

NOTES

MORMONS AND MUSLIMS: LESSONS FROM EARLY MORMONISM AND THE MUSLIM TRAVEL BAN

Aaron Christenson

ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2019.663
<http://lawreview.law.pitt.edu>



This work is licensed under a Creative Commons Attribution-NonCommercial-No Derivative Works 3.0 United States License.



This site is published by the University Library System of the University of Pittsburgh as part of its D-Scribe Digital Publishing Program and is cosponsored by the University of Pittsburgh Press.

NOTES

MORMONS AND MUSLIMS: LESSONS FROM EARLY MORMONISM AND THE MUSLIM TRAVEL BAN

Aaron Christenson*

And if a stranger sojourn with thee in your land, ye shall not vex him. But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself.

Leviticus 19:33–34 (King James).

. . . [T]o parents do good, and to relatives, orphans, the needy, the near neighbor, the neighbor farther away, the companion at your side, the traveler, and those whom your right hands possess. . . .

Qur'an 4:36 (Sahih International).

I. INTRODUCTION

It has often been argued that Muslims, as a religious minority in the United States, should bear the burden of assimilating their beliefs to match the expectations of liberal democracies. As some have put it, Muslims can either adopt Western

* J.D., 2019, University of Pittsburgh School of Law; B.S. Law and Constitutional Studies, 2014, *cum laude*, Utah State University. Many thanks to Professors William Carter and Haider Ala Hamoudi for their nuanced teaching, guidance, and support.

values, or get out.¹ Politicians, the media, and some scholars assert that instead of welcoming Muslims into the fold, the United States should warily protect itself from a religion that cannot be reconciled with liberal democracy.² This notion manifests in President Trump's executive order designed to bar Muslims from entering the United States,³ and in counterterrorism policies that largely ignore right-wing extremism.⁴

The argument that certain religions are not compatible with United States citizenship is not new. It was forcefully applied against the early Mormons, forcing the group to abandon its property in Illinois and Missouri and head west to what would later become Utah. Unlike Mormons, the estimated 3.45 million Muslims who call the United States home cannot simply pack up and move westward to a territory where they can slowly adapt their understandings of doctrine to conform with citizenship.⁵ This Note will compare the 19th century assertions that Mormonism was incompatible with United States citizenship and the modern animus against Islam with the following fundamental question in mind: Is adherence to Islam compatible with the duties of United States citizenship? It will then analyze President Trump's travel ban and United States counterterrorism policy in the context of the First Amendment.

The first section of this Note will lay out a brief history of the Mormon Church and the eventual acceptance of Mormons upholding their religious and civic duties. The second will review assertions from media and scholars claiming that Islam is not compatible with the requirements of Western democracies. In fact, as this Note will

¹ Regarding offensive portrayals of the Prophet Muhammad in various media and Muslims reactions, one British commentator argued that "Muslims might come to endure attacks upon Muhammad and the [Qur'an], not because they believe that they are obliged to by some principle that supersedes their religion (what principle could that possibly be?), but only because, in practice, that is all they can do short of leaving society." Peter Jones, *Respecting Beliefs and Rebuking Rushdie*, 20 BRIT. J. POL. SCI. 415, 418 (1990).

² *Id.*

³ See generally *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

⁴ See, e.g., *Murder and Extremism in the United States in 2017*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/reports/murder-and-extremism-in-the-united-states-in-2017#the-perpetrators> (last visited Apr. 2, 2019) (explaining that between 2008 and 2017, 71% of extremist-related killings in the United States were committed by right-wing extremists, while Islamic extremist killings accounted for only 3% of the total).

⁵ Besheer Mohamed, *New Estimates Show U.S. Muslim Population Continues to Grow*, PEW RESEARCH CTR. (Jan. 3, 2018), <http://www.pewresearch.org/fact-tank/2018/01/03/new-estimates-show-u-s-muslim-population-continues-to-grow/>.

show, tenable interpretations of Islamic doctrine posit that Muslims can follow their sacred teachings and reside in, give loyalty to, and fulfill the duties of citizenship of liberal democracies. The third section will outline the reasonable interpretations of Islam that allow Muslims to fulfill the duties of liberal citizenship, demonstrating that Muslims, like Mormons, can achieve the highest ideals of United States citizenship without renouncing core tenets of their faith. Finally, this Note will point out the role the judiciary should play in protecting the rights of Muslims as a religious minority under the Establishment Clause of the First Amendment.

II. THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS IN THE UNITED STATES

The Church of Jesus Christ of Latter-Day Saints (often referred to as the Mormon Church) traces its roots back to the early 19th century. Joseph Smith, a farmer from upstate New York and the first prophet of the Church, saw a vision in which an angel told him that no existing church was correct, and thus he should join none of them.⁶ The United States was in the midst of great social changes. Andrew Jackson had recently been elected President, ushering in an unprecedented era of populism and individualism.⁷ Innovations in transportation would soon reshape the scope and character of the nation.⁸

Joseph Smith created the Church in the midst of these technological and cultural innovations and, in the 1830s, established a series of doctrines and revelations that were generally apolitical.⁹ The Church moved from New York to Jackson County, Missouri in response to Smith's revelation that it would shortly become the New Jerusalem.¹⁰ The swelling number of Mormon settlers led to conflict, and a minority of the residents of Jackson County violently removed the

⁶ THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, CONTAINING REVELATIONS GIVEN TO JOSEPH SMITH, THE PROPHET, WITH SOME ADDITIONS BY HIS SUCCESSORS IN THE PRESIDENCY OF THE CHURCH 101:80 (The Church of Jesus Christ of Latter-Day Saints, 1989) [hereinafter D & C].

⁷ Patrick Q. Mason, *God and the People: Theodemocracy in Nineteenth-Century Mormonism*, 53 J. CHURCH & STATE 349, 350–51 (2011).

⁸ In 1830, the Tom Thumb, a coal-fueled locomotive engine, carried passengers thirteen miles in fifty-seven minutes, convincing the directors of the B&O Company that steam-powered locomotives were a worthwhile investment. JOHN F. STOVER, HISTORY OF THE BALTIMORE AND OHIO RAILROAD 35–36 (1987). Unhappily for Peter Cooper, who built the Tom Thumb, the locomotive later lost a race with a horse-drawn carriage. *Id.* at 36.

⁹ Mason, *supra* note 7, at 351.

¹⁰ *Id.*

Mormons from the area.¹¹ It thus became apparent to the Church that political apathy was not an option, and the leadership of the Church unanimously promulgated a statement on the proper role of government in 1842.¹² Most significantly, the document stated that the Church did not “believe it just to mingle religious influence with civil government, whereby one religious society is fostered and another proscribed in its spiritual privileges, and the individual rights of its members, as citizens, denied.”¹³

Thus, early in its history the Church established a canonical stand on the respective roles of government and religion; religions should not unjustly seek to influence government to receive preferential treatment in their ability to worship how they pleased. Instead, religions owe an obligation of loyalty to the government: “[W]e believe in being subject to kings, presidents, rulers, and magistrates, in obeying, honoring, and sustaining the law.”¹⁴ In return, the Church expected state, local, and United States governments to allow all adherents of faith to believe “how, where or what they may.”¹⁵ Of course, allowing minority religions to believe and practice their beliefs is not controversial until those practices conflict with the beliefs of other groups and with other governmental priorities. As another example, nations that have codified Islamic law principles into their constitutions have wrestled with how much protection to give to non-Muslim citizens’ ability to practice their religion.¹⁶

Ironically, based on persecutions heaped on its members and a belief that the end of days were near at hand in the early days of the Church, Mormon leaders stated that the only way to achieve a government that truly fulfilled the promises of the

¹¹ *Id.* at 352. To their credit, many Missouri politicians, journalists, and citizens decried the violence against Mormons: “[w]e fear that the party opposed to the Mormons will think themselves placed so far beyond the pale of the law as to continue to utterly regardless of it.” EDWIN B. FIRMAGE & RICHARD C. MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830–1900*, at 66 (1988).

