

# CONNECTICUT PUBLIC INTEREST LAW JOURNAL

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VOLUME 11

SPRING-SUMMER 2012

NUMBER 2

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## Dar al-Constitution: Islam and the American Constitutional Order

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### I. INTRODUCTION

“I think it is a profound mistake,” argues Harold Berman in *The Interaction of Law and Religion*, “to consider the relation of law to religion solely from a legal point of view, that is, solely in terms of the legal foundation of religious freedom. It is also necessary to consider the religious foundations of legal freedom. Otherwise,” he continues, “we will not do justice to the religious sentiments of the American people.”<sup>1</sup> This is certainly true; there is little debating the profound religious content of American history.<sup>2</sup> As any close reading of that history will reveal, those religious sentiments may be negative as well as positive; the assertions of religious identity for some may come at the expense of others.

Even the historiography may be suspect. In his magisterial opus *A Religious History of the American People*,<sup>3</sup> Sydney Ahlstrom identifies everything that occurs after 1960 as taking place in the “post-Protestant” era, a clear indication of a sense—even if subconscious—of the ownership

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<sup>1</sup> Harold Berman, *The Interaction of Law and Religion*, 31 *MERCER L. REV.* 405, 406 (1980).

<sup>2</sup> See generally WINTHROP S. HUDSON & JOHN CORRIGAN, *RELIGION IN AMERICA*, (6th ed. 1999).

<sup>3</sup> SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 1079 (1972).

by Protestants of American history to that point (the election of the nation's first Catholic president). Never mind that Catholics, Jews, and Muslims had been on the continent for four hundred years by that point, and Native Americans longer still.

A simple cause for the sense of ownership is basic demographics; there were significantly fewer Catholics in early colonial history than there were Protestants, and fewer still of Jews and Muslims.<sup>4</sup> As for Native Americans, their marginal position in the colonial period meant that they would suffer politically well into the twentieth century. One powerful manifestation of the sense of ownership is what I have called elsewhere "the American constitutional order";<sup>5</sup> the collective authority of the federal complex, its foundational documents, and the near-mythic aura that would come to surround it all. This order—which arose before the battles of the American Revolution but did not attain its fullest authority until the middle of the twentieth century—started as a Protestant vehicle for citizenship, nationhood, legislation, and identity, and communities outside of the Protestant mainstream have had to contend with its construction as they have sought inclusion into the order itself.<sup>6</sup>

This has had profound implications on the reality of religious liberty embodied in the religion clauses of the First Amendment. Initially a recapitulation of the standards and sensibilities of a vaguely mainstream Protestantism, as the American constitutional order has evolved, it has developed into an identity separate from (though still influenced by) Protestant Christianity, enabling it to better accommodate non-Protestants. First Catholics and Jews, then a broader array of religious traditions—and even non-religious traditions, social classes, races, and ethnicities—have gained a measure of substantive (as opposed to merely rhetorical) religious liberty, and have thus secured a footing in the order.<sup>7</sup>

This Article will examine the encounter of Islam and the American constitutional order. In Part I, I provide a brief introduction to the concept of the order, including an examination of the role of race in that order. In Part II, I explore the encounters with Islam by the American constitutional order, contextualizing conflicts with 1) North African majority-Muslim

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<sup>4</sup> HUDSON & CORRIGAN, *supra* note 2, at 39–40.

<sup>5</sup> See generally ERIC MICHAEL MAZUR, *THE AMERICANIZATION OF RELIGIOUS MINORITIES: CONFRONTING THE CONSTITUTIONAL ORDER* (1999). While this kind of interpretation may be uncomfortable to some, it is in keeping with a long line of research and analysis related to religion in American culture, and depends in part on the disciplines of sociology, rhetoric, and myth and ritual studies.

<sup>6</sup> *Id.*

<sup>7</sup> One ironic measure of the transition over the past twenty years or so is the appearance of evangelical Protestant groups as parties making legal claims for greater religious liberty. See *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990); *Rosenberger v. Rector*, 515 U.S. 819 (1995).

states in the early nineteenth century, 2) American Mormons in the late nineteenth century, 3) Muslims of the southern Philippine Islands in the early twentieth century, and 4) African American Muslims in the middle of the twentieth century. And in Part III, I examine transformations in the American constitutional order with regard to Muslim Americans, as well as some of the transformations in American Islam with regard to the order.

Unlike other religious communities in the United States—such as the Church of Jesus Christ of Latter-day Saints (“Mormons”<sup>8</sup>), or the Watchtower Bible and Tract Society (“Jehovah’s Witnesses”<sup>9</sup>)—adherents of Islam in America<sup>10</sup> have not experienced a specific and identifiable period of encounter with the American constitutional order. In this Article I will argue that the key to understanding how the American constitutional order has approached Islam lies less in the religious community’s encounter with the evolving authority of the federal judiciary, and more in the possible lessons learned by the order from its distinct encounters with Islam. However we must first establish what it is when we discuss the American constitutional order itself, so it is to the order that we now turn.

## II. THE AMERICAN CONSTITUTIONAL ORDER

### A. *Theoretical Foundations*

The evidence from American history suggests that religious liberty is a function of the relationship of the litigant to a dynamic and organic constitutional order composed of the various branches of the federal government and the rhetoric related to the people in leadership positions (elected or appointed) in those branches, but also heavily influenced by the mythos surrounding those institutions and particularly (as it relates to religion) of the U.S. Constitution. This relationship seems to be determined by a set of variables that includes the relationship of the order to a vague but recognizable form of Protestantism, the moment of contact between the litigant group and the order, and the combined mix of recognizable Protestantism in the litigant and parallel cultural Protestantism in the order

<sup>8</sup> The Church of Jesus Christ of Latter-day Saints is but one of the many organized communities falling under the Mormon umbrella. However, for the purposes of this Article, unless otherwise indicated I will be using the terms synonymously.

<sup>9</sup> JEHOVAH’S WITNESSES: WATCHTOWER SOCIETY OFFICIAL WEBSITE, <http://www.watchtower.org> (last visited Apr. 5, 2012).

<sup>10</sup> As with all religious communities, there is a great danger in presenting Islam as if it were a monolithic or homogenous social expression of undeniably diverse history and demographics; in this, it is no different from other religious traditions. However, it is a measure of a religious community’s marginal status that—as far as the American constitutional order is concerned—this diversity is seen either as unimportant or as totally unrecognized as the community interacts with the order. For an examination of this issue with regard to Native Americans, see generally Joel W. Martin, *Before and Beyond the Sioux Ghost Dance: Native American Prophetic Movements and the Study of Religion*, 59 J. AM. ACAD. RELIGION 677–79 (1991).

at the time of conflict. As the American constitutional order has moved from political identity with Protestantism, through a period of growing separation from that same (vague) Protestantism, to an independent entity justifying its existence less on Protestant theology than on its own transcending self-reference, it has become less coercive with regard to enforcing public Protestantism and more coercive with regard to protecting its own territorial integrity and ideological identity. Put another way, this means that a religious community's likelihood of experiencing substantive religious liberty has depended (in earlier American history) on seeming rather Protestant-like or (in more recent American history) on seeming to be non-threatening to the physical (that is, territorial) authority of the now-theologically independent American constitutional order.

This argument can be traced in the First Amendment litigation history of Mormons from 1878 to 1890, Jehovah's Witnesses from 1938 into the early 1960s, and traditional (that is, non-Christian) Native American religious communities from the American colonial period through the end of the twentieth century.<sup>11</sup> On the one hand, the relationship between the Mormons and the American constitutional order was determined less by the perception (of many non-Mormons) of Mormon behavioral impropriety (with regard to plural marriage) and more by the challenge Mormon leadership presented to the order by seeking to use the order's own rules—creating the Mormon state of Deseret—to evade the authority of the overwhelmingly Protestant constitutional order.<sup>12</sup> Once Mormon leadership renounced its claims of supremacy—over the issue of plural marriage, but also over the political machinery in the Utah territory—statehood (and a retraction of congressional threats to liquidate the Church's holdings) shortly followed.<sup>13</sup>

On the other hand, the American constitutional order could easily ignore Jehovah's Witness challenges to its ultimate authority because they were eschatological—Jehovah's Witnesses didn't seek a territorial base within the United States, they merely disavowed any connection to any earthly political entity until the coming of the end of the world.<sup>14</sup> This nicely coincided with the fact that by the time the Jehovah's Witnesses were challenging the American constitutional order, the order itself was

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<sup>11</sup> See generally MAZUR, *supra* note 5.

<sup>12</sup> While Mormons experienced significant difficulty before relocating to the Salt Lake basin, it was not until they settled there that the federal government got involved. Part of this had to do with how the First Amendment was interpreted at the time, and part of it had to do with sectional conflicts that provided protection for the Mormons by Southern states advocating states' rights. But part of it also had to do with the American constitutional order being able to ignore what was only a problem for the various states (New York, Ohio, Missouri, and Illinois) until it was seen as a threat to federal authority and territorial integrity. *Id.* at 62–93.

<sup>13</sup> *Id.* at 64.

<sup>14</sup> *Id.* at 63.

less motivated by an urgency to protect Protestantism and more motivated to protect its own territory.<sup>15</sup> Additionally, unlike the Mormons—whose Book of Mormon added to the suspicion with which they were viewed by American Protestants—Jehovah’s Witnesses merely interpreted extant Protestant scripture in their own fashion.<sup>16</sup> Their challenge was therefore not perceived as scripture-based—in fact, they were overwhelmingly successful pressing for greater individual freedoms when they based their arguments (in part or in whole) on free speech grounds, and clearly unsuccessful when they based their arguments entirely on religious liberty justifications.<sup>17</sup>

However, with Native Americans, the story is entirely different, and it is more difficult to identify a distinct period of litigation on religious liberty issues.<sup>18</sup> In part this is because, unlike the Mormons and the Jehovah’s Witnesses, there is no point at which traditional Native American religions “start” in an already operating American constitutional order. This is also because of the history of Native Americans’ integration into the American constitutional order—first as potential enemy agents (under the auspices of the Department of War), then as an internal nuisance (under the auspices of the Department of the Interior).<sup>19</sup> Native Americans remaining on government reservations were not granted full American citizenship until the mid-1920s and were unprotected by the First Amendment until 1968.<sup>20</sup> It is no surprise that cases involving claims based on traditional Native American religions did not get a hearing by the Supreme Court until the 1980s.<sup>21</sup> It seems that they continue to be unsuccessful there because many traditional Native American religions are oriented in space rather than in time (like Judaism, Christianity, and Islam), and therefore almost by definition challenge the territorial integrity and authority of the American constitutional order.<sup>22</sup>

### B. *America as a Christian Nation*

The foundation of the constitutional order is easily explained, and is neither nefarious nor surprising to find in a democracy. If the government and all of its institutions are in any way representative, it stands to reason that it will be representative demographically as well as ideologically. The

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<sup>15</sup> *Id.* at 30.

<sup>16</sup> *Id.* at 36.

<sup>17</sup> See MAZUR, *supra* note 5, at 31.

<sup>18</sup> As I explain elsewhere, while there has always been an extraordinary level of demographic diversity among native peoples in North America, the American constitutional order rarely recognized this fact, or rarely acted as if it did.

<sup>19</sup> *Id.* at 101.

<sup>20</sup> *Id.* at 109.

<sup>21</sup> *Id.* at 108–09.

<sup>22</sup> *Id.* at 112–13.

challenge has been for some to admit that “representative” has not always been synonymous with “universal,” and for others to admit that the very definition of “representative”—though it may have farther to go—has changed over the course of American history.

There is little debate that, initially, “representative” meant representative of wealthy white male Protestants. Demographically this was the case throughout the British colonial period—Spanish and French colonial interests (and their Catholic associations) notwithstanding—and was well established by the founding of the new nation.<sup>23</sup> Historian Stephen Marini documents an extraordinary level of religious homogeneity in his study of the state constitutional ratifying conventions.<sup>24</sup> The same is true for those involved in the drafting and signing of the Declaration of Independence, the Articles of Confederation, and the U.S. Constitution.<sup>25</sup> Such relative demographic homogeneity resulted in a body of law that was decidedly Protestant, reflecting the general sense of the dominant culture that “this was a Christian commonwealth, founded by Christians, maintained by Christians, and only gracious (‘tolerant’) to non-Christians as long as they acted relatively Christian.”<sup>26</sup> State statutes enshrined—and state courts protected—Protestant privilege in the prosecution of blasphemy and Sunday closing violations, the enforcement of school Bible reading, and eligibility restrictions for elected officials.<sup>27</sup> The *Virginia Declaration of Rights*—often cited as foundational in the evolution of religious liberty in America—eventually replaced the promise of toleration with the recognition of the right of religious free exercise, but noted nonetheless “that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other”—be he “Jew, Turk, or Infidel.”<sup>28</sup>

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<sup>23</sup> *Id.* at 20–23.

<sup>24</sup> See generally Stephen A. Marini, *Religion, Politics, and Ratification in RELIGION IN A REVOLUTIONARY AGE 184* (Ronald Hoffman et al. eds., 1994).

<sup>25</sup> *Id.* at 189–90.

