few interests that the Supreme Court has described as compelling. (The court provided this description in the notorious *Korematsu* case, which held that the Japanese-American internment policy implemented during World War II survived strict scrutiny). The difficulty, however, will be in showing that the measures are neither overinclusive nor underinclusive because the overwhelming majority of Muslims pose no threat to national security.

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Pilgrims touch the Kaaba, the sacred Muslim shrine, at the Great Mosque in the Muslim holy city of Mecca, Saudi Arabia, on Dec. 29, during the minor pilgrimage, known as Umrah.

Two final caveats. First, courts are quite deferential to the president and Congress with respect to foreign affairs and immigration. So perhaps the fact that the president-elect's contemplated measures will touch on these sensitive areas would lead courts to refrain from reviewing them under strict scrutiny.

Second, courts are reluctant to find that policies neutral on their face with respect to religion are in fact motivated by religious discrimination. Thus, if the new administration were to target immigration from *countries* deemed likely sources of terrorist threats, a court would not lightly conclude that such a measure discriminates on the basis of religion – even if the affected countries contain largely Muslim populations.

In fact, from 2002-2011, the Bush and Obama administrations administered just such a country-specific immigration policy. It survived constitutional challenges in lower courts. But those administrations also emphasized in their public statements that it was *not* government policy to discriminate against Muslims.

The president-elect has thus far taken a different approach. As a consequence, if his administration seeks to implement a policy that targets Muslim-majority countries, his campaign statements might well complicate any argument that the policy is non-discriminatory toward Muslims.

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