¹² D & C, *supra* note 6, at 101:80.

¹³ Mason, *supra* note 7, at 353.

¹⁴ D & C, *supra* note 6, at 184:12.

¹⁵ *Id.* at 184:11.

¹⁶ *See, e.g.*, IRAQ CONST. art. II, § 2 (translation) (“This Constitution guarantees the protection of the Islamic identity of the majority of the Iraqi people, just as it protects all of the religious rights of all individuals in their freedom of conscience and religious exercise, such as Christians, Yazidis, and Sabian-Mandean.”); *see also* MALAY. CONST. art. XI, § 1 (translation) (“Every person has the right to profess and practice religion. . . .”).

United States Constitution (which was recognized as an inspired document) was to have Mormon leaders fill the highest seats of power.¹⁷ It is not clear how Joseph Smith would have resolved the conflict between the Establishment Clause (not to mention the earlier-referenced precept that religious and civil influence should not be intermingled) and a federal government populated by Mormons with a primary obligation to respect God's commands. Many areas of Smith's political doctrines included broad goals that were never fleshed out before his untimely death.¹⁸ He "did not make his mark as a sophisticated political thinker. What he did possess, however, was a remarkable religious imagination that incorporated a profound new vision of society that would reorder earth to better approximate heaven."¹⁹

Ultimately, most Mormons, unsettled by their experiences in Missouri and governmental complicity with mob violence, uprooted to Nauvoo, Illinois.²⁰ It was there that the most controversial religious, political, and social teachings of the Church were promulgated, including baptisms for the dead, temple rituals, and polygamy.²¹ Significantly, Joseph Smith began to refine the broadly held Christian concepts regarding the differences between the kingdom of heaven and earthly kingdoms.²² The model of a proper earthly kingdom, said Smith, was ancient Israel, a theocracy in which God made the laws and chose leaders to administer them.²³ Ultimately, Smith concluded that no government on Earth had fulfilled its role of securing individual liberties and rights of worship for its constituents.²⁴ Further, the only way to achieve "unadulterated freedom" for all would be, first, to create a "theodemocracy" in which God served as the ultimate legislator, and then select leaders (through the voice of a righteous people) who would act in the best interest of all people in enforcing those rules.²⁵

¹⁷ Mason, *supra* note 7, at 354.

¹⁸ *Id.* at 372–73.

¹⁹ *Id.* at 373.

²⁰ *Id.* at 354.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 355.

²⁴ *Id.* at 357.

²⁵ *Id.* Interestingly, in the 20th century, the concept of theodemocracy resurfaced when Maududi, a Pakistani philosopher and imam, advocated the creation of a Muslim state where government decisions

To that end, and in response to failed attempts at asking presidential candidates of the 1844 election to look after Mormon interests, Smith ran an unsuccessful presidential campaign.²⁶ Therein he argued that more religion in the public arena would cure secular government's anger towards religious minorities.²⁷ Ironically, Smith's sudden, about-face insistence that more religion was needed in the public sphere to create harmony amongst secular and religious groups was one of the main pieces of political philosophy that incited a mob to murder him in 1844.²⁸

The Mormon experiment in Illinois was thus a failure. Thereafter, the Church began its famous trek westward to territory that was then owned by Mexico, where Smith's successor as prophet, Brigham Young, attempted to implement Smith's political philosophy.²⁹ Young argued that a religious democracy was perfectly consistent with American political ideals: "The kingdom of God circumscribes and comprehends the municipal laws for the people in their outward government, to which pertain the Gospel covenants, by which the people can be saved."³⁰

One of Smith's innovations that Young adopted was "The Council of Fifty," whose stated purpose was "the establishment of [God's] rule, for the introduction of [God's] law . . . and for the maintenance, promulgation, and protection of civil and religious liberty in this nation and throughout the world."³¹ In other words, the Council of Fifty was a religiously created government-in-exile that would record, interpret, and execute God's laws when Christ returned to the earth.³² The Council was largely a formal structure, having "no real political power,"³³ yet it demonstrated the Church's desire for autonomy and fair enforcement of constitutional rights in a

would be decided by mutual consultation among all Muslims. See generally Charles J. Adams, *Maududi and the Islamic State*, in VOICES OF RESURGENT ISLAM (John L. Esposito ed., 1983).

²⁶ Mason, *supra* note 7, at 357–58.

²⁷ *Id.* at 357.

²⁸ *Id.* at 357–58.

²⁹ *Id.* at 359.

³⁰ *Id.*

³¹ FIRMAGE & MANGRUM, *supra* note 11, at 6.

³² *Id.* at 7.

³³ *Id.*

time when Mormons were regularly silenced, shunned, and expelled by local and state governments.³⁴

Eventually, the Church backed away from the ideas of religious democracy in its attempt to achieve statehood. They had learned that the benefits of statehood were too important to pass up, and updated their views on government accordingly.³⁵

Polygamy soon followed.³⁶ Wilford Woodruff, the fourth president of the Church, explicitly repudiated polygamy in 1890, and led the transition from opposition to the federal government to a more accommodating stance that led to Utah's statehood in 1896.³⁷ Further, without explicitly saying so, Mormon leaders dropped the political and public elements of theodemocracy in the governance of the Church.³⁸ Although the idea did not die, after the protracted battle over gaining statehood was won, theodemocratic principles and organizations were found solely within the Church, leading to secular institutions taking root in Utah.³⁹

Vestiges of Joseph Smith's political innovations remained and were fleshed out by subsequent Church leaders. One of the lessons that Church leadership gleaned from being forcibly expelled from multiple states was that the law of the land was insufficient to vindicate Church members' constitutional rights.⁴⁰ To that end, beyond creating the Council of Fifty, ecclesiastical courts were established once

³⁴ *Id.* at 8. Brigham Young repeatedly emphasized throughout his church presidency that the church "might be displeased with some of the acts of the administrators of the law, but not with the Constitutional laws and institutions of Government." *Id.*

³⁵ *Id.*

³⁶ Mason, *supra* note 7, at 361.

³⁷ *Id.* at 360–61.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See FIRMAGE & MANGRUM, *supra* note 11, at 20. Speaking of the law and lawyers generally, Brigham Young, the second prophet of the church, asked members to

not go to law at all; it does you no good and only wastes your substance. It causes idleness, waste, wickedness, vice, and immorality. Do not go to law. You cannot find a court room without a great number of spectators in it; what are they doing? Idling away their time to no profit whatever. As for lawyers, if they will put their brains to work and learn how to raise potatoes . . . it will be a great deal better for them than trying to take the property of others from them through litigation.

Id. at 19.