<sup>26</sup> PHILLIP E. HAMMOND, ET AL., RELIGION ON TRIAL: HOW SUPREME COURT TRENDS THREATEN FREEDOM OF CONSCIENCE IN AMERICA 49 (2004).

<sup>27</sup> See generally ROBERT HANDY, A CHRISTIAN AMERICA: PROTESTANT HOPES AND HISTORICAL REALITIES (1st ed. 1984); see generally H. Frank Way, *The Death of the Christian Nation: The Judiciary and Church-State Relations*, 29 J. OF CHURCH AND ST. 509 (Autumn 1987); see also John K. Wilson, *Religion Under the State Constitutions, 1776–1800*, 32 J. OF CHURCH AND ST. 753 (Autumn 1990). Disputes over the reading of the Bible had less to do with abstentions and more to do with debates over which Bible to use: the “authorized” (King James) version or the Douay (Catholic) translation.

<sup>28</sup> Virginia Declaration of Rights, §16, available at [www.archives.gov/exhibits/charters/virginia\\_declaration\\_of\\_rights.html](http://www.archives.gov/exhibits/charters/virginia_declaration_of_rights.html) (accessed March 4, 2012). The phrase “Jew, Turk, or Infidel” is borrowed directly from Morton Borden, *JEWS, TURKS AND INFIDELS* (1984), but it (or variations of it) was not uncommon in the literature of the time; see *Torcaso v. Watkins*, 367 U.S. 488, 495 n10 (1961) (Justice Black, for the Court, quoting future Supreme Court Justice James Iredell at the North Carolina Convention on the adoption of the Federal Constitution: “. . . It is objected that the people of America may, perhaps, choose representatives who have no religion at all, and that pagans and

It may be a sign of the changes to come that so many public figures felt compelled to aver the Christian nature of the young Republic. In 1833—just as the Commonwealth of Massachusetts was dismantling the last of the state religious establishments<sup>29</sup>—Supreme Court Chief Justice John Marshall noted in a letter to the Rev. Jasper Adams that

The American population is entirely Christian, and with us, Christianity and Religion are identified. It would be strange, indeed, if with such a people, our institutions did not presuppose Christianity, and did not often refer to it, and exhibit relations with it. Legislation on the subject is admitted to require great delicacy, because freedom of conscience and respect for our religion both claim our most serious regard.<sup>30</sup>

Probably the most representative voice of what we could call “Protestant Nationalism”—the near-theocratic melding of Protestantism and American legal culture—was that of Supreme Court Justice Joseph Story, who served on the Court from 1811 to his death in 1845.<sup>31</sup> Story was identified as “an American Blackstone”<sup>32</sup> and “one of the most relied upon

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Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?”); *School District of Abington Township v. Schempp*, 374 U.S. 203, 214 n6 (1963) (Justice Clark, for the Court, quoting Roger Williams: “There goes many a ship to sea, with many hundred souls in one ship, whose weal and woe is common, and is a true picture of a commonwealth, or human combination, or society. It hath fallen out sometimes, that both Papists and Protestants, Jews and Turks, may be embarked in one ship; upon which supposal, I affirm that all the liberty of conscience I ever pleaded for, turns upon these two hinges, that none of the Papists, Protestants, Jews, or Turks be forced to come to the ship’s prayers or worship, nor compelled from their own particular prayers or worship, if they practice any.”); *United States v. Smith*, 18 U.S. 153, 163 (1820), (“If any person, therefore, native or foreigner, Christian or Infidel, Turk or Pagan, with whose country we are in amity, trade or correspondence, shall be robbed or spoiled, in the narrow or other seas, whether the Mediterranean, Atlantic, or Southern, or any branches thereof, either on this or the other side of the line, IT IS A PIRACY, within the limits of your inquiry, and cognizable by this Court.”); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION §1873 (1970), (“Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faiths, or mode of worship.”). Story also quotes Blackstone using a similar phrase; see STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1843.

<sup>29</sup> See Charles H. Lippy, *The 1780 Massachusetts Constitution: Religious Establishment or Civil Religion?* 20 J. OF CHURCH AND ST. 533 (1978).

<sup>30</sup> ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES 28 (1990) (quoting a letter from Marshall to Rev. Adams, 9 May 1833).

<sup>31</sup> HAMMOND ET AL., *supra* note 26, at 52.

<sup>32</sup> Gerald T. Dunne, *The American Blackstone*, 41 WASH. U. L. Q. 321, 321–37 (1963). Story has also been compared to Lord Coke (Morgan D. Dowd, *Justice Joseph Story: A Study of the Legal*

and most powerful interpreters of the Constitution for the first one hundred years of the Court's operation."<sup>33</sup> He not only sat on the Supreme Court for thirty-four years, he also taught law school, authored more of the Court's decisions relating to religion than any other nineteenth-century justice, and created a body of work on the law that, according to Roscoe Pound, "must be counted one of the controlling factors in the shaping of American law."<sup>34</sup> In particular, his three-volume *Commentaries on the Constitution*—also published in 1833—served not only as the definitive statement on the meaning of the Constitution for the rest of the century,<sup>35</sup> but also provides a glimpse into the Justice's understanding of the First Amendment, and thus the relationship between religion and government.

Story was particularly interested in religion.<sup>36</sup> Born a Calvinist but later converting to Unitarianism as a young man, Story nonetheless retained a strong Calvinist notion of the definition of religion that would powerfully guide his strong federalist notion of its relationship to law.<sup>37</sup> It is clear that, for Story, not only was Christianity very much woven into the very fabric of American legal culture, but its basic tenets—drawn from basic Protestant theology—formed the very foundation upon which the federal government's relation to religion was built. Namely, the doctrine of "faith over works" determined how the federal government could appropriately respect state powers while maintaining federal constitutional authority.<sup>38</sup> As I have written elsewhere, such a position created an environment in which "[a]ny citizen, regardless of his beliefs or the limits placed on him by any state constitution, could (in theory) participate in the federal government as long as he behaved properly: like a good Christian."<sup>39</sup>

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*Philosophy of a Jeffersonian Judge*, 18 VAND. L. REV. 643, 648 (1965)), and identified as the second most important of the Supreme Court's justices, behind Chief Justice John Marshall (Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 TULSA L. J. 93, 93–159 (1995)).

<sup>33</sup> HAMMOND ET AL., *supra* note 26, at 52.

<sup>34</sup> Roscoe Pound, *The Place of Judge Story in the Making of American Law*, 48 AM. L. REV. 676, 693 (1914).

<sup>35</sup> Henry Steele Commager calls the treatise "the Bible of the nationalists," noting that it "achieved an authoritativeness which rivaled that of the Federalist Papers themselves," and had an impact on the reconceptualization of constitutional authority after the Civil War. Henry Steele Commager, *Joseph Story*, in THE GASPAR G. BACON LECTURES ON THE CONSTITUTION OF THE UNITED STATES, 1940–1950 53, 55 (1953).

<sup>36</sup> Story biographer James McClellan writes: "Not only is Story the only Supreme Court justice who has ever attempted to answer Jefferson [in a debate about whether or not Christianity was part of the American common law], but he is also the first member of the Court to deliver opinions on the subject of religious freedom in America." See JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT 119 (1971).

<sup>37</sup> *Id.* at 6, 119.

<sup>38</sup> *Id.* at 126.

<sup>39</sup> Eric Michael Mazur, *Religion, Race, and the American Constitutional Order*, in FAITH AND RACE IN AMERICAN POLITICAL LIFE 35, (Robin Dale Jacobson & Nancy D. Wadsworth eds., 2012).



This interpretation of a Protestant nationalist approach to the laws regarding religion provides a different lens through which one can understand federal authority. If the states, through the proper exercise of their police powers, reserve the power to regulate the actions of their citizens, then the federal government is the guarantor of creedal neutrality between the majorities of the various states with their lingering state religious establishments. The debates over the First Amendment can thus be understood as debates over how best to limit competition among the different Protestant establishments—primarily Congregationalists in New England and Episcopalians in Virginia—who feared the possibility of religious persecution or political disadvantage at the hands of the others.<sup>40</sup> Religion—or more specifically, Protestant Christianity—would be the tool of federalism; states would regulate actions, but the federal government would safeguard the diversity of belief among all citizens by leveling the playing field among the Protestant denominations (and, if necessary, Catholics, “Jews, Turks, and Infidels”). As Story would argue,

The real object of the [First] amendment was, not to countenance, much less advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.<sup>41</sup>

Story and others were not intolerant or insensitive, but they were not the great pluralists as we understand the term today. As Story biographer Gerald Dunne noted, Story had “an almost militant instinct of religious tolerance” that was “unquestionably based on *noblesse oblige* rather than democratic idealism.”<sup>42</sup> Hammond, Machacek, and Mazur concluded that “religion issues were not unimportant, but they fit into a larger debate over the negotiation of political power.”<sup>43</sup>

Throughout much of the nineteenth century, the Supreme Court evaluated religion cases by the measures established by Story.<sup>44</sup> Whether it

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See also HAMMOND ET AL., *supra* note 26, at 58–60; *Freedom, Religious*, in *ENCYCLOPEDIA OF RELIGION IN AMERICA 862–870* (Charles Lippy & Peter Williams eds., 2010).

<sup>40</sup> See John F. Wilson, *Religion, Government, and Power in the New American Nation*, in *RELIGION AND AMERICAN POLITICS: FROM THE COLONIAL PERIOD TO THE 1980S* 77–91 (Mark A. Noll ed., 1990). Wilson provides an important corrective to those who present the Framers altruistic enlightened public philosophers concerned only with the broadest notions of the rights of man.

<sup>41</sup> STORY, *supra* note 28, at Book III: §1877.

<sup>42</sup> Dunne, *supra* note 32, at 327.

<sup>43</sup> HAMMOND ET AL., *supra* note 26, at 47.

<sup>44</sup> Although from the founding of the nation until 1878 there are few decisions specifically addressing the First Amendment, there are 28 that address religion-related topics. See JOHN WITTE, JR.,

was a probate dispute, an argument over church property, or alleged violations of Sunday restriction ordinances, the Supreme Court was guided regularly by the Story-articulated Protestant ethic that

religion is necessary for a moral citizenry, Protestant Christianity is the model of religion, and belief is free and protected by natural law (and the Constitution) while actions are not, and are within the jurisdiction of the states (which can limit them based on their own locally preferred version of Protestant Christianity).<sup>45</sup>

By the end of the nineteenth century, however, the close linkage between Protestantism and the goals and needs of the American constitutional order would fracture. Seen as early as President Grant's "Peace Policy" and the emergence of Catholics and non-mainstream Protestants into the public sphere,<sup>46</sup> by the end of the century the order was most comfortable with a relationship better characterized as Republican Protestantism wherein a broad conceptualization of Christianity (verging on mere theism) served as a better fit for the increasingly theologically independent federal government. Legal historian Stuart Banner points out that although arguments linking Christianity to the common law were a regular feature of judicial pronouncements through most of the nineteenth century, by the end of the century they became increasingly less common,<sup>47</sup> a point affirmed by political scientist Frank Way particularly with regard to state court decisions surrounding blasphemy prosecutions, violation of Sunday closing legislation, church property disputes, and Bible reading cases.<sup>48</sup>

One clear example of the shift from Protestant Nationalism to Republican Protestantism can be seen in the shift in rhetoric in the Court's decisions from 1844 to 1931. In 1844, Justice Story argued that a will's exclusion of clergy from participating in religious instruction at an institution established by the will was not incompatible with Christianity (and, therefore, was not a violation of the common law of Pennsylvania) because—in a very Protestant interpretation—clergy did not have a

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RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES Appendix 3 (2005).

<sup>45</sup> HAMMOND ET AL., *supra* note 26, at 62.

<sup>46</sup> See ROBERT HANDY, *UNDERMINED ESTABLISHMENT: CHURCH-STATE RELATIONS IN AMERICA 1880–1920* (1991).

<sup>47</sup> Stuart Banner, *When Christianity Was Part of the Common Law*, 16 L. & HIST. REV. 27, 27–62 (1998).

<sup>48</sup> H. Frank Way, *The Death of the Christian Nation: The Judiciary and Church-State Relations*, 29 J. OF CHURCH & ST. 509, 509–29 (1987).

monopoly on religious instruction.<sup>49</sup> He concluded “there is nothing in the devise establishing the college, or in the regulations and restrictions contained therein, which are inconsistent with the Christian religion, or are opposed to any known policy of the state of Pennsylvania.”<sup>50</sup> In 1892, Justice Brewer broadened the locus of Christianity when he wrote that the United States is “a Christian nation,” as seen in the variety of expressions of Christianity abounding in American culture.<sup>51</sup> However, by 1931, in a case involving an application for citizenship of a Canadian Baptist who refused on religious grounds to pledge to defend the nation, Justice Sutherland was perfectly comfortable identifying the nation as Christian, as long as that notion of Christianity was subordinate to the authority of the Constitution:

We are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God. But, also, we are a nation with the duty to survive; a nation whose Constitution contemplates war as well as peace; whose government must go forward upon the assumption, and safely can proceed upon no other, that unqualified allegiance to the nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God.<sup>52</sup>

The American constitutional order, according to Sutherland, and at least four other members of the Court, was not only powerful enough to compel a pacifist either to pledge to take up arms to protect it or to refuse him admission; it was also powerful enough to know that “unqualified allegiance” to the order and its laws were “not inconsistent with the will of God,” the Canadian Baptist’s religious scruples notwithstanding.<sup>53</sup>

By the time the Supreme Court expanded its understanding of the First Amendment to include state violations of the religion clauses in the 1940s, the American constitutional order was well established as the superior religious authority in the nation. Marginal religious communities could turn to it for protection from all units of government—federal, state, or local<sup>54</sup>—but risked pariah status if they lost their quest and refused to bow

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<sup>49</sup> *Vidal v. Girard’s Executors*, 43 U.S. 127, 197–201 (1844).