Church members had migrated to Utah.⁴¹ Originally created solely to hear disputes on spiritual matters, their success in creating rulings that were accepted and followed by the community led to their subject-matter jurisdiction being expanded to cover all civil matters.⁴² By the end of the 19th century, the only cases that were left to government-established courts in Utah were criminal, due to the Church's inability to imprison or impose corporal punishment.⁴³ Mormon scholars argue that the existence of these courts was due entirely to necessity, and that the Church would have preferred statehood and secular government and courts, but statehood was denied them because of conflicts over polygamy.⁴⁴

Regardless, the economic, social, and political power of the Mormon Church was nearly ubiquitous in Utah throughout the 19th century.⁴⁵ The Church's power in Utah became a serious concern for the political leadership of the nation, and under the guise of eradicating the "twin relics of barbarism" (slavery and polygamy),⁴⁶ the federal government began a campaign to force Mormons to conform with traditional American beliefs about marriage and citizenship.⁴⁷ The campaign to Americanize Mormons grew after the Civil War, and Congress, the judiciary, and the United States military all played a role in quelling Mormon beliefs that did not conform to mainstream American expectations.⁴⁸

⁴¹ *Id.* at 20.

⁴² *Id.*

⁴³ *Id.* Although the criminal matters were left to the state to enforce, the church did step in and provide judgment and religious penalties (private reprimands all the way up to excommunication) of its own when church leaders felt that "the state demonstrated an inability to handle such matters." *Id.*

⁴⁴ *Id.* at 126.

⁴⁵ *See id.* at 130.

⁴⁶ *GOP Convention of 1856 in Philadelphia*, USHISTORY.ORG, http://www.ushistory.org/gop/convention_1856.htm (last visited Apr. 30, 2018). At the 1856 GOP Convention, the party highlighted the most important goals for the upcoming election: "it is both the right and the duty of Congress to prohibit in the Territories those twin relics of barbarism—polygamy and slavery." *Id.*

⁴⁷ FIRMAGE & MANGRUM, *supra* note 11, at 130–31.

⁴⁸ *Id.* at 131.

A. *The Morrill Act, Reynolds v. United States, and the Mormonism Report*

Congress led the way in attempting to force Mormon conformity by establishing anti-polygamy legislation, which President Lincoln signed in 1862.⁴⁹ The Morrill Act annulled laws passed by the Territory of Utah that had previously allowed Mormons to practice polygamy.⁵⁰ Prosecutions were swift and severe, and even when unable to obtain indictments under the federal law for evidentiary reasons, federal judges creatively applied a hybrid of Mexican polygamy laws and American adultery laws to obtain convictions.⁵¹ It was not until 1878, nearly twenty years after the Morrill Act was passed, that George Reynolds, private secretary to the Prophet Brigham Young, was the first to challenge a polygamy conviction before the Supreme Court of the United States.⁵² In *Reynolds v. United States*, Reynolds appealed to the Court to reverse his polygamy conviction, arguing that his statute of conviction was unconstitutional, and the trial judge had given prejudicial jury instructions that were infected with anti-Mormon animus.⁵³

First, Reynolds asserted that his statute of conviction represented an unconstitutional restriction on his ability to practice religion.⁵⁴ The Supreme Court conceded that Reynolds was acting in conformance with “what he believed at the time to be a religious duty,” but reasoned that when religious duty conflicts with criminal laws, the government may rightly interfere with the religious practice.⁵⁵ Thus, the First Amendment did not bar Congress from passing the statute of conviction, and Reynolds’ belief, though sincere, did not immunize him from prosecution.⁵⁶

⁴⁹ Morrill Act, 12 Stat. 501 (1862) (“[A]ll . . . acts and parts of acts heretofore passed by the said legislative assembly of the Territory of Utah, which establish, support, maintain, shield or countenance polygamy, be, and the same hereby are, disapproved and annulled.”).

⁵⁰ *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1232 (D. Utah 2013) (explaining the history of the Morrill Act in Utah and its relation to prior territorial legislation).

⁵¹ FIRMAGE & MANGRUM, *supra* note 11, at 137.

⁵² *Reynolds v. United States*, 98 U.S. 145 (1878).

⁵³ *See id.* at 153.

⁵⁴ *Id.* at 162.

⁵⁵ *Id.*

⁵⁶ *Id.* at 165.

Next, Reynolds argued that the following jury instructions were unfairly prejudicial:

I think it not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion. As this contest goes on, they multiply, and there are pure-minded women and there are innocent children—innocent in a sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory, just so do these victims multiply and spread themselves over the land.⁵⁷

The Supreme Court held that the jury instructions did not render the trial fundamentally unfair.⁵⁸ It is not unusual for lower-level courts to act out of line with their constitutional duties—what is shocking is that this jury instruction was endorsed by the highest court in the land.⁵⁹ It represents an animus towards Mormon beliefs that was pervasive in politics, the judiciary, and much of mainstream American culture at that time. The federal court demonstrated animus against Mormonism that followed the narrative established by the groups that had expelled the Mormons from Missouri and Illinois in the first place.⁶⁰

The animus demonstrated by the trial judge in *Reynolds* was not uncommon in the judiciary. Less than a decade after Utah had achieved statehood, the Third Circuit (which then included Utah) compiled a report (The Mormonism Report) on whether the religion's fundamental precepts were "consistent with citizenship in the United States."⁶¹ The Report was prompted by the United States Senate campaign of Reed Smoot, a Mormon leader, in 1903.⁶² It concluded first that Smoot, "whose first obligation is to aid in maintaining and administering that alien and hostile

⁵⁷ *Id.* (citing prior case history).

⁵⁸ *Id.* (quoting case syllabus).

⁵⁹ *Id.*

⁶⁰ *See id.* at 150.

⁶¹ U.S. DIST. COURT FOR THE DIST. OF UTAH, THE INSIDE OF MORMONISM: A JUDICIAL EXAMINATION OF THE ENDOWMENT OATHS ADMINISTERED IN ALL MORMON TEMPLES 1 (1889) [hereinafter THE MORMONISM REPORT].

⁶² *See generally* KATHLEEN FLAKE, POLITICS OF AMERICAN RELIGIOUS IDENTITY: THE SEATING OF SENATOR REED SMOOT, MORMON APOSTLE (2004). As the title suggests, Smoot ultimately won a seat in the United States Senate, where he served for thirty years. *Id.* at 10.

government,” should not be allowed to serve in the United States government “if so counseled by the oligarchy to which he belongs, to help destroy [it].”⁶³

Regarding Mormon leadership, the Report argued that “this despotic oligarchy interferes with rights which are guaranteed every citizen by our Constitution, it vitiates society, it offends the ethical sense of our people and it menaces the government itself.”⁶⁴ The conclusion of the Report was clear: Mormon leaders could not be trusted with governmental responsibility, because when push came to shove, they would prioritize their religious duties over governmental ones, even if that meant destroying the government.⁶⁵ The authors crowed that Brigham H. Roberts, a Mormon polygamist, had lost a recent race for the House of Representatives: “the people of the United States rose in their majesty . . . and sent him back to his harem.”⁶⁶

The Mormonism Report also asked whether ordinary members of the Church were capable of adhering to the conflicting requirements of citizenship and religion. It transcribed a case dealing with citizenship applications of nine Mormon men.⁶⁷ Judge Anderson, an acting judge on the Third Circuit, without including any testimony from Church leaders, members, or the applicants, concluded that citizenship and Mormonism were utterly irreconcilable, and denied the applications on that fact alone.⁶⁸ The court relied on the testimony of various men who had left the Church, noting various reports that Mormons were religiously required to violently avenge Joseph Smith’s death and uphold polygamy at all costs.⁶⁹

Judge Anderson reasoned that key tenets of Mormonism made fidelity to the United States Constitution impossible.⁷⁰ Specifically, Anderson claimed that Mormons believed Congress had no right to pass laws interfering with the practice of their religion, and that the Morrill Act was an “unwarrantable interference[] with

⁶³ THE MORMONISM REPORT, *supra* note 61, at 4–5.