<sup>50</sup> *Id.* at 201.

<sup>51</sup> *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1891).

<sup>52</sup> *United States v. Macintosh*, 283 U.S. 605, 625 (1930) (internal citation omitted).

<sup>53</sup> *Id.*

<sup>54</sup> In keeping with the problematic history of traditional Native American religions and their encounter with the American constitutional order, Native Americans (on the reservation) could not turn

to the will of the order or its representatives. This arrangement benefitted the non-majoritarian religious communities, who could now for the first time secure seats at the table of governance, and it also greatly benefitted the order who, for the most part, now enjoyed transcending and existential authority absent any serious competition.<sup>55</sup>

### C. *Religion, Race, & the American Constitutional Order*

The construction of Protestant Christianity, upon which the early state establishments were built, and its subsequent transformation into the American constitutional order depended in large part on the understanding that Christian meant not only Protestant, but it also meant “white.”<sup>56</sup> From the colonial period through the American Civil War (and beyond), Protestantism was part and parcel of the construction of white identity, and found as its justification either the lesson of the curse of Ham (Genesis 9:22) or as an explanation of the two creation narratives found in the earliest chapters of Genesis.<sup>57</sup> As historian Daniel Lee argues:

At the end of the Civil War, White Americans found it necessary to distinguish themselves from non-White Americans. Initially, they took it for granted that non-Whites were also non-Christians. . . . Thus, White people could safely divide America into two distinct populations: Christians and non-Christians.<sup>58</sup>

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to the federal courts for religious protection from their own tribal governments until 1968. *See* Indian Civil Rights Act, 25 U.S.C. §§ 1301–1303 (2006).

<sup>55</sup> American historian Laurence Moore argues that, over the course of American religious history, religious communities of all sorts have enjoyed being both “insiders” and “outsiders” of American culture—“inside” enough to be accepted, but “outside” enough to retain the moral authority to be critical of the dominant culture. *See generally* R. LAURENCE MOORE, *RELIGIOUS OUTSIDERS AND THE MAKING OF AMERICANS* (1986). This suggests the possibility that it is the culture that remains the single authority—that to which the religious communities both strive to be “inside” and strive to remain “outside.” It is that culture—with the patina of official governance—that is the American constitutional order.

<sup>56</sup> In my initial 1999 analysis I failed to take into account the issue of race; Mormon leadership was *de jure* white at the time of their encounter (a position that would not change until 1978), and Jehovah’s Witnesses were *de facto*. Perceptions of racial differences between Native Americans and the Protestant American dominant culture were therefore factored out so that other comparable factors could be analyzed. I credit my wife with helping me toward this understanding; having grown up Jewish near Spanish Harlem, she did not consider herself or other Jews “white.” *See generally* KAREN BRODKIN, *HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA* (1999).

<sup>57</sup> *See generally* ALEXANDER WINCHELL, *PREADAMITES; OR A DEMONSTRATION OF THE EXISTENCE OF MEN BEFORE ADAM*, (4th ed. 1886).

<sup>58</sup> DANIEL B. LEE, *A Great Racial Commission: Religion and the Construction of White America*, in *RACE, NATION, AND RELIGION IN THE AMERICAS* 107, (Henry Goldschmidt & Elizabeth McAlister, eds., 2004).

Understood more broadly than it might first appear to contemporary readers, the notion of race was used in roughly the same way as the concept of “stock,” or even, for those in the late twentieth century, “ethnicity.” In the congressional debates over the Civil Rights Act of 1866, one can find references to a wide variety of different “races,” including Chinese, German, Gypsy, Jewish, Latin, Mexican, Mongolian, Scandinavian, Spanish, as well as Anglo-Saxon.<sup>59</sup> Upon closer examination, one detects a religious pattern: all of the “races” except the Anglo-Saxons, Germans, and Scandinavians are non-Protestant. Even the presumed Lutheranism of the Germans and Scandinavians might have alienated them in the eyes of more Calvinist-leaning Protestants, who would have seen them as too much like Catholics to count.<sup>60</sup>

This association of race with religion would continue into the twentieth century. In 1923, fifty-seven years after the congressional debates over the 1866 Act, the Supreme Court denied a resident noncitizen American citizenship based on its interpretation of “non-white” in contemporary immigration law.<sup>61</sup> Throughout the decision, the Court treated as synonymous the man’s religion, ethnicity, nationality, and race.<sup>62</sup> As late as 1987, the Supreme Court was still applying the original understanding of race articulated in the 1866 Act. Writing for a unanimous Court in one decision, Justice Byron White noted that “[p]lainly, all those who might be deemed Caucasian today were not thought to be of the same race at the time [42 U.S. §] 1981 became law . . . It was not until the 20th century that dictionaries began referring to the Caucasian, Mongolian, and Negro races, or to race as involving divisions of mankind based upon different physical characteristics.”<sup>63</sup> The decision, and another reported just after,<sup>64</sup> involved two different claims of racial bias; in the first decision, an Arab man sought to sue his employer for racial discrimination,<sup>65</sup> while in the second, a Jewish congregation sought to bring civil rights violations charges against a person who had damaged their synagogue. In the decisions, the Court ruled that neither the Jew nor the Arab would have been considered “white” under the nineteenth century statute, and were therefore deserving

<sup>59</sup> Civil Rights Act of 1866, 14 Stat. 27 (1866); See CONG. GLOBE, 39TH CONG., 1ST SESS. 238–51, 498–99, 523, 542, and 1294 (1866).

<sup>60</sup> See generally Patricia U. Bonomi, *Religious Dissent and the Case for American Exceptionalism in RELIGION IN A REVOLUTIONARY AGE* 31–52 (Ronald Hoffman et al. eds., 1994).

<sup>61</sup> *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923).

<sup>62</sup> *Id.*; See also Jennifer Snow, *The Civilization of White Men: The Race of the Hindu in RACE, NATION, AND RELIGION IN THE AMERICAS* 259 (Henry Goldschmidt & Elizabeth McAlister, Eds. 2006). Mr. Thind was a member of the Sikh community, but in the decision was regularly referred to as a “high caste Hindu.”

<sup>63</sup> *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610–11 (1987).

<sup>64</sup> *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 615–18 (1987).

<sup>65</sup> The employee is identified as Muslim only in the decision’s summary. *Id.*

of the additional protection afforded by the Act.<sup>66</sup>

While these two decisions from 1987 examine how the nineteenth century Congress—and one can assume, most of American society at the time—conflated race and religion, they also suggest how different things had become by the time the modern Court handed them down. Although “white” and Protestant were synonymous for much of American history, by the middle of the twentieth century, the two were becoming increasingly uncoupled. The acculturation of Catholics and Jews—White “non-whites”—into broader American public culture not only broadened the definition of race, it also challenged the mainstream Protestant cultural monopoly, enabling other groups—mostly notably African Americans, but also other non-Protestant “non-whites”—to follow shortly thereafter.<sup>67</sup>

The broken linkage itself was enabled by the transformation of the American constitutional order, which by the end of the nineteenth century no longer depended on Protestantism exclusively as its transcending source of authority. By the middle of the twentieth century the transition was well on its way to locating in itself that source of transcending authority. Though still a significant motif of the American constitutional order, Protestant Christianity was becoming one of the many world-views competing for expression. This competition would not only empower traditionally marginal religious communities, but it would expand the democratic process through a “multiplicity of sects.”<sup>68</sup> Ironically, as the logical, if unintended, result of the Protestantization of American society—particularly its privileging of the principle of radical individualism—uncoupled Protestantism, Christianity, and then institutional religion entirely from the self-conceptualization of the American constitutional order, the federal government was better able to integrate non-Protestant and then “non-white” communities into the public sphere. This uncoupling would ultimately have an impact on how the order came to understand and evaluate Islam, to whom we now turn.

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<sup>66</sup> See *Shaare Tefila*, 481 U.S. at 618; *Saint Francis Coll.*, 481 U.S. at 610–11.

<sup>67</sup> Mazur, *supra* note 39 at, 40–41. See *Americanization*, in *ENCYCLOPEDIA OF RACE, ETHNICITY, AND SOCIETY*, I, 62–64 (Richard Schaeffer, ed., 2008); *Pluralism*, ii:1051–53.

<sup>68</sup> In *The Federalist* No. 51, “Publius” argues:

In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government.

THE FEDERALIST NO. 51 (James Madison).

### III. THE AMERICAN CONSTITUTIONAL ORDER, ISLAM, AND THE STAGES OF DEVELOPMENT

Unlike the experience of Mormons and Jehovah's Witnesses—and much more like the experience of traditional Native American religions—there is not a distinct period of encounter between Islam and what comes to be the final arbiter of the order's transcending authority, the United States Supreme Court. Ordinarily, a focus on the Court is essential to understanding the religious aspect of the order. In participating in First Amendment religious liberty litigation, an organization's leadership is signaling (even unconsciously or symbolically) the possibility that, in losing and agreeing to accede to the Court's ruling, they are subordinating the dictates of conscience and faith to the dictates of the order. A lack of periodization for the encounter, therefore, is as telling as the very clearly demarcated periods of encounter for Mormons and Jehovah's Witnesses.

However, like religious liberty claims from those representing traditional Native American religions, the claims of adherents to Islam have only recently reached the Supreme Court.<sup>69</sup> Despite the fact that, according to Richard Freeland, the first Muslim on the continent was a Moroccan travelling in 1539 with a Franciscan explorer,<sup>70</sup> and while there are numerous references to Muslims and Islam in the decisions issued by the Supreme Court from the beginning of the nation's history,<sup>71</sup> the first religious liberty case involving a Muslim would not reach the Court until 1971.<sup>72</sup> Some of this can be explained demographically; many of the Muslims who came to this continent were either part of the Spanish exploration (and therefore beyond the early Anglo-American colonial experience) or enslaved (and therefore ineligible for any rights under that same system).<sup>73</sup>

The evolving nature of religious liberty litigation would also keep Muslim claims to a minimum, certainly until the 1940s and the expansion of the interpretation of the religious clauses. Most of the behaviors that are

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<sup>69</sup> In the analysis of encounters with the American constitutional order, emphasis is placed on the United States Supreme Court for several reasons; its jurisdiction is national, its authority is therefore superior, and particularly in the case of small religious communities in the United States, it may be a better barometer of the federal government's approach to that community than state, federal circuit, or federal district courts. For a sense of the dispersion of the American Muslim community, see *Muslims as a Percentage of All Residents, 2000*, VALPARAISO UNIV. DEP'T OF GEOGRAPHY AND METEOROLOGY, [www.valpo.edu/geomt/pics/geo200/religion/muslim.gif](http://www.valpo.edu/geomt/pics/geo200/religion/muslim.gif).

<sup>70</sup> Richard Freeland, *The Treatment of Muslims in American Courts*, 12 ISLAM AND CHRISTIAN MUSLIM REL. 449, 450 (2001).

<sup>71</sup> For examples from the nineteenth century, see *Manella v. Barry*, 7 U.S. 415 (1806); *The Star*, 16 U.S. 78, 100 (1818); *United States v. Smith*, 18 U.S. 153, 173 (1820); *Dodge v. Woolsey*, 59 U.S. 331, 370 (1855); *Mahoney v. United States*, 77 U.S. 62, 66 (1870); *Dainese v. Hale*, 91 U.S. 13 (1875); *In re Ross*, 140 U.S. 453, 463 (1891).

<sup>72</sup> *Clay v. United States*, 403 U.S. 698 (1971).

<sup>73</sup> Freeland, *supra* note 70, at 450.

considered to be a threat to the American constitutional order have been traditionally considered to fall under state authority,<sup>74</sup> meaning that encounters before the 1940s would seem invisible at the federal level.<sup>75</sup> Mormons experienced a distinct period of litigation because of their presence on federal territory; indeed, part of their motivation to relocate beyond the reach of any particular state was the impossibility of constitutional protection from state religious persecution during their sojourn in Ohio, Missouri, and Illinois.<sup>76</sup> Had their religious liberty litigation begun while they still resided in any one of those states, it is reasonable to assume it would never have reached the Supreme Court.<sup>77</sup> On the other hand, Jehovah's Witnesses experienced a distinct period of Supreme Court litigation because of the coincidence of timing with the expansion of the interpretation of the First Amendment speech and religion clauses that they helped initiate.<sup>78</sup>

In the case of Islam, the slave trade brought early Muslims to the British colonies from North and West Africa, but the perils of slavery—family separations, lack of religious leadership, imposed Christianity, and prohibitions against group gatherings—stifled its survival in the slave community.<sup>79</sup> According to Gwendolyn Simmons, this form of Islam is generally recognized to have dwindled to statistical insignificance with the end of the importation of slaves across the Atlantic in the first decades of the nineteenth century.<sup>80</sup> Islam was revived through the religious innovations of the African American experience of Islam in the early twentieth century and Muslim immigration from parts of the world experiencing their own encounter with the American constitutional order. In the interim, the order developed in an environment that was not hermetically sealed but was, among other things, populated by nations and other political units with Muslim adherents. How the order dealt with those political units—nations, cultures, and subcultures—depended largely on where the order was in its own stages of development.<sup>81</sup> As we will see, the

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<sup>74</sup> For a discussion of systemic biases against marginal religious communities, see Frank Way & Barbara J. Burt, *Religious Marginality and the Free Exercise Clause*, 77 AM. POL. SCI. REV. 652 (1983).

<sup>75</sup> This explains why there doesn't seem to be a corresponding period of Jewish or Roman Catholic litigation before the Supreme Court. For example, see generally BERNARD J. MEISLIN, *JEWISH LAW IN AMERICAN TRIBUNALS* (1976).

<sup>76</sup> See Mazur, *supra* note 5, at 66–67.

<sup>77</sup> See *Id.*

<sup>78</sup> See Edward F. Waite, *The Debt of Constitutional Law to Jehovah's Witnesses*, 28 MINN. L. REV. 209, 216–18 (1944).

<sup>79</sup> Gwendolyn Zoharah Simmons, *From Muslims in America to American Muslims*, 10 J. ISLAMIC L. & CULTURE 254, 258–59 (2008).

<sup>80</sup> *Id.* at 261.

<sup>81</sup> In my initial analysis, I categorized the reactions of the religious communities according to their reaction to the American constitutional order: “convergence” (Jehovah's Witnesses), “conversion”



order's response to North African Muslims encountered during the nation's encounter with the Barbary states was influenced in part by its inheritance from larger European Christian culture, but its experience with Mormons, even as they were being compared to Muslims, was shaped as much by the order's desire for territorial expansion as it was for moral superiority. The order's experience with the Moros of the southern Philippine Islands provides a classic study of the dilemmas of an empire, while its dealings back home again with re-emerging models of African American Islam tested the order's self-conceptions as ideologically (and therefore, theologically) self-referential and independent of its Protestant roots.<sup>82</sup>

Each of these stages has meant that the American constitutional order has responded to Islam in varying ways, each time according to the needs of the order at the moment. As we will see, while much of the response was directed either internationally or at non-Muslims, ultimately this has had an impact on the experience of religious liberty of the American Muslim community.

#### A. *Encounter: The Barbary Encounter*

While the slave trade may have provided some Americans their first contact with an actual Muslim, most others had been encountering an exoticized notion of Islam for centuries. Historian Marianne Perciaccante argues that it was the rise of the Ottoman Empire as a political competitor (and threat) to Europe which "led to a blossoming of writings against the Muslims," a phenomenon that carried even greater significance since it roughly coincided with the Reformation. This resulted in the use of Islam as a negative label attached by Protestants to Catholics, and vice versa.<sup>83</sup>

By the time the North American colonies were established, citizens of the colonial powers of Europe had enslaved and been enslaved by North Africans for a substantial period.<sup>84</sup> In 1631, two Algerian vessels landed in Ireland and "abducted the entire hamlet" of Baltimore.<sup>85</sup> Even earlier than that—as early as the 1620s—two colonial American ships were captured and taken to Morocco.<sup>86</sup> By the time the Marines were on their way to the "shores of Tripoli," well-educated Americans were already familiar with the region through exposure to European literature such as travel journals

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(Mormons), and "conflict" (Native Americans). In the present analysis, the focus is less on Islam per se and more on the reaction of the American constitutional order.

<sup>82</sup> See generally Edmund Arthur Dodge, *Our Mohammedan Subjects*, 19 POL. SCI. Q. 20 (1904).

<sup>83</sup> Marianne Perciaccante, *The Mormon-Muslim Comparison*, 82 MUSLIM WORLD 296, 298 (1992).

<sup>84</sup> See generally Paul Michel Baeppler, *The Barbary Captivity Narrative in American Culture*, 39 EARLY AM. LITERATURE 217 (2004).

<sup>85</sup> *Id.* at 228.

<sup>86</sup> *Id.* at 218. The event occurred just a dozen years after the establishment of the British colony at Jamestown, and almost coincidental to the landing at Massachusetts Bay.

and other popular historical works.<sup>87</sup>

Despite the speed with which Moroccan Emperor Mohammed III recognized the new American nation on December 20, 1777<sup>88</sup>—less than eighteen months after the Declaration of the Independence was drafted—and even with a treaty with France ensuring that country’s protection of the new nation,<sup>89</sup> diplomatic difficulties continued between the North African states and the Americans. In early October, 1784, the American vessel *Betsy* was captured off the coast of Morocco, resulting in diplomatic exchanges and a “flurry of denunciation in the American press.”<sup>90</sup> In late July, 1785, a Boston-based vessel was captured by Algerians off the southwestern tip of Portugal, and a Philadelphia-based vessel was captured in the seas near Lisbon.<sup>91</sup> The inability to secure the release of the captured American sailors by the young government outraged American citizens, but delighted the British, who retained a desire to recapture the colonies, and seemed to confirm the weakness of the Confederation of American states.<sup>92</sup> Not surprisingly, the onset of war only exaggerated the situation, as the capture of the *USS Philadelphia*, Captain Stephen Decatur’s mission to burn it and thus deny its use by its captors, the attack on Tripoli, and other events of the war “provided significant press and were a source of nationalistic pride.”<sup>93</sup>

Before, during, and as a mechanism to conclude the war, the new Republic was able to negotiate treaties with the various North African states. Not surprisingly, in many of the treaties the term “Christian”<sup>94</sup> is used to identify a European or American, while “Christian powers”<sup>95</sup> and

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<sup>87</sup> Glenn James Voelz, *Images of Enemy and Self in the Age of Jefferson: The Barbary Conflict in Popular Literary Depiction*, 28 WAR & SOC’Y 21, 25 (2009).

<sup>88</sup> Moulay Ali Bouânani, *Propaganda for Empire: Barbary Captivity Literature in the U.S.*, 7 J. TRANSATLANTIC STUD. 399, 401 (2009).

<sup>89</sup> Treaty of Amity and Commerce, art. 8, Feb. 6, 1778, 8 Stat. 12. The Treaty reads

The most Christian King will employ his good offices and interposition with the King or Emperor of Morocco or Fez, the regencies of Algier, Tunis and Tripoli, or with any of them; and also with every other Prince, State or Power of the Coast of Barbary, in Africa, and the subjects of the said King, Emperor, States and Powers, and each of them, in order to provide as fully and efficaciously as possible for the benefit, conveniency and safety of the said United States, and each of them, their subjects, people, and inhabitants, and their vessels and effects, against all violence, insult, attacks, or Depredations on the Part of the said Princes and States of Barbary, or their Subjects.

<sup>90</sup> Bouânani, *supra* note 88, at 405.

<sup>91</sup> *Id.* at 404.

<sup>92</sup> *Id.*

<sup>93</sup> Voelz, *supra* note 87, at 46.

<sup>94</sup> See Treaty of Peace and Friendship, U.S.-Morocco, art. XI, Jan. 1, 1787, 8 Stat. 100; Treaty of Peace and Friendship, U.S.-Tripoli, art. XI, Nov. 4, 1796, 8 Stat. 154; Treaty of Peace and Amity, U.S.-Algiers, art. 14, Jun. 30, 1815, 8 Stat. 224.

<sup>95</sup> Treaty of Peace and Friendship, U.S.-Morocco, art. 17, Jun. 28, 1786, 8 Stat. 100; Treaty of Peace, U.S.-Morocco, art. 24, Sept. 16, 1836, 8 Stat. 484.

“Christian nations”<sup>96</sup> are synonymous with Europe and the United States. Likewise the terms “Moor”<sup>97</sup> and “Musselmen”<sup>98</sup> are used to designate a non-European (who, by definition, would also have been a non-Christian). The use of these terms may have been at the insistence of the non-American diplomats; many of the treaties were originally written in Arabic or Turkish and only translated later, and several start with what for a majority-Christian nation would be an unorthodox salutation.<sup>99</sup>

However, it is clear where the American imprint is located in the treaties. While most use the terms “Christian” and “Moor” in passing—and generally absent of any theological significance—two treaties make reference to religion and religious liberty, but in what we can now see is a particularly Protestant manner. Article 11 of the 1797 “Treaty of Peace and Friendship” with Tripoli proclaims:

As the government of the United States of America is not in any sense founded on the Christian religion—as it has in itself no character of enmity against the laws, religion or tranquility of Musselmen—and as the said states never have entered into any war or act of hostility against any Mahometan nation, it is declared by the parties, that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries.<sup>100</sup>

Similarly, Article 15 of the 1822 “Treaty of Peace and Amity” with Algiers declares:

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<sup>96</sup> See Treaty of Peace, U.S.-Morocco, art. 24, Sept. 16, 1836, 8 Stat. 484.

<sup>97</sup> See Treaty of Peace and Friendship, U.S.-Morocco, art. 6, 11, 21 Jun. 28, 1786, 8 Stat. 100; Treaty of Peace, U.S.-Morocco, art. 21, Sep. 16, 1836, 8 Stat. 484.

<sup>98</sup> See Treaty of Peace and Friendship, U.S.-Tripoli, art. 11, Nov. 4, 1796, 8 Stat. 154.

<sup>99</sup> Treaty of Peace and Friendship, U.S.-Tunis, Aug. 28, 1787, 8 Stat. 157.

God is infinite.

Under the auspices of the greatest, the most powerful of all the princes of the Ottoman nation who reign upon the earth, our most glorious and most august Emperor, who commands the two lands and the two seas, Selim Khan the victorious, son of the Sultan Moustafa, whose realm may God prosper until the end of ages, the support of kings, the seal of justice, the Emperor of emperors.

The most illustrious and most magnificent Prince Hamuda Pasha, Bey, who commands the Odgiak of Tunis, the abode of happiness; and the most honored Ibrahim Dey; and Suleiman, Agha of the Janizaries and chief of the Divan; and all the elders of the Odgiak; and the most distinguished and honored President of the Congress of the United States of America, the most distinguished among those who profess the religion of the Messiah, of whom may the end be happy.

See also the Treaty of Peace and Friendship, U.S.-Morocco, Sep. 16, 1836, 8 Stat. 484.

<sup>100</sup> Treaty of Peace and Friendship, U.S.-Tripoli, Nov. 4, 1796, 8 U.S.T. 151–1867.

As the government of the United States has, in itself, no character of enmity against the laws, religion, or tranquility, of any nation, and as the said States have never entered into any voluntary war, or act of hostility, except in defence of their just rights on the high seas, it is declared, by the contracting parties, that no pretext arising from religious opinions shall ever produce an interruption of the harmony between the two nations; and the Consuls and Agents of both nations shall have liberty to celebrate the rites of their respective religions in their own houses.<sup>101</sup>

The first of these two treaties states that the federal government is not founded on Christianity, a declaration that masked the fact that in 1797 several of the colonies-turned-states retained vestiges of their previous Protestant establishments. However, both treaties use the expression “religious opinion,” a notion that, centered as it is on belief rather than action, seems particularly Protestant.

As Moulay Bouânani illustrates, popular representations of the events relied on ancient stereotypes and rallied “the popular masses behind the cry of ‘Innocent White Christians’ in the hands of Barbarian ‘Mohammedans.’”<sup>102</sup> Paul Baeppler argues that the image of the Muslims as barbarians was informed by their more local experience with Native Americans in North America,<sup>103</sup> a point confirmed by Glenn Voelz, who concludes that “[a]s Americans struggled to interpret the culture of the Barbary they relied significantly on parallels to a more familiar context of experiences with Native Americans.”<sup>104</sup>

This connection may have been informed by a concern that political instability caused by both non-Christian adversaries served the interests of the British, and both Native Americans and the Barbary powers were seen as “savage and pliable agents of British design against American interest.”<sup>105</sup> The comparison predated the Barbary conflict; Adam Smith had compared Arab and Native American cultures “to elucidate the more primitive forms of social organisation”<sup>106</sup> and works “suggesting links between Native Americans and the ancient Hebrews of the Mediterranean” were published as early as 1775.<sup>107</sup> From the beginning of the Barbary conflict, President Jefferson’s approach to both groups—Native Americans

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<sup>101</sup> Treaty of Peace and Amity, U.S.–Algiers, Dec. 22–23, 1816, 8 U.S.T. 233–1867.

<sup>102</sup> Bouânani, *supra* note 88, at 406.

<sup>103</sup> Baeppler, *supra* note 84, at 113–14.

<sup>104</sup> Voelz, *supra* note 87, at 26.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 24.