⁶⁴ *Id.* at 6.

⁶⁵ *Id.* at 6–7.

⁶⁶ *Id.* at 7.

⁶⁷ *Id.* at 92–93. I have been unable to find a state or federal court reporter that includes this case. However, the Mormonism Report was created by the federal judiciary in an official capacity, so I believe it is reliable.

⁶⁸ *Id.* at 93.

⁶⁹ *See generally id.* at 6–52.

⁷⁰ *Id.* at 92–93.

their religion.”⁷¹ Yet no evidence was put forward in the case demonstrating that the applicants for citizenship had in fact acted in a way that demonstrated a lack of loyalty to the United States. Put differently, Judge Anderson denied citizenship solely because of the applicants’ religious beliefs, even though those beliefs had led to no evidence of actions that were inconsistent with citizenship. However, the notion that God’s laws are higher than the laws of man is not unique to Mormonism; every religion in the world’s history has had to grapple with that question. Joseph Smith had clearly stated early in his ministry that the Church believed in “obeying, honoring, and sustaining [secular] law.”⁷²

Tensions between tenets of Mormonism and the law remain,⁷³ but Mormonism has largely successfully entered the fold of American legal culture. The Mormonism Report has not proved prophetic. Perhaps one of the key reasons for this success is the relatively high degree of autonomy the State of Utah and the Mormon Church was given, after the conflict over polygamy had faded away, to make decisions regarding how citizenship and religious duty would fit together in the newly created state. Further, religious and ethnic tolerance increased in the years following Utah’s statehood, and theories that Mormons constitute an inferior race have largely faded away. Mitt Romney’s presidential campaign in 2012 demonstrates that while the Mormon faith is not widely understood, its adherents can plausibly fulfill the highest ideals of citizenship and Mormonism.⁷⁴

III. ISLAM AND LIBERAL CITIZENSHIP

There are two basic types of arguments, applicable to Mormons and Muslims alike, that suggest that neither religious group can successfully fulfil the duties of United States citizenship. The first is doctrinal: are the fundamental teachings of Islam and Mormonism compatible with citizenship? The Mormonism Report, discussed above, demonstrates an attack on Mormonism of this sort in which sacred rituals and fundamental doctrines were alleged to be incompatible with citizenship. Of course, such arguments can be rebutted in word and proved false in the actions of

⁷¹ *Id.* at 92.

⁷² D & C, *supra* note 6, 184:12.

⁷³ See Kristine Phillips, ‘*Extraordinary, Good Man*’: A Utah Judge’s Description of a Former Mormon Bishop Convicted of Rape, WASH. POST (Apr. 17, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/04/17/extraordinary-good-man-a-utah-judges-description-of-a-former-mormon-bishop-convicted-of-rape/?utm_term=.ed1509d66462 (discussing a former Mormon bishop’s rape conviction).

⁷⁴ See generally Tom Rosentel, *Public Opinion About Mormons*, PEW RESEARCH CTR. (Dec. 4, 2007), <https://www.pewresearch.org/2007/12/04/public-opinion-about-mormons/>.

the faithful, even if logical inconsistencies may exist between the duties of religion and citizenship. However, the second strain of argument can be much more difficult to confront, however illogical, because it consists of the animus that often lies beneath the surface of arguments claiming religious doctrines and citizenship are incompatible. The Judge Anderson opinion (compiled in the Mormonism Report) and severe enforcement of the Morrill Act embody this sort of animus. Although in common-sense terms animus is easily identified, rooting it out and confronting it in a legally binding way can be difficult.⁷⁵ Similar arguments are deployed by those claiming that Islam and United States citizenship (or even entry into the United States) are not compatible.⁷⁶ The remainder of this Note will explain some of these doctrinal and animus arguments and extant efforts to rebut them.

A. *Animus*

Although scholars have pointed out myriad interpretations of Islam that fit within the conception of liberal citizenship, examples of animus against Muslims are widespread and potent. Many of the arguments used in the Mormonism Report (that Mormons' final loyalty lies with Church leadership, which will inevitably try to subvert the United States Government) are broadly applied to Islam. Strong evidence of anti-Islamic sentiment exists in the White House⁷⁷ and in the media.⁷⁸ During his campaign, then-presidential candidate Donald Trump stated that curtailing terrorism would be one of his top priorities as President; to that end, Trump proposed a "total and complete shutdown of Muslims entering the United States."⁷⁹ More recently,

⁷⁵ See, e.g., *Washington v. Trump*, 847 F.3d 1151, 1165–66 (9th Cir. 2017) (per curiam), *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017) (affirming injunctions granted to the states of Washington and Minnesota against enforcement of the President Donald Trump's Executive Order that barred entry into the United States for citizens of several Muslim-majority nations); *Aziz v. Trump*, 234 F. Supp. 3d 724, 739 (E.D. Va. 2017) (granting an injunction to the Commonwealth of Virginia against the same Executive Order); *Hawai'i v. Trump*, 245 F. Supp. 3d 1227, 1235–36 (D. Haw. 2017), *aff'd in part, vacated in part, remanded by Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (upholding the grant of a preliminary injunction against the Executive Order).

⁷⁶ See, e.g., George Packer, *Fighting Faiths: Can Liberal Internationalism Be Saved?*, NEW YORKER (July 10, 2006), <https://www.newyorker.com/magazine/2006/07/10/fighting-faiths> (contending that "[t]he prolonged and violent demonstrations [by Muslims] against the Danish cartoons were a staged attempt to intimidate their enemies in their own countries and in the West").

⁷⁷ See, e.g., *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 547 (2017) (recounting then-presidential candidate Donald Trump's call "for a total and complete shutdown of Muslims entering the United States," as well as his professed belief that "Islam hates us").

⁷⁸ Packer, *supra* note 76.

⁷⁹ Jenna Johnson, *Trump Calls for Total and Complete Shutdown of Muslims Entering the United States*, WASH. POST (Dec. 7, 2015) at A1, <https://www.washingtonpost.com/news/post-politics/wp/2015/>

President Trump has targeted Ilhan Omar, a Muslim congresswoman from Minnesota, for what he has called her downplaying of the 9/11 attacks, prompting repeated death threats against Omar.⁸⁰

Others have attempted to attack Islamic doctrinal compatibility with United States laws and regulations through lawsuits.⁸¹ Finally, commentators like Daniel Pipes and Pam Gellers expend copious amounts of ink arguing that “radical” Islam is incompatible with the requirements of United States residency, much less citizenship.⁸² Behind each of these lines of attack lies an animus against Islam that is easy to identify but difficult to prove. Thus, the remainder of this Note will focus on the doctrines of Islam to demonstrate that reasonable interpretations of Islam exist that can accommodate religious duties and citizenship in a non-Muslim state.