<sup>107</sup> *Id.* at 26; see also JAMES ADAIR, THE HISTORY OF THE AMERICAN INDIANS 13–14 (1775).

and the Barbary powers—was parallel, “seeking pacification either through military force or a policy of engagement and transformation.”<sup>108</sup>

The popular result was that what has come to be known as captivity narratives provided the opportunity to relate the experience. This appeal to narrative strengthened the claims of empire by heightening concern about the perceived enemy and highlighting the ability of the forces of righteousness and justice to prevail.<sup>109</sup> Thus, both the Barbary and the Native American narratives served roughly the same purpose, and “[j]ust as the Indian captivity narrative succeeded in demonising the Indian, the Barbary captivity narrative succeeded in rallying the population against the Muslims.”<sup>110</sup> The Barbary narratives, which Baepler points out were predominantly produced in North America “near the end of the American War of Independence when the vulnerable new nation lost its British naval protection,”<sup>111</sup> not only provided increasing authority to the American constitutional order by making it, at least in part, the hero of the conflict, it also created a legacy that affirmed the order’s connection to European Christianity by highlighting its distinction with North African Islam. Freed from its connection to the actual physical threat of piracy, which had diminished significantly by the 1830s “with the start of European colonialisation,”<sup>112</sup> the legacy of the Muslim-Native American comparison would continue. According to Baepler, a “young Abraham Lincoln owned a copy of [James] Riley’s *Authentic Narrative*”<sup>113</sup> (a popular Barbary captivity narrative), crediting it as “one of the influences that shaped the future president’s opinion of slavery in the United States.”<sup>114</sup> Marianne Perciaccante notes that some of the naval histories of the military encounter with the Barbary States, “expressing the Western view of the East,” could be found in the library of Joseph Smith, the founder of the Mormons, the community to which we now turn.<sup>115</sup>

#### B. Expansion: The Mormon Encounter

The connection between Islam and Joseph Smith is not random. In the

<sup>108</sup> Voelz, *supra* note 87, at 38.

<sup>109</sup> Bouānani, *supra* note 88, at 400. Traditional captivity narratives often included accounts of abduction, confrontations with demands to convert, and subsequent descriptions of escape or liberation.

<sup>110</sup> *Id.* at 409.

<sup>111</sup> Baepler, *supra* note 84, at 220.

<sup>112</sup> Voelz, *supra* note 87, at 46.

<sup>113</sup> Baepler, *supra* note 84 at 217. According to the Library of Congress, the full title of the 1817 work is *An authentic narrative of the loss of the American brig Commerce, wrecked on the western coast of Africa, in the month of August, 1815. With an account of the sufferings of her surviving officers and crew, who were enslaved by the wandering Arabs on the great African desert, or Zahahrah; and observations historical, geographical, &c., made during the travels of the author, while a slave to the Arabs, and in the empire of Morocco.*

<sup>114</sup> Baepler, *supra* note 84., at 217–18.

<sup>115</sup> Perciaccante, *supra* note 83, at 300.

second half of the nineteenth century, as the threat from the Barbary States was waning, the perception of a Mormon threat was growing. While the emerging authority of the American constitutional order may have been more concerned about the growing exercise of political power in the Mormon community,<sup>116</sup> the rhetoric of the day focused on the Mormon practice of plural marriage, which was considered an abomination of the uncivilized. Throughout the last quarter of the nineteenth century, as Congress increased its pressure on the Mormons—including, ultimately, a threat to seize and liquidate all of the Church's assets—it would demand that the Church cease its support of two institutions, one political (its control over the Mormon political machinery in the then-Utah territory) and the other social; plural marriage, known more commonly as polygamy. As Chief Justice Waite wrote in 1878, “[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.”<sup>117</sup>

The comparison of the Mormon practice to that of presumably uncivilized peoples of non-European races was not new. In an 1865 article comparing Mormonism with Islam, Hyppolite Taine had argued that “polygamy in both religions serves as a means of transforming paternity into sovereignty,”<sup>118</sup> an argument that Waite uses without attribution in the Court's decision.<sup>119</sup> The common perception among non-Mormons—now as much as then<sup>120</sup>—was that Mormons were not Protestants, and given our earlier discussion of the relationship between religion and race, that would have strengthened the notion that the Mormons were also “non-white.”

This is a point that reverberates within Mormonism as well as outside of it. Considering themselves the descendents of Israelites of the First Temple period (1000–586 BCE), Mormonism placed itself in line more with Middle Eastern Jews than with European Protestants.<sup>121</sup> After their ancestral escape from the Babylonian conquest<sup>122</sup> and their relocation to the Western hemisphere, a disagreement resulted in those who renounced Divine authority having “a skin of blackness to come upon them.”<sup>123</sup> While this reference might suggest a euphemism to modern students of race, for the Mormons it explained the presence of Native Americans on the

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<sup>116</sup> See generally, MAZUR, *supra* note 5, at 62–93.

<sup>117</sup> *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

<sup>118</sup> Perciaccante, *supra* note 83, at 307.

<sup>119</sup> *Reynolds*, 98 U.S. at 166 (“Professor [Francis] Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.”).

<sup>120</sup> See generally JAN SHIPPS, MORMONISM: THE STORY OF A NEW RELIGIOUS TRADITION (1985).

<sup>121</sup> See 1 *Nephi* 1:4. In the same way that Jews refer to non-Jews as “gentiles,” it is common for Mormons similarly to refer to all non-Mormons “gentiles” (even Jews).

<sup>122</sup> See 1 *Nephi* 18: 22–23.

<sup>123</sup> 2 *Nephi* 5: 21.

continent by the time it was discovered by the Europeans several hundred years later.<sup>124</sup>

Among non-Mormons, the identification with race was possibly subtler, but present. Justice Waite's description of the Mormon practice of plural marriage as "odious" did not compare it negatively to all of Europe, but only to the citizens of the "northern and western nations of Europe"<sup>125</sup> who were—certainly by the beginning of the eighteenth century—predominantly Protestant. On the other hand, the "Asiatic" and "African" people were neither Christian nor white; they were the only other cultures where one could find this "odious" practice.<sup>126</sup> Waite is, by reference, arguing that the Mormons were engaging in a non-Christian, and therefore, "non-white" religious practice.<sup>127</sup>

What might be even more powerful a suggestion of the religio-racial nature of the threat from Mormons is the observation made by Marianne Perciaccante. She stated that, while "during the nineteenth century anti-Mormon historiography and polemic were marked by the constant appearance of comparisons between Joseph Smith and Muhammad and between Mormonism and Islam," by the beginning of the second decade of the twentieth century "it virtually disappeared."<sup>128</sup> She argues that the reason had less to do with Mormonism and more to do with international affairs; "the early decades of the twentieth century saw a dramatic decrease in American interest in Islam and a decline in public information about Islamic culture."<sup>129</sup> While it also may have had to do with the near-total

<sup>124</sup> These peoples would be identified as "Lamanites," named for one of the sons of the Mormon patriarch Lehi who had rejected Divine authority. See LEONARD J. ARRINGTON & DAVIS BITTON, *THE MORMON EXPERIENCE: A HISTORY OF THE LATTER-DAY SAINTS*, 33 (2d. ed., 1992). Africans and African-Americans were understood differently, and those of African descent were prohibited from the Church's priesthood until 1978. See *id.*, at 321–25; Spencer W. Kimball, *Official Declaration 2 at Semiannual General Conference of The Church of Jesus Christ of Latter-Day Saints* (June 8, 1978), available at <http://www.lds.org/scriptures/dc-testament/print/od/2?lang=eng>.

<sup>125</sup> *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

<sup>126</sup> *Id.*

<sup>127</sup> Montesquieu used a remarkably similar construction one hundred thirty years earlier:

When, two centuries ago, the Christian religion suffered the unfortunate division that divided it into Catholic and Protestant, the peoples of the north embraced the Protestant religion and those of the south kept the Catholic.

This is because the peoples of the north have and will always have a spirit of independence and liberty that the peoples of the south do not, and because a religion that has no visible leader is better suited to the independence fostered by the climate than is the religion that has one.

MONTESQUIEU, 24 *THE SPIRIT OF THE LAWS*, 463. (Anne M. Cohler, et al. eds. Trans., 1989). See also Mazur, *supra* note 39, at 39–40.

<sup>128</sup> Perciaccante, *supra* note 83, at 296.

<sup>129</sup> *Id.* at 301. See *The Star*, 16 U.S. 78, 100 (1818). References to anything related to Islam disappear in Supreme Court rhetoric between 1891 and 1940, save for one reference to "Mohammedan countries" in a decision involving competing men's communal organizations in the United States. *Ancient Egyptian Arabic Order v. Michaux*, 279 U.S. 737 (1929).

victory of the American constitutional order over the Mormon Church—which in 1890 had changed its position on both plural marriage<sup>130</sup> and control of Mormon political machinery, and by the first decade of the twentieth century had successfully placed a Mormon in the Senate<sup>131</sup>—there is no doubt that the decline and fall of the Ottoman Empire was a significant presence in the mind of the order and its citizens. As Perciaccante concludes, “the final decline of the Ottoman Empire” marked the end of an empire that “for centuries had posed a threat to the West. . . . The Mormon-Muslim comparison virtually disappeared around 1912.”<sup>132</sup>

### C. *Empire: The Moro Encounter*

The third period of encounter between the American constitutional order and Islam began unintentionally, as an unexpected by-product of the war between the United States and Spain, and its resolution may also have contributed to the cessation of the “Mormon-Muslim comparison.” According to John Finley, the man who would eventually govern the southern Philippine Islands for the Americans, the U.S. government “was not aware of the existence of any Mohammedans in the Philippines” until it was well engaged in war with the Filipino colonial authority.<sup>133</sup> In 1899, after learning of their existence and sensing the possibility of a “holy war,”<sup>134</sup> Oscar Straus, U.S. Minister Plenipotentiary and Envoy Extraordinary to the Sublime Porte (the Turkish Court), “armed with the American treaty of 1796 with Tripoli,”<sup>135</sup> set up a meeting with Sultan Abdul Hamid, asking for “aid in America’s peaceful penetration of the Philippines.”<sup>136</sup> According to Straus’s biographer, Naomi Cohen, Straus “assured the Sultan that the United States would not interfere with the religion of the Muslims concerned, and Abdul Hamid agreed to cooperate.”<sup>137</sup> The strategy worked; the Sultan sent a cable to Mecca,

<sup>130</sup> See Wilford Woodruff, *Official Declaration 1* (Oct. 6, 1880), available at <http://www.lds.org/scriptures/dc-testament/print/od/1?lang=eng>. This is often referred to as the *Woodruff Manifesto* after Church President Wilford Woodruff.

<sup>131</sup> See MILTON R. MERRILL, REED SMOOT: APOSTLE IN POLITICS 8–9 (1990).

<sup>132</sup> Perciaccante, *supra* note 83, at 301. One such comparison of Islam and Mormonism was Bruce Kinney’s *Mormonism: The Islam of America* (1912).

<sup>133</sup> John P. Finley, *The Mohammedan Problem in the Philippines*, 5 J. OF RACE DEV. 353, 357 (1915). According to one observer, there were 110,000 Muslims in the southern Sulu Sultanate in 1901; see Oliver C. Miller, *The Semi-Civilized Tribes of the Philippine Islands*, 18 ANNALS OF AM. ACAD. POL. & SOC. SCI. 43, 60 (1901). By 1940, just six years before Philippine independence, there were 650,000 Muslims in the Philippines (out of a total population of 16 million).. See Sidney Glazer, *The Moros as a Political Factor in Philippine Independence*, 14 PAC. AFF. 78 (1941).

<sup>134</sup> Finley, *supra* note 133, at 357.

<sup>135</sup> *Id.*

<sup>136</sup> NAOMI W. COHEN, A DUAL HERITAGE: THE PUBLIC CAREER OF OSCAR S. STRAUS 93 (1969). Cohen clarifies that, “[a]s spiritual head of the Muslims in the islands, he could influence them to accept American rule without opposition.” *Id.*

<sup>137</sup> *Id.* at 94.



where some of the Philippine Muslim leaders had gone for the hajj, the leaders agreed not to resist the American forces, and Straus's efforts "were credited with having saved the lives of many American soldiers."<sup>138</sup> In the treaty signed by President McKinley and the southern Philippine Sultanate in October, 1899, in exchange for unchallenged sovereignty in the former Spanish territories, the Americans promised to respect local authorities and to "abstain from interference with the prevailing religion and customs."<sup>139</sup> Possibly due more to American Protestant anti-Catholicism (and lingering anti-Spanish sentiment<sup>140</sup>) than to reality, American forces in the Philippines initially felt more at home among the Muslims than among the Spanish Catholics; noted Oliver Miller in 1901, "[i]t is strange but true that to-day a man may carry the American flag with greater safety through the land of the Moros than through any other part of the Philippine Archipelago."<sup>141</sup>

Ultimately, however, the 1899 treaty failed, largely because of a misunderstanding rooted in a mistranslation over the relationship between the Americans and the Sulu Sultanate who, at least in the English version, the Americans sought to strip of any significant authority.<sup>142</sup> By 1902, American forces were engaged with the Moros of the south, and an amnesty proclamation issued by President Roosevelt that year specifically did not include the Moros, who had not "submitted to the authority of the United States."<sup>143</sup> Largely in recognition of the uprising already going on, the American Governor of the Philippines was notified on March 2, 1904,

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<sup>138</sup> *Id.*

<sup>139</sup> Glazer, *supra* note 133, at 82. The Americans had already achieved victory over the Spanish in 1898, and Article 10 of the "Treaty of Peace" between the United States and Spain, signed in Paris in December of that year, promised that "[t]he inhabitants of the territories over which Spain relinquishes or cedes her sovereignty shall be secured in the free exercise of their religion." See Treaty of Peace, U.S.-Spain, Feb. 6, 1899; Finley, *supra* note 133, at 361. It is not unreasonable that, while applying to the Muslim population of the southern islands, this provision would have been of greatest importance to the residents of the northern islands, who were both Catholic and more directly under Spanish control at the time of the war. As Howard Federspiel notes, "[t]he United States did not establish its own presence in much of the southern region until 1902." Howard M. Federspiel, *Islam and Muslims in the Southern Territories of the Philippine Islands During the American Colonial Period (1898–1946)*, 29 J. OF SOUTHEAST ASIAN STUD. 340 (1998).