B. Doctrinal Response: Islam and Liberal Citizenship Are Compatible

In response to the vexing problem of whether Islam and liberal citizenship are theoretically compatible, Andrew March, a political science professor at Yale, has taken on the task of elucidating a political philosophy that can accommodate Islamic doctrine and Muslim citizenship in liberal states.⁸³ March outlines the Islamic

12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?noredirect=on&utm_term=.1ec2b9beded3.

⁸⁰ Jeff Murray & Christal Hayes, *'I'll Put a Bullet in Her': Trump Supporter Charged with Threatening to Kill Rep. Ilhan Omar*, USA TODAY (Apr. 5, 2019), <https://www.usatoday.com/story/news/politics/2019/04/05/ilhan-omar-death-threat-leads-to-arrest-of-new-york-man/3379387002/>.

⁸¹ Haider Ala Hamoudi, *The Impossible, Highly Desired Islamic Bank*, 5 WM. & MARY BUS. L. REV. 105, 146–50 (2014) (explaining, *inter alia*, how anti-Islamic sentiment was the foundation of a case where the plaintiffs opposed the TARP bailout to AIG, which supposedly promoted Shari'a law. The purported motivation of the plaintiffs was to prevent the United States government from violating the Establishment Clause by supporting the insurance company AIG, whose broad array of products included an Islamic insurance scheme, but “[t]he real motivation for the suit stemmed from a desire to deny specific space for Muslim accommodation because of the threat that the opponents of Islamic finance believed Islam posed to the United States.”).

⁸² See, e.g., Daniel Pipes, *Islam and Islamism: Faith and Ideology*, 59 NAT'L INT. 87–93, <http://www.danielpipes.org/366/islam-and-islamism-faith-and-ideology> (arguing, *inter alia*, that interpretations of Islam that allow for gender equality are not truly Islamic); see also generally PAMELA GELLER, *FATWA: HUNTED IN AMERICA* (2017) (contending in hyperbolic prose that Islam teaches Muslims to wage war against all non-Muslims, denying them human rights and encouraging acts like the 9/11 terrorist attack).

⁸³ See ANDREW F. MARCH, *ISLAM AND LIBERAL CITIZENSHIP: THE SEARCH FOR AN OVERLAPPING CONSENSUS* (2009).

doctrines that allow faithful Muslims to reside in, and give a sufficient degree of loyalty to, liberal democracies.⁸⁴ Although there are conflicting interpretations of Islam, reasonable interpretations exist that can accommodate the highest ideals of citizenship and the requirements of Islam.

1. Residence

March confronts the doctrinal difficulties surrounding Muslim residence in liberal states and proposes rules that must be adopted by Muslims to create an overarching consensus. First, the doctrinal texts do not necessarily prohibit such residence.⁸⁵ Second, fulfilling religious duties may be possible even under non-Muslim legal authority.⁸⁶

As March notes, “there is a tradition in Islamic law of regarding [Muslims residing in non-Muslim states] as impermissible”;⁸⁷ thus, any political theory that attempts to reconcile Islam and liberal citizenship must contend with the question of Muslim residence in non-Muslim lands. The Maliki school of law and the Saudi adherents of the Wahhabi doctrine have held that there is a “categorical divine command to migrate from spheres of non-Muslim rule.”⁸⁸ This view stems from *Qur’an* 4:100: “And whoever emigrates for the cause of Allah will find on the earth many [alternative] locations and abundance. And whoever leaves his home as an emigrant to Allah and His Messenger and then death overtakes him—his reward has already become incumbent upon Allah.”⁸⁹ Inger Stojberg, the Danish Minister of Immigration, has sought to create immigration policies that reflect a visceral reaction to these sorts of readings of the *Qur’an*: “Muslim immigrants . . . do not value democracy and freedom . . . [W]e should make it easier for those who traditionally can and will integrate to come . . . while we make it more difficult for those who don’t have the ability or the will.”⁹⁰

⁸⁴ *Id.* at 166–206.

⁸⁵ *Id.* at 166.

⁸⁶ *Id.*

⁸⁷ *Id.* at 137.

⁸⁸ *Id.*

⁸⁹ *Qur’an* 4:100.

⁹⁰ *Harder Immigration Rules for Muslims: Opposition*, THE LOCAL (COPENHAGEN) (July 28, 2014), <https://www.thelocal.dk/20140728/make-it-harder-for-muslims-to-come-to-denmark-venstre>.

Several Muslim jurists have read verse 4:100 as creating a limited duty to migrate to an Islamic state, or no duty at all.⁹¹ The first method is contextualization: verse 4:100, the argument goes, created an obligation upon the faithful to follow the Prophet Muhammad in the migration from Mecca to Medina.⁹² However, once Mecca had been conquered, there was no longer the same dire need for the faithful to physically rally around the Prophet, and so this obligatory act became a recommended one.⁹³ Other jurists have pointed out practical difficulties inherent in the duty to migrate: Whereas in the time of the original call to migrate there was a clearly established authoritative Islamic state that was created to foster all Muslims. No such place currently exists, so to what state would Muslims be obligated to migrate?⁹⁴

It is also worth noting another interpretation of *hijra*, or migration, that fits within the liberal conception of citizenship—one that identifies the duty as a spiritual obligation to migrate from or avoid sin.⁹⁵ This spiritual approach requires Muslims to repudiate sin and to move away from that which is forbidden by God, thus putting temporal concerns like geography, politics, and demographics on the back-burner.⁹⁶

Finally, many jurists have read verse 4:100 as requiring migration only when Muslims no longer enjoy the right to practice their religion as they see fit where they live; thus, the obligation to migrate would not apply to Muslims living in non-Muslim lands who enjoyed the right to manifest their religion.⁹⁷ The right to manifest one's religion, as seen above in the context of Mormonism, can create tension between the state and the faithful. The early Mormon Church created courts which enjoyed total civil jurisdiction, and the Church held almost unlimited political and economic power in the territory of Utah up until it became a state.⁹⁸ Thus, manifesting one's religion was a simple task, because those wielding political power also were charged with expounding the duties of religion.

⁹¹ *Id.* at 166–79.

⁹² *Id.* at 166.

⁹³ *Id.*

⁹⁴ *Id.* at 179.

⁹⁵ *Id.* at 176.

⁹⁶ *Id.* at 178.

⁹⁷ *Id.* at 169.

⁹⁸ Mason, *supra* note 7, at 361.