<sup>140</sup> Although patronizing, Finley in particular expresses a romantic view of the Moros and a heartfelt pity for how they had been treated by the Spanish. He argues in one article that "the hardships to which the Moros have been subjected in the last three hundred and fifty years would account for their deterioration mentally, morally and physically," suggesting that the Muslim leadership in the southern islands were as self-aware as "any royal family of Europe—or the D.A.R.'s." Finley, *supra* note 133, at 354–55. In a separate article, he argued that "[b]oth of these fields of social and physical betterment had been neglected under Spanish dominion. The main idea with the Spanish conquerors was the spread of Catholicism and the establishment of the authority of the Papal Church." John P. Finley, *The Commercial Awakening of the Moro and Pagan*, 197 N. AM. REV. 327–28 (1913).

<sup>141</sup> Miller, *supra* note 133, at 62.

<sup>142</sup> Richard Freeland, *Orientalism and the 'Shari'ah': American Imperialism in Egypt and the Philippines*, 27 HAMDARD ISLAMICUS 60 (2004).

<sup>143</sup> Dodge, *supra* note 82, at 20.

that the 1899 treaty was no longer in effect.<sup>144</sup> The conflict subsided by the beginning of World War I<sup>145</sup> when, with help from the now-trusted American John Finley and the Ottoman Caliph,<sup>146</sup> American forces minimized the office of the Sultan to “the same degree of authority possessed by the heads of all other religious bodies in American territory,” with spiritual but no political authority.<sup>147</sup> A civilian government was established, and just after World War II the Philippines became an independent nation. As Howard Federspiel put it, “The American Period lasted for almost 50 years, but the south was under direct rule only for the first fifteen.”<sup>148</sup>

Islam had been a part of Philippine history since just before the beginning of the fifteenth century, but by the end of the seventeenth century, the Spanish had conquered the northern islands and forced the Muslims—whom the Spanish called Moros “after the Moors of Spain”—out of the north and into the southern islands. Catholicism became the religion of the north, and from 1578 until the American period began in 1898, the two groups were locked in a stalemate.<sup>149</sup>

The arrival of the Americans—or more specifically, the image of the Moros that emerged in the minds of the Americans after they became aware of their presence—was heavily influenced by two pre-existing stereotypes: the Muslim Barbary pirates, and (not surprisingly) Native Americans. The Americans accepted and perpetuated the image of the Moros as pirates, with one contemporary writer identifying them as “strong, brave sea-rovers, the ‘Norsemen’ of the East,”<sup>150</sup> and another suggesting that they were, among sea farers, “the most unconquerable.”<sup>151</sup> Some expressed the fear that, without the strong hand of American leadership, “these Moros would revive their piratical life and war on their

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<sup>144</sup> *America Abrogates Treaty with Moros*, N.Y. TIMES, March 15, 1904, at 5.

<sup>145</sup> Federspiel, *supra* note 139, at 342.

<sup>146</sup> Finley was instructed to tell the Caliph that the Moros “were true followers of Islam, but also loyal citizens of the United States and wished to remain so.” Finley, *supra* note 133, at 362; *See also* John P. Finley, *The Mohammedan Problem in the Philippines. II*, 7 J. OF RACE DEV. 23, 46 (1916); *Sultan to be Peacemaker: Will be Asked to Make Philippine Mussulmans Obey America*, N.Y. TIMES, Feb. 16, 1913, at 21.

<sup>147</sup> *See* Glazer, *supra* note 139, at 84, n. 4; *See also* Federspiel, *supra* note 139, at 350.

<sup>148</sup> Federspiel, *supra* note 139, at 343. Evidence of this a more distant supervision of the southern islands is suggested by the fact that, over the course of the American constitutional order’s involvement in the Philippines, only two cases involving religion reached the Supreme Court: the first, *Santos v. Holy Roman Catholic and Apostolic Church*, 212 U.S. 463 (1909), involved a dispute over property and was settled along a line of decisions involving similar (albeit Protestant) church property disputes in the contiguous states; and the second, *Gonzalez v. Archbishop*, 280 U.S. 1 (1929), was as much an employment dispute (over a clerical position) as anything else. Both involved the island’s Catholic community, and both presented the order with the opportunity to exert authority over the island’s Catholic church. Neither involved Islam.

<sup>149</sup> Glazer, *supra* note 133, at 81.

<sup>150</sup> Finley, *supra* note 133, at 354.

<sup>151</sup> Miller, *supra* note 133, at 61.

Christian brothers.”<sup>152</sup>

The other image burned into the psyche of the American constitutional order—of the Native American “other” as threat and nuisance—found expression in the plans for dealing with the Moros after their “discovery.” Shortly after the 1899 treaty, the Philippine Commission was instructed to deal with the “uncivilized tribes” (the Moro and “Pagan” peoples) as Congress had dealt with Native Americans—a plan that was approved and adopted by Congress, the Commission’s official oversight institution, in 1902.<sup>153</sup> Richard Freeland recounts how U.S. Secretary of War Elihu Root “thought U.S. policy toward Muslims should be guided by the U.S. Supreme Court decision in *Cherokee Nation v. State of Georgia*”—no doubt a reference to Chief Justice John Marshall’s designation of the Native Americans as a “domestic dependent nation”<sup>154</sup>—and how Native Americans were sent to the southern Philippine islands “to spread the word of pax-Americana.”<sup>155</sup> “As with American attitudes to American Indians,” Freeland concludes, “U.S. policy sought to civilize their overseas empire through Christianisation [sic].”<sup>156</sup>

Christianization—at least of the Protestant variety—was on the mind of many with regard to the peoples of the Philippines, be they Catholic or Muslim. This religious enthusiasm blended well with a sense of religious mission—more in keeping with Republican Protestantism than Protestant Christianity traditionally understood—that accompanied the American presence in all of the possessions it now controlled, including (but not limited to) the Philippines; or as one writer put it, “the uplifting, Divine mission of America in the Philippines.”<sup>157</sup> This form of Christianization—evangelizing for American democracy—was evident in the attitude of the military toward the Moros, which was as strategic as it was enlightened.<sup>158</sup> As early as 1902, Major General George W. Davis was advising against both missionary work among the Moros,<sup>159</sup> and the Civil Government Act for the Philippines, which was approved by Congress on July 1, 1902, not only restated the religion clauses of the First Amendment, but also

<sup>152</sup> Maximo M. Kalaw, *Recent Policy Towards the Non-Christian People of the Philippines*, 10 J. INT’L REL., 1, 1 (1919).

<sup>153</sup> Finley, *supra* note 140, at 326.

<sup>154</sup> “They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.” *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 17 (1831).

<sup>155</sup> See Freeland, *supra* note 142, at 62.

<sup>156</sup> *Id.*

<sup>157</sup> Miller, *supra* note 133, at 44.

<sup>158</sup> For an analysis of the pedagogy of democratization, see Jeffrey Ayala Milligan, *Democratization of Neocolonialism? The Education of Muslims under U.S. Military Occupation, 1903–20*, 33 HIST. OF EDUC. 451 (2004).

<sup>159</sup> Finley, *supra* note 133, at 358.

extended them in a way that—with an emphasis on both “religious profession and worship”—cast them as significantly less Protestant than that which was contained in the original United States Constitution.<sup>160</sup> Howard Federspiel notes that “[w]hile the line between religion and state among Americans was not as clearly defined at the time as many thought it was, American military and civilian officials in the Philippines believed the principle could be applied to the peoples of the southern territories. They saw no reason,” he concludes, “why the Muslims could not practice Islam so long as they accepted American political authority.”<sup>161</sup> In the mind of Major Findley, advocacy of this point facilitated “a bond of sympathy and a basis of co-operation” with the Moros, which “steadily gr[ew] in strength and influence.”<sup>162</sup>

Over time, the American mission to the Philippines proved to be a success, mostly for the American constitutional order that, in bringing its form of democratic piety to the former Spanish colony, came to seek resolution of deep religious differences. The Muslims were eventually taught the order’s values—particularly the lesson of “the separation of Church and State in the Moro country and the relinquishment of civil authority by the native chiefs in favor of the agents of the central government,” a feat never before attempted in another “Mohammedan country.”<sup>163</sup> By putting aside religious differences, “for the first time in the history of the Philippine Islands, the Mohammedan Filipinos sat side by side with the Christian Filipinos in the legislative halls to work out the destinies of the common country.”<sup>164</sup> Ultimately, the Filipino issue boiled down to one of race, and as the American occupation moved toward its conclusion, one can see the transformation from the earlier notion of race as “stock” or ethnicity to one more familiar to the later twentieth century American. Catholic or Muslim, the Filipinos were certainly “other,” for good or bad.<sup>165</sup> As Maximo Kalaw argues, the “Moros and Christian Filipinos can live harmoniously together” because “they are in truth citizens of one country and members of one race.”<sup>166</sup> More cynically,

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<sup>160</sup> The pertinent part of the Civil Government Act read: “That no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof and that the free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be allowed.” *Id.* at 361.

<sup>161</sup> Federspiel, *supra* note 139, at 343.

<sup>162</sup> Finley, *supra* note 140, at 328.

<sup>163</sup> Kalaw, *supra* note 152, at 8.

<sup>164</sup> *Id.* at 11. Kalaw recounts how several members of the Filipino legislature even took the oath of office using a Qur’an.

<sup>165</sup> Wrote Sidney Glazer: “The Americans assumed that there was a profound difference between the Muslim and Christian Filipinos. This was an error. . . . The possibility of quickly assimilating the Moro country into a united Philippines, was hobbled by thus emphasizing the cleavage between Christians and non-Christians.” Glazer, *supra* note 133, at 82–83.

<sup>166</sup> Kalaw, *supra* note 152, at 8.

Sidney Glazer noted in 1941 that “[t]he problem presented by the backward minority (in some ways like the Negro minority problem in the United States), will become insignificant should July 4, 1946 indeed be Independence Day for the Philippine Islands.”<sup>167</sup>

This inability to overcome racial differences—which seemed to be more of a distraction than were distinct religious differences—paralleled the path being followed by the American constitutional order. By the middle of the twentieth century, the first stratum of “non-whites”—Catholics and Jews—was beginning to acculturate into American society, and the order was increasingly turning its attention to the second stratum. It is to that stratum that we now turn.

#### *D. Extension: The American Muslim Encounter*

One gets the sense of reverse-Orientalism<sup>168</sup> in much of the historiography of Islam in America, which seems to overlook American (and more specifically, African American) forms of Islam for Middle Eastern and South Asian forms of later arrival.<sup>169</sup> However, the history of adherents of the religion in the United States began not with the arrival of Arab Muslims in the late nineteenth century but with the arrival of African Muslims at the very beginning of the North American colonial period.<sup>170</sup> And while the unbearable conditions endured during enslavement contributed to the fading of this African form of Islam, there were nonetheless elements of continuation in the African American community even as adherents of Islam from other places on the globe were gaining the attention of the American constitutional order.

The main African American forms of Islam mirrored social thinking of the time, and linked religion and race. In the words of Gwendolyn Simmons, for African Americans these forms of Islam were “Black Religion—that perennial expression of blacks’ struggle against racism and oppression that for many reasons took on a religious identity.”<sup>171</sup> The Moorish Science Temple, founded in 1913 by Noble Drew Ali (born Timothy Drew, 1886), taught that Islam was the proper religion for people of African descent while Christianity was the proper religion for those of European descent, and that the world would never experience lasting peace

<sup>167</sup> Glazer, *supra* note 133, at 89.

<sup>168</sup> See generally EDWARD W. SAID, *ORIENTALISM* (1978).

<sup>169</sup> Gwendolyn Simmons points out that “the large influx of Muslims from the Islamic world [since the 1960s] has caused a shift in the content of Islam and in the basis of Islamic religious authority in the US due to their claim to have ‘superior if not [the] ultimate authority to define Islam.’” Simmons, *supra* note 79, at 274.

<sup>170</sup> *Id.* at 258.

<sup>171</sup> *Id.* at 274.

“until each racial group ha[d] its own ‘true religion.’”<sup>172</sup> The “Moorish” in the community’s name was a reference to the belief that African Americans were descended from the Moors of North Africa, and through them linked to “the ancient Moabites who inhabited the northwestern and southwestern shores of Africa.”<sup>173</sup> The Nation of Islam, an ideological and organizational descendent of the Moorish Science Temple, was founded in 1930 by Wali Fard Muhammad, who claimed to be the reincarnated Noble Drew Ali, and retained Ali’s notion of the racial connection between Christianity and White Europeans.<sup>174</sup> Fard was succeeded by Elijah Muhammad (born Elijah Poole, 1898), who expanded his predecessor’s teachings in the area of racial segregation and self-reliance, and further developed the community’s race-based theology.<sup>175</sup> This theology would lead to Muhammad’s eventual arrest during World War II for “refusing to comply with the Selective Service Act” by “evading the draft and influencing others to do so.”<sup>176</sup> As it turned out, prison served the organization well, enabling the leadership to attract new members among African Americans who might be predisposed against both the government and the dominant White European Protestant culture.<sup>177</sup>

It is no surprise then that the first encounters of Islam over the issue of religious liberty came in cases involving those struggling against the physical authority of the American constitutional order, and that the cases—*Clay v. United States* and *Joseph v. United States*—dealt directly with the need of the order to supply muscle for its military ventures overseas.<sup>178</sup> What may be surprising is that both cases produced decisions in favor of the members of the Nation of Islam claiming conscientious objector status (“CO”), albeit on procedural grounds.<sup>179</sup> Both of these CO

<sup>172</sup> See CLIFTON E. MARSH, FROM BLACK MUSLIMS TO MUSLIMS: THE TRANSITION FROM SEPARATION TO ISLAM, 1930–1980 43 (1984).

<sup>173</sup> See *id.*, at 43–44 (quoting DREW ALI, HOLY KORAN OF THE MOORISH SCIENCE TEMPLE (1927)).

<sup>174</sup> *Id.* at 51.

<sup>175</sup> As Gwendolyn Simmons notes, “By the time of Mr. Muhammad’s death on February 25, 1975, the NOI was the prevailing Islamic presence in North America,” with over 100,000 members in more than a hundred cities. She concludes “One can safely say that there would be no Islam in America were it not for these proto-Islamic African American formations.” Simmons, *supra* note 79, at 254, 267, 269.

<sup>176</sup> MARSH, *supra* note 172, at 60.

<sup>177</sup> This relationship continues with the success of Islam in contemporary prisons, suggesting that the element of attraction among prison inmates may be Islam’s challenge to the dominant culture as much as its independent theology. See generally Mark S. Hamm, *Prison Islam in the Age of Sacred Terror*, 49 BRIT. J. OF CRIMINOLOGY 667–85 (2009).

<sup>178</sup> *Clay v. United States*, 403 U.S. 698 (1971); *Joseph v. United States*, 405 U.S. 1006 (1972). Clay is Cassius Clay, heavyweight boxer who had converted to the Nation of Islam. He was represented in the lower courts by Hayden Covington, who had successfully litigated numerous cases—including conscientious objector cases—before the Supreme Court for the Jehovah’s Witnesses. See MAZUR, *supra* note 5, at 28–61.

<sup>179</sup> While interpreted differently by the legal community, a “win” on procedural grounds is still seen as a victory by the religious community involved in the litigation; many of the “wins” enjoyed by

cases also produced responses (one concurrence, one dissent, respectively) from Justice William Douglas, who used the occasion to reiterate his critique from *Gillette v. United States* of the Court's limitation on conscientious objection for those who opposed certain types of war rather than all war.<sup>180</sup>

However, Justice Douglas's appearance here carries greater symbolic significance; other than a lone reference in an 1891 majority opinion written by Justice Field,<sup>181</sup> Justice Douglas was the first and most consistent Supreme Court Justice to use the term "Moslem" (or "Muslim") rather than the more common (but highly offensive) "Mohammedan" in his decisions.<sup>182</sup> This use symbolically and rhetorically paved the way for the "normalization" of Islam as just another of the religious traditions in the American constitutional order, particularly when it appeared in (mostly, but not exclusively) religion-related decisions in lists of a variety of more traditionally accepted, Western monotheistic religious traditions.<sup>183</sup>

This "normalization" was hardly coincidental or accidental. After Elijah Muhammad's death in 1975, his son Wallace led the Nation of Islam into orthodox (Sunni) Islam, encouraging his followers to give up the Nation of Islam's goal of racial segregation, "honor the American flag," and participate in the political process by voting.<sup>184</sup> He affirmed American citizenship and the obligation of citizens to defend the country, but released those who maintained a conscientious objection by respecting their personal religious commitments.<sup>185</sup> By the time the Court heard the case of *O'Lone v. Estate of Shabazz*<sup>186</sup>—identified by Richard Freeland as "[o]ne of the most important cases on Muslim prisoners' rights"<sup>187</sup>—the attention of the American constitutional order had moved beyond the

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Jehovah's Witnesses—particularly among the many CO decisions—came on procedural grounds. See MAZUR, *supra* note 5, at 52–54.

<sup>180</sup> *Gillette v. United States*, 401 U.S. 437, 463–75 (1971) (Douglas, J., dissenting).

<sup>181</sup> The reference is hardly complimentary: "The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all their intercourse, and all proceedings had in their tribunals." *In re Ross*, 140 U.S. 453, 463 (1891).

<sup>182</sup> In a handful of decisions from 1806 through the end of the nineteenth century—none of which actually involve Muslims—the Supreme Court regularly uses words such as "Turk," "Mohammedan"/"Mahometan," and "Moor." See *The Star*, 16 U.S. 78, 100 (1818). References of anything related to Islam disappear in Supreme Court rhetoric between 1891 and 1940, save for one reference to "Mohammedan countries" in a decision involving competing men's fraternal organizations in the United States. See *Ancient Egyptian Arabic Order v. Michaux*, 279 U.S. 737, 739 (1929).

<sup>183</sup> See *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *McGowan v. Maryland*, 366 U.S. 420 (1961) (Douglas, J., dissenting); *Arlan's Dep't Store, Inc. v. Kentucky*, 371 U.S. 218 (1962) (Douglas, J., dissenting); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Douglas, J., dissenting); *Wright v. Rockefeller*, 376 U.S. 52 (1964) (Douglas, J., dissenting); *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664 (1970) (Douglas, J., dissenting).

<sup>184</sup> MARSH, *supra* note 172, at 94.

<sup>185</sup> *Id.*

<sup>186</sup> *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

<sup>187</sup> Freeland, *supra* note 50, at 456.

issues raised during the Civil Rights Era. In his dissent of the Court's decision—which rejected prisoners' religious liberty demands for religious accommodations for *Jumu'ah* (Friday afternoon communal prayers)—Justice Brennan, a Catholic, compared the ritual to Catholic mass, placing it, according to Kathleen Moore, “within the Judeo-Christian religious tradition,” thereby ascribing Islam “an air of familiarity,”<sup>188</sup> much as Justice Douglas had done before him.

The Immigration Act of 1965 had transformed the entire landscape of religion in America. Although migrations from the Middle East had expanded the population of Muslim Americans since the 1870s,<sup>189</sup> the increase in immigrant Muslims would change the demographics dramatically. Today, according to Gwendolyn Simmons, referring to a Pew Research Survey, “[i]mmigrants constitute the majority of the Muslim population, accounting for 64% of the community” coming from “80 different countries, including both Muslim majority and Muslim minority states.”<sup>190</sup> With a total population estimated by the Pew Foundation at just under 2.5 million,<sup>191</sup> it is “one of the most diverse Muslim communities on earth.”<sup>192</sup> Given the seismic change in American Islam, it is no surprise that the three most recent cases to reach the Supreme Court involving Muslim religion claims came from naturalized Muslim Americans born elsewhere. In *Saint Francis College v. Al-Khazjari*, a U.S. citizen born in Lebanon sought employment protection after being fired, allegedly because of his race;<sup>193</sup> *EEOC v. Arabian American Oil Company* involved a naturalized U.S. citizen born in Lebanon and a question of statutory extraterritoriality;<sup>194</sup> and *Ashcroft v. Iqbal* involved a motion to dismiss charges brought by a citizen of Pakistan against federal employees acting in their official capacities after attacks on New York and Virginia on September 11, 2001.<sup>195</sup>

An interesting pattern emerges from these three decisions that seems to

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<sup>188</sup> KATHLEEN MOORE, *Muslims in Prison: Claims to Constitutional Protection of Religious Liberty*, in *THE MUSLIMS OF AMERICA*, 136, 150 (Yvonne Yazbeck Haddad, ed., 1991); see O'Lone v. Estate of Shabazz, 482 U.S. at 360 (Brennan, J., dissenting).

<sup>189</sup> Simmons, *supra* note 79, at 259–60.

<sup>190</sup> *Id.* at 262. Simmons estimates the percentage of African American Muslims at 20 percent.

<sup>191</sup> *Id.* This number is extraordinarily controversial, largely because of its value in the fight for Islamic acceptance in the American constitutional order. Claims that the Muslim American community is larger than the American Jewish community make it the “second” largest religion in the United States, a small victory considering that—grouped together in this way—all forms of Christianity together represent nearly 80 percent of the population.

<sup>192</sup> Freeland, *supra* note 70, at 452.

<sup>193</sup> *Saint Francis Coll. v. Al-Khazjari*, 481 U.S. 604, 606 (1987).

<sup>194</sup> *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 247 (1991). The only mention of religion can be found in the “Brief for the Petitioner Ali Boureslan” submitted to the Supreme Court. Brief for Petitioner at 3 *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (No. 89-1845), 1990 WL 10012850 at \*3.

<sup>195</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).



reflect on the issue of the physical, territorial authority of the American constitutional order instead of on the issue of religion. As noted above, in the first decision the Court granted protection to the individual;<sup>196</sup> in the second, the claim of extraterritoriality was rejected;<sup>197</sup> and in the third, the motion to dismiss was granted for the government officials acting in their official capacities after the attacks of September 11.<sup>198</sup> The first decision involved the expansion of protection for a citizen, regardless of race (or religion),<sup>199</sup> as promised by an idealized reading of the order's foundational documents; the second decision recognized the limits of the order's reach<sup>200</sup>—maybe a surprising conclusion, but not an unreasonable one; and the third sought to protect the order (and its agents) as they performed their highest duty, the protection of the order (if also its citizens).<sup>201</sup> Regardless of one's view of the federal government's response to the events of September 11, 2001, there can be no doubt that—perceived as it was as an unprovoked attack—the order would respond according to patterns developed over its history.

The events of September 11, 2001, have, in the words of Gwendolyn Simmons, “separated the history of American relations with the Muslim world into before and after phases.”<sup>202</sup> The passage of the various restrictive legislative acts, the invasions of Iraq and Afghanistan, and the heightened sense of Islamophobia have seemed to confirm for many Muslim Americans their sense of alienation from the American constitutional order. However, as Agatha Koprowski notes, “[a]lthough a watershed event in so many other areas of American life, September 11 did not seem to significantly change the ways in which American courts approach Muslim parties.”<sup>203</sup> And there is evidence that—while very real for those who perceive it to be the case—this is more a matter of perception than reality.<sup>204</sup> Anecdotal accounts are powerful,<sup>205</sup> but may not

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<sup>196</sup> *Saint Francis*, 481 U.S. at 604.

<sup>197</sup> *EEOC*, 499 U.S. at 247, 259.

<sup>198</sup> *Ashcroft*, 556 U.S. at 686.

<sup>199</sup> See *Saint Francis*, 481 U.S. 604.

<sup>200</sup> See *EEOC*, 499 U.S. 244.

<sup>201</sup> See *Ashcroft*, 556 U.S. 662.

<sup>202</sup> Simmons, *supra* note 79, at 277.

<sup>203</sup> Agatha Koprowski, *Islamophobia, Neo-Orientalism, and the Specter of Jihad: Problems Facing Muslim Litigants in U.S. Courts*, 14 U. PA. J.L. & SOC. CHANGE 183, 200 (2011).

<sup>204</sup> According to a survey conducted by the Pew Research Center in 2007, while 53 percent of those surveyed responded that it was more difficult “[b]eing Muslim in the U.S. since 9/11” and 54 percent of those surveyed indicated that they thought the government did “single out Muslims for extra surveillance,” 73 percent of those who responded indicated that they had never “been a victim of discrimination as a Muslim in the U.S.” Pew Research Center, *Muslim Americans: Middle Class and Mostly Mainstream*, PEW RESEARCH CENTER (May 22, 2007), <http://pewresearch.org/assets/pdf/muslim-americans.pdf>.

<sup>205</sup> See generally Mohamed Nimer, *The Muslim Experience of Discrimination in the United States*, 2 J. ISLAMIC L. 21 (1997).

take into account changes that are already taking place in both the American Muslim world and in the American constitutional order in which they now live, suggesting an equilibrium being approached by both the order and—in this case—its Muslim American citizens.