However, unlike the Qur'an, the Book of Mormon does not include the concept of scriptural crimes or family law which members would expect only leaders of the Church to implement and execute. Thus, when Utah became a state and the Church was required to step back from its omnipotent political position, it was relatively easy for Church leaders to point out that ecclesiastical courts and other sub-state institutions had arisen out of necessity and that the exigencies mandating their creation had passed. Do Muslim jurists believe that liberal states must leave some freedom for Muslims to apply certain areas of Islamic law, which would undermine the possibility of an Islamic, liberal conception of citizenship?⁹⁹

March notes that many jurists have taken on the task of determining how much autonomy Muslims in a non-Muslim state need to practice their religion, but no consensus has arisen.¹⁰⁰ Some jurists (Maliki, Hanafis) have argued that migration is necessary unless Muslims are held accountable under Islamic law, while others seem to leave the door open to less autonomy so long as future generations will not be seduced away from Islam (*al-fitna min al-din*).¹⁰¹ Of course, the latter position still reflects discomfort with the liberal conception of citizenship, which could allow subsequent generations the freedom to leave Islam.¹⁰² March thus points to the *fatwa* of Syrian jurist Muhammad Rashid Rida, who stated that *hijra*, or migration, is not required for Muslims who are allowed to manifest their religion free from seduction, which he defines as “coerced abandonment of religion or the prohibition on performing religious duties.”¹⁰³ Under this conception, Muslims could readily live in the United States so long as it upheld its promise of equal protection and constitutional rights. Thus, though conflicting doctrinal interpretations exist, reasonable understandings of Islam exist which allow Muslims to reside in non-Muslim lands.

2. Loyalty

Of course, the United States asks for much more than an understanding from Muslims that residence is permissible. It requires citizens to sacrifice a measure of their communal autonomy—as evidenced by limitations on proselytizing and “peculiar institutions” like polygamy—and sometimes their lives for the sake of the

⁹⁹ MARCH, *supra* note 83, at 168.

¹⁰⁰ *Id.* at 169–70.

¹⁰¹ *Id.* at 170.

¹⁰² *Id.* at 171.

¹⁰³ *Id.*

nation.¹⁰⁴ Some Muslim authorities that condone Muslims residing in non-Muslim states do so because proselytizing and converting non-believers is a central tenet of Islam.¹⁰⁵ Thus, the concern arises that Muslims may only half-heartedly accept the terms of liberal citizenship in the belief that they will one day obtain political majorities necessary for Islamization of the state.¹⁰⁶

March notes that for Islamic doctrine to be compatible with liberal citizenship, proselytizing, even if accepted or indeed encouraged in non-Muslim states, must not be a justification for Muslims to reside in liberal states that overrides the ability to respect the diverse viewpoints existing in a liberal society.¹⁰⁷ One contemporary Muslim scholar has argued that the obligation to spread the teachings of Islam does not require Muslims to convert their neighbors in non-Muslim states; rather, “the duty of the Muslim is to spread the Message and to make it known, no more no less. Whether someone accepts Islam or not is not the Muslim’s concern for the inclination of every individual depends on God’s Will.”¹⁰⁸ This liberal conception of the duty to proselytize fits well within the demands of liberal citizenship; in fact, it goes beyond what the United States expects of its religious citizens. The obligation to convert non-believers is common amongst many Christian faiths, including Mormonism. Religious adherents are not barred from attempting to convert non-believers, so long as the duty to proselytize is not the chief justification for loyalty.¹⁰⁹

If Mormon history is any indicator, concerns about half-hearted or strategic Muslim loyalty are exaggerated. Mormons believe that theirs is the one true faith and that it is their responsibility to spread it; at any given time, approximately 70,000 young Mormon men and women are knocking on doors around the world attempting to spread the faith.¹¹⁰ Similar to Islam, proselytizing is a fundamental part of

¹⁰⁴ See Immigration and Naturalization Act, 8 U.S.C. § 1448 (2018) (requiring citizens to defend United States laws and the Constitution).

¹⁰⁵ MARCH, *supra* note 83, at 138.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ TARIQ RAMADAN, TO BE A EUROPEAN MUSLIM 134 (1999). Unfortunately, Ramadan is in jail awaiting trial on sexual assault charges. See Angelique Chrisafis, *Oxford Professor Charged with Raping Two Women*, THE GUARDIAN (Feb. 2, 2018), <https://www.theguardian.com/society/2018/feb/02/oxford-professor-of-islamic-studies-charged-with-raping-two-women>.

¹⁰⁹ MARCH, *supra* note 83, at 181.

¹¹⁰ See generally, e.g., CLAYTON M. CHRISTENSEN, THE POWER OF EVERYDAY MISSIONARIES: THE WHAT AND HOW OF SHARING THE GOSPEL (2012).

Mormonism, yet that has not stopped the Church from concurrently establishing unswerving loyalty to the United States. If Mormonism was able to transition from its state of deep ambivalence about its role in the United States, so too can Islam.

The doctrinal arguments for Muslim loyalty to the liberal state in which they are a citizen largely stem from Islamic reverence for contracts and treaties.¹¹¹ Several Qur'an verses emphasize the importance of following contractual agreements, such as the following: "Righteousness is not that you turn your faces toward the east or the west, but [true] righteousness is in . . . those who fulfill their promise when they promise."¹¹² Another verse admonishes the faithful: "O you who have believed, fulfill [all] contracts."¹¹³ The importance of contracts is further emphasized by verse 8:72, which directs believers to withhold military aid to Muslims who did not emigrate to Muslim lands against non-Muslims with whom the audience of the verse have a treaty.¹¹⁴ Thus, an agreement amongst a non-Muslim and a Muslim can, in certain respects, enjoy priority over religious obligations between Muslims. Further, Sunni jurists have made it clear that contracts with non-Muslims are morally binding.¹¹⁵ The next step then is to ask whether such commitment to contracts and other agreements would extend to agreements with a liberal state, such as the United States oath of citizenship referenced above. March states that jurists are "unanimous" in holding that the enjoyment of *aman* (a formal covenant guaranteeing security to a Muslim from a non-Muslim state or other potentially hostile entity) demands a degree of moral and legal loyalty to the non-Muslim state that granted it.¹¹⁶ *Ghadr* (treachery) to such a state is plainly forbidden.¹¹⁷

Although these teachings establish that a degree of loyalty to a non-Muslim state is in line with Islamic doctrine, it is not clear how far it extends. The issue, as it is for all religions, is what to do when a law appears to conflict with the commandments of God. Just as early Mormons protested the creation of laws that banned polygamy, Muslims may object to laws that limit any number of religious

¹¹¹ MARCH, *supra* note 83, at 184.

¹¹² *Qur'an* 2:177.

¹¹³ *Qur'an* 5:1.

¹¹⁴ *Qur'an* 8:72. This verse also raises interesting questions about the obligation of Muslims to migrate from non-Muslim states, as it seemingly indicates disfavor with those who fail to do so.

¹¹⁵ MARCH, *supra* note 83, at 185.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

prerogatives. March contends that this problem cannot be resolved in one fell swoop.¹¹⁸ More importantly, he argues, Islamic contract rules create a presumption that following the laws of a non-Muslim state does not inherently involve disobedience to God.¹¹⁹ Within that framework, resolving disputes over individual laws that Muslims may find objectionable fits squarely within the American tradition of civil disobedience.¹²⁰

Finally, March notes the difficulties that inhere in reconciling Islamic doctrine and the obligation to contribute to self-defense of a non-Muslim state.¹²¹ Initially, it is important to note that Muslims fighting Muslims is universally regarded by jurists as impermissible.¹²² March notes that a significant step has been taken by some modern jurists, who have renewed an ancient position (as demonstrated by respect for the Christian king of Abyssinia, al-Najashi) that non-Muslim rulers and states can be just.¹²³ Thus, Rashid Rida argued in favor of Muslims fighting for Russia in the Russo-Japanese War at the beginning of the 20th century.¹²⁴ According to Rida, a Muslim fighting for a non-Muslim state “protects his brothers from amongst the state’s subjects from any oppression or evil that may befall them if the state is . . . oppressive . . . [and] it makes them equal to any other citizen in rights and privileges if it is a representative, just state.”¹²⁵ Beyond this, Rida suggests that the strengthening of Muslims engaged in combat serves as a worthy goal.¹²⁶

Questions may arise from a liberal state about these justifications, which could suggest that Muslims seek to gain strength for tactical reasons, or to later wage war against non-Muslims, including possibly the state that trained them. Such concerns must be contextualized. Groups and individuals often enter war with ambivalence and for reasons other than pure civic duty. To expect citizens to volunteer for war

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 187.

¹²⁰ *Id.*

¹²¹ *Id.* at 190.

¹²² *Id.* at 192.

¹²³ *Id.* at 193.

¹²⁴ *Id.*

¹²⁵ *Id.* at 192.

¹²⁶ *Id.* at 194.

(the United States has not used conscription to enlarge its military since 1973)¹²⁷ solely because it is their duty would be irrational. United States recruiting materials reflect this reality by focusing on the excitement, character-building, and financial benefits of military service.¹²⁸ More importantly, Islamic doctrine can reasonably be interpreted to allow for Muslims to take up arms in defense of the United States.

For their part, Mormons argue that their respect for, and loyalty to, American institutions never wavered; instead, corrupt government officials flouted the Constitution, requiring a commensurate response.¹²⁹ Only when Mormons began enjoying the benefits of Utah's statehood and equal legal protection did they begin to align their loyalty with both the Constitution and the government bodies charged with carrying out its promises. The lesson for government policy towards Muslims is apparent: provide constitutional protections for all religious followers, regardless of sect, and loyalty to civic institutions will follow. As demonstrated above, the core principles of Islam do not inherently prevent such loyalty.

IV. THE JUDICIARY'S ROLE

The judiciary has a unique role to play in providing constitutional protections for the religious, especially those belonging to minority sects. Since the embarrassing stunt that was the Mormonism Report,¹³⁰ the judiciary has at least recognized the possibility that religious minorities may suffer from prejudices that cannot be corrected through normal political processes.¹³¹

However, certain policies by the United States government in relation to Muslims are a cause of ongoing concern. Whereas Mormonism is now largely recognized as a mainstream religion or at least a harmless oddity,¹³² Islam has

¹²⁷ Alex Dixon, *July Marks 40th Anniversary of All-Volunteer Army*, U.S. ARMY (July 2, 2013), https://www.army.mil/article/106813/July_marks_40th_anniversary_of_all_volunteer_army (explaining the end of conscription and subsequent Army efforts to make military careers attractive).

¹²⁸ *Id.*

¹²⁹ See *American Legal and Political Institutions*, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.lds.org/study/history/topics/american-legal-and-political-institutions?lang=eng> (last visited Apr. 2, 2019).

¹³⁰ See generally THE MORMONISM REPORT, *supra* note 61.

¹³¹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 151 n.4 (1938) (commenting that a "more searching judicial inquiry" may be required when religious minorities are unable to effect change and self-preservation through ordinary political processes).

¹³² *Americans Learned Little About the Mormon Faith, But Some Attitudes Have Softened*, PEW RESEARCH CTR. (Dec. 14, 2012), <https://www.pewforum.org/2012/12/14/attitudes-toward-mormon-faith/>

historically been identified as an implacable enemy of Western civilization,¹³³ and this portrayal continues today.¹³⁴ This view, though discredited above, infects policymaking decisions on many levels of government and forces Muslim Americans to make an agonizing choice: at times hide their religious identity or accept that their privacy and safety might be in jeopardy due to existing counterterror policies¹³⁵ and cultural pressures from Americans.¹³⁶

This choice, according to Khaled Beydoun, a legal scholar who studies Islamophobia, represents an injury to the Free Exercise rights of American Muslims.¹³⁷ Beydoun notes that even modern approaches to counter-radicalization theory have inherent flaws: in seeking to strengthen interpretations of Islam that can coexist with liberal democracy, policymakers have put pressure on American Muslims to “perform their Americanness” largely without providing opportunities for Muslim-American input on policy.¹³⁸ Beydoun does not propose solutions to this problem—instead, much of his research is designed to inform and equip scholars

(explaining that while most Americans know very little about Mormonism’s religious tenets, they are increasingly likely to identify Mormons with one-word descriptions like good, dedicated, honest, or friendly).

¹³³ See, e.g., Winston Churchill, *Churchill on Islam*, THE CHURCHILL PROJECT (Mar. 4, 2016), <https://winstonchurchill.hillsdale.edu/churchill-on-islam/> (citing SIR WINSTON CHURCHILL, THE STORY OF THE MALAKAND FIELD FORCE: AN EPISODE OF FRONTIER WAR (1897)) (“[T]he Mahomedan religion increases, instead of lessening, the fury of intolerance. It was originally propagated by the sword, and ever since its votaries have been subject, above the people of all other creeds, to this form of madness.”).

¹³⁴ See Gregory Krieg, *Trump’s History of Anti-Muslim Rhetoric Hits Dangerous New Low*, CNN (Nov. 30, 2017, 10:30 AM), <https://www.cnn.com/2017/11/29/politics/donald-trump-muslim-attacks/index.html> (recounting President Trump’s vitriolic rhetoric, including his sentiment that he would “strongly consider” shutting down mosques as an anti-terror measure). But see George W. Bush, *Backgrounder: The President’s Quotes on Islam*, THE WHITE HOUSE: PRESIDENT GEORGE W. BUSH (Dec. 5, 2002), <https://georgewbush-whitehouse.archives.gov/infocus/ramadan/islam.html> (“[W]e respect the vibrant faith of Islam which inspires countless individuals to lead lives of honesty, integrity, and morality.”).

¹³⁵ Khaled A. Beydoun, *Acting Muslim*, 53 HARV. CIV. RTS.-CVL. LIBERTIES L. REV. 1, 7–9 (2018).

¹³⁶ In a 2017 survey, 75% of American Muslims said they perceived “a lot of discrimination against Muslims in the U.S.” *U.S. Muslims Concerned About Their Place in Society, But Continue to Believe in the American Dream*, PEW RESEARCH CTR. (July 26, 2017), <https://www.pewforum.org/2017/07/26/findings-from-pew-research-centers-2017-survey-of-us-muslims/>. Further, 62% said that Americans do not see Islam as part of mainstream society. *Id.*

¹³⁷ Beydoun, *supra* note 135, at 7.

¹³⁸ *Id.* at 36.

with the tools to analyze responses and negotiations Muslim Americans will make during Trump's presidency and beyond.¹³⁹

The judiciary may be the only branch of government capable of correcting the First Amendment abuses inherent in existing counterterror policies. However, the existing legal framework for protecting Muslim Americans has proven inadequate. For example, in other contexts, the Supreme Court has failed to correct factual misconceptions about the damage caused by religiously motivated hate speech.¹⁴⁰ And even when the Court accepted the Wisconsin legislature's conclusion that bias-motivated crimes are likely to "inflict distinct emotional harms on their victims," it did so half-heartedly.¹⁴¹

Further, President Trump's Muslim Travel Ban and the subsequent legal battle demonstrates that inflammatory anti-Muslim statements from an official as high as the President of the United States are still not enough to constrain the Supreme Court to recognize the harms to all Muslims that stem from damaging religiously motivated stereotypes.¹⁴² In his campaign, President Trump proposed a "total and complete shutdown of Muslims entering the United States" and produced an executive order to that effect.¹⁴³ Then, after seeing the writing on the wall, President Trump updated the policy multiple times through executive orders designed to be less blatantly discriminatory by barring entry for some non-Muslim majority nations and incorporating certain Department of Homeland Security data.¹⁴⁴

In a 5-4 decision, the Court upheld the new executive order without addressing the claim that the policy violated the Establishment Clause.¹⁴⁵ Perhaps as a rebuke to President Trump, Chief Justice Roberts outlined a lengthy history of American presidential treatment of religious minorities, from Washington promising equal treatment to a Hebrew congregation to Eisenhower promising an audience at an

¹³⁹ *Id.* at 64.

¹⁴⁰ *But see* R.A.V. v. City of St. Paul, 505 U.S. 377, 424 (1992) (Stevens, J., concurring) (agreeing that "harms caused by racial, religious, and gender-based invective are qualitatively different from that caused by other fighting words").

¹⁴¹ Wisconsin v. Mitchell, 508 U.S. 476, 488 (1993) (describing the emotional distress of victims of cross-burnings as merely a "perceived harm").

¹⁴² *See generally* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

¹⁴³ *Id.* at 2433 (Sotomayor, J., dissenting).

¹⁴⁴ *Id.* at 2403-07 (majority opinion).

¹⁴⁵ *Id.* at 2419-20.

Islamic center that America would protect the rights of Muslims to have their own Church.¹⁴⁶ However, Roberts held that even if the Court looked beyond the text of the latest Executive Order, it would still survive because it was designed with the legitimate purpose of “preventing entry of nationals who cannot be adequately vetted.”¹⁴⁷

Justice Sotomayor vigorously dissented.¹⁴⁸ She emphasized the policy’s roots in then-candidate Trump’s statements that all Muslims should be barred from entering the United States.¹⁴⁹ Under normal Establishment Clause principles, she noted, the historical background, series of events leading to creation of an official policy, and contemporaneous statements of the decision-maker can be considered.¹⁵⁰ Sotomayor argued that the takeaway from Trump’s speeches and tweets regarding the policy was a clear anti-Muslim animus.¹⁵¹ Finally, she noted that the same sort of superficial national security claims found here were used to uphold, to universal historical disapprobation, the internment of Japanese-Americans in World War II.¹⁵²

Justice Sotomayor’s analysis better conforms to Establishment Clause precedent. In *McCreary*, the Court held that a ten commandments display violated the Establishment Clause because later efforts to contextualize the display were only undertaken to make an initially unconstitutional act legal.¹⁵³ President Trump’s clear, unmitigated, and unrelenting anti-Muslim animus should have been recognized for what it was, and later efforts to “constitutionalize” a clearly discriminatory policy should not have been upheld.¹⁵⁴ If ever there was a smoking gun proving discriminatory intent, it existed in this case. The Court’s failure to acknowledge this animus is at best a departure from Establishment Clause precedent suggesting that

¹⁴⁶ *Id.* at 2417–18.

¹⁴⁷ *Id.* at 2421.

¹⁴⁸ *Id.* at 2433 (Sotomayor, J., dissenting).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 2435 (first citing *Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540 (1993); then citing *McCreary Cty. v. ACLU*, 545 U.S. 844, 862 (2005)).

¹⁵¹ *Id.* at 2438.

¹⁵² *Id.* at 2447–48 (citing *Korematsu v. United States*, 323 U.S. 214 (1944)).

¹⁵³ *McCreary Cty.*, 545 U.S. at 862.

¹⁵⁴ *See id.* at 855 (holding that subsequent efforts to contextualize an initially unconstitutional official action with a secular purpose must be more than “a sham”).

historical context matters when reviewing potentially discriminatory government actions. At worst, it is a case that will be remembered as a return to *Korematsu*.

Beyond *Trump v. Hawaii*, the judiciary's failure to uphold the Establishment Clause has continued with *Dunn v. Ray*.¹⁵⁵ In *Dunn*, the Supreme Court held that Domineque Ray, a Muslim man scheduled for execution, had failed to timely file his appeal regarding the right to have a spiritual advisor present in the courtroom.¹⁵⁶ Only a month later, the Court held that Patrick Murphy, a Buddhist inmate on death row, was entitled to a Buddhist spiritual advisor.¹⁵⁷ Mr. Ray waited just five days after learning his Imam could not be present, while Mr. Murphy waited fifteen days after receiving the same information.¹⁵⁸ The Court's decision to allow a Buddhist spiritual advisor while denying an Imam in nearly identical circumstances ignores the Establishment Clause's "clearest command . . . that one religious denomination cannot be officially preferred over another."¹⁵⁹

As noted above, the judiciary has failed to take up its mantle as an enforcer of government religious neutrality. The Constitution demands better. Further, as a policy matter, Muslims should be more involved in decision-making regarding counterterror policy. United States surveillance of Muslim terrorist organizations is unmatched, but that alone cannot solve counterterror problems, nor does it accurately reflect from which demographics threats are likely to arise¹⁶⁰

V. CONCLUSION

Like early Mormons, American Muslims are castigated, cast out, and otherwise persecuted because of their faith. Early Mormon experimentation with theodemocracy and polygamy can largely be explained by historical context. Once Mormons were granted statehood and the promise of constitutional protections of their property and religious rights, rebellion against the United States government quickly folded. Tenable interpretations of Islam allow Muslims to reside in, give their loyalty to, and take up arms in defense of liberal democracies. While

¹⁵⁵ *Dunn v. Ray*, 139 S. Ct. 661, 661 (2019).

¹⁵⁶ *Id.*

¹⁵⁷ *Murphy v. Collier*, 139 S. Ct. 1111 (2019).

¹⁵⁸ *Ray v. Comm'r of Ala. Dep't of Corrs.*, 915 F.3d 689, 692 (11th Cir. 2019); *Murphy*, 139 S. Ct. at 1112 n.* (Kavanaugh, J., concurring) (emphasizing that the appeal was filed a month before the execution).

¹⁵⁹ *Larson v. Valente*, 456 U.S. 228, 244 (1982).

¹⁶⁰ See, e.g., *Murder and Extremism in the United States in 2017*, *supra* note 4 (explaining that between 2008 and 2017, Islamic extremist killings accounted for only 3% of all extremist killings).

commentators and politicians have suggested that Islam is incompatible with liberal citizenship, such arguments are generally specious, and fail to consider the experiences of many religious groups, including Mormons, that have demonstrated that loyalty to one's religion can wholeheartedly embrace the duties of liberal citizenship. The embrace of liberal democracy must reach all who wish to join this great nation.

The judiciary has a key role to play in ensuring that Muslims can sincerely practice their beliefs without government interference. It has so far failed to do so. Recognizing the harms caused by early persecution of Mormons, the judiciary should take steps to note the unique harms caused by religiously-based animus and protect Muslims who wish to practice Islam in the United States. Despite high-flown language from the Supreme Court emphasizing the importance of the First Amendment, in practice, American Muslims are forced to alter or completely cover their religion to avoid suspicion, and Muslims from other nations who wish to seek refuge have been made unwelcome. This flies in the face of our most dearly held constitutional values, and it must not continue.