#### IV. TRANSFORMATIONS

Underlying the above analysis of the encounter of the American constitutional order with Islam has been the model of behavior discerned in the history of Mormons, Jehovah's Witnesses, and traditional Native American religions as they have experienced the authority of the order themselves. That model examined how Mormonism seemed ultimately to capitulate to the will of the order, while the Jehovah's Witnesses found a way to translate their theology into a language understood by the order. The inability of traditional Native American religions to gain any meaningful form of religious liberty could therefore be understood as their failure to follow the example of either the Mormons or the Jehovah's Witnesses.

Islam in the United States has been as adaptive as any religious tradition in the twentieth century—enabled by the constitutional order's increasing distance from its Protestant foundations. Current research of non-African American Muslims suggests that they are becoming increasingly "Americanized." As Yvonne Haddad and Adair Lummis put it, "with each succeeding generation there is a decline in strict adherence to those values that are identified by Muslim leadership as specifically Islamic."<sup>206</sup> Education level, economic status, and length of time in the United States each has a profound effect, and "American Muslims now suffer the dilemma of all religious minorities: to maintain a distinctive culture or assimilate into the mainstream?"<sup>207</sup> As the community has grown and become more established, "small ethnic enclaves are in some cases learning how to share their institutions with more recent immigrants, in the process gradually dropping their ethnic particularities and moving toward a more common Islamic identity."<sup>208</sup>

Adapting does not necessarily mean capitulating, and scholars have been exploring ways of transforming traditional Islamic institutions to fit the American circumstance.<sup>209</sup> "American versions of Islam," notes Karen

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<sup>206</sup> YVONNE YAZBECK HADDAD & ADAIR T. LUMMIS, ISLAMIC VALUES IN THE UNITED STATES: A COMPARATIVE STUDY 166 (1987).

<sup>207</sup> Freeland, *supra* note 70, at 452.

<sup>208</sup> HADDAD & LUMMIS, *supra* note 206, at 158.

<sup>209</sup> See, e.g., John R. Bowen, *Islamic Adaptations to Western Europe and North America: the Importance of Contrastive Analyses*, 55 AM. BEHAVIORAL SCIENTIST 1601 (2011); Safiya Ghori, *The Application of Religious Law in North American Courts: A Case Study of Mut'a Marriages*, 10 J. ISLAMIC L. & CULTURE 29 (2008); Issa Smith, *Native American Courts: Precedent for an Islamic Arbitral System*, THE AMERICAN MUSLIM, Spring 1993, <http://theamericanmuslim.org/tam.php/>

Leonard, “are being formulated in an ongoing dialogue with other members of American society,” and while some immigrants want to avoid the effects of Americanization, “new versions of Islam are being constituted from ‘American’ ways of being Muslim and from other ways, as long as Muslim immigrants keep coming, of being Muslim.”<sup>210</sup>

The examination of Islam and the American constitutional order also suggests a more dynamic model, one that must take into account the transformation of the American constitutional order not only from Protestant Nationalism through Republican Protestantism and finally into an independent, self-referential transcending mythic source of authority, but also in terms of its essence as a political entity. The constitutional order transformed not only as religion in American transformed, but also as the nation on which it was built transformed, and its experience with Islam seems to have changed as its political orientation changed. The early encounter with Barbary Muslims was informed as much by the youth and inexperience of the nation as it was by the difference of religion. The young nation’s expansion into the West required that it not be interrupted by a competing political entity, necessitating the neutralization of Mormon authority and subsequent negative comparison to Islam. And the dictates of empire required that the Moros be brought into the realm for military reasons, regardless of their religious orientation. When the order was able to focus on its own Muslim community, it no longer did so based on religion but on race, reflecting the nation’s transcendence of the former but lingering fixation with the latter.<sup>211</sup>

In the most recent phase, the American constitutional order is both loosened from its Protestant foundations—and therefore better able to incorporate non-Protestant (and therefore, “non-white”) communities into the public sphere—but also without rival for the construction and maintenance of transcending meaning and authority, protective of its own physical and ideological territory, and threatened from beyond its borders. This situation has contributed to the sense of disorientation felt by many American Muslims who feel increasingly accepted in American public culture yet still singled out and marginal in American legal and political culture.

Beyond the mere use of the word “Muslim” in Supreme Court decisions, there are a number of positive signs attesting to the acculturation of Islam into the American constitutional order, and the order, for its part,

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features/articles/native\_american\_courts\_precedent\_for\_an\_islamic\_arbitral\_system/0013143; Saminaz Zamm, *Amrikan Shari’a: The Reconstruction of Islamic Family Law in the United States*, 28 SOUTH ASIA RESEARCH 185, 186 (2008).

<sup>210</sup> Karen Leonard, *American Muslims and Authority: Competing Discourses in a Non-Muslim State*, 25 J. AM. ETHNIC HIST. 5, 8 (2005).

<sup>211</sup> *Id.* at 10–13.

seems to be integrating Islam as it has other religious communities. For example, in 1991, Imam Sirah Wahhaj of Brooklyn, New York, was the first Muslim to deliver an opening prayer to the U.S. House of Representatives,<sup>212</sup> followed in 1992 by Imam Warith Deen Mohammed (son of Elijah Muhammad), the first Muslim similarly to open the United States Senate.<sup>213</sup> In 1993, Imam Abdul-Rasheed Muhammad became the first Muslim chaplain in the U.S. military, the only chaplain of nearly 3,200 who was “neither Christian nor Jewish.”<sup>214</sup> The previous year, nearly 80 Muslim American members of the military made the hajj “aboard a military aircraft.”<sup>215</sup> In 1996, ‘Eid and Ramadan Iftar observances were held at the White House,<sup>216</sup> and in 2001, the United States Postal Service issued 75 million “Eid Mubarak” stamps.<sup>217</sup> Noted the Council on American-Islamic Relations chair Omar Ahmad, “[t]his is one sign that the Muslim presence in America is being recognized.”<sup>218</sup> In 2004, the Kerry/Edwards campaign issued buttons reading “Muslims for Kerry Edwards,”<sup>219</sup> and in 2006, Keith Ellison (D-MN) became the first Muslim elected to Congress; he was sworn in on a Qur’an.<sup>220</sup>

In 1997, a number of Muslim organizations raised an objection to the depiction of Muhammad in the 1930s-vintage frieze in the Supreme Court chamber.<sup>221</sup> Although the organizations’ objections were dismissed, the

<sup>212</sup> Mohamed Nimer, *Muslims in American Public Life*, in *MUSLIMS IN THE WEST: FROM SOJOURNERS TO CITIZENS* 176 (Yvonne Yazbeck Haddad ed., 2002).

<sup>213</sup> C. ERIC LINCOLN, *THE BLACK MUSLIMS IN AMERICA* 265 (3rd ed. 1994); See Simmons *supra* note 79, at 271 (according to Gwendolyn Zoharah Simmons, Imam Mohammed also played a part in the first Clinton Inaugural).

<sup>214</sup> *Muslim Chaplain Sees Historic Role in Army*, N.Y. TIMES, Dec. 25, 1993, <http://www.nytimes.com/1993/12/25/nyregion/muslim-chaplain-sees-historic-role-in-army.html>.

<sup>215</sup> Laurie Goodstein, *For Muslims in the Military, A Chaplain of their Own*, WASH. POST, Dec. 4, 1993, at A1.

<sup>216</sup> Nimer, *supra* note 212, at 210.

<sup>217</sup> Sylvia Moreno, *Stamp Backlash Worries Muslims; Tribute to Islamic Holidays Scorned by Collectors’ Newsletter, Conservative Group*, WASH. POST, Nov. 24, 2001, at B1. The first Hanukkah stamp was issued in 1996, and the first Christmas stamp was issued in 1962. See also Bill Broadway, *A Sticky Church-State Issue; Postal Service’s Hanukkah Stamp Rekindles Debate Over Holiday Commemoratives*, WASH. POST, Oct. 19, 2006, at D8.

<sup>218</sup> Bill Broadway, *Stamp to Honor Muslim Holiday*, WASH. POST, Nov. 25, 2000, at B9.

<sup>219</sup> From the personal collection of the author. In 2008, the Obama/Biden campaign circulated buttons reading “Muslim Americans for Obama Biden” as well as “American Muslims for Obama Biden.”

<sup>220</sup> Omar Sacirbey, *Conservatives Attack Use of Koran for Oath*, WASH. POST, Dec. 9, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/08/AR2006120801482.html>. (There was some negative reaction to the use of the Qur’an. But even this negative response is a tempest in a teapot; all members of the House of Representatives are sworn in en masse—without books of any kind—on the House floor; the use of any book for a personalized swearing in ceremony is purely for publicity.) André Carson [D-IN], elected in a special election in 2008, was the second Muslim elected to Congress.

<sup>221</sup> Tamara Jones & Michael O’Sullivan, *Supreme Court Frieze Brings Objection*, WASH. POST, Mar. 8, 1997, at A1 (There are 18 figures depicted, including Hammurabi, Moses, Solomon, Confucius, Justinian, Charlemagne, William Blackstone, John Marshall, Napoleon Bonaparte); see Joan Biskupic,

mere fact that they were raised was seen by some to be a positive sign.<sup>222</sup> Abdurahman Alamoudi, the executive director of the American Muslim Council, pointing to the age of the frieze and its historical context, expressed pride in the depiction of Muhammed, stating that it was “an honor to see Muhammad portrayed as a lawgiver in the Abrahamic tradition,” and that “Muslims should appreciate it.”<sup>223</sup>

More recently, there have been situations in the public sphere involving strong anti-Muslim rhetoric, including a focus during the 2008 presidential campaign on the religion of then-Senator Barack Obama.<sup>224</sup> In one manifestation of this phenomenon, a number of states have expressed concern over the use of what they call “Sharia law,” passing referenda prohibiting its use in state courts.<sup>225</sup> Again, anecdotal evidence—in this case, of the number of times a court has incorporated “Sharia law”—may be powerful, but it defies interpretation because it rejects contextualization.<sup>226</sup>

As baseball great Reggie Jackson once noted, “[f]ans don’t boo nobodies.”<sup>227</sup> It may be that, as the American Muslim community becomes more integrated into the American constitutional order, its detractors will take greater notice even as its adherents avail themselves of the opportunities afforded by participating. For example, Karen Leonard laments that a problem in the practice of Sharia is the dearth of those trained in its interpretation and application, arguing that a class of “new spokesmen have changed the inward foci of national-origin communities and reached out to other Muslims and the American public, advocating citizenship and participation in mainstream politics and abandoning a

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*From Two Friezes, Great Figures of Legal History Gaze Upon the Supreme Court Bench*, WASH. POST, Mar. 11, 1998, at H1.

<sup>222</sup> Jones & O’Sullivan, *supra* note 221.

<sup>223</sup> *Id.*

<sup>224</sup> See, e.g., Khody Akhavi, *Right Paints Obama as Manchurian Candidate*, INTERPRESS SERVICE, Feb. 28, 2008, <http://www.ipsnews.net/news.asp?idnews=41401>.

<sup>225</sup> Donna Leinwand, *More States Enter Debate on Sharia Law*, USA TODAY, Dec. 9, 2010, at 3A (Leinwand notes that “Although Oklahoma’s law is the first to come under court scrutiny, legislators in at least seven states, including Arizona, Florida, Louisiana, Oklahoma, South Carolina, Tennessee and Utah, have proposed similar laws, the National Conference of State Legislatures says. Tennessee and Louisiana have enacted versions of the law banning use of foreign law under certain circumstances”); See *Awad v. Ziriax*, No. 10-6273, 2012 WL 50636, at \*16 (10th Cir. Jan. 10, 2012) (As this article was being written, the United States Court of Appeals for the 10th Circuit affirmed a preliminary injunction against the referendum that had passed in Oklahoma).

<sup>226</sup> *Shariah Law and American State Courts: An Assessment of State Appellate Court Cases*, CENTER FOR SECURITY POLICY 10–12 (2010) <http://shariahinamericancourts.com/> (A study by the conservative Center for Security Policy notes that, between 2010–2011, of fifty cases considered, twenty-nine were “highly relevant,” and twenty-one were “relevant.” The study covered all fifty states—New Jersey and California produced the highest numbers, with six and five, respectively—but did not supply data as to the total number of eligible cases. Information about the Center, including the identities of those affiliated with it, can be found on line at: [www.centerforsecuritypolicy.org](http://www.centerforsecuritypolicy.org)).

<sup>227</sup> Phil Taylor, *No Taboo to Boo*, SPORTS ILLUSTRATED, May 17, 2004.

stance that had assumed only temporary residence in the U.S.”<sup>228</sup> Just under a century ago, argues Jerold Auerbach, the center of authority in the American Jewish community shifted from religious to legal worlds, from rabbis to lawyers, as a natural factor in the acculturation and integration of the American Jewish community facing marginalization and exclusion.<sup>229</sup> Quite possibly, the American Muslim community will experience full integration into the American constitutional order along a similar path as the order itself continues to be transformed.

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<sup>228</sup> Leonard, *supra* note 210, at 9.

<sup>229</sup> JEROLD S. AUERBACH, RABBIS AND LAWYERS: THE JOURNEY FROM TORAH TO CONSTITUTION xix (1